THE PRIVATIZED STATE

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THE PRIVATIZED STATE

Introduction

THE IDEA of a privatized state sounds like a contradiction. Yet it is the state of contradiction in which we currently live. Without exaggeration, one may say that if the twentieth century was the age of the bureaucratization of the modern state, with its expanded class of ministers, public officials, and civil servants, the twenty-first century has been the age of its privatization. Since the 1980s, rulers around the world have promised smaller governments. President Bill Clinton of the United States, in the 1996 State of the Union address, twice proclaimed that "the era of big government is over." But Clinton was wrong. What the new era has delivered is not smaller governments, but rather bigger, yet privatized, ones.

Ask yourself: who pays for your children's public education? Who adjudicates whether your employer owes you a remedy for an injury you suffered at work? Who fights wars on your behalf? Who has the power to keep you in prison if you commit a felony? Who determines the health-care treatments for which you can claim public reimbursement? Who, when you need them, provides you with welfare services? Who decides whether you can sell or buy that product, drink that water, or eat that food?

As a citizen of one of the many professedly liberal and democratic states in the world today, you would likely answer that it is "the government" of your country that does all these things. Your answer would not be wrong, per se, but it would be an incomplete answer, one that conceals an important ambiguity. What is "the government" nowadays after all?

In some states, although government treasuries pay the majority of funds for education, a significant part is paid by private philanthropic sources that the government itself incentivizes through tax breaks. For example, the Bill and Melinda Gates Foundation—a private corporation—donated about

$2 billion between 2000 and 2008 to open or improve 2,602 schools across the United States.[1]

With regards to employment disputes, very often a private entity, not a state court, determines, through a process of private arbitration rather than public adjudication, what is owed to whom. Although the private arbitrator acts under government authorization, he or she is not an appointed public official. The arbitrator is handpicked by private parties on the basis of a contractual arrangement between them. While a judge answers only to the law, a private arbitrator answers first and foremost to the parties' needs and intentions.

Governments increasingly outsource the fighting of wars to private military corporations—today's version of the age-old mercenary. These corporations act under government authorization, through contract, but they are not part of the national army. During recent US military operations in Iraq and Afghanistan private contractors accounted for, on average, 50 percent of the total Department of Defense presence.[2] As for the UK, in 2006 there were twenty thousand private contractors in Iraq—three times as many as regular British soldiers.

Although states generally retain the final authority to determine who goes to prison, the power of imprisonment is increasingly exercised by for-profit corporations, rather than by public officers. Private prison officers judge when prisoners commit an infraction and when to impose punishment, and they provide advice to parole boards. Australia has the highest proportion of prisoners held in private prisons—about 18 percent of the total inmate population. Several countries across all continents are also engaged in prison privatization.[3] The number of US federal and state inmates held in private prisons increased from zero to almost 150,000 people between 1987 and 2001, and by another 56 percent from 2000 to 2013.[4]

What about access to health care and welfare? Although governments may fund most of these services, they also contract out to private corporations an increasingly large part of their provision, and with it the de facto authority to decide who should be eligible for these services. Some thirty-three thousand private US organizations are under a total of some two hundred thousand government contracts for social services delivery, including education, health care, child care, and unemployment benefits.[5] In some US states, nonprofit organizations control up to 90 percent of overall social service delivery.[6] Whereas until recently private actors had provided only particular services, today government outsources to such private actors the responsibility of running entire welfare offices.[7] Similarly, since the 1990s, in Britain, so-called

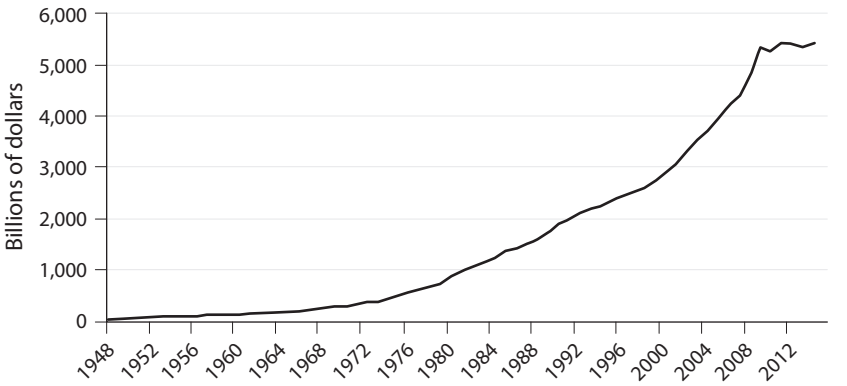

FIGURE I.1. Graph depicting total government expenditures between 1948 and 2014. *Source*: Office of Management and Budget—Fiscal Year 2016 (as published in John J. Dilulio, "10 Questions and Answers about America's 'Big Government,'" February 13, 2017), https://www.brookings.edu/blog/fixgov/2017/02/13/ten-questions-and-answers-about-americas-big-government.

quasi markets, characterized by public funding and private delivery, have become very popular in the provision of both health care and education.

Finally, the food we eat, the water we drink, the products we buy and sell in the market, and the environment in which we live are often not directly regulated by governments. Rather, governments have delegated extensive regulatory authority to international private-sector organizations, and governments are often compelled to adopt the rules these organizations establish.[8]

A privatized government, note, is not the same as a smaller government. Even in the United States, the breeding ground of neoliberal "small government" advocates, government spending has substantially increased in the last decades (see figure I.1), and the overall workforce employed by the federal government has also gone up. However, its composition and modes of operation have changed (see figure I.2). While the number of civil servants has remained more or less unchanged, the number of private contractors has grown significantly. Private contractors in the United States amount to about 12.7 million employees, a number far greater than the sum of the federal civilian workforce, US postal workers, and uniformed military personnel (4.25 million).[9] In the meantime, contractual exchange has become the main instrument of governing, to the extent that the administrative state has been redefined as "the contracting state."[10] In sum, while government is morphing into a nexus of contracts with private actors, private actors are, in turn, morphing into government.

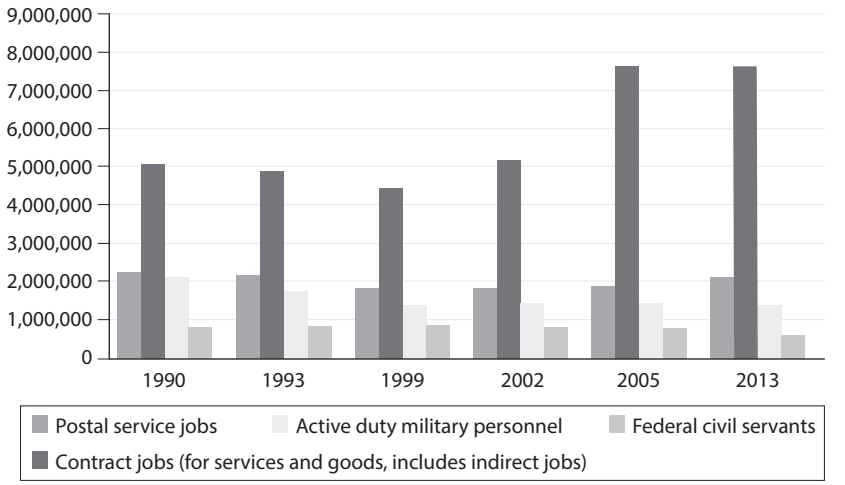

FIGURE 1.2. Chart depicting the growth and decline of civil servant and contract workers, respectively, between 1990 and 2013. *Source*: Bureau of Labor Statistics, Defense Manpower Data Center. Published in Paul C. Light, *The True Size of Government*, Washington, DC: Brookings Institution Press, 1999.

In 2002 and 2005, Light estimated that roughly 60 and 70 percent, respectively, of the contractor workforce provided services—the category most of interest. The 2013 contractor estimate is the same as 2005. The value of contracts awarded in 2013 is slightly higher than the same value in 2005 (after adjusting for inflation). However, numerous factors make this number higher or lower.

Light also includes employment created by grant spending in his analysis. The Center for Effective Government excluded this category because of the different nature of the relationship between grant recipients and those working on a contract. That said, there is a reasonable debate about what truly makes up the federal and public workforce.

When it gets down to it, then, government today is not what many intuitively think it is. And, certainly, it is very far from the picture we get of it from most books of political theory, or the history of political thought. Although elected lawmakers, appointed judges, and executive agencies are still an important component of many contemporary democratic governments, a large part of the practice of governing is outsourced to private institutions, whether these be for-profit or nonprofit organizations.

While historians still debate how and why this dramatic, if quiet, transformation of the mode of governing has occurred, there are urgent ethical and philosophical questions that must be addressed.[11] Can justice ever obtain, and can democratic legitimacy ever be secured, in a privatized state? What ethical considerations should guide debates about the expanding privatization of government? When is the use of private means for public ends morally objectionable,

and why? Are there public functions that should never be delegated to private actors, even if by outsourcing them a government could achieve better results?

Although few would doubt the importance of these questions, political philosophers have paid relatively little attention to them. While increasing economic inequalities have led to a renewed concern with the distribution of private control over the means of wealth accumulation in the economy, not much has been said about the distribution of private control over what may be called "the means of governing."[12] Similarly, while much ink has been spilled in debating the implications for both justice and democracy of the growing concentration of political power at the global level, as manifested in the consolidation of new international institutions, little attention has been paid to the potential implications of the reverse phenomenon: the increasing dispersion of political power at the domestic level, through systematic processes of privatization and outsourcing.[13]

Recently, however, there has been a growing, yet confined, discussion on whether and when it is permissible for a government to delegate certain responsibilities to private actors. According to some, the answer ultimately boils down to a question of outcomes, while others contend that, even if privatization could facilitate the achievement of socially desirable goals, there are functions that we have strong reasons not to privatize, irrespective of outcomes.[14] While appreciating this important discussion, I should explain why an alternative approach is necessary.

Consider, as one example, the case of private prisons. The dominant view among economists, and also shared by some philosophers, is that whether prisons ought to be privatized exclusively depends on instrumental considerations. As some scholars put it, "the most controversial and interesting issues raised by private prisons concern the quality of service."[15] On the opposite end of the spectrum, there are philosophers who argue that the privatization of prisons is inherently problematic and should be avoided, even if it could facilitate the achievement of better outcomes. For some, the reason is that punishment inflicted by private hands is not punishment. It is violence.[16] Insofar as managing prisons entails the imposition of sanctions on inmates, such functions cannot be delegated to private actors without compromising punishment's own condition of possibility. For others, instead, the problem is that it is always wrong to exercise coercive power merely for private gains. Since private actors are more likely than public actors to be motivated by such gains,

and since prison guards exercise coercion over inmates, the privatization of prisons is inherently suspect. Other arguments against privatization build on considerations that are familiar from the literature on the moral limits of markets.[17] Privatization, in this view, is a corrupting force.

Without denying the importance of such views and leaving aside for now the relative merits of the above approaches, I find the framing of this debate to be reductive, if not misleading. This is not only because the debate seems to rest, somewhat simplistically, on an all-or-nothing approach to the relevance (or lack thereof) of outcomes in the assessment of privatization decisions.[18] Nor is it simply because many of the considerations that are relevant to determine the moral limits of markets cannot extend to privatization, since the latter need not involve the direct buying or selling of goods, and since privatization has often been conducted through nonprofit organizations, putatively outside the market. Rather, and more fundamentally, by presenting the problem simply as a question about the desirability or permissibility of transferring discrete functions to private actors, even the strongest critics of privatization, somewhat paradoxically, reinforce its very logic, which assumes that government is ultimately reducible to a provider of particular goods and services, on par with a business or charity, and thus ought to be evaluated as such by its citizens, customers, or beneficiaries.[19]

This approach not only risks presenting privatization as a merely technocratic problem, rather than as a genuinely moral and political one. It not only fails to understand privatization for what it is: a broader transformation of the mode of governing and of the identity of government, rather than a particular policy. It also, and most importantly, leaves unanswered two fundamental questions: If private actors are morphing into government, can they act with the legitimacy that government claims? And can a government morphed into a network of private actors still govern those subject to its rules legitimately? These are the questions at the core of this book.

Asking whether a governing agent is legitimate, I take it, is to ask whether that agent has the right to make and impose certain decisions on others, and whether the agent has the standing to make those decisions in a way that results in changing the normative situation (the rights and duties) of those subject to them. In this respect, legitimacy is relevantly different from other values, including justice and efficiency, which either concern the substantive content of certain norms, for example, whether they are fair, or concern their expected benefits and costs.[20]

This book treats privatization, understood as a transformation of the practice of governing, mostly consisting in the systematic delegation of public functions to private actors, as an object of philosophical investigation. My aim is both to provide an original, diagnostic account of the wrong of privatization—a wrong that is partly independent from whatever good or bad outcomes privatization may also produce—and point to a path forward.

This book also aims to make theoretical contributions to a set of questions that are of fundamental importance in political philosophy and democratic theory. It develops an account of the foundations and limits of democratic authority that gives centrality to a commitment to rational independence (chapter 2); it defends a novel, philosophical account of the conditions of representative agency—what it takes for an agent to genuinely act in the name of another (chapter 5); and it develops an account of legitimate, ordinary lawmaking grounded on a theory of jointly intentional action (chapter 6). Although these contributions are developed through a critical discussion of privatization, their validity and significance are meant to stand independently of it. Therefore even those who are not particularly interested in contemporary transformations of governance will hopefully find other sources of interest in the philosophical arguments.

Privatization as Regression to the State of Nature

Why start with a focus on legitimacy, rather than directly focusing on the overall consequences of privatization for, say, distributive justice or equality? To see why, consider the following scenario. Imagine that a random person in the street, call him Stuart, walks toward you and claims the right to determine what you owe as a remedy to a third party you allegedly injured, or the right to determine whether you are entitled to be publicly reimbursed for a surgery, or the right to force you to enter and remain in a closed space against your will. You would presumably think, and reasonably so, that Stuart is out of his mind. Even if Stuart was acting with good intentions and was substantively right in his determinations, and even if his determinations would likely generate desirable outcomes, including a more equal distribution of resources, Stuart would have, I take it, no right to do what he claims to have the right to do. After all, who is Stuart to determine what you owe and what you are owed? Who is he to coercively restrict your freedom? If Stuart were to act on his claims, his actions either would be impermissible or would, in any case, lack the moral

power to change your normative situation—to impose new obligations on you or to determine what you are entitled to as a matter of justice. If backed by actual force, or by a credible threat of force, the imposition of such obligations would constitute a wrongful infringement on your freedom. Note that Stuart's willingness to be accountable to you for his actions would not improve the situation substantially. Stuart could be disposed to provide reasons and compelling justifications for what he has done or would like to do, but he would still lack the appropriate standing to act in that way.

If a privatized system of government turns out to be akin to a system where private actors, precisely like Stuart, lack the legitimacy to do what a government should do, we would have strong reasons to at minimum significantly limit privatization, even in the presence of some improvements in terms of efficiency, distributive justice, or equality, and regardless of other corrupting cultural tendencies privatization may or may not have. For keeping things as they are, in such conditions, would not be much different from keeping a benevolent colonial order in power just because it is benevolent. Benefiting others is an insufficient ground for the right to rule over them.[21]

However, privatization may seem to generate no problem of legitimacy. After all, unlike Stuart, within a privatized government, private actors are often authorized by a democratic government, generally through contract, to act on its behalf, and they can be subject to more or less strict forms of legal regulation and control by the principal. They thus seem to inherit, by transfer, whatever legitimacy government has.

But this conclusion is premature. As we shall see, political legitimacy does not simply require that those who credibly claim permission to define the content of our rights or duties, or to restrict our freedom through presumptively binding rules, be de facto publicly authorized to do so. They must also be validly authorized, an invalid authorization being no authorization at all. I will refer to this as "the authorization condition" on the legitimate exercise of political power. Further, in a democracy, the power to make decisions that change the normative situation of citizens, especially if discretional in nature, ought to be not simply authorized by the people but also exercised "in their name" and in a way that carries out their shared will.[22] We may call this "the representation condition." Finally, those who are authorized to make certain decisions, or to perform certain functions, on behalf of a democratic government must have the capacity, both moral and factual, to do whatever it is that they are authorized to do. Otherwise, their actions, even if well intentioned, would end up falling outside of the proper

domain of public authorization, with the result that they would amount to nothing more than merely unilateral determinations. We may call this third condition "the domain condition."

In light of these considerations, whether a privatized government can be a legitimate government ultimately depends on (1) whether privatization systematically transfers to private actors the power and de facto authority to make decisions or issue rules that change the normative situation of citizens in a relevant sense, thus triggering concerns of legitimacy, and (2) whether private actors have the standing and the capacity to meet the above conditions on the legitimate exercise of political power. By providing a positive answer to the first question and a negative answer to the second, this book delivers a distinctive critical diagnosis of the fundamental problem with privatization.

What is ultimately wrong with privatization, I argue, is not, or not primarily, that it commodifies, thereby corrupting, the meaning or nature of some particular goods or purposes, nor that it makes the provision of certain intrinsically public goods impossible. Nor is it only the fact that privatization may embody an objectionable form of neoliberal rationality, or that private actors tend to be motivated by inherently objectionable, profit-making considerations, or are unaccountable in the sense of lacking transparency or being unresponsive to the political community.[23]

The ultimate wrong of privatization rather consists in the creation of an institutional arrangement—the privatized state—that denies, to those subject to it, equal freedom, understood not as mere noninterference but rather as a relationship of reciprocal independence.[24] It does so by making the definition and enforcement of individuals' rights and duties, as well as the determination of their respective spheres of freedom, systematically dependent on the merely unilateral will of private actors, whose standing turns out to be not much different from the one of Stuart.

By further developing the recent revival of Kantian political philosophy, I argue, in part 1, that the very rationale that justifies and compels the existence of political institutions, including a democratic system of government and an administrative apparatus, consists in overcoming a precivil state of merely provisional justice. This state occurs because, in the absence of a political authority, the determination and enforcement of rights cannot but consist in the wrongful subjection of some to the merely unilateral and legislative wills of others.[25] This is true even if everyone is, by assumption, determined to act on objectively valid principles.

On the basis of this account, I then turn to show, in part 2, how, through the progressive privatization of its own functions, a democratic government reproduces, within the state itself, the very same problem that characterizes the precivil condition as a condition of merely provisional justice. This is because private actors' exercises of political power, owing to certain features that, normatively speaking, distinguish these actors from genuinely public agents, fail to qualify as exercises of an omnilateral, public power and instead remain merely unilateral decisions of particular men and women. Under a privatized system of governance, then, citizens' power of choice—their ability to form and pursue ends—becomes systematically and, to a large extent, unavoidably, subject to the legislative and merely unilateral will of others. In this way, privatization undoes the very rationale that justifies and compels the existence of political and democratic institutions in the first place.

So understood, privatization, while being an institutional transformation, is also, and more fundamentally, a normative one. It represents nothing short of a progressive regression to the state of nature, understood not in the Hobbesian sense of a state of ever-potential conflict, but rather in the Kantian sense of a normative condition of merely provisional justice, objectionable dependence, and unfreedom. Of course, in many democracies, unlike in the Kantian state of nature, the law still imposes limits on how private actors can exercise their discretionary powers, and the state, through its judicial system, retains a final say over private actors' decisions. However, as we shall see, the internal logic of privatization seriously undermines both the constraining power of public rules and the ability of states to exercise their adjudicatory authority through courts.

As I will show, one important way in which privatization reproduces the problem of the state of nature within the state itself is by undermining the separation between public offices and private roles—a separation on which the modern, bureaucratic state was founded so as to obliterate the patronage dependencies that were legacies of the feudal state.[26] In so doing, privatization turns the wheel back to a renewed kind of patrimonialism. In this respect, the critical thrust of the book can also be read as a continuation and, at the same time, an inversion of the story that Jürgen Habermas so eloquently told in his seminal book *The Structural Transformation of the Public Sphere*. Habermas argued that the entanglement of public and private, state and society, in the nineteenth century led to a refeudalization of society, culminating in the destruction of the bourgeois public sphere—a space of critical and open exchange.[27] I argue that the ever-greater entanglement between public and

private, brought about by processes of privatization since the late twentieth century, leads to a refeudalization of the state itself, a collapse between public offices and private loyalties, status and contract, that undermines the very rationale that justifies the existence of the modern state and the exercise of political power by its government.

If we assume that the progressive privatization of governments is a signature feature of what is often referred to as the contemporary "neoliberal order," the above fact also illuminates a contradiction that is arguably internal to neoliberalism itself.[28] As an ideology, neoliberalism advocates a restoration of liberalism, understood as an era of limited government that putatively ruled before the era of the welfare state and social democracy. However, as a practice of governance, if my analysis is correct, neoliberalism delivers the opposite: a renewed feudal order within which political power is increasingly exercised on the basis of privately negotiated obligations, nonpublic purposes, and, ultimately, unilateral determinations. Neoliberalism is thus inherently illiberal, insofar as it contradicts a view that is central to any possible liberalism: the idea that political power ought to be exercised in a public capacity and for public purposes alone.[29]

The title of this book can then be read in two ways. On the one hand, "the privatized state" is a descriptive characterization of a system of government in which the distinction between public offices and private contracts fades, and where the administration of the public is widely outsourced to private actors. On the other hand, it refers to a normative condition—a state—of objectionable dependence, where the determination and enforcement of people's entitlements, and of the restrictions under which they can be free to act, is made systematically dependent on private and merely unilateral exercises of power, rather than on an "omnilateral," that is, genuinely public and representative, will.

If to provide a philosophical diagnosis of the ill of privatization is one ambition of this book, a further, more prescriptive, ambition is to point a way forward. The solution to the normative problem that privatization generates—a problem of legitimacy—should be found, I argue in part 3, neither simply in increasing the regulation of private actors nor in accepting the rigidity and inflexibility of an aging command-and-control public bureaucracy. The solution should rather emerge both from (1) a normative account of the constitutional limits that must, *ex ante*, constrain the process of outsourcing and from (2) a democratic theory of public administration.

With regards to the first solution, I will not argue that all individual instances of outsourcing are equally problematic and should be constitutionally

limited. Although the book of course cannot address each and every instance of privatization, it does propose a new normative framework for thinking about such instances. What makes the relevant difference, I will suggest, is primarily the kind of discretionary power that private actors come to exercise within a privatized system of governance, and not all instances of outsourcing transfer the same kind of discretionary powers. Only forms of privatization that transfer "quasi-legislative" discretionary powers to private actors—the power to establish or regulate both the conditions of, and the restrictions on, individuals' freedom and their capacity to pursue ends—trigger, in my account, concerns of legitimacy. I will argue that privatization, as an overall transformation of the system of governance, does consist in the systematic transfer of quasi-legislative forms of power to private actors.

Further, I will not defend the implausible view that legitimacy is the only value that matters. In cases in which privatizing certain responsibilities would lead to massive gains in terms of, say, distributive justice that could not be achieved otherwise, these gains may well override considerations of legitimacy and thus also the case for constitutional limits. However, I do believe that, as the example of Stuart shows, legitimacy should enjoy a certain priority. Therefore, in many cases, we may have sufficient reasons to limit outsourcing even in the presence of some other gains.

Finally, my normative defense of constitutional limits does not imply that, starting tomorrow, any government around the world should implement it, regardless of circumstances. Clearly, if a government is deeply corrupted or largely dysfunctional, and if privatization is, empirically speaking, the only way of getting things done, then there can be an all-things-considered justification for some instances of privatization. However, as I will also argue, it is doubtful whether this is the kind of situation many contemporary democracies face. Indeed, the opposite would seem to be true: privatization contributes to, rather than reduces, several aspects of institutional corruption, and its promised gains in terms of justice and efficiency are highly debatable. In any case, a justification for privatization as an escape from corrupted and dysfunctional governments would be, at most, a temporary and second-best solution.

A more ideal, but still feasible, solution is, I will suggest, to reform the system of public administration in a way that would also strengthen civic trust in government. In this respect, the second prescription proposed in this book consists in a more democratic theory of public administration. While this theory should include a sharp, normative distinction between office and contract—a distinction that, in practice, privatization so insidiously undoes—it should

also demand a tighter integration between the democratic and the bureaucratic, by including participatory elements in the daily administration of public affairs. In systems that are widely privatized, however, and where a democratized system of administration is out of reach, at least in the short or medium term, the problem of privatization can be addressed only by directly, albeit provisionally, extending some of the requirements of political morality to the internal organizations of private actors. These requirements include demands for democratization, that are generally thought to apply to political institutions alone.

Broader Contributions to Political Philosophy

Beyond its diagnostic and prescriptive goals, this book also aims to make a number of broader contributions to political theory and political philosophy. Much contemporary political philosophy focuses either on questions of democratic authorization and democratic citizenship, or on the content of principles of justice, while largely ignoring the inner workings of government and of the modern administrative state. Against this trend, my book brings to the forefront a still-neglected area of investigation: the practice of public administration. In this respect, it joins in the recent efforts of a few scholars, including Bernardo Zacka and Henry Richardson, who have already done much to establish public administration as a new object of inquiry for the discipline.[30] However, unlike Zacka's excellent study, which focuses on the moral agency of street-level bureaucrats, the present book focuses on questions of legitimacy, including what counts as a legitimate exercise of administrative power and whether quasi-legislative power can be validly delegated to unelected public officials, and further, to private actors. Unlike Richardson's pioneering work on bureaucratic domination, it treats privatization as a distinctive threat to administrative legitimacy and draws important normative distinctions between public and private administrative agents. Importantly, the book shows that the legitimacy of a system of government and, in part, also the justice of a society do not depend simply on government respecting certain formal constraints, satisfying certain substantive principles, or achieving certain outcomes, but also on questions of agency: by whom relevant principles are implemented, what public officials are committed to, what ethos they have, what intentional relationships they share among themselves and with citizens, and whether or not they are embedded in an integrated procedural structure.

This book also hopes to contribute to the recent neorepublican literature in at least two important respects. While neorepublicans are directly concerned, as I am, with the problem of domination, they tend to focus on the excessive centralization or concentration of political power in the hands of a few as the main causes of political domination. This neglects the dangers of domination that arise from the excessive dispersion or diffusion of political power outside the formal branches of government, through processes such as outsourcing.[31] For republicans, then, the principal institutional solution to political domination naturally involves the separation of powers across different branches of government. Yet further separating powers may not be a viable solution within contemporary administrative states where functions of implementation and policy making cannot be fully separated and cannot provide a solution in those cases where the systematic delegation of political power to private actors is the problem. This leaves us with a dilemma that remains largely unaddressed by normative political theorists: either we limit outsourcing, thereby accepting the rigidity and inflexibility of an aging command-and-control public bureaucracy, which in and of itself can be regarded as a form of domination, or we embrace outsourcing but then face the risk of privatized domination, which leads us back to that very problem of subjection to the merely unilateral will of others that the modern bureaucracy, with its neat distinction between office and contract, was supposed to overcome.

In response to this problem, the book builds on a normative critique of privatization as a diagnostic tool with which to discover what general features a nondominating system of public administration should exhibit. While retaining the impersonal character of officeholding as a crucial feature of any such system, I reinterpret the requirement of impersonality as entailing, in terms of its practical achievement, not a rigid, Weberian system of command and control, or blind obedience to rules, but rather, and on more Hegelian lines, an appropriately institutionalized ethos of public service. I further argue that, while the system of public administration should become more "representative," democratic forces should be more directly involved in the process of administration. Rather than a sharper separation of powers, I thus propose, in this context, a partial integration of powers, as a way of combating new forms of privatized domination.

The second contribution to neorepublicanism, and more generally to democratic theory, consists in a novel, philosophical account of representation, as developed in chapter 5. Traditional understandings of what it means to act "in the name" of another tend to emphasize either certain qualities of

the representative's external conduct, for example, the representative's acting within the boundaries of a given mandate, or the audience's uptake of the representative's act. By contrast, I argue that while compliance with mandates is not sufficient for representation, the audience's uptake is not necessary. I develop an "internalist account of representative agency" that puts emphasis on the representative's intentions and reasons for action. In order to truly act as a representative, an agent must behaviorally act not only within the boundaries of his or her mandate, however vague these may be, but also on the basis of reasons that are not positively excluded (although they may not be positively included either) by his or her authorized mandate. This account has, in turn, important implications for how we should understand the duties of officeholding and lawmaking.

Finally, much of contemporary political philosophy, in particular liberal-egalitarian theories of justice, influenced by either John Rawls or Michael Walzer, still tends to conceptualize the social world as a cluster of discrete spheres—state, civil society, and markets—governed by different moral principles. This picture leaves almost no conceptual space to think about the complex relationships that in the real world take place between public and private institutions and organizations, of which the phenomenon of privatization and outsourcing in the administration of justice is perhaps one of the most important instantiations. By focusing on such transformations, a further contribution of the book is to create that conceptual space, while at the same time, however, also providing a renewed defense of a division of moral labor between political institutions and nonpolitical associations. On the one hand, the book argues that the division of moral labor that liberal-egalitarians envision among different social spheres and social actors is premised on a certain picture of the social world that began to vanish in the 1970s.[32] On the other hand, it reaffirms the need for a sharp institutional distinction between public and private, properly understood, arguing against an increasingly common view of political institutions and private forms of action as interchangeable means for the achievement of independently defined ends. What, of this distinction, must be preserved is an outcome, rather than a premise, of the book.

Methodologically, the book engages with different disciplines and different styles of argumentation. At times, especially in addressing foundational questions, I use the means of analytic philosophy, including conceptual analysis and logical argumentation. Other times, I closely engage with the social sciences, and I provide an interpretative analysis of real-world cases, so as to offer an empirically grounded account of how existing practices of governance

actually function. This approach, moving from the fairly abstract Kantian philosophy of right to the very concrete daily operation of nonprofit and for-profit companies, is not meant to be a form of methodological schizophrenia. Rather, it is meant, following Kant himself, as a reminder that we can move from the universal (the concept of right) to the particular only through a "principle of politics" that is "drawn from experiential cognition of human beings, that have in view only the mechanism for administering right and how this can be managed appropriately."[33] My hope is to show how, on the one hand, abstract philosophy is a necessary means to generate a normative framework that focuses our judgment on certain aspects rather than on others, when evaluating even the most mundane kinds of political practices. For example, our normative assessment of how to deliver welfare services to the needy may change substantively depending on our understanding of the philosophical foundations of the state and its political authority. On the other hand, the analysis of concrete, daily practices of governance may illuminate certain limits of a theoretical framework that we may not be able to see through philosophy alone. For example, a sociological analysis of how the exercise of discretion actually works within the administrative state, and of the limits of legal frameworks in constraining such discretion, may reveal some important holes, if not necessarily theoretical limits, within the republican theory of political legitimacy. How can citizens be free from the arbitrary imposition of the will of others, if the making and implementation of the law are unavoidably discretional?

Outline of the Argument and Book Roadmap

The book is divided into three parts. Part 1, "Privatization and the State," provides both the motivational and the philosophical background against which an account of the wrong of privatization is then developed. In chapter 1, after clarifying how to understand the concept of a public function, I critically assess existing answers to the question of when and why privatization is morally problematic. I then argue for a different diagnostic approach, which begins with the following fundamental question: what are political institutions for?

In chapter 2, I reject the widespread idea that political institutions and private modes of action are ultimately interchangeable means for the pursuit of the independently defined goal of justice. I defend the view that political institutions, including a democratic system of law, are constitutive of justice, rather than merely instrumental to it, for it is only through these institutions that claims of justice can be defined and enforced in a way that respects both

the fundamental status of persons as equal normative authorities and their independence, including their rational independence (independence in one's ability to respond to reasons and independence in acting being closely intertwined).

In chapter 3 I argue that if the rationale for a democratic state is to curb a form of subjection to the merely unilateral and legislative will of others, the just and effective administration of the modern state risks reproducing this problem within the state itself by demanding the delegation of a form of quasi-legislative discretion to administrators, whose judgment cannot be fully constrained or predetermined by higher, democratic rules. I call this the problem of bureaucratic unilateralism. I further show that in the privatized state this kind of discretion is unavoidably transferred to private actors. The problem of bureaucratic unilateralism, I then argue, can be solved, or at least mitigated, only by directly applying certain standards of legitimation directly to the exercise of quasi-legislative, administrative discretion. These standards require (1) that the delegation of relevant discretion be validly authorized by a democratic legislature, representative of an omnilateral will; this is what I refer to as *the authorization condition* on the legitimate exercise of administrative discretion; (2) a neat separation between contract and office, so as to support officeholders' commitment to implement the law in the name of all; this is demanded by *the representation condition*; and (3) an appropriate procedural integration between the bureaucratic and the democratic, so as to ensure that laws and policies carry out the omnilateral, shared will of the people throughout a unified process of administration, even when mandates are left vague and the constraining power of formal rules is limited, and to ensure that delegated agents end up doing what they are authorized to do, rather than something else, as required by *the domain condition* on legitimate exercise.

Part 2, "The Privatized State," turns to show how privatization, by virtue of its very logic and of certain features that constitutively differentiate private from public actors, undermines each one of the above conditions. In this way, it reproduces, within the state itself, the very same problem of subjection to the merely unilateral and legislative will of others that characterizes the precivil state as a state of merely provisional justice.

In chapter 4, I answer *the question of authorization*: are there limits to what a democratic government can validly (not simply permissibly) authorize private actors to do on its behalf? Although I reject an essentialist account of "inherently public functions"—functions that by their very nature can never be delegated—I argue that there should be *ex ante*, aggregative limits to what

private actors can be validly authorized to do and decide on behalf of a democratic government. More precisely, I defend the claim that privatization, beyond a certain threshold, ought to be regarded as an abdication of the collective right to democratic self-rule. Since, I argue, a democratic people lack the moral power to abdicate their own self-rule, a government lacks the moral power to validly engage in the systematic privatization of public functions. Therefore, in societies where privatization is already pervasive, further delegations ought to be regarded as lacking the authorizing normative power they purport to have. When private actors make decisions under invalid authorization, they do so in their own private capacity, namely unilaterally. Their resulting exercises of salient forms of discretion thus fail to meet the authorization condition on legitimate exercise.

In chapter 5, I answer *the question of representative agency*: do private actors have the standing or capacity to exercise certain forms of power, or make certain decisions, in our name? I first defend a novel account of the conditions that an agent must meet in order to act or speak in the name of another. I call this "the internalist account of representative agency." On the basis of this account, I then argue that, even when private actors act under valid democratic authorization, owing to certain constitutive features that differentiate them, qua private actors, from public ones, they systematically fail to act in our name. They thus fail to meet the demands of the representation condition on legitimate exercise.

In chapter 6, I turn to *the question of delegated activity*: do private actors have the standing to do what they are democratically authorized to do on behalf of government? I argue that, in some cases, the agency, public or private, through which a certain decision is made, or a function is performed, changes the very nature of the decision or function at stake. On this basis, I further show that private actors, even when they follow the terms of their government's authorization, may fail to do what they are authorized to do, thereby violating "the domain condition" on legitimate exercise. Insofar as their actions can be regarded as falling outside of the domain of public authorization, they remain not very different from the merely unilateral (because also unauthorized) actions of private individuals in the Kantian state of nature. Therefore, if a commitment to independence provides us with reasons, indeed a duty, to exit the state of nature, it also provides us with strong reasons, indeed a *pro tanto* duty, to exit the privatized state.

Part 3, "Beyond the Privatized State," both provides an account of the responsibilities of private actors within nonideal contexts of widespread privatization and proposes an exit strategy—a way out of the privatized state.

Chapter 7 focuses on one kind of private actor: the philanthropist. I argue that, in contemporary societies, the philanthropist's duty to give should be understood neither as an imperfect duty of beneficence nor as a conclusive duty of justice, but rather as a transitional and provisional duty of reparative justice. The duty is "transitional" because it should eventually be taken over by public institutions. It is "provisional," for in the absence of just institutions, its fulfilment is simultaneously demanded by, and incompatible with, individual independence. Finally, the duty is "reparative" because it is grounded on the wealthy's liability for wrongful harm to the poor.

Chapter 8 turns from independent private donors to contracted private providers. Within contexts of widespread privatization, I argue, we have strong reasons to extend to the internal conduct of many private organizations the same demands of political justice and democratic governance that many political philosophers, in particular liberal-egalitarians, would instead confine to political institutions alone. In particular, I defend a transitional duty of democratic justice for nonpolitical associations that pursue justice as government's proxies. However, I argue that, since the collapse of a division of moral labor between political institutions and nonpolitical associations comes at great costs for the latter's members' associative independence, we have strong reasons, grounded on associative independence, to limit privatization and reestablish a sharper division of both institutional and moral labor between the political and the associational.

Chapter 9 sketches a way out of the privatized state. It first defends certain constitutional limits on privatization. It then articulates, in broad terms, some policy proposals for rebuilding a more democratic and representative system of public administration. One such proposal concerns an educational program for the civil service. Although I believe that the education of the civil service should share many of the features of the civic education of citizens, I do defend some distinctive conditions that apply only to the former. The other proposal concerns the introduction, through arrangements like codetermination, of democratic practices within the administrative state itself. The purpose of these arrangements should be to strengthen the democratic legitimacy of the administrative state, and thus also citizens' trust in it, without compromising its independence from undue political pressures.

The epilogue provides a quick summary of the book's argument and draws three main theses from it.

PART I

Privatization and the State

1

Privatization and Its Discontents

SOME EXPRESS DISCOMFORT with the current scale of privatization. They feel strongly that certain public functions, whether fighting a war or managing prisons, should never be outsourced to private actors. Some even go so far to say that privatization is "evil."[1] But what exactly, if anything, is morally objectionable about such a phenomenon is subject to widespread disagreement. Those who favor privatization often dismiss these negative reactions as the mere product of ideological prejudice. They conjecture that anxieties about the increasing outsourcing of public responsibilities would and should dissipate if we were presented with clear empirical evidence that pursuing public goals through private means is the most efficient way to achieve those goals—evidence that is, up to this point, both insufficient and mixed.[2] Others say that the problem is not privatization per se, but whom we privatize to—whether for-profit or nonprofit organizations.

The primary task of this chapter is to investigate the nature of this disagreement. I will critically assess and partly reject four dominant approaches to the question of whether, when, and why the privatization of the public is morally objectionable: the distributive, motivational, sociocultural, and essentialist arguments.

The problem with current approaches, I want to suggest, is not only that they often fail to provide fully persuasive accounts of when and why using private means for public ends is objectionable, but also the more fundamental problem that they develop from an excessively narrow conceptualization of the issue at stake. The question of privatization, I will argue, should not be reduced to a question of distributive justice, or of the moral limits of the market, or to a cultural critique of neoliberal practices, or even to a disquisition on the inherent value of public goods. It should rather be reframed as a fundamental problem of political legitimacy. Privatization, as a transformation of

the mode of governing, changes the way in which presumptively authoritative political institutions operate. We should then question whether such transformation is compatible with the reasons why a state and its government ought to exist, and can legitimately rule, in the first place.

The argument in this chapter will proceed as follows. I will first clarify the very concept of privatization. I will then critically assess the main philosophical arguments against privatization. I will conclude by highlighting some of the general features that, in my view, a diagnostic account of the wrong of privatization should possess.

What Is Privatization?

Using the term "privatization" to describe the widespread delegation, outsourcing, or contracting out of certain functions or responsibilities to private actors makes sense only if we assume that such functions or responsibilities are "public"—the appropriate domain of government—in the first place. This is to say that the very concept of privatization conceptually presupposes a baseline against which the idea of public functions must be specified. In this section, I briefly discuss different ways in which the relevant baseline can be set.

The Historical Baseline

When political scientists and law scholars write about privatization, they generally adopt a historical, descriptive baseline to define what counts as a public function. They understand public functions in terms of actions or responsibilities that have been traditionally performed by government, and they define privatization as the outsourcing of these responsibilities to private actors.[3]

This way of conceptualizing the relevant baseline has the advantage of generally according to widely shared intuitions about what a public function is. This is perhaps because, having lived under a government that has for decades or centuries performed certain functions—say policing—it is natural for us to come to regard those functions as the primary responsibility of our government. From a normative perspective, however, there is little reason to believe that just because a government has traditionally undertaken the performance of certain functions, then these functions ought to be regarded as the responsibility of government. After all, governments may have simply usurped certain areas of competence and responsibility that should have been left to other

actors to begin with, or governments may have neglected certain responsibilities that they should have undertaken in the first place.

Further, the historical baseline is, somewhat ironically, guilty of anachronism. In order to work as a baseline, the historical account of public functions must assume the conceptual fixity of categories like public and private, government and private actors, which instead have significantly shifted over time. The administrative state itself—constituted by a system of public offices occupied by civil servants with tenure protections and a fixed salary—is a fairly recent creation. As Jon Michaels, building on Nicholas Parrillo's work, explains with reference to the United States, in the early nineteenth century "there wasn't a dime's worth of difference between contractors and government employees. And what we today term as a 'make or buy' privatization decision—that is, the decision whether to assign State responsibilities to federal civil servants or commercial service contractors—had few, if any, of the political, fiscal, legal, and sociocultural implications that the choice now has."[4] Yet, precisely because what we mean by government now is different from what government was then, it makes little sense to think of public functions as functions that have been "traditionally performed by government," as if government had stayed the same throughout.

In order to define privatization in a way that overcomes these shortcomings, we then need a way of determining what counts as a "public function" that is both normative and able to account for paradigmatic cases of privatization in the current world.

The Economic Baseline

Economists provide one such account. They tend to define public functions negatively. Broadly speaking, a public function is whatever the market fails to do. Market failure is in turn specified in terms of market inefficiency. The market can fail to provide certain goods—goods that people happen to want—for many reasons, including principal-agent problems owing to information asymmetries; negative or positive externalities arising from poorly designed property rights; imperfect competition owing to economies of scale; and finally problems with the design and enforcement of contracts. Since private market actors cannot solve all these collective action problems, state involvement, in the form of either funding or provision, will at times be necessary to overcome these failures and to secure the satisfaction of otherwise unsatisfied preferences.[5] However, insofar as governments themselves are subject to specific

failures, public provision or performance can be justified only when the costs of market inadequacies exceed those of government failures, so that the final outcome constitutes an efficiency improvement. An efficiency improvement occurs when moving from one state of affairs to another does not make anyone worse off and makes at least one person better off. Against this baseline, "privatization" is understood as a government's decision to discharge its public responsibilities, as defined negatively, in accordance with a theory of market failure, through a series of arrangements with private actors (e.g., public provision with private purchase or public purchase with private provision).[6]

Whereas the distinctive ability of government to solve certain collective action problems and overcome market failures may provide one important consideration in determining whether, other things being equal, certain functions should be undertaken by government rather than through alternative institutional mechanisms, the economic approach both underreaches and overreaches as a method for determining the scope of public functions and responsibilities.[7] It underreaches because there are goods the public funding or provision of which can be justified by reasons other than market inefficiency. It overreaches because there are goods the public provision of which remains unjustified, even if promoting efficiency.

To see why the economic baseline underreaches, consider the case of education. If, as Milton Friedman argues, the reason why government should be involved in the funding of public education is simply that such involvement is necessary to prevent certain market failures in the form of negative externalities that would arise from having a large illiterate population, then we should conclude that it would be fine for government to ensure access to education to just one part of the population. For, as Debra Satz rightly points out, "it is possible to live in a highly productive society where some people form a permanent underclass."[8] Yet there are many reasons to resist this conclusion, including, most obviously, reasons of justice, which make reference to the importance of securing equal access to an at-least-adequate level of education for all as a precondition and entitlement of free and equal citizenship. We may then have reasons to consider the funding of basic education for all as a public responsibility, even if and when such funding cannot be justified as a way of compensating for certain market failures.

To see why the economic baseline overreaches, consider a very different good: fireworks. Fireworks, like defense and other goods, count as a "public good" in the economic sense of being both nonexcludable and nonrivalrous.[9] Fireworks are nonexcludable because it is impossible or prohibitively costly

to prevent nonpayers from enjoying their benefits. They are nonrivalrous because nonpayers could watch a fireworks show and satisfy their preferences without reducing anyone else's enjoyment. These features respectively explain why market actors lack sufficient incentives to produce firework shows and why such failure generates an inefficiency. Government can compensate for this market failure by taking over the production of firework shows, funding them through taxes, and providing them equally to all. It follows that if we take compensation for market failures as both a necessary and a sufficient condition for determining when a good should be publicly provided, we should come to the conclusion that providing fireworks counts as a public function in the relevant sense. But this conclusion is unwarranted. There are, indeed, good reasons to think that a government lacks the legitimate authority to force people into forms of cooperation, including producing discretionary goods like fireworks, just because those forms will benefit other people, by satisfying preferences that would otherwise remain unmet. After all, as John Rawls puts it, "there is no more justification for using the state apparatus to compel some citizens to pay for unwanted benefits that others desire than there is to force them to reimburse others for their private expenses."[10] If this is correct, that government can provide goods like fireworks, which are not required by justice, more efficiently than the market cannot suffice to make these goods a public function or responsibility.

In sum, appeal to efficiency and market failure cannot be the only or even the main consideration in defining what counts as a public function and thus cannot establish the content of the baseline against which privatization should be defined. Rather than simply asking what government traditionally did or is most efficient at doing, we should then ask what government can permissibly do and ought to be doing, on the basis of a normative account of the reasons why a government should exist in the first place and of the values that it should promote, as well as of relevant facts about its limits and distinctive capacities. As long as this baseline can be proved not to be empty of content, we can then define privatization as the discharging of public functions and responsibilities, however exactly specified, through private agents.

The Normative Baseline

At this stage, my purpose is not to fill in details about the content of a normative baseline but rather to show that the content of the baseline is not empty, that is, that we can safely assume the existence of at least some public functions

and responsibilities, such that the question of privatization—whether a government can permissibly discharge these responsibilities through private actors—retains its conceptual meaning.

Why even worry that the normative baseline could be empty? Don't we already recognize many functions—for example, defense, security, education, health care, welfare services, and so on—as public? Yes, we generally do, but from the perspective of justice, it is not at all obvious that a government should provide many of the in-kind goods that contemporary governments commonly provide, and that are most often the object of privatization. Indeed, even liberal-egalitarians, who, unlike libertarians, argue that a just state has the responsibility to secure a fair distribution of economic resources over time, through tax and transfers, would argue that a government may have no duty of justice to do many of the things current governments do. As Liam Murphy and Thomas Nagel have pointed out, "an argument against big government is not necessarily an argument for lower taxes, since taxes may be used to promote distributive justice directly without being spent on public programs."[11] Some even claim that engaging in certain forms of in-kind provision amounts to an unacceptable form of paternalism, thereby violating the demands of justice. Yet, if it turns out that justice permits governments only to provide their citizens with cash so that they can produce, buy, or obtain whatever goods and services they might need through the market, or through private associations, then the question of privatization would, at least in part, lose its conditions of possibility, for there would be no public program or function to be privatized in the first place, with the only exception perhaps of tax collection itself.

However, there are good reasons to think that government's responsibilities should not be reduced to the collection and distribution of cash, and indeed should be regarded as including both the funding and the provision of a potentially wide range of in-kind goods and services.

First, it is worth pointing out that almost all substantive theories of justice, from libertarian to egalitarian, would agree that governments should have the primary responsibility, although perhaps not the exclusive one, to both fund and provide at least some in-kind goods, including national defense, a prison system, and policing. While some may argue that this is because a purely private security market would be unstable,[12] or ultimately self-defeating (e.g., because it would provide companies with incentives to increase the overall demand for protection by incentivizing crimes, or anxiety about crime), others would claim that the public provision of security as an indivisible good

is essential to the constitution of a public or of a relationship of equal citizenship among those subject to state power.[13] A fairly minimal list of public functions can thus be regarded as something different from, even opposite to, what theories of justice would converge on.

Second, whether justice requires the provision of certain in-kind goods beyond the minimal list above is subject to wide and reasonable disagreement. This lack of consensus results not only from a more fundamental disagreement about first principles of justice but also from the fact that these principles, however defined, are not sufficiently determinate to generate a clear account of the means through which their demands ought to be fulfilled. Given the indeterminacy of justice principles, we should, for reasons I will further clarify in the next chapter, determine what justice demands, including which public functions it requires, through shared democratic procedures. If the content of justice should be defined, at least in part, procedurally, it is likely that, depending on contextual factors, justice will demand a more extensive provision of in-kind goods than the ones agreed on even by libertarians.

We should also doubt the claim that the provision of in-kind goods necessarily amounts to a form of paternalism.[14] Consider, for example, the way in which universities provide their academic employees with a research account that can be spent only for certain research purposes approved by the university itself. One generally cannot use this account as a source of fungible cash and cannot ask the university for more fungible income instead of the research account. Now it seems to me that there is nothing paternalistic about such an arrangement. This is because the reason that justifies it is not to prevent the beneficiaries, in this case academics, from wasting the cash equivalent on ends that are not good for them. Rather, the reason for instituting a research account has to do with the very nature and purpose of the university and the relationship between this institution and its members. As an institution, the aim of which is to pursue academic excellence, a university has reasons, even a duty, to support its members' capacity to develop and cultivate academic excellence, whether through teaching, research, or both, but it has no duty to provide them with fungible cash (beyond their salary) so that they can pursue their own personal preferences, whatever these may be.

Similar considerations apply, I believe, to political membership. Forms of in-kind provision are not necessarily paternalistic if they can be justified by appealing to the nature of citizens' reciprocal obligations, or to the purpose of political organization, and without reference to the irresponsibility of

citizens.[15] For example, if one agrees that a state's obligation to the poor arises from their objective claims to avoid objectionable relationships of dire dependency, and not from their subjective preferences, then certain forms of in-kind provision may be better placed to discharge that obligation than are cash transfers, for the former, unlike the latter, cannot be used in ways that contradict the very ground of the obligation.

So far, my purpose has been to argue that (1) the very concept of privatization presupposes a baseline of public responsibilities, that (2) this baseline ought to arise from a normative and partly procedural account of what justice requires, rather than from an economic theory of market failure or a historical account of traditionally public functions and, finally, that (3) there are good reasons to believe that the baseline is not empty of content. Depending on historical conditions, this baseline may be reasonably interpreted as including a broader range of public functions, beyond defense, policing, and criminal justice. Indeed, most contemporary liberal democracies interpret the baseline of public functions and responsibilities in a fairly expansive way, as including the provision of goods such as welfare, health care, and education.

Now, to argue that a government has, on grounds of justice, the primary responsibility to provide certain goods or to perform certain functions does not automatically imply that a government should perform any such functions directly, that is, through governmental agents. A government could, we might think, retain the primary responsibility to fund and provide national defense, policing, and prison services while delegating the implementation and execution, and even the regulation of these functions, to private firms or nonprofit associations through a series of contracts. It could outsource the provision of health-care services to private bodies, while reimbursing them for the services provided to patients in need. It could contract out the implementation of welfare programs, as well as their oversight. It could provide parents with vouchers with which they can buy education for their children from a variety of private providers. These count as genuine forms of "privatization," in the sense that they consist in discharging certain responsibilities that are understood as "public" through private means.

With a definition of privatization in hand, we can now turn to the question of when, if ever, privatization is morally problematic. In the remainder of this chapter, I will critically assess and partly reject some of the main answers that have been given by moral, political, and legal philosophers to this question. I will do so to set the stage for a different diagnostic approach.

Instrumental Arguments against Privatization

The Distributive Argument

It is not surprising that when economists and political scientists debate the vices and virtues of privatization they do so in purely instrumental, that is to say, outcomes-focused terms. On the one hand, the case is often made that privatization, by enhancing market competition, produces incentives to improve the quality of services, and that, unlike public employees, private employees can personally gain from saving on the costs of provision, thereby having incentives to provide a service in a less expensive way than public actors. On the other hand, there is a worry that privatization produces perverse incentives to excessively reduce costs, thereby undermining the quality of services. This is especially true in the case of goods and services like child care and prisons, where the individual affected is not the customer and has little or no voice to complain.

More surprising is the fact that some philosophers, especially liberal-egalitarians, would also seem to reduce the question of privatization to a question of efficient outcomes. However, unlike economists, these philosophers tend to see the value of efficiency as subordinated to the value of distributive justice. Mathias Risse clearly illustrates this view as follows: "For liberal egalitarians, in particular, the philosophically interesting battles are won once it is established that the state has a duty to finance equal and universal basic education in the first place. Within limits, how to organize it is plausibly left to efficiency considerations."[16] Risse is referring to the good of education, but his remarks can be generalized: liberal-egalitarianism is concerned with what goods ought to be provided as a matter of justice or what ends (e.g., distributive patterns) a just society ought to maintain, not with how—through which agents or institutional arrangements—those goods are provided or those ends pursued. According to the liberal-egalitarian perspective, then, privatization is objectionable insofar as, and only insofar as, it can be empirically proved that it is less efficient than public provision, or that it produces unjust outcomes, for example by generating unfair inequalities with regards to access to certain goods.[17]

However plausible and important, the liberal-egalitarian approach suffers from some limitations. For one thing, it arguably provides an excessively narrow understanding of what consequences matter in the assessment of

privatization. Consider the case of the private prison industry, which has lobbied extensively to increase the number of people in prison, by contributing to the drafting of Arizona's harsh anti-immigrant law.[18] Here, as Debra Satz points out, the problem with privatization is not (or not only) that it generates inefficiencies or distributive unfairness, but rather that it compromises the integrity of political institutions by providing incentives to increase the demand for certain goods, in this case criminal justice, in a manner that leads to institutional corruption, and in turn undermines the very reasons for why that good ought to be provided in the first place, such as reducing crime.

The liberal-egalitarian view, however, could be easily amended so as to account for broader consequences. After all, if what ultimately matters from the perspective of justice is that the way resources are spent must be justifiable to all, it is hard to see how spending resources to support a criminal justice system that fails to reduce the amount of crime, and imposes needless suffering on inmates in overcrowded prisons as a result of perverse incentives, could ever be justifiable.

Yet there is a more fundamental problem with a purely instrumentalist assessment of privatization. By exclusively focusing on outcomes, this approach neglects to even ask, let alone answer, important questions of process. One such question concerns the normative relevance (or lack thereof) of the agents through which a certain function is carried out. The liberal-egalitarian approach tends to assume that the nature of a good or function remains constant independently of the agent through which the good or function is provided or performed, thereby leaving unaccounted for the possibility that the nature of certain goods or functions may be agent specific. A function is agent specific, I take it, if its nature makes essential reference to the agent who performs it, or to the capacity in which that agent acts. To illustrate, if during a game a football player wrestles another player to the ground with the intent of stopping the other player from carrying out what the latter intends, we would say that the first football player is performing the function of "tackling." If you, as a private person, try to do exactly the same thing to me, wrestling me to the ground with the intent of stopping me from pursuing my goal, your act would certainly not count as tackling. It would count as an act of violence. Note that your act would remain such even if, by hypothesis, a football player had previously authorized you to wrestle me to the ground. The point is that the nature of a person's act, as an act of tackling, and thus the nature of the performed function, constitutively depends on the kind of agent who performs the act,

including the particular role that person occupies and the kind of practice within which the act or function takes place.[19] If it turns out that some of the functions governments are in charge of performing are agent specific, like tackling, in the sense that they can be performed only by public officials, then privatizing them would be objectionable, even if efficient, because it would compromise the very nature of the function at stake.[20] By exclusively focusing on distributive outcomes, the liberal-egalitarian approach ignores such questions. Yet, as I will argue below, this is precisely where, for some philosophers, the strongest objection to certain cases of privatization rests.

Beyond questions of agency, the liberal-egalitarian view also neglects questions of legitimacy—that is, questions concerning the way, including with which authority, certain rules or decisions are imposed on people, as opposed to the substantive nature of such decisions and their consequences. Consider the case in which a colonial power is more efficient at securing the conditions of social and distributive justice among its subjects than a democratic government would be. I suspect that many would still agree that we ought to remove the colonial power because, even if in some sense just, it has no right to rule. For parallel reasons, even if privatizing some functions were instrumentally necessary to more efficiently achieve certain substantive outcomes, it may still be seriously wrong if it turns out that private actors lack the right or the standing to exercise those functions, and the powers this exercise may involve, legitimately. In this case privatization may end up generating a problem similar to the one illustrated by the case of Stuart in the introduction to this book. Of course, unlike both the colonial power and Stuart, private actors generally operate under government authorization. Yet, as I will argue in chapter 5, an agent may fail to act legitimately, even if legally authorized to act as it does and even if it acts within the boundaries of its authorized mandate. For now, however, it is sufficient to point out that the liberal-egalitarian framework, with its focus on outcomes, diverts our attention from these sorts of questions.

If liberal-egalitarians provide a purely instrumentalist account of the ethical limits of privatization, other scholars have recently argued that there are outcomes-independent reasons to object to at least certain forms of privatization. I shall refer to these as noninstrumental arguments. In what follows, I will argue that, although appealing, each of these arguments fails to provide a compelling diagnosis of the noninstrumental wrong of privatization. Indeed, when properly unpacked, we can see that they often collapse into instrumental arguments themselves.

Noninstrumental Arguments against Privatization

The Motivational Argument

One reason for why the privatization of certain functions may be thought to be morally problematic, independently of outcomes, is that private actors are often motivated by dubious considerations, including the quest for profit. This "motivational argument" usually takes the following form:

1. It is morally wrong to be motivated by certain considerations (Cs) when ϕing, where ϕing stands for an action that harms others.
2. Private actors are more likely to be motivated by Cs than public actors.
3. There are moral reasons not to delegate to private actors the responsibility to ϕ.

For example, in relation to the privatization of military functions, James Pattison has recently argued that: (1) "it is [morally] problematic if individuals are motivated by financial gain *in the context of* military force, given that military force *harms* others." Since, empirically, (2) "private contractors are more likely to be motivated by financial gains than regular soldiers," it follows that (3) "we have reasons to object to individuals *being employed* in private military operations and, other things being equal, this means that we should prefer public to private force."[21] Similarly, in relation to the privatization of prisons, Debra Satz has argued that "there is indeed something morally objectionable about viewing human punishment as a moneymaking activity. . . . Viewing imprisonment as a revenue stream denigrates the plight of the imprisoned."[22] This would support a case against the privatization of prisons, insofar as those who are employed by private companies are more likely to view punishment in this objectionable way.

Notice that the motivational argument against privatization, both in Pattison's and in Satz's versions of it, has limited application. If it works, it would be limited only to those functions that "harm others," such as fighting a war and punishing criminals, excluding other functions that do not involve the direct exercise of force or coercive powers. Further, the argument applies only to the delegation of public functions to one particular category of private actors: for-profits. However, despite its intuitive appeal, and despite the fact that, as I will argue in chapter 6, motives may (indirectly) matter for assessing the legitimacy of privatization, I believe that the motivational argument provides

an unsatisfactory diagnosis of what is wrong with (even limited forms of) privatization.

Consider the argument's first premise. It is simply not true that it is always morally problematic for individuals to be motivated by financial gains in the context of activities that harm others. To illustrate, if I open a restaurant that sells better food than yours, and because of this your business loses its customers and eventually fails, I harm you and, in doing so, I am very likely to be motivated by financial gains. But it is far from clear that I have done anything wrong.[23] It is even less clear that the authority who gave me the license to open the restaurant did anything wrong. Of course, it could be argued that the case of the mercenary is different because, unlike (ideal) market competition, a war (even if, ex hypothesi, just) is not voluntary for many of those who end up harmed by it (e.g., civilians and conscripted soldiers), and the kind of harm involved is much more severe than business failure. It is thus plausible to think that the conduct of soldiers should be governed by deeper motivational strictures. Let us grant this point. Yet the mere fact that a private agent (A) is motivated by financial gains "in the context of military force" is not sufficient to prove that A does something wrong. To see why, consider the parallel case of a schoolteacher who is motivated by financial gains in the context of educational activities. Whereas it would be (arguably) wrong for the teacher to be motivated by financial gains, rather than by a dedication to his or her students, when teaching classes, it might not be wrong for the teacher to accept a teaching job because of financial gains. Further, as long as the teacher is committed to treating his or her students with care and respect, and to address the subject matter of the class with intellectual integrity, the teacher is doing nothing wrong, whatever his or her inner motives for doing so. What matters, then, is the object of the teacher's intentional commitment when teaching, not the teacher's motives for endorsing that commitment. Similarly, even if mercenaries are motivated by financial gains in entering particular contracts with the government in the context of (just) military operations, as long as they have the right kind of commitment when using military force—to do so rightfully—they might not do anything wrong.

But let us assume that there is something morally wrong with engaging in military operations, or even only occupying a military role, while being motivated by financial gains; what kind of wrong, exactly, would that be? As Kant long ago observed, there is a categorical difference between ethical (as assessed from the perspective of interpersonal morality) and rightful (as assessed from the perspective of political morality) conduct: "That lawgiving which

makes an action a duty and also makes this duty the incentive is *ethical*. But that lawgiving which does not include the incentive of duty in the law and so admits an incentive other than the Idea of duty itself is *juridical*."[24] Ethical conduct must be internally motivated by the appropriate maxim. This means that the reasons that justify a given precept must be the same reasons that move the agent to action. In this respect, the conduct of the mercenary who kills the enemy for financial incentives is *unethical*, even if he or she acts within the limits of *jus in bello*, because his or her motivating reasons do not align with the reasons that justify (assuming there can be such reasons) killing the enemy. But conduct can be rightful even when unethical, that is, even if motivated by an external incentive rather than by the duty itself. As long as the mercenary follows just rules, his or her conduct is rightful, even if the motivating reasons for why the mercenary follows just rules happen to be partly financial.

Let's grant then that the mercenary's conduct is unethical. Let's also grant that, as a matter of fact, private actors tend to be motivated by pecuniary considerations more than public actors are (an assumption that would need explanation and empirical support). Does the conclusion of the motivational argument follow from its premises? It seems to me that it does not. If we assume that the mercenaries are committed to act rightfully (or can be compelled to do so), it is not clear why it would be morally wrong for a liberal state to hire them. To answer that this is because a state should condemn, rather than condone, unethical behavior is to treat the state on par with a paternal or religious authority, and this seems wrong.[25] A liberal state has arguably no business enforcing, or even taking into account, morals beyond what is necessary to secure the justice and reasonable stability of its own institutions. Yet if just outcomes turn out to be the only reasons why a state could decide to discriminate among its agents depending on their inner motives, then the motivational argument would fail to provide noninstrumental reasons against privatization and would effectively collapse into an instrumental argument. Therefore, either the motivational argument provides a noninstrumental, but seemingly implausible, objection against privatization, or it may provide a plausible one, but only at the cost of losing its noninstrumental character.

The Sociocultural Argument

An alternative noninstrumental argument against privatization is that it amounts to a form of either cultural or relational corruption that is objectionable, regardless of outcomes. On one variant of this argument, privatization

commodifies, thereby corrupting, the social meaning of the goods or functions that are privatized. This variant finds its contemporary origins in Michael Walzer's pluralistic theory of justice, according to which the social meaning of a good—the way the good is conventionally valued across a society or community—triggers its appropriate distributive principle.[26] For example, health care, given its social meaning, should be distributed according to a principle of need rather than according to ability to pay, while friendship should be a nonmonetized exchange, rather than a market exchange. Privatization, by introducing market mechanisms in the production and provision of public goods, corrupts the social meaning of these goods, reducing them to fungible commodities.

It is not my purpose here to provide an exhaustive analysis of Walzer's complex argument, which is widely discussed in the literature.[27] I will only highlight some problems with it as a basis for debates on the ethical limits of privatization. First, even if we assume that the argument works as an argument for certain moral limits to markets (what can be permissibly bought or sold), this does not mean that it can also work as an argument for moral limits to privatization. This is because privatization need not involve having individuals directly buying and selling goods on the market.[28] Governments can rely on private actors to deliver universal health care while publicly funding health care and reimbursing hospitals for their services so as to secure universal access; they can contract out prisons services without asking inmates to directly pay for those services; they can use nonprofit organizations to administer welfare programs; and so on.

But even if Walzer's insights could be in principle extended to some cases of privatization, it is unclear how far reflecting on the genuine social meaning of a good can lead us with regards to assessing the moral limits of privatization. Consider, for example, the good of water. Why is it, as Joseph Heath provocatively asks, that "water services delivered to the home through pipes should not be privatized but it is fine to sell water bottles?"[29] The answer cannot, obviously, refer to the social meaning of water, even assuming this social meaning could be univocally defined, since this meaning would seem to be the same in both cases.

And even if we assume that goods have clear social meanings, and that these meanings ought to be preserved, it is not obvious that privatizing their provision necessarily corrupts those meanings, and the ability of people to value them accordingly. People are often able to value goods to at least some extent independently from the institutional mechanisms through which those goods

are provided or exchanged. It seems, for example, that people retained the ability to value life as a sacred, nonfungible good, even after the introduction of market-based life insurance.[30] Certainly many of us value our homes as intimate places, not reducible to commodities, despite the fact that we rented or bought them on the market. Similarly, one can think of health care as a good that should be distributed according to need while still supporting the use of market-based mechanisms to provide it.

It is, however, true that privatization, especially when embedded in an overarching culture that valorizes market values and efficiency above everything else, does often contribute to changing the way in which social meanings are attributed to both objects and practices.[31] Those of us who would like to live in a world where these values are not dominant may then have good reasons to complain that privatization is a corrupting force that ought to be constrained. The problem, however, is that other people may disagree about what a good society ought to look like. They may then rebut: Why should we keep the social meaning of goods fixed, according to your preferred comprehensive conception of the good society, and then assess the permissibility of privatization or other modes of governance against it, rather than assessing current social meanings against the consequences of retaining them for individuals' welfare or well-being?[32] Insisting that these meanings are "good" does nothing to persuade those who disagree, and who may reasonably insist that the right ought to have some priority over the good. If this is correct, then one can at most support a weaker version of the corruption argument, according to which we have reasons to resist the privatization of certain functions, and the change in social meanings this would (arguably) lead to, if these social meanings are widely shared and valued, and unless this change would lead to more just outcomes. Yet, reframed in these terms, the argument would seem to collapse into an instrumental argument against privatization.

But perhaps what privatization corrupts are relationships, rather than, or beyond, particular goods. Consider, as an example, which I take from Debra Satz, the case of a person, Sara, owing her friend a gift for her birthday.[33] Suppose that Sara's secretary is a more thoughtful gift shopper. Still we may think that it would be wrong for Sara to delegate the task of choosing the gift to her secretary. Sara's friend may reasonably feel disrespected or offended when she finds out that Sara outsourced her responsibilities of friendship in that way. For homologous reasons, it may be argued that citizens can reasonably feel disrespected when their government privatizes important public

responsibilities, rather than discharging them directly, and this is so regardless of outcomes.

The obvious problem, however, is that the kind of relationship at stake in the two cases is not equivalent. Although political philosophy is full of analogies between political communities and intimate relationships, as a matter of fact, the bond of love and affection that characterizes a relationship between friends is very different from the much more impersonal bond that characterizes the relationship between citizens and their government. Therefore, it is unclear why citizens ought to feel disrespected if their government delegates to private actors the task of providing certain goods or performing certain functions. Indeed, people do not seem to care much as to whether the goods and services they receive are directly provided by government or by private actors, as long as their access to those goods is efficiently secured.

The Essentialist Argument

We can finally turn to what I think is the most interesting and powerful noninstrumental argument against (some forms of) privatization. According to this argument, recently defended by legal theorists Avihay Dorfman and Alon Harel, there are certain inherently public goods that cannot, by their very essence, be privatized.[34] The privatization of such goods renders their provision logically impossible. Punishment is, in these authors' view, the paradigmatic example of an inherently public good. Unlike other goals of a criminal justice system, which may include deterrence, rehabilitation, and retribution, punishment consists, according to Dorfman and Harel, in the public condemnation for the public wrongs done.[35] On the basis of this communicative conception of punishment, they argue that "public condemnation is possible in the first place only if it emanates from the appropriate agent."[36] Punishment is, therefore, like tackling, what we called "an agent-specific good." In the case of punishment, the relevant agent must be able to speak "in the name of" the political community on whose behalf the condemnation is communicated. The only appropriate agent capable of performing this communicative act is the state, for only the state is authorized to speak in the name of the political community. Punishment performed by a private actor is then not punishment. It is illegitimate violence.[37]

But why does a private agent—for example, a private prison—necessarily lack the standing to speak in our name? After all, government authorizes, through contract, private prisons to execute punishment. In response, Harel

and Dorfman distinguish between actions *for* the state and actions *of* the state.[38] Privatization necessarily delegates to private agents the discretion to decide how to perform certain actions and what actions, exactly, to perform. Private actors can try to execute the commands of the legislator or judge impartially, by performing their functions in a way that is in line with the public interest. Harel and Dorfman call this mode of reasoning "fidelity by reason."[39] The problem with fidelity by reason, however, is that the private parties' judgments necessarily proceed from their own point of view because "even an attempt to decide on these matters impartially implies a value judgment (by the assistant) concerning what impartiality requires."[40] The private agent, therefore, necessarily fails to reason from the sovereign's point of view, which is the public point of view. Therefore, private agents' actions, even if they proceed from fidelity by reason, cannot count as actions *of* the state—they are at most actions *for* the state—and this is why, ultimately, they cannot be regarded as done in our name.

If private agents were able to completely defer to the sovereign's judgment in determining, to the last detail, how to perform certain actions, then their actions would count as action *of* the state, rather than for it. This is what Harel and Dorfman call "fidelity by deference."[41] However, they further argue, privatization necessarily entails that private agents adopt the fidelity by reason model, not the deferential one. This is because even if private actors were willing to adopt fidelity by deference, they could not do so in isolation. Their decisions would need to be integrated into a "community of practice" that brings together, through specific procedures, the political and the bureaucratic.[42] Only in this way could their decisions be regarded as being made from the point of view of the public. But this would entail transforming private actors into public officials.

Harel and Dorfman conclude that, since private actors cannot speak in the name of the state, when they perform inherently communicative public functions like punishment, they are doomed to fail.[43] When a private prison guard incarcerates a convicted criminal, this is an act of illegitimate violence rather than of punishment.

I believe that Harel and Dorfman's argument opens up a crucial question in assessing why the privatization of certain public functions may be problematic regardless of outcomes—can private agents act and speak in our name? (I will provide my own answer to this question in chapter 5). I also believe, however, that their argument ultimately fails to explain why privatization is wrong. For one thing, the argument is grounded on a very specific (and

contested) interpretation of the essence of certain goods as inherently public. For example, their argument has nothing to say to those who believe that the core function of punishment is rehabilitative or retributive, rather than communicative.[44] Further, the argument is able to condemn only a very limited category of cases of privatization. As the authors concede, "Our noninstrumental case against privatization . . . need not apply to . . . some controversial cases such as education and health," because these are not inherently public goods.[45] After all, it seems that health care is health care, whether it is privately or publicly provided.

But let us grant Dorfman and Harel's definition of punishment as an inherently public good and limit our attention to it. Still, it remains unclear whether their argument can provide an even *pro tanto* case against privatization. This is because in order for A to communicate a message *in the name of* B it is not necessary that A's actions be actions *of* B. To illustrate: suppose I hire a web designer to write the content of my academic web page and grant the designer full discretion in the choice of how to communicate my research interests. As long as the web designer's exercise of discretion depends on and falls within the boundaries of my authorization, we would say that the resulting content of the web page and the messages it contains are communicated in my name, even if, because of the lack of full deference, they are not "my" messages. Similarly, private actors may arguably be able to communicate condemnation in the name of the state, even if their actions are not actions of the state. Representative agency is not the same as proxy agency.

But suppose for the sake of argument that only public actors can perform the communicative act of punishment. At this point, another problem arises. It is not clear how Dorfman and Harel's account can make sense of the fact that, while we intuitively regard the privatization of certain goods such as punishment as problematic, we do not care much about the privatization of other goods that seem to also be "inherently public," according to their definition. Consider the case in which the public communication of praise for valuable achievements, rather than the public communication of condemnation for crimes, is at stake. Think, for example, of the practice of honoring war veterans with medals for their outstanding public service. Imagine that the government selects the recipients but delegates to a private actor, say, a Hollywood star, the communicative task of conferring the medals, and of deciding how to do so, on behalf of the political community. Assume that, for the reasons illustrated by Dorfman and Harel, the private actor's judgment about how, exactly, to confer the medals remains private and that, because of this, the private actor

is incapable of communicating praise in the name of the political community. Still, it is unclear whether there would be anything seriously wrong with this kind of privatization. But if this is correct, then our unease in the case of privatized punishment cannot simply be explained by the fact that delegating certain functions to a private agent makes the delivery of certain inherently public goods impossible, because that is true of both the case of punishing and the one of medal awarding.

Now, Dorfman and Harel could respond that the privatization of punishment, unlike the privatization of honors conferral, is wrong because it "violates dignity," by "subjecting the inmate to the private warden's judgment concerning how to proceed with expressive condemnation."[46] But then the very category of inherently public goods seems to become irrelevant. It is not the imposition of a private judgment on others in delivering inherently public goods that violates dignity, and thus provides a reason against privatization, for this imposition is equally present in the case of honors conferral. What violates dignity in the case of administering punishment, as opposed to the case of conferring honors, is arguably that, even if they are both inherently public goods, punishment, and only punishment, entails a restriction of an individual's freedom or the curtailment of his or her rights. To the contrary, no one is entitled, at least not on grounds of justice, to being awarded a medal in a particular way. But then what ultimately supports the case against the privatization of punishment is neither that privatization makes the provision of certain inherently public goods impossible, nor the fact that the imposition of someone's private judgment on others as such is wrong, but rather that the imposition of private judgment on others in a way that restricts their freedom or compromises their rightful entitlements is wrong. An account of the wrong of privatization should then be able to make sense of these differences, something I will try to do.

Reframing the Debate: What Are Political Institutions For?

In this chapter I have critically assessed what I believe are the most influential answers to the question of when, if ever, privatization is objectionable: the distributive, motivational, sociocultural, and essentialist arguments. Although these accounts direct our attention to important concerns, I have found their answers partly unsatisfactory.

Upon further reflection, however, it seems that these approaches have even more fundamental, theoretical limits. These limits concern the very way in

which they conceptualize the question of privatization, not only the ways they try to answer it. By briefly reflecting on such limits, we can set the stage for an alternative approach.

The first problem is that, as anticipated in the introduction, the above accounts all tend to focus on the outsourcing of particular functions, taken serially. In this way, they fail to see privatization for what it is: a broader transformation of the way government operates, and of the way we, as citizens, relate to it. Once the phenomenon is considered through a more systemic lens, the question of what is wrong with privatization becomes inextricably linked to the more fundamental question of what political institutions, including a democratic system of government, are for, and whether a privatized mode of governing is compatible with, or rather undoes, the rationale that justifies the existence of those institutions in the first place.

A second problem with dominant approaches is that, if on the one hand they are too narrow because they fail to see privatization as an overall institutional transformation, on the other hand, they are too broad, for they focus on particular goods or functions as their unit of analysis, rather than on the different kinds of powers that the provision of a certain good or the performance of a certain function may entail. Take the case of "welfare provision"—a function that is a widespread object of privatization. This function may include, and even hide, action types that are as different as determining the rules of eligibility for benefits; deciding who is eligible for certain benefits on the basis of preestablished rules; deciding, among those eligible, whom to serve first; and actually handing, without making any relevant decisions, those benefits to particular people once all relevant decisions about entitlements have been made elsewhere. Although the function in question is the same—welfare provision—the powers involved in the performance of the different action types have very different normative significance and raise different concerns.

A third, and final, general limit of dominant approaches concerns the way in which they rest on a sharp distinction between instrumental and noninstrumental considerations, some arguing that outcomes are all that matter, while others dismiss outcomes altogether. I think this dichotomous approach is unwarranted. As I will further argue in chapter 4, instrumental and noninstrumental considerations interact in complex and interesting ways. Some instances of privatization, for example, may be wrong neither because they generate bad outcomes *simpliciter*, nor because they delegate to private actors inherently public functions that should never be delegated, regardless of outcomes. Rather, they may be wrong because, given some of the outcomes they

generate, they ought to be regarded as consisting in the alienation of certain collective rights that cannot be so alienated, or so I will argue.

Building on the above considerations, my aim is to provide a diagnostic account of the wrong of privatization that, respectively, (i) rests on a more fundamental account of what justifies the existence of authoritative political institutions, including a democratic system of government; (ii) takes as its site of analysis the nature of the discretionary powers that come with delivering or administering certain goods or functions on behalf of government; and (iii) goes beyond the framework of instrumental versus noninstrumental, by stressing the noninstrumental relevance of outcomes.

2

What Are Political Institutions For?

IN THE LAST CHAPTER, I argued that a diagnostic assessment of privatization, understood as a historical process of institutional transformation, cannot begin with an exclusive focus on distributive outcomes, the commodifying tendencies of markets, or the essence of particular goods. Rather, it should begin with the more fundamental question of what political institutions are for.

Many take for granted that functioning political institutions are necessary for a just society, and that justice, however exactly defined, ought to be pursued through these institutions. Laws should be made by political representatives, rights disputes should be publicly adjudicated by courts, redress for rights violations should be sought through a public criminal justice system, duties to respect those rights should be enforced coercively by public officers, and taxes should be collected by state administrators.

But this view is far from being universally shared, and its justification is far from obvious. Widely influential economists, including Gary Becker and George Stigler, have argued that law enforcement should be in private hands. Private individuals and firms should investigate violations, apprehend violators, and conduct legal proceedings to redress violations.[1] Legal and political pluralists think that the state should not be the exclusive source of law and should not always be the one to handle the adjudication of disputes.[2] In their view, the private adjudication of disputes through arbitration, as well as private legal systems where law develops gradually from customs and social practices, are superior to public systems because they are more efficient, less bureaucratic, and less coercive. The view that justice ought to be secured through public institutions rather than autonomous private action cannot therefore be simply assumed. It must be justified and defended.

Yet contemporary political philosophers have often provided unstable arguments in defense of public action on behalf of justice. Radically different branches of political philosophy, from libertarian to egalitarian, seem to converge on what I shall call *the interchangeability assumption*. This is the assumption that, at the fundamental level of theory, there is no difference between the public or private pursuit of justice—that political institutions and private actions (of adjudication, enforcement, and provision) ultimately are different, interchangeable means to achieve the independently defined end of justice. Indeed, some explicitly condemn "the oddness of thinking that justice is concerned with some means to that end but not others."[3]

The aim of this chapter is to reject the interchangeability assumption and to explain why there is a fundamental and morally necessary connection between justice and public action. This will lead me to defend the important thesis that justice cannot be secured through private means, at least insofar as the definition, adjudication, and enforcement of rights is at stake. I do not mean "cannot" empirically but rather analytically—privately achieved justice is not justice.

Even if successful, my argument will leave open the possibility that justice is fully compatible with a highly privatized system of *governance*—where privatization is confined to the execution of specific public functions, the implementation of duly legislated public policies, or the delivery of goods and services by private agents—against the background of a political authority that retains functions of lawmaking and adjudication. It will be the purpose of future chapters to show that this is not, in fact, the case and that the privatization of governance, even in the presence of an established public authority, does indeed compromise the very reasons why we ought to bring about and support authoritative political institutions in the first place. This is because privatization generates, at the lower level of governance, the very same problem that the justification of political authority is meant to solve to begin with. It does so by reproducing within the civil state the very same normative conditions that characterize and define the precivil state—the state of nature—as a state of merely provisional justice.

The chapter will proceed as follows. I will first introduce the interchangeability assumption. I will then build on, and further develop, the recent revival of Kantian political philosophy, found in the work of Katrin Flikschuh, Anna Stilz, and Arthur Ripstein, among others, to reject such assumption.[4] Kantians have argued that the existence of a state is necessary, and noninstrumentally so, for justice, for in the absence of a common political authority, that is, in the

precivil condition, rights remain merely provisional, and the private definition, adjudication, and enforcement of right claims inevitably put individuals in morally problematic relationships with each other. While the general thrust of the Kantian argument is by now familiar to many, wide disagreement persists as to what exactly makes rights, and thus justice, provisional in the state of nature, and what the precise nature of the problem is that the political state is meant to solve. My contribution to this debate will consist in defending a particular answer to these questions and in rescuing a version of the Kantian position from important objections that, in my view, have yet to be appropriately addressed. I should stress that my aim is not interpretative. I do not purport to provide the most accurate reading of Kant's own views on the matter of private right. Rather, while operating within a broadly Kantian framework, I hope to defend a normative view that makes sense in its own terms.

I will argue that the ultimate problem with private adjudication and enforcement in the precivil state consists not, as some have claimed, in an unequal distribution of spheres of freedom, or in a failure of reciprocity, or in treating others as social inferiors.[5] Rather, justice cannot obtain in a world of privately regulated interactions because only in the presence of appropriately constituted democratic institutions can rights and duties be defined, adjudicated, and enforced in a way that is fully consistent with a norm of mutual respect both for the equal normative authority of all and for individuals' rational independence. It is a commitment to respect both a certain kind of fundamental equality and reciprocal independence that, in turn, grounds the authority of democracy. I will conclude by suggesting that the privatization of adjudication, as experienced in many parts of the world today, should be understood as a regression to the Kantian state of nature, even if it happens against the background of a political authority.

The Interchangeability Assumption

The most powerful defense of what I called "the interchangeability assumption" comes, I believe, from neo-Lockeans.[6] The general thrust of the Lockean argument is well known. It is grounded on the premises that (1) all persons, qua moral agents, possess by nature a bundle of moral rights and duties, and that (2) justice demands that we comply with these moral requirements.

Our natural rights, for the Lockean, include "a broad right of self-government and independence," where independence is defined as nonsubjection to "the will or authority of any other man."[7] This right, in turn, entails, at

minimum, rights to property and bodily integrity. The Lockean further assumes that (3) the demands of justice, including respect for independence, can in principle be fulfilled independently of the existence of any shared institution, and that (4) there is no definite proof that public institutions are better means than autonomous private action to fulfill those demands. From this, the Lockean draws the conclusion that (5) we are permitted, compatibly with the requirements of justice, not to support any public institutional arrangement, let alone a full state system. If it could be proved that supporting state institutions, including a public system of taxation, right adjudication, and enforcement, were morally necessary means to discharge our obligations of justice, then, even for Lockeans, we would have a duty of justice to subject ourselves to and obey the state directives.[8] But the Lockean tends to reject this assumption. As A. John Simmons forcefully puts it, "it is plainly an empirical question, and not one for which a positive answer can just be assumed, whether political membership best discharges our duties and respects others' rights."[9] The Lockean argument thus provides strong philosophical support to the claim that, depending on empirical circumstances, justice itself may require us to slowly move from a public system to a private system of enforcement, from public to private adjudication, and from taxation to philanthropy. Therefore, those who want to resist the progressive privatization of the public should have a persuasive answer to the Lockean argument.

A widespread trend in the contemporary literature on justice has been to develop one such answer not by rejecting the interchangeability assumption as such, but rather by arguing for the empirical superiority of political institutions versus private action.[10] According to this view, justice should be secured through public means not because of some fundamental relationship between justice and political institutions but rather because "these institutions . . . have two virtues: not only do they secure justice more effectively than could people acting without institutions, they also minimize the costs people must sustain to secure justice."[11]

The problem with this view, however, is that the empirical superiority of political institutions is precisely what many legal scholars and social scientists nowadays object to, and political philosophers do not generally offer compelling evidence in support of such superiority. Further, although it is true that if we had to pursue justice through our own private actions alone this may impose significant costs on us, the Lockean may respond that these costs would still be much lower than the costs of having one's own independence thwarted by unwanted coercion.

In what follows I will thus provide a refutation of the interchangeability assumption that does not rest on considerations concerning the superior efficiency or effectiveness of political institutions. The point will be to show why we cannot just treat people rightly by individually respecting their rights, independently of any political arrangement or institution.

The Puzzle of Provisional Rights and the Problem of Unilateral Subjection

Kantians agree with Lockeans that we are morally bound to respect other people's claims to be free, and that freedom consists, as Locke himself would argue, in a kind of independence from the private will or authority of others.[12] Importantly, we ought to respect the freedom of others not because freedom is a constitutive component of a good life. Rather, it is the very recognition of each other as human beings, endowed with a power of choice, that requires us to respect each other's freedom.[13] Conversely, it is our capacity to set and pursue ends that gives us a claim to independence, the nature of which is inherently reciprocal. This is a claim not to be subject to the choices of others, insofar as this claim can "coexist with the freedom of every other in accordance with a universal law."[14] True, there is a sense in which we cannot avoid being affected by other people's choices. What we can do is always partly conditioned by what those around us decide to do or not to do. But having our power of choice subject to the will of others is not the same as having our actual choices affected by them. Only the former mode of subjection, as we shall see, violates our independence.[15]

Kantians further agree with Lockeans that independence requires rights. To have rights is to have a sphere of action that one is entitled to control and others are obliged not to interfere with. What rights we have ultimately depends on what is required by the exercise of our moral power to set, pursue, and revise ends.[16] Rights to control our own body, and rights to enter into associative and contractual relations with others, as well as rights to acquire and control the use of external resources—a right to "useable means"—are obvious candidates.[17]

Where Kantians depart from Lockeans is on the possibility of acquiring conclusive rights in the state of nature—rights that impose binding and enforceable obligations on others. The acquisition of rights, except for our innate right to freedom and the right to control our own bodies that comes with that

right, can occur only through external acts. Property rights to usable means are the paradigmatic but by no means the only case of acquired rights.[18] In order for our claims of acquisition to generate conclusive rights, these claims must come with the authority to impose correlative binding obligations on everyone else. However—Kantians argue—in the absence of a political authority, private agents lack the right to legitimately impose new obligations on others.[19] It follows that private acquisition remains unable to generate conclusive rights, to which enforceable correlative duties are attached. If rights are merely provisional in the state of nature, so is justice.

But why exactly is the acquisition of rights through private acts unable to generate binding obligations? Why does justice ultimately remain provisional in the state of nature? And what is wrong, if anything, with the adjudication and enforcement of rights by private agents in the absence of a political authority? For our purposes, providing a compelling answer to these complex questions matters for the following reason. If, as this book aims to argue, privatization reproduces, within the state itself, the same normative problem that characterizes and defines the Kantian state of nature as a condition of unfreedom and merely provisional justice, then, in order to understand what is ultimately wrong with privatization, we must first gain a clear idea of what the precise nature of this normative problem is.

It could be argued that what ultimately explains the provisionality of rights is the failure of reciprocity that claiming such rights, in the absence of a shared political authority, necessarily entails. If a claim to independence is a claim not to be subject to the choices of others, insofar as this claim can "coexist with the freedom of every other in accordance with a universal law," then, our claims to freedom are inherently limited by the claims to freedom of others.[20] Freedom as independence thus includes, as its own corollary, a requirement of reciprocity or "inner equality," understood as "independence from being bound by others to more than one can in turn bind them."[21] Yet claims of rights, in the state of nature, would seem to be necessarily incompatible with this requirement, or so one could argue.[22] To see why, consider the case of property acquisition. When I acquire property in the state of nature, I thereby limit your ability to use previously unowned things, and I also impose obligations on you that you would not otherwise have, such as the obligation to refrain from using the object of my acquisition. I thus bind you, by changing, in Arthur Ripstein's words, your "normative situation."[23] Yet, in the absence of a common political authority to authorize my particular act of acquisition in the name of all, including you, my act of appropriation necessarily amounts to the

imposition of a merely unilateral (private) will on you. It follows that I, the appropriator, through my unilateral act, bind you more than you bind me in turn, thereby violating the requirement of inner equality.

The problem with this argument, however, is that even if we grant for the moment that an act of acquisition in the state of nature necessarily amounts to nothing more than the imposition of a unilateral will on others, it is not immediately clear why this should violate a requirement of reciprocity. After all, everyone has the same power to obligate others through unilateral acts. Consider, as an example, the case of two individuals, Ann and Bill, who, according to the same principle of "finders keepers," simultaneously appropriate the first apple they find, reciprocally binding each other to the same obligation not to appropriate previously unowned apples. If the nonreciprocal nature of obligations is what ultimately explains the provisionality of rights, why can Ann's and Bill's acquired rights to their respective apples not be conclusive? One could respond that this is because Ann's and Bill's imposition of symmetrical obligations on each other, even if simultaneous and reciprocal, would still be incompatible with their claims to freedom, because it results in a sort of reciprocal subjection to each other's unilateral wills. But if this is the case, then the fundamental problem with private acquisition is not that I have more power or authority to bind you than you have over me; it is rather that, through my act of acquisition, I unilaterally legislate the background constraints within which you are permitted to act. By doing so, I do not merely affect your choices. I rather subject your power of choice—your capacity to set and pursue ends—to my own private will, thereby violating your independence, and this is so regardless of whether you have equal power to do the same thing to me, and regardless of whether I am willing and prepared to allow you to coerce me on those very same grounds.[24]

But perhaps we have misunderstood the demands of reciprocity. After all, for Kant, reciprocity does not consist in a form of mutual exchange but rather in an idea of universality. As Kant puts it, "the universality, and with it reciprocity, of obligations arises from a universal rule."[25] So understood, Ann and Bill necessarily fail to reciprocally bind each other because, even if they grant to each other equal binding power, the obligations they purport to impose on each other, at any given point in time, do not derive from a universal rule, but rather from their unilateral wills.

But then we face a new problem. What if Ann's or Bill's acts of acquisition instantiate objectively right principles? What if Ann and Bill are right to claim what they claim because, say, the "finders keepers" principle is just the only

correct principle of acquisition? Insofar as objectively right principles are universal laws that equally bind everyone, why is the fact that an act of appropriation is right, in the sense of being compliant with those principles, not enough to render the obligations it generates "reciprocal" in the relevant, Kantian sense?

A common Kantian answer is that being right—acting according to objectively and universally valid standards—is not the same as having authority. The fact that the claims advanced by Ann may be right is not sufficient to confer to her the authority to impose her own determination on Bill. But why not? The answer cannot simply be, as some Kantians argue, that a unilateral will (even if right) cannot be legislative for anyone else, as this would simply beg the question. We must ask why being right, according to universal principles, is not enough to confer to someone the authority to legislate the conditions of freedom according to those principles, in the name of everyone else. I will return to this point later. For now it is sufficient to establish that what we may call "the reciprocity account" encounters some important difficulties in explaining why justice remains provisional in the state of nature.

Perhaps some of these difficulties can be overcome by adopting a different account of what makes rights, and thus justice, ultimately provisional in the absence of a shared political authority. According to this alternative account, the answer rests not on a failure of reciprocity but rather on a failure of distributive equality. Suppose that, in the state of nature, you and I happen to disagree about the scope of our respective rights, which we are likely to do since the boundaries of rights are often subject to reasonable disagreement. Under conditions of epistemic disagreement, the argument goes, if I impose on you my own private interpretation of what the boundaries of our respective rights are, I de facto arrogate for myself a sphere of discretionary space that is larger than yours. In the words of Japa Pallikkathayil: "a straightforward consequence of the requirement of equal external freedom is that no person can have a unilateral right to resolve this indeterminacy [the indeterminacy of rights], *because such a right would make that person's discretionary sphere larger than everyone else's*."[26] By "discretionary sphere" it is meant "a sphere of discretionary space, that is, a domain within which she [the agent] is entitled to control what happens," or "the space of self-directed action secured by a bundle of rights."

I do not find this answer fully persuasive. For one thing, empirically, I could well exercise my unilateral right to solve the indeterminacy of rights in a way that reduces rather than enlarges my own space of self-directed action. I could,

for example, unilaterally interpret, on religious grounds, my own right to bodily integrity as excluding a right not to be assaulted by my husband.[27]

Regardless, to see why having a right to unilaterally determine the scope of rights need not amount to having an unequal discretionary sphere of freedom, consider the following example:

> *Taking Turns at Unilateral Subjection*. Ann and Bill, both inhabitants of the state of nature, take equal turns at unilaterally adjudicating the boundaries of their rights. On Monday, Ann is entitled to unilaterally decide the boundaries of her own and Bill's rights, while on Tuesday, Bill is entitled to do the same, and so on, and so forth.

Taking Turns is, of course, a far-fetched example, but it is, I think, very helpful in separating two analytically distinct considerations: (1) distributive equality, understood as having equal spaces of control over one's choices and (2) freedom as independence, understood as not being subject to anyone else's unilateral and legislative will. Since the social practice described in *Taking Turns* satisfies the distributive condition, the reason why Ann's and Bill's rights cannot be conclusive cannot be that the practice results in unequal spheres of self-directed action. Rather, the reason must be that, even if the resulting distribution of discretionary spheres is equal, the practice is still incompatible with both Ann's and Bill's claims to independence, because, even if equally and reciprocally, it subjects both parties to the unilateral and legislative judgment of others. This reinforces the conclusion that neither lack of reciprocity as such, nor the unequal distribution of substantive spheres of freedom, but rather that the state of being subject to the both legislative and unilateral will of another is the ultimate problem with the private adjudication of rights in the state of nature.

At this point, some may object (explicitly departing from an orthodox Kantian account) that the problem with the unilateral determination of rights should be located in a violation of social equality rather than in a violation of a claim to independence. By imposing my own unilateral determination on you, I treat you as a social inferior, thereby contradicting a norm of equal standing.[28] The problem, however, is that this view assumes that unilateral rule over others is necessarily incompatible with social equality. But this is arguably false. A society of equals is a society characterized by the absence of ongoing social relations of unequal power, authority, and consideration that overall compromise the ability of members to relate as social equals.[29] Yet social equality, so understood, is a holistic value that can obtain, to some extent,

independently of the inegalitarian character of particular interactions. From this perspective, what matters is that the distribution of power and authority in society be overall equal, but not that it be equal in each and every instance of decision making. *Taking Turns*, for example, is arguably a society of social equals. Yet, even for this society, we could still reasonably ask: Why on earth should, at any point in time, Ann's unilateral determination be binding law for Bill? The answer that this is so because Bill gets to call the shots in a different context seems highly unsatisfying. The fact remains that Bill can reasonably complain that being forced to comply with Ann's unilateral determination regarding his associative rights subjects his power of choice to her will in a way that compromises his freedom. This is because Ann's determination makes the normative constraints under which Bill can permissibly act (i.e., the scope of his rights and duties) dependent on her discretionary judgment.

From our discussion so far, we can draw the following preliminary conclusion. The fundamental problem with the private adjudication and enforcement of rights in the state of nature is not that they constitute a failure of reciprocity, or that they generate an unequal distribution of spheres of freedom, or that they fail to instantiate an appropriate relationship of social equality between the parties. Rather, the problem is that they subject the power of choice of some to the will of others in a specific way. They make the determination of A's rights, and of the normative constraints under which A can permissibly act, dependent on B's unilateral judgment, thereby subjecting A's power of choice, which on those rights depends, to B's legislative will. This is incompatible with A's independence. It follows that private persons cannot, compatibly with the freedom of others, be endowed with the authority either to determine the boundaries of other people's rights or to impose correlative obligations on them unilaterally. Lacking any such authority, their claims of rights remain provisional.[30]

The state of nature, so understood, presents a contradiction that is internal to freedom itself: on the one hand, freedom as independence requires and provisionally authorizes the acquisition of certain rights; on the other hand, however, in the absence of a political authority, private acquisition remains incompatible with freedom and is therefore unable to generate conclusive rights, to which enforceable correlative duties are attached.

However, the above conclusion is only "preliminary" because the argument can work only if we are able to explain why a private person's legislative determination in the state of nature should be regarded as unilateral, even if correct. For, as we saw, one could reasonably object that when someone advances claims of rights in the state of nature according to objectively and universally

valid principles, one is not thereby imposing his or her unilateral judgment on others. One is rather acting on a universal rule that ought to be regarded as equally binding for everyone, independently of anyone's particular judgment, and this is true even if others happen to disagree with that determination. Even if the judgment is produced by a particular person, the form of the judgment—one may claim—ought to be regarded as authoritative, because it applies a norm whose authority comes from its objective universality rather than from the subject who happens to apply it. The following section attempts to find an answer to this challenge.

Being Right versus Having Authority

We could try to explain why being right does not entail having the authority to impose one's determination on others by appealing, once again, to reciprocity. Some Kantians would seem to adopt this strategy. Katrin Flikschuh, for example argues that

> since no one who coercively imposes law upon others can at the same time be subject to that law's coercive authority, private persons who impose coercive laws upon others place themselves beyond the coercibility of those laws. It follows that no private rights claimant, in raising a *valid* entitlement claim against others, can legitimately enforce this claim against them while remaining a constituent member of the rights relation.[31]

According to Flikschuh, then, by legislating on others, even if rightly, a person places him- or herself outside of reciprocal rights relations, thereby violating the requirement of reciprocity that inheres in right. And this why the person ultimately lacks the authority to do so. The problem, however, is that it does not seem true that "no one who coercively imposes law upon others can at the same time be subject to that law's coercive authority." People can be both rulers and ruled, at the same time. More to the point, when one claims the authority to determine whether he or she has a right to X, on the basis of the fact that an objectively valid universal principle entitles him or her to X and obligates others to do Y, the person is not thereby committed to denying that he or she is him- or herself subject to that same law and that other persons can, in turn, authoritatively subject that person to similar restrictions grounded on the same universal rule. It is not clear then why the acquirer, who advances valid claims, should be regarded as placing him- or herself outside of rightful relations with others.

The answer as to why being right does not entail having the authority to impose one's judgment on others must, therefore, come from somewhere else. In my view, it comes from the fact that, as Kant himself claims, in the absence of a shared political authority, individuals have an equal right to stand by their own judgment. Imposing one's judgment on others, however correct, would then violate this right. The difficulty then rests in explaining how one can consistently claim that, in the state of nature, (1) individuals have the right to reject being coerced on the basis of an objectively correct interpretation of what right requires, while, at the same time, affirming that (2) individuals lack, on grounds of freedom, the right to reject being coerced to bring about a condition where rights can be determined omnilaterally, as all Kantians would agree. In other words, why does one have a right to stand by his or her own judgment in one case but not the other?

The response ultimately must rest, I believe, on the structural, not merely epistemic, indeterminacy of justice and thus of right. In order to see why, we must first ask why individuals in the state of nature cannot refuse being coerced for the sake of bringing about a rightful condition (i.e., being forced to exit the state of nature). The answer, as Louis-Philippe Hodgson points out, rests on the fact that our rational nature, that is to say, our humanity or capacity for the origination and pursuit of ends, demands that we bring about that condition, together with the fact that our rational nature is "a source of practical necessity," an obligatory end the demands of which we cannot but recognize.[32]

Now, if our humanity is a source of practical necessity, then it must be rationally incumbent on us to adopt the necessary means to bring about a condition of reciprocal equal freedom. This follows from a principle of instrumental rationality: if I am obligated to pursue an end, I must thereby be obligated to take the necessary means for that end. If this is the case then, in a world where there was one and only one objectively rightful and self-evident determination of the scope of rights, and thus of the conditions of equal freedom, obeying *this* determination would amount to a necessary means to the establishment of a rightful condition, and thus to the obligatory end of humanity. Therefore, in such a world, we could not have a right to stand by our own judgment whenever this judgment departed from that determination.[33] It is only in a world where multiple valid determinations, that is, multiple means to achieve the same obligatory end, are in principle available that it is no longer practically necessary for us to obey any particular determination. It is because principles of right are structurally indeterminate, then, that there is no determination that we must accept as a matter of practical necessity. This is why, in turn,

we have an equal right to stand by our own judgment regarding the most appropriate determination. Further, the fact that we have rationally arrived at a certain determination gives us an extra reason to stand by it, partly independently of the value of the determination itself. The reason for this is that our success as rational agents depends on our ability to discover and choose appropriate reasons for action and stand by them.

To be clear, the kind of indeterminacy that is at stake here is structural rather than epistemic. The problem is not that people, including reasonable ones, are never going to agree on how to specify universal principles. Rather the problem is that there is no single right way of specifying universal principles. While there are some universal principles that directly derive from the fundamental right to freedom, such as the principle that individuals ought to be able to own property, these principles, given their formal nature, do not provide a single determinate specification. The reasonability of disagreement thus derives not (or at least not primarily) from the limits of human judgment but rather from the inherently formal and indeterminate nature of principles.

It is not then the case that, as some argue, even if the nature of rights were fully determinate, we would lack the authority to bind others according to those rights.[34] Rather, the opposite is true: it is only because (1) principles of right are structurally indeterminate, (2) their determination requires judgment, and (3) what counts as a valid determination is necessarily (in terms of conceptual possibility rather than empirical actuality) subject to multiple specifications and thus to reasonable disagreement that we can plausibly claim that (4) each individual, as a rational agent, has an equal right to stand by his or her own judgment as to what the correct determination is, that is, each individual enjoys equal normative authority. Further, it is because everyone has equal normative authority that, in turn, (5) others lack the standing, and thus the authority, to impose their judgment, however reasonable, on their fellows. Insofar as they lack the authority to impose their legislative determinations on others, including the authority to change their normative situation, (6) their rights remain provisional. Structural indeterminacy thus explains (lack of) authority.

Importantly, indeterminacy also explains why no one's particular judgment, however reasonable or valid, can be regarded as omnilateral, that is, as representative of the judgment of all as subsumed under a universal rule. The reason is not that the judgment is produced by a particular individual, for that is ultimately true of any judgment. The reason is that because there is no judgment that everyone must, as a matter of practical necessity, follow, no particular

judgment can be regarded as representative of everyone else's judgment. If no one's judgment can be truly representative of the judgment of all, then, when a private person proceeds to establish the constraints under which everyone else must act, everyone else is necessarily made dependent on his or her particular judgment, rather than on a form of judgment that everyone has nonrefutable reasons, that is, is practically necessitated, to share or endorse.

If the problem of indeterminacy were a purely contingent, epistemic problem, then it could be, at least in principle, overcome by achieving factual agreement in the state of nature. The problem, however, is a different one: owing to the structural indeterminacy of right, there is no particular determination of right that everyone must, as a matter of practical necessity, accept. Therefore, the fact that individuals may happen to (accidentally) converge on one determination in the state of nature does not eliminate the fact that they continue to have a right to revise their judgment and stand by it.

To sum up the argument so far: since, in the absence of shared public standards that everyone is practically necessitated to abide by, everyone has an equal right to stand by his or her own judgment—equal normative authority—no one can have the right to treat his or her own judgment as legislative for others, even if this judgment turns out to be right. Since a right, definitionally, entails the legitimate authority to impose binding and enforceable obligations on others, rights cannot be conclusive in the state of nature. Does this mean that advancing claims of rights in the state of nature wrongs others? Kant's answer is that it does not. The state of nature is a state void of justice, but not an unjust state. However, as we saw, treating one's own judgment as authoritative in the state of nature amounts to subjecting others to one's own unilateral will by arrogating for oneself the authority to legislate the conditions under which others can permissibly set and pursue their ends, including the restrictions (duties) under which they can permissibly act and the scope of their sphere of discretionary action (e.g., rights to usable means and unowned objects). This may be prudentially justified in the absence of a shared political authority, but it is nevertheless wrong, and for more than one reason, as I now turn to explain.

The Wrong of Private Adjudication and Enforcement

The wrong of private adjudication and enforcement in the state of nature can be disaggregated into different aspects. One aspect consists in disrespecting others as equally authoritative judges. To treat my own unilateral interpretation as

authoritative for you is to usurp you of your equal normative authority. Logically, the only way to respect others as equally authoritative judges would be either to defer to the authority of an external, impersonal entity or to share the authority to determine the scope of each other's rights and duties with everyone equally, in all those instances in which reasonable disagreement is possible (rather than actual).[35]

A different aspect consists in the infringement of other people's independence, here understood as purely external freedom. As Arthur Ripstein argues, if I unilaterally bind you, I use your powers of action for the sake of purposes that you have not authorized or established for yourself. The way I violate your independence in this case consists in the fact that "I use force . . . to get you to do something for me that you would not otherwise do."[36]

However, it seems that I can violate your independence even without getting you to do anything that you would not otherwise do. Consider, for example, the case in which, in the state of nature, I claim a right to this piece of land. Let us assume that, for whatever reason, using that piece of land never was and, by assumption, never would become a part of your purposes or life plans. We may even assume that you are destined to die tomorrow and that the land is located such that you all together lack the physical capacity to reach that land before your death. It is unclear, then, in what sense the appropriation of that piece of land by me would compromise your ability to set and pursue ends for yourself, for it would not force you to do anything you would not otherwise have done. Yet my acquisition would still amount to a problematic infringement of your independence. Why so? By giving a "sign" that I intend to control this piece of land, and by claiming a title to coerce you if you fail to respect that intention, I try to get you to do something (i.e., comply with whatever obligation is correlative to the right I claim) not on the basis of reasons you might recognize as sufficient independently of my will, but rather for the sake of reasons that I myself generate through my own unilateral claim. For even if I genuinely believe that there is an independent reason for you to do what I claim you should do (e.g., respect what I deem to be the boundaries of my rights), insofar as (1) rights are structurally indeterminate, (2) you may reasonably disagree with my determination, and (3) there is no shared authority that can settle our disagreement in the name of us all, I cannot assume that you have any sufficient reason—a reason you cannot but accept—for acting in the way I dictate, independently of my unilaterally dictating it. Beforehand, your reason not to enter the land was the shape of your own life plan; now your reason not to enter it is simply that I say so. My determination therefore

supplants your reasons for action with reasons that my unilateral act creates. In this way, I subject you to my will.

So understood, the wrong of unilateral acquisition amounts to a violation of the following principle (a revised version of what A. J. Julius calls "the principle of independence"):[37]

> *Principle of rational independence*: It is wrong for A to get B to x when B takes himself as having no sufficient reason (R) to x independently of the fact that A is getting him to x, assuming that B has no independent sufficient reason to come to regard R as a sufficient reason to x, or to defer to A's judgment as to whether R is a sufficient reason for B to x.

But why is it objectionable for A to displace B's reasons for action in this way? The answer is that, by violating the principle of rational independence, A fails to respect B's ability to appropriately respond to reasons for action. But why is respecting others' responsiveness to reasons so important? The answer is to be found, I think, in the connection between reasons and actions. As Christine Korsgaard points out, reasons are constitutive parts of the kinds of action we choose, not external to them, because they are constitutive parts of the ends these actions pursue. To pursue an end through action entails not the mere performance of an act but rather the performance of an action for certain kinds of reasons. If you decide to play chess for the mere pleasure of doing so, the object of your choice—your purpose—is not the *act* of "playing chess" but rather the *action* of "playing chess for the mere pleasure of playing chess."[38]

Therefore, and crucially, respect for others' external freedom—their ability to act in accordance with certain ends, without these ends being imposed by others—necessarily entails not only refraining from forcing them to perform acts they would not otherwise perform, but also respecting their ability to act for reasons they can appropriately respond to. External and internal freedom cannot be sharply separated. Binding other people to act in a certain way just because "I say so" amounts to a violation of their capacity to set ends, and thus of their humanity, even if they would have acted in that very same way in any case.[39]

Although displacing people's reasons for action in violation of the principle of rational independence is generally wrong, there are limits to the extent to which we are obligated to respect other people's responsiveness to reasons. The very reasons we all have to respect each other's responsiveness to reasons are also reasons to limit the range of reasons that deserve such respect. First, as previously discussed, precisely because we are (among other things)

rational agents, we have no standing to refuse to recognize the authority of certain kinds of reasons, including reasons to bring about a state of affairs where rights, understood as necessary conditions for the exercise of rational agency, can be adjudicated and secured. These are nonrefutable reasons for the simple fact that, as Louis-Philippe Hodgson puts it, every rational agent, unlike a wanton, "is committed to recognizing the authority of rational agency [and thus of freedom] simply by virtue of acting."[40] Further, since freedom is itself relational—my right to freedom requires coexistence with the freedom of others—then our claim to act on our own reasons is inherently limited by the same demand by others. Respect for other people's rational agency is thus itself a nonrefutable reason. This, in turn, means that individuals have no claim to act on their own reasons when so acting is incompatible with the claims to freedom of others. This means they cannot claim a right to settle the boundaries of rights in a way that compels others to defer to their own unilateral will.

To sum up: the reason why justice cannot obtain in the state of nature is not that private systems of adjudication and enforcement are inefficient or ineffective. Rather, justice cannot be secured privately because seeking to make rights conclusive in the state of nature unavoidably fails to treat all individuals as equally authoritative judges and fails to respect their independence, including their rational independence. Insofar as they too are committed to respect for independence, and for whatever rights independence demands, even Lockeans should be able to agree on this conclusion.

However, rejecting the view that justice can be secured—adjudicated and enforced—through private action is not yet sufficient to reject the interchangeability assumption as such. One needs to further prove that public institutions are, at least in principle, able to overcome the defects of private action. This is the task to which I now turn.

The Democratic Authority of the Law

If the problem with a system of private right were reducible to a violation of reciprocity, distributive justice, or social equality, a system of equally distributed unilateral ruling, along the lines of *Taking Turns*, could provide a solution to it. A group of individuals could unilaterally rule on welfare, while others rule on property rights. Yet, as we saw, the problem we need to solve is of a different kind. An alternative solution must thus be found.

In order to make a rightful condition possible, we need a system through which the rights and duties of all can be authoritatively determined,

adjudicated, and enforced in a unified way (otherwise, in the presence of competing authorities, the problem of indeterminacy would reproduce itself) and in a way that (1) guarantees to each an equal sphere of freedom, (2) does not treat anyone as fundamentally more authoritative than anyone else, and (3) does not subject anyone's power of choice to the unilateral will of anybody else.

Conceptually, there are two ways in which we can secure that we are not individually subject to anybody else's particular will. We can be individually subject either to (i) our own unilateral will alone, like in conditions of anarchy, or to (ii) a non-unilateral will. The first solution (anarchy) is ruled out by the fact that the very problem we are trying to solve derives from our unavoidable interactions with others. Only if the boundaries of our rights and duties can be defined, adjudicated, and enforced by a will that is non-unilateral, then, can rights be conclusive and a rightful condition obtain. There are, however, two distinct ways in which a will can be said to be non-unilateral: it can be either nonlateral or impersonal, in the sense of not being the will of anyone (like, for example, the will of a computer that nobody programmed), or it can be omnilateral or shared by all, in the sense of being everyone's will, or a will representative of all. Without further argumentation, the imperative of reciprocal nonsubjection leaves underdetermined the choice between an impersonal and a shared will.

From an Impersonal to a Shared Will: Democratizing the Rule of Law

At first sight, Kantians would seem to identify the solution to the problem of the state of nature with subjection to an impersonal, nonlateral will. After all, the Kantian solution rests on a sharp separation between the rule of law, quite literally understood, and the rule of particular persons.[41] A rightful condition is "a condition in which what is to be recognized as belonging to it [the individual] is determined *by law*."[42] Because the law is an impersonal entity, under the rule of law no one is by definition subject to anyone's particular will. Of course, this immediately raises the question of how the law can impersonally rule given the fact that the law is not an agent and it is necessarily made and applied by particular individuals. It also raises the further question of how a public system of laws should be both authorized and designed in order to qualify as the instantiation of a will that is not merely unilateral. The standard

Kantian answer is that for the law to qualify as such, it is enough that the content of the law be such that it could be hypothetically agreed to by each member of a people. In this view, it is not necessary that a public system of law (the state) be actually, let alone democratically, authorized by the people in order to count as legitimate. Insofar as the legislative authority acts for the exclusive purpose of securing a rightful condition, and not for any private purposes, it ipso facto acts in a way that could be the logical object of consent by the people. Its acts of lawmaking can then be regarded as truly representative of the united will of the people, understood as a collective body, rather than the mere expression of someone's particular will. This is why, according to orthodox Kantians, even if the law is an impersonal entity, being ruled by the law is being ruled by an omnilateral, shared will, even if the will in question may not be actually shared by anyone.

Yet, while this account seems sufficient to guarantee that the law has a rightful aim or content, for laws that deny equal rights could not be the object of hypothetical acceptance, it is not clear how it could secure the condition that, by simply subjecting themselves to the law, people avoid being subject to anyone else's will. Insofar as the legislative authority ought to be obeyed regardless of the procedures through which it was authorized to begin with, and insofar as rightful judgment could be in principle exercised by all sorts of authorities, the Kantian solution to the problem of the state of nature is (arguably) compatible with subjecting everyone to the authority of a benevolent monarch or enlightened dictator who has succeeded in seizing power. Yet it is difficult to see how being subject to this kind of ruler would be any different from being subject to the unilateral will of another.[43] One could answer that as long as the ruler acts according to certain fundamental public rules, his or her subjects are subject to those rules and not to the ruler's will. But the question remains: who authorizes those (constitutional) rules to begin with?

Recall that the reason why no one had the authority to impose his or her own judgment on others in the state of nature, however valid and correct, was that everyone had an equal right to stand by his or her own judgment and not to defer to others with regard to reasonable disagreements about the shape and boundaries of their reciprocal rights and obligations. A system of rules that defines individuals' fundamental rights and duties can then acquire authority only if it is itself the result of a process that is compatible with the fundamental equal normative authority of all. This requirement entails that a legislative authority can be legitimate only if the procedures through which it was authorized to begin with do not themselves arbitrarily privilege a

particular person's authority over others.[44] Yet a particular individual seizing power would not meet this test. The above requirement, therefore, grounds a strong presumption in favor of procedures that distribute the authority to decide on fundamental rules equally to all, since it is on these rules that the distribution of legislative authority ultimately depends. Since it would be difficult to decide on a constitution via lottery, the commitment to respect the equal normative authority of all generates a presumption in favor of the democratic authorization of fundamental law.

But now suppose that a democratically sanctioned constitution authorizes enlightened forms of dictatorship. In this case, it seems, as long as an unelected autocrat rules within the boundaries of his or her constitutional mandate, he or she would rule in a way that neither amounts to a unilateral imposition of someone's particular will on others nor presupposes higher natural normative authority, for the autocrat's unilateral exercise of power would be omnilaterally authorized by procedures that give fundamental equal authority to all. The will of the dictator could then be regarded as omnilateral.

This conclusion seems, however, unsatisfying. In the same way in which the demands of freedom as independence obligate us to leave the state of nature, these same demands must also set limits to the forms of government a people could legitimately authorize. Interestingly, among these demands Kant himself includes a requirement of rightful honor. According to this requirement, an individual should not reduce him- or herself to a mere means for another's pursuits but should rather assert his or her own worth in her relation to others. If rightful honor constrains what a people can validly authorize, then, it would seem, a people cannot collectively authorize an autocratic master to rule them, for this would de facto reduce its members to passive subjects, thereby undermining their rightful honor.[45]

As Kant introduces it, rightful honor is a duty toward oneself. We need not, however, endorse his characterization in full. We can instead regard rightful honor, more broadly, as a necessary precondition for a person's capacity to set and pursue ends. A person's ability to set and pursue ends, whatever their particular content, necessarily depends, in part, on his or her being an active agent, someone who is able to develop and act on commitments rather than being a mere means for the commitments of others. Yet our active agency would likely be jeopardized if we were subject to a system of rights and restrictions on our freedom that was simply imposed on us, without our being able to play any part in actively shaping its content. Even if such imposition could not be attributed to anyone's particular will, and so no problem of subjection

would arise, a constant condition of passive rather than active citizenship would endanger our very rational nature.

So understood, the requirement of rightful honor can be plausibly regarded as demanding that free and equal people refrain from authorizing, through a constitution, autocratic governments, for these governments would make their citizens, especially in the long run, passive subjects rather than active citizens, rendering them unable to assert their own worth and equal standing vis-à-vis each other.[46] I thus interpret rightful honor as extending the presumption in favor of democracy from sovereignty to government.

Finally, the character of the omnilateral will must be representative of a united will. It is not enough that a properly authorized government determines and secures equal rights for all. It also matters that it does so "in everyone's name." Why so? One reason has to do with the structure of justice claims. Justice does not simply require that a certain state of affairs be achieved, no matter how and by whom. It rather requires that certain duties be discharged either by the agents who owe those duties, or in their name. After all, if I owe you a debt, your claim is not satisfied by simply receiving a certain amount of money no matter how and by whom. It is me, or someone acting in my name, who has to repay the debt, in order for your claim to be fulfilled.[47] Yet, as we saw, although individuals owe it to each other to support a rightful condition out of respect for their common humanity, they, as private persons, lack the capacity to secure justice. Therefore, it is only through a government entrusted to act in their name that citizens can appropriately discharge their reciprocal obligations of justice. A second reason is that if presumptively authoritative rules that determine the scope of citizens' entitlements and duties were set in the name of a particular group of people alone, rather than in the name of everyone, those subject to those rules would become subject to a private, particular form of judgment. Therefore, it is only insofar as determinations of rights and duties are made in everyone's name that those subject to those determinations can maintain their independence. Because of these reasons, government must be representative. The representative capacity to speak in the people's name, in turn, further reinforces the presumption in favor of the democratic quality of government, for it is difficult to see how a government can truly act in the name of everyone, unless collectively authorized by, and accountable to, all its citizens.[48]

In sum, four considerations—(1) reciprocal nonsubjection, (2) respect for the equal normative authority of all, (3) active rather than passive agency, and (4) representation—jointly ground a strong presumption in favor of the

democratic authorization and enactment of public laws, as well as of a representative system of government. Whereas a system of government grounded on the random selection, through lottery, of a few lawmakers charged with the task of defining justice within the constraints of certain constitutional essentials would also meet the condition of reciprocal nonsubjection and equal authority, it would be arguably lacking with respect to the condition of active citizenship (e.g., because without elections and given the likely impossibility of selecting every citizen, many citizens would have little or no opportunity to contribute to the law); and of genuine representation (e.g., because it would fail to include electoral mechanisms of accountability). It is important to note that, so understood, the presumption in favor of democracy is grounded on a plural set of demands that are all inherent in, and corollary to, the idea of freedom as independence, rather than external to it. Therefore, the authority of those demands, and the authority of the presumption they ground, cannot be refused without also refusing the authority of freedom itself, which, as we saw, cannot be so refused without violating the demands of rational agency itself.[49]

However, for a democratic regime to be able to conclusively, rather than presumptively, provide a solution to the problem of the state of nature, we need to say more as to how democratic procedures can also meet the further requirement of rational independence. This entails showing that a democratic system does not force any of those subject to it to act on the basis of reasons that have no force independently of someone else's particular will.

It is not obvious that even the most appropriately functioning democracy can guarantee that no one is subject to anyone else's particular will, or to the aggregation of particular wills, and that some people's reasons for action or inaction are not therefore displaced by the reasons of others. After all, even if all citizens have an equal right to vote and an equal opportunity to influence the political outcomes of their elections, a minority will still eventually be dependent on the will of the majority—a minority will be forced to do x, not because they see an independent reason to do x, but just because the majority says so. Yet it would seem that the majority's will is nothing other than an aggregate of private wills. This means that, as a member of the minority, my reasons for action will necessarily be dependent on the unilateral will of others.[50] The democratic solution to the problem of the state of nature thus seems doomed to fail.

There is, however, room for hope. As we saw, whereas individuals in the state of nature retain the authority to refuse the binding force of many reasons

for action, they cannot refuse—that is, they have nonrefutable reasons—to exit the state of nature and therefore subject themselves to authoritative decision-making procedures that can establish the content of rights and duties in the name of all. We have also seen that there is a strong presumption in favor of the democratic authorization of public laws, because democratic procedures distinctively meet conditions that are themselves requirements of a rightful condition. These facts, jointly taken, support the following premise:

(1) Individuals, in the state of nature, have *presumptive* nonrefutable reasons, grounded on freedom, to treat democratic procedures as authoritative.

But, to treat certain procedures as authoritative is ipso facto to grant these procedures a special reason-giving status. In other words, and here is a second premise:

(2) To treat a procedure as authoritative means to regard oneself has having reasons to comply with the outcome of the procedure just because the procedure selects that outcome, independently of any particular first-order reasons for wanting that outcome or not.[51]

Following Joseph Raz, to treat a procedure as authoritative means to treat it as a second-order exclusionary and content-independent reason for action.[52] Reasons to perform an action are content independent when they do not depend on the actual merit of the action. They are exclusionary when they exclude from our deliberation other particular, first-order reasons we may have for performing or not performing that same action.

Suppose, for example, that I believe we should drive on the right, while you believe we should drive on the left. Suppose further that as a result of our shared democratic process, which we both have presumptive nonrefutable reasons to support, your view wins and I am compelled to drive on the left. I am now compelled to do so not because you, or the majority, say so, or because that is what you think is right. Rather, I am compelled to obey only on the basis of procedural (content-independent and exclusionary) reasons that I myself must share, insofar as I have independent, nonrefutable reasons to support democratic procedures. The reason why I should comply is simply that our shared procedure, which we all have reasons to uphold, resulted in that outcome rather than another.

But if this is the case, democratic procedures do not require that a citizen, including a member of the minority, be forced to replace his or her own reasons for action with the reasons of the majority. They rather require that every citizen, whether he or she belongs to the majority or the minority, act on procedural, authoritative reasons that he himself or she herself must share, insofar

as that citizen is committed to regarding those procedures as authoritative on the basis of nonrefutable reasons.

If this is correct, then we can draw the following conclusions:

(3) If all citizens treat the outcomes of a democratic procedure as authoritative, which they have presumptive nonrefutable reasons to do, then they do not surrender to any other's particular will when they do so but rather act on shared, because procedural, reasons that the political process alone generates (assuming some substantive constraints on the outcomes are met, as I will explain later).

Further, (4) as long as (i) the minority has independent, presumptive reasons to treat the democratic political process as authoritative, and insofar as (ii) treating this process as authoritative means that the minority must act on reasons that are themselves generated by the authority of that process, then (iii) the minority has reasons to comply with the outcomes of the process that are not themselves dependent on the majority's will.

Therefore, (5) the principle of rational independence is satisfied.

Importantly, it is precisely the fact that democracy can satisfy the principle of rational independence that makes democratic procedures conclusively, and not simply presumptively, authoritative. This, in turn, is why individuals have conclusive, rather than presumptive, nonrefutable reasons to bring about a system of democratically authorized law, as a way of solving the problem of the state of nature.[53]

In the account I defend, what makes democratic regimes categorically different from nondemocratic ones (including the case of the enlightened dictator) is that only under the former is no one compelled to subject him- or herself to the will of another, independently of a shared political process that they have independent reasons to endorse.[54]

The account here developed locates the justificatory ground for democracy neither in a principle of self-mastery nor in a principle of relational equality but rather in a pluralistic commitment to reciprocal nonsubjection, rightful honor, respect for the equal normative authority of all, and respect for rational independence.

The Co-originality of Substance and Procedures

There are, however, limits to the authority of democratic procedures, and those limits are founded on the same principles that underpin their authority.[55] They cannot therefore be consistently rejected while affirming the authority of democratic procedures. Recall that what makes a will omnilateral is not only

its procedural form but also its substantive aim. This is to say that it must be a will, the exercise of which makes possible the free choice of each to accord with the freedom of all. Now, in order for the free choice of each person to accord with the freedom of others, people must be guaranteed, beyond equal formal freedoms, the *material* means necessary to exercise those freedoms. People cannot be independent if they lack control over their bodies, if their lack of material means make them dependent on the choices of others, and, more broadly, if they lack the all-purpose means necessary to exercise their capacity to form and pursue ends.[56] Therefore, a will that willed, say, to protect the rights of some to bodily integrity at the sacrifice of the same rights for others, or to enable the enrichment of some at the expense of the independence of others, could not be omnilateral. There will be many cases, however, where the practical requirements of equal freedom will be indeterminate and subject to reasonable disagreement. Therefore, what justice requires in practice must itself, to a large extent, be decided procedurally rather than fixed in advance (as I have already anticipated in chapter 1, in relation to decisions concerning whether a government should provide certain goods in kind or not). Because of this, beyond having the aim to secure a rightful condition of equal freedom, an omnilateral will should also have the aim to maintain the procedural conditions that are necessary to render the demands of justice fully determinate. This requires the maintenance of the necessary social and material conditions for active democratic citizenship.

What does this imply in practice for democratic decision making? First, it entails that those who participate in giving practical reality to the omnilateral will through democratic procedures should endorse the creation of a rightful condition as the goal of their collective practice. This means, for example, that citizens should refrain from exercising their democratic rights toward purposes that, even if not self-interested, explicitly contradict the substantive aims of the omnilateral will. Although there are several reasonable ways of interpreting, more or less expansively, the demands of a rightful condition, whatever the range of reasonable possibilities, there seem to be some purposes that would fall outside this range. For example, it is hard to see how voting for a party that proposes to incriminate adults who engage in homosexual sex or that denies basic welfare to its citizens could ever be compatible with a condition of equal freedom.

Second, while what justice requires in practice, including what goods and services government should provide, must be to a large extent determined through appropriately constituted democratic procedures, these procedures

must operate within certain substantive constraints generated by the same values that justify their existence. Institutionally, it is the role of constitutional guarantees to secure that these substantive conditions be maintained. Whereas democratically enacted laws must be congruent with these guarantees, constitutional law must itself be understood as democratically authorized law.

Third, the requirement of active, as opposed to passive, citizenship is better served if democratic procedures are designed so as to include a strongly deliberative component. By providing each other with reasons that are both intelligible and pertinent to the aim of their collective decision, and by allowing the force of the better argument to eventually prevail, citizens treat each other as active participants in the construction of a shared will—the will of no particular group of persons.[57] Electoral procedures are thus best understood as complementing, rather than replacing, public deliberation.

Further, it seems unlikely that the demands of rightful honor can be met in circumstances where the losing minorities are always the same. It would become increasingly difficult for the members of a permanent minority to regard themselves, and to claim that others treat them, as partaking in a shared political will, rather than as passive subjects. Therefore, avoiding the formation of permanent minorities should also be regarded as a substantive constraint on democracy, on the basis of one of the values that justify its authority in the first place.

Importantly, the substantive and procedural aspects of legitimacy should be regarded as equally fundamental and grounded on the same source, for they correspond, respectively, to the aim and the form of the omnilateral will.

But should the democratic pedigree of the law be limited to fundamental law, or should it extend further? As we saw, limiting the scope of democratic authorization to constitutional norms would be at odds with the very commitment to both nonsubjection and rightful honor that grounds a presumption for the democratization of fundamental law in the first place. The threat of subjection arises because even robust constitutional standards and well-established mandates would not resolve the indeterminacy problem. Rights boundaries are interpreted and reinterpreted through the implementation and execution of ordinary laws and policies by those who are in charge of issuing and administering them. True, citizens could in principle constitutionally renounce any control over the process of ordinary lawmaking. However, as we have already argued, a commitment to rightful honor explains why people cannot, on grounds of freedom itself, democratically institute fundamental laws that make some of their officeholders their masters with almost unconstrained and unaccountable discretion. Doing so would make citizens passive,

and likely subservient subjects rather than active agents who are able to assert their rightful honor by contributing to the law. Therefore, less fundamental, ordinary law must also be sanctioned through democratic procedures. The specific content of ordinary laws, beyond respecting certain substantive, constitutional constraints, must carry out the shared will of the people as it is constructed through the democratic process.[58] Only in this way can people be subject to a will that is omnilateral, rather than to the personal judgments of particular others. What this requires with respect to the process of making ordinary law will be the subject of chapter 6.

To sum up our argument so far: justice remains merely provisional in the state of nature because, owing to the structural indeterminacy of right, people lack the authority to impose binding obligations on others. In this state, the private acquisition and enforcement of rights amount to an objectionable kind of subjecting others to one's will. What is distinctively objectionable about this kind of subjection is that, beyond failing to respect the equal authority of all to judge the validity of norms, it violates their independence, including both their external freedom and their rational independence. Democratic institutions, with the authority to both determine and impose rights and duties in the name of all, are the necessary solution to this problem because democratic procedures alone meet the demands of the principles of nonsubjection and rational independence, while at the same time respecting the fundamental equal normative authority of all (together with their rightful honor). The democratic state, including a system of representative government and democratically enacted laws, is, therefore, a necessary and constitutive condition of justice. This is why ultimately the interchangeability assumption ought to be rejected, at least at the fundamental level of theory.

As a way of bringing abstract theory to bear on our concrete experience, I now turn to examine how the justification of political institutions developed in this chapter provides an interesting perspective from which to assess one particular form of privatization: the privatization of adjudicatory functions.

The Privatization of Adjudication as a Regression to the State of Nature

The increasing privatization of public functions that characterizes many contemporary societies in the neoliberal era is generally treated as a technocratic rather than a political problem. Building on the argument of this chapter, I

want instead to start rethinking the process of privatization as one of political delegitimation—an ongoing regression to the state of nature. I will focus on what I deem to be one of the most extreme cases of privatization: the privatization of adjudication.

Talks of regression to a state of nature may sound hyperbolic. But this is only because, I suspect, our common imaginary leads us to think of the state of nature as a primitive, savage state, or as a historical condition threatened by unsolvable conflict or war. However, as I understand it, along Kantian lines, the state of nature is nothing other than a normative condition of provisional justice, and thus of unfreedom, defined, analytically, by the problem of unilateral subjection: the attempt to authoritatively change the normative situation of others through unilateral, private action. This condition does not depend on a society's cultural, technological, or economic development, or on the presence of actual or potential conflict. As such, regression to the state of nature represents a possibility for any civil condition.

To understand why certain aspects of the present condition are better understood as a regression to the state of nature, consider, first, the following scenario:

> *Corporate Sovereigns*.[59] A large number of transnational corporations (e.g., Google, Amazon, Facebook, eBay, etc.) enjoy wide discretionary authority over people's lives. They decide if and when your account should be closed, whether you are entitled to a refund, whether your emails should be disclosed, and so on. To a large extent, these corporations also enjoy discretion in unilaterally choosing to which legal system they want to submit, for example, by deciding to submit to the contract law of one country rather than another. Further, they may prevent their customers from resorting to the law of whichever country they operate in by using a private, yet binding, arbitration scheme. Let us assume that the corporations' shareholders and managers are morally motivated and that the outcomes their decisions produce are substantively just.

This is not a far-fetched scenario, except for the last sentence. Indeed, it describes a widespread feature of our globalized world that, by now, is well understood. What is less understood is that this scenario has all the ingredients of a case of regression to a precivil condition. Therefore, what is fundamentally problematic about this phenomenon, even if we set aside all considerations of resulting distributive outcomes, motivating commitments, and

cultural commodification, is the same as what is fundamentally problematic with the private adjudication of rights in the Kantian state of nature.

As a starting point, it is worth stressing that the decisions that the private corporations make do not simply affect people's welfare or well-being but rather, precisely like acts of property acquisition in the state of nature, they purport to change individuals' normative situation by de facto changing their rights and duties in a quite fundamental way. Granted, I also have the power to (unilaterally) change your rights and duties through promises, contracts, and acts of gift giving. When I give you my book as a present, I discretionally give you a right to my book that you did not previously have, and everybody else, including me, has a correlative duty to refrain from taking the book from you. Yet, there are relevant differences between this case and the way corporations change our rights and duties.[60] First, in the case of me giving you a present, my action does not determine the scope of your right. Your voluntary acceptance of my gift does. If you refuse my gift, your entitlements to it remain exactly as before. In this respect, you yourself control the shape of your own entitlements. Second, through my gift, I do not impose on others a new duty that they would not previously have, nor do I change the content and scope of their rights and obligations. Rather, I simply change the direction of an already-existing duty, and I do so against the background of a system of property and contractual rights that, by assumption, is omnilaterally sanctioned. Following Arthur Ripstein, we may say that my action is a unilateral exercise of an omnilateral will.[61] By contrast, in *Corporate Sovereigns* it is the very content of our rights and correlative duties that is determined by, and under the control of, the corporate entity. In this respect, the corporations in question exercise a power that is *legislative* in form, insofar as, like the property acquirers in the state of nature, they legislate the restrictions within which other agents can freely exercise their power of choice.

It could be argued, however, that the corporations' unilateral exercise of legislative power is, precisely like my gift-giving action, omnilaterally authorized. This is because—the argument goes—private corporations are authorized to exercise this power by a public system of law, which is equally binding on all citizens: the law of contract. The problem is that even if the exercise of such normative authority apparently depends on, and it is subordinated to, the law of contract, as long as private corporations have the power to enter into contractual relationships with different sovereign entities, it is the corporations themselves, as signatories, that ultimately establish which contract law,

that is, the contract law of which legal system, is binding on them.[62] This means that it is the private corporations themselves that, through their own unilateral judgment, decide which overarching norms they want (or want not) to obey.

The upshot is that the private corporations in question, precisely like individuals in the case of property acquisition in the state of nature, purport to (1) exercise quasi-legislative power, by changing the normative situation of others in a quite fundamental way, and (2) do so unilaterally. For the reasons we saw, this form of unilateral subjection constitutes a violation of individuals' reciprocal independence, regardless of whether it also results in problematic economic and political inequalities.

But perhaps the case of corporate sovereigns is an exceptional case—although one increasingly common in our world. So let us consider the far more common, and apparently less problematic, case of the privatization of adjudication: domestic private arbitration schemes.

The Case of Private Arbitration

In the case of private arbitration, we do not have private corporations unilaterally determining the rights of others. Rather, we have publicly authorized private arbitrators who, against a well-established background of contract law, adjudicate the rights and duties of corporations, their employees, and their customers.

As we saw in the introduction to this chapter, private arbitration—the outsourcing of adjudication to private actors—is often defended on grounds of efficiency, informality, pluralism, confidentiality, speed, and flexibility. The problem, however, is that appeals to the above values do not suffice to make the exercise of adjudicatory authority legitimate, that is, an instantiation of an omnilateral, rather than merely unilateral, will. This warning should be taken seriously given the fact that arbitration is increasingly mandatory rather than optional. In the United States, for example, the employees and customers of private firms do not generally have the option to go to court, or to litigate fair standards of treatment through class action in front of federal judges. Rather, they are obligated to rely on private arbitration for claims of sex or age discrimination, negligent treatment, violations of antitrust law, or alleged violations of consumers' rights, among others. True, both employees and customers acquire obligations to arbitrate by signing a contract with their employers or providers. However, these contracts are not generally subject to voluntary negotiation, alternatives to signing them are often absent, and the large

structural inequalities between corporate powers and individual employees means that exit options are rarely available or are very costly.[63]

At first glance, however, the defects of private arbitration would not seem to raise any fundamental problem of legitimacy. After all, private arbitration simply amounts to an instance of publicly authorized outsourcing: judges, in response to evolving policies and legal doctrines, increasingly delegate their function of adjudication to private arbitrators. The latter's power is thus publicly authorized and sanctioned by the state. Further, at least in theory, arbitrators are "neutrals," that is, committed to provide an impartial assessment of legal wrongs, according to public purposes alone. A closer look at how arbitration works, however, shows why this conclusion is premature. Although a full ethical assessment of arbitration would require a book of its own, I will here point at some problems with it that are particularly salient for our purposes.

Is the Public Authorization of Private Arbitration Legitimate?

Even if private arbitrators act under de facto state authorization, in order for their exercise of power to count as legitimate, such authorization must itself be legitimate. Yet in order for it to be legitimate it must be compatible with individuals' claims to independence. There are at least two ways in which the public authorization of an action or practice can be incompatible with claims of independence. First, the authorization itself can be procedurally invalid, as when issued by an agent who lacks the appropriate authorizing power. Second, the authorized action or practice may contradict claims to independence, either inherently (e.g., as with slavery), or because of its likely and foreseeable outcomes. I believe that the authorization of private arbitration, at least in its existing form, falls within the second category. Let me explain.

Independence requires, as we saw, that the state secure an effective and reciprocal system of equal rights. Now, there are two different ways in which a system of rights can fail to be reciprocal.[64] On the one hand, it can do so with respect to the content of rights if, for example, it arbitrarily grants to some people a larger set of freedoms and entitlements than to others. On the other hand, even a system of rights that succeeds in granting equal rights to all may still fail to secure that people's rights are equally and effectively protected, and if your rights are effectively protected and mine are not, you and I fail to relate on reciprocal terms no less than if the content of our rights were unequal.

There are, I believe, robust empirical reasons to regard private arbitration as failing to secure an equal and reciprocal system of rights in both the senses

above. These four reasons are contingent insofar as they depend on the empirics of private arbitration, but they are robust in the important sense that it is the very logic of private arbitration itself, and the values that underpin it as a practice, that generate those contingencies and make them very difficult, if not impossible, to overcome, without compromising the very rationale of the practice in the first place.

The first reason is that, usually, the very same appeals to the values of efficiency, informality, pluralism, and flexibility that are meant to prima facie justify the privatization of adjudication are also reasons for deregulation. It is not a coincidence, then, that there is no unified and publicly available body of procedures for the regulation of private arbitration. Private arbitrators may decide which procedural rules to follow and may produce their own rules; they are "free to specify procedures without public input"[65] and do not have to base their decisions on precedents. Indeed, as one scholar explains, there are "no central registries for . . . the claims filed before them, their rules, fees, or outcomes."[66]

Second, there is no general, enforceable expectation that private arbitrators must interpret and implement the law; they may decide to focus on the content of the agreement between the parties instead.[67] At times, these agreements may contain contractual clauses, or "stipulated damages," as they are often called, that specify, *ex ante*, what kind of remedies a contracting party will be owed in case of incurred damage, without a court, or even the arbitrator, deciding on the remedy on the basis both of an interpretation of the law and of the kind of legal wrong at stake.[68]

These two facts, jointly taken, make it possible, in principle, that the same kind of right violation could, by identically positioned individuals within the same jurisdiction, lead to the adjudication of very different remedies, through different privately chosen procedures. Yet if remedies are the way in which people's rights are (at least partially) restored—a remedy, following Kant, is the means through which an individual's legal standing as a right holder is publicly affirmed and vindicated—then, a regime of this kind, by failing to provide a system in which equal cases are treated alike, also fails to equally vindicate the status of all as rights bearers.

This problem could perhaps be mitigated if the process of private arbitration were fully open so that procedures could be publicly compared and reviewed by higher courts, and the decisions of similar cases subject to public scrutiny. Yet the value of confidentiality, defined as part of "the character of arbitration itself,"[69] often makes these remedies unavailable, for private

arbitration generally happens behind closed doors, and there are no public records of its proceedings. As Judith Resnik explains, "one consumer cannot know from arbitration dockets whether another won or lost based on identical allegations of overcharges or product defects, just as one employee cannot generally know if another succeeded on discrimination or on other claims rights."[70]

Third, in the interest of efficiency and speed, systems of private arbitration tend to be subject to lower standards of accountability than public courts. Their decisions are generally not directly reviewable by courts. In the United States, for example, the Federal Arbitration Act "generally requires courts to enforce arbitration agreements as written" and protects agreements requiring arbitration from judicial interference.[71] Courts can refuse to enforce agreements only in clear cases of fraud, duress, or unconscionability, which almost never happens. Given the mandatory nature of arbitration, appeals to higher courts are usually not successful.[72] All this reinforces the claim that, within systems of private arbitration, citizens lack reasonable assurance that their rights and duties are equally and reciprocally upheld.

Fourth, arbitration, because of its reliance on contractual agreements, tends to empower the powerful, and to disempower the already disempowered. It tends to give control over the process to those who have the power to shape the terms of the agreement, that is, those who draft the agreement and have stronger bargaining power. Further, current arbitration schemes often confer to powerful firms and corporations the power to avoid having employment disputes litigated in court through class and collective action. As William G. Young, a federal judge, puts it, thanks to mandatory private arbitration, "ominously, business has a good chance of opting out of the legal system altogether and misbehaving without reproach."[73] Even more importantly, the system of incentives that frame the practice of private arbitration is such that the judgment of private arbitrators tends to favor the powerful. Although judges are not immune from corruption either, there are reasons of a distinctive and structural nature to be skeptical of the alleged impartiality of private arbitrators. Unlike judges, private arbitrators are not protected by insulation mechanisms like tenure, and their selection is not regulated by either state or federal constitutions. Arbitrators are often selected by only one of the parties, which obviously has an incentive to choose an arbitrator that will serve that party's interests. Since contractual agreements may specify a specific private arbitrator, and since these agreements are generally drafted by private corporations, rather than by their employees or customers, arbitrators have a strong

incentive to favor the most powerful party, in order to secure future business engagements. Further, as one legal scholar explains, "there are no practical means of allowing multiple parties to choose an effective and unbiased arbitrator together without dramatically increasing the costs of dispute resolution," thereby compromising the rationale for the privatization of adjudication in the first place.[74] Industry capture is therefore a major concern when it comes to arbitration. This, of course, means that the rights of some (employers) enjoy higher protection than the rights of others (employees and customers), with the consequence that they no more relate on reciprocal and equal terms than if the content of their rights were unequal to begin with.

The conclusion that we can draw from the above contingent, yet robust facts is that the public authorization of a system of private arbitration has the very likely, if not unavoidable, and foreseeable consequence of denying to citizens an equal and reciprocal system of rights. Yet if this is the case, this authorization, albeit omnilateral in form, ought to be regarded as lacking legitimate force, for it fails to instantiate a will with an omnilateral aim, that is, the preservation of a rightful condition. In other words, the authorization of private arbitration does not meet some of the substantive requirements of democratic legitimacy. The upshot is that the verdicts of arbitrators, even if well intentioned, should be regarded as exercises of a merely unilateral, because publicly unauthorized, will. They should have at most merely provisional status—a status that is not fully binding on others—along the lines of individual judgments about the appropriate boundaries of rights in the Kantian state of nature.

Do Private Arbitrators Have the Appropriate Kind of Standing?

Suppose, however, that a system of private arbitration can be legitimately authorized. A further question looms large: have private arbitrators the appropriate standing to impose binding duties on citizens, thereby changing their normative situation? My answer, to wit, is that they do not, and this is for two reasons: (1) lack of embeddedness in constitutionally sanctioned procedures and (2) their being creations of contract rather than of office.

Let's consider the first reason first. As we saw, an important consequence of the process of deregulation that goes hand in hand with the privatization of adjudication is the lack of public and shared procedures among private arbitrators. While state and federal constitutions clearly define the boundaries of courts' jurisdiction, and provide detailed action-guiding directions to judges

about the role of precedents, as well as the writing and publication of their reasons for or against certain decisions, and fully open these procedures to public scrutiny, private arbitration, by contrast, rests to a large extent on a patchwork of privately selected and not publicly reviewable procedures.[75] Further, the decisions of arbitrators do not generally establish precedents for others and are not in turn constrained by precedents themselves. These differences matter for the following reason. Because judges act within a clear set of constitutionally mandated procedures, as long as they follow their official mandate, they can be regarded, at least *pro tanto*, as acting in accordance with the aim of an omnilateral will, that is, for public purposes alone. In turn, citizens, when they comply with the judges' judgment, however discretional, can think of themselves as being dependent on a shared procedural will, rather than on the private will of the judge alone. The same, however, is not so true of private arbitration. To the extent that the procedures arbitrators use are not constitutionally mandated, are not shared in common, and are often developed by private actors themselves, it is difficult to see why we should regard a private arbitrator's judgment as an exercise of a public, procedural will any more than we should regard a benevolent dictator's commands as an instantiation of the people's shared will, just because the people authorized that dictator to seize power in the past. In the absence of a properly constituted office, the exercise of the power of adjudication remains merely unilateral, even if that exercise was originally publicly authorized. But if this is the case, when bound by the arbitrators' discretionary decisions, citizens are made dependent on a will that—like the will of the dictator—they do not partake in. They are dependent on the arbitrator's will, however impartially exercised, rather than on the legal process as a whole.

Turning now to the second reason, there is a categorical difference between the standing of private arbitrators and public judges. As vividly put by Resnik: "judges are *agents of the state*, charged with implementing its law through public decision making; arbitrators are *creatures of contracts*, obliged to effectuate the intent of the parties."[76] As "creatures of contract," private arbitrators are the voices and interpreters of a contractual, and therefore particular, will. As such, their decision making "favor[s] the content of the agreement over the law." But if this the case, not only will legal wrongs be privately adjudicated in a way that is hidden from public scrutiny and freed from tight procedural strictures, but also, and importantly, acts of adjudication will heavily rely on privately developed rules, embedded in contracts drafted by particular parties rather than on a public system of law. As Seana Shiffrin rightly points out, the

development of stipulated damages that has recently accompanied the increasing privatization of adjudicatory work presents a striking example of this problem.[77] Rather than having a court publicly adjudicate, in the name of the entire political community and for public purposes alone, what remedies a certain legal wrong calls for, we have private arbitrators deferring to contractual agreements written by private parties in making that very same determination. The latter determination is therefore made dependent on the particular will of the contracting parties as negotiated and expressed in their agreement. Yet if what I am owed as a remedy so that my right can be vindicated is determined on the basis of a private agreement, written by my private employer, and having presumptive binding force, rather than on the impartial assessment of a public body, then, it seems, I am made dependent for the enjoyment of my rights on the private judgments of others.

Therefore, both because the public authorization of private arbitration fails to meet certain substantive constraints on democratic legitimacy, and because private arbitrators, as representatives of particular contractual wills, fail to make decisions in the name of all, there are good reasons to regard the privatization of adjudication as a regression to the Kantian state of nature, understood as a state of merely provisional justice.

Perhaps in situations where deep-seated corruption and incompetence pervade the entire legal process and make an equal and reciprocal system of rights impossible to maintain, private arbitration, like other forms of outsourcing, may become a temporary escape (assuming that, in this situation, the drawbacks of the legal process seriously outweigh the drawbacks of the privatized system). But this escape is likely to be illusory. First, if the legal process and the judges who partake in it are seriously corrupt, the process of outsourcing they initiate will very likely be itself corrupt. Second, and for the reasons discussed above, private arbitrators' authorization to make binding decisions can be at most provisional, precisely like the authorization to acquire property that individuals have in the state of nature. If this is the case, however, there is a common obligation, shared by the people as a whole, including private arbitrators, to exit the state of nature and bring about a public system of adjudication that can overcome those very limits that make private arbitration look necessary. Yet the very fact of outsourcing adjudicatory functions, especially when pervasive, may make it more difficult to reconstitute a just system of public adjudication, for it can provide the illusion that such a system is no longer needed. Therefore, even in highly nonideal conditions, we may have

strong, legitimacy-based reasons to avoid, or at least seriously constrain, the privatization of adjudication.

Conclusion

In this chapter, my primary task has been to reject the interchangeability assumption. Building on the recent revival of Kantian political philosophy, I have argued that justice cannot obtain within a private system of rights adjudication and enforcement—the state of nature. This is because this system necessarily fails to respect both individuals' equal normative authority and their rational independence. I have then argued that a system of democratic law is the solution to this problem. Democracy, unlike nondemocratic regimes, does not force those subject to it to act on preprocedural reasons they have no independent reasons to act on except for being subject to someone else's particular will. I concluded by showing how, unfortunately, at least some processes of privatization, including the privatization of adjudication, partly reproduce, within a putatively civil condition, the very same problem of unilateral subjection that characterizes the state of nature. They represent a regression to a state where justice is at most provisional, but never conclusive.

Nothing in my argument, however, would seem to provide a case against the privatization of most governmental functions, such as, for example, the pervasive outsourcing of welfare and health-care services or the management of prisons. This is for at least two reasons. First, these instances of privatization, unlike private arbitration, do not seem to involve the adjudication of rights, or the exercise of a legislative power by private actors. In other words, it seems that in most instances of privatization, private actors do not have the power to legislate the conditions of freedom and to change the normative situation of citizens in a relevant sense. Second, whatever power private actors exercise, it would seem to be omnilaterally authorized through democratically sanctioned delegations. It will be the purpose of the next two chapters to respectively defeat each one of these assumptions, thereby showing that a democratic society cannot systematically delegate its daily administration to private actors without sacrificing its own legitimacy and regressing to a precivil state.

3

Legitimizing Administrative Discretion

POLITICAL LEGITIMACY, as argued in the previous chapter, has two equally fundamental elements: a substantive aim and a procedural form. If the constitutional democratic state ought to aim to secure the substantive, sociomaterial conditions of reciprocal independence, its procedural form also requires that the precise demands of justice be defined and secured through a political process that avoids the problem of unilateral subjection.

Yet the modern administrative state—the state as we know and experience it—provides a powerful challenge to the legitimacy of the democratic state. On the one hand, no one has yet shown that, in our world, the substantive conditions of reciprocal independence could be sustained without a complex administrative apparatus. Indeed, even long-standing critics of the administrative state, such as Jürgen Habermas, recognize that the expansion of the state's administrative functions was originally necessitated by the need to overcome dangerous forms of dependency rooted in concentrated power and wealth.[1] In this respect, the administrative state seems, under current historical circumstances, necessary to fulfill the substantive requirements of a rightful condition.

On the other hand, however, the dispersion of decision-making powers throughout the administrative state seems irreconcilable with the procedural demands of legitimacy itself. This is partly because, as we shall see, administrative entities unavoidably end up making decisions that do not simply affect individuals' options for choices or well-being but rather have, precisely like acquisitive acts in the Kantian state of nature, a quasi-legislative character. By this I mean that they "legislate" the conditions of individual freedom (their entitlements of justice) as well as the restrictions under which individuals can

permissibly act. In other words, their decisions have the presumptive authority to change individuals' normative situation in a relevant sense. It is further because, even if administrative entities are generally authorized by a democratic legislature to make the decisions they make, legislative statutes often leave administrators with a wide degree of discretion and autonomy as to how to make them. More precisely, the very terms of authorization often have holes that must be discretionally and autonomously filled by administrators. The risk therefore is that, within the context of large administrative states, citizens' power of choice becomes subject to the legislative and unilateral—because not entirely subsumable under higher terms of authorization—will of non-elected administrators.[2] This, in turn, threatens to reproduce, within the state itself, the very same normative problem of unilateral subjection that, as we argued in chapter 2, political institutions exist to eliminate. The existence of the administrative state, then, seems to generate a contradiction within the omnilateral will itself: what is (empirically) necessary to achieve its substantive aim is (normatively) incompatible with its procedural form. I will refer to this as *the problem of bureaucratic unilateralism*.

Privatization, by attempting to substitute the traditional administrative state with a contracting state, is often presented as an escape from, or even a solution to, this problem. Dispersing power through contract—it is argued from both sides of the ideological political spectrum—curbs the most dominating aspects of a bureaucratic system by reducing hierarchy, increasing flexibility, and avoiding dangerous concentrations of power. By depoliticizing administrative decisions and transforming them into a matter of efficient and technical execution, privatization also reduces the risk of political domination through administrative vehicles. The transformation of the contemporary administrative state into "the contracting state" should then be a welcome historical development—a progression toward reconciling the substantive and procedural demands of political legitimacy.

One of the aims of this book is precisely to reject this thesis by showing that, far from being the solution to, or even an escape from, the vexing problem of bureaucratic unilateralism, privatization makes a potentially tractable problem into an intractable one, thereby reproducing, within the state itself, a condition that is structurally and normatively homologous to the Kantian state of nature. To wit, this is because, in the privatized state, (1) private actors, precisely like public administrators, come to unavoidably make decisions that, like acquisitive decisions in the state of nature, have a quasi-legislative character; (2) even if private actors are de facto authorized through government

contracts to make these decisions, their authorization should, under certain conditions, be regarded as invalid; and (3) even if valid, their resulting decisions generally fail to qualify as exercises of an omnilateral, in the sense of appropriately representative, power and as instantiations of an omnilateral, in the sense of appropriately shared, will. They thus remain impositions of a merely unilateral will on others. The escape from this condition of subjection can then be found only in an appropriately constituted system of public administration.

But in order for this argument to even get started we must first acquire a clearer grasp of the problem of bureaucratic unilateralism itself. The first purpose of this chapter will thus be to explain in what sense administrative discretion has a quasi-legislative and partly autonomous character. We must then explain what internal resources, if any, the administrative state has to respond to this problem. The second purpose will then be to set up a general framework for the legitimation of administrative discretion. I will propose an "integrative model" that appropriately combines different mechanisms of legitimation, including (1) forms of top-down authorization and political control, (2) an institutionally supported bureaucratic ethos, and (3) bottom-up forms of democratic control. The rationale for an integrative model is that different dimensions of the overall legitimacy of a constitutional democratic state call for different institutional ways of legitimizing residual administrative discretion at different stages of the administrative process. Finally, and this is the third purpose of the present chapter, I will explain how privatization reproduces, at a lower level of delegation, the threat of bureaucratic unilateralism, by transferring to private actors not merely executive decision-making powers but also quasi-legislative ones.

In the following chapters, I will develop in more detail each one of the demands of the integrative model in order to show that it is precisely by compromising many of the relevant mechanisms of administrative legitimation that privatization renders this legitimation impossible, or at least very unlikely, thereby reproducing a condition of unilateral subjection within the state itself.

The Formalistic View of Administrative Discretion

It is common knowledge that bureaucrats must exercise discretionary judgment in implementing and applying democratically legislated policies and laws. Less clear is why this fact threatens to reproduce the problem of

unilateral subjection. After all, if I hire an electrician to fix some broken wires in my living room, and if I explicitly leave to him or her the choice of the means, the electrician's exercise of discretionary judgment can be regarded as fully authorized by me. I could not then complain that, just because the electrician exercised some discretion, he or she has thereby imposed his or her unilateral will on me. Similarly, it could be argued that as long as the democratic legislature sets the ends of policy, even if bureaucrats are left with ample discretion to choose the means of implementation, no problem of unilateral subjection arises.

With a few important exceptions, much of liberal political philosophy sees bureaucratic discretion, precisely like the electrician's discretion, as a nonproblem, and so also as something we need not talk about.[3] Locke explicitly took this stance by telling us that of "ministerial and subordinate powers in a commonwealth, we need not speak," one reason being that "they have no manner of authority, any of them, beyond what is by positive grant and commission delegated to them, and are all of them accountable to some other power in the common-wealth."[4] Locke wrote, of course, before the advent of complex administrative organizations, but the silence he advocates for is still persistent in much contemporary liberal thought. This silence results from the often untheorized (Hobbesian) assumption that the administrative apparatus is not much different from the nerves and tendons that move the several limbs of a body.[5] Just as nerves and tendons are mere instruments that execute movements that have been initiated elsewhere, the administrative bureaucracy is simply an instrument that implements policies that have been made elsewhere. It is indicative, for example, that the word "bureaucracy" appears only once in John Rawls's *A Theory of Justice*, and that Rawls seems to reduce the administration of justice to a question of "justice as regularity," understood as the regular and impartial implementation of public rules.[6]

Perhaps at the risk of excessive simplification, we may say that the still-dominant view of public administration in much of contemporary political philosophy presents one or more of the following features: (1) a focus on compliance with higher mandates and formal rules, and (2) an understanding of bureaucratic discretion as the exercise of means-ends rationality (both Weberian features),[7] as well as (3) an externalist, attitude-insensitive understanding of the duty of officeholding (a Kantian feature). According to this view, which for reasons of brevity I will call "the formalistic view," the administrative state has the power to rule and regulate all actions within precisely defined spheres of a state's official jurisdiction via a hierarchy of formal rules, thereby leaving

little to no space for discretion. Even when discretion exists, its nature is purely instrumental, and its boundaries are established by well-defined higher mandates—discretion being, like the hole in a doughnut, an area left open by a surrounding clear belt of restriction.[8] Further, the legitimate exercise of such discretion does not, in any way, depend on the internal attitudes or dispositions of officeholders. In Arthur Ripstein's words, "lesser officials act for the state when they act within their legal mandates"[9] and "the distinction between an official's acting within his or her mandate and outside it does not depend on the official's attitude"[10] but only on the official's external conduct. This is the externalist element of the formalistic view.

In principle, this formalistic model of administration seems to be the only one compatible with the demands of freedom as independence. It is only by detaching, through clear rules and mandates, the administration of justice from the discretionary judgment of particular individuals that the systematic imposition of merely unilateral wills on citizens can be avoided. Unfortunately, however, this model suffers from several shortcomings. First, it is excessively formalistic in the sense that it overestimates the power of legal rules and mandates in constraining administrative discretion. Second, it is narrowly instrumental in the sense that it implausibly reduces the judgment of bureaucrats to a form of instrumental ends-means rationality. Last but not least, the account is excessively externalist, in the sense that it neglects the importance of administrators' internal dispositions for the overall legitimate exercise of administrative discretion. In what follows, I will explain the nature of these limits in order to show why they prevent us from taking seriously the problem of bureaucratic unilateralism.

The Unavoidability of Administrative Discretion

The idea that administrative discretion can and should be eliminated through the tightening of rules and mandates is subject to notorious, both empirical and normative, challenges.

Empirically, both legal scholars and political scientists have long shown that the boundaries of mandates are inevitably vague and open to multiple interpretations. This is true both for legislative mandates to administrative agencies, and for the latter's delegations to lower-level bureaucrats.[11] Like in the case of contracts, the impossibility of predicting, *ex ante*, all possible contingencies and relevant considerations that may arise throughout the process of implementation provides reasons to maintain a certain vagueness in the design

of mandates. Further, informational asymmetries between principal and agent, as well as temporal and economic constraints, compromise the principal's ability to fully control the agent. Yet if mandates are themselves indeterminate with regards to the boundaries of permissible discretion, then administrators can easily end up exercising their discretionary judgment in ways that the democratic legislature could not have foreseen or contemplated *ex ante*, and in ways that are not fully constrained through specific authoritative standards. Further, the presence of significant informational asymmetries at times means that the legislature lacks the capacity to substitute its own judgment for that of the administration. In these cases, the exercise of discretion de facto becomes an exercise of final decisional authority.

Whether or not the formalistic view is empirically plausible, we may wonder whether there are good normative reasons to not excessively circumscribe administrative discretion in the first place. As we saw in chapter 2, freedom as independence justifies a public duty to secure not only the sociomaterial conditions necessary to avoid relationships of abject dependence, but also, and more broadly, the conditions of active citizenship, including the conditions necessary to support citizens' ability to exercise good and independent critical judgment, as well as the conditions necessary to maintain the ability to assert one's rightful honor.[12] Such considerations have implications not only for the kind of policies that should be implemented but also for how these policies ought to be administered. Without attention to values such as fairness, respect, and responsiveness in the administration of policies, citizens' ability to escape passivity and to assert one's rightful honor could be easily compromised (as empirically demonstrated by the kind of humiliation and passive dependence that some forms of welfare provision tend to generate). Yet, as Bernardo Zacka points out, "while strict rules may yield democratic control, they sometimes get in the way of the other normative standards . . . such as effectiveness, efficiency, fairness, respect, and responsiveness."[13] Therefore, insofar as some administrative discretion is necessary to support these values, it is republicanism itself that should be understood as providing a normative case in support of that discretion.

There are also cognitive and epistemic reasons not to attempt to completely eliminate administrative discretion. As Henry Richardson argues, a certain amount of discretion is necessary for "practical intelligence" in the implementation of rules.[14] This form of intelligence, unlike pure instrumental ends-means rationality, includes the ability to revise or reformulate the ends (not only the means) of policies throughout the implementation process in light of new information and changes in circumstances.

These considerations support the view that administrative discretion, at least to some extent, may be not only empirically unavoidable but also normatively desirable. However, a prima facie justification for the use of administrative discretion does not make the problem of bureaucratic unilateralism disappear. Your exercise of discretion may be reasonable and fair, but as long as it is your own unilateral, partly unconstrained judgment that is imposed on me through that exercise, I retain a reasonable complaint against you.

The Legislative and Autonomous Character of Administrative Discretion

Those who think that bureaucratic unilateralism is not a problem may argue that this is because the discretion administrators exercise, or should exercise, is not of the relevant quality, normatively speaking. After all, as we saw in chapter 2, only decisions that have a *legislative* character—decisions that purport to authoritatively change the normative situation of individuals by determining their rights and duties—trigger a concern for unilateral subjection. Alternatively, they could argue that the exercise of administrative discretion, whatever its character, can be entirely subsumed under, and justified by appealing to, higher terms of public authorization.

The insight that not all exercises of discretion are equally normatively relevant should be taken seriously. To see why, consider the case of a public entity in charge of operating street cleaning and garbage collection within a certain urban area. The entity has discretion in making the following decisions: (1) establishing, through binding rules, whether and when it is permissible to tow cars in order to make space for street cleaning; (2) deciding, according to independently given and clearly defined rules, whether it is permissible to tow this particular car in order to make space for street cleaning; (3) deciding whether garbage should be collected in blue or yellow bags. These are all exercises of discretion, but some seem to raise a normative concern about unilateral subjection, while others do not.

Decision (1) does raise such concern, for it directly implicates the very definition of individuals' rights. If I have the authority to determine whether and when people can keep their cars on the street, I have the authority to determine the boundaries of their property rights (i.e., the right to use their property as they wish), as well as to impose on them new duties: duties not to use a piece of the street that they would otherwise be able to use. I shall call this

legislative or regulatory discretion because it legislates the conditions—the scope of individual rights and duties—under which individuals can permissibly act. Because of its ability to change the normative situation of citizens in a quite fundamental way, we should insist that this kind of discretion be omnilaterally authorized and exercised in the name of everyone, and for publicly sanctioned purposes alone.

Decision (2) is different. If the independently defined rules that determine whether and when, exactly, cars should be towed are fully clear and determinate, then the garbage collector, through his or her decision, is not changing the normative situation of anyone. He or she is simply applying a higher, omnilaterally authorized rule to particular cases. I shall call this *executive discretion*. In this case, we may say that, as long as the decision is made in a way that respects democratically sanctioned rules, no problem of unilateral subjection arises. There is no residual need to subject such decisions to extra standards of legitimation, unless the original rules, rather than being fully specified, were themselves underdetermined, incomplete, or open to multiple interpretations, in which case the exercise of executive discretion may itself acquire a quasi-legislative character.

Finally, the discretion in (3) presents no particular problem of unilateral subjection. This is not because, like in case (2), there is an independent, omnilaterally authorized rule that determines what color garbage bags should have, but rather because the very content of the decision falls outside of the domain of justice. I shall call this *indifferent discretion*. Since we do not have reasons, at least not reasons grounded on justice, to care about the color of garbage bags, we do not have reasons to care about whether the discretion is omnilaterally authorized in the first place or not.

The view that the exercise of bureaucratic discretion does not trigger a concern of unilateral subjection could then be reformulated as the view that the bureaucrat's discretion is (and should be) merely executive or indifferent. However, this is not a plausible way of conceiving administrative discretion. As many law scholars point out, "the power to implement and apply rules is inseparable from the power to set policy,"[15] and "close government oversight or specification of policies and procedures can limit the extent of discretionary authority . . . but cannot eliminate it."[16] This means that in many cases bureaucratic discretion acquires a quasi-legislative character and thus raises relevant concerns of unilateral subjection.

One may, however, react skeptically to the claim that policy making and implementation cannot, and perhaps should not, be clearly separated. After

all, most political philosophy endorses a strict separation between legislative and executive powers as a distinctive legitimizing feature of the modern state. It is then important to be clear about the precise sense and ways in which the exercise of bureaucratic discretion either unavoidably or desirably acquires a legislative or regulatory form, and more generally, about the ways in which such exercise triggers a concern for unilateral subjection.

We can gain clarity on this question only by analyzing in detail the inner workings of practices of discretionary judgment within administrative organizations. In what follows, then, I will consider two cases of "street-level" bureaucracy, one concerning medical care organizations and the other prisons.

The reason for focusing on street-level bureaucracy, rather than on high-level administration, is simple: whereas it is relatively easy to make the case that the rules issued by high-level administrative agencies have a legislative or regulative character, and the power to significantly alter the normative situation of citizens (in the United States, for example, administrative agencies promulgate rules for the regulation of individual conduct and social life that have the same binding force of law as pieces of legislation passed by Congress), one may think that the discretion exercised by a prison guard or a social worker necessarily lacks the relevant legislative character.[17] Therefore, showing that even low-level cases of administrative discretion raise, at least prima facie, concerns of unilateral subjection is a way of showing how pervasive the problem of bureaucratic unilateralism is.

The Legislative Character of Administrative Discretion

CASE A: REGULATING THE DEFINITION OF ENTITLEMENTS

Under the US health-care system, recipients of publicly funded health-care services typically enroll in "managed care organizations" (MCOs). The government pays MCOs a set amount for their services.[18] Since, given resource scarcity, it is impossible to cover all requests for treatment, an MCO must make decisions about what treatments to cover.

Suppose that two patients, A and B, both enrolled in the same MCO, claim access to different kinds of treatments, T_1 and T_2. Both patients advance reasonable claims and are prima facie owed the treatment, but because of resource scarcity only one treatment can be covered.[19] The MCO must then decide how to balance these patients' claims. The government could try to reduce the MCO's discretion to a minimum by providing narrowly specified

directives. First, it could require the MCO to adopt a prioritarian principle according to which priority ought to be given to those who are worst off in absolute terms. In this case, however, the MCO would still unavoidably retain discretion in establishing whether A's needs count as more urgent than B's or vice versa. More importantly, providing the MCO with this guidance would seem unreasonable. For it would seem that even if A's need is more urgent than B's, if, owing to the particulars of the situation, treating B would result in a much higher net health benefit, then B's claim should be given priority. Alternatively, the government could require the MCO to adopt a maximizing principle and to prioritize the treatment with the highest chance of producing the greatest net health benefit per dollar spent, in which case, again, the MCO would have to establish what counts as the greatest net benefit. But, like in the previous case, this guideline would sometimes provide unclear, if not unreasonable, directives, such as in a case where A's claim is much more urgent and B would benefit only marginally more from the treatment. The government would then have to provide guidelines that specify, exactly, how much net health benefit the MCO would have to be willing to sacrifice in order to give priority to worse-off patients. Providing this kind of specification in a way that leaves no discretion to the MCO seems impossible. Guidelines should then be designed in a way that leaves the MCO with a reasonable amount of discretion and space for practical judgment.

One way in which the MCO could deal with such discretion is by exercising particularized judgment on a purely individualized basis, assessing each case according to the unique nature of the situation, and striking a particular balance between its various considerations. Although responsiveness to particular needs is certainly an important consideration, this approach would be impractical because excessively time-consuming. It would also be undesirable because individualized treatment is not the only value at stake. We also want equal treatment—similar cases, we think, should be treated alike—as well as efficient delivery.

To reconcile these competing values, the MCO must then rely on a process of categorization. A process of categorization, to use Victor Thompson's definition, "requires that the raw data of reality be organized into classes or categories that often recur."[20] Although generally caricatured as the paradigmatic expression of a form of impersonal and mechanistic reasoning, in reality, the development of categories happens through a complex negotiation between the needs of beneficiaries and the organizational pressures that bureaucrats face.[21]

Initially, this process of categorization, as empirical studies of organizational behavior have shown, takes the form of a "triage." In developing its own triage, the MCO then needs to develop something like the following categorization: most urgent treatment, with very low net benefit; least urgent treatment, with moderate health benefit; urgent treatment, with high net benefit. It then needs to establish priorities between different kinds of treatment accordingly. Through their routine application and continuous readaptation to new cases, these categories eventually acquire an institutionalized form. The more advanced the process of institutionalization, the more they take the form of authoritative norms. These norms finally come to constitute in effect a new policy. The creation of a dominant pattern of decision making through these classifications ends up determining the allocation of entitlements to particular goods and services, and fixing the precise content and scope of these entitlements. In the case of MCOs, it amounts to a policy for the allocation of entitlements to publicly funded medical treatment. Different classifications generate different allocative policies.

This stylized reconstruction of the MCO's exercise of discretion is meant to show how the administrative discretion exercised by even "street-level" bureaucrats can often have what we have called a legislative, rather than merely executive, character. The MCO's decision-making process purports to change the normative situation of citizens by developing presumptively authoritative rules, in the form of allocative policies, on the basis of which A's and B's justice-based entitlements to health care are ultimately determined. It is in virtue of the MCO's determination that A but not B turns out to be conclusively entitled to medical treatment, and thus to collective resources. In this respect, the power exercised by the MCO is relevantly different from other exercises of power that may also change individuals' rights in some sense. Consider, as a comparison, the power to enter into contracts. By signing a contract with you, for example, by selling you my house, I transfer to you the right to do certain things (e.g., control the use of the house) that you did not previously have. But my decision to sell you my house already presupposes a well-established right to the object of the transfer. My decision transfers certain entitlements from me to you, but it does not establish new entitlements from scratch, nor does it determine the scope of those entitlements.[22] Further, my decision happens against a preestablished, clear set of contract rules, which is not in my power to define.

Unlike my exercise of contractual private power, the MCO's exercise of power—similarly to acquisitive decisions in the state of nature—is public in

a relevant sense. First, it purports to transform something others could use (collective resources) into something A has the exclusive entitlement to use. Second, it establishes some of the very background rules, in the form of allocative policies, according to which rights to certain resources ought to be distributed, rather than simply distributing certain rights in accordance with clear preexisting rules. Third, it determines not simply the addressee of certain entitlements but also the precise content or scope of such entitlements, for example, to what treatment an agent is entitled to. In these ways, the MCO has the power to legislate some of the enabling conditions of freedom. The MCO's exercise of discretion has the further feature of being partly nonderivative. By this I mean that the MCO's final determination does not automatically follow from the mere instrumental specification of a more general and publicly authorized rule or mandate. The MCO rather develops, through the exercise of value-loaded judgment, new standards, to some extent independently from higher norms. Because of its legislative and nonderivative or autonomous character, the MCO's exercise of discretion poses a genuine threat of unilateral subjection.

However, it could be argued that such threat disappears as soon as we take into account the existence of a judiciary with the final authority to adjudicate disputes between the MCO and those subject to its rulings, in case of conflict. There are, however, some reasons why this view may be excessively simplistic. The first, empirical reason is that, because of information asymmetries, courts have reasons to be widely deferential. As law scholars point out, in many specialized judicial settings, "it has become common practice to delegate authority for decision making to administrative personnel: referees, commissioners, probation officers, medical examiners, marriage counselors, and others."[23] Courts tend to defer to street-level bureaucrats because the latter are supposed to have better knowledge of particular circumstances and situations. Further, since the higher rules that ought to guide the MCO's exercise of discretion are themselves indeterminate, it will be difficult for a court to adjudicate the reasonableness of the MCO's decision on the basis of those rules. This further pushes courts to be deferent. Yet when judicial deference becomes the default position, the distinction between the MCO having presumptive authority and their having final, adjudicative authority blurs.

Further, courts can offer only *ex post* remedies. Yet being subject to the unilateral will of another when the determination of rights and duties of justice is at stake (e.g., being denied a medical treatment on the basis of a merely unilateral judgment) is something that should be prevented rather than simply

remedied. Remedies may be necessary to restore my rights, but they are not fully sufficient to repair, let alone cancel, a right violation or a form of wrongful imposition. This means that we should find ways of legitimizing the exercise of relevant administrative discretion, beyond and before relying on a judiciary to provide remedies for exercises of discretion that are indeed illegitimate.

CASE B: REGULATING THE EXERCISE OF COERCION

Let us now turn to the case of prisons. According to the standards of the American Correctional Association (ACA) on the use of force within prisons, prison guards have the authority, under a legal mandate, to use "physical force" in "instances of justifiable self-defense, protection of others, protection of property, and prevention of escapes . . . only as a last resort and in accordance with appropriate statutory authority." The standards also specify that "in no event is physical force justifiable as punishment."[24] Whereas other ACA standards impose duties and constraints on prison staff that leave them with little discretion—for example, on food, these standards specify the number of meals that prisoners should get, caloric intake, maximum time between meals, and so on—the standards on the use of force clearly leaves open ample space for discretion. Under what conditions, exactly, does the protection of potential victims trigger a right to use force for preventive purposes? When is it that a right (and a duty) to "prevent" escapes by means of physical force kicks in? Is a prisoner's actual attempt to escape a necessary condition, or is the high likelihood or reasonable suspicion of such an attempt sufficient? If so, when is it that a suspicion is reasonable?

These questions are hard to answer *in abstracto* and once and for all. The complexity of such questions is part of the explanation for why, as economists have shown, contracts between states and prisons are significantly incomplete with respect to both the use of force by guards and the quality of personnel.[25] Such vagueness cannot be overcome, for it is simply impossible to anticipate all possible situations and emergencies *ex ante*. Further, we have reasons to want guards to remain sensitive to a multiplicity of goals when acting, for example, treating people humanely, responding to violent situations effectively, fostering a cooperative environment between prisoners and guards, fostering rehabilitation, maintaining authority, being fair and equitable between prisoners, and so on, and this sensitivity may be thwarted by guidelines that are too strict.

This is why authoritative standards for the use of force in prisons are generally left vague, while requiring prisons themselves to autonomously develop their own specific set of rules and standards—a "policy manual"—dealing with specific matters and situations. The content of these policy manuals should be regarded as a specification of more general guidelines. Yet, and inevitably so, this specification adds substantive prescriptive content to those guidelines, often in ways that could not have been foreseen or contemplated by those who established the original authoritative standards. This means that those who manage and administer criminal justice within prisons come to share the authority to regulate (as opposed to simply implement) the use of coercive force on prisoners: those who manage and administer criminal justice within prisons determine the very rules according to which such force ought to be used.

Joseph Field explains the regulatory and autonomous, because nonderivative, character of this authority very clearly:

> *Corrections officers in a prison serve in a quasi-judicial role*: not only do they judge when infractions have occurred, but they are also responsible for imposing punishment and advising parole boards. . . . Although prisons are often highly regulated, *these regulations are derived more from the prison environment than from the legislature*. The Legislature's rules provide only a skeletal outline of what goes on inside the prison; the day to day rules regarding prison life are left to the correctional authorities. The very nature of prisons suggests that they cannot be run by procedures carefully detailed by "outsiders." Additionally, courts have long granted substantial deference to the discretion of prison administrators in making and enforcing rules for the institution.[26]

Not only do prison officers unavoidably possess discretion in how to both exercise and regulate the direct use of physical force, but also, the very same reasons that transfer of discretion is unavoidable (and in some respects perhaps even desirable) are the same reasons that its exercise is difficult both to review by higher authority and to challenge by courts. For one thing, the very fact that the function of incarceration cannot be fully specified contractually means that citizens, including prisoners, face considerable legal obstacles to challenging the conduct of guards in court. Further, the very reasons that explain contract incompleteness and the resulting vagueness of rules—unforeseeable emergencies, and the specificity of certain situations, as well as the necessity of balancing different concerns and values—also explain why

courts tend to be deferent and why the review by higher authorities of the rules or "policy manual" developed by lower prison administrators is as difficult and likely to be as incomplete as the specification of those rules in the first place.

Prisons thus provide another clear example of the way in which, within the complex administrative apparatus of the modern state, the distinction between legislating, or adjudicating, the terms of justice and implementing them is radically blurred. Low-level prison administrators authoritatively and discretionally legislate some of the restrictions, in part independently from the dictates of higher rules, against which individuals, in this case inmates, can be left free to act.

Our analysis of the above cases is meant to show that administrative discretion is more complex than the formalistic view recognizes. Such discretion has five distinctive features. First, it is both ineliminable and, to some extent, desirable. Second, far from being merely instrumental it has a value-loaded, interpretative, and generative character. Third, and importantly, it is not merely executive but rather regulatory or legislative. The legislative character of administrative discretion means that administrators, even low-level ones, have the de facto authority to change the normative situation of citizens in a relevant sense—by determining through presumptively binding norms the scope of their entitlements of justice or by imposing new duties on them, as well as by directly regulating their sphere of freedom. Bureaucrats' decisions have a credible presumption of authority, whether this is ultimately legitimate or not. This presumption clearly derives from the fact that we regard them as agents of government, claiming the legitimacy that government claims. Fourth, and also crucially, administrative discretion is in part nonderivative and autonomous, in the sense that its exercise cannot be completely subsumed under, or guided by, higher authoritative standards or mandates. Fifth and finally, exercises of administrative discretion, for the very same reasons that they are unavoidable and at times desirable, cannot be fully held into account *ex post* through judicial mechanisms.

It is because of these features that the exercise of administrative discretion, far from being either merely executive or indifferent, triggers, at least prima facie, a concern with unilateral subjection, similar to the one triggered by acquisitive decisions in the Kantian state of nature. Unless properly legitimized, it amounts to particular individuals unilaterally legislating the conditions under which, or by means of which, others can freely act.

An appropriately structured (ideally and yet realistically conceived) administrative state, however, has the internal resources to overcome the threat of

unilateralism, at least to a large extent. These resources must ensure that a system of public administration meet a set of important legitimizing conditions, such that administrators' quasi-legislative decisions, however discretional and partly autonomous, can still be reasonably understood as exercises of an omnilateral power or instantiations of an omnilateral will. I shall now turn to outline these conditions. A more detailed elaboration of such conditions will emerge, dialectically, as the argument of this book develops in future chapters. Only by positing certain general conditions that an administrative apparatus must meet in order to overcome the vexing problem of bureaucratic unilateralism can we understand why and how privatization, by failing to meet these conditions, generates a condition of unfreedom. At the same time, it is only through a careful analysis of the wrong of privatization that a more fully specified account of a legitimate system of public administration will emerge. The following section will thus set the basic framework for the core argument of the book.

Legitimizing Administrative Discretion: An Integrative Model

The social-scientific and legal literature on administrative discretion generally proposes three models for its legitimation. According to the first account, administrative discretion can be legitimate only if its exercise is forced to track the will of the people, understood as the will of the majority, and the only way of achieving this outcome is through almost unqualified directive control of bureaucrats' actions by elected officials. We may call this the "top-down model" of administrative legitimation.[27]

According to a second model—the "fiduciary model"—in order for the exercise of bureaucratic discretion to be legitimate, it is not necessary for it to track the popular will. Rather, as entrusted fiduciaries of the people, bureaucrats should be left free to act on their independent judgment of what is best for the people, without being subject to strict directive control.[28] The fiduciary model acknowledges that the discretional authority of administrative agencies should be circumscribed by the legislature's mandate, for this mandate sets the conditions of the entrustment, but mandates can and should be designed so as to leave ample space for independent judgment.

If the fiduciary model emphasizes the importance of rightful and independent judgment, the third and final model once again gives centrality to

democratic control. However, unlike the top-down model of political control, this model sees participation from below as a necessary means of legitimation. Rather than simply strengthening legislative oversight, administrative discretion should be forced to track the will of the people by including the very people in administrative decisions. We may call this the "public participation model."[29]

These models are generally presented as alternative and competing accounts of administrative legitimacy.[30] I think this is a mistake. In what follows, I will propose an "integrative model," the aim of which is to appropriately combine different aspects of the above models, while rejecting others. Mere compromise is not the reason for an integrative model. Rather the view that I will try to defend is that different dimensions of the overall legitimacy of a constitutional democratic state call for different modes of legitimizing residual discretion at different stages of the administrative process.

According to the account of political legitimacy defended in the previous chapter, the exercise of legislative power must meet certain criteria. It must (1) be omnilaterally authorized by an appropriately constituted democratic process; (2) carry out a judgment the form of which is omnilateral—that is, not reducible to anyone's particular judgment; (3) be conducive to the creation of a rightful condition, and thus compatible with both constitutional essentials and the rule of law; (4) be attributable to a unified and effective, juridical and authoritative, process of specification of individuals' rights and duties; and (5) be carried out in a representative capacity—in the name of all.

Now, if the account of administrative discretion provided in the first part of this chapter is sound, many (although not all) exercises of such discretion should themselves be regarded as exercises of legislative, not simply executive, authority. It follows that these exercises of discretion, in order to be legitimate, must meet the above criteria. From the perspective of procedural legitimacy, this requires that bureaucratic discretion must be both democratically authorized and exercised in a way that carries out the shared will of the people, rather than the particular purposes or judgments of single individuals, and does so in the name of the people. This in turn demands a large degree of fidelity to the democratic will on the part of administrators, as expressed by the people and their elected officials. This is the account of legitimacy predominant in the top-down and political participation models.

At the same time, however, the exercise of administrative discretion must also meet certain conditions of substantive legitimacy. As we saw in the previous chapter, a democratic will cannot coherently claim the authority to

enforce rules that are incompatible with the requirements of reciprocal freedom. A society where people were denied certain basic rights, or where the application of laws was arbitrary, or where the rights of some were enforced differently from the rights of others, could not qualify as a rightful condition. This requirement entails, in line with the fiduciary model of administrative legitimacy, that administrative discretion is exercised not only democratically but also fairly, that is, nonarbitrarily and in respect of the fundamental principles and integrity of the constitutional democratic state. This, in turn, means that administrators' fidelity to the democratic will, as actually expressed by the people and their elected officials, should be limited by a requirement of fidelity to other aspects of the constitutional democratic state.

With these two conceptions of fidelity in mind, we can now turn to the question of how different models of administrative legitimacy can and should be coherently integrated.

Qualifying Top-Down Democratic Control

The top-down model aims to legitimize administrative discretion by enhancing administrators' fidelity to the majoritarian will through elected officials' oversight and directive control over administrative action. Proposed means of enhanced democratic control may include, among other features, the detailed specification of legislative mandates so as to reduce discretion and prescribe precise courses of action to bureaucratic agencies; requiring bureaucratic agencies to provide careful accounting and cost-benefit analysis of all their relevant activities to higher officials so as to make sure the agencies' activities fall within the terms of their mandates; granting the legislature the prerogative to revoke administrative regulation through a legislative veto; or giving elected officials (e.g., an elected president) the prerogative to remove administrators who do not follow specific courses of action as dictated from above.[31] Through these means, the aim would be to force administrative discretion to track the popular will by forcing the bureaucracy to act with complete fidelity to the legislature's mandate and intent.

The top-down model rightly stresses that democratic authorization, in the form of a valid legislative mandate, provides the most fundamental means of legitimizing administrative discretion. I shall refer to this as *the authorization condition*. In the absence of such authorization, the resulting discretion would amount to the imposition of a merely unilateral, because publicly unauthorized, will over others.

The top-down approach is also correct in stressing that authorization is not enough. If bureaucrats, precisely like elected officials, exercise a kind of discretion that has the power to change the normative situation of citizens in a fundamental sense, and if they, precisely like elected officials, operate on the basis of higher mandates that cannot *ex ante* determine or fully constrain the use of that discretion, then the demands of procedural legitimacy that apply to "political" activity should also extend to "administrative" activity. In the same way that it is not sufficient for legislators to be authorized (elected) by the people in order for the policy they make to be democratically legitimate, bureaucrats, if they are to act legitimately, cannot simply be authorized by a democratic legislature; they must also exercise their residual discretion in a way that further specifies and carries out the people's shared will, and they must do so in a genuinely representative capacity, that is to say, in the name of everyone.[32] We may refer to this as *the representation condition*.

The top-down model has, however, two major shortcomings. The first limit consists in thinking that unqualified political control from above is the only, or even the best, means to meet the demands of procedural legitimacy. As we have already seen, there are empirical reasons to think this is not the case. Not only can asymmetries in information render elected officials unable to exercise effective control from above, but also excessive top-down control can "significantly diminish the returns from agencies' special expertise,"[33] which arguably provides a reason for democratic delegation in the first place. Further, the top-down model presupposes an already-formed democratic will whose political preferences administrators should be forced to track in the course of implementing policies. However, democratic elections do not often confer mandates to pursue specific regulative policies. When it comes to the development of actual policies, the content of the democratic will is partly constituted through the administrative process itself. Therefore, this process cannot be simply expected to track a will whose content is pregiven.

But there is a second, more fundamental, limit. The top-down model erroneously reduces the question of administrative legitimacy exclusively to a question of fidelity to the majoritarian will and thus to a question of direct democratic control. As we saw, however, democratic control, so narrowly understood, is only one aspect of the legitimacy of the constitutional democratic state. As servants of this state, public administrators must also show fidelity to other requirements, including respect for the rule of law and support for the effective realization of a rightful condition, and this is so even when the current majoritarian will resists these demands. The top-down model, however,

risks undermining this second kind of fidelity because it allows administrators no insulation from short-term majoritarian pressures, thereby compromising long-term democratic or constitutional commitments.

Given the limits of the top-down model, although some of the mechanisms proposed by this model should be retained (e.g., reasonably close oversight), others (e.g., the demand that particular courses of action be *ex ante* dictated from above, or the almost-unconstrained authority of elected officials to remove public administrators at will) should be rejected. Yet, once we constrain democratic control from above, supplementary mechanisms may become necessary to maintain over time administrators' due fidelity to the democratic will, while at the same time protecting the rationale that justifies the existence of the administrative state, which is to execute policies in an effective and intelligent way, and to protect the nonarbitrary and fair execution of the law from the temporary pressure of partisan interests.

Legitimizing Fiduciary Discretion

The fiduciary model can be regarded as complementing (rather than replacing) the top-down model by providing what the latter lacks. Unlike the top-down model, the fiduciary model starts from the premise that entrustors "cannot exercise complete control or ensure comprehensive monitoring of fiduciaries' actions without negating the fiduciary relation's efficiencies."[34] Residual discretion is thus not only necessary but also desirable. The fiduciary model then goes further claiming that, as long as fiduciary malfeasance is deterred through appropriate accountability mechanisms and fiduciaries act according to their own independent and expert interpretation of the interests of their entrustors, then legitimacy obtains. Just as parents exercise their parental authority legitimately, as fiduciaries of their children, insofar as they act according to their own reasonable interpretation of their children's interests without necessarily having to track the children's own conception of their interests, public administrators, according to the fiduciary model, act legitimately as long as they exercise their residual discretion through reasonable independent judgment and for public purposes alone.

While I believe we should retain the first insight of the fiduciary model—that residual discretion is unavoidable and that we need mechanisms for the legitimation of its exercise that cannot be reduced to top-down controls—I think we should reject the further idea that these mechanisms are sufficient to its legitimation, and that residual forms of democratic control over the exercise

of independent judgment are, therefore, unnecessary. After all, citizens are not children, and therefore they may, within certain boundaries, legitimately expect public administrators to carry out their own judgment and interpretation of what counts as a public purpose, and to do so in their name, that is in virtue of their mandate, as understood and authorized by the citizens themselves.[35]

For our purposes, therefore, we may reframe the question posed by the fiduciary model—how to avoid fiduciary malfeasance—by asking through which mechanisms administrators can be directed (1) to act in line with the shared will of the people, and in their name, when top-down controls are either ineffective or undesirable, while simultaneously (2) resisting short-term partisan pressures when these go against the rule of law or other constitutional essentials.

One such mechanism comes in the form of tight procedural integration between the bureaucratic and the democratic. Consider, as a concrete example, the role of the Administrative Procedure Act (APA) in the United States, which compels administrative agencies that exercise relevant rule-making power—a power that at times amounts to the power to issue regulations having the force of binding laws—to give notice of their proposed rules, provide the public with opportunities to comment and advise on promulgated rules, and provide the public with clear reasons for their internal decision-making process. Although the APA is an insufficient means of democratization, since the role of the public remains mainly advisory, it serves an important fiduciary function. As some administrative law scholars explain, "the APA employs notice-and-comment procedures as minimalist procedural safeguards akin to the fiduciary duties of care and loyalty in private law."[36] In other words, by forcing administrators to provide the public with reasons for their proposed regulations they (the public) can accept, the purpose of the APA is to direct administrators to act exclusively for public purposes.

Procedural integration, however, is not sufficient to legitimize administrators' residual discretion. This is for two reasons. First, in order for procedures to work appropriately, those who enact them must have the appropriate orientation in the form of a commitment to preserving the integrity of those procedures. Second, procedures are ultimately constituted by legal rules, and the power of these rules, as we saw, is limited. Procedures must then be complemented by systems of peer accountability, as well as by what we may call a "bureaucratic ethos." This ethos consists in the internalization of a specific set of ethical-cultural norms. The function of these norms is to support administrators' stable commitment to be faithful to the spirit of legislative mandates

(in compliance with the requirements of procedural legitimacy), while at the same time their being ready to defend the rule of law and constitutional essentials against the encroachment of undue political pressures (in compliance with the requirements of substantive legitimacy). This requires a disposition to exclude private purposes and personal loyalties from consideration, even when the openness of rules leaves wide interpretative discretion in place. The ethos thus contributes to legitimizing residual bureaucratic discretion by making the exercise of this discretion congruent with the different dimensions of democratic legitimacy.

There is a further reason for why a bureaucratic ethos ought to be regarded as an essential feature of a legitimate system of administration. Recall that on what we called the formalistic view, the duties of administrators are limited to "behaviorally" acting in accordance with their official mandates. This is because, according to this view, for a public official's exercise of discretion to genuinely count as an instantiation of an omnilateral will, it is enough that the official's external conduct falls within the boundaries of his or her publicly authorized mandate. On this account then, the internal attitudes of officeholders do not matter at all from the perspective of legitimacy. The problem with this view, however, is that unless officeholders share an appropriate intentional orientation, it is unclear whether they can be genuinely regarded as carrying out the people's shared will, even if their external conduct falls within their mandate. To see why, consider the case of an officeholder who ends up doing what he or she is supposed to do but only because a wealthy corporation has promised that it will make a generous donation to the officeholder if he or she supports appropriate regulatory policies. We can also assume that after the officeholder has done his or her job, the corporation fails to keep its promise, and the officeholder receives no benefit, so that no legal prohibition against bribes is broken. If we look only at the external actions of the officeholder we may say that he or she has externally acted within the boundaries of the public's official mandate. However, the officeholder's actions arguably remain the mere instantiation of a unilateral, as opposed to a shared, will, and are arguably not done in the people's name (they fail to be representative). Rather than carrying out the shared will of the people, as determined through democratic procedures, the officeholder is simply carrying out an alternative will (the corporation's will), which just may happen to have identical content to what the people will. Further, the officeholder is acting in the name of the corporation, not of the people. An account of the democratic legitimacy of residual administrative discretion must thus be concerned not only with external

conduct but also with administrators' internal attitudes and commitments (chapter 5 will provide further justification in support of this point).

This consideration, however, generates a problem. If the carrying out of an omnilateral, shared will, and the doing so in a genuinely representative capacity, partly depend on administrators' individual set of internal commitments, intentions, or dispositions, are we not back to a situation, similar to the state of nature, where justice is ultimately left to depend on particular individuals' goodwill and internal mental states?

The solution to this problem, I would suggest, rests on a Hegelian distinction between what we may call an institutional and a personal ethos. Hegel's well-known claim about the necessity of an ethos of civil service is not the implausible one that civil servants are supranatural creatures, endowed with a unique, personal capacity for purely impartial judgment. Rather, the ethos is itself an institutional, impersonal element, such that being dependent on the civil servant's ethos is ipso facto being dependent on shared institutions, not on the official's private persona. As Carl Shaw points out, for Hegel it is the "the very constitution of an office [that] makes the cognitive orientation toward others more feasible than in any other political institutions."[37] An appropriately constituted system of public administration is thus a system that succeeds in orienting its occupants' practical judgment toward public purposes. The bureaucratic ethos, therefore, can be reduced neither to the mere following of formal rules nor to a merely subjectivist inclination. Rather, it is an institutionalized cultural and normative ethos that directs the work of administration toward appropriate public purposes. As long as citizens are dependent on this ethos, they are therefore not dependent on the particular will of anyone.

An appropriately constituted system of offices thus represents a further necessary mechanism, beyond procedural integration, to avoid fiduciary malfeasance and undue dependence on the particular will of officeholders. What are, then, we should ask, the structural (normative) features of an office through which the bureaucratic ethos is supposed to achieve its practical realization?

The following four features are essential (although they may not be sufficient):

1. The nonnegotiable and noncontractual nature of the duties of office;
2. The absence of free purposiveness—the lack of freely arrived at comprehensive purposes;[38]

3. The insulation of the officeholder, through tenure and a salaried compensation, from undue external influence;
4. The lack of discretionary property rights.

Consider the first feature. Although duties of office are assumed through contract, they are not duties *of* contract. This distinction concerns both the ground of a duty and the way in which the content of the duty is arrived at. While duties of office are grounded on the constitutive norms that define an office, contractual duties are grounded on an act of voluntary exchange.[39] Unlike the content of contractual duties, which is established at will by the parties in the contract, the content of the duty of office is attached to and specified by the office itself, through its constitutive rules. Unlike merely contractual employees, an officeholder cannot therefore negotiate the content of the contract and thus of the duty attached to it. Importantly, this means that while the duties and responsibilities of a contractual employee may reflect the idiosyncratic and changing preferences of the employee or of his or her company, the duties of the officeholder, in principle, cannot, and this is so even if offices are voluntarily entered. Therefore, even if bureaucrats must necessarily exercise practical, and at times creative, judgment, as long as they remain committed to do their duty, their judgment will necessarily reflect the purposes of the office alone, rather than their own private purposes.

True, the purposes of an office may be plural and potentially conflicting. However—and here we get to the second distinctive feature of a public office: the absence of free purposiveness—these purposes should not be regarded as generating from the free exercise, by particular individuals, of their capacity to form and pursue comprehensive ends. This is because, insofar as citizens can always reasonably reject being coerced for purposes other than justice, a just state, including its agents, cannot have any such purposes. Rather, the purposes of an office are dictated exclusively by a public, legislative mandate, which sets the constitutive rules of the office. While the rationale for the existence of any private company or association may well reflect the particular values and priorities of the owner of the company or of its members, the rationale for the existence of a system of public administration, and the offices within it, does not and cannot reflect anyone's particular or comprehensive purposes. This does not mean, as is often thought, that bureaucrats must operate in a fully depersonalized or dehumanizing way. Exhibiting care and attention for particular others can be, for the reasons we previously discussed, fully

compatible with, and indeed required by, the rationale that justifies the existence of a system of public administration (in my view, this rationale is the effective and efficient achievement of the substantive conditions of freedom as independence in a complex world). Rather, it simply means that by signing an employment contract with a corporation, an employee may acquire duties to pursue or contribute to particular comprehensive purposes, while, by simply becoming a civil servant, one cannot.

Turning to the third feature, the tenure of (certain) offices as well as the fact that civil servants are paid through a fixed salary are meant to insulate officeholders from undue political pressure and to deincentivize partial behavior toward interested parties. In this respect, as Weber famously argues, officeholding is definitionally antithetical to a relationship of patronage, and a certain degree of insulation is a necessary means to preserve this antithesis.

Last but not least, as Weber also points out, "legally and actually office holding is not considered ownership of a source of income to be exploited for rents in the exchange for the rendering of certain services."[40] The bureaucrat does not own a share of the public resources he or she manages. These resources are not his or her own, and as such they cannot be discretionally promised or spent. This fact should direct the bureaucrat to understand his or her role as one of stewardship, and thus to use resources for public purposes alone.[41] It should prevent officeholders from becoming exploiters, for they cannot use their control over public resources as a means to exact services or favors from those who need those resources.

In all these ways, an appropriately constituted system of office, together with a system of procedural integration, is meant to support a sociocultural orientation to act in accordance with legislative mandates. Even when these mandates are vague or left incomplete, and when top-down controls are weak or absent, the structural features of officeholding, and the ethos they support, should direct public administrators to exercise their independent judgment in compliance with the spirit (absent the letter) of democratic mandates. Simultaneously, some of the structural features of officeholding (i.e., its tenure requirements) are also meant to support the capacity of administrators to resist undue political pressures. For example, civil servants can sometimes resist the implementation of higher executive orders whenever these contradict basic constitutional essentials, thereby generating a public reconsideration of the orders in question.[42]

Of course, one important and difficult question concerns the appropriate scope of insulated and independent action that a system should allow

administrators to have. To what extent can public administrators resist implementing the demands made by elected officials if, according to their own independent judgment, these demands are unjust? It is outside of the scope of this chapter to provide a comprehensive answer to this question. Two framing considerations are, however, particularly worthy of notice.[43] First, an answer to the above question must be coherent with the conception of political legitimacy defended so far. On the one hand, this means that the more legitimate the democratic process from which a mandate results, the stronger the reason for administrators to act within the mandate, despite disagreement about its content. After all, if administrators, only in virtue of their competence or expertise, could bypass the dictates of a procedurally legitimate democratic process whenever these dictates contravened the administrators' own judgment about the nature of justice, we would be back to the problem of the state of nature. Some people's independent judgment would be treated as having higher natural normative authority than others. On the other hand, however, there are substantive limits to what a democratic people can will. As we saw, the same conditions that ground the authority of democratic procedures also ground some justice-based constraints on these procedures. Therefore, the more outrageous the violation of basic principles of justice by a democratic majority, the stronger the reasons administrators have to resist implementing those mandates. Note that, in these cases, although the exercise of independent judgment by administrators unavoidably requires some degree of constitutional interpretation, this does not necessarily amount to subjecting others to their unilateral will. Rather, in cases of blatant injustice (e.g., racial segregation), it is the democratic state itself that, through its constitutional norms, should be understood as omnilaterally authorizing lower officials to exercise and act on their independent judgment. This form of independence and insulation is itself a necessary condition for maintaining the legitimacy and stability of a constitutional democratic state over time.

To sum up the argument so far: compared to the top-down model, the fiduciary model of administrative legitimacy has the advantage of reserving a space for administrators' independent judgment and insulation from undue political pressures. Through both (1) procedural integration and (2) the appropriate structure of offices, administrators can be directed to act in line with the spirit of legislative mandates and for public purposes alone, even when top-down controls are either ineffective or undesirable, and to resist short-term political or self-interested pressures when these go against basic requirements of justice, equal treatment, or other constitutional essentials.

The fiduciary model, however, leaves us with a few residual concerns. First, even if we acknowledge the centrality of both procedural integration and the appropriate constitution of offices, these requirements still may not be sufficient to guarantee that administrative action does not deviate from entrusted purposes. Second, the fiduciary model risks reproducing the vexing problem of unilateral subjection once again. In cases where legislative mandates are underdetermined, and top-down democratic controls are limited, there can be many underspecified reasonable alternatives in the interpretation and application of the same policy. Further, and importantly, as Henry Richardson persuasively shows, an intelligent process of public administration can itself generate new interpretations of the very ends, rather than merely the means, of policies, in a way that could not have been anticipated at the moment of authorization.[44] Now, according to the fiduciary account, if the people authorize, through their elected officials, public administrators to decide at their discretion among alternative options, in light of their special expertise, then nothing else is necessary to legitimize the public administrators' resulting determination, at least as long as the latter act within entrusted purposes. The problem is that, if the nature of entrusted purposes (the ends of policy) can change during the process of administration itself, reference to these purposes may not be sufficient to legitimize bureaucrats' residual discretion. Going further, one may reasonably ask: why should public administrators' independent judgment, rather than the collective judgment of the people themselves, decide on which reasonable alternative should be pursued and how the ends of policy should be reinterpreted? Appeals to the bureaucrat's expertise provide an unsatisfying answer. After all, people could in principle also authorize an expert autocrat to make relevant choices about their rights and duties on their behalf in light of his enlightened nature. However, doing so would run the risk of eventually making citizens dependent on a form of judgment they could not recognize as exercised in their name, at least insofar as they would lack the authority to change, shape, or control it. This process would also in the long run transform them into passive subjects, rather than active citizens, willing to accept whatever regulation is imposed in the name of expertise. Expertise may certainly be a reason to take the judgment of properly selected administrators seriously and to insulate them from undue pressures, but it is not a sufficient reason for the people to deny themselves an authoritative say as to how rights and duties should be allocated in their name, how the ends of policy should be ultimately interpreted, and through what means the conditions of equal freedom should be preserved.

Last but not least, the fiduciary model generally equates entrustors with beneficiaries in a linear way. Think about the paradigmatic case of a fiduciary relationship between shareholders and corporate managers. In this case, shareholders are both the entrustors and the beneficiaries of the fiduciary relationship. This, in turn, means that if corporate managers appropriately act in line with the terms of their entrusted power, they automatically also act for the benefit of their beneficiaries. However, this equation dissolves in the case of the administrative state. While the terms of entrustment are set by the people as a whole, through their elected officials, many administrative entities serve only a subset of beneficiaries. This, in turn, means that many administrative rules may end up changing the normative situation of only a subset of the overall population. But if this is the case, then it seems that this is the relevant "people" that should have a special say in accepting or rejecting the provided justification for those rules.[45] This may provide a further reason why the legitimacy of these rules cannot depend on a top-down form of authorization alone.

These considerations lead us to conclude that the fiduciary model, and the mechanisms of legitimation it supports, should be supplemented with a further element of democratic control. This element cannot be reduced to a top-down form of political control, since we have already indicated the limits of this form of control. The exercise of residual discretion by bureaucrats can then be legitimized only from below, through bottom-up democratic processes. These processes should, at the same time, also ameliorate the potentially alienating aspects of bureaucratic rule, and the depoliticizing tendencies of expertise-based decision making. I will now turn to provide some illustrative guidelines for how this process of democratization of the bureaucracy could, in principle, be achieved, in a way that does not undermine the elements of expertise and independence that the fiduciary model aims to protect.

Legitimizing Residual Discretion through Democratic Participation

Bureaucracy and democracy are often thought to be incompatible. Weber, for instance, argues that democracy and bureaucracy are inherently in conflict because democracy "prevents the development of a closed status group of officials in the interest of a universal accessibility of office" and aims to minimize "the authority of officialdom in the interest of expanding the sphere of influence of 'public opinion.'"[46]

There are, however, possible ways in which democracy and bureaucracy can be reconciled precisely (1) by making some (but not all) administrative offices universally accessible and (2) by making the legitimacy of the authority of officialdom itself partly dependent on the "influence of 'public opinion'" properly understood. This second requirement constitutes the core of the third model of administrative legitimacy: the participation model.

The participation model is often presented as requiring more direct involvement of people, local communities, or interest groups in administrative decision making. Some existing administrative states have already included a component of political participation within their structure. We already mentioned, as an example, the Administrative Procedure Act (APA) in the United States. Although mechanisms like the APA represent an improvement in the legitimizing of bureaucratic discretion, they suffer from several limits, which are also, more generally, limits of the public participation model. The first limit is that the function of public participation is circumscribed to a purely advisory role. Providing the public with advisory responsibility may have great epistemic benefits, by improving the quality of policy making, and may also be an effective means of counteracting the alienating aspects of bureaucracy and supporting the demands of active citizenship. However, an advisory role is not sufficient to provide the people with an opportunity to control the exercise of residual discretion, especially in cases where the legislature is far from exercising complete control over the bureaucracy.

This limit could be overcome by providing the people with actual decision-making authority. However, as Joseph Heath rightly points out, doing so opens up other notorious problems.[47] The first problem concerns the risk of capture and unequal representation. Members of the public included in decision-making administrative processes are generally limited to representatives of interest groups, with the subsequent risk that agencies' decisions carry out the will only of particular groups of people. Those who participate often tend to include only those for whom participation has low opportunity costs, those whose interests are already well represented by existing formal organizations or social movements, and those who have a significant economic interest in the decision. An open system of public participation thus tends to systematically privilege certain groups (e.g., capitalists) over others (e.g., workers).

The second problem concerns the instability of decision making at the community level. Given the open and fairly unstructured character of many forms of public participation, majorities can continuously change depending on who decides to participate on particular occasions and who has the strength

to mobilize a different majority. Thus, decision making at the local level may fail to exhibit a stable collective will.

Third, the public faces an important collective action problem in gathering and processing information. As Heath puts it, "because the public has interests that are extremely diffuse, very few individuals have any incentive to do the research and spend the time required to acquaint themselves with 'the file' on any particular issue."[48] This may in turn reduce the quality of decision making and increase opportunities for manipulation.

Finally, there is the problem of conflicts of interests. Consider the case of an agency or office the job of which is to establish fair eligibility criteria for the allocation of welfare benefits. On the one hand, the inclusion of beneficiaries in the decision-making process may provide invaluable information. On the other hand, however, there is the risk that direct beneficiaries will exercise their decision-making power in a completely self-serving way, at the expense of another, more diffuse, group of beneficiaries—the citizenry at large—who have an interest in having the state fairly distribute those benefits.

In order to legitimize residual discretion, we would then need to find a way to extend actual decision-making rights to the people, while at the same time overcoming the above shortcomings and, also at the same time, preserving some of the distinctive benefits of an insulated and expert system of administration. This is a very challenging task. However, I believe, it is not impossible to imagine institutional solutions that can simultaneously meet these desiderata.

As an illustration of the kind of institutional arrangements that could pass the test, consider a system of codetermination, coupled with public hearings.[49] In this system, decentralized administrative agencies, as well as local agencies empowered to regulate and oversee the work of street-level bureaucracies within specific issue areas, would be managed by boards of directors including both members of the public and insulated officeholders. The members of the public would be selected by lot, on the model of civic juries, from among those whose rights or duties of citizenship are governed or changed by the proposed regulations. This selection by lottery would be justified by the fact that the direct election of citizens for different administrative boards may be unfeasible or unreasonably costly (given the numbers of administrative agencies), and that lotteries, like elections, give no citizen higher fundamental authority to decide than others, simply in virtue of their natural superiority. Depending on the nature of the agency and regulations in question, the relevant "people" may be constituted by the entire population present within a given territory or by a subset of it. The part of the board constituted by the people may be

conceived along the lines of a jury with a veto right on proposed regulations that are judged to fail to take relevant interests into due considerations. Further, public hearings would be designed so as to encourage both interest groups and the public at large to participate through open deliberation. In this way, the rule-making process could take into account the interests of those subject or likely to be subject to the regulation, while at the same time being open to new information and concerns that may have been neglected or not anticipated by the administrative process, as well as to the potential formation of new constituencies.

To be clear, the purpose of a system of codetermination, so understood, would not be to substitute top-down mechanisms of legitimation with bottom-up ones, but rather to complement them. In this respect, the relationship between the legislature and administrative bodies would remain unchanged. The bureaucracy would still be under a duty to propose regulations that carry out the legislature's intent (within the constraints set by the requirements of substantive legitimacy). However, insofar as the interpretation of that intent can generate multiple reasonable alternatives, the choice among available alternatives should be codetermined by those whose normative situation is changed, or likely to be changed, by the regulations in question, as well as by civil servants who, because of their formation, may have the required level of technical expertise to develop complex regulations effectively.

The purpose of codetermination is then to retain the benefits of a certain kind of expertise and independence through the presence of meritocratically selected and partly insulated civil servants on the boards, while also providing a mechanism for legitimizing residual discretion democratically. Civil servants remain the ones who develop and propose, according to their own specific competence and in consultation with the public, a set of regulatory proposals and who, in the absence of a veto by the civic jury (the other component of the board), decide which regulations should be adopted. However, their exercise of residual discretion is sanctioned through further democratic procedures—the civic jury retains a right to veto regulations that, even if perhaps compatible with the intent of the legislature, still fail to take certain relevant interests, or information that has emerged during the process of public consultation, into due consideration. The selection process and fixed structure of the jury would contribute to eliminating concerns about capture and instability of decision making. Insofar as members of the jury would be paid and appropriately informed, concerns about collective action problems with regards to the gathering of relevant information would be significantly reduced.

Cases of conflict of interest could also be significantly reduced, if not entirely eliminated, by including in the relevant "people" not only those whose entitlements are determined by the relevant regulations, but also those whose duties of citizenship are affected. For example, in the case of regulations determining eligibility criteria for welfare benefits, not only would representatives of potential or past beneficiaries be included in the randomly selected pool, but also representatives of the citizenry at large whose contributive duties are also shaped by those regulations. Finally, by including a salient participatory and deliberative aspect, this system would also mitigate, if not fully eliminate, reasonable concerns about the alienating aspects of bureaucratic rule.

Of course, much more could be said about the details of this proposal. My purpose here, however, is limited to proposing a general framework for legitimizing administrative discretion and for showing the internal resources that an administrative state, ideally but realistically conceived, has for overcoming the problem of bureaucratic unilateralism. Further chapters will spell out some of these conditions in more detail.

What I have suggested so far is the following: Given the inherent limits of rules and hierarchies, as well as the inevitable vagueness of mandates, the tight procedural integration of the bureaucratic and the democratic is an essential feature of a legitimate administrative system. If procedural integration, as well as the institutionalization of a bureaucratic ethos through the appropriate constitution of offices as distinct from merely contractual employment, should supplement top-down mandates and controls, then so too should the internal, if partial, democratization of administrative decision making—for example through a system of codetermination—supplement the function of the ethos. I hope I have shown that it is a mistake to present, as it is often the case, the three models of administrative legitimacy as competing ones. Rather, different elements of these models should be integrated to satisfy the different demands (both procedural and substantive) of political legitimacy and the challenges that the process of administration poses with respect to these demands at its different stages.

Privatization as Bureaucratic Unilateralism

We are now finally ready to go back to privatization and to analyze this phenomenon through new theoretical lenses. When we consider the main forms that privatization takes in the age of neoliberalism, we see that it amounts to the systematic transformation of the modern state's system of public

administration. Far from being a withdrawal or shrinking of the system of public administration, it is rather a reconfiguration of its internal functioning. In the privatized state, the rule-making functions of administrative agencies are often transferred to private actors; the provision of social, welfare, and health-care services is contracted out to for-profit and nonprofit companies, and the management of prisons, as well as military operations, is also outsourced to private firms and corporations.

Obviously, the transfer of such functions to private parties does not make the threat of unilateral subjection disappear. Privatization simply changes the locus of bureaucratic unilateralism. From the perspective of political legitimacy, the question of privatization then becomes the question of whether a privatized state can still meet the necessary conditions for the legitimation of administrative discretion. If the answer turns out to be negative, an important implication would follow: rather than being a mechanism for constituting a relationship of reciprocal independence among citizens, a privatized government would end up reproducing, within the state itself, those very same conditions of unilateral subjection, the overcoming of which, as we have argued in chapter 2, justified and compelled the state's existence in the first place.

My aim is to show that this is precisely the case. I will argue that privatization reproduces the very normative problem of the Kantian state of nature, insofar as under a privatized system of governance (1) private actors unavoidably make decisions that change individuals' normative situation in relevant respects; (2) even if private actors are de facto authorized through government contracts to make these decisions, their authorization should often be regarded as invalid; (3) even if valid, their decisions fail to qualify as exercises of an omnilateral, because genuinely representative, power and as instantiations of an omnilateral, because genuinely shared, will. They rather remain merely unilateral determinations of particular men and women. Therefore, (4) privatization unavoidably subjects citizens' power of choice to the unilateral will of others, thereby relegating them to a condition of dependence and unfreedom.

This chapter has already provided support for premise (1). The justification of the other premises will be the task of the second part of this book. This justification will consist in showing that privatization, by its very logic, compromises each one of the necessary conditions of administrative legitimacy that I have defended in this chapter, as parts of what I have called "the integrative model." To recap, these conditions require that (i) democratic mandates, which delegate important legislative or regulatory discretion outside of the

legislature, be valid, as demanded by the authorization condition. They further require that (ii) legislative or quasi-legislative discretion be exercised in a representative capacity—in the name of all—as demanded by the representation condition. This condition in turn demands, for its practical realization, the institutionalization of a bureaucratic ethos through an appropriately constituted system of public offices (why this is the case will be further clarified in chapter 5). Finally, (iii) the exercise of legislative discretion must carry out (and, in the process, help reconstitute) the shared will of the people throughout the process of administration. This further condition helps ensure not only that bureaucrats do not impose their unilateral judgment on citizens, but also that what bureaucrats end up doing can be reasonably regarded as falling within the scope of their delegated authority. We may call this *the domain condition*, where the term "domain" refers to the scope of their authorized or delegated authority. This condition requires, for its practical realization, a tight procedural integration between the bureaucratic and the democratic from the top to the bottom, and from the bottom to the top (why this is the case will be further clarified in chapter 6).

When the exercise of legislative bureaucratic discretion meets the above conditions, we may say that this exercise qualifies both as an exercise of an omnilateral, in the sense of genuinely representative, power, and as an instantiation of an omnilateral, because shared, will.

On the basis of this general framework, the second part of this book will argue that privatization compromises each one of the above conditions in distinctive ways.

First, it compromises the *ex ante* validity of democratic delegations, thereby violating what I have called "the authorization condition." This means that the delegation of certain functions to private actors should be regarded as lacking authorizing force, and that the performance of those functions by private actors should, in turn, be regarded as lacking an omnilateral authorization. I shall refer to this problem as *the problem of authorization* (chapter 4).

Second, privatization compromises the ability of administrators to act "in the name of" the people when exercising relevant forms of discretion by undermining many of the structural features of office, as well as by changing the nature of the bureaucratic ethos. This violates what I have called "the representation condition," generating what I shall refer to as *the problem of representation* (chapter 5).

Last but not least, privatization separates, rather than integrates, the bureaucratic and the democratic, thereby preventing the administrative state

from carrying out the shared will of the people. This violates what I have called "the domain condition," by leading bureaucrats to fail to do what they have been democratically authorized to do. I will call this *the problem of delegated activity* (chapter 6).

As we shall see, these defects of the privatized state do not amount to mere contingencies that can be easily overcome through regulation, but rather to robust problems. These are problems that are themselves dictated by the logic of privatization and by certain constitutive features that distinguish (or should, ideally, distinguish) private from public actors. They cannot therefore be overcome without making privatization a self-defeating project. By making, through the above mechanisms, the problem of unilateral subjection intractable, the privatized state should be understood, normatively, as a state of progressive regression to the state of nature, and, historically, as a renewed form of patrimonialism. Understanding the modalities of this regression will simultaneously shed further light on the constitutive features of a well-ordered system of public administration.

PART II

The Privatized State

4

The Problem of Authorization

IN THE PRIVATIZED STATE, private actors replace or supplement public officials in the administration of welfare programs, the management of prisons, the fighting of wars, the setting of regulatory standards, and many other functions. In this way, they are unavoidably empowered to make discretional decisions that, as we saw, do not simply affect others' well-being or reduce their options for choice, but rather change their normative situation in a quite fundamental sense. They legislate the scope of citizens' entitlements of justice and regulate the imposition of restrictions on their spheres of freedom.

In the last chapter we also saw that only if these decisions qualify as exercises of an omnilateral power can the reproduction of the very problem of unilateral subjection that, as we discussed in chapter 2, characterizes the precivil condition as a state of merely provisional justice be avoided. In order to qualify as such, we argued, private actors' exercises of discretion must meet an authorization condition (they must be validly authorized through democratic mandates), a representation condition (they must carry out the shared will of the people and do so in their name), and a domain condition (private actors must do what they have been validly authorized to do).

In this second part of the book I turn to show how privatization, far from being just another ring in the endless chain of delegations of powers within the modern administrative state, does indeed reproduce, within the apparatus of the state itself, the problem of unilateral subjection. I take three independent routes to this conclusion. The first route takes issue with the authorization condition, questioning whether private actors can be validly authorized by a democratic government to make many of the discretional decisions they routinely make in the privatized state. I call this *the problem of authorization*. The second route takes issue with the representation condition. It consists in showing that even if and when private actors can be validly authorized to

perform functions that involve relevant forms of legislative discretion, nevertheless, they often lack the standing to exercise this discretion in a genuinely representative capacity. I will call this *the problem of representative agency*. Finally, the third route takes issue with the domain condition. I argue that private actors, as a result of some of their constitutive features qua private actors, often fail to do what they are democratically authorized to do, thereby failing to carry out the people's will (I will call this *the problem of delegated activity*).

In this chapter, my aim is to investigate the first route, leaving the second and third ones for the following two chapters. The central question is this: are there limits to what a democratic government can validly authorize other actors to do on its behalf? This is a question of important significance for political philosophy, independently of its further relevance for privatization.

It is sometimes argued that limits to the delegation of (some) governmental functions can be grounded in the inherently agent-relative nature of the functions in questions. These functions or responsibilities—the argument goes—make essential reference to the public agent who should perform them, such that if their performance were delegated to someone else, their very nature would be compromised in some relevant respect. In chapter 1, we saw how Dorfman and Harel argue, along these lines, that punishment is a function that cannot be delegated to private actors.[1] Punishment, they claim, consists in the public condemnation of a wrong in the name of the political community as a whole and can therefore be performed only by public agents who exclusively have the capacity to speak in everyone's name. Similarly, Eric Beerbohm has recently argued that distributive obligations, because of their second-personal character, can be discharged only by all citizens, acting together through government, and not by private actors.[2] In the same way in which *you* cannot compensate a victim for a tort *I* have done, Beerbohm claims, a private third party, for example, a philanthropic foundation, cannot repair the debts citizens owe to each other as a matter of justice.

Whereas these arguments could in principle provide strong reasons to rule out the independent private exercise of some specific functions, it is unclear how they can rule out the delegation, through democratic authorization, of the performance of those functions to private actors. After all, we can generally authorize others to communicate things in our name, and we can generally answer the second-personal claims we have against each other by authorizing someone else to satisfy those claims on our behalf. It might perhaps be less virtuous of me to repay my debts through a delegate rather than directly, but it is no less just. Appeals to the inherently agent-relative nature of certain

functions or responsibilities cannot therefore explain why a democratic government could not validly authorize private actors to punish in its name, or to provide justice on its behalf. The question of valid authorization then reproduces itself.

A more promising answer to this question can be found in what legal scholars often refer to as "the nondelegation doctrine."[3] This doctrine, contained in many constitutional regimes, prohibits any branch of government from delegating to another body, whether internal or external to government, the exercise of certain functions and powers. Legal scholars have recently appealed to this doctrine to question the constitutionality of certain forms of privatization. For example, in his influential crusade against government outsourcing, law scholar Paul Verkuil argues that the nondelegation doctrine demands that private actors not be authorized, *ex ante*, to perform certain functions on behalf of government, whether or not they can be subject to constraints and regulations *ex post*.[4] Different philosophical justifications can be, and have been, provided in support of this doctrine. The first justification is fiduciary. It claims that, because of their entrusted nature, core public powers—legislative power being an exemplary case—cannot be subdelegated without violating the delegator's (the people's) trust or confidence. The second justification is contractualist. It maintains that further delegating entrusted powers amounts to a violation of the people's original consent. The third and final justification appeals to the principle of separation of powers. It argues that the rationale for nondelegation is ultimately grounded on a republican commitment to avoiding the dangers of despotism that the concentration of certain powers in the hands of a few would produce.

Unfortunately, as I will show, the above justifications also fail to explain why a democratic government cannot validly authorize private actors to exercise most public functions and powers, including legislative and regulative ones, on its behalf.

The main aim of this chapter will then be to rescue and defend a qualified version of the principle of nondelegation, on the basis of a different justification. This justification is grounded on a principle of collective nonalienation, properly applied to a democratic society. This principle states that, insofar as citizens, understood as a collective body, lack the moral authority to abdicate their ability to rule themselves democratically, a democratic government necessarily lacks the authority to issue laws or undertake policies that amount to such abdication. On this basis, I will argue that the systematic privatization of public functions, if considered in aggregation, violates such principle. It should

thus be regarded as transferring to private actors—both for-profit and nonprofit organizations—powers that cannot be validly transferred to them.

Unlike dominant accounts of the nondelegation doctrine (at least as applied to privatization), my view does not entail that each and every delegation of certain particular functions or powers, for example, punishment or even legislative powers, taken in isolation, is invalid, but rather that it becomes so only when considered as both a contributive and a constitutive part of a process of abdication of the collective capacity for, and right to, democratic self-rule. The principle of collective nonalienation therefore supports a narrower, aggregative, and nonessentialist account of the scope of nondelegation and, in turn, of the constitutional constraints that ought to limit privatization. In this way, my argument also contributes to existing accounts of the ethical limits of privatization in at least two ways: first, by focusing on the aggregative effects of privatization, it shows that privatization can be morally problematic even when none of the delegations it constrains, considered serially, are themselves problematic. Second, my argument points to the noninstrumental significance of the causal effects of privatization, by showing how, under certain conditions, a practice of governance that allows the progressive erosion of democracy through privatization can become constitutively (rather than merely causally) incompatible with democracy—an abdication of a people's right to self-rule.

Before presenting my own account of the principle of nondelegation, I should begin by explaining why the justifications that have been provided in support of this principle so far are, normatively speaking, unsound.

The Grounds of Nondelegation

In this section I will briefly clarify the meaning of the nondelegation doctrine, before turning to examine the justifications in its support. The nondelegation doctrine, as applied to private actors, can be interpreted in two different ways. On one, weaker reading all the doctrine demands is that certain functions or powers ought, all things considered, not to be delegated to private hands, hence government does something morally impermissible by delegating them. This interpretation does not hold that such delegations are, per se, invalid, that is, lacking authorizing force. If and when they occur, they retain the moral power to transfer, albeit wrongly, the delegated function and annexed responsibilities to the private actor. According to a stronger reading, the doctrine states that certain delegations are invalid, in the sense that they lack the moral

authority to effectuate the transfer. I interpret the nondelegation doctrine as making the second, stronger statement. After all, there may be thousands of reasons for why any transfer of responsibilities, even fairly trivial ones, could be in some circumstances wrong, all things considered; but it would be odd to say that, just because of this, such transfers should be treated as *ex ante* unconstitutional.

Further, there is the question of what, exactly, cannot be validly delegated. According to a narrow reading of the doctrine, only legislative power cannot be delegated. This reading makes sense historically, since the nondelegation doctrine can be seen as a direct expression of the republican idea that the power to make laws is the most direct expression of popular sovereignty, and as such can be exercised only by the people themselves or, in the context of representative democracies, by elected representatives who stand for the people. It cannot be further delegated.[5] Depending on how legislative power is defined, even this narrow reading of the nondelegation doctrine could in principle rule out as unconstitutional important cases of privatization.[6] As a concrete example, in 2015 a US court held that Congress's grant of authority to regulate the use of railroads to the National Railroad Passenger Corporation—a private entity—was unconstitutional under the nondelegation doctrine. When the case reached the Supreme Court, several of the justices upheld the court's reasoning on the grounds that "handing off regulatory power to a private entity is '*legislative* delegation in its most obnoxious form.'"[7] If the authority to regulate the use of railroads counts as legislative power, then, it seems, the authority to develop rules for determining which medical services should qualify for public reimbursement, or which citizens ought to be eligible for unemployment or disability benefits, or how force should be used against prison inmates, should also count as instances of legislative power. On this basis, the outsourcing of welfare and health-care programs, as well as the privatization of prisons, should all be regarded as unconstitutional even under the narrow reading of the nondelegation doctrine, for, as we saw in chapter 3, they delegate to private actors precisely this kind of authority.

According to a broader reading, what cannot be delegated to private actors goes beyond legislative power, and it includes all "inherently governmental" functions, defined as all those functions that "significantly affect life, liberty, or property of private persons," or "determine, protect, and advance economic, political, [and] property . . . interests."[8] If this broader reading is adopted, then, many cases of privatization, beyond those addressed by the narrow reading, could violate a principle of nondelegation.

Here I shall focus on the narrow reading of the nondelegation doctrine for two reasons. First, if it turns out that this doctrine, in its narrow interpretation, fails to rule out even clear cut cases of delegation of legislative power as inherently problematic, a fortiori it would fail to rule out more controversial cases concerning the delegation of other governmental powers and functions that are not as central to sovereignty as legislative power itself. Second, many of the considerations that arise in assessing the delegability of lawmaking and policymaking powers are also applicable to other functions and powers.

With these clarifications in hand, we can now turn to assess whether a commitment to nondelegation can be justified.

The Fiduciary Account of Nondelegation

"Delegata potestas non potest delegari" (delegated power cannot be further delegated). This maxim is often taken as providing a solid ground for nondelegation.[9] Medieval English jurists like Henry de Bracton may have been the oldest sources of such a maxim. According to Bracton, the king was "created and elected" and entrusted with his subjects' rights in order to secure conditions of "peace and tranquility" for his people, hence he could not delegate the crown's rights to someone else, because he did not "own them" but held them in trust.[10] However, it is in the work of American jurists and legal scholars Justice Joseph Story and Chancellor James Kent that we find some of the most lucid statements of this fiduciary account of nondelegation.[11] Consider first Story's justification of the maxim in his 1839 *Commentaries on the Law of Agency*:

> One, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known might not be selected by him for such a purpose. . . . The reason is plain, for, in each of these cases, there is an *exclusive* personal trust and confidence reposed in the particular party. And hence is derived the maxim of the common law; *Delegata potestas non potest delegari*.[12]

Story makes clear that the reason why delegated powers cannot be subdelegated is that subdelegation would violate "the exclusive personal trust" placed in the trustee by the trustor. The assumption here is that legislative power should be entrusted by the people to their representatives on the condition that the latter will exercise it *themselves*.

The problem with this account is that it is not clear why entrustment should be understood in this agent-specific way. After all, in many cases, the reason why we entrust others to do things for us is that we believe that they can do a better job than we could do ourselves. Entrustment thus generally entails trusting others' judgment and goodwill to use their discretion conscientiously, including to conscientiously decide when to subdelegate certain tasks.[13] When, for example, I entrust my electrician to fix an electric wire, and he or she promises to do as I have asked, it is implicit that I leave it to his or her judgment to do whatever is needed to ensure the work is done well, including making the decision whether he or she should or should not subdelegate certain tasks to his or her assistants. Hence, the electrician would not betray my trust if, after careful consideration, he or she decided to subdelegate parts of the job to a more competent electrician, whose expertise would help the first electrician do a better job. This is true even if the electrician does not "own" the wires but simply holds their management in trust. If we assume that, in a representative democracy, lawmakers, like the electrician, are entrusted by the people to perform certain functions because the people themselves lack the expertise or capacity to perform those same functions directly, then, it seems, lawmakers should enjoy, compatibly with the people's trust, wide discretion in performing their entrusted function, including the discretion to subdelegate substantial parts of their decision making whenever necessary to achieve the goal of their mandates.[14] Subdelegation would then violate, pace Story, no trust.

One could respond, however, that this is not how the relationship between elected representatives and the people should be understood. It is not that citizens lack the competence to do what their representatives are entrusted to do, so that the former must leave to the latter almost full discretion in deciding how to achieve some vaguely specified political goals. Citizens may just lack the time to make laws on a daily basis, or there may simply be too many of them to participate in lawmaking directly, and this is why they should entrust legislative powers to their representatives. If this is the case, however, citizens may well retain the competence to dictate, more or less in detail, what their representatives should do. Citizens can then expect their representatives to make specific promises about what they are going to do, and how, if elected. They may then elect their representatives in virtue of the exact content of these promises, leaving them with little to no discretion to move beyond their strict terms.[15]

Leaving aside the plausibility of this view of representation, the fact that representatives should follow the content of specific promises does not per se

mean that the subdelegation of legislative powers on the part of elected representatives to other actors necessarily amounts to the breaking of a promise. It all depends on the precise content of the representatives' promises and, in particular, on whether these promises have agent-specific content—they make reference to a specific agent as the exclusive agent who can fulfill the content of the promise. We then face the question of what representatives should promise as the citizens' entrusted agents. The answer to this question in turn depends on how we understand the legislators' official duties.

If we think, following John Rawls, that the "rational legislator is to vote his opinion as to which laws and policies best conform to principles of justice,"[16] then the legislator should promise only to choose among various laws and policies in light of what best conform to those principles. If justice turns out to be best realized by voting for statutes that delegate significant legislative powers to, say, administrative agencies or private actors, then this is what a legislator ought to do to keep his or her promise. Subdelegation, in this case, would not amount to a breach of a promise. Indeed, it may be a required means to fulfill the object of the trust, the content of which is set by independently identified principles of justice.

If, instead, one believes that legislators' decisions should not track preestablished principles of justice but rather should defer, as much as possible, to their constituents' actually held preferences, then what the representatives should promise is to make laws that track these preferences.[17] Whether subdelegation would amount to a betrayal of trust would then entirely depend on what the majority of citizens' actually held preferences entailed in a given society at a given moment. This contingent rationale would then be insufficient to support a generally applicable constitutional ban on delegation. Further, as a matter of empirical fact, in the context of contemporary administrative states, we neither (at least not often) hear representatives openly promising not to subdelegate certain decision-making powers to other bodies, nor do we witness citizens protesting or rebelling every time our representatives delegate important aspects of such powers to other agents, for example, executive agencies or even private actors. And whether such delegations are compatible or not with constitutional norms, and thus with the original act of entrustment, is itself subject to wide disagreement. Therefore, it remains unclear why subdelegation should be regarded as a breach of trust.

But perhaps the maxim "Delegata potestas non potest delegari" can be supported on other grounds. Consider James Kent's own understanding of the ground for nondelegation:

> The maxim is, that, *delegatus non potest delegare*, and the agency is generally a personal trust and confidence which cannot be delegated; for the principal employs the agent from the opinion which he has of his personal skill and integrity, and the latter has no right to turn his principal over to another, of whom he knows nothing.[18]

According to Kent, it seems, what explains why the entrustment of legislative power ought to be regarded as agent-specific and thus as banning subdelegations is the epistemic nature of reasonable trust: we can reasonably entrust things we care about only to people we know, for only a secure knowledge of their character can provide us with the confidence that they will act according to our own interests rather than exclusively their own. Subdelegation, especially to agents that are unknown to the principal, would then constitute a breach of a fiduciary relationship because it amounts to a betrayal of that epistemically grounded confidence.

Let us assume, with Kent, that it is generally reasonable for us to entrust important functions to others only when we have good reasons to trust them and that reasonable trust requires knowledge of the trustee's specific qualities and capacities.[19] Still, an appeal to reasonable trust, so understood, does not suffice to prove that legislative entrustment should be understood as exclusive, in an agent-specific sense.

For one thing, since we generally lack detailed and reliable information about our representatives' true character and personality, it is difficult, and perhaps even dangerous, for us to entrust them with any power primarily on the basis of confidence in their goodwill or character traits. Although judgment of their good character can and, I think, should play some role in our decisions, what matters most is our belief that were the goodwill of our representatives toward us to vanish, existing institutional mechanisms of accountability and responsiveness would direct them to keep doing what we have entrusted them to do. Yet, if this is correct, the mere fact that citizens know nothing about the particular character traits or skills of those to whom legislative discretion is subdelegated may not be a reason not to subdelegate that discretion in the first place, at least to the extent that those mechanisms of accountability that support our reliance on representatives also extend, whether directly or indirectly (through the representatives themselves), to those to whom the relevant discretion is subdelegated. Regardless, if we trust our representatives because of the qualities of judgment and integrity they exhibit, we should also trust that our representatives will be able to exercise

good judgment in choosing trustworthy subdelegates whenever necessary to more effectively fulfill the functions we have entrusted to them. After all, if I have good reasons to trust my surgeon because of his or her expertise, integrity, and goodwill toward patients, I will also have good reasons to trust that surgeon to judge whether to delegate some parts of the operation to others I might not know, whenever necessary or appropriate.

Because of all the above reasons, the fiduciary account seems unable to support a principle of nondelegation and, in turn, *ex ante* constitutional limits to privatization grounded on this principle.

The Contractualist Account of Nondelegation

It could be argued that a contractualist account provides a more plausible explanation for why representatives are under a duty not to delegate legislative power and regulative forms of discretion to other agents. Thomas Cooley, who in 1868 published the most influential legal treatise of his time—*A Treatise on the Constitutional Limitations*—referred directly to John Locke as the father of the principle of legislative nondelegation.[20] The following passage, from Locke, is often cited in support of this principle:

> This Legislative is not only the supreme power of the Commonwealth, but sacred and unalterable in the hands where the Community have once placed it; nor can any Edict of any Body else, in what Form soever conceived, or by what Power soever backed, have the force and obligation of a Law, which has not its Sanction from that Legislative, which the publick has chosen and appointed. For without this the Law could not have that, which is absolutely necessary to its being a Law, the consent of the Society, over whom no Body can have a power to make Laws, but by their own consent, and by Authority received from them. . . . The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it on to others.[21]

Like Story and Kent, Locke claims that delegated power cannot be further delegated. Yet, unlike Story and Kent, he gives centrality to the notion of consent rather than of trust. It is wrong for someone to delegate to others a power that has been delegated to him or her not because, or only because, this would violate a fiduciary duty but rather because this would violate the power holder's original consent.[22]

Does this consent-based account provide sufficient reasons in support of a principle of nondelegation? Simply understood, it clearly does not, for whether an act of subdelegation by an agent violates the consent of the principal entirely depends on what it is that the principal has consented to. I could in principle consent both to someone performing a function on my behalf and to that person doing so by subdelegating the performance of that function to others. So the question becomes, assuming for the sake of argument that it makes sense to talk about a people's actual, original consent to the ordering of their political society, what should we look at when determining the precise content of a people's consent?

One option is to look at intentions.[23] What did the people intend when signing the original social contract? According to Locke, they have intended to create a government that fulfills the commandments of natural law, including the protection of life, liberty, and property. Yet if the parties intend to secure certain purposes, and if this is ultimately why they consent to signing the original contract, then it is unclear why they would not also consent to the further delegation of legislative power if and when necessary to more efficiently secure those goals. More broadly, if political institutions are just means to achieve certain ends, then powers within any system of government ought to be distributed according to what is necessary to most effectively achieve those ends. This instrumental reasoning would seem to go against absolutist prohibitions against further delegations of decision-making powers.[24]

An alternative option is to treat consent as a communicative act. On this view, in order to determine what a person has consented to, we must look not only at his or her intentions but also at the content of what he or she has communicated.[25] What do the parties in the original social contract communicate? Locke imagines that the people consent only to rules made by the legislators they have appointed:

> We will submit to rules, and be govern'd by laws made by such Men, and in such Forms, no Body else can say other Men shall make Laws for them; nor can the people be bound by any Laws but such as are Enacted by those whom they have Chosen, and Authorized to make Laws for them.[26]

The well-known problem, however, is that most people have never actually communicated their consent to be governed in this way. But perhaps they have done so tacitly. As many have noticed, however, it can be dangerous to attribute tacit consent to citizens. The mere fact that a citizen does not protest a law or constitutional norm, or that the citizen doesn't leave his or her country,

cannot be taken as communication of assent because there could be many other reasons why the citizen failed to do either.[27] Yet, even if we assume, *arguendo*, that failure to take action entails consent, there are good empirical reasons to believe that the citizens of current societies do not tacitly consent to a doctrine of nondelegation. If anything, they consent to lift the restrictions of this doctrine. This is because, in most contemporary democratic administrative states, people elect representatives with the knowledge that the legislature will likely subdelegate important rule-making and legislative powers to executive agencies and even private actors. And again, we rarely see citizens protesting against such delegations. It is therefore unclear why we should regard citizens as consenting to transferring those powers to the legislature only conditionally on the latter respecting a strict principle of nondelegation.

Regardless, it is unclear whether Locke himself is committed to a principle of nondelegation after all. In a further passage of the *Second Treatise*, Locke makes a distinction between the power to "make Laws" and the power "to make Legislators":

> The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which *being only to make Laws, and not to make Legislators*, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands.[28]

This passage is sometimes read as supporting the nondelegation doctrine. Yet what Locke seems to argue is that the legislative, and only the legislative, must be the one who authorizes or sanctions all acts of laws, whoever makes them.[29] This is arguably compatible with the complete delegation of all exercises of legislative power except the initial authorization. For instance, if a legislative body decided to delegate to executive agencies or private actors the statutory authority to make tax laws or welfare policies—even if the legislative body refused to give the agencies detailed instructions—this could arguably not be objected to on Lockean grounds. Such delegations would amount to the transfer of lawmaking power (permissible) but not to the transfer of legislative offices (impermissible), for the ultimate authorization of law would remain with the legislature. This interpretation would seem to find support in Locke's previous claim that "nor can any Edict of any Body else . . . have the force and obligation of a Law, which has not its Sanction from that Legislative. . . . For without this the Law could not have that, which is absolutely necessary to its being a Law, the consent of the Society." Those who defend a principle of

nondelegation have tended to interpret this passage as meaning that the edicts of no body other than the legislative can ever qualify as law because they lack the sanction of the legislative.[30] But an alternative, and perhaps more plausible, reading is that the edicts of other bodies can qualify as law if and only if they receive the legislative's sanction.[31] On the latter interpretation, a Lockean argument does not provide an objection to the legislature delegating the power to make laws to other bodies, provided it is the legislature itself that ultimately authorizes, thereby sanctioning, this transfer of powers. The contractualist, Lockean account therefore also fails to firmly support a commitment to nondelegation.

The Separation-of-Powers Account of Nondelegation

A commitment to the separation of governmental powers (legislative, executive, and judiciary) is a third, and possibly the most plausible, ground for a principle of nondelegation. Indeed, the principle of nondelegation may seem logically implied by the one of separation: in order for powers to remain separate, it must be the case that the relevant bodies do not delegate their own powers to each other. But can a commitment to the separation of powers truly support a commitment to a principle of nondelegation, especially when it is delegation to private actors that is at stake?

According to one rationale, famously championed by Montesquieu, the separation of powers is necessary to prevent tyrannical monopolies of political power.[32] This rationale seems not to support a strict principle of nondelegation, since the latter is not necessary to prevent power accumulation.[33] At least in principle, the accumulation of political power by one branch may be prevented by all branches reciprocally delegating, within well-established constraints, some of their powers to each other rather than by strictly separating these powers. More importantly, the subdelegation of certain powers to private actors may be regarded as fostering rather than impairing the purpose of breaking monopolies of power by further dispersing certain powers across plural entities rather than concentrating them in the hands of government alone.[34]

A second rationale for separating powers is to protect the political process from private factional interests. William Paley and James Madison are among the best-known proponents of this rationale. Lawmaking power, according to Paley, should be exercised by Parliament alone mainly because "Parliament knows not the individuals upon whom its acts will operate."[35] Since, because

of this, Parliament has no incentives to serve private interests, "its resolutions will be suggested by the considerations of universal effects and tendencies, which always produce impartial, and commonly advantageous regulations."[36] In the *Federalist Papers*, Madison arrives at similar conclusions, arguing that legislative bodies that are sufficiently large so as to include representatives of many factions are the most effective protections against factions.[37] Some have worried that delegation of powers (especially of lawmaking power to executive agencies) undermines this second rationale, for "delegation radically reduces the membership of the entities that adopt rules" as well as "creates balkanization in which factions can avoid facing each other in one legislative process."[38] In particular, it is argued, executive agencies, owing to their small size, relatively homogeneous character, and long-term relationships with particular interests, are more prone to be captured by factions than legislative bodies.

The problem is that the empirical assumption that nonlegislative bodies are necessarily more prone to capture than legislative ones is unlikely to hold in the context of large modern administrative states and, in fact, is highly contested among political scientists.[39] Not only are nonlegislative bodies subject to a variety of constraints aimed at preventing partisanship, but also the costs of participating in nonlegislative proceedings are often significantly lower than the costs of participating in legislative proceedings, which may mean that a wider variety of interests are represented in agency policy making relative to legislative policy making.[40]

The third rationale for the separation of powers is government accountability. In this view, keeping powers separate, including by prohibiting subdelegations of such powers, helps citizens identify and hold accountable those who make the rules. This idea is appealing. But how exactly is accountability (and what kind of accountability are we talking about?) compromised by the subdelegation of legislative and other powers?

The main worry, as often stated, is that elected representatives have an incentive to delegate significant rule-making power to executive agencies or private actors so as to avoid responsibility for controversial policy decisions or undesirable outcomes. According to this view, a principle of nondelegation is thus a necessary means to make sure that representatives remain answerable for their actions and the outcomes these generate.

The problem, however, is that, at least from a normative perspective, the delegation of discretionary decision-making power is not incompatible with retention of responsibility (as answerability) for outcomes. Indeed, we generally retain final responsibility for the results of actions that we have

delegated to others. Therefore, a government could delegate most of its functions to other entities while still retaining outcomes responsibility and a duty to account for the decisions those entities make. Loss of accountability for outcomes may not then be a good reason to object to legislative delegation as such.

On a different view, the problem that delegation poses for accountability is not primarily about answerability for outcomes but rather about the extent of citizens' control over the actions and decisions of lawmakers. This is a more attractive way of posing the problem. However, as often presented, it faces a serious limitation: in a representative democracy, every exercise of lawmaking power is already an exercise of delegated power and thus entails some loss of control. The first delegation of power—from voters to representatives—is often justified by appealing to the complexities of modern states, or to the fact that these are too large for citizens to be able to deliberate on each and every issue, or to the condition that citizens lack the necessary time required by direct democracies, or to the need for special expertise in solving many of the problems characterizing contemporary societies, and so on. Yet these very same characteristics can be used to argue in favor of the further delegation of rulemaking powers from legislative bodies to nonlegislative ones, such as executive agencies, and also from the nonlegislative bodies to private actors. These latter acts of delegation, then, appear to be just further rings in a chain of delegation, started by the people themselves. Without further argumentation, the reason why we ought to uphold the first ring and accept the loss of control it entails while rejecting the further rings, or accept the first two and reject the third, remains unclear.

Finally, questions of accountability trigger important questions about the urgency of certain forms of *ex post* regulation but should be distinguished from questions of *ex ante* nondelegability. To illustrate, consider the case of the Halliburton company—a private oil services corporation that, during the Iraq war, was under a $6.5 billion contract with the US government to provide the military with a range of goods and services.[41] Halliburton committed fraud by overcharging $186 million for meals that they never served. During the investigation, the Department of Defense's inspector general found that 87 percent of the contracts under review were not under appropriate surveillance and that the performance of 43 percent of the contractors was left undocumented. This is a clear and striking case of an accountability deficit. Yet the mere fact that owing to this lack of monitoring and accountability a company like Halliburton ended up committing fraud does not certainly suffice to prove that the

delegation to this company of the function to provide meals was *ex ante* invalid. We may rather argue that what government should have done is delegate *and* regulate. Without further argumentation, the argument from accountability cannot be aptly regarded as an argument against delegation as such.

We may then be tempted to conclude, following some scholars, that "the nondelegation position lacks any foundation . . . in sound economic and political theory."[42] However, before uncritically accepting this radical conclusion, it is worth thinking harder as to whether political philosophy can offer other rationales in defense of the view that there should be *ex ante* constitutional limits to what can be validly delegated by a democratic government, and to whom.

Collective Nonalienation as the Ground of Nondelegation

As its powers are delegated by the people, a democratic government cannot enter into agreements with others that its principal, the people themselves, could not have validly entered into. This assumption can be grounded on the following moral principle:

> *The principle of authority transmission*: An agent (A) who acts on behalf of a principal (P) lacks the moral authority to enter into agreements with others that P him- or herself lacks the moral authority to enter into.[43]

We can lack the moral authority to enter into an agreement if and because (a) the agreement requires that we transfer to others rights and powers that we do not ourselves possess, or (b) the agreement requires the alienation or abdication of rights that we possess but that cannot be alienated or abdicated through the agreement.[44]

I believe that a plausible rationale for a (qualified) principle of nondelegation, and for constitutionally limiting privatization through it, can be found in the principle of authority transmission, as applied to the agency relation between a democratic government and its citizens. However, to defend this conclusion, a change of perspective is needed. Rather than focusing exclusively on isolated instances of delegation, we should look at privatization for what it actually is: an aggregation of many delegations that systematically transfer a variety of functions, responsibilities, and decision-making powers, including regulatory and legislative ones, from government to private actors. From this systemic perspective, we should then reconsider the very object of the

transfer: what, exactly, is being transferred by, or ceded through, the process as a whole?

I want to suggest that we should regard privatization as consisting in the abdication of the collective right to democratic self-rule, through the erosion of this right's minimal preconditions. I will then further argue that a democratic people lacks the moral authority to abdicate its own right to self-rule. In order to advance this claim, one needs to show how a practice that causally contributes to eroding the conditions of democratic self-rule can, under certain conditions, be regarded as being constitutively incompatible with that self-rule, indeed, an abdication of the right to self-rule.

By a "right to self-rule" I refer to a claim right held by the citizens of a democratic society, understood as a collective body, to democratically govern their own affairs, within the boundaries set by certain substantive constraints, free from external (unilateral) impositions. For reasons explained in chapter 2, this right, even if held by a collective, is ultimately derivative from the claims to equal freedom of individuals. This right is justified because only through collective democratic self-rule can the rights and duties of citizens be determined in a way that simultaneously and reciprocally respects both their equal normative authority and their independence.

In an attempt to define the minimal preconditions of self-rule, I shall start with a focus on individual self-rule to then draw implications for collective, democratic self-rule. Although analogizing individual and political self-rule can be controversial and can open up highly complex questions about both the notion of a collective will and the ontological status of a democratic people, for the purpose of this chapter I will maintain a level of generality on which many different understandings of the requirements of political self-rule should be able to converge.

Self-Rule and Its Preconditions

Asking what self-rule is not may help discover what it is. Someone who determines his or her choices and actions in light of norms or principles that he or she mimics from those around may be ruling, but that person is not *self*-ruling.[45] By contrast, someone who always follows his or her whims without reflection, whatever these may be, may express a sense of self in actions, but that person is not self-*ruling*. The self-ruling person is thus someone who judges which courses of action to take in light of considerations and norms

that are tested and ratified through a process of moral reflection and deliberation.

In order to retain self-rule, an agent must then be able to maintain higher-order control over the direction of his or her practical life. This necessitates a capacity for vigilance—being alert to signs that one's life course is deviating from what it should be according to the reasons one has.[46] Self-rule also entails the ability to engage from time to time in a thorough review and reassessment of one's chosen courses of action. This further requires deliberative and epistemic capacities, including the ability to maintain one's own reflective capacities, to survey alternative courses of actions, and to access, gather, and critically assess relevant information on the course of our own actions and their consequences whenever necessary. It also requires a directive capacity: the willingness and ability to act as one has decided one ought to—to ensure that whoever is acting for us is acting in accordance with our directions.

On the basis of this admittedly broad account of self-rule and its conditions, what does it take to "abdicate" one's self-rule? Insofar as to self-rule is to act in accordance with one's reflective moral judgment, then to abdicate self-rule can mean one of these two things: either (1) to bind oneself to obey someone else regardless of one's own critically reflective moral judgment (e.g., entering a slavery agreement, thereby binding oneself to follow a master's orders regardless of their content) or (2) to bind oneself to a condition in which critically reflective moral judgment is rendered impossible or undermined to the point at which the only available choice is to obey someone else.[47]

To clarify, we do many things that may, in the aggregate, causally erode our capacity for self-rule. For example, drinking too much, failing to read books, watching bad TV, and being isolated may, cumulatively and in the long run, erode our deliberative, epistemic, and directive capacities. However, we would not want to say that every time we are acting in this way we are "abdicating" our self-rule, let alone our right to self-rule. While signing a contract of self-enslavement is constitutively incompatible with our self-rule, and indeed an abdication of it, acting in a way that causally contributes to the erosion of the conditions of self-rule is not constitutively incompatible with it, nor can it generally be regarded as an abdication of it. The distinction between constitutive violation and causal erosion should not, however, be exaggerated. Suppose, for example, that I face the choice to take an addictive pill that would make me permanently drunk for the rest of my life with no, or very low, possibility to stop in case I change my mind. There is little reason, I think, to regard the decision to take the pill as relevantly different from the decision of

self-enslavement. If the latter constitutes an instance of abdication of self-rule, so does the former.

Further, we can assume that having the capacity for self-rule, up to a threshold, as distinct from actually exercising that capacity, is necessary for having a conclusive right claim to self-rule—a right that imposes *pro tanto* duties on others not to interfere with one's self-rule.[48] This is why the severely mentally impaired, lacking the basic capacity for self-rule, can be permissibly placed under the guardianship of others without their consent. It follows that binding oneself to a condition in which one's capacity to function as a self-ruling agent is severely and irreparably undermined, like in the case of the addictive pill, can be regarded as tantamount to abdicating one's right to self-rule.

Importantly, for a choice or agreement to be regarded as consisting in the abdication of one's right to self-rule and thus as invalid (assuming for the moment that the right to self-rule cannot be so abdicated), it is not necessary that the loss of the relevant capacity for self-rule, as a consequence of signing the agreement, be certain. High likelihood is sufficient. Consider, again, the case in which an agent agrees to take an addictive pill that *could* make him or her permanently and irrevocably drunk. Suppose that the chances that the pill will have such effects are extremely high (99.9999 percent) but do not amount to certainty. Assuming the agent's full knowledge of the risk and probabilities, we could reasonably say that in this case taking the pill amounts to the agent agreeing to abdicate his or her capacity for self-rule.[49] If retaining this capacity, up to a threshold, is necessary to retain a conclusive right to self-rule, and if this right (by assumption) cannot be validly abdicated, then the agreement to take the pill should be regarded as invalid. Now suppose that, by contrast, the chances are extremely low (0.00001 percent); in this case, we would say that taking the pill amounts to none of the above. To set a precise threshold of probabilities may be difficult, but it is for our purpose unnecessary. All we need to agree on is that agreeing to binding ourselves to a condition in which losing the minimal capacity for self-rule is highly likely should be regarded as invalid, if we assume that the right to self-rule cannot be validly abdicated.

Although in paradigmatic cases of (arguably) invalid agreements—for example, the agreement to become someone else's slave—the abdication of one's self-rule is itself a demand of the agreement, not merely an expected consequence or side effect of it, this is not necessary to invalidate an agreement. For example, if you ask me to take an addictive pill that you know has the foreseeable and highly likely consequence of making me permanently and irreversibly drunk, it is not unreasonable to understand your request as containing not

only a demand that I take the pill but also a demand that I abdicate my self-rule.

When we move to the political level, similar considerations with regard to the relationship between capacities and rights extend to the idea and practice of democratic self-rule. Let me explain. Even those who endorse a fairly minimalist account of democratic self-rule, that is, as compatible with majority rule and as requiring limited direct participation of citizens in political decisions, would agree that there cannot be democratic self-rule when a people lacks, or is deprived of, the capacity for vigilance, as well as certain deliberative, epistemic, and directive capacities. Take, for example, the neorepublican account of democratic self-rule, as recently developed by Philip Pettit. According to this influential account, and partly in line with the Kantian justification for democracy I defended in chapter 2, a claim to collective, democratic self-rule is grounded on an individual's claim not to be subject to anybody else's alien will, rather than on the more demanding claim of being fully self-mastering.[50] It follows an account of the conditions of democratic self-rule that is fairly minimal. What collective self-rule requires, according to Pettit, is not that each and every piece of legislation perfectly tracks the actual will of each and every citizen but rather that the people share equally in controlling the laws and policies imposed by their government.[51] Equal share in the joint control of government necessarily requires neither citizens' active influence in the form of direct participation nor their equal influence. Reserve influence and equal access to the system of influence—equal opportunities for political influence—may be enough.[52] To illustrate the difference between active and reserve influence with an example provided by Pettit himself: if I directly and continuously steer a horse in my chosen direction, I am making sure that the horse tracks my will through active influence.[53] But I can also make sure that the horse tracks my will by letting it goes wherever it pleases, as long as I retain the disposition and capacity to change its direction should its own wishes stop aligning with my will. This is an exercise of reserve influence.

Even according to this fairly minimalist account, then, democratic self-rule, precisely like individual self-rule, requires a capacity for effective vigilance by the citizens. In Pettit's words, "the control of the people over government is grounded in a disposition of the people to raise up in the face of a government abuse of legitimacy."[54] Vigilance in turn demands not simply a certain disposition, being alert rather than apathetic, but also certain distinctive epistemic and directive capacities. Citizens, even if not continuously active, must know

where their proverbial horse, that is, government and its agents, is going—must be able both to track its actions and to effectively change the direction of those actions if and when deemed necessary.

Further, there can be no self-rule if the rule is not imposed by a self to begin with. Yet, in a context where people have different interests and will different things, political self-rule cannot demand that at every point in time every citizen be subject to rules that perfectly track his or her own individual will. Rather, political self-rule must be understood as requiring that laws and policies track a will that can be regarded as the people's shared will. This will may not correspond to any individual's particular will. However, the notion of a shared will entails, at minimum, that the people themselves share equally in the authority and opportunities to determine the outcomes of their joint action (I further clarify the notion of a shared will in chapter 6). Take Pettit's example of a group of people jointly pushing a large billiard ball.[55] If all the members of the group are given the same right to push the ball and an equal opportunity to exercise the same traction on it, then we can say that they share equally in determining the outcome of their joint influence on the ball's movement. As long as the ball follows a direction that is collectively determined by people's respective choices as to whether to exercise their equal right to push the ball and take advantage of their equal opportunities to exercise traction, no member of the group will be able to object to being subject to an alien will, just because the ball does not follow, in this occasion, his or her favorite direction. This is true also if some people freely decide not to push the ball. Not pushing, under conditions of equal authority and opportunity, and only under these conditions, can be reasonably regarded as a contribution to the final outcome. Similarly, under an electoral system, insofar as every citizen has the same right to vote and equal opportunities to influence the electoral process, and votes are aggregated in a way that privileges no voter, then they will all share equally over the direction of government. Also in this case, even if the resulting laws and policies do not perfectly track each and every citizen's wishes at all times, no one could object to being forced to comply with an alien will. This is why roughly equal opportunities to influence the political process is crucial for democratic self-rule, even according to a fairly minimalistic understanding of its demands.

This, I take it, is an account of the preconditions of self-rule that many democratic theorists would judge as too minimalistic. Those who believe that self-rule also requires more continuous and direct forms of participation or

influence are welcome to add extra conditions on top of these.[56] Yet if my considerations apply to a minimalist (albeit practically demanding) view of the conditions of democratic self-rule, they will a fortiori apply to a more demanding one.

Like in the individual case, also in the political case, the right to self-rule presupposes the maintenance of certain preconditions.[57] Further, also in the political case, the abdication of the right to self-rule can take two forms: (1) a people voluntarily binding itself to obey something else (i.e., a tyrant or colonial power), the direction of which cannot be controlled by the people itself, or (2) a people binding itself to a condition in which the preconditions of self-rule are impossible or undermined to the point that the only available choice is to obey someone else. In the political case, this latter condition would be one in which (i) the people's directive control of government, (ii) their capacity for civic vigilance, or (iii) their equal opportunities for political influence are seriously compromised.

We should now turn to the question of whether a democratic people should be regarded as having the moral authority to abdicate its capacity for self-rule, or whether, instead, this abdication ought to be regarded as invalid.

Can Collective Self-Rule Be Validly Abdicated?

A democratic people, I believe, generally lacks the moral authority to abdicate its capacity for (collective) self-rule, and this is so whether we think individuals also lack this authority or not.[58] The main reason for this directly emerges from the Kantian justification of the democratic state that we introduced in chapter 2. The general idea is this: a collective agent's claim to self-rule is ultimately derivative from the claims of the individuals who compose it. Individuals' claims to live under appropriately functioning democratic institutions are grounded in their right to equal freedom. Individuals, as we saw, have a natural duty of justice to exit the state of nature and to bring about and preserve collective democratic institutions, for only these institutions can establish a relationship of reciprocal independence between subjects while securing respect for their equal normative authority. The people, understood as a collective entity that is both constituted by, and subject to, those institutions, cannot then claim a right to democratically decide to abdicate their collective capacity for democratic self-rule, for this abdication would be incompatible both with the duties of justice of its members and with the reasons that ground the authority of their democratic institutions in the first place.

It could be objected that such view has implausible implications. Suppose, for example, that a people votes, in a referendum, to dissolve its own existence as a self-ruling entity, merging into another state. Would this be beyond their authority? Or suppose that a state allows a referendum within a province to allow the province to decide whether it wants to secede. Would this decision be invalid? My argument for the nonalienability of collective democratic self-rule does not commit one to rule out these decisions as invalid. This is for at least two reasons. First, in cases where democratic institutions systematically fail to secure minimal conditions of equal freedom for certain minority groups or de facto disenfranchise them, the very reasons that support the authority of their democratic system and bind its subjects to uphold collective self-rule lose normative force. Second, a group's decision to secede is not the same as the people's decision to alienate their right to self-rule. It is rather a decision to reconstitute the boundaries of the people (the self) that is meant to do the ruling. A minority group may, under certain conditions, have a right to exit a certain juridical and political relationship with a majority group, that is, a right to cease to be a part of a certain people.[59] What the minority group has no right to do is to remain in that juridical and political relationship while working to undermine the self-rule of the collective it currently belongs to. While the latter option would violate the members of the collective's claims to equal freedom, exit would end the very relationship that triggers the necessity of reconciling competing claims to freedom in the first place. This, of course, does not mean that secession is always justified. It simply means that it is not necessarily ruled out as invalid by a principle of collective nonalienation.

Now, if it is true that a people lacks the moral authority to abdicate their basic capacity for self-rule, then they also lack the power to transfer that authority to others, including their representatives. Assuming the validity of the principle of authority transmission, we then arrive at the following principle:

> *Principle of collective nonalienation*: a democratic government lacks the moral authority to pass either laws or policies that, whether individually or aggregatively, amount to the abdication of its citizens' basic capacity for democratic self-rule.

It follows that, if it can be proved that the transfer of certain powers and functions from government to private actors amounts to an abdication of the basic capacity for collective self-rule, then such a transfer should be *ex ante* ruled out as invalid and nonbinding.

Privatization as Abdication of the Capacity for Collective Self-Rule

Does it make sense to regard privatization as consisting in the abdication of the basic conditions of democratic self-rule? This question can be answered only by analyzing a complex set of empirical facts. Building on recent literature on the effects of systematic outsourcing, we can uncover at least three robust causal mechanisms through which privatization distinctively undermines the three fundamental preconditions of self-rule, namely (1) directive control, (2) civic vigilance, and (3) equal opportunities for political influence. I will examine these mechanisms in turn. Although these considerations are, qua empirical facts, contingent, they are robust. A robust contingency, as I explained in previous chapters, is not simply coincidental and cannot be easily eliminated or changed through regulation. It is rather the result of an arrangement's internal logic or dynamic, and, as such, it is difficult, if not impossible, to overcome it without eliminating the arrangement itself. Further, and importantly, some of the above causal mechanisms derive from certain features that, as we argued in chapter 3, constitutively differentiate private actors from public offices, including the former's (i) free purposiveness (their capacity to form and pursue comprehensive ends); their (ii) interest, as grounded on that free purposiveness, in associational autonomy; and their (iii) private ownership of resources.

Privatization and the Loss of Government's Directive Control

We saw that democratic self-rule requires, even in its fairly minimal form, a specific and dual form of directive control: the ability to track the direction of actions done in our name and to assess whether that direction corresponds to our preferred one (epistemic control), as well as the ability to change that direction if necessary (practical control).

In order to see how privatization, especially when expansive in scope, distinctively undermines these conditions, we first need to reconstruct both the logic and the phenomenology of privatization. Privatization, as we saw, does not amount to the withdrawal of government. It rather amounts to a transformation of the practice of governing. By contracting out a series of functions to private actors, democratic governments aim at once to improve both efficiency and flexibility while saving costs, and to compensate for a lack of specific capacities to respond to new situations. This is, in a nutshell, the prima facie case for privatization.

This very rationale, however, generates a well-documented problem: if government lacks the capacity to directly perform certain functions or to do so efficiently, it will also likely lack sufficient capacity to coordinate, plan, oversee, and regulate those to whom those functions are delegated, and to do so efficiently.[60] This problem is made more acute by the fact that the more a government privatizes, the more difficult it becomes for it to control its myriad agents. Take, as an example, the progressive expansion of contracting in the US military during the first decade of the twenty-first century. The Department of Defense's contracting budget increased by more than 100 percent between 2000 and 2005. This expansion led to a situation in which public officials did not even know, and were not able to easily find out, how many private contractors, often transnational corporations, were working for the military.[61] The problem with epistemic control becomes even more complex if we take into account the further fact that the higher the number of private contractors, the higher the likelihood of a "brain drain" from government to the private sector.[62] After all, if government agencies privatize to save costs, it would be self-defeating to then spend resources to raise the salaries of its employees so as to match those of private firms and corporations. So the motivations that make privatization prima facie publicly justifiable are the very same features—costs saving and lack of capacity—that prevent government from effectively maintaining the capacity to supervise its new delegates. What then? In order to overcome this deficit, governments must outsource the very function of overseeing those outsourced activities. It is not surprising, for example, that the US Department of Defense now contracts out to private actors much of its responsibility for oversight. These actors are not even themselves directly subject to the oversight of military authority, but, even if they were, a control deficit would likely remain. This is because, as Paul Verkuil provocatively puts it, "if government does not have adequate personnel to oversee its outsourcing it does not have adequate personnel to read the reports on outsourcing submitted by its private overseers."[63] Therefore, the more government outsources, the less capacity it is likely to retain to gather basic information about performance, costs, and outcomes, and thus to choose competent delegates as well as to enforce contractual terms. Basic numbers, together with basic assumptions about the limits of human capacities, reinforce this point. Consider this striking figure: while federal spending in the United States increased very significantly between 1960 and the first decade of the twenty-first century, the number of civilian workers remained more or less unchanged (see figure 4.1). Who was then supposed to monitor and supervise the also significantly higher

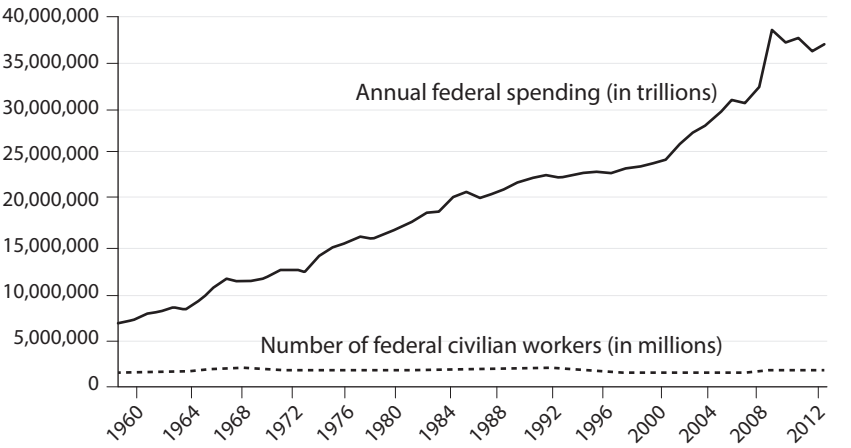

FIGURE 4.1. Graph depicting the relationship between the number of federal civilian workers and annual federal spending between 1960 and 2012. *Source*: Data from National Bureau of Economic Research / Office of Management and Budget. Published in "The Rise and Fall of the U.S. Government" by John J. Dilulio Jr., *Washington Monthly*, January/February 2015, https://washingtonmonthly.com/magazine/janfeb-2015/the-rise-and-fall-of-the-u-s-government/.

number of proxies (about 40 percent of the workforce employed by the US government) who were required to manage that spending?

When eleven thousand officials are left with the responsibility to supervise and control over twelve million contractors, it is unclear how they can accomplish their task.

To make things even worse, the less government officials perform the relevant functions themselves, the more they lose the ability to actually perform those functions. They become dependent on private actors. This in turn provides further incentives to keep delegating political power to private actors. The chain of delegation then becomes a vicious circle, each delegation making the following one ever more necessary. The more power is delegated, the harder it becomes to take it back and thus to reverse previously made choices. If a lack of relevant capacities and information drives the delegation process, it can also make it very difficult, if not impossible, for the government to regain control over its own functions. In this way, not only government officials, but also the people who are represented by those officials, progressively lose both epistemic and practical control over the exercise of political functions and annexed powers. They become unable to exercise even the more passive form of control—reserve influence.

Although these considerations do not and are not meant to support the far too strong claim that privatization is inherently incompatible with democratic control, they also do not limit themselves to support only the far too quick claim that privatization is merely coincidentally incompatible with such control. Rather, the very internal logic of, and justification for, privatization explains why loss of democratic control is a foreseeable and persistent effect of privatizing governance. It also explains why increased regulation is an insufficient remedy for the problem. Close oversight and tight regulation tend to contradict, thereby nullifying, the original rationale of privatization itself: compensating for lack of state capacities, saving costs, and curbing the dominating aspects of bureaucratic red tape. As law scholar Jon Michaels forcefully explains, privatization achieves these purposes by "swapping out heavily regulated and duty-bound civil servants for less regulated (and therefore more pliable) private contractors expected to advance the administration's agenda in a far more expeditious fashion."[64] Therefore, privatization and the chain of delegations it sets in motion—the political equivalent of the addictive pill in our previous example—progressively and unavoidably undermine a democratic government's directive capacities by undermining both its practical and its epistemic control over its agents.

Privatization and the Loss of Citizens' Civic Vigilance

But what about the effects of privatization on citizens' ability to remain vigilant? Civic vigilance is a disposition that has both an epistemic and an affective (motivational) component. On the epistemic side, being vigilant is being cognitively alert to the possibility of abuses. This in turn requires that abuses be detectable and knowable. On the affective side, vigilance is a form of caring about one's surroundings. This is what makes a state of vigilance different from the mere state of being awake. I can be awake without paying attention, and paying attention requires a form of caring, a disposition to ascribe salience to the things that surround us. If I don't care about what's happening around me, why should I be vigilant?

Privatization is often championed as a cure for the kind of apathy that burdensome bureaucratic rules supposedly generate. There are, however, important reasons to believe that, far from being a cure for apathy, privatization poses a distinctive threat to citizens' civic vigilance.

One reason is that privatization, especially when expansive, makes abuses much less detectable. In principle this reason does not apply only to

privatization but also to processes of outsourcing in general. However, the fact that private actors, unlike civil servants, tend to have stronger claims (grounded on their preexisting right to freedom of association and organizational autonomy), against intrusive forms of interference and regulation; generally act outside of tight administrative procedures so as to maintain flexibility and efficiency; and, qua private corporations, can operate across multiple jurisdictions makes privatization particularly pernicious in this respect. As Jody Freeman and Martha Minow observe: "Outsourcing impairs the visibility necessary to check for such abuses [like waste and fraud], because private companies control info about cost, performance, and other vital data that otherwise would be open to review by government agencies."[65] This lack of visibility is also a direct and foreseeable consequence of the loss of epistemic control analyzed above. The longer and fuzzier the chain of delegations, the harder it is to find out what is happening in the process of government administration. This poses a problem. The harder it is for citizens to find out what happens, the more they should be vigilant but will, at the same time, be less inclined to be vigilant. For one thing, if a citizen cannot see that something is wrong, that citizen will take him- or herself to have little reason for vigilance. Further, the harder it is to find information about abuses, the more demanding that citizen's exercise of vigilance will be. Generalized across a polity, therefore, pervasive privatization, as one scholar explains, "contribute[s] to civic disengagement, including ignorance of public affairs, disenchantment with government and political apathy."[66]

But there is also a second avenue—both more interesting and distinctive—through which privatization promotes civic apathy. Privatization hides the face of government. It occludes the role of government behind myriad market and charitable actors through which the government comes to provide goods and services to its citizens. In this sense, privatization contributes to what Suzanne Mettler has aptly called the "submerged state."[67] "The policies of the submerged state"—Mettler explains—"remain largely invisible. . . . Even when people stare directly at these policies, many perceive only a freely functioning market system at work." This in turn "leav[es] citizens unaware of how power operates, unable to form meaningful opinions, and incapable, therefore, of voicing their views accordingly."[68]

The effects of privatized governance on vigilance are not limited to epistemic ones—making people unaware or generating false beliefs. The way public affairs are administered, and by whom, also impacts the affective dimension of vigilance. This is partly a consequence of the fact that private organizations' symbolic identity visibly differs from the one of public entities. Insofar as,

unlike public entities, they are both owned and funded by particular individuals and have free purposiveness—the ability to pursue particular conceptions of the good—private organizations often exhibit visible signs of connection with particular persons or particular comprehensive purposes. These signs can include religious symbols (e.g., crucifixes on the wall of nonprofit Catholic hospitals); plaques in honor of donors or investors; or being named after particular families or ideological commitments. It follows that, in a privatized state, even if it is the government that funds many of the goods that citizens receive from private agents, citizens receive and experience these goods qua members or as clients of private associations, with their particular symbolic identity. Yet, when people do not see their own government as the main provider of the benefits they receive, they see little reason to care about their government and thus to actively participate in politics.[69] It follows that, in contexts where "the face" of government is largely privatized, citizens' affective interest in politics, including the urge to ensure their government's accountability through continuous vigilance, tends (as the empirical literature on the submerged state confirms) to diminish, and civic apathy to grow.

One could object that these concerns can easily be overcome by rendering private actors more impersonal, akin to public entities. Nothing in principle prevents a government from making delegation contracts conditional on private actors' willingness to assume a public, impersonal face, by getting rid of their particular symbols. There are, however, several problems with this solution. First, systematic privatization accompanied by this kind of regulation would come with serious costs for the pluralism of associational life and for associative independence (I will further examine the nature and moral relevance of these costs in chapter 8). Second, private associations, unlike public offices, have a weighty interest in organizational autonomy that directly derives from their free purposiveness. This is an interest in controlling and shaping, to some extent, their own internal structure according to their own independent pursuits and commitments. This interest in organizational autonomy, in turn, sets limits to what contractual offers it may be *ex ante* rational for a private entity to accept. For example, it may no longer be rational for private organizations to accept a government's contractual offers if the latter were made conditional on the recipients accepting heavy constraints on their organizational autonomy and ability to express their conceptions of the good, for the independent pursuit of such conceptions of the good is often the very raison d'être (or at least one of them) of those organizations. Third, if free purposiveness is what, among other things, constitutively distinguishes a

private association from a public office, it becomes unclear to what extent we could still meaningfully talk about "private" actors as relevantly different from public ones if we extended to them the same requirements of bureaucratic impersonality that apply to public entities. We thus face a situation in which doing what would be required to render privatization compatible with the conditions of democratic self-rule (civic vigilance in this case) either would defeat the very rationale for privatization or would blur to the point of disappearance the distinction between public and private entities that makes privatization conceptually possible in the first place.

Privatization and Unequal Opportunities for Political Influence

What about the third condition of democratic self-rule: equal opportunity for political influence? There are many different ways in which this principle can be undermined, yet the most obvious and powerful way, especially in societies characterized by an unequal distribution of economic resources, is through the conversion of such resources into political influence. Privatization increases the conversion rate by providing wealthy private firms and corporations with incentives to direct a large amount of their private resources into politics, thereby also contributing to institutional corruption, understood as a process through which forms of improper, although not necessarily unlawful, influence ultimately render political institutions unable to fulfill their purpose.[70]

As Freeman and Minow point out, "private contractors that gain so much from the federal contracting regime . . . currently spend considerable resources on lobbying and advocacy"[71] so as to make sure that the contracting regime continues. Were that contracting regime absent, private firms and corporations would have much less prudential and self-interested reasons to keep pouring money into the political process.

Four aspects of this phenomenon are worth noticing. First, regulations on campaign finance or a system of public funding for elections could mitigate such concerns but would not eliminate them. One reason is that these regulations would likely only constrain direct contributions to political parties, while leaving unconstrained more indirect means of influence, the reason being that constraints on the latter kind of activities would likely infringe on rights of political expression.

Second, what makes public officials increasingly dependent on the wishes of private actors is their dependence not simply on the latter's material

resources but also on their immaterial assets, such as knowledge and information. In the words of Henry Farrell, "as more aspects of the economy are privatized, it becomes easier for actors who might benefit from privatization to press the state to make further concessions. As states become more reliant on the private sector for information and resources, they become more inclined to acquiesce to the demands of private actors."[72] Privatization thus creates a condition of background dependence that makes exercises of undue economic influence particularly likely to succeed.

Third, and crucially, although public agencies can obviously also be subject to capture by particular interests, it is a distinctive and constitutive feature of a public office, beyond the lack of free purposiveness, that the officeholder, unlike a private actor, does not own property that he or she can discretionally use or spend. As we saw in chapter 3, civil servants are bound by what Allen Buchanan calls "the principle of stewardship," which serves "to impress upon the bureaucrat that the resources she controls are not her property but rather are owned by others for whom she serves as trustor or steward."[73] While bureaucrats, in their public capacity, can and do manage state resources, they should not have discretionary control over public property with which to influence the political process. A bureaucrat working for the public park agency cannot sell or leverage public land to raise resources to influence the political process. This means that, in the case of private, for-profit corporations, unlike in the case of public bureaucracies, ownership of resources (and information), together with an incentive to maximize profit and survive in a competitive market, can be more easily translated into an instrument of exploitation. Here government, for once, is the exploited rather than the exploiter. The private actor can get government to do what, counterfactually, government would not otherwise do, by threatening to withdraw relevant resources, services, and information in exchange for certain concessions, thereby taking advantage of the government's vulnerability for its own self-enrichment.

These facts show how privatization, beyond posing threats to both directive control and civic vigilance, distinctively undermines fair equality of opportunity for political influence. It is the free purposiveness of private actors, and their interest in associative autonomy, as well as their discretionary ownership rights and particular set of economic incentives, that ultimately explain why privatization represents a powerful and distinctive threat to the preconditions of democratic self-rule.

My claim, to be sure, is not that all existing privatized governments, as a matter of comparative empirical analysis, fare worse than existing nonprivatized

governments in preserving civic vigilance and directive control, or fair equality of political opportunity. Indeed, widely corrupted or captured nonprivatized governments may fare worse, all things considered, than noncorrupted privatized ones (although, as we saw, privatization is itself a potential and powerful source of institutional corruption and capture). My claim is rather that, even assuming the absence of widespread corruption, a privatized government, owing to certain distinctive features that normatively differentiate private from public actors, poses a distinctive set of threats to the preconditions of democratic self-rule. In other words, while the corrosion of self-rule can certainly result from the corruption of public government, this same corrosion is endemic to privatized government and its logic, even in its noncorrupted form.

But what are the normative implications of these findings for how we should understand the principle of nondelegation?

The Principle of Nondelegation Revisited

The fact that an agreement is likely to have bad outcomes is generally not sufficient to invalidate it. At most, it seems, bad expected outcomes might make an agreement morally unjustified, depending on the overall balance of considerations. Similarly, it seems that the fact that privatization is likely to have certain bad outcomes cannot suffice to render the choice to privatize invalid and to justify *ex ante* constitutional constraints on privatization. The question should then perhaps be reduced to how to balance different competing values, for example, efficiency versus civic vigilance, and to decide on that basis what a government can permissibly do.

I believe this conclusion would be mistaken, for it neglects the fact that outcomes might matter for different reasons and in different ways. On the one hand, we could just say that privatization is bad and ought to be avoided because it causes bad outcomes. On the other hand, however, this would ignore the possibility of a more fundamental claim: insofar as privatization is highly likely, and robustly so, to cause a very specific set of bad outcomes, which amount to a loss of the collective capacity for democratic self-rule, and insofar as the capacity for self-rule is, up to a threshold, a necessary precondition for claiming a right to self-rule, then privatization amounts to an abdication of such right, through the abdication of its preconditions.

So understood, a people's choice (through its government) to privatize beyond a certain threshold is, in relevant respects, similar to an individual's

agreement to take an addictive pill that will foreseeably make him or her seriously drunk, and from whose effects it is very difficult, if not impossible, to recover. Insofar as taking the pill would amount to an abdication of the individual's right to self-rule, and assuming that the individual lacks the moral power to so abdicate this right, the agreement should be considered invalid, that is to say, nonbinding. Similarly, insofar as systematic privatization amounts to a people's abdication of the right to democratic self-rule—a right that cannot be so abdicated—a democratic people lacks the moral power to decide to privatize. Importantly, according to the principle of authority transmission, government, as the agent of the people, lacks the moral authority to do what the people lack the moral authority to do themselves. From this, an important implication follows: privatization, when systematic, is not simply bad and, at least *pro tanto*, impermissible, but also unauthorized. It consists in an invalid agreement (or an invalid set of agreements, jointly taken) through which government attempts to abdicate a collective right that cannot be so abdicated.

This in turn means that many democratically authorized delegations of public functions and powers to private actors, which, if taken seriatim, may be valid, lose their authorizing power when regarded as both contributive and constitutive elements of an overall policy of privatization through which democratic self-rule is abdicated. Systematic privatization thus violates the principle of collective nonalienation.

But, of course, one may object that, like in the case of other problems of many hands, in the case of privatization, one cannot say that a specific act of delegation, taken in isolation, has caused any particular loss of collective capacity for self-rule. One can say only that the aggregation of many acts of delegation causes a particular loss. Therefore, it could be argued, no particular instance of privatization can or should be regarded as *ex ante* invalid, and thus as lacking authorizing force.

In order to answer this objection in a way that also clarifies how we should think about the relevant threshold beyond which delegations of political power to private actors become fundamentally problematic, we may consider an analogy, famously used by Peter Singer in the context of climate change, which is a paradigmatic case of a problem of many hands.[74]

Singer encourages us to think of the atmosphere as a giant sink into which we pour our waste. At first, the wastes (carbon emissions in Singer's analogy, and instances of privatization in my analogy) disappear and have no adverse impact on any of us, so no one worries about it. Then conditions change so that the sink's capacity to process our wastes is used up to the full and so that

there is already some unpleasant seepage that clearly indicates that the sink is being used too much. At this point, when we continue to throw our usual wastes down the sink, our right to unchecked waste disposal becomes impossible to justify. For the sink belongs to us all in common, and by using it without restriction now, we are depriving others of their right to use the sink without bringing about results that none of us wants or is authorized to produce.

We should think of a society's capacity for collective self-rule along similar lines. Like the atmosphere, a democratic society's capacity for collective self-rule is an indivisible good from which everyone benefits (i.e., from which everyone's equal freedom depends) and to the preservation of which every democratic citizen has an equal claim. Like in the case of the sink, in the case of the capacity for collective self-rule, a few delegations of public powers and functions to private actors here and there may (arguably) be easily constrained through regulation so as to avoid a loss of directive control; to this level, privatization may not hide government action to the point of rendering it invisible to the citizenry and may not incentivize the pouring of large amounts of money into the public sphere. Yet once the capacity for collective self-rule starts becoming incapable of absorbing the effects of such delegations—that is, when directive control is weakened, when civic apathy grows, and when opportunities for political influence become increasingly unequal—then it becomes impossible to justify any further usage of such capacity, which is a collective and indivisible asset, and to claim that we have a right to such usage, insofar as there is no right to collective self-alienation. An act of delegation becomes invalid, then, at the point at which there are clear initial signs that the capacity for collective self-rule is being put under strains.

We can gain two further insights by thinking about privatization along the lines of climate change. First, like in the case of individual carbon emissions, there may be nothing fundamentally problematic with individual instances of privatization before a certain threshold is reached. Yet, once the risk of self-rule abdication becomes sufficiently likely, then each instance of privatization may become morally wrong, and morally wrong independently of the particular nature of the privatized function. Second, in the same way in which, in the case of carbon emissions, strategies of compensation (e.g., planting trees) are generally insufficient to offset the harm caused by continuing to emit, in the case of privatization, compensatory strategies such as *ex post* close regulation or oversight are, for the reasons explained, insufficient to offset the threat that privatization poses to democratic self-rule. Stopping privatization is then, like stopping emissions, the morally required solution.

This analysis has quite radical implications for many societies in the age of neoliberalism, where, as some of the empirical evidence mentioned above suggests, privatization has already affected the preconditions of democratic self-rule. If my analysis is correct, in these societies, further attempts to privatize ought to be regarded as unconstitutional because they are in violation of a principle of nondelegation. This is particularly true of delegations of public functions to private actors that, whatever their specific content, further contribute to citizens' (a) loss of democratic directive control over policy making and the exercise of coercive power, by diffusing and hiding the exercise of this power; (b) loss of civic vigilance, by obfuscating the role of government in the provision of justice-required benefits; and (c) unequal opportunities for political influence, by increasing the conversion rate of economic inequalities into political influence.

The reason for constitutionally limiting privatization should be clear. Preventing a government from doing what it has no authority to do—entering into agreements that bind its people to a condition in which the exercise of self-rule is impossible or undermined to the point at which the only available choice is to obey someone else—should be regarded as a fundamental matter of legitimacy. Constitutional limits should apply to a wide range of privatizations, including of regulatory functions (which involve lawmaking), of prisons and military forces (both of which involve the direct exercise of coercion), and of the provision of welfare services (the implementation of which necessarily involves policy-making functions and the privatization of which further hides the role of government in the provision of justice). A principle of nondelegation, as grounded on a principle of collective nonalienation, should be regarded as ruling out further delegations of such functions as lacking the very power of authorization they purport to have.

It might be thought that an aggregative rationale is an unworkable ground for constitutional limits. After all, we generally think of constitutional constraints in terms of the protection of individual basic rights, not in terms of the prevention of ills that may result from the aggregation of myriad actions. Yet this way of understanding the appropriate functioning of constitutional reasoning is, I think, too restrictive. Indeed, aggregative considerations are not foreign to the reasoning of many constitutional courts. Just to take an example, in a recent case on campaign finance, the US Supreme Court has held that limits on the corrosive effects of financial contributions to political campaigns, when considered in aggregation, are justified by the compelling governmental interests in "preserving the integrity of the electoral process, preventing

corruption, . . . sustaining the active, alert responsibility of the individual citizen in a democracy for the wise conduct of the government," and maintaining "the individual citizen's confidence in government." Limits on privatization should be, according to my argument, similarly justified on aggregative grounds.[75]

If my reasoning is correct, more far-reaching implications follow. When governments keep privatizing important public powers and functions to the point where the capacity for self-rule is significantly weakened, the private actors who are delegated those functions should be regarded as lacking the legitimate authority to perform them, since the authorization they received from government should be regarded as invalid. Yet, in the absence of a valid democratic authorization, the private actors' decisions unavoidably remain unilateral acts of particular men and women, rather than legitimate exercises of an omnilateral power. Within such a system, when a private prison guard forces an inmate to go back to his or her cell, or when a private association, responsible for providing welfare benefits on behalf of government, declares someone ineligible for such benefits, their directives should be regarded as no different from the directives issued by any publicly unauthorized private person, like in our example of Stuart in the introduction to this book. It is as if a random person from the street were physically locking a fellow citizen into a room without the latter's consent (we would call this kidnapping), or if my neighbor purported to authoritatively determine whether I am entitled to a portion of public resources (we would call this madness). These determinations would clearly lack the legitimacy they purport to claim, and, if translated into action, they would constitute naked impositions of one individual's merely unilateral will over another.

We should then regard systematic forms of privatization as reproducing, within the state itself, the very same normative problem that, as we saw in chapter 2, characterizes the Kantian state of nature as a state of merely provisional justice and unfreedom, where the determination of people's rights and duties is left in the hands of private parties' merely unilateral, because publicly unauthorized, choices. What is ultimately wrong with privatization is not then reducible to consequences (although, as we saw, outcomes matter). The ultimate wrong of privatization is deontological in kind: it consists in the creation of an institutional system that subjects some to the merely unilateral will of others, thereby violating the former's independence and disregarding their equal normative authority.

Conclusion

In this chapter, I have provided reasons to doubt the widespread view that some forms of political power, most obviously legislative power, as well as some governmental functions, including coercive functions, are inherently nondelegable. However, I also argued that, once we move from an individualized to a systemic perspective and consider delegations of political powers and governmental functions in the aggregate rather than seriatim, a new justification for a (restricted) principle of nondelegation can be supported. Since a democratic people lacks the moral power to abdicate its own self-rule, government necessarily lacks the power to undertake policies that amount to such abdication. To the extent that privatization, beyond a certain threshold, can be regarded as a process of self-rule abdication, the delegations that directly contribute to such abdication must be regarded as lacking the relevant authorizing force. The resulting exercises of political powers by private actors thus remain publicly unauthorized, merely unilateral decisions of particular men and women.

In a skeptical note about the possibility of stopping or at least reducing the increasing privatization of government, Jody Freeman and Martha Minow conclude: "with contractual governance here to stay, the real question is not whether to outsource at all, but to what ends, using which strategies, and under what constraints." Freeman and Minow's justification for this assertion is that "it is unlikely that the American public is prepared to abandon outsourcing in favor of a larger and more powerful state."[76] Freeman and Minow's pessimistic view may reflect something empirically true about citizens' widespread distrust of government, but it fails to acknowledge that, after a point, whether government outsourcing should continue is not a question whose answer should depend on what citizens happen to want or are prepared to do. This is because people lack the moral authority to, and have a duty of justice not to, make choices that are collectively self-alienating. The real question, then, is indeed whether to outsource at all, and the answer to this question is not always up to the people to determine. Citizens have no moral power to authorize government to do in their name what they could not themselves do.

5

The Problem of Representative Agency

IN THE PREVIOUS CHAPTER we argued that, as a matter of general principle, a democratic government can validly authorize a private actor to exercise important forms of political power, including legislative discretion, on its behalf. However, to the extent that the systematic delegation of public functions to private actors becomes a means through which the conditions of democratic self-rule are abdicated, such delegation loses its authorizing normative force. It lacks validity. This means that, in states where privatization is widespread, many private actors, even if formally authorized to act on the government's behalf, should be regarded as acting on their own, merely unilaterally. They have no higher presumptive authority than your neighbor or cousin. Their exercises of power fail to meet the *authorization condition*, as a demand of democratic legitimacy.

Yet, even if we were to assume the validity of government authorization, we would still be left with the further question of whether and to what extent private actors meet what I have called the *representation condition*. Can they truly act in the name of the people, whom government is meant to represent? I am here assuming that the fact that an agent A is validly authorized by another agent B to perform a certain function F on B's behalf may (arguably) be necessary but is certainly not sufficient to make it the case that A acts on B's behalf, let alone in his or her name, when performing F.[1] After all, A may simply be an impostor. I will call "representative agency" that form of agency by which one agent's doing something counts as doing it in the name of someone else (the principal).

This chapter's primary aim is thus to answer the question of what it takes for an agent to act "in the name" of another. I will refer to this as the *question*

of representative agency.[2] This question is different from, and comes prior to, the question of what makes a virtuous representative. The question of representative agency is rather the question of what it takes to be a representative at all, or what distinguishes a bad representative from a failed one.[3] Like the question of authorization, this is a problem with philosophical relevance independent of privatization.

After assessing the limits of existing accounts of representative agency, I will propose an alternative one, which I call "the internalist account of representation," for reasons that will become apparent. I will then explain why, according to this account, private actors often fail to act in the name of government. This is a consequence of certain features that constitutively distinguish private actors from public agents (as discussed in chapter 3), including their (1) free purposiveness, their (2) organizational ethos, and the (3) merely contractual nature of their obligations. To the extent that private actors fail to act as representative agents of a democratic government, their decisions cannot be regarded as done in the name of the political community as a whole. They remain merely private forms of judgment.

But, one may wonder, why does it really matter if private actors can act as representative agents of government and of its people? The answer, once again, has to do with the kind of power that these actors exercise. In some cases, we can perform an action permissibly only if the action is authorized, in the sense of being licensed, by our government. Take, for example, the action of selling alcohol in a bar. Depending on circumstances, it might be the case that in order for my action of selling alcohol, as a bar owner, to be all things considered permissible, I must be in possession of a public license. Yet it is not necessary that I also act "in the name of" government when selling alcohol, or as if government were itself selling alcohol. This is because selling alcohol, even when publicly licensed, remains an exercise of private power. The act of selling alcohol being such, I can permissibly and legitimately exercise that power in my own name. Many cases of privatization are, however, relevantly different, insofar as they involve the delegation of political power to private actors. After all, they delegate to these actors a part of the responsibility to administer public affairs. This responsibility, in turn, can be exercised legitimately only if it is exercised in everyone's name.

One could respond, however, that speaking of representative agency is out of order when the administration, rather than the legislation, of public affairs is at stake, although they both involve exercises of political power. As Andrew Rehfeld puts it, "when holding a political office does not entail standing for

anyone else, but merely enforcing orders, executing law, or some other thing, we can reject this as not a case of representation at all."[4] The problem with this argument, however, is that it underestimates the inseparability of legislative and executive functions within complex administrative states. As we discussed in chapter 3, the execution of laws and policies, even at "the street level," often entails the exercise of quasi-legislative discretion, which in turn reshapes the very content of the original law or policy. Since the exercise of such discretion purports to authoritatively alter the normative situation of citizens, by establishing their entitlements of justice or by regulating the imposition of restrictions over their spheres of freedom, and since the exercise of such discretion cannot be fully guided by, and subsumed under, higher-order rules or mandates, this power must be itself exercised as legislative power should be, that is, in a genuinely representative capacity. This is why it is important to ask to what extent private actors, whether these be for-profit, nonprofit, or hybrid entities, can truly act as a government's representative agents.

But why, one may insist, is representative agency necessary for the legitimate exercise of quasi-legislative political power? What is the connection between representation and legitimacy? One connection, as we anticipated in chapter 2, has to do with the structure of justice claims. Justice does not simply require that a certain state of affairs be achieved, no matter how and by whom. It rather requires that certain duties be discharged either by the agents who owe those duties or in their name. For example, if I owe you a debt, your claim is not satisfied by simply receiving a certain amount of money no matter how and by whom. It is me, or someone acting in my name, who has to repay the debt, in order for your claim to be fulfilled. Now, a democratic government is the agent entrusted by its citizens to both determine and fulfill their duties of justice in their name. Only if government acts in its citizens' name, then, can citizens appropriately discharge, through their government, their reciprocal obligations of justice, thereby maintaining a rightful relation. It is therefore the very terms of entrustment that dictate that government agents discharge certain obligations in a representative capacity—in the name of all. A failure by these agents to act in a representative capacity when establishing rights and duties of justice should then be understood as a violation of that entrustment and thus as illegitimate.

A second connection between representation and legitimacy builds on a different aspect of the Kantian argument that we developed in chapter 2. If presumptively authoritative rules that determine the scope of our entitlements and duties of justice were set in the name of a particular group of people alone,

rather than in the name of everyone, those subject to those rules would become subject to a private form of judgment, where "private" means a form of judgment that is not appropriately representative of everyone's will, including their own. Therefore, it is only insofar as determinations of rights and duties are made in a genuinely representative capacity that those subject to those determinations can escape unilateral subjection. This is why, as Kant puts it, "any true republic is and can only be a system *representing* the people, *in order to protect its rights in its name*, by all the citizens united and *acting through* their delegates (deputies)."[5] To the extent that, in the privatized state, private actors fail to exercise relevant forms of quasi-legislative power in a genuinely representative capacity, this state constitutes a regression to the Kantian state of nature, understood as a normative condition of subjection to the merely private judgment of particular others.

The Question of Representative Agency

The Deference View

Under what conditions can we say that an agent acts or speaks in the name of another? According to one view, which I shall call "the deference view," in order for an agent to act in the name of another, not only must the agent be authorized to do so, but the agent must also be fully deferential to the principal. Avihay Dorfman and Alon Harel have recently defended a version of this view.[6] To the question "What are the conditions required for an agent 'to act in the name of the state'?" the authors respond that the agent's acts "must count as 'deferential,'" by which they mean that the agent must fully defer to the judgment of the principal "in fixing the contours and details of executing official pronouncements."[7] Dorfman and Harel further argue that it is only public officials who act as part of a community of practice that is "characterized by its principled openness to ongoing political guidance and intervention" who are able to fully defer to the public point of view and thus to act in the name of a democratic government. Only public officials can thus perform functions such as punishment that can be performed only in the name of the political community.

Despite its appeal, Dorfman and Harel's view is, I believe, mistaken in regarding deference as a necessary condition of representative agency. To illustrate with an example we discussed in chapter 1, suppose that I hire a web designer to design my academic web page. Through our contract, I provide the

designer with all relevant information about my research, while leaving to him or her full discretion in deciding how to organize the page and what to write on it. It seems that, in spite of the wide discretion exercised by the web designer, insofar as he or she acts within the terms of the contract, the content of the resulting web page would still be written in my name. What the discretional autonomy of the web designer arguably affects is whether his or her action can count as *my* intentional action.[8] If the web designer acts in the absence of specific guidelines, what the web designer does cannot be regarded as something that I, the principal, have intentionally brought about. However, insofar as the web designer's action, however discretional and nondeferential, essentially depends on, and falls within, the boundaries of my authorization, his or her action counts as done in my name. In other words, while deference may be a necessary condition of proxy agency, it is not a necessary condition of representative agency. The deference view thus underreaches, for it fails to count as acts done in the name of government certain acts that ought to qualify as such. A private prison can in principle succeed in punishing inmates in the name of government, regardless of how wide and nondeferential its exercise of discretion is.

The Mandate View

In order to avoid the shortcomings of the deference view, one may be tempted to adopt what we may call the "mandate view" of representative agency. According to this view, insofar as an agent's conduct falls within the bounds of his or her authorized mandate, the agent's action, no matter how discretional, should count as an act done in the name of the principal. Along these lines, Arthur Ripstein argues that the actions of particular officials qualify as acts done in the name of everyone, insofar as they are in accordance with their office's mandate.[9] This is because, insofar as an officeholder acts within his or her legally and omnilaterally authorized mandate, the officeholder acts on terms to which the people could hypothetically consent. Ripstein further clarifies that his view does not depend on the internal mental states of officeholders but only on whether their external conduct complies with the demands of the office. As he puts it, "the distinction between an official's acting within his or her mandate and outside it does not depend on the official's attitude," but rather on his or her "external conduct."[10] In this sense, the mandate view is entirely externalist, for it sets aside as irrelevant the representative's internal mental states.

If the mandate view turns out to be correct, then, as long as private actors act within the bounds of their contracts with the state, the equivalent of an authorized mandate, their actions would need to be regarded as done in the name of everyone.

Yet the mandate view, as I have anticipated in chapter 3, overreaches, for it must regard as actions exercised in the name of government actions that cannot be so regarded. To illustrate, consider the following cases:

- *Corruption*. Lawmakers are under an electoral mandate to "pass a law that will result in one thousand new job placements." None of the lawmakers take themselves to have reasons to pass the law. However, a group of wealthy donors promise the lawmakers future benefits in exchange for passing a law the content of which happens to be identical to the one demanded by the people's original mandate. In response to the donors' request, the lawmakers pass the law, which they would not have otherwise passed. The law successfully results in one thousand new job placements, and, as a result of this, the lawmakers get reelected. After the law is passed, the donors change their mind and the lawmakers receive no extra benefit for passing the law.
- *Whistle-Blowing*.[11] British Petroleum (BP) hires a new spokesperson, Liz. Liz's mandate is to represent the company's official view on climate change. The official view is that BP is committed to a lower-carbon future. Liz is an environmentalist activist in disguise, and her aim is to blow the whistle by revealing BP's nefarious environmental practices to the public. However, because of a distraction, Liz ends up inadvertently communicating BP's official view to the public.

These cases, I believe, present an important challenge to the mandate view. In both cases, the putatively representative agents act within the bounds of their authorized mandate, at least insofar as their external conduct is concerned, and yet we would not say that their actions are done "in the name" of the principal. Indeed, the principal would be entitled to disavow their actions. But why?

In both *Corruption* and *Whistle-Blowing*, although the agents' conduct falls squarely within the domain of their mandates, it does so either coincidentally or accidentally rather than intentionally. The agents in question do not act in virtue of their delegated authority by the principal, for they lack an intention to act in accordance with this authority.[12] Their actions cannot therefore count as done in the name of those who conferred that authority, because it is not in

their capacity as holders of this authority that the agents act. While the lawmakers in *Corruption* act, we would say, in the name of the donors, rather than of the citizens, Liz in *Whistle-Blowing* acts in her own name, as a whistleblower, rather than in BP's name.[13] Note, Liz might well be, all things considered, justified in wanting to blow the whistle, but this is just to say that she might well be justified to refuse to speak in the name of BP. Insofar as Liz refuses to speak in virtue of the authority granted to her by BP (although "behaviorally" still in line with that authority), her assertions fail to qualify as BP's assertions and instead remain her private, unilateral assertions.[14]

In order to accommodate *Corruption* and *Whistle-Blowing*, defenders of the mandate view could concede that, in order for an agent to act as a representative agent, it is not enough that the representative agent's external conduct fall within the relevant mandate. It must also be the case that the representative agent actually intends to comply with the mandate. Alternatively, defenders of the mandate view could follow Jennifer Lackey's recent account of group assertion and argue that an agent acts as a representative of another if and only if the representative aims to reflect the view that the principal intends for the representative to reflect on its behalf.[15] But once the mandate view concedes as much, it is no longer an externalist view. Most importantly, we should further ask whether intending or aiming to comply with the principal's mandate is sufficient to qualify as the principal's representative agent.

Consider the following example:

> *Infiltrating Spy*. A KGB spy infiltrates the US government as a public official. In order to avoid being discovered, the spy must do his or her job as a US official impeccably. Therefore, the spy intentionally aims to do everything the spy's mandate as a public official requires him or her to do.

Does the KGB spy act in the name of the US government and of its people? Clearly not. The American people would be entitled to disavow the spy's decisions as not made in their name. Yet the reason cannot be either that the spy lacks the intention to comply with his or her given mandate, for they spy does not, or that the spy does not aim to do what his or her principal intends for the spy to do, for he or she does. After all, unlike the lawmakers in *Corruption* and Liz in *Whistle-Blowing*, the spy's compliance is not accidental. What makes the spy a failed representative agent must then have something to do with the reasons for the sake of which the spy intends to comply. The spy intentionally complies with his or her authorized mandate but only because of reasons (being able to maintain the spying position without being discovered) that are

not the reasons for the sake of which the spy is given that authority in the first place, that is, to carry out the people's will.

One may then be led to conclude that a necessary condition of representative agency should be that the representative acts for particular reasons that are the same reasons for the sake of which the principal authorized the agent to act in the first place. This view is appealing for the following reason. We may think that representation occurs when a represented can be reasonably regarded as if he or she were acting or speaking through the representative. After all, as Hanna Pitkin argues, representation is about a representative making the represented "present again" in the representative's act.[16] Yet, in order for this to be possible, one may argue, the representative must act on reasons that the represented him- or herself shares. Let's call this "the shared reasons condition."

However appealing, this view encounters a problem. It cannot make sense of cases like the following one:

> *Alienated Official*. An official intends to comply with his or her mandate but only because the official wants to get his or her paycheck at the end of the month.

The alienated official, like the infiltrating spy, fails to meet the shared reasons condition, for the official acts exclusively for reasons (getting paid) that are not the same for the sake of which he or she is given the mandate in the first place. Yet, unlike the infiltrating spy, the official arguably acts in the name of the people. The people, in other words, would not be allowed to disavow the alienated official's action as not done in their name. Interestingly, this is so even if we assume that the alienated official, like the lawmakers in *Corruption* and the spy in *Infiltrating Spy*, would not act in accordance with the mandate were his or her personal incentive absent.

An important part of my defense of an alternative account of the conditions of representative agency in this chapter will be to explain the difference between the infiltrating spy (a failed representative agent) and the alienated official (an arguably bad, but not failed representative agent). This will require understanding what kinds of reasons an agent must act for, or refrain from acting for, in order to genuinely count as a representative agent. For the purpose of this section, however, my goal was simply to demonstrate that we are required to move beyond the externalism of the mandate view. Internal mental states, including intentions, as well as reasons for actions both matter when it comes to representative agency. I further showed, however, how internalist accounts are subject to their own limits.

The Interests View

Our discussion of the limits of the mandate view shows why what we may call the "interests view" of representative agency also fails to provide a satisfactory account of the necessary conditions of representative agency. I take Hanna Pitkin's canonical account of political representation to represent this view. In Pitkin's own words, "the substance of the activity of representing seems to consist in *promoting the interest* of the represented, in a context where the latter is conceived as capable of action and judgment, but in such a way that *he does not object* to what is done in his name."[17] This is generally interpreted as implying that the standard for evaluating a representative consists in "the extent to which policy outcomes advanced by a representative serve 'the best interests' of their constituents."[18] Private actors, on this view, should be regarded as acting in our names as long as they contribute to producing just outcomes and citizens do not object to them so acting.

This conceptual definition of representation is subject to similar objections to the mandate view. More precisely, it would seem to have the unpalatable implication that the corrupted lawmakers and whistle-blower Liz all act as representatives of their principal. After all, they do "promote" the interests of the represented. However, for the reasons mentioned above, I think we should reject such a conclusion, and this is so even if none of those they claim to represent object, or could object, to their actions, given that there is no accessible evidence on the basis of which they could do so.

The Uptake View

Consider, finally, what we may call the "uptake view" of representation, as most recently defended by Andrew Rehfeld, among others. Contra Pitkin, Rehfeld argues that "representatives . . . are created by a set of beliefs that audiences have."[19] More precisely, "political representation . . . results from an audience's judgment that some individual, rather than some other, stands in for a group in order to perform a specific function."[20] On this view, to be a representative is nothing else than to be recognized as such by a relevant audience.

To see why this view of representation is unconvincing consider the following example.[21] The faculty of a philosophy department elects, following the department's procedures, a black member of the faculty as its new chair. Suppose that the new chair goes to the university administration and asks such and such on behalf of the department. It just happens that, owing to pervasive

and entrenched institutional racism, most members of the administration refuse to recognize the new chair as speaking in the name of the department. Has the chair spoken in the name of the philosophy department to the administration? It seems clear to me that the chair did speak in the name of the department. Being recognized by an audience is not, then, a necessary, let alone sufficient, condition of representative agency. To see why, suppose that a month after the incident a radical change in the staff of the university administration occurs. The new staff is not as racist as the previous one. The university administration now fully recognizes the same chair of the philosophy department as speaking in its name. It would be odd, I think, to say that now the chair speaks in the name of the department while a month ago he or she didn't. What I would rather say is that, while the chair of the department always spoke in the name of the department, the university administration wrongly failed to recognize that fact in the past. This is why, I take it, the university administration should now apologize for its past behavior and should retroactively endorse the statements made by the chair as statements made in the name of the department. Yet one could not explain any of this if one accepted the view that an agent cannot act as the representative agent of an entity to an audience unless the audience recognizes the representative agent as such.

The Internalist Account of Representative Agency

Reflecting on the limits of dominant views of representative agency should help us individuate at least some of the necessary conditions that must be met by an agent in order for it to count as a representative of someone else.

We saw, through the examples of *Corruption* and *Whistle-Blowing*, that even when an agent acts in compliance with an aptly authorized mandate, the agent may fail to act as a representative agent if he or she fails to act "in virtue of" his or her delegated authority. We further saw, through the example of *Infiltrating Spy*, that acting "in virtue" of one's delegated authority cannot simply mean, as some argue, to intend to, or aim to fulfill the content or stated purpose of the mandate, for this is something that a spy could also intend or aim to do. The reasons for the sake of which an agent acts matter as well. We also argued, however, that it cannot be the case that for an agent to act as the representative agent of another, the former must act for the same reasons for the sake of which he or she was delegated official authority in the first place (what we called "the shared reasons condition."). This view could not make sense of *Alienated Official*. The alienated official, like the infiltrating spy, intends to act

in accordance with his or her mandate, and, also like the spy, the official's reason for doing so is not a commitment to the rationale or purpose of the mandate but rather a different reason, that is, the desire to get paid. Unlike the spy, however, the alienated official would seem to act in a representative capacity, although he or she may be a bad representative.

What is the difference then? The relevant difference must concern the kind of reasons for the sake of which the spy and the alienated official respectively act. While the spy acts for reasons that are positively *excluded* by his or her mandate, the alienated official acts for reasons that, although are not the same reasons for the sake of which the mandate is conferred—they are not positively included—yet they are not excluded by it. By excluded reasons, I mean reasons that ought to be excluded from an agent's deliberation. These are different both from indifferent reasons—reasons that may or may not be included in an agent's deliberation—and from reasons that are included but ought to be given a low weight. Sometimes, as Joseph Raz points out, the occupancy of a certain role is just the second-order *exclusionary* reason why certain first-order reasons for action should be excluded from a role occupant's deliberation.[22] Now, it seems clear that the occupancy of a public office in country X is the exclusionary reason why maintaining, as an agent of a foreign government, a successful spying position within government in country X cannot count as a reason for action in that context. This in turn means that the infiltrating spy acts for a reason that lacks the status of a reason for action from the perspective of the institution he or she is pretending to represent. Now, if for representation to occur we must be able to regard the represented as if he or she were acting or speaking through the representative, then the representative must (at minimum) act for reasons that are not positively excluded as reasons for action from the perspective of the represented. Failed representation thus occurs when the representative acts for reasons that lack the status of reasons from the perspective of the represented. This is ultimately why the infiltrating spy is a failed representative agent, not simply a bad one.

Things are different in the case of the alienated official because the occupancy of a public office does not positively exclude "earning a salary" from the official's deliberation, as a consideration that lacks the status of a reason for action. After all, public officials are not, and should not be, expected to work for free. Although we may plausibly regard a fully committed representative as a better representative than an alienated one, possibly because the former acts on a balance of reasons that is morally superior to the latter's, yet the alienated

official does not count as a failed representative agent for he or she does not act on excluded reasons. Insofar as the agent does not act on excluded reasons, he or she shares with the represented a commitment to a structure of deliberation, although the agent may not act on the same balance of particular reasons. Insofar as the representative and the represented share what we may call "a space of included reasons," as different from any particular reason for action, the latter can be plausibly regarded as acting through the former. In other words, the relevant condition of representative agency requires not that the representative act on any particular shared reason but rather on a shared conception of which reasons for action are included, and which are not.[23]

So far, the view of representative agency here defended can be summarized as follows:

An agent (A) performs X in a principal (P)'s name if and only if:

1. The authorization condition: P validly granted to A the authority to do X
2. The intention condition: A intentionally does X
3. The included reasons condition: A does X for reasons that are not positively excluded in virtue of acting under P's authorization.

In *Corruption* and *Whistle-Blowing*, the agents fail to meet condition (2). In *Infiltrating Spy*, they fail to meet condition (3). But these conditions may not be sufficient. To illustrate, consider a further case:

> *Web Designing*. I hire a web designer, Tom, to build my academic website. I tell him that I want the website to include three pages, one with a short bio, one with research papers, and the last with miscellanea. I give him discretion on how to organize the pages and develop the design of the website. Tom has worked for Hollywood clients for many years. His understanding of what counts as a successful website is strongly affected by his previous career experience and his previous clients' tastes. Upon reflection, he decides to post a picture of an attractive actress next to each link to my academic papers, so as to solicit as many views as possible. Nothing in the contract explicitly prohibited him from doing so. To my great surprise and shame, when I access the site, I see what looks like a beauty pageant advertisement under my name.

Although Tom intends, in good faith, to act in virtue of his mandate—he takes the purpose of the contract, "designing an academic website," as a reason to act in certain ways rather than others—and although he acts within the terms

of a written contract, he still fails to act in my name. This is because Tom grossly misinterprets the content of the mandate. Indeed, owing to his cultural background, Tom lacks the epistemic or interpretative competence to understand the purpose of the mandate in a way that I could comprehend and endorse, given my own interpretative framework. Unlike Liz and the spy, we may say that Tom acted outside of the scope of his authorization, reasonably interpreted, for he acted according to an understanding of what counts as an "academic" web page that is not (and could not reasonably be understood as being) the one according to which my authorization to exercise discretion was given. Whereas the corrupted legislators, whistle-blower Liz, and the spy all act within the bounds of their authority but fail to act in virtue of it, Tom acts outside the bounds of his authority, in spite of acting in virtue of it.

It could be argued that the fact that I could have fired Tom but I did not, means that we should regard Tom's action as being performed in my name. After all, if there is a mechanism in place that would allow me to prevent Tom from acting on his idiosyncratic interpretation of the mandate, then if I fail to use that mechanism, this must mean that I approve of Tom's interpretation. There is, however, a problem with this view. The mere fact that I have an opportunity to prevent or contest Tom's exercise of discretion, but I fail to do so, is insufficient to prove that I approve of this exercise. Suppose, for example, that I failed to contest what Tom did not because I changed my mind about what an academic website should look like, but rather because I was suddenly overwhelmed by an emergency, or even simply because of negligence. The fact that I had an opportunity to contest the final result and I didn't does not change, at least in this case, the fact that I cannot regard the final product as something done in my name. What we would need in order to avoid this outcome is some more active involvement on my part. For example, if after a thorough review of the website I decide to sign off on the final product, we could then say that my understanding of the contractual mandate came to align with Tom's. Tom would now be acting in my name.

But suppose that in the process of designing the website, Tom must make some decisions with lasting consequences—suppose, for example, that once uploaded on the web page, pictures could be deleted only after one year. Then forms of accountability such as final review may no longer be effective means to avoid Tom's substitution of his will (i.e., his interpretation of the mandate's rationale) for mine. In the case of decisions that are not easily or quickly reversible, we need a mechanism of *ex ante* consultation, beyond a mechanism of *ex post* review.

I thus propose to complement the above account of representative agency in the following way:

The internalist account of representative agency: an agent (A) does X in a principal (P)'s name if and only if:

1. The authorization condition: P validly granted to A the authority to do X
2. The intention condition: A does X intentionally
3. The included reasons condition: A does X for reasons that are not excluded in virtue of acting under P's authorization.
4. The domain condition: X falls within the authorized domain of action D, according to a reasonable interpretation of P's own understanding of the boundaries of D at the time of the authorization, or according to a subsequent review or in-process ratification by P.

From what we said so far, the following conclusion can be drawn: being authorized by a government (G) to perform a function (F) on its behalf and externally behaving within the bounds of G's authorization or performing F in a way that promotes G's interests are not sufficient to be regarded as performing F in G's name. It follows that, in those cases in which performing F in G's name is the only way in which our performing F can count as a democratically legitimate exercise of political power, agents that are validly authorized to perform F on G's behalf may fail to act legitimately even if they externally behave within the bounds of their contract or mandate. This may occur if (a) they act for reasons that lack the status of reasons for action from the perspective of the representative and his or her mandate (in violation of the included reasons condition) or, (b) in areas where the mandate is open to multiple interpretations, they act according to an interpretation of the rationale of the mandate that cannot be understood as a reasonable interpretation of the principal's intention, at least in the absence of the principal's explicit ratification (in violation of the domain condition).

Before proceeding, I should address a possible objection. It could be argued that the internalist account of representation here defended is incompatible with the Kantian account of legitimacy that I defended in chapter 2. After all, if the legitimacy of certain exercises of political power is made dependent on public officials' intentions and mental states, rather than on external compliance with formal rules alone, then citizens are unavoidably made dependent on those officials' goodwill, which would be incompatible with the citizens'

independence. This objection, I believe, neglects what in chapter 3 I referred to as the Hegelian distinction between a merely personal and an institutional ethos. The appropriate intentional orientation required of officeholders and civil servants should be a product of what I have called a "bureaucratic ethos." This ethos is itself an institutional, impersonal element, such that being dependent on it is ipso facto being dependent on shared institutions, not on the officeholder's private persona. As long as citizens are dependent on this ethos, they are therefore not dependent on the particular will of anyone.

On the basis of the internalist view of representative agency here defended, I will now turn to argue that private actors systematically fail to act "in the name" of government, even when they act within the boundaries of their contractual mandates, and even if they act in good faith. This failure is primarily due to certain constitutive features of private organizations, which lead to a violation of both (1) the included reasons condition and (2) the domain condition on representative agency. These features have to do, respectively, with (1a) the private actors' free purposiveness, that is, with their ability to form and pursue comprehensive ends and organizational goals that are external to the rationale of their public mandates, and with (2a) an organizational ethos, which is different in relevant respects from the bureaucratic ethos of public service, properly conceived.

On the one hand, like in *Infiltrating Spy*, the presence of conflicting, often comprehensive goals and corresponding reasons for action lead private actors, even well-intentioned ones, to act on the basis of reasons that ought to be understood as excluded reasons from the perspective of government and its agents. I will call this *the problem of excluded reasons*.

On the other hand, like in *Web Designing*, the particular organizational culture in which private actors and their managers operate strongly influences their interpretive competence, often leading private actors to act on a distorted interpretation of their mandate's rationale. I will call this *the problem of misinterpreted domain*.

Further, public mechanisms of review, ratification, and consultation, as well as the availability of contract revocation, cannot be easily extended to private actors without compromising the very logic of privatization itself.

The result is that, even if we assume that private actors can be validly authorized to exercise forms of quasi-legislative discretion on behalf of a democratic government, their decisions often fail to qualify as done in the name of government, and of the political community government represents. Whereas it is certainly true that neither public officials nor private actors can do

anything other than act on their own judgment, appropriately constituted public offices and administrative entities, unlike private contractors, can make the exercises of interpretative judgment consistent with the normative conditions of representative agency without having to sacrifice the very purposes for the sake of which they exist in the first place.

In order to defend the above claims, my argument will proceed through the analysis of a real-world case concerning the privatization of welfare services. The description of the case, as well as the content of all the interviews, are taken from a study by Janice Johnson Dias and Steven Maynard-Moody.[24] Although I will focus on one case only, I follow Dias and Maynard-Moody in treating the features of this case as widely generalizable.

Case Study: The Privatization of Welfare

In 1996 the Clinton administration passed the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA). This included a block grant for states, known as Temporary Assistance to Needy Families (TANF), to provide time-limited cash assistance for families in need, conditional on work in most cases. States were in turn assigned the duty to use the grant in any way that could be "reasonably calculated to accomplish the purposes of TANF," including, among others, providing assistance to needy families so that children could be cared for in their own homes; reducing dependency by promoting job preparation, work, and marriage; and encouraging the formation and maintenance of two-parent families. The act also incentivized states to contract out the provision of welfare services delivery to for-profit firms, in the hope that privatization would increase the quality of services while reducing their costs.

WorkOpts, a for-profit firm, was one of the many private actors to enter a delivery contract with the state. The contract required the firm to serve twelve hundred welfare recipients per year, including "hard to place" individuals who had been on welfare for at least five years, and to provide job placement to at least 10 percent of them. As a private organization, WorkOpts' managers also had fiduciary obligations toward their company's shareholders, beyond their contractual obligations toward the state. As a subsidiary of Headly Inc., a for-profit corporation, WorkOpts was required to make at least an 8 percent profit. The way in which WorkOpts could proceed to meet its contractual obligations toward the state thus had to take this second goal into account. This duality of institutional goals is, in fact, what guided the managers' decision-making

process. On the one hand, contractual obligations toward the state required WorkOpts to keep on the books "unsuccessful" recipients who would not find employment or who would cycle back to the program after losing employment. This made it difficult to predict caseload size variations and to fix the number of recipients per caseworker. On the other hand, obligations toward shareholders set limits to the amount of new staff that managers could hire to respond to recipients' variable demands, and organizational success meant finding the most cost-effective way to meet the contractual quota of job placements. Management judged that the easiest (and perhaps even the only) way to meet both their contractual obligations toward the state and their fiduciary obligations toward shareholders required minimizing the resources, in terms of both time and effort, that caseworkers could devote to each recipient. Rather than spending thirty minutes with each recipient, they would spend fifteen or ten minutes. In this way, managers successfully secured both goals at the same time. Ten percent of their enrolled recipients found a job placement, and the 8 percent profit target was met.[25]

Far from being merely a technical decision, the managers' choice qualitatively transformed the relationship between caseworkers and recipients. As one frontline worker reported:

> You've got like maybe ten minutes for each participant, sometimes less than that; so basically the relationship is really bad. I mean you don't have time. I wouldn't use the word "relationship" because you don't have any relationship; you just fill out papers [and] ask basic questions.[26]

This emphasis on immediacy, together with a results-oriented pressure to meet certain measurable quotas, meant that the frontline workers had to treat people with very diverse needs in a fairly standardized way. Rather than spending time understanding the particularities of each recipient's situation and finding solutions tailored to his or her particular needs, the focus shifted to fast placement:

> We have a limited amount of time, you know, with the person. . . . It's gotta be fast. To me, they're [management] looking for results here. "How many placements did you get? What were the results?" It's like, almost like a statistical thing.[27]

The emphasis on immediacy and quantifiable outcomes, as well as the reduced amount of time social workers could spend with the recipients, had the further consequence of pushing social workers to focus on easily employable

clients, at the expense of more difficult ones. It is not a coincidence that, although the contractual quotas were met, almost none of the recipients with serious obstacles to employment found a job at the end of the six months of training.[28] Indeed, the focus on fast job placement displaced attention to remedial education. As one worker pointed out:

> You cannot get somebody ready for a job if they have no skills, if they have no education. . . . My main issue [with the program] is the job thing. They [managers] emphasize the job more than the education, and to me, it should be education, then job. Because the more education you got, then the more you can make on your jobs.[29]

When challenged on not providing adequate educational and psychological services necessary to secure upward mobility, managers rationalized their decisions by emphasizing their clients' lack of work ethic and motivation. For example, asked to explain the causes of recipients' unemployment, a manager confidently stated:

> It's the motivation. Those individuals that have secured appointments[,] they're not necessarily college graduates. They do have again eight[h], ninth grade reading level and have three to four children so they do face the same barriers that those that are not. I think it's the mindset of do I want to go now or is this the summertime and I just want to chill in the summer and wait until September comes around.[30]

Managers tended to agree that motivation was the most significant obstacle to employment. This assumption had its own moral consequences in that it not only contributed to constructing and reinforcing an image of welfare recipients as undeserving and as ultimately responsible for their own situations, but also reinforced the dependency of the recipients by providing justification for paternalistic programs, focused on work ethic, at the expense of educational programs focused on skills development. The words of this recipient could not more clearly express, with his tone of desperation, how WorkOpts' focus on fast placement at the expense of personalized responsiveness to need ended up increasing rather than reducing recipients' dependency:

> Welfare is modified slavery. They put you in jobs that they wouldn't even want to be in. Where they wouldn't want to take their kids, their daughters, their cousins, their aunts, none of their family members just so that they can keep their jobs.[31]

In spite of what we may regard as a subversion of the original policy goal of ending welfare dependency, WorkOpts was regarded and rewarded as a success. After all, the managers successfully met both their sets of conflicting obligations.

The WorkOpts case raises many ethical concerns about the privatization of welfare. Most obviously, it raises concerns of justice. The decisions made by WorkOpts had clear redistributive implications, for through practices of so-called creaming they de facto enhanced the claims of some citizens to economic opportunities while weakening the claims of others. By contributing to the institutionalization in concrete practices of a perception of clients as morally irresponsible and undeserving, they also sanctioned existing racial and class-based inequalities by reinforcing social stereotypies that are often at the root of those inequalities.

What is less obvious is that cases of privatization like WorkOpts also raise concerns of representative agency and, through that, democratic legitimacy. On paper, WorkOpts' managers have followed government's contractual directives and met contractual standards. Yet can we truly say that they have exercised their decision-making powers and provided welfare in the name of government? To answer this question, we need to assess whether the managers' actions meet the conditions of representative agency proposed by the internalist view.

Privatization and the Problem of Excluded Reasons

WorkOpts' managers had to exercise considerable discretion in interpreting the terms of the contract and deciding how to achieve its goals. For example, they could have decided to focus classroom activities less on work motivation and more on skill acquisition so as to progressively enable the most disadvantaged to qualify for job placement. They could have given more weight to the frontline staff's occupational interests in providing recipients with more individualized case management at the expense of standardization. Overall, they could have chosen a model of implementation more focused on social work, but they rather focused on fast placement, so that only those who already possessed certain skills could de facto claim an entitlement to be provided with employment opportunities. These decisions, in turn, resulted in a specific pattern of entitlements. They ultimately determined not only who got to get a job but also who could rightfully claim the opportunity to get one.

In order to pick a course of action among possible alternatives, the managers had to weigh different considerations. While doing so, the managers were

conditioned both by (1) their status as occupants of potentially conflicting institutional roles and by (2) their practical perception—what they regarded and filtered as salient considerations. Let's consider the first point first.

As we saw, qua employees of a private state contractor, WorkOpts' managers face conflicting institutional commitments. On the one hand, they have a duty to fulfill a contractual obligation, which is owed to the government and, through it, to the people the government represents. On the other hand, however, the managers, qua members and employees of a for-profit organization, also have a fiduciary obligation owed to their company's shareholders, which, in this particular case, takes the form of meeting an 8 percent profit target. In principle, however, it could take other forms, including fostering any comprehensive goal the company may have or securing the goal of organizational success or excellence, however exactly understood. These goals should be regarded as having a different and independent normative source from the contractual obligations owed to government. This is not only because they exist prior to those contractual obligations but also because, since a democratic government lacks free purposiveness—it lacks the moral power to pursue comprehensive ends, associational purposes, or ideas of excellence—it cannot transfer to its agents the right to act for these particular purposes, for it has no such right. Nor can government use its agents to pursue these particular purposes itself.[32] The managers' responsibility to fulfill nonpublic goals is thus exclusively owed to their private organization and held in virtue of acting in a private capacity. All this entails that private actors who, like WorkOpts, operate under a government contract tend to have two independent sets of institutional obligations and corresponding reasons for action.

To understand how this "institutional dualism" compromises the managers' ability to act in the name of government, we must analyze more in depth the link between representative agency and reasons for action. The question is this: When is it that acting on certain reasons changes the representative agency with which we are acting?[33]

Institutional Roles, Exclusionary Reasons, and Failed Representative Agency

Different institutional roles, as the WorkOpts case shows, provide agents with different, and possibly conflicting, obligating reasons for action. I will refer to "obligating reasons" as reasons that demand a certain action or the achievement of a certain goal. Now, as Onora O'Neill puts it, "the task of practical

judgment about what we ought to do is to find some act that satisfies multiple *rationes obligandi*,"[34] that is to say, our multiple obligating reasons. To accomplish this task, we generally need to assess the comparative weights of different reasons for and against a certain course of action. This is exactly what, we have seen, the managers do, and it may well be what the managers ought, all things considered, to do, given the conflict they face. The problem is that, sometimes, the considerations that provide us with reasons for action cannot simply be balanced. For example, in some cases one reason (A) may be the reason why another reason (B) lacks the status of a reason for action. Suppose, for example, that you are acting in virtue of being a member of your department's hiring committee. The mere fact that one of the job candidates is your friend, it seems, provides you with *no* reason in favor of hiring that candidate as opposed to another one. The institutional role you occupy *is* the reason why friendship, within the context of that role, provides you with no reason for action. Your institutional role is, we would say, a second-order exclusionary reason—it neutralizes the reason-giving status of other reasons.

To be sure, the fact that certain considerations lose the status of reasons for action within a certain institutional context does not mean that they cannot count as such in other decisional contexts.[35] Suppose, for example, that my friend needs urgent assistance, today. Yet today two job talks are scheduled in my department. If I attend the talks, my deliberative contribution will result in hiring the best job candidate. If I visit my friend instead, the second-best candidate will be hired. In this case, visiting my friend may well be the right thing to do, all things considered. But this is not because reasons of friendship persist as reasons for action within the context of my institutional role. It is rather because, whereas reasons of friendship have no status in relation to the question of how to act in my institutional capacity, they still have status in determining the answer to the question of whether I should act in my institutional capacity in the first place. In the above case, it seems, I have stronger reasons to give up acting in my institutional capacity. And this is compatible with the fact that, if I choose to act in my capacity as a hiring committee member, considerations of friendship provide me with no reason for contributing to hiring the second-best candidate rather than the first.

But why does acting in an institutional capacity make it the case that some of the reasons we have lose their status as reasons for action? This is because acting as an institutional role bearer is tantamount to acting in the name of the institution. In so acting, it is as if the institution speaks or acts through our agency. As channels of the institution, the reasons bearing on how to act are

only those that are relevant to the institution's agency and are thus determined by its purposes and norms, not by our own. Institutions have the authority to establish, through their rules and norms, what counts as acting in their name, including the range of reasons that bear on the actions performed on their behalf.[36]

Importantly, the fact that occupancy of an institutional role has the normative power to deprive certain considerations of the status of reasons also explains why a person's representative agency changes depending on the reasons the agent intentionally acts on, and whether these reasons have the status of reasons within the scope of the agent's institutional role. In answering our initial question—when is it that acting on certain reasons changes the representative agency with which we are acting?—we should then distinguish three types of cases:

Failed representative agents. Where an occupant of an institutional role acts on reasons that have *no* status as reasons from the perspective of the institution, precisely like in the cases of *Corruption*, *Whistle-Blowing*, and *Infiltrating Spy*, the agent is a failed representative agent. In this case, the agent effectively ceases to act in the name of the institution, for we could not say that an institution has acted through an agent if the agent acts for purposes that the institution does not and cannot recognize as reasons for action. The institution in this case would be entitled to disavow the agent's actions as not done in its name.

Bad representative agents. In those cases in which the agent intentionally tries to act only for purposes that have the status of reasons from the perspective of the institution but inadvertently fails to do so, we may say that the agent is a bad agent but not a failed one. In this case, the agent still acts within the bounds of included reasons but—like every other agent, including the institution itself—can make mistakes. Insofar as institutions themselves generally have rules aimed at coping with such mistakes, the bad agent still acts within a shared deliberative space.

Bad representative agents (2). The above cases must be further distinguished from cases in which agents do intend to act for the wrong kind of reasons, or on a suboptimal balance of reasons, but still retain the capacity to act in the name of the institution because those reasons, albeit wrong, retain the status of reasons from the perspective of the institution. Consider, for example, the conflict between a police officer's decision as to whether to arrest his daughter for a theft he knows she has committed or to let her go because he loves her.[37] These are reasons having different sources. Regardless of what the answer to

the question "what should the police officer do all things considered?" is, there is the separate question of what the police officer must do in order to act qua a police officer as opposed to a father. If the police officer decides, out of his love for his daughter, to let her go, he is no longer acting in the name of the political community. The political community would be entitled to disavow that decision as not done in its name (although it may retain liability for it) and to fire the officer, for he is acting for a reason that lacks the status as a reason from the perspective of the police. Now, compare this case with the apparently similar case of a police officer who has to decide whether to arrest a teenager who has stolen a bottle of beer from a shop or to let the teenager go. The police officer may face a conflict of goals and thus of reasons. He may have to balance in his deliberation retributive goals with rehabilitative goals, or with the goal of maintaining community harmony. The police officer may decide to prioritize the latter goal and corresponding reasons, and thus resolve to let the teenager go. In this case the goals and their corresponding reasons have one source: they all come from principles and norms that define the role of the police officer. They are thus internal to the mandate. Whatever goal the police officer prioritizes, he is still acting as a police officer and we would (like in the case of the alienated official) be able to say that the political community has acted through him, even if we happen to disagree with his way of balancing different reasons for action.

Roles Conflict and Excluded Reasons

So, what is the problem with the WorkOpts' managers? Recall that, being employees both of a for-profit company and of a state contractor, the managers face conflicting obligating reasons. Their entire decision-making process and the practical judgment it requires take the form of an attempt to balance their competing obligations. If asked what the managers should have done all things considered, it is not implausible to respond that qua simultaneous occupants of two conflicting institutional roles, they should have made the decisions they made and should have interpreted the goals of the contract in the way they did. After all, only in this way could the managers succeed in simultaneously satisfying both sets of obligating reasons.

The problem, however, is not only that the managers' attempt to satisfy two sets of institutional goals led them to act on a narrow (i.e., exclusively focused on fast placement) interpretation of the goals of the contract. The problem is also, and more fundamentally, that by acting for the sake of their private

company's organizational goal (i.e., the 8 percent profit target), and by taking this goal as a reason for adopting one contractual interpretation rather than another, the managers, like the infiltrating spy, intentionally act for purposes that lack the status of reasons from the perspective of their institutional role as presumptive government's agents. Indeed, qua an agent of government, the company's goal of 8 percent profit making should, precisely like spying, provide no reason for action. To be clear, this is not to say that government agents cannot be at all motivated by profit-related considerations. As the example of the alienated official shows, officials can arguably act in the name of government, even if motivated by pecuniary considerations (i.e., earning their paycheck), as long as they have a firm intention to act for public purposes alone. However, the WorkOpts case is relevantly different. A private organization's independently defined profit target, understood as a standard of organizational success set by a company's shareholders, cannot be the object of governmental agents' intentional action—the purpose, or even one of the purposes, for the sake of which they act. This is because, unlike the alienated official's purpose of earning a fixed salary for his or her work, which is itself included in, or at least not positively excluded by, the official's role as a public officeholder, the corporate profit target of a private organization, qua a private associational goal, is positively excluded by his or her role as an agent of government. In other words, occupying a government role is the second-order exclusionary reason for the sake of which the specific corporate goal of reaching a particular profit target loses its status of a first-order reason for action. Therefore, taking the company's 8 percent increase in profit, or, for that matter, any nonpolitical or comprehensive associational goals, including charitable or religious ones, as the object of one's intentional orientation means acting for purposes, and thus for reasons, that should be regarded as extraneous to the rationale of the government contract, and excluded by one's occupancy of a public role. Insofar as the managers act for reasons that are excluded from the perspective of government, they fail to act in the name of government. Precisely like in *Infiltrating Spy*, their actions fail to meet the included reasons condition on representative agency.

Surely, it would go too far to claim that every time the bearer of an institutional role takes into consideration reasons or purposes that are excluded by his or her role, the bearer of the role fails to act in the name of the institution. For example, a lawyer can successfully present a defense in the name of his or her client even if the lawyer takes, say, his or her love for tennis as a reason to set certain constraints on how much time he or she can dedicate to the client's

defense. Yet note that, in this case, the putatively excluded reason (i.e., love for tennis) does not change (by assumption) or dictate the purpose for the sake of which the lawyer acts. The lawyer still acts exclusively for the sake of his or her client's defense when preparing the defense or arguing the case in court. Further, insofar as the lawyer's official role does not demand that the lawyer spend unlimited hours doing his or her job, the lawyer's role does not positively exclude love for tennis, or other personal reasons, as a relevant consideration when the setting reasonable constraints on how much time the lawyer should dedicate to the client's defense. Love for tennis does not therefore count, within this decisional context, as an excluded reason but rather as an indifferent one. It would be different if, say, the lawyer were made responsible for protecting the reputation of his or her firm and if, in turn, this reputational goal supplanted or changed the lawyer's intentional orientation to act for the defense of his or her client alone when arguing the case in court. It would also be different if the lawyer appealed to the above reputational goal, company's profit, or love for tennis, as reasons to choose a defense strategy among different options that were, by assumption, equally compatible with the demands or time constraints of the lawyer's role. In both these cases the lawyer's representative agency would be compromised, for the above goals lack the status of reasons within the context of choosing how to carry out the lawyer's official duties. The problem with the WorkOpts case is an instance of the latter problem. In this case, the managers' corporate, private goals both modify the goal of their intentional action—they form a part of the purpose for the sake of which the managers act when implementing state contracts—and are taken as reasons to choose among different implementation strategies. It is because of this that the managers fail to act as representative agents of government.

By purporting to act as agents of government while failing to act in its name, the private company fails to meet the representative condition on the legitimate exercise of administrative power. The rules that WorkOpts develops and imposes on welfare recipients are neither developed nor imposed in the name of everyone, but rather in the name of a private actor. The same way the infiltrating spy fails to act legitimately, because it fails to act in everyone's name, even if the content of the spy's actions (e.g., the laws he or she passes as an officeholder) could in principle be justified to all, similarly, WorkOpts' managers fail to act legitimately even if the content of their actions could pass a test of justification.

But to what extent is this problem unique to privatization? After all, public bureaucracies have conflicting goals as well. Indeed, the empirical literature

emphasizes both goal ambiguity and conflict between plural goals as pervasive features of modern bureaucratic agencies. As Michael Lipsky points out "street-level bureaucrats characteristically work in jobs with conflicting and ambiguous goals. Is the role of the police to maintain order or to enforce the law? Is the role of public education to communicate social values, teach basic skills, or meet the needs of employers for a trained work force? Are the goals of public welfare to provide income support or decrease dependency?"[38]

Goals conflict within public bureaucracies should not be underestimated. But there is an important normative difference between the conflict of goals public bureaucracies face and the one generated by privatization. The former is (ought to be) a conflict between goals that have the same normative source: securing justice. How to balance different goals when they conflict may require further democratic deliberation or technical expertise. But none of the goals of a public agent should be regarded as being external to the state's public purpose of securing justice. This is because, insofar as citizens can always reasonably refuse to be coerced for purposes other than justice, the state and its agents ought not to have any nonpublic purposes. Even when economic goals of efficiency and cost-effectiveness enter the picture, they should not be understood in terms of the particular associational goals of private organizations. Rather, they ought to be understood as requirements of justice, for example, because uncontrolled government spending could not be reasonably justified to the citizens of a democratic society.

Privatization, by contrast, generates a conflict between goals that have, and should be regarded as having, independent and competing normative sources. This kind of conflict is a consequence of how the (normative) difference between public and private actors should be understood. First, private organizations, unlike public bureaucracies, are not creations of office but rather are associations that exist prior to, and independently of, the contract they happen to sign with the state. As such, their contractual obligations, unlike role obligations that are fixed by the constitutive rules of the office, should be understood as being negotiated at will, by taking into consideration the interests of both contracting parties, including the particular goals and loyalties that those organizations have, qua private associations. Indeed, since they exist to satisfy independent interests and goals, it is rational for private organizations to accept the terms of a contract, including government contracts, only when these terms fit with those interests or goals. This in turn means that a private organization can sign a contract with government and still retain, unlike its public counterparts, particular goals and loyalties.

Second, as we discussed in chapter 3, public agencies are created as a result of a public act of entrustment with the exclusive mandate to serve specific public purposes and have no independent existence outside of this act of entrustment. As such, they should be thought of as being bound to higher authorities by a vertical fiduciary relationship, which implies a duty of loyalty—a duty to act solely for public entrusted purposes.[39] By contrast, the relationship between government and private actors is not a vertical relationship of entrustment but rather a horizontal contractual relationship. This both explains and reflects the fact that in circumstances of privatization there is rarely, if ever, a presumption or expectation that one contractual party owes the other a fiduciary duty of loyalty. All that is presumed is a duty of performance. This means that, when particular or unexpected conflicts among competing goals arise, such as in the case of WorkOpts, there is no fiduciary requirement on the part of the managers to regard their company's independently defined objectives as providing no reason for action, as would be the case for a public agency. This however means that the managers will have reasons to act for purposes that lack the status of reasons for action from the perspective of government. This is why, unlike public officials, private contractors, owing to the institutional dualism they distinctively face, systematically fail to meet the included reasons condition on representative agency.

It could be objected that pursuing certain associational or comprehensive ends, including meeting certain corporate profit targets, is not incompatible with acting according to public purposes alone. After all, there is disagreement about the content of these purposes, and we have second-order reasons to uphold a procedural, democratic solution. The only purposes that are a priori ruled out as "nonpublic" are those ruled out by the constitution, but it is not clear that the pursuit of a corporate profit target is one of them. Insofar as a democratic majority supports the end of corporate profit maximization, or religious ends for that matter, and insofar as private actors act in accordance with democratically sanctioned ends or purposes, why should they be regarded as acting for nonpublic purposes and thus for excluded reasons? The answer to this objection directly derives from the Kantian justification of the state endorsed in chapter 2. According to this justification, as we saw, citizens cannot use their democratic institutions to decide on which associational or comprehensive nonpublic purposes the state should support, for individuals can always reasonably reject being coerced for purposes others than justice. This is why the state, unlike private companies, lacks free purposiveness. Citizens cannot therefore authorize agents of the state to pursue comprehensive

or associational purposes on their behalf. In turn, these purposes cannot count as public even if citizens happen to support them. Only in some very restricted cases could the pursuit of comprehensive or associational purposes by government contractors be justified and regarded as a public purpose. I am thinking, for example, of cases where justice itself requires that government provide certain goods and services according to particular comprehensive conceptions of the good. Suppose, for example, that a government has failed to secure a system of public education that is neutral across the conceptions of the good held by different cultural groups in society. In this case, the government may have reasons of justice to correct the unequal treatment either by eliminating the existing bias or, if this is not possible, by delegating a part of the provision of public education to schools that represent the disadvantaged minorities' comprehensive conceptions of the good. In this case, when these schools design an educational program in accordance with their conception of the good, they can still be regarded as acting for public purposes alone, because their doing so is itself required by justice. It is difficult, however, to see how these considerations could extend to standard cases of privatization concerning the management of prisons, the fighting of wars, or even the delivery of employment benefits by private actors.

Possible Solutions to the Problem of Excluded Reasons

Could there be ways for managers to successfully satisfy the competing requirements of both of their institutional roles in a way that does not compromise their ability to act as representative agents? One way to resolve conflicts between competing obligating reasons is via time management. An agent can satisfy one goal at time T and the other at time T^1. This is, however, not a suitable way of solving the conflict that the managers face. Managers are expected to satisfy the goal of organizational success at the same time as they satisfy contractual obligations toward government. Indeed, successful performance of a government contract can be regarded, from the perspective of the managers, as one means of achieving their private organization's goals.

Balancing competing goals by assigning some weight to both of them can be regarded as a second solution. Yet, for the reasons explained above, this is insufficient as a solution to the problem of representative agency. What happens when managers compromise is that they make some decisions in light of reasons that should not count as such from the perspective of at least one of their institutional roles. Compromise means that the managers will act (as

they did in the example) for a dual, composite goal of, for example, finding employment for X people *and* making a company 8 percent profit. Yet this composite goal should not be understood as coextensive with the rationale of the company's public mandate, since this rationale cannot include a nonpolitical goal such as the 8 percent profit target.

When *ex ante* ways to prevent the conflict between competing obligating reasons that cannot be resolved *ex post* are available, we have strong reasons to pursue them. Now, the conflict between competing obligating reasons that privatization distinctively generates is fully contingent on the fact that government acts through private associations, whose independent and preexisting goals are external to that of government itself. If we have reasons to eliminate the conflict between competing obligating reasons that managers face (so that multiple institutional demands can be simultaneously satisfied), we then also have reasons to eliminate the sources of such recurrent conflict. Given the relevant, both empirical and normative, differences between public and private agents, these are also reasons to limit the extent of privatization. They are, that is, weighty reasons to restore a system of direct government provision.

It should be clear that my argument is not meant to show that only private actors can empirically fail to act in the name of the people. After all, many public officials, when corrupted or captured, also fail to act in the people's name. The claim is rather that, whereas public agencies who act for the sake of private ends are conceptually failing in their raison d'être—this is why, after all, we talk of "corruption"—the same failure is, by contrast, endemic to private actors, even appropriately constituted ones.

Privatization and the Problem of Misinterpreted Domain

So far I have argued that privatization generates a problem of representative agency because, as a result of the institutional dualism that private actors face, these actors fail to meet the included reasons condition on representative agency, as established by the internalist view.

In this section, I argue that private actors who purport to act in the name of government often fail to meet as well the domain condition on representative agency. This is because, like in the case of *Web Designing*, their nonpublic organizational culture shapes their interpretive competence, leading them to interpret the purpose of their public mandate in a way that does not align with the principal's understanding of that same purpose, given the latter's interpretative framework. In order to see how this problem arises, we must go back to

the WorkOpts case and focus on what precedes the manager's exercise of practical judgment.

Perceptive Judgment and Practical Salience

Our ends-means reasoning must often be preceded by a process of ends specification. After all, we can select means to an end only if we have a clear idea about what the end is. In David Wiggins's suggestive words:

> Deliberation is still *zetesis*, a search, but it is not primarily a search for means. It is a search for the best specification. Until the specification is available there is no room for means. When this specification is reached, means-end deliberation can start, but difficulties which turn up in this means-end deliberation may send me back a finite number of times to the problem of a better or more practicable specification of the end.[40]

Before attempting to select appropriate means to the end of fulfilling contractual goals managers must then settle on an understanding of the very end of the contract. At first sight, the end of the contract seems to need no further specification. Finding a job for 10 percent of recipients is a clear enough end, or so it seems. Yet even this very simple end is indeterminate and admits of different specifications. Should "job" mean a minimally paid occupation or rather some kind of meaningful activity that must have some fit with the person's developed skills? Should "10 percent of recipients" be interpreted as including whomever can find a job first, given the recipients' level of developed capacities before the beginning of the program, or should the 10 percent include whomever can find a job after all have been given an adequate opportunity to develop their skills up to a level?

Managers, as we saw, come to specify the end of the contract as implying immediate job placement for whomever is able to find a job, whatever job, first. But why do the managers settle on this specification of the contractual end? The managers' understanding of the end of contract, it seems, is strongly influenced by the way they perceive certain features of their work and of their responsibilities within it. This point is well illustrated by the following statement by one of the WorkOpts managers:

> This type of [welfare-to-work] *industry* requires *fast-paced* thinking, *quick* thinking, effective thinking, resourcefulness. . . . [It's not] traditional social work, [where] there is a process in working with a *client*. There are

> expectations and rules and regulations and that is also in the welfare *industry*, but there isn't that *immediacy* as much as . . . within the welfare *industry*. In the traditional social work . . . something that needs to get done [can get done] within a few weeks or a month or something . . . there isn't as much *immediacy*.[41]

What is striking in this description is how the manager selectively perceives immediacy as an architectonic feature of her activity, something that must be assigned primary salience in decision making.[42] This happens at the expense of other features to which the manager remains blind (e.g., individualized care), not in the sense that she is not aware of the possibility of alternative approaches, but in the sense that she does not attribute to them practical salience as reasons to guide her decision making—she perceives them as belonging to the very different "industry" of "traditional social work."

The fact that the manager's perception, what the Greeks would call "aesthemi," captures immediacy as the most salient action-guiding feature, as opposed to other features, seems to directly result from the distinctive way in which she perceives the nature of welfare. It is because welfare is seen and experienced by the managers as an "industry," as opposed to "traditional social work," that immediacy acquires architectonic salience. A conception of welfare as a "service" would have most likely led the eye of the manager to focus on, and give salience to, other features of her job, such as individualized care.

Once the manager's perceptive eye is focused on immediacy, it becomes natural to filter other features of the situation in a way that fits with that architectonic goal, so as to speed up decision making and assure internal coherence. For example, the presumption, widespread among managers, that lack of motivation and work ethic are the root cause of unemployment fits the demands of immediacy in a way that seeing lack of education and other structural factors as possible root causes does not. Indeed, removing the latter would require that kind of "traditional social work," the salience of which has already been ruled out as incompatible with immediacy. Similarly, the way in which the managers come to rationalize their role as technical appliers of rules allows them to minimize conflict, simplify their responsibility, and thus more easily fulfill the overarching goal of immediacy.

It is this kind of "practical perception," this aesthetic component of practical judgment, that guides the managers' interpretation and specification of the contract's end. Before even attempting to exercise practical judgment, thereby subsuming particulars (specific decisions) under universals (the rules of the

contract), the managers exercise what we may call "perceptive judgment." By this I mean, following John McDowell, a "capacity to read the details of situations in light of a way of valuing actions."[43] Before asking "How ought I to act?" or "What decisions should I make?" the manager takes a stand as to what considerations have to be taken into account in his or her decision, that is, what considerations are salient. The exercise of perceptive judgment in turn requires more than mere awareness; it requires a kind of practical recognition—the ability to capture the salience of a certain feature of reality and come to see it as a reason for action. I can be aware of a condition (e.g., the fact that an animal is in pain) without, however, recognizing the condition's salience, and without therefore regarding that condition as giving me any reason for action (e.g., to rescue the animal). Perceptive judgment is thus parasitic on what Barbara Herman calls "rules of moral salience."[44] These are standards against which an agent can assess what features are relevant and which are not in appraising a certain situation. Rules of salience determine the content of moral or practical perception by directing an agent's attention to certain considerations. They "structure an agent's perception of his situation so that what he perceives is a world with moral features. They enable him to pick out those elements of his circumstances or of his proposed actions that require moral attention."[45] Therefore, we may ask, where do the standards of salience that structure the managers' moral perception come from?

Organizational Culture as a Source of Rules of Moral Salience

Following traditional virtue ethics, we may be tempted to say that the managers' focus on immediacy and fast placement at the expense of individualized care reflects their self-interested character or their lack of compassion. This view, however, seems excessively simplistic. As situationists would argue, our dispositions to act ethically are in large part context specific and socially sustained.[46] People with similar character traits may act very differently if put in different social contexts. Conversely, people with different character traits may still appraise situations similarly and act similarly if situated within the same context. This, of course, does not prove that moral education or character development are irrelevant. More modestly, it provides support to the view that standards of salience are not dependent exclusively on individuals' character traits.

In the case of managers, situationism supports the plausible view that the organizational culture within which the managers act is highly relevant in

producing certain standards of salience. This is in part due to the fact that, as Yeheskel Hasenfeld explains, organizational forms are moral practices. They "both constitute and are constituted by the moral rules these organizations adopt."[47] These moral rules in turn function as rules of moral salience for those who act within, and identify with, the organization. They are internalized as an ethos. They filter the way in which occupants of different roles within an organization perceive the nature of their role, their aims and responsibilities, and the priority of certain considerations over others.

To better understand how the culture of an organization functions as a powerful source of standards of moral salience, which in turn guide practical perception, and thus the process of end specification, we need a clearer grasp of the very idea of "organizational culture." A "culture" includes the ideas, values, commitments, and norms that find practical expression in the practices, symbols, and modes of communication of a social form of organization. The constitutive elements of a culture—its beliefs, values, and norms—form a pattern of shared assumptions and reciprocal, yet often tacit, understandings between the members of an organization, that both create mutually reinforcing expectations about appropriate behavior and are appealed to in order to justify action.[48] An ethos consists in the internalization of a culture by its participants. Following Cook and Yanow's account of organizational learning, we may say that a culture or ethos is "organizational" insofar as it consists in "the acquiring, sustaining, or changing of intersubjective meanings through the artefactual vehicles of their expression and transmission and the collective actions of the group."[49] It is the so-called artifacts of an organization—its symbolic objects, language, and acts—that are expressed in day-to-day routines, work rules, and practices within the organization, as well as in its stories and in the daily judgments of its members, that form its culture.

Importantly, organizational cultures have their own rationality. This rationality consists in the fact that such cultures both (1) incorporate "institutional interests and learned responses to internal integration and survival challenges" and (2) "give rise to mutually reinforcing expectations about appropriate behavior for members" in a way that sustains those interests, as well as the goals of the organization.[50]

The language used by the managers at WorkOpts gives us powerful insights into their organizational culture, and its rationality. The repeated use of terms such as "clients" instead of "recipients," and "industry" instead of "service," as well as the emphasis on results, rational implementation, and fast-paced action, are all expressions of a particular kind of market-driven culture. This

culture can be partly regarded as a rational response to the interests and the goals of organizational survival that characterize this organization qua a private, for-profit firm operating in conditions of market competition. After all, success and survival for private firms depend on the ability of managers to provide a surplus of revenues over costs and to ensure capital investment programs for the future. Economic efficiency, therefore, far from being a means to an end, or a secondary end the importance of which is derivative from more fundamental goals, is a primary end. It is constitutive of the goal of organizational survival as a basic fact of economic life. Public administration and its agencies are not, of course, immune from efficiency considerations, but the importance of efficiency for these organizations should be of secondary and derivative importance (although, empirically, privatization has led to a fusion of public and private management). It *can* be of *secondary* importance insofar as public organizations, by not relying primarily on the market for their revenue, cannot go bankrupt. It *should* be of *derivative* importance insofar as the primary and only organizational goals of public organizations, unlike the one of market actors, should derive from the function of an office and the public purposes the office is meant to serve, rather than from loyalties to private owners and shareholders, and what these loyalties demand in conditions of market competition. Within the structure of government, therefore, efficiency should acquire significance only as a means to achieve relevant public purposes.

These considerations provide a sound, indeed unsurprising, explanation for why WorkOpts' managers perceive welfare as an industry and citizens as clients: this perception is rational given the organization's broader goals and location within a competitive market. Once in place, these perceptive understandings progressively sediment as shared meanings in the culture of the organization, or of an organizational field, and are then internalized as an ethos by its members, thereby reproducing mutual expectations about appropriate behavior for the managers. This is why for managers, unlike for public administrators, "making the right decision is less important than making an appropriate decision, given the elements of risk and uncertainty involved." After all, "managers are judged by their ability to recognize and seize opportunities, react quickly to changed circumstances and make profits and avoid losses."[51] This in turn explains the managers' emphasis on fast results and immediacy as perceived criteria for their own success qua managers, both from their own perspective and from the perspective of the organization as a whole.[52]

To sum up, organizational cultures develop, in part, as rational responses to particular problems. Different organizations give rise, through their

discourses and practices, to different cultures, depending on the problems they face and contexts within which they operate. An organizational culture, once created, provides the standards of salience that guide its members' practical perception and, in turn, the ethos that guides their practical judgment.

Misinterpreting the Domain of Action

It is through the standards of salience provided by their organizational culture that the managers at WorkOpts came to specify the end of the contract and thus the content of their entrusted mandate. In the same way in which Tom, in *Web Designing*, interpreted the rationale of his contractual mandate through the standards of salience provided by Hollywood culture, similarly, the managers in WorkOpts interpreted the rationale of their contract with government according to the standards of salience provided by their market-driven organizational culture.

In *Web Designing*, recall, the problem was that Tom's standards of salience led him astray in specifying the purpose of the contract. Even if Tom acted in a well-intentioned way, he understood the purpose of building a successful academic website in a way that could not count as a reasonable specification of the principal's rationale. Because of this, we concluded that he acted outside of the domain of the mandate and thus not in the name of the principal.

I believe that the same analysis can be applied to WorkOpts. The organizational context within which the managers operated strongly influenced what managers came to regard as salient features. For example, their organizational goal of meeting state contractual obligations while securing 8 percent profit already ruled out the possibility of both being a successful manager and also understanding welfare as slow social work rather than as an industry focused on fast-paced case management. Since salient features, as they become embedded in the culture and ethos of the organization, are ultimately the sources of what managers take to be their reasons for action (if I fail to recognize a person's pain as salient, I will take myself as having no reasons to do something about it), the market-oriented culture within which the managers act necessarily filters what managers take to be their reasons for action. It gives prominence to some, while silencing others. This means that when exercising discretion in specifying the end of the contract, managers end up denying the status of reasons to certain considerations (e.g., individualized care) that would be relevant if considered by reference to the nature and purpose of a democratic government.

Of course, our perception can be distorted by many factors, including bias, features of our character, lack of attention, and so on, and this happens within both public and private organizations. But as we saw in chapter 3, a public office, by its own constitution, should include a system of incentives, the purpose of which is to sustain an intentional orientation toward public purposes alone and corresponding reasons for action. By contrast, but for parallel reasons, the competitive market structure within which the managers are situated, and its attendant system of incentives, give rise to an alternative set of cultural lenses through which salience is denied to certain considerations that would be relevant from the perspective of public purposes. We can thus expect the problem of silencing relevant reasons to be inherent to (even properly constituted) private organizations, in a way that it is not to (properly constituted) public offices.

Now, the fact that managers fail to give to certain considerations (e.g., responsiveness to individuals' particularized needs) appropriate deliberative weight is not per se sufficient to argue that they fail to act in the name of government. Indeed, insofar as an agent is, by definition, a different person from the principal, the weight the agent gives to certain considerations will never perfectly align with the weight that the principal would have given to those same considerations. As long as the agent acts on an interpretation of the purpose of his or her mandate that does not substantially differ from that of the principal, we may regard the agent as acting within the domain of the mandate.

However, what we see in the case of WorkOpts (and what constitutes a common feature of cases of contracting out) is different from a mere deviation from the principal's preferred pattern of deliberation. After all, the process through which the managers come to specify the end of contract by attributing salience to certain factors, while discarding others, changes the very nature of the end they were meant to so specify. What we witness in the course of this process is thus, to use Henry Richardson's words, "the rational establishment of a new end on the basis of its fit and coherence with other ends and commitments."[53] The managers do not act for the purpose of reducing welfare dependency by providing educational and employment services to recipients according to their needs (a reasonable specification of the aim of the policy from which their contract derives its justification). They rather see their purpose as meeting an industry's dual targets of finding a job, any job, for a quantifiable number of interchangeable clients in the shortest possible amount of time, while securing a profit. These are radically different purposes, no less different

than Tom's and my understandings of the criteria for a successful website. Indeed, the managers' narrow interpretation of the contract's purpose seems to be fundamentally at odds with the overarching policy goal of reducing welfare dependency. It constitutes what, in the empirical literature, is sometimes referred to as "goal displacement."

We can then conclude that the managers and, through them, their organizations, do not truly act in the name of government. This is not because, like in the case of *Corruption*, *Whistle-Blowing*, or *Infiltrating Spy*, they act on reasons that have no such status from the perspective of government. Rather, it is because, like in *Web Designing*, the way they specify and interpret the purpose of their mandate (through the lenses of a market-oriented, nonpublic organizational culture) does not constitute a reasonable interpretation of the principal's understanding of that very purpose. What qualifies their interpretation as "unreasonable" is not the fact that this interpretation does not perfectly overlap with the interpretation the principal would have arrived at, if acting on his or her own. What makes WorkOpts' interpretation of their mandate "unreasonable" is that the interpretation proceeds from an interpretative framework that either unduly silences considerations that ought to be relevant or gives salience to nonpublic values that should have no place in the specification of the content of public purposes. In the same way in which it would be unreasonable for an agent of the state to specify what territorial integrity requires on the basis of, say, what the Bible says, it is unreasonable for an agent of the state to specify how welfare ought to be allocated on the basis of a nonpublic organizational culture oriented to maximize returns on investment in conditions of market competition.

We can then try to draw a second general lesson regarding the problem that privatization poses for representative agency and, in turn, democratic legitimacy. Private organizations differ from public agencies not only because they have comprehensive goals and shareholders to which duties of loyalty are owed—a feature that gives rise to the problem of excluded reasons. They differ also in the further respect that their different internal rationalities give rise to different organizational cultures that help these organizations respond to the challenges of survival and success within the context of a competitive market. A marketized ethos thus replaces the bureaucratic ethos of public service. This, in turn, influences, if not dictates, the way managers perceive the purpose of their activities and the nature of their responsibilities. These perceptual lenses lead managers to understand their action-guiding purposes in a way that is at odds with the way these purposes should be understood from the perspective

of public administration. Yet, as we saw, acting for a purpose that is different from the one of the principal amounts to not acting in the principal's name. This is an instance of the problem of misinterpreted domain in representative agency. We then arrive at a second explanation for why the WorkOpts managers, even if publicly authorized, cannot be regarded as having acted in the name of the government and of those whom government is meant to represent.

Conclusion: Is More Regulation the Solution to the Problem of Representative Agency?

In our discussion of *Web Designing*, we saw that there are different ways in which I could avoid being subjected to Tom's idiosyncratic interpretation of my mandate's purpose. First, I could thoroughly review what Tom had done and decide, in light of that review, not to ratify the final product. Second, in the case of irreversible decisions, I would need a mechanism of *ex ante* consultation and ratification to prevent Tom from making decisions that do not align with the original purpose of the mandate. Finally, if after Tom and I sign the contract I radically change my mind and no longer want him to act as my agent, I should be able to revoke the contract (while compensating him) at any time. In the absence of this mechanism, the discretion Tom exercises after that moment can no longer count as discretion exercised in my name, for its exercise no longer depends on my authorization.

In light of these considerations, it is tempting to argue that the problem that privatization presents for representative agency can be easily solved through the extension of appropriate standards of accountability to private actors. This solution, however, faces important limitations, partly empirical and partly normative.

Empirically, many of the norms of accountability that generally bind public actors tend not to apply to private actors.[54] Consider, for example, the set of procedures and standards of public accountability that are in place in the United States to limit the discretion exercised by public agencies and to provide the kind of review-and-ratification and consultation-and-ratification mechanisms mentioned above. These include the Administrative Procedure Act (APA)—the primary statutory source for public disclosure, public involvement in rule making, and judicial review for government decision making; the Freedom of Information Act (FOIA), which mandates public disclosure of government activities; the Federal Register Act, which requires the

publication of regulatory documents for public inspection; and the exercise of judicial supervision by courts. Private actors are often free from these constraints. The APA and the FOIA apply only to public actors, exempting state contractors from requirements of notice, comment, and transparency. Private actors' decisions are not generally subject to judicial review either. True, the government has contractual power to sue private contractors under the Contract Disputes Act. However, it may contract out of certain protections in the negotiating process. This is because, in line with contract law principles, as law scholar Kimberly Brown explains, "if a contractor is in breach, the government stands as a party to the contract with common law remedies rather than as a superior with review and removal power within an administrative structure."[55] Further, as Jody Freeman further explains, the logic of a horizontal contractual relationship, as opposed to a vertical fiduciary one, "prohibits unilateral amendment at the behest of the agency or unilateral interpretation [of the contract] in the form of guidance documents. Thus an agency may find itself, even if only temporarily, bound to a bad bargain and unable to alter it though a simple interpretative decision or rulemaking process."[56] As things stand, therefore, appropriate mechanisms of review and ratification and of consultation and ratification are often unavailable for private actors, and contracts cannot be easily revoked.

Could the solution just be to extend public norms to private actors? Unfortunately, there are two main obstacles to such extension. One obstacle is normative. The more privatization is pervasive, the more the extension of public norms through privatization would amount to other spheres of society being co-opted by the administrative rationality of the state itself. This would exacerbate the problem that Habermas famously addresses in his seminal book *The Structural Transformation of the Public Sphere*, where he argues that by invading each other, social and political organizations, and public and private spheres, deprive each other of their distinctive forms of action and modes of valuation.[57] As I will discuss in chapter 8, this process of normative colonization of civil society by the state would also compromise a division of moral labor between the state and civil society that we have reasons to maintain, on grounds of both value pluralism and freedom of association.

A second obstacle comes from the fact that extending public norms through privatization risks making the latter a self-defeating political project. As we saw, privatization is prima facie justified by appeals to efficiency and cost-saving considerations: as a means for government to diminish bureaucratic inefficiencies, while improving flexibility and innovation by harnessing market competition in the provision of a variety of public goods.[58] Yet, when assessing

the efficiency and cost-effectiveness of privatization, we cannot simply assess savings at the end point—that is, by asking how much it costs for a private agent, as compared to a public agent, to actually deliver good G. We must rather assess the totality of transaction costs, including the "costs of managing the relationship between government and the contractor."[59] Janet Pack, for example, estimates that monitoring can take up to one-fifth of the total cost of a typical contract.[60] The costs of monitoring and administration already generate doubts about the comparative efficiency of private actors over public ones. As Johnston and Romzek argue, "when a more complete accounting of transaction costs is incorporated into analyses, cost savings tend to be modest or nonexistent."[61] Some have even found evidence of greater inefficiencies through contracting across a range of contracting venues.[62] This empirical data provides support for the view that, were stricter mechanisms of review and consultation as well as a wider set of public procedures and constraints extended to private actors, the prima facie justification for privatization decisions would fail, for the efficiency gains of privatization would be nonexistent.

Finally, privatization must work on the assumption that it will be rational for both government and private actors to enter into a scheme of reciprocal contracts. Yet the foreseeable prospect of strict monitoring, review, and oversight, as well as intense government pressure and strict regulation through public norms, would likely make it irrational for private actors to accept government contracts. This is not only because it might make it more costly for private actors to comply with the terms of the contract, but also because public norms may threaten to compromise the mission and internal culture of their organizations.

For all these reasons, we arrive at the following conclusion: the more contained privatization's threat to representative agency (through the extension of public norms to private actors), the less plausible the initial case for it. The more plausible the prima facie case for it (with its appeal to efficiency and cost-effectiveness), the more pronounced the threat that privatization poses to representative agency and democratic legitimacy—private actors being empowered to exercise relevant forms of political power, including quasi-legislative ones, in their own name, rather than in the name of the political community as a whole. This in turn means that, even if publicly authorized to do whatever it is that they do, private actors' determinations systematically fail to count as exercises of a genuinely omnilateral, that is to say appropriately representative, power. Like acquisitive acts in the Kantian state of nature, they amount to the imposition, under the disguise of government's acts, of merely private forms of judgment on citizens.

6

The Problem of Delegated Activity

WE SAW THAT, in the privatized state, private actors are often delegated important forms of decision-making power, including legislative or lawmaking power, broadly understood as the power to make presumptively binding rules that change the normative situation of citizens.

Political theorists often adopt a fairly narrow understanding of "law" as limited to definitive rules, backed by sanctions, that govern human conduct, and which can be directly enforced by courts. Within modern administrative states, however, a large part of what counts as "law" is constituted by vague policies and legislative directives that do not directly govern human conduct, and whose content must be further elaborated and ultimately determined by executive bodies, for example, bureaucratic agencies, through acts of adjudication, rule making, or advice.[1] So understood, governments directly delegate, increasingly, significant lawmaking authority to private actors. For example, the Securities and Exchange Commission (SEC), the powerful US financial market regulator, has progressively delegated the task of developing binding rules for the regulation of corporate activity in the United States to the International Accounting Standards Board—a private-sector regulator based in London. These rules, also known as financial reporting standards, "affect all sectors of the economy and are central to the stability of a country's financial system."[2] Further, as we saw in chapter 3, the delegation of policy-making and quasi-legislative powers, and of the de facto authority to exercise these powers, can also happen, indirectly, through the privatization of other public functions traditionally performed by governments, including the provision of healthcare and welfare services, as well as the management of prisons.[3]

In chapter 4, I argued that there should be *ex ante* limits to what a democratic government can validly authorize private actors to do on its behalf, with the result that often private actors exercise their delegated decision-making

powers without valid public authorization. In chapter 5, I further argued that private actors often fail to exercise those powers in the name of everyone. Both arguments were meant to provide independent reasons in support of the overarching claim that in the privatized state, like in the Kantian state of nature, individuals are systematically subject to the legislative and merely unilateral, because either publicly unauthorized or not properly representative, will of others.

In the present chapter, I defend a third and complementary thesis: even if (1) private actors can be validly authorized to make the (legislative) decisions that they are de facto authorized to make, and even if (2) they are willing to make these decisions by carefully following the terms of their contracts or mandates, nevertheless (3) their resulting determinations often fail to qualify as acts of lawmaking, for they fail to qualify as acts that the lawmaking community has done together. Privatization in this case compromises the very possibility of the delegated function, rather than the *ex ante* validity of its authorization, or whether the function is performed in a representative capacity. I shall call this *the problem of delegated activity*.

A clarification is in order. I am here assuming that what private actors are authorized to do is not simply to make rules but to make presumptively legitimate rules. I shall thus use the term "lawmaking" in a moralized sense, as including only rules and policies that enjoy a presumption of democratic legitimacy.

The above argument, if successful, comes with an important implication. If it is true that private actors ultimately fail to do what is that they have been publicly authorized to do (i.e., to make presumptively legitimate rules), then their resulting actions necessarily fall outside of the boundaries or domain of their publicly conferred authority. They fail to meet what in chapter 3 I called "the domain condition"—the third condition on the legitimate exercise of administrative discretion, beyond the authorization and representation conditions. Private actors' determinations thus remain merely unilateral, because publicly unauthorized, acts of particular men and women.

To anticipate the thrust of my argument, it might be helpful to start with an example that has nothing to do with the delegation of lawmaking power, but which concerns the delegation of a task that can be performed only together.

Delegated Tic-Tac-Toe.[4] Susan delegates to Paul the task of playing tic-tac-toe with Jon. Susan writes down the rules of tic-tac-toe for Paul, reserving for

herself the right to check whether Paul complied with her demand once the game is over. After reading the rules, Paul enters a room, where there is Jon. Paul and Jon start idly marking, in turn, an X and O on a three-by-three matrix on a chalk board, wandering in and out of the room, neither being aware of the other, until the matrix is filled.

Has Paul done what Susan asked him to do? Can we say that Paul and Jon "played tic-tac-toe"? Though Paul instantiates the activity pattern prescribed by the rules of tic-tac-toe that Susan gave to him, he and Jon, we would say, have not played a game of tic-tac-toe. Indeed, they have not even "played." This is because playing tic-tac-toe is an activity that can come about only when the individuals engaging in it have the appropriate kind of interlocking intentions. Playing tic-tac-toe is, in Kirk Ludwig's words, "an essentially intentional collective action type."[5]

In all essentially intentional collective action types, in order to say that the action occurs, it must be the case that participants engage in the activity (1) in accordance with the rules of the game; (2) with the intention to achieve a certain end—for example, in the case of tic-tac-toe, each participant must aim at a winning position that only one can occupy; and (3) with the intention to be engaged in the activity—for example, playing tic-tac-toe—together.[6] In the case of tic-tac-toe, if participants (1) are unable or unwilling to follow the rules of the game; (2) do not share an intentional orientation to the end of achieving a winning position, or have different understandings of what this means (e.g., one plays with the intention to lose the game so as to make the other participant happy); or (3) lack the appropriate "we intentions" to play together, then they are not really playing tic-tac-toe. They are doing something else.

Note, when Susan goes and checks whether Paul has played tic-tac-toe with Jon, external appearances (the fact that Paul and Jon have marked the board according to certain rules) may cause Susan to believe that Paul has carried out her will, that is, has done what she asked him to do. Yet, as a matter of fact, Paul failed to do so, for he failed to relate to the other player, Jon, in an appropriate way—in the way constitutively required by the nature of the function that Susan delegated to him. While Susan asked Paul to do "tomato," Paul did "tomahto," thereby failing to carry out Susan's will.

If it can be demonstrated that ordinary lawmaking is an intentional shared cooperative activity, precisely like playing tic-tac-toe, and that therefore an act of lawmaking is an intentional collective action type, then the question of whether an agent's decision counts as an instance of lawmaking will not be

reducible to whether that act follows certain prescribed rules. Rather, it will also depend on whether the agent who performs the act is appropriately related to other agents within the same practice, as well as whether the agent has the appropriate intentional orientation.

My argument will proceed through the following steps. I will first develop a moralized account of (legitimate) lawmaking as something that a certain group of people can do only together. I shall refer to this as "the collective action view of legitimate lawmaking," as applied to the making of ordinary law. According to my account, it is only by understanding the lawmaking process within government as a form of shared intentional cooperative activity, inclusive of citizens, elected officials, and administrative bodies, and through which the shared will of the people is not simply tracked, as if it were exogenous to that process, but rather continuously reconstituted, that we can regard the decisions emerging from that process as genuine instances of law, rather than as expressions of a merely unilateral will. This point is not completely novel. After all, legal positivists have long argued that the law is a social practice—something that people do together.[7] Yet while positivists advance a descriptive claim, I will advance a normative one: that ordinary law *ought to be* made together.

On the basis of this account, I will then argue that private actors, because of their (1) multiplicity of conflicting loyalties and goals, (2) relative lack of a bureaucratic ethos of public service, and (3) lack of integration in a unified procedural structure that links together the bureaucratic and the democratic, often fail both to have the right kind of intentional orientation and to relate to other participants in the appropriate way. They thus fail to act as participants in the collective practice of lawmaking. This, in turn, means that their decisions fail to qualify as acts that the lawmaking community has done together. They thus lack the status of acts of lawmaking that from this community of practice derives.

Omnilateral Lawmaking

It is a widespread assumption among both neorepublicans and some neo-Kantians—an assumption that I defended in chapter 2—that in order to be compatible with individual freedom, laws and policies that purport to authoritatively change, demarcate, and enforce people's rights must be regarded as instances of an "omnilateral" will—that is, they must be made in everyone's name and in a way that carries out the people's shared will, beyond simply being publicly authorized.[8]

As we saw, one way of understanding the requirement that lawmaking should track the omnilateral will of the people is by appealing, following Kant, to a hypothetical understanding of such will and of the process of authorization. According to this view, legislators should establish laws that "*could* have arisen from the united will of a whole people," as expressed in the idea of an original social contract.[9] However, the idea that the law should track a will that is purely hypothetical, rather than what the people actually will, suffers from notorious problems. One problem has to do with the impossibility of establishing a priori the full content of any such will, especially given the presence of pervasive and reasonable disagreement about not only the good but also the right. Further, even if there were a self-evident, preprocedural answer to all substantive questions of justice that "experts" could discover and enforce, still, unless the experts' decisions were properly authorized and, to some extent, controlled by the people, the imposition of those decisions on the people could be reasonably regarded as a form of alien imposition—an instance of domination.[10]

The limits of the hypothetical account provide us with reasons to move to a more empirically grounded understanding of the omnilateral will, as a will that a people come to actually share, under appropriate conditions. The obvious obstacle that any such account must face, however, is explaining how people who hold very different views and commitments can share a will. Given the fact of pluralism, by "shared will" one cannot mean a will whose precise content is endorsed by each and every citizen. It may, however, be possible to overcome this problem by adopting a more minimalist account of what it means for people to share a will. In the next section, I will analyze and show both the advantages and the limits of what I see as the most promising account. My purpose is to establish how we should understand the concept of a "shared will," in order to then explain what it means to "carry out" any such will through lawmaking.

The Minimalist Account of a People's Shared Will

According to the account recently developed by Henry Richardson, Christopher Kutz, and, with more detail, Anna Stilz, the shared will of a people should be understood neither as a mysterious metaphysical entity, nor as requiring the convergence of all particular wills on a particular set of issues, but rather as an interlocking structure of intentions.[11] "A shared will," in this view, is nothing more than "an interlocking structure of cooperative 'we-intentions' on the

part of each participant, amid common knowledge that those intentions obtain."[12]

The idea of "we-intentions" requires elucidation. Take the case of you and me cooking together. In order to aptly say that we are cooking together rather than merely simultaneously, we must be engaged in a shared activity. In order for our activity to be shared in the appropriate sense, it must be the case that our intentions interlock in a particular way. As Michael Bratman argues, it is only because we intend that we cook together (we take it to be the object of our intentional action that we cook together), and both because we are willing to adjust our activity in accordance with a shared plan, and because all this is common knowledge between us, that we can aptly say that we are cooking together.[13] This is a structure of "we-intentions." Without such structure, we would just be two people who happen to be peeling potatoes and chopping garlic in the same room, at the same time. We would not be cooking together. While we would say that those who cook together share a will (e.g., they share an intentional commitment to an object that orients their activity), those who cook only simultaneously do not, although their behavior may look the same to an external eye.

The thrust of the minimalist account is to show how a people that, unlike the cookers, is characterized by internal pluralism and disagreement, and embedded in a corporate, hierarchical and coercive structure (i.e., the state), can still be said to share a (political) will, because of the way in which its members' intentions interlock.

Stilz ingeniously shows this point through an analogy between the state and a small joint venture. Consider the practice of running a restaurant.[14] The owners or partners of a restaurant normally have both coreferential and interreferential intentions. Their intentions are "coreferential" insofar as they refer to the same end as the object of their commitment (that is, they intend to run the restaurant together and to keep it in business). This shared intention, in turn, directs the partners to perform certain actions that are conducive to their shared end (hiring waiters, paying bills, etc.). Their intentions are also "interreferential" insofar as the end of running a restaurant together implies that each partner's intentions must be responsive to other partners' intentions by way of meshing subplans; each partner must be careful not to do things that conflict with other partners' actions and may have to be willing to assist in these actions when needed.

The partners' cooperative enterprise will be possible only if they develop, over time, some shared commitments as to how their joint venture should be

carried out, even in the face of disagreement.[15] Over time, the partners may develop complex policies and norms, including procedural ones, for resolving disagreements whenever they arise or for giving priority to certain considerations over others when they conflict. The development of shared commitments will eventually amount to a sort of constitution or what Stilz calls "group standpoint"—a set of core values, whether substantive or procedural, about how to select among competing plans of actions and how to direct the venture.[16] Given its development through negotiations, deliberation, and compromises, the group standpoint will likely not perfectly track any of the partners' complete set of first-order preferences. Yet, to the extent that all the partners have an equal opportunity to influence the formation of the standpoint and to the extent that they intend to act according to the object of their shared commitment, they will have strong reasons to accept the standpoint and share in it. A sign of this, as Stilz points out, is that the partners of the restaurant may feel disrespected if someone from the outside were to impose his or her own standpoint on their shared venture, and this is so even if some of the policies of the restaurant do not directly satisfy the partners' first-order preferences.

The partners, we would say, share a will. Their shared will is precisely the interlocking structure of their "we-intentions" to run a joint venture (the restaurant) together and to act in accordance with the values and priorities that constitute their group's standpoint.[17]

Suppose, now, that a manager is appointed to facilitate the division of labor within the enterprise. The manager comes to make most of the administrative decisions—for example, deciding how many waiters should be hired and what food should be served and at what price—and to direct the partners' operations according to specific plans. As long as the manager acts in accordance with the group's standpoint and to further the aims of the restaurant within the boundaries of his or her mandate, and insofar as the partners can dismiss the manager if they are not happy with the job the manager is doing, the manager can be regarded as acting on the partners' shared will.[18] The partners are not therefore dominated by the manager.

This model can be, at least partially, scaled up so as to explain how the citizens of a modern state can also share a will, and what it takes for representatives to carry out their will. As Stilz argues, political activity can be regarded as jointly intentional cooperative activity.[19] This is because citizens of well-functioning states can be regarded as jointly supporting, through intentional cooperative activities, their government's rule. They vote, pay taxes, comply with the law, express their opinion, cooperate with public officials, and so on.

Many of these acts make sense only within a framework in which each citizen expects others to act with a participatory intention, that is, to do their part in the pursuit of a shared goal. One may go even further and argue that political activity indeed should be understood and practiced as a jointly intentional cooperative activity, since this is the only way in which a plurality of people who disagree about both the good and the right can come to live together under coercive and hierarchical institutions without being subject to domination (as the case of the restaurant illustrates).[20]

It is tempting then to conclude with Stilz that, precisely like in the case of the managers' decisions in relation to the partners' will, government laws and policies are legitimate when, and to the extent that "(a) the people willingly cooperate together to support their government's rule; (b) the laws and policies imposed by that government *reflect* the people's shared commitments, as they are worked out by their members, and (c) there is some mechanism for the people to revoke authorization of their government if it oversteps its bounds."[21]

In spite of its appeal, there are, however, some problems with the minimalist account, which I now turn to elucidate.

The Limits of the Minimalist Account

The first problem is that the minimalist account seems to assume that people's shared commitments (their shared will) precede the legislative and administrative process. Yet the shared will of the people, rather than preexisting this process, is, for the most part, forged through it. Laws and policies do not simply "reflect" people's independently defined shared commitments. Rather the process through which they are proposed, debated, interpreted, and implemented contributes to the forging of such commitments. It follows that, within the context of complex administrative states, Stilz's claim that "governing officials are a tool for a self-organizing citizenry to more effectively carry out their joint purposes,"[22] the same way that managers were a tool to more effectively implement the restaurant partners' commitments, appears inadequate. Far from being mere "tools," or neutral vessels, those who make and implement laws and policies are crucial participants in the process of cooperative will formation. To put it in terms of the restaurant analogy, legislators and administrators are not mere "managers" but rather "copartners."

The second limit of the analogy follows from the first. In the restaurant case, as long as the managers' decisions can be regarded as reasonable elaborations

of the group standpoint, as long as the owners can dismiss the manager if unsatisfied, the latter's decisions have the status of legitimate acts of management and acquire normative force regardless of whether they are arrived at monologically or in dialogue with others. Yet, in the political context, for certain decisions to acquire the normative force of presumptively authoritative laws or policies, it is not sufficient that duly elected or appointed officials happen to converge, perhaps inadvertently, on a decision whose substance happens to match the people's standpoint. It is also necessary that the officials arrive at that decision through a specific process—as participants in an authoritative collective practice. To illustrate: unless judges coordinate their behavior with one another through practices of precedents, and lower courts' judges take the decisions of higher courts' judges as constraints on their own behavior, the resulting decision would not count as valid law, no matter how rightful its substance. Similarly, unless bureaucrats in administrative agencies take the statutes passed by democratically elected legislatures as constraints on their behavior, their decisions cannot be regarded as authoritative acts of policy implementation, even if they happen, according to external standards, to qualify as reasonable elaborations of the shared will of the people. Policy acquires its authoritative status from being the product of a collective social practice (the legislative-administrative practice).

The third, and perhaps most important, limit of the minimalist account rests, in my view, on the assumption that for a law to carry out the will of the people it is sufficient that the law "reflects" the people's shared commitments. To see why this assumption is misleading, let us consider again a case that we encountered in the previous chapter: a group of corrupted officials pass laws whose substantive content is perfectly in line with the terms of their democratic mandate, but they do so only coincidentally—because they intend to do what certain wealthy donors want, in exchange for material benefits, and it just happens that what the donors want is identical in content to what the people want. Even if the resulting laws "reflect" the shared will of the people, for their content is, by assumption, in line with the people's shared commitments, it would be mistaken, I think, to say that the laws actually carry out the people's shared will (and this is so even if the people, deceived by appearances, take themselves as having no reasons to dismiss their representatives). Rather, it would be more accurate to say that they carry out an alternative, unilateral will (the donors' will), the content of which happens to be identical to the people's shared will. If this is the case, however, the fact that the laws reflect the people's will cannot be sufficient to prevent the imposition of a merely

unilateral will on citizens. It must also be the case that those issuing those laws, unlike the corrupted officials, intend and aim to comply with their democratically authorized mandate.

In light of these considerations, we need to revise the minimalist account and gain a clearer understanding of how a complex process of lawmaking can both forge and carry out, rather than merely reflect, the shared will of the people.

The Collective Action View: Lawmaking as a Shared Cooperative Activity

As Henry Richardson points out, legislating practically requires agreement on shared ends.[23] Unless the legislature settles on some ends, executive agencies will be unable to implement them. A statement of purpose, as included in a statute, generally plays the role of communicating the agreed ends. Take, as an example, the US Clean Air Act. This piece of legislation requires the US Environmental Protection Agency (EPA) to issue standards regulating the emission of potentially harmful air pollutants, so as to provide an "ample margin of safety to protect public health." This statement of purpose represents the content of the legislature's agreement.

The question is how this end should be arrived at in order to count as an end that carries out the will of the people. One first condition, it seems, is that the substantive content of the end must qualify as a reasonable specification of some of the people's joint commitments.[24] Legislators must then agree on an end the content of which is in line with the citizens' shared commitments as embedded in the political constitution of their country. These commitments must precede the legislative and administrative process, for in the absence of any fixed points, practical reasoning, including legislative reasoning, would be unable to proceed. Note, however, that constitutional values, given their level of generality, can function only as negative constraints rather than as positive action-guiding principles that orient particular policy decisions toward specific ends. They generally tell legislators what they ought *not* to do (e.g., a statute requiring the EPA to torture people so as to limit polluting emissions would be unconstitutional) but not what they ought *to* do. The content of the end of legislation, and thus the actual content of the people's shared will, cannot then be pregiven and must be constructed through a subsequent process.

That legislators converge on an end whose content amounts to a reasonable specification of the people's initial commitments is, however, a necessary but

not sufficient condition for democratic representatives to be regarded as carrying out the people's will. As the example of the corrupted legislators shows, carrying out an agent's will also requires an intention to act in virtue of the mandate authorized by the agent. Yet, in the case of democratic officials, the mandate itself should be understood as including the demand that lawmakers collectively construct a reasonable specification of the people's shared will. Therefore, in order for participants in the legislative process to be able to carry out the people's will, they must meet the following condition:

> Intentional orientation to joint activity: lawmakers each have an intention, though perhaps motivated by different reasons, to the (joint) activity of reaching an agreement on an end that reasonably specifies the shared will of the people, by further specifying their shared commitments.

If the people's commitments, as embedded in constitutional principles, are so general that they will leave ample discretion to legislators as to how to further specify the content of policy ends, how should the legislators proceed in this specification in a way that can be regarded as further carrying out the people's will?

One option is aggregative: each legislator should bring to the floor the views of his or her particular constituents, and these should be aggregated. The notorious problem with this method is that the mere aggregation of many particular wills does not qualitatively change the nature of such wills, which remain particular rather than shared. Further, mere aggregation lacks what Henry Richardson calls "practical intelligence," for it lacks a process through which participants can discover new concerns and revise old ones.[25]

A second option would be to appeal to putatively neutral deductive judgment. Any end could then be regarded as a legitimate specification of the people's will if legislators can arrive to the formulation of the end, through logical deductive reasoning, by starting from shared premises (e.g., basic constitutional commitments). Yet, as we have already mentioned, constitutional commitments are often too vague to deliver any determinate or semideterminate answer to policy questions and are also subject to widespread interpretative disagreement. This leaves open the question of how to solve such disagreements when they arise. If preferences aggregation is the answer, we are then back to the problem of how to transform particular preferences into a shared will.

There is, however, a third option. While preferences can be, and arguably so, only aggregated, reasons can be shared. A decision-making process oriented toward a consensus on mutually acceptable decisions can, if appropriately

deliberative, generate or construct shared reasons. Unshared reasons can become "shared" in virtue of the fact that participants conceive of a decision-making process as a shared activity.[26] Imagine, for example, two members of a department who are committed for very different reasons to the shared activity of hiring a new colleague.[27] One may want to hire someone as a means to promote diversity, while the other is committed to hiring for personal, strategic reasons—let's say this would promote his or her subfield within the department. Suppose that they have equal input in the process. After considering each other's reasons through deliberation, either they might revise their original reasons so as to find agreement by convergence, or they may arrive at a compromise. In either case, if they are both committed to the shared process of arriving to a mutually acceptable decision, beyond being committed to the end of hiring, they will have second-order reasons to regard their compromise as a shared reason (a reason for them both) to act in one way rather than another, even if this compromise does not perfectly track their first-order evaluations. Unlike a process of mere preference aggregation, this process may be regarded as generating a genuine shared will.

For a legislative process to generate shared reasons that together can qualify as a reasonable specification of the people's original shared commitments, this process should ideally take a deliberative form. In order to develop concrete proposals, each representative may start by referring to the political views of their constituents, since such views have more specific content than general commitments, but they should do so with an intention to contribute to an overall decision-making process whose aim is to arrive at a reasonable elaboration of the shared commitments of the citizenry as a whole. This, in turn, means that each representative must be willing to revise his or her views in light of what other representatives say; they must take into account the voice of less established views in the legislature, they must be willing to formulate proposals that reflect reasonable compromises among all participants in the process, and they must allow for fair hearings of all.[28] Each representative must thus intend to reach an agreement on an end together with the other participants (as specified in their joint commitment) by way of each acting in accordance with his or her own subplan (voicing and representing the political views of his or her constituencies), in a way that meshes with the subplans of others (by each being willing to listen to others and revise his or her views accordingly), knowing that others will do the same.

To be sure, legislators need not be saints. They may participate in the overall process for motives that are far from altruistic (getting paid or gaining social

prestige). Further, like the person in the department who is committed to hiring for strategic reasons, legislators may be initially committed to the overall process because, say, they want to be reelected and they may work hard to defend their partisan views against objections. Ultimately, however, they must be intentionally oriented toward reaching a collective agreement on an end that can be reasonably regarded as both specifying and constituting the shared will of the people. And this requires the above kind of mutual responsiveness. For only through this kind of mutual responsiveness that moves from the particular to the general as deliberation generates agreement can we regard the object of agreement as carrying out the people's shared will, as opposed to either a mere aggregate of particular wills or an alternative will with similar content.

Beyond an intentional orientation to joint activity, legislators must thus also exhibit the following:

> Mutual responsiveness: each lawmaker attempts to be responsive to the intentions and actions of the others, knowing that the others are attempting to be similarly responsive.

If and insofar as most lawmakers display (as they should) the features of (1) an intentional orientation to joint activity and (2) mutual responsiveness, then we can say, following Michael Bratman, that they are engaged in jointly intentional action, for the intentions of the parties both reference the same end (coreference) and also reference each other (interreference)—the parties intend to mesh their subplans with the ones of others according to a requirement of mutual responsiveness.[29] We then arrive at the following thesis:

> T1: The legislative process should take the form of a jointly intentional activity among elected officials.

We can then come to regard the ends included in legislative statutes as joint intentions, forged through a deliberative legislative process, that have the following form: we, lawmakers, intend "to do action A for the sake of end E" (e.g., in the case of the US Clean Air Act, "to provide an ample margin of safety to protect public health"). Insofar as E can be regarded as following within the boundaries of the people's shared commitments, and insofar as the representatives act under the people's authorization and with a shared intention to reach an agreement that counts as a specification of the people's original joint intention, we can say that the joint intention of the people is carried out through the legislative process.

Yet, is it sufficient that the legislative process take the form of a jointly intentional activity, or should it also, and more demandingly so, take the form of a shared *cooperative* activity (SCA)?[30] To see the difference between the two kinds of activities, consider the following example:

> *Strategic Chefs*.[31] Two professional chefs, Clare and Sam, work at a restaurant. Each desires to be promoted, but only one of them can get a promotion. Clare wants Sam to fail so that she can get a promotion, and Sam, for the same reason, wants Clare to fail. Yet, because the success of each depends on cooperation with the other (only by cooking together can they prepare a meal that will please the restaurant's owner), both are willing to play their part as long as the other does the same. Yet, were Sam to fail in front of the boss, Clare would not help him, and vice versa.

Strategic Chefs is a case of jointly intentional activity, insofar as both Clare and Sam share an intentional commitment to their joint activity (cooking a meal together) and insofar as their subplans mesh as a result of mutual responsiveness to this commitment. There is a superficial sense in which we can say that Clare and Sam cook together. Yet we would not say that Clare and Sam cook together in the same way in which two truly cooperative chefs cook together. This is because Clare and Sam, lacking a commitment to mutual support between them, fail to participate in a shared cooperative activity.

Now, if (1) lawmakers must each be intentionally committed (likely for different reasons) to the joint activity of reaching an agreement on an end that can be regarded as a specification of the shared will of the people, and if (2) an end can be so regarded only if it is the result of a stable joint process that, through the mutually responsive deliberation of all participants, transforms particularistic wills into a shared will, then it seems that (3) a certain requirement of mutual support is already included in the very nature of the joint commitment. For if each party wished to see the other fail (e.g., by wishing those with diverging views in the legislature to be silenced), they would fail to share the commitment expressed in (1). While, in the case of the two strategic chefs, hoping that the other party will fail does not contradict, indeed supports, the chefs' intentional commitment to get promoted (although given present circumstances this commitment is better achieved through cooperation), a legislator's hope that other legislators will fail, in the sense of being unable to participate in deliberation, contradicts their very initial commitment. For it is a constitutive element of that commitment that can be pursued only if each aims at its realization through the agency of other participants.

This, in turn, means that, although some level of strategic behavior may be compatible with the legislative process as a whole, and even if it is fine for legislators to be motivated to do their job because of strategic or prudential considerations, like earning a salary, a legislative process dominated by strategic behavior is unable to appropriately carry out the shared will of the people.

An appropriately structured legislative process must therefore meet the following condition as well:

> Commitment to mutual support: each lawmaker is committed to supporting, or at least to not actively undermining, the efforts of other lawmakers to play their roles in the joint activity.

The ends of policy can be regarded as a specification of the people's shared commitments if and only if they are reached through a legislative process that meets the requirements of SCA. We can then postulate a second thesis:

> T2: The legislative process should take the form of a shared cooperative activity through which the joint intention of the people is carried out.

This leads us to the following conclusion: (1) ordinary laws have the normative power—the permission to change the normative situation of citizens—insofar as and only insofar as they carry out the omnilateral, because shared, will of the people (as itself constrained by certain substantive requirements, as discussed in chapter 2); (2) in order to do so, laws must be arrived at together—they must be the product of a process of lawmaking that is constituted as a shared cooperative activity; therefore, (3) cooperative activity is an important source of legitimacy.

Insofar as the democratic legislative process is understood as an SCA, democratic lawmaking shares important structural similarities with the act of playing tic-tac-toe. In the same way that what makes a pattern of actions an instance of genuine tic-tac-toe playing is that the parties have carried out the pattern together, similarly, in a democracy, what makes something an instance of legitimate and presumptively authoritative lawmaking is that, among other things, legislators have arrived at it together, through a process of collective action that specifies citizens' joint intentions.

The problem however is that, as we discussed in chapter 3, in the modern administrative state, the specification of the ends of policy, and thus of the people's joint intentions, does not end with the legislature. Statutes are often left vague, and administrators are often called to exercise discretion as to how to interpret and further reformulate the ends of policy.[32] Given the discretion

necessarily left in the hands of administrators, how can the activity of administration be understood as carrying out the shared will of the people, as specified in the legislative statute?

The Problem of Administrative Discretion

As we mentioned earlier, the statement of purpose, as specified in legislative statutes, can be regarded as the legislature's joint intention that administrators perform action X for end E. One obvious way in which administrators could carry out this intention is by simply executing it as written, that is, by acting as a vessel that simply implements that intention through a neutral process. This would be a straightforward sense in which the joint intentions of the people, as filled in through the legislative process, could be carried out.

Perhaps the most influential administrative process that appears as a mechanism of neutral implementation is cost-benefit analysis. According to this model, the administrator establishes and balances the costs and benefits attached to various options by assessing citizens' willingness to pay for various goods.

To see how cost-benefit analysis works and what its limits are, it might be worth comparing it to an alternative way in which administrative agencies can go about specifying the ends of policy, which we may call "deliberative rule making."[33] Political scientist Robert Reich illustrates this method through the following real-world case that arose in the 1980s in the United States:[34]

> *Asarco*. A company (Asarco) runs a copper smelter in the area near Tacoma, Washington. The company emits inorganic arsenic—a carcinogenic pollutant produced when ore is smelted into copper. In the absence of emissions control, four people each year will likely develop cancer. Even after installing the most effective technology to control pollution, there would still be one new case of cancer per year. The Environmental Protection Agency must decide, under the Clean Air Act, what, if anything, to do about the situation. The act requires the EPA to issue standards to regulate the emission of potentially harmful air pollutants, so as to provide an "ample margin of safety" to protect public health.

How would the cost-benefit EPA analyst proceed to carry out the joint intention of the legislature? First, as Reich explains, the analyst would ask what the most efficient means are to reduce the costs of pollution in order to protect public health (understood in terms of reducing risk of cancer across the

population), without at the same time increasing other burdens. He or she would then consider various alternative means, for example, (1) requiring the company to install very expensive technology that would successfully eliminate all hazardous pollution, (2) requiring the company to install less expensive but also less effective technology, or (3) requiring that the company stop production whenever the wind is blowing toward residential areas. The analyst then calculates and compares the costs and benefits attached to the different options. Option (1) will minimize health hazards but will likely generate the most unemployment, by forcing the company to diminish production and to fire workers. Option (2) will have higher health hazards and environmental costs but will reduce unemployment costs. Option (3) will have higher costs for the environment than the previous alternatives and, depending on how the weather turns out, very high costs for production and employment. After assessing the relative costs and benefits of all options, on the basis of people's willingness to pay for certain goods, the analyst would settle on the most efficient way to achieve the end of the policy, as initially defined. He or she might, for example, settle on the second option while at the same time finding alternative means to reduce the costs attached to that option (e.g., by giving vouchers to people likely to be affected by the remaining emissions to relocate to pollution-free areas).

Compare this with what might happen if the EPA selected a method of deliberative rule making instead (according to Reich, this is what actually happened in that case).[35] Following this second approach, EPA officials decide that the citizens of Tacoma ought to deal with the problem through public deliberation. Three public workshops are organized. The first two workshops are meant to attract environmental groups, local citizens organizations, and a large number of smelter workers. The third workshop is placed in a residential neighborhood, located in Vashon Island, a town outside of the Tacoma area where the winds carry many of the emissions, so as to attract home owners who do not have direct financial stakes in Tacoma itself.[36]

During the deliberation, beyond the obvious concern for their own health, several residents show a concern for the potential impact of the emissions on their animals' welfare and on their plants. During one of the workshops, an industrial hygienist points out that were the factory to close, the resulting unemployment could result in high levels of anxiety, which in turn could generate serious health risks as well as deaths. Another participant proposes to change the framing of the issue as a whole from a question of "environment versus jobs" to one of investing in forms of technological innovation that could

reduce emissions while enabling the factory to remain open. Other participants tell stories about the personal burdens, including loss of friendships and meaningful social relationships, that they were forced to endure when forced by the emissions to leave their residential area and relocate elsewhere.

Even the residents of Vashon Island, whose health is vulnerable to the pollution but who do not have an economic stake in the smelter, start wondering whether there would be ways to keep open the smelter, while mitigating the resulting pollution.[37] They see the workers from the smelter and begin incorporating the workers' perspective into their own solutions.

Through deliberation, latent concerns are uncovered and, importantly, a new way of understanding "public health" and its connection with emissions emerges. It becomes clear that the relevant health issues at stake are not limited to the carcinogenic hazards for human animals of arsenic emissions; they also include the way in which emissions pollution could impact the welfare of other animals, as well as how, on the other hand, control requirements would impact the mental health of the unemployed and the social relationships among people. Preventing community division becomes another important aspect linked to the quality of life of members of the community.

This process of discovery, through democratic deliberation, finally leads to a revision of the initial joint intention, as specified in the statement of purpose of the Clean Air Act, or at least to a novel interpretation of the end. Rather than interpreting the end of providing "an ample margin of safety" to protect public health in the simplistic way of reducing the risk of cancer contraction by controlling emissions, the EPA, in light of the latent concerns that emerged in the discussion, redefines the end as simultaneously protecting plural aspects of public health, including physical and mental health, people's relationships with other living beings, and social cohesiveness.[38] Though deliberation, these dimensions of value start to appear not simply as external constraints, in terms of costs or benefits, on how the primary end of public health ought to be achieved, but rather as internal, constitutive components of the very end of public health.[39]

Once the end of securing public health is reinterpreted more broadly in light of new concerns, it becomes apparent that the goal of securing this value is no longer in stark contrast with the constraint of not imposing unreasonable costs on Asarco's employees. For preventing massive unemployment is now itself included in the very definition of public health, rather than simply as a cost that needs to be balanced against this value. Promoting public health, narrowly understood, may conflict with the goal of the economic prosperity,

but promoting public health, broadly understood, does not. The final solution may still require a compromise between different values, but the way these values are understood, as well as their relative weight, has changed in the process.

This comparison effectively illustrates the shortcomings of a purely cost-benefit approach to policy implementation. First, as Henry Richardson points out, cost-benefit analysis takes the ends of policy as fixed in order to assess costs and benefits against it. Yet, an intelligent approach to practical problems, including policy, requires a willingness to remake one's aims in light of new information about costs and benefits.[40] Second, as he also points out, cost-benefit analysis takes costs and benefits as being fixed prior to any process of deliberation. Yet it is only through a deliberative process that latent values and concerns can be uncovered and that people can reach agreement as to what should count as morally salient costs and benefits.

For these reasons, we have at least *pro tanto* reasons to prefer "deliberative rule making" to pure cost-benefit analysis as a method of administration and policy implementation.

Yet once deliberative rule making is implemented, two new problems arise. First, if the intelligent carrying out of the legislature's joint intention must be open to progressive reinterpretation of this intention in light of new information, this generates a threat of bureaucratic unilateralism, as defined in chapter 3.[41] This brings us back to the question of how to legitimize administrative discretion, so as to be able to say that the end of policy, in spite of the partly independent exercise of this discretion, carries out the people's shared commitments. Second, the focus that deliberative rule making puts on stakeholders' actual deliberation raises a further threat of unilateral imposition: after all, aren't stakeholders just expressing their particular views on a certain policy issue? If their views are directly translated into policy without any further process, it is difficult to explain why this should not amount to the imposition of particular individuals' views on others.

Preventing Bureaucratic Unilateralism

In the same way that legislators are required to go back and forth from their constituencies to their colleagues so as to ensure that people's particular views are translated into common concerns through the legislative process, administrators must be able to translate people's actual concerns, as they emerge through properly structured processes of deliberative rule making, into a reformulation of the ends of policies that is acceptable to the representatives of

the people as a whole. In this way, the process of administration can be both intelligent and responsive to people's actual concerns, while also regarded as a specification of the legislature's joint intention, which should, in turn, be a specification of the people's shared commitments.[42]

My claim is that, in order for this process to take place, the relationship between lawmakers and administrators must also take the form of an SCA, characterized by the same requirements of (1) shared intentional orientation, (2) mutual responsiveness, and (3) mutual support, as the legislative process. This is for the following reasons.

On the one hand, in order for the agency to be regarded as carrying out the joint intention of the legislature, the intentions of administrators must connect to the intentions of the legislature in an appropriate way. First, administrators must take the joint intention of the legislature, as expressed in the statute, as the background against which they can deliberate.[43] This, I assume, is compatible with administrators maintaining an appropriate level of insulation from undue factional pressures, as discussed in chapter 3. Second, administrators must further intend to carry out that intention, for the same reasons why elected lawmakers must intend to comply with their mandates, rather than simply doing so accidentally or coincidentally. On the other hand, however, in order to obtain the deliberative benefits of the implementation process, as well as the benefits of administrators' expertise, the legislature must in turn be open to revise its own initial intentions, as expressed in the statement of purpose, in light of that process, albeit with a right to exercise veto power on the result of that process if the legislature reasonably judges that the process has grossly distorted the spirit of the statute.[44] Further, the legislature must afford, in line with constitutional principles, at least some degree of independence to the administrative process. This independence must then itself be regarded as a demand of the legislature's intention. If all this is correct, the administration and the legislature must be regarded as sharing an intentional orientation toward a joint activity:

> Intentional orientation to joint activity: administrators must have an appropriate intentional orientation (though perhaps motivated by different reasons), shared with the legislature, to the joint activity of reaching an agreement on a further specification of the end of policy that can be regarded as a reasonable elaboration of the people's will.

Note that the demands of the above joint activity already include a requirement of mutual responsiveness. Whereas agencies must be intentionally

responsive to the legislature's intentions (indeed, they must treat these intentions as the backdrop for deliberation), the legislature must also be responsive to the process of administration. It must retain a willingness to revise its plan depending on the results of that process. The legislature's and administrative agencies' joint activity must thus meet the following condition as well:

> Mutual responsiveness: both lawmakers and administrators attempt to be responsive to the intentions and actions of the other, knowing that the other is attempting to be similarly responsive.

In practice, the commitment to mutual responsiveness can be sustained only if certain procedures are in place. These procedures must establish stable and integrated relationships between administrators and elected representatives. So regarded, and importantly, the purpose of administrative procedures is not reducible to securing fairness and accountability in the exercise of administrative discretion. Administrative procedures are not simply means of democratic control. These procedures should also and importantly be thought of as channels of practical reasoning, the aim of which is to support a form of jointly intentional activity: the very definition and public justification of policy through a collective, shared practice characterized by mutual responsiveness. It is because of the existence of this unified practice that we can regard our laws and policies as something that the different parts of government have done together, as part of a single, if multicentered, process of specifying the shared will of the people.

How can administrative procedures secure mutual responsiveness? First, procedures must make it possible for democratically elected officials to retain adequate top-down control over the decisions and deliberations of administrative bureaucracies, so that the latter can orient their decisions according to the actions and decisions made by the legislature.[45] However, as we saw in chapter 3, forms of top-down control should be constrained, to some extent, by the demands of administrative independence and insulation. Beyond control functions, an important, if neglected, function of properly designed administrative procedures should be to create mutual and deliberative relations between administrators, elected representatives, and the public. In many states, including the United States, administrative agencies commonly solicit comments from the public on draft rules, provide all interested parties with an opportunity to communicate their views, and must allow participation in the decision-making process. As things stand, however, participation rarely takes a deliberative character. This could be overcome by complementing such

procedures with practices of structured deliberation, along the lines of the *Asarco* case. The practice of deliberative rule making could then be improved through the institution of committees, including a randomized sample of different stakeholders, so as to avoid the consolidation of certain interest groups at the expenses of other voices. Agencies would then be required to deal with the evidence and considerations presented to them by the public and provide reasons, on the basis of those considerations, justifying their decisions. The entire sequence of decision making—notice, comment, deliberation, collection of evidence, and so on—should then provide elected representatives with plenty of opportunities to respond when an agency seeks to move in a direction that goes against the judgment of public officials.[46] In carrying out this oversight, representatives should not simply test whether the agency has deferentially executed the policy end as originally interpreted and specified by the legislature but should also be open to assess and potentially endorse new reformulations of that very end.[47] In this respect, mutual responsiveness should be differentiated from full deference.

Now, administrative procedures can successfully integrate the democratic and the bureaucratic in a stable way only if there is a commitment to mutual support between administrators and elected officials. If administrators, like the strategic chefs in our previous example, intend to act in line with, say, the legislature's intent only if and insofar as this is strategically convenient for themselves, then as soon as an opportunity to escape the control of the legislature presents itself, they will stop acting in accordance with that intent. But this is incompatible with the very nature of their original commitment. An administrator's intention to deviate from the legislative intent whenever convenient would contradict his or her required intention to reach an agreement on a specification of the end of policy that can be regarded as a reasonable elaboration of the people's will. This is because the object of this intention requires, as we saw, a certain level of deference to the legislature.

Therefore, the relationship between lawmakers and administrators must also involve a commitment to mutual support:

> Commitment to mutual support: both lawmakers and administrators support the efforts of the other to play their role in the joint activity.

In practice, integrated procedures, as well as, importantly, what in chapter 3 I have called a "bureaucratic ethos," are necessary to support such commitment, especially given the limits of the constraining power of formal rules and incentives.

The conclusion we reach is the following: it is only by understanding the overall process of lawmaking and policy making, throughout the different branches of government, as an SCA that we can say that public officials carry out the shared will of the people. We can then posit the following thesis:

> T3: The relationship between the legislature, the administration, and the public should take the form of a shared cooperative activity, through which the joint intention of the people is further specified and reconstituted.

The people's will, although partly constituted by their original shared commitments in the form of basic constitutional essentials, is ultimately the product of a complex shared cooperative intentional activity expanded across a variety of interconnected institutional settings. If this is correct, what counts as a law or policy that carries out the omnilateral, because shared, will of the people—as opposed to a decision that merely instantiates someone's unilateral will—is, at least in part, a function of what some people (including elected officials, bureaucrats, and the public) do together.

There are, we saw, independent substantive principles—basic constitutional essentials—that a policy must comply with in order to be legitimate. However, ordinary law derives its legitimacy—its moral permission to change the normative situation of citizens—not only from its substantive content but also from the social practice through which this content is determined. This practice, for the reasons illustrated above, ought to take the form of a shared cooperative intentional activity among different actors. When it comes to making policies or laws, doing it together matters, beyond getting it right.

Making law is thus, in important respects, precisely like playing tic-tac-toe. It is important not only that (1) participants engage in a pattern of activity within the boundaries of certain constraints (e.g., promulgating policies that have a specific substantive content) but also that (2) participants engage in the activity with a specific intentional orientation, as well as that their participation meets conditions of mutual responsiveness and mutual support.

It is now time to return to privatization. As we saw, in privatized systems, private actors tend to make decisions that have, descriptively, the features of lawmaking and policy making. These decisions purport to change the normative situation of those subject to them. But can we regard their decisions as genuine acts of lawmaking? If my argument is correct, answering this question ultimately requires establishing whether private actors' decisions can be reasonably regarded as something that the lawmaking community makes together. I will now turn to this task.

Privatization and the Problem of Delegated Activity

Democratic lawmaking, we have argued, should be understood as a multicentered SCA. For an SCA to take place, an intentional commitment to a joint activity, as well as conditions of mutual responsiveness and mutual support, must be in place. Yet, in order for these conditions to be met, two further preconditions must also be in place.[48]

First, the parties must converge on the object of their shared intentional activity. In other words, the object or goal to which the parties intentionally contribute—what they intend to do when they participate in their joint activity—must amount to the same thing. For example, as previously noticed, in order for us to be able to say that two people are playing tic-tac-toe, participants must engage in the activity with the intentions to achieve a certain final winning position. If participants fail to converge on the ultimate end of the game (e.g., one plays with the intention to lose the game so as to make the other participant happier), or if they have radically different understandings of what the end of the game is, then they are not really playing tic-tac-toe. They are doing something else. Lack of convergence, including epistemic convergence, on the same end, understood as the object of the parties' shared intention, undermines the very possibility of the collective activity. I shall refer to this condition as *broad convergence on the end of the joint activity*.

To clarify, it is not the case that any disagreement on the end of the activity necessarily undermines the possibility of acting together. For example, as Christopher Kutz persuasively argues, members of a department can be said to be hiring a new faculty member together even if they disagree about the value of hiring a new candidate and have different reasons for so acting.[49] Yet as long as their understanding of what "hiring" a new faculty member means substantively overlaps, and as long as their intentions appropriately interlock in the pursuit of this shared goal, we could still say that "they" have "hired a new faculty member."

Beyond broad convergence on the end of the activity, a second precondition of SCA is what I shall call *contained alienation*.[50] Alienation is the condition in which an agent contributes to an activity as if he or she were practically committed to the goal of the activity without actually being so committed. The focus here is not on the reasons why someone forms an intention to contribute to a certain goal but rather on what it is that an agent is intentionally committed to. As Matthew Smith rightly points out, what determines whether an agent participates in a shared activity is the agent's intentional

orientation toward the goal of the activity, and not the motives that support that orientation.[51] Now, in large-scale social practices, the intentional commitments of participants are often sustained by the expectation of earning a salary. This is consistent with an activity being a shared cooperative one if this expectation generates a firm intention to contribute to the overall institutional activity and its goal (in the same way in which two people can be genuinely said to play tic-tac-toe, as long as they both have a firm intention to reach a winning position and to do so by playing together, even if the motivating reason why they have this intention is, say, to receive some benefits from third parties). The problem, however, is that many people who are motivated mainly by the expectation of earning a salary (or by other similar reasons) will likely intend to do only what is necessary to earn a wage, regardless of whether more is needed to contribute to the overall activity of the institution.[52] Consider, for example, a case where an employee is presented with a costless opportunity for failing to act on his or her duty, however defined. The employee who is exclusively motivated by the promise of a wage or bonus or by the threat of being fired will take the opportunity not to perform his or her duty. This is to say that the employee is alienated, as he or she seemingly lacks any intentional commitment to contribute to the end of his or her institution, except for when doing so is a necessary means to fulfill his or her private purposes. Some level of alienation may well be compatible with the existence of a shared cooperative activity. Yet social practices in which alienation is rampant cannot be regarded as a shared cooperative activity, for they necessarily fail to meet the condition of mutual support. An SCA therefore requires that alienation be contained.

Therefore, in order for the activity of democratic lawmaking to take the form of an SCA, it is not only the case that lawmakers and administrators must do their parts of intentionally promoting the goal of that activity. It must also be the case that (1) they overlap in their conception of that goal, and that (2) they exhibit only a moderate level of alienation. In turn, in order for a particular decision or determination to count as an omnilateral act of lawmaking, that determination or decision must result from a process of collective action that meets the above conditions.

However, meeting the above conditions may yet not be sufficient for a particular decision to count as an act of lawmaking, for they may not be sufficient for the attribution of a particular act to the relevant lawmaking practice. To see why, let us go back to Kutz's case of the hiring department. Imagine an agent, call him Peter, who always accompanies his wife to departmental meetings.[53]

Peter intentionally participates in the deliberations of the department. Far from being alienated, he is genuinely committed to the department's goal of hiring the best candidate, and he shares with the members of the department an understanding of what that goal is about. In spite of meeting both the broad convergence and the contained alienation conditions, if Peter decides to hire X, we could not say that "the department" has hired X. In other words, Peter's decision cannot be attributed to the department and treated as a departmental decision. And this is because, of course, Peter is not a member of the department.

For parallel reasons, for a particular determination to count as an act of democratic lawmaking, not only is it necessary that it result from a certain decision-making process that must take the form of an SCA. It must also be the case that the decision be attributable to the lawmaking community as a whole—the equivalent of the department. Only members in good standing of this community can make law. So, the crucial question becomes: how are relevant members identified?

In the case of Peter, the answer is easy. Peter is not a member of the department because he is not formally appointed as a member by the institution. Formal appointment may not, however, be sufficient to qualify as a member in good standing of an institution, in the sense required so that one's actions can be regarded as actions of the institution. Here I agree with Christopher Kutz that "someone whose behavior was so out of line with institutional norms would also be excluded from the inclusive 'we,'" regardless of possession of formal membership.[54] The notion of "being in line with institutional norms" is admittedly vague. Certainly, we want to regard as legitimate members of an institution people who oppose existing institutional norms because they believe they are deeply unjust or inappropriate. At the same time, however, it is difficult to regard as a full member of an academic department someone who, in spite of being formally appointed, never deliberates with his colleagues, follows different institutional norms, and systematically fails to act with the goal of the department in mind. Therefore, we may say that, in order for an agent's action to count as the action of an institution, the agent, beyond being formally appointed, must also act within a unified, institutional, and procedural space that can orient his or her action toward the overall project of the institution, and can appropriately connect his or her action to the other members' actions. In this view, the function of stable institutional norms is (among other things) to provide a shared background framework for action, as well as to confer unity to the acting institutional agent. Following Bratman,

by "background framework," I mean shared norms and institutional relations that structure and unify practical reasoning and deliberation by, for example, shaping what options are to be considered in a decision or what to count as a relevant consideration, and by providing effective mechanisms and channels of communication for the meshing of individuals' subplans.[55] It is not only the practice of formal appointment but also embeddedness in a coherent and unified system of institutionally framed relations that transforms an aggregate of individual actors into members of an institution whose actions can be attributed to the institution itself.

It follows that it is not enough that participants in the practice of lawmaking (1) broadly converge on the goal of their shared activity, and that (2) their level of alienation be overall contained. It must also be the case that (3) they be integrated through a coherent and unified procedural structure, so that their individual actions can be attributed to the relevant practice as a whole. Call this last condition the condition of *procedural integration*. Only in this way can their determinations be regarded as genuine acts of lawmaking.

In the remaining part of this chapter, I show how, in the privatized state, private actors systematically fail to meet all the three conditions identified above. It follows that their decisions cannot generally be regarded as something that the lawmaking community has made together. Their decisions do not, therefore, qualify as omnilateral acts of law but rather remain unilateral acts of particular men and women.

How Privatization Undermines Convergence on the End of the Joint Activity

A first problem with privatization is that it makes the condition of broad convergence on the end of the joint activity particularly difficult to obtain. This is because what private actors are up to—the object to which their action is intentionally oriented and that guides their decision making—is likely to be relevantly different from, rather than coextensive with, that of their principal, including the legislature and the public bureaucracy. This in turn means that political officials and private actors merely appear to be jointly oriented toward the same goal of applying duly legislated policies and laws in a way that carries out the people's joint intentions—precisely like the case of *Delegated Tic-Tac-Toe*, where participants merely appeared to play together.

The reason for this, note, is not that private actors' motives are different from those of public actors, for different motives can support the same

intention to pursue a shared goal. The reason for why privatization undermines broad convergence has rather to do with the plurality of goals that private organizations, unlike officeholders, exhibit, in virtue of their free purposiveness and of being creations of contract rather than of office.

In chapter 5, I illustrated this point through the case of WorkOpts—a for-profit state contractor.[56] WorkOpts' contract with the state required the firm to serve twelve hundred welfare recipients per year and to provide job placement to at least 10 percent of them. However, as a private organization, WorkOpts' managers also had a fiduciary obligation, owed to their company's shareholders, to make at least an 8 percent profit. At the same time as it sought to meet its contractual obligations toward the state, WorkOpts also had to take this second goal into account in decision making. As we saw, this duality of institutional goals, having different and potentially conflicting normative sources, was, in fact, what guided the managers' decision-making process. The result was that management judged that the easiest (and perhaps even the only) way to meet both obligations was to minimize the resources, in terms of both time and effort, that caseworkers could devote to each recipient.

For our present purpose, we should ask: which goal were the managers intentionally oriented toward when deciding how to act? For one thing, even assuming that the managers had a firm intention to comply with the state's contractual directives, it seems plausible to understand their intention in terms of a singular intention to follow the state's orders—that is, an intention that WorkOpts meet the performance target, as specified in the contract, so as to receive compensation for its services—as opposed to a plural "we" intention that they (the private organization, together with the legislature and the administration) make policy together, as cooperative partners in an overall, unified community of decision makers. One reason why it seems plausible to assume so is that, as we discussed in chapter 3 and chapter 5, private organizations, unlike public agencies, should be understood as having a preexisting life and identity of their own to which particular goals, loyalties, and commitments are attached. Because of these features, private actors can have a rational interest in participating in the collective enterprise of policy making only to the extent that doing so is compatible with and supportive of their preexistent set of loyalties and goals. Therefore, a private company will likely lack the plural intention to make or implement policy together with the government, at least in those cases where the fulfillment of such a plural intention would require acting beyond the limits of the singular intention, against the private actor's independent commitment-generating goals.

Further, those who make decisions within private organizations are unlikely to have the same level of identification with the goals of governmental institutions as those who chose a career in public service. The reason for this is not that private employees are naturally more selfish than public employees. It is rather that institutional identification derives from a process of socialization within the organization itself. After all, as we put it, the bureaucratic ethos is itself an institutional achievement. Since private actors are only irregular participants in the collective practice of policy making—their contractual relationships with government are temporary, and they perform many other tasks beyond implementing government policies—their employees will likely lack a sense of themselves as contributors to such collective practice and to its overarching goals.

However, one could object that for private actors to participate in a shared cooperative activity of lawmaking together with public administrators, the legislature, and the people, it is not necessary that private actors share a commitment to intentionally contribute to the goal of that activity, let alone that they have a plural intention. All that is required is that their activity be guided by a shared plan, set by a higher authority, and that private actors be willing to follow the authority's directives.[57] The authority must intend all participants to adopt its directives as their subplans and to revise all other subplans so that they mesh with these directives, and the participants must intend to adopt the content of the directives as their own subplans and to revise other subplans so that they mesh with the directives. Therefore, one might claim, insofar as private actors follow the state's contractual directives, their decisions can still be regarded as arrived at together, by the policy-making community as a whole, and thus as part of a process that aims to provide a unitary and coherent specification of the legislature's joint intentions.

One obvious problem with this objection is that it faces, at an even lower level of delegation, the same problem of discretion that arises at the administrative level. Participants in the collective practice of policy making and implementation often make decisions that are not, and cannot be, specified fully in advance by rules. Therefore, these exercises of residual discretion must derive their legitimacy not from their ability to be subsumed under clear directives but rather from being the product of an appropriately structured, collective, and authoritative practice of decision making. For this purpose, and for the reasons advanced in this chapter, an intention to contribute to the end of the joint activity is necessary.

There is a further problem with the above objection that is well illustrated by the WorkOpts case. In this case, the managers did not simply adopt the

content of the authority's directives (the state's contractual terms) as their own subplans and only then revise their own independently existing subplans (their own organizational goals) so that the latter could mesh with the former. By contrast, the managers reinterpreted the authority's directives—the terms of contract—so that they could mesh with the independently defined goal of their organization: making a certain return on investment so as to fulfill preexisting fiduciary obligations. Indeed, this reinterpretation was itself dictated by these obligations. The result was that the participants in the activity (government and private actors) were not really intending to do the same thing. While the government intended to get 10 percent of a certain population employed so as to reduce welfare dependency, the private managers intended to get 10 percent of a certain population employed only insofar as doing so was compatible with making 8 percent profit and regardless of whether this helped reduce overall welfare dependency. These are not coextensive objectives. This mismatch of commitments is not coincidental. As we saw in chapter 5, it generates from the fact that private actors have plural goals, emanating from different normative sources that must be satisfied simultaneously. This in turn means that the state and WorkOpts were not really acting together as participants in the same SCA. Like in *Delegated Tic-Tac-Toe*, in spite of appearances, they were up to different things.

How Privatization Fosters Alienation

Pervasive alienation presents another obstacle to the possibility of a genuine SCA. Although the problem of alienation pervades all institutional settings, from public to private organizations, there are reasons to believe that privatization aggravates this problem in distinctive ways.

The first reason has to do with differences in organizational culture between public and private actors. Although the empirical evidence is complex and sometimes uncertain, it is generally agreed that the so-called ethos of public service, or what in chapter 3 I called "the bureaucratic ethos," broadly defined as "the belief, values and attitudes that . . . concern the interest of a larger political entity and that motivate individuals to act accordingly whenever appropriate,"[58] is weaker within private than within public organizations. As the House of Commons Select Committee on Public Administration in the United Kingdom puts it: "We conclude that, in the mixed economy of public service, it is possible for private and voluntary sector bodies and people to uphold the public service ethos, however, the profit motive may put it under

strain."[59] Several empirical studies have confirmed relevant motivational differences between public- and private-sector employees. Eleven studies, across more than three decades, argue that civil servants and private employees differ significantly in their work motives: the former have a higher sense of community service, a commitment to act according to the public interest, and a predisposition to consider the work of public service as a mission or vocation, instead of just an occupation.[60] Further, these studies show that those employed in the public sector tend to put greater stock in intrinsic rather than extrinsic (i.e., monetary) rewards. Even those who object that "there is no consistent pattern of evidence in support of the widespread idea that employees in public-sector organizations behave differently from those employed in private-sector contexts" acknowledge that at least "one empirical finding was found consistently: civil servants show a higher level of community-service motivation."[61]

Although, as we discussed, the question of motives is different from the question of intentional commitment to a goal, as the latter can be sustained by different motives, these questions cannot be completely separated in practice. It seems reasonable to believe, for example, that a strong bureaucratic ethos may play an essential role in sustaining an intentional orientation to support the overall project of making policy that carries out the shared will of a democratic people, even when the constraining power of directives and formal incentives reaches its limit. This in turn entails that when a government systematically discharges important political functions through private actors who lack such ethos because of their organizational culture and distinctive rationality, alienation within democratic institutions is likely to increase, putting the cooperative nature of such institutions at risk.

The second reason why privatization poses a risk of alienation is, we may say, positional rather than cultural. Unlike public administrators, private organizations are often positioned outside of the procedural structure that generates tight deliberative relationships between administrators, elected officials, and the public. As we saw, using the United States as an example, administrative procedures like the APA that impose requirements of mutual responsiveness throughout the process of policy implementation often do not extend to private actors.[62] And, as law scholar Jon Michaels has recently argued, "state power passed through private conduits becomes much harder for the rest of civil society to monitor and challenge. . . . The public has fewer statutory rights to access those private conduits, and the contractors have fewer statutory obligations to act inclusively, transparently, or rationally."[63]

These are contingent facts, but, once again, they are not merely coincidental. They have a logic to it. The very rationale on the basis of which decisions to privatize are prima facie justified—improving efficiency, reducing overhead costs, or protecting freedom of contract—makes it irrational or even contradictory to extend demanding administrative procedures, let alone participatory requirements, to private actors. Further, private actors may have little reason to enter into contractual relationships with a state that would seriously diminish their autonomy and flexibility, as well as impose excessive burdens on them. The result is that individual contractual agreements between government and private actors may include accountability requirements, but they fail to establish a systematic, continuous, and shared web of stable institutional relationships between those actors and the lawmaking community.[64]

The problem, however, is that administrative procedures are important mechanisms for containing alienation. This is because, if appropriately designed to establish regular and integrated deliberative relationships of mutual responsiveness between the administration, the legislature, and the public, these procedures play a significant role both in sustaining a shared understanding of the overarching goal of their shared activity and in supporting a collective sense of self, according to which each participant can come to regard him- or herself as a cooperator in a joint venture of policy creation and implementation.

The upshot is that privatization, by fragmenting the community of policy makers and weakening procedural ties between them, threatens to foster alienation within the structure of government. This is a second reason why privatization makes it particularly difficult, if not impossible, for the practice of policy making and implementation to take the form of an SCA. To be clear, the nature of this difficulty does not amount to a logical impossibility, but it amounts to what I have previously defined as a "robust contingency."

We are now ready to complete the analogy between the policy-making activity of private actors under government contracts and the case of *Delegated Tic-Tac-Toe*. A player who, asked to play tic-tac-toe on someone else's behalf, attentively follows the rules of tic-tac-toe, but does so with the intention of making the other player win, plays as if he or she were committed to the goal of the game without actually being so committed. Because of this, in spite of appearances, the player is not really playing tic-tac-toe. He or she is not therefore doing what the principal asked him or her to do. The player is therefore failing to carry out the principal's will. For parallel reasons, the private actor that follows the contractual directives set by the government but does so while

being intentionally committed to fostering its own organizational goals, or while having a very different understanding of the goal of the overall activity, performs the task of policy making without being intentionally oriented to the goal of the policy-making activity—that is, to carry out the shared will of the people and translate it into policy. Therefore, in spite of appearances, the private actor's actions fail to qualify as something the lawmaking community has done together. His or her actions in turn lack the presumption of legitimacy that results from acting together as a part of that community. They thus fail to qualify as acts of (legitimate) policy making or lawmaking.

The implication of my analysis is as follows: private actors are likely to act illegitimately, whether their actions have good outcomes or not. Their decisions remain unilateral, private judgments of particular men and women rather than being genuine instances of omnilateral lawmaking.

How Privatization Compromises Attributability

But let's assume that private actors can meet the conditions of broad convergence and contained alienation, and thus can be regarded as taking part in the shared cooperative activity of lawmaking. We would still face the further question of whether their decisions could be attributed to the lawmaking community as a whole. After all, remember, Peter was acting together with the members of the department in trying to hire the best possible candidate, and yet his decisions could not qualify as decisions of the department. My contention is that, similarly, private actors' decisions often fail to qualify as decisions that can be attributed to the lawmaking community as a whole. Yet, unlike in the case of Peter, this is not because they are not formally appointed members but rather because they fail to meet what I have called the condition of procedural integration.

We saw that for an agent's decision to be attributable to a certain institution, the agent must act within a stable, coherent, and unified institutional structure that, by providing a shared background framework, appropriately connects the practical reasoning and actions of the various participants, and confers unity to their acting.

When the administration and implementation of policies is at stake, the practical means that secure this unified institutional space include, as we saw, those administrative procedures the purpose of which is to establish stable and integrated relationships of mutual responsiveness between elected officials, lower administrators, and the public. Yet, as we further explained, often these

procedures do not frame the institutional space within which private actors operate. Indeed, privatization contracts tend to separate private actors' decision making from the institutional constraints imposed by the procedural structure of bureaucracy. This in turn leaves these actors in important ways outside of the lawmaking community, understood as a unified collective agent (along the lines of the member of the department who is formally affiliated to it but who never shows up at meetings and fails to appropriately relate to the other members). This is ultimately why privatization generates not simply a problem of accountability but also one of attributability. Yet, if private actors' determinations, however well intentioned, cannot be attributed to the lawmaking community, they fail to qualify as genuine acts of lawmaking. They, analytically speaking, remain private conclusions of particular men and women.

But why, one may ask, can we not bring private actors within the lawmaking community by simply extending to them relevant administrative procedures and requirements? The answer should by now be clear. First, this solution would be self-defeating, for the practical purpose of privatization is precisely to bring certain decisions outside of burdensome administrative constraints, so as to foster efficiency and innovation. Second, if private actors were genuinely forced to act for public purposes alone, and were fully embedded within the procedural structure of public administration and within the system of public offices, they would cease to be "private" in the relevant normative sense. They would acquire many of the features that, as we saw in chapter 3, constitutively differentiate public from private actors (although, of course, they may retain some descriptive features that are often taken to characterize private actors). This would make privatization a conceptually empty term.

Before concluding, it is important to answer some possible objections to the collective action view of legitimate (ordinary) lawmaking, which I developed in this chapter. Answering these objections will also help me further clarify the implications of my argument for how we ought to assess private actors' exercises of lawmaking power in the real world.

Conclusion: The Duty to Exit the Privatized State

Some could argue that the collective action view is too idealistic or even naive, as demonstrated by two implausible implications. First, the objection goes, if this view is true, no existing government appears to be legitimate, in the sense of being permitted or justified to exercise the lawmaking power it exercises

over its citizens. Call this *the legitimacy charge*. Second, if the collective action view is true, no existing government has authority—a right to be obeyed by its subject, at least insofar as ordinary lawmaking is concerned—and so the specter of anarchy looms large. Call this *the authority charge*.

Although the collective action view is indeed demanding—it requires officeholders to have an appropriate intentional orientation, beyond behaviorally complying with their mandates—I think both charges can be answered.

My answer to the legitimacy charge comes in two parts. On the one hand, I believe that, once properly understood, the demands of the collective action view could be realistically met by many governments. On the other hand, I think that, under certain circumstances, a government may be justified, all things considered, to exercise lawmaking power over its subjects, thereby holding a provisional kind of legitimacy, even if it does not fully meet the demands of the collective action view. Let me explain.

As I have argued in chapter 2, we have a (natural) duty of justice to exit the state of nature and to bring about democratic political institutions that meet certain conditions. This duty is grounded in our duty to respect each other's external freedom, as well as our equal normative authority and rational independence. A state, inclusive of a system of government, that meets the relevant conditions can justifiably impose coercive laws on us and change our normative situation, for we have no right not to be coerced to do what we have a natural duty of justice to do.[65]

In the view I defended, substance and process are co-original elements of legitimacy. This means that a wielder of political power is fully justified in wielding that power if and only if wielding it both (1) secures the basic substantive conditions of freedom as independence (e.g., basic constitutional rights) and (2) further specifies and implements the demands of justice through democratic procedures that are themselves compatible with the independence of all. These procedures, in turn, must guarantee both that (a) laws are democratically authorized and that (b) they carry out the people's shared will, rather than some person's unilateral will (including, e.g., the will of a group of wealthy donors having identical content to the people's will). The latter condition, if my view is correct, requires that officeholders act "together," according to the demands of the collective action view.

One important implication of this view is that, since legitimacy is pluridimensional, it comes in degrees. Governments can be more or less legitimate, that is, more or less justified in exercising the lawmaking power they exercise, depending on whether they meet only some of or all the above procedural and

substantive conditions. The collective action view, therefore, is compatible with the view that governments that secure and respect basic human rights and allow for a process of democratic authorization, but exhibit rampant alienation among lawmakers and officeholders, are more legitimate than governments where there is no alienation but also no respect for human rights or no process of democratic authorization.

Further, citizens must be able to assess whether their government, and the process of lawmaking, is legitimate or not. A requirement of publicity is thus an important, epistemic complement to legitimacy. Although, I believe, publicity is not a demand of legitimacy itself, it is a demand that must be met in order for citizens to be able to judge whether their government is legitimate. The collective action view of legitimate lawmaking risks failing the publicity test because citizens cannot know what their representatives are intentionally committed to. Publicity thus requires that we use appropriate institutional benchmarks to judge whether a government meets the internalist demands of legitimacy. These benchmarks may include data concerning the level of corruption and alienation in government; the existence of a system of administration that partly insulates the civil service from undue factional pressures through appropriate institutional mechanisms, for example, tenure and a salaried scheme of remuneration; and appropriate educational institutions that instill an ethos of public service in public administrators; as well as the presence of appropriate procedures to integrate the bureaucratic and the democratic.

The collective action view is thus compatible with treating as fully legitimate all governments that, beyond respecting basic human rights and allowing for a fair process of democratic authorization, also meet the above institutional benchmarks—benchmarks that are not impossible to meet for any developed liberal democracy.

The collective action view is also compatible with claiming that nondemocratic states can sometimes make legitimate laws, at least provisionally so. The same reasons why we have a duty to exit the state of nature and why democracy is a requirement of full legitimacy are the same reasons why a government that is not democratic may still be all things considered justified to exercise political power over those subject to its rules if (a) democracy is unfeasible in the short term or (b) exercising political power in a nondemocratic way is necessary to eventually transition to a fully legitimate state.[66]

Turning now to the authority charge, I am here assuming that possessing political legitimacy is a necessary condition for authority: the right to be

obeyed by those subject to a government's rules. Although I grant that the collective action view sets a high bar, I do not think that this fact in and of itself raises the specter of anarchy. The reason for this is simple: citizens can, in principle, have compelling reasons to comply with their government's laws, even if they do not owe any duty of obedience to the government itself. It may be helpful to reframe this point as follows: citizens may have nonauthoritative reasons to comply with their government's laws or rules, even if they have no authoritative reason to do so. Reasons, I take it, are "authoritative" if they derive from the very fact that a given institution or body issues a certain rule. Citizens, I take it, have no authoritative reasons to obey laws that fail to meet the demands of the collective action view, for the mere fact that their government issues a certain rule is, in this case, no reason to obey it. Yet, as Allen Buchanan argues, sometimes it may be necessary to obey the rules issued by a particular entity that lacks the imprimatur of democratic legitimacy "in order to achieve the modicum of order needed to develop the democratic institutions which alone make the exercise of political power fully legitimate."[67] Citizens can then have nonauthoritative reasons to obey the laws of a government, the lawmaking activity of which, according to the collective action view, fails to qualify as fully legitimate, if doing so is necessary to support a more legitimate process of lawmaking.

Where do these considerations leave us with regards to the legitimacy of the privatized state—a state where the power to make presumptively binding rules that change the normative situation of citizens is systematically delegated by the government to private actors? My claim is that many of the rules issued by the privatized state are neither fully legitimate nor worthy of obedience. Why? First, regardless of whether it meets the substantive conditions of legitimacy, the system of government in the privatized state systematically fails to meet the procedural ones, for the reasons examined in the previous two chapters, as well as in the present chapter. In this way, the privatized state systematically subjects its citizens to the unilateral will of others in the context of very important decisions about the scope of their rights and duties. The privatized state does not even meet the institutional benchmarks that we can reasonably use as indicators of officeholders' appropriate intentional commitments. By contrast, as we saw, privatized states generally exhibit what Jon Michaels has called "a marketized bureaucracy," where the civil service is systematically stripped of its protections and the distinction between public purposes and private loyalties is blurred to the point of disappearance.[68]

Second, and with regards to obedience, there is little reason to think that systematically relying on a system of privatized ordering, and obeying the directives that come out from this ordering, is a necessary means to transition to a more democratic process of lawmaking. Indeed, for the reasons that we examined throughout this book, privatization weakens rather than strengthen the prospects for a more democratic order.

The conclusion is that privatization compromises both the legitimacy and the authority of government. It confers to private actors the de facto authority to change the normative situation of citizens, without these actors having the standing to exercise this authority omnilaterally—in the name of all and in accordance with a shared will—and thus legitimately. This is the sense in which privatization, understood not as an isolated policy but as a process of transformation of the overall practice of governing, constitutes a regression to the Kantian state of nature. It reproduces a condition in which some purport to authoritatively legislate the rights and duties of others through merely unilateral determinations. This condition, as we saw in chapter 2, is incoherent and deprived of justice. Indeed, treating one's merely unilateral will as legislative for others violates not only their equal normative authority but also their freedom, as well as their rational independence. Therefore, for the same reasons why we have a natural duty of justice to exit the state of nature, we also have a natural duty to exit the current system of privatization.

PART III

Beyond the Privatized State

7

The Duties of Private Donors

I HAVE ARGUED THAT a liberal-democratic state has strong reasons, ultimately grounded on its duty to rule legitimately, to constitutionally constrain the overall scope of privatization, as well as the delegation of particular decision-making powers to private actors. I now want to shift gears to focus on the duties of those private actors who act and operate within already widely privatized systems of governance. This and the next chapter will concentrate, respectively, on two different aspects of privatization: the funding of justice through private philanthropy and the provision of justice through private organizations. I will suggest that, in the context of such phenomena, we should significantly revise our dominant understanding of the duties and responsibilities of private actors, whether these be philanthropic donors or nonpolitical associations. If until now my main concern has been with questions of democratic legitimacy, my analysis will now turn to questions of justice, although considerations of both justice and legitimacy remain necessarily intertwined.[1]

Albeit historically old, the practice of philanthropy has gained renewed attention in recent years, in both public and academic discourse.[2] This is partly due to the sociopolitical role that philanthropy is called to play by neoliberal governments in a context of increasing privatization, and to the concomitant self-understanding of the very wealthy as entrepreneurial agents of social change. While many democracies, including affluent ones, face increasing cuts to the public funding of important goods and services—such as primary education, health care, and even policing—their governments publicly encourage private giving as an alternative way of financing their production.[3] Philanthropy is thus instrumental in facilitating privatization. Consider, for example, US president Barack Obama calling on foundations and philanthropists to partner with government: "Now more than ever we need to build cross-sector

partnerships to transform our schools, improve the health of Americans, and employ more people."[4] This happened in a country where the annual amount of private giving is already striking: about $410 billion per year.[5] Obama's call was soon echoed by the British government's advocating for "a stronger culture of giving time and money"[6] and promising to "take a range of measures to encourage charitable giving and philanthropy."[7]

By situating the practice of philanthropy within the context of privatized governance, my aim in this chapter is to address two relatively neglected normative questions. First, I ask how we should understand the primary role of philanthropy in contemporary liberal-democratic societies, as well as the normative status of the duty to give. What kind of duty, if any, have private persons to give their resources away? I shall refer to this as *the question of kind*. In principle, we could understand philanthropic donations as expressions of altruism the primary purpose of which, like other kinds of gifts, should be to communicate gratitude toward those to whom these gifts are directed, or to reflect donors' personal appreciation for particular causes. Alternatively, we might understand philanthropy as a practice of enlightened self-interest directed at the enrichment of society for civic purposes, as Andrew Carnegie long ago encouraged Americans to do.[8] Or, finally, we could see philanthropy as providing the best available means to discharge positive duties of beneficence or humanity, that is, duties to use one's rightfully owned resources to promote valuable moral ends, such as the minimization of suffering, as Peter Singer and the increasingly popular effective altruist movement advocate.[9]

However, I believe that none of these ways of understanding the normative status of philanthropy in wealthy contemporary societies is adequate. All these conceptions, in different ways, are guilty of the same error: they fail to appropriately contextualize the practice of philanthropy, and, by doing so, they operate under false assumptions. More precisely, they tend to assume that donors have a moral entitlement to the resources they give away. Yet this proprietary assumption is, under current conditions, unwarranted.

I wish, therefore, to defend an alternative normative account of the role of philanthropy. I will argue that, within the context of many contemporary societies, philanthropy should be conceptualized as a means of reparative justice. By this I mean that philanthropy should be regarded as an instrument that the well-off should use to repair a particular kind of absolute harm to the worst-off, for which the former can be held liable, although not necessarily blameworthy. From this perspective, citizens' duty to give should be understood as a provisional duty of reparative justice. The duty is "provisional" in

both a temporal and a normative sense. Temporally, it is provisional in the sense of being transitional. It should eventually be taken over by public institutions and should be discharged with the aim of eliminating its very justificatory conditions, that is, with the purpose of bringing about a situation where philanthropy is no longer needed as a means to return to others what is rightfully their own. Normatively, the duty is provisional for a similar reason why rights to property are merely provisional in the Kantian state of nature—as we saw in chapter 2. The reason is that this duty involves an internal contradiction: in the absence of just institutions, its fulfillment is simultaneously demanded by, and incompatible with, freedom as independence. It is demanded by it qua a means through which the poor can be returned at least part of what is rightfully their own, including certain basic resources that are necessary conditions of independence. It is incompatible with it because it makes the obtainment of such conditions dependent on the merely unilateral will of particular others. This contradiction requires that we treat this duty as sui generis: a morally binding demand whose character is, however, morally suspect.

Understanding the duty to give as a demand, albeit provisional, of reparative justice has important implications for a second set of questions: how should individual or corporate donors make their donations? Should donors be morally permitted to exercise personal discretion in deciding how much to give and to whom, given the context of privatization within which their giving takes place? And should their giving be responsive to the recipients' preferences? Further, should institutions constrain or direct donors' personal discretion? I shall refer to this set of questions as *the question of discretion*.

By "personal discretion" I mean the moral prerogative to appeal to agent-relative reasons when making a decision. Agent-relative reasons are reasons that are nonshared, for they make essential reference to a particular agent's identity, life history, or personal projects. The question of discretion, thus, is the question of whether donors should be permitted to make their donative choices about how much to give and to whom, by appealing to these nonpublic reasons.

It is a widespread assumption, both in commonsense morality and in political discourse, that citizens should enjoy wide discretion in deciding how to direct charitable donations. Incentives to philanthropy, it is argued, should "fit with people's lifestyles and interests," and giving should happen "on the back of free decisions by individuals to give to causes around them" about which "they care."[10] Even so-called effective altruists, who argue that people should donate so as to most effectively promote humanitarian outcomes, rather than

according to their personal policies, seem to assume that donors rightfully own the resources in their possession and thus retain the moral right to choose among available charities as if they were privately investing in those organizations.

This prevailing answer to the question of discretion is, I think, wrong. If philanthropy is, under current conditions, a demand of reparative justice, then affluent donors should, at least up to a threshold, exercise no personal discretion when deciding how to give and to whom. The reason is simple: we do not have the right to use resources that are not rightfully our own according to what we personally care about. Debtors cannot be choosers; they do not get to decide through what means their debts should be repaid. It follows that public officials should refrain from encouraging personal discretion through public discourse, and should design tax incentives to private giving, assuming these can sometime be justified, in a way that minimizes this discretion, by matching incentives to well-defined, particular causes. This may require changes to existing schemes. In the United States, for example, incentives to charitable giving—that is, charitable tax deductions—are designed so as to leave donors with wide discretion in selecting the addressee of their tax-exempted charitable gifts. Deductions do not match a narrow range of causes and are not structured according to redistributive principles.[11] Religious giving has long captured about 30 percent of total donations, and it further increased by 2.9 percent in recent years.[12] Assessing the moral justifiability of the discretionary view can help us assess the justifiability of these tax policies, which have significant costs for the public—more than $50 billion per year is lost by the US Treasury in charitable deductions.[13]

Justice versus Beneficence

The kind of discretion that we are morally permitted to exercise when discharging a certain duty depends on the kind of that duty. Imagine I borrowed your bike. It seems obvious that I should have no discretion in deciding whether to give you back your bike or, say, a rare book instead. Even if I personally value rare books more than bikes, and even if, by assumption, rare books are objectively more valuable than bikes, these should count as irrelevant considerations in my decision. I owe you exactly what I borrowed. Things are different in those cases where I do not owe you anything that is rightfully yours, even if I might still have a moral duty to give you something. Imagine, for example, that you helped me prepare an exam. Your helping me was

unsolicited and supererogatory. Yet it required a sacrifice on your part from which I benefited. I should give you something to express my gratitude. I decide to buy you a rare book. I could have bought a bike for the same value, but it just happens that I value rare books more. In this case, unlike in the previous one, it seems perfectly fine for me to pick the book because I value it more.

The relevant difference between the two cases relates to the kind of duty the agent bears. In the first case, I have a duty of justice; I owe you something that is rightfully yours. Because of this, I do not get to decide how to discharge my duty, for I do not get to decide how to use your property. Since duties of justice are correlative to specific entitlements, the duty bearer has no or very little discretion in deciding by what means to discharge them and toward whom. In the second case, by contrast, I may well have a moral duty of gratitude toward you. But this duty does not point at any specific entitlement of yours; it rather points toward a general end—expressing my gratitude. Since I can pursue that very same end, and thus discharge my duty, in many different ways, I am left with a certain space for discretion. This, in turn, means that, as Kant would say, I remain entitled to appeal to my own "sensibilities" when deciding by which means to discharge the duty in question.[14] It also means that I retain some discretion in deciding the circumstances of action. This second duty is, we would say, a duty not of justice but rather of beneficence.

Much more could be said about the distinction between justice and beneficence. However, for our purposes, it is sufficient to agree that donors in contemporary societies can be entitled to the personal discretion they currently enjoy in deciding how to give and to whom only if their duty to give is not a duty of justice.[15]

The Question of Kind

How do we know whether the citizens of contemporary democracies have a duty to give money away on grounds of justice rather than of beneficence? We must first determine whether the resources these citizens have at their disposal are rightfully theirs or rather owed to someone else. We cannot know this without first knowing whether the current pattern of property distribution is just, such that everyone can claim a clear right to what is in their pockets.

Different theories of justice will answer this question differently. For the sake of the present argument, it will be enough to notice that all the major theories of social distribution tend to converge on the verdict that the current distribution of property is seriously unjust.

Consider, first, libertarianism. One may think that libertarians have little reason to criticize the current, even if highly unequal, distribution of property holdings, for they are not committed to any particular distributive pattern, let alone an egalitarian one. For libertarians, a distribution of property is just if and only if everyone has acquired an entitlement to the holdings they possess, either through direct just acquisition or through just transfer from someone else who was in turn rightfully entitled to that holding, according to the same principles.[16] While a transfer of property is just simply if it meets certain felicity conditions, including the absence of fraud or stealing, what counts as justice in original acquisition is notoriously more controversial. We can safely assume, however, that in order to be just the acquisition of property must, at minimum, not result from violent dispossession or fraud (beyond not worsening, in some relevant respect, the position of those no longer at liberty to use previously unowned property).[17]

Even libertarians, therefore, have reasons to evaluate the current distribution of property as unjust, for much of today's property distribution is undeniably the result of past conquests, violent expropriations, stealing, fraud, force, slavery, and so on. In the impossibility of tracing all relevant sources of injustice, there is as much libertarian reason to adopt a policy of radical redistribution and start from scratch as there is to maintain the status quo. Not even libertarians are then committed to the claim that the wealthy in current societies rightfully own all their wealth.

The same conclusion can be reached, more easily so, from a liberal-egalitarian perspective. Unlike libertarians, liberal-egalitarians reject a preinstitutional view of property rights. The reason is simple: we cannot determine what an individual is fairly entitled to, and thus what he or she rightfully owes, independently of the claims of everybody else in society, understood as a joint scheme of mutual cooperation. Therefore, the economic and political institutions that arrange this scheme of cooperation, including a just tax system, should not be understood as subtracting from people a part of what they already, preinstitutionally own. They rather determine what people own.[18] True, some people may be smarter or more talented and produce more, while others less. Yet, as John Rawls reminds us, the value of our talents is itself endogenous to the sociopolitical and economic structure of the society in which we live and cannot be assessed independently of it.[19] Our fair share cannot thus be determined according to a preinstitutional conception of moral desert either. Hence, people rightfully own only what remains in their pockets after they have discharged their duties to support a fair, mutual scheme of social

cooperation, by supporting the institutions that frame this scheme. These institutions include both redistributive institutions and institutions of public provision.[20] Duties of distributive justice are thus duties to contribute one's fair share of resources to these institutions. In an ideal society, once citizens have appropriately discharged their distributive duties in this way, they can use the resources that are rightfully their own to discharge their residual duties of beneficence, for example, by donating money to nongovernmental charitable associations.[21] However, in the real world, governments are generally not the only funders of justice-required goods, and, within the context of the privatized state, they are not even sufficient funders. In the United States, for example, primary and secondary public schools often must create (tax-exempt) philanthropic foundations in order to function properly.[22] Philanthropic giving is also emerging as a significant means by which health systems fund the renovation of aging infrastructure and cope with staffing shortages.[23] In the United Kingdom, similar considerations apply even to policing.[24] In these contexts, liberal-egalitarianism provides strong reasons to doubt that the resources wealthy philanthropists give away can be regarded as conclusively their own, for they arguably get to retain in their pockets more than they would if they were subject to just institutions.

The same is also true for Kantian conceptions of property rights. Kant's own theory of property rights occupies a fruitful middle ground between libertarianism and liberal-egalitarianism. For Kantians, like for libertarians, there are preinstitutional claims, in the form of provisional rights, to the secure use of external usable means, and such claims should affect the shape and limits of economic and political institutions (although these institutions need not amount to capitalist systems of private property). Yet, as we saw in chapter 2, like liberal-egalitarians, Kantians believe that property rights qua conclusive rights can exist only under public institutions. Interestingly, however, for Kant, a state can secure property rights in a way that is consistent with its citizens' equal freedom if and only if it has priorly endorsed a duty to support the poor. In other words, the legitimacy of a system of property is conditional on welfare provision. Why? Recall that the justification for a system of property is that secure rights to control the use of external objects and resources are necessary for freedom as independence. The problem is that, unless appropriately constrained, a system of property would violate its own very justificatory rationale. Excessive accumulation of property in the hands of a few would render some citizens' survival, as well as their ability to form and pursue ends, dependent on the discretionary choices and actions of others, including the wealthy's

willingness to share some of their own resources with the poor through philanthropy. Hence a system of property, in light of its own rationale, can be legitimate only if appropriately constrained by a duty to secure the substantive independence of everyone. Therefore, unless the duty to support the poor is appropriately fulfilled, the legitimacy of a property system is forfeited. It follows that, as long as a duty to secure the independence of the most vulnerable in society is not appropriately discharged by the state, the wealthy cannot rightfully claim conclusive and secure property rights in their own wealth and possessions.

We must then ask: within a social system in which at least a part of property owners' holdings cannot be regarded as rightfully theirs, what kind of duty do donors (who own a significant amount of property) have to voluntarily give their holdings away?

The Grounds of Reparation: Benefits, Contribution, and Relations

If, as things stand, the wealthy cannot claim a full right to own all the resources they have at their disposal, we should ask whether, even before more just institutions can be brought about, the wealthy ought to directly return at least some of those resources to their rightful owners, and if so, how.

One first thing to notice is that when a government fails, even if only partially, to fully fund the provision of justice-required goods (of whatever kind and to whatever threshold required), wealthy citizens may, and often do, benefit from this failure, while the poor are harmed. The wealthy benefit at least when they (1) pay less taxes than they would have to pay to support a government-run system of just public provision and, at the same time, when they (2) are not themselves damaged by the cuts, for they can afford access to, say, education and health care through the market—something they often do regardless of whether public alternatives are available.

It could then be argued that, when an agent benefits, whether voluntarily or involuntarily, from a process of privatization, here understood as government withdrawal, that wrongfully harms others by depriving them of what they are rightfully entitled to, the agent acquires a duty of reparative justice toward the victims of such a process. By a duty of "reparative justice" I mean a person P's duty to fairly compensate P1 for harm for the compensation of which P can be held liable, where "harm" means a setback to P1's interests. The beneficiary agent—the argument goes—ought to compensate for the damage this system unfairly inflicts on its victims, so as to return the victims as close

as possible to the preharm baseline.[25] This is true even if the agent lacks the capacity to provide full compensation along all the relevant dimensions of the damage.

But can wealthy philanthropists have a duty of reparative justice to compensate for harm inflicted by their state on their fellow citizens, through a process of privatization, simply because they benefit from this system? The mere fact that an agent benefits from a system that wrongfully harms others is not always sufficient to impose on the agent a duty of compensation, and this is so even if the benefit is voluntarily sought.[26] For example, many academics intentionally benefit from writing books on social injustices, and they would not so benefit if those injustices did not exist.[27] Yet we would not say that it is wrong for academics to benefit in this way, or that they owe compensation to the victims of those injustices for the mere fact of benefiting from them. What grounds a duty of reparation, then, cannot be the simple fact that we benefit, even if voluntarily, from some form of wrongful harm or injustice. *How* we benefit matters too.

Certain forms of benefiting are themselves actual contributions to injustice.[28] For example, even if young white men did not originally contribute to instituting a labor market that treats women as inferior, for example, by systematically paying them less than men for the same quality and quantity of labor, these same men can be regarded as perpetuating, and thus contributing to, the injustice if they continue to intentionally benefit from it without taking any action to change the system. Benefiting constitutes an even worse contribution to injustice when it occurs at the cost of making the victims even worse off than they would otherwise be. For example, when the wealthy send their children to elitist private schools while paying less taxes than those required to support an adequate system of public schooling, they not only may benefit from the injustice but also further enlarge the competitive gap between their children and the members of more vulnerable populations.

Now, we are generally liable for the wrongful harms or injustices to which we contribute, even if our contribution is only indirect or does not itself amount to a wrongful action. For example, if I drive other members of my mob to a bank so that they can rob it, I can bear responsibility and be held liable for the robbery, even if driving a car is not itself a wrongful act and even if I have only indirectly contributed to the robbery itself.[29] Similarly, I can be held responsible and liable for intentionally benefiting from an injustice in a way that further contributes to it, even if the action through which I benefit only indirectly contributes to that injustice or is not itself wrongful.

If this is correct, then within privatized societies where the wealthy benefit from cuts to public services that harm the poor, the wealthy can be reasonably said to have a duty to repair that harm, at least to the extent that their benefiting from it can be regarded as a form of contribution to that injustice.[30]

It could be pointed out, however, that the conditions under which we can reasonably affirm that wealthy citizens benefit from an unjust system may not always apply or may not apply to all wealthy citizens. This is because the fact that, in the privatized state, basic services are underprovided by government does not necessarily mean that the wealthy are paying less in taxes than they would have to pay to support an adequate government-run provision system. Indeed, their taxes might simply have been diverted to other, futile expenditures (e.g., excessive military spending). Further, the wealthy might themselves be damaged by the cuts, although not as damaged as the already disadvantaged. Many of the relatively wealthy may well be better off if they lived in a just society that fully funds a broad range of justice-required goods.

Does this take the wealthy off the hook? I do not think so. This is because individuals may acquire reparative duties even without benefiting at all from injustice. Benefiting from an injustice (at least when benefiting amounts to contributing) might be sufficient to ground reparative duties, but it is not necessary. I can certainly have a duty to compensate others for an injury that I negligently inflicted on them, regardless of whether I benefit from it or not. In those circumstances, where the wealthy do not benefit from a system that underprovides basic goods and services, they may still acquire duties of reparative justice if they can be held causally responsible or liable, in a relevant sense, for the policies that harm the poor.

To answer the question of liability thoroughly, we would need a complete theory of individual responsibility for collective wrongs. I cannot develop such a theory here. I will, however, rely on a long tradition in democratic theory that argues that citizens of legitimate, democratic states are complicit in their states' injustice, in pretty much the same way that members of a mob are complicit and can be liable for the crimes of the mob even if they, individually, have done nothing wrong. True, participation in a mob is (generally) voluntary whereas participation in a state (generally) is not. Yet, as long as a state acts as a legitimately authorized body, and according to basic constitutional essentials, and as long as its policies carry out the shared will of the people in a relevant sense, it can be regarded as acting in the name of its citizens.[31] This is regardless of whether citizens actually support each and every state policy or not. After all, individuals have nonrefutable moral reasons, indeed a duty,

as we saw in chapter 2, to transfer the right to define and enforce their own rights and duties according to democratically authorized rules to political institutions.

If we accept this idea of democratic complicity, we must also accept that citizens retain liability for the policies of their states, even if they did not directly vote for those policies, for as long as the state acts legitimately its action can be regarded as authorized by its citizens. True, an exception can arguably be made for those citizens who have actively campaigned against unjust policies—it may be argued that these citizens' injustice-offsetting actions cancel their liability.[32] Leaving these cases aside, however, if we agree that citizens of democratic states are often complicit in their state's unjust policies, we must also agree that a citizen of a democratic state can acquire a duty of justice to compensate his or her cocitizens when they are harmed by their state's policies.[33]

It could be objected that this liability should fall on rich and poor alike, as both count as authorizing citizens, and that reparative duties cannot be assigned only to the wealthy. However, as Eric Beerbohm points out, "inequalities in political power alter our liability for democratically sponsored unjust policies. In a seriously imperfect democracy, where power is distributed in a way that tracks income or wealth, the moral liability of citizenship can track these inequalities"; this is both because, as Beerbohm further agues, "poverty constrains citizens' opportunities for political influence," and because "the poor are more harmed by the enacted policies than the wealthy."[34]

So far I have argued that both those individuals who benefit (in a contributory sense) from injustice and those who can be reasonably regarded as complicit with it (even if they do not benefit from it) can be held, for different reasons, liable for the injustice. They can then be attributed a duty of reparative justice to compensate the victims of that injustice. But what about those cases in which the wealthy neither benefit from injustice nor can be regarded, in any meaningful sense, as being complicit with their unjust domestic system, perhaps because this system does not meet the relevant conditions of democratic legitimacy? I believe the wealthy may still owe a duty of repair. This is because one can have a remedial responsibility for X (assuming one has the capacity to discharge it), without being complicit in X, and regardless of one benefiting from X or not. Let me explain, by using an example that I borrow from Debra Satz.[35]

Suppose that I find out that your violin is actually mine. Your cousin stole it from my mother and then gave it to you as a present. You did not know that the violin was stolen when you accepted it so you violated no moral duty and

cannot be blamed for it. Also, since you detest the sound of violin you have not benefited from it (suppose you cannot even sell or rent the violin so as to profit from it). Nevertheless, it seems that you have a remedial responsibility to return the violin to me (or to provide me with some form of compensation) as soon as you find out, and even to apologize on behalf of your relative. The reason why you would have a remedial responsibility in this case, even in the absence of direct contribution to, and benefit from, the harm caused, is that only by discharging this responsibility would you be able to restore a rightful relationship with me, the victim.[36]

For parallel reasons, the fact that a citizen did not advocate or vote for a reduced form of public provision, which deprives the worst-off of what is rightfully their own (or for tax breaks such as the so-called hedge-fund loophole, which benefit the wealthy, while impoverishing government),[37] as well as the fact that the citizen in question may not even benefit from that policy (that citizen would be better off in a more just society), may be sufficient reasons not to blame that citizen. However, as a wealthy member of a political society that, through a process of privatization, deprives the poor of access to what is rightfully their own, the citizen in question may still have a remedial responsibility for returning to others what they have been unjustly deprived of (or, at least, to compensate them for the deprivation). Only in this way can a moral, rightful relationship among citizens, let alone the social glue of public trust, be, at least partially, restored.

Therefore, even those wealthy members of society who do not benefit from or contribute to policies that underprovide, or cause the underprovision of, justice-required goods may still bear a duty toward the poor to compensate for the costs of those policies (assuming, of course, that they have the capacity to discharged this duty—a question I will address below). The central question then becomes how this duty should be discharged.

The Reparative Account of the Duty to Give

Compensation for wrongful harm can be paid either in general, neutral resources (i.e., cash) or by returning to the victim the specific object of which he or she has been wrongly deprived. Yet, as Debra Satz rightly points out, in order to be fair, compensation needs to satisfy at least two conditions: (1) it must be "targeted (where possible) to the wrong it is meant to redress," and (2) it must be aimed at restoring (as far as possible) the victim to the preharm baseline, while doing so in a way sensitive to the specific kind of harm suffered by the victim.[38]

When imposing on the wealthy a duty to compensate the poor for the costs imposed on them by a system that underfunds justice-required goods, the above principle provides us with reasons to favor the object-specific option. This is because the privatized system in question harms the poor, with respect to their access to certain specific goods (education, health care, policing, etc.) the provision of which is collectively established, through democratic procedures, as a public responsibility grounded in justice. Within this context, returning to the poor what is rightfully theirs means ensuring that the poor have access to those goods to which they have a rightful claim against the state, rather than simply giving them cash, so that they can fulfill whatever personal preferences they may have, as preference satisfaction is not what citizens' claim against the state is about.[39] I shall call this *the principle of object-specific compensation*.

The question is how the demands this principle makes on the wealthy should be discharged in contexts where a fully functioning system of public provision is unavailable and where it may take time before it is brought about. The obvious way for the wealthy to fulfill those demands is by supporting, through donations of money or time, those service-providing agencies (often nonprofit organizations) that are best suited to compensate for government failure, when the provision of justice-required goods is at stake.

It could be objected, however, that, even in these circumstances, relying on philanthropy could have undesirable effects.[40] The more philanthropy substitutes itself for government action, the more the latter has an excuse not to take back its responsibilities. Although this strategic concern is legitimate, I still believe that, overall, the morally best way to compensate for an unjust system is by preventing that system from having its most devastating effects on its victims. Yet lack of access to some particular good today may have effects that cannot be repaired by securing access to that same good tomorrow. A child needs access to good public schools in his or her early childhood. Parents need access to child care right after pregnancy if they both want to keep their jobs. Spending time and money in political advocacy, so as to support the provision of more and better services in the future, cannot compensate damages caused by cuts to these services here and now. Compensation must thus happen, at least in part, before more just institutions can be brought about. I shall call this *the principle of damage limitation*.

This principle provides a second moral reason for regarding philanthropy as one means, and sometimes the only available means, of reparative justice. While doing whatever is in their power to bring about just institutions, the

wealthy should also (partly) compensate, through philanthropy, for the damage that an unjust system of public provision inflicts on the worst-off.

It could be argued, however, that individuals cannot discharge duties of distributive justice through donations to particular associations, for both individuals and associations lack the capacity to secure and preserve just patterns—what Rawls would refer to as the capacity to adjust background conditions—and may even upset these patterns through their autonomous actions. It may seem, then, that private actors cannot discharge duties of reparative justice either. The objection, however, ignores an important difference between reparative and distributive justice. What matters, from the perspective of reparative justice, is that a harm is compensated, rather than how people comparatively fare with respect to their bundle of particular resources.[41] Of course, this harm can be defined as a "deficit" in access to goods one ought to have access to on grounds of distributive justice, in which case the demands of a duty of reparative justice are provided by a substantive theory of distributive justice, itself concerned with relative shares. But this need not always be the case. When your state deprives some of your fellow citizens of access to health care or education, the state can be regarded as harming them in more than one way. On the one hand, it is depriving them of their fair share of goods or resources, as calculated relative to the share to which other citizens are entitled. This is a distributive harm in kind. On the other hand, it is also harming them in absolute terms. It is depriving them of the basic conditions necessary to their independence. The latter harm qualifies as such at least partly independently of considerations of relative inequity. This is what I would call an absolute kind of harm. Whereas distributive justice can be secured only by restoring a pattern of relative equity, however exactly defined, absolute harms can be at least partly repaired by simply bringing the harmed person closer to the relevant threshold (the preharm baseline), to some extent independently of whether other equally harmed persons are simultaneously compensated. Reparative justice in the second case does not require the kind of continuous adjustment that would be instead necessary to secure distributive justice, and that private agents arguably lack the capacity to secure. Further, while one cannot secure a holistic pattern of distributive justice by giving to some while neglecting others, one can be said to repay a debt even when neglecting other debts that are also due. Private actors can then have, at least in principle, the capacity to discharge their reparative duties, if so understood, even if (by assumption) they lack the capacity to secure a fully just distribution

of resources. Therefore, even if one agrees that private giving should not be regarded as a means of distributive justice, contributing to an organized system of philanthropy might still be the morally best means of discharging more modest duties of reparative justice.

There is, however, a different and more fundamental sense in which philanthropy may be regarded as an inappropriate means of justice, whether distributive or reparative. In chapter 2, I rejected what I called "the interchangeability assumption," that is to say the view that private and public action are interchangeable means to achieve justice. The main reason for my doing so was that privately achieved justice is incompatible with individual independence. Yet this concern also extends to philanthropy. Even if a social system relying on philanthropy could produce good states of affairs, it would necessarily also produce structural relations of dependency that are incompatible with individual independence. This is because, in the absence of just institutions, philanthropists, however well intentioned, would retain the discretion to withhold at will their support for the poor, thereby making the power of choice of the poor—their ability to form and pursue ends—inevitably dependent on philanthropists' own unilateral will.[42] Similarly, a system wherein creditors' ability to recuperate what is rightful their own, or to have their rights restored, is dependent on their debtors' unilateral will is a system that is itself void of justice, because incompatible with the equal independence of all. Isn't it, then, contradictory to speak of *philanthropy* as a duty of reparative *justice*?

I believe such duty does indeed entail a contradiction. I also believe, however, that this contradiction does not prove that there is no such duty. It does, instead, prove that the duty in question is a provisional and transitional one. To see why, recall Kant's treatment of property rights in the state of nature. In the absence of political institutions, such rights are merely provisional precisely because they involve a contradiction. Enforcing such rights, or their correlative obligations, against others (unless when necessary to exit the state of nature) would violate their freedom as independence and would thus be incompatible with the very requirements of right. Yet the necessity of using external means to pursue one's own ends, as itself a demand of freedom as independence, is such that there is a provisional authorization to acquire property even in the state of nature and that it makes sense to talk about property rights, even if merely provisional, even in that state.

I believe that similar considerations support regarding philanthropy as a provisional duty of reparative justice within the privatized state. As long as the

duty of reparative justice is not properly enforced by political institutions through redistribution, the poor's ability to recuperate what is rightfully their own remains dependent on the goodwill of their debtors. Independence thus demands that we bring about a state of affairs in which the demands of reparative justice are enforced by political institutions through a functioning system of fair taxation. At the same time, however, independence also requires that we retain control over a certain range of usable means, for only in this way can the choice and pursuit of our ends not be subject to the will of others. Insofar as an at least sufficientarian level of material provision is necessary to maintain such capacity in the absence of fully functioning political institutions, securing the provision, up to a threshold, of time-sensitive, justice-required goods through private action should be regarded as a priority even from the perspective of independence itself.

Further, it is important that not only the wealthy but also the poor are fully and actively included in the process of bringing about more just institutions. This is not only because it is empirically more likely that institutions will be just if those most directly affected by injustice participate in their design and regulation, but also because, as we saw, active as opposed to passive citizenship is itself an important dimension of independence. Yet active, independent citizenship—the ability to contribute to the law—is empty without secure access to certain material, educational, and social resources.[43] In the absence of an adequate provision of such resources by political institutions, a duty of reparative justice, discharged through philanthropy, is often the only available means to provide individuals with the material preconditions necessary to act as active citizens and thus participate in the process of institutional reconstruction.

Because of its internal contradiction, the duty to secure a sufficientarian level of provision of time-sensitive goods through philanthropy should be regarded as transitional rather than perpetual. Indeed, the full realization of independence requires eventually replacing such duty with a mechanism of coercive enforcement that would make the fulfillment of reparative justice unconditional on the will of others. It should also be regarded as provisional rather than conclusive, for, as it stands, its fulfillment is not fully compatible with the demands of equal freedom that a reciprocal system of rights and duties should exhibit; in the absence of just institutions, its fulfillment is simultaneously demanded by, and incompatible with, freedom as independence. It is demanded by it as a means through which the poor can be returned at least part of what is rightfully their own, in the form of the substantive necessary conditions for maintaining their independence to at least a minimal level. It is

incompatible with it because it makes the obtainment of such conditions dependent on the will of particular others.

The Question of Discretion

Assuming that wealthy donors' duty to give, at least up to a threshold, is a provisional and transitional duty of reparative justice, what discretion should donors enjoy in determining the means and ends of their giving?[44]

To the extent that it can be regarded as an instrument of reparation, the duty to give is a duty to return to others what they have a rightful claim to. It is a duty to pay a debt. This means that agent-relative reasons appealing to what donors "care about" or their "life history" should play no role in the process of deciding how to give. After all, we do not get to decide in which currency to repay a debt according to our own personal sensibilities. All that should guide wealthy donors' reasoning is rather a concern about the absolute level of deprivation suffered by the worst-off, as well as the time-sensitive nature of certain goods as opposed to others. Victims who have suffered or are at risk of suffering greater harm, defined as deprivation from time-sensitive goods, should be served first.

I take it that this duty of reparative justice applies to all wealthy citizens unless perhaps (1) they have actively campaigned against government underfunding those goods, or (2) their contribution would be completely futile. When (2) applies, however, individuals may still have a duty of justice to divert their money to advocacy instead, so as to persuade other people or institutions to support the collective provision of relevant goods.

Of course, some level of discretion will inevitably remain. Indeed, the wealthy could presumably achieve the same exact results (e.g., bringing about just institutions or limiting the damage inflicted on the worst-off) by donating to more than one type of organization or through more than one form of giving. Within this range, what particular organizations or forms of giving the donor chooses is morally indifferent. My main point is simply that donors should give as if what they donate is not their property.

Importantly, if philanthropy is regarded as a means of reparative justice, donors are not obliged to direct their donations according to the preferences of their beneficiaries either, as it is sometimes assumed, for those who are owed a debt also do not get to decide in what currency the debt they are owed should be repaid. The currency of repayment is determined by the nature of the debt incurred or the harm suffered, not by the recipients' preferences.

What donors should do, then, is to give so as to bring the worst-off back to a preharm baseline, appropriately defined, regardless of the recipients' particular preferences.

This consideration rules out the view that philanthropy should be democratized *because* recipients' preferences should dictate the direction of philanthropic donations. It does not, however, rule out the idea that recipients should be more involved in decisions concerning the direction and use of gifts. This is not only because recipients may be useful sources of otherwise unavailable information concerning their own needs and experienced harm, as well as the needs and particular contingencies of the communities they inhabit. It is also because recipients' involvement may mitigate their dependence on donors' discretionary powers. My account therefore supports the view that philanthropic foundations should make decisions about grant making in close consultation with grassroots organizations, which represent the interests of disadvantaged communities. Representatives of such communities may also be given a veto on foundations' spending programs within their own community.

The fact that the duty to give as a duty of reparative justice is transitional in nature also implies that it should be discharged in a way that facilitates, rather than hinders, the progressive dissolution of its own conditions of existence. This means, for example, that philanthropists, especially the very wealthy ones, should avoid publicly advocating, as they often do, new models of social change that see philanthropy and other forms of private entrepreneurship as permanent substitutes for public institutions and collective action.[45]

With regard to public policy, governments should be duty bound to limit donors' personal discretion, rather than encouraging it through political discourse. This means that they should match incentives to giving—assuming, for the sake of argument, that these incentives are at least sometimes justifiable—to a set of specific causes, selected according to the same moral principles that should guide individual donations.[46] Consider, for example, the case of the $96 billion annually directed to religious associations in the United States. Among these donations, only donations directed to religious associations that (a) operate in deprived areas and that provide (b) justice-required goods that are (c) time sensitive and (d) underprovided by government should be entitled to charitable tax-deductions.

Before concluding, I would like to address some possible objections. It could be argued that there can be no duty of reparative justice to make philanthropic donations, not even a provisional one, because donors cannot know

how much each of them owes to each of the victims of injustice, barring a system of philanthropic giving that is fully perfected and institutionalized. This objection points at an important epistemic limit. However, from a moral perspective, we can still say that individuals are, as a matter of general principle, required to contribute in philanthropy at least what they would have to pay in taxes, were government itself to directly finance the level of in-kind goods necessary to bring individuals above a threshold of sufficiency. I say this because it may turn out that the best available way for individual citizens to independently provide their fraction of a good G that they failed to provide collectively is dramatically more costly to them than if their government had provided G in an efficient way and simply charged them for their share of the costs. In this case, citizens may (arguably) not be required to pay the exorbitant fee. We can agree, however, that they have a duty to contribute, at a minimum, what their fair share would have been in the case where the government discharged its obligations correctly and proportioned the costs justly. In practice, even if donors cannot exactly know what their due is before an institutional system is brought about, they still have a duty to approximate this principle as best as they can in their daily life. The fact that this duty necessarily remains indeterminate doesn't make it any less a duty grounded on justice.

Someone could insist that, as long as a system of donation is not fully perfected and publicly enforced, citizens cannot be under a duty of justice, not even a provisional one, to give, for citizens must be sure that other people will also comply with the same duties in order to be bound by those duties in the first place. In the absence of enforcement mechanisms, this assurance will be missing. Although the problem of free riding is a serious one and provides us with reasons to perfect and collectively enforce the duty to give, we are not released from our duties of justice whenever others act unjustly. As Rawls argues, "a more stringent condition is required: there must be some considerable risks to our own legitimate interests."[47] The noncompliance of others legitimizes our noncompliance only when complying would significantly imperil our own capacity to form and pursue our ends. Yet expecting the wealthy to give what they should otherwise return to the state would not seem to compromise any of their fundamental capacities or interests, even in the case of other people's noncompliance.

But what if no one else is paying the fee and the good we need to collectively produce is of a kind that, if nobody else contributes, my contribution will be not only costly but also completely futile? Before suggesting an answer to the problem of futility, let me clarify that this problem does not seem to

apply to many of the situations that arise in our societies. When a government cuts public spending to education or policing, we, as citizens, do not face a situation in which we must produce a public good from scratch. Public schools and police stations are still in place, albeit underfunded. In this kind of situation, any contribution, quite independently from the contributions of others, has the power to improve the provision of those services. However, in cases where our contributions would be completely futile, we have strong reasons to divert those contributions to public advocacy so as to persuade others to contribute to the point at which our contributions would cease to be futile.

Finally, let us assume, just for the sake of the argument, that it is morally indefensible to require the wealthy to compensate the victims of current injustice unless we can coerce each of them to give exactly their due (in which case private giving would collapse de facto into taxation). We can still agree that the status quo—the worst-off being badly harmed by public cuts—is even less morally defensible. We could then still accept the claim that uncoerced giving should be regarded as a second-best form of reparative justice. As long as this is the case, my argument that donors should not be entitled, let alone encouraged, to appeal to their personal projects or sensibilities when deciding how to give still stands.

The argument developed in this chapter says nothing about what the role and limits of philanthropic giving should be in a society where government fully succeeds in providing the range and amount of public goods and services necessary to secure and maintain basic conditions of justice, however exactly defined. Even in this society, it might be the case that the discretion of donors ought to be limited by considerations of justice or legitimacy. For example, even in nonprivatized societies, there may be a need to restrict donations directed to political campaigns in order to prevent the colonization of politics by private capital, or a need to prevent people from altruistically giving away certain goods—for example, their child's labor or their votes. However, in these societies there would be ample space for what might be called "discretionary philanthropy"—philanthropy that tracks an agent's own idiosyncratic sensibilities. Philanthropists would enjoy a wider liberty to make donations according to what they care about, in the knowledge that justice and other public values are taken care of by their common institutions. Those who care about philanthropy should then regard the privatization of justice more as a curse than as a blessing.

8

The Duties of Private Providers

IN THE PREVIOUS CHAPTER, I have focused on the ethical duties of philanthropists within a privatized system of funding for justice. In this chapter, I turn to investigate the duties of a different kind of private actors: private organizations that provide, rather than fund, justice-required goods as government agents or substitutes. These organizations can have a for-profit, nonprofit, or hybrid organizational form and today constitute a large part of so-called civil society. Within the context of privatized systems of governance, these actors play a necessary, rather than complementary, role in both the provision of welfare and the administration of justice. It is thus important to inquire what principles or considerations should guide their conduct. Doing so will simultaneously provide an opportunity to rethink the way in which political philosophers understand the division of (moral and institutional) labor between the political and the associational.

It is a widespread assumption among contemporary political philosophers, in particular liberal-egalitarians, that political institutions and nonpolitical associations (hereafter associations) ought to be subject to different moral principles and evaluative standards. This is, in a nutshell, what I shall refer to as "the division of *moral* labor" between political institutions and associations.[1] The principles of political justice, John Rawls argues, are not to apply directly to the internal life of the many associations, including, among others, churches, universities, charitable organizations and business firms.[2] By this he means that associations, unlike "the basic structure," which instead includes the main political, social, and economic institutions of society, are not morally required either to organize their own internal governance according to democratic procedures, or to distribute benefits and opportunities according to any "specified distributive principle."[3] Nonpolitical associations can be left free to

organize their own internal life according to principles other than principles of political justice, and to pursue values other than justice.

What exactly grounds a commitment to this division of moral labor is an object of contention. Indeed, some philosophers—most prominently G. A. Cohen and Susan Okin—have argued that no such division of labor can be justified. Albeit in different ways, they both claim that the very same fundamental principles that apply to the basic structure should also apply to the choices of individuals and to the internal life of (at least some) associations, in particular the family.[4] Yet even Cohen and Okin in the end acknowledge important differences between the all-things-considered norms of conduct that ought to govern political institutions, as opposed to those that should guide the actions of nonpolitical associations and their members. Cohen, for example, argues that individuals and associations, unlike the state, enjoy a special "prerogative" to depart from the demands of justice, whenever complying with them would be excessively demanding, given individuals' particular projects and pursuits.[5] As for Okin, it is unclear if principles of justice, in her view, should govern the internal life of associations other than the family at all, since the family is regarded as special, given both its important role in the reproduction of society and its nonvoluntary character.

In this chapter, I wish to argue that even if, contra Cohen and Okin, one assumes that a division of moral labor between political institutions and associations can be justified, privatization, understood as an institutional transformation of the system of governance, forces us to give up on such division. This is because privatization changes the sociopolitical background conditions—the division of institutional labor between political institutions and associations—against which alone a division of moral labor can be justified.[6]

This means that, within the privatized state, even those who endorse the division of moral labor should be, at least *pro tanto*, committed to extending to the internal conduct of many associations, beyond the family, the same demands of political justice that they would otherwise confine to the organization of political institutions. I will suggest that, in practice, a duty of political justice for associations should take the form of a procedural duty of democratic governance. I shall call this *the duty of (associational) democratic justice*. Further, within a privatized system, associations also lose the moral power to appeal to the kind of prerogatives to depart from the demands of political justice that Cohen would grant to them.

I will also argue, however, that the abolition of a division of moral labor between political institutions and associations comes at great moral costs for

the latter, and in particular for their members' associative independence, understood as their ability to collectively form and pursue shared ends, through their associations, without these being externally imposed by someone else. Therefore, we face, like in the case of philanthropy (chapter 7), a conflict internal to independence itself. On the one hand, citizens' independence requires that in the privatized state many putatively nonpolitical associations be subject to at least some of the same substantive and procedural demands of political justice that bind political institutions. On the other hand, however, independence also demands that private associations remain, to a significant extent, free from such demands so as to be able to serve as means through which individuals can freely exercise their capacity to co-originate and pursue their ends.

The above conflict requires that we understand associations' duties of democratic justice as provisional and transitional, similarly to the philanthropists' duties analyzed in the previous chapter. These duties should eventually vanish upon the restoration of a more radical division of institutional labor between government and the associations of civil society (a restoration the practical ingredients of which will be laid out in the next and final chapter). This also means that these associations should exercise their duties of democratic justice in a way that supports, rather than further undermines, the project of reestablishing such division of institutional labor.

In what follows, I will first assess different possible justifications in support of a division of moral labor between political institutions and nonpolitical associations. I will then explain why none of these justifications, even if they were successful in principle, could justify a division of moral labor within the privatized state. I will then show the implications of this fact for the duties of private actors within systems of privatized governance. I will finally argue that we have strong reasons to limit privatization in order to reestablish a division of moral labor between the political and the nonpolitical.

The Functionalist Account

On one view, the division of moral labor—the idea that separate normative principles and evaluative standards apply to political institutions and nonpolitical associations—is justified by the different kinds of social functions that these entities ought to respectively perform. I shall refer to this view as the "functionalist account." The most explicit expression of the functionalist account can be found in Rawls's *Political Liberalism*. Here Rawls argues that "it is the distinctive purposes and roles of the parts of the social structure and how

they fit together, that explains there being different principles."[7] A division of moral labor between political institutions and associations is thus grounded on a prior division of functions and roles, that is, a division of institutional labor. The latter, in turn, is a moralized rather than a descriptive assumption. The claim is not that state and associations contingently happen to have different roles and purposes (although, historically, Rawls was writing in a period where the boundaries between political institutions and nonpolitical organizations were sharper than they progressively became throughout the neoliberal era).[8] It is rather that they ought to have different "purposes and roles." While the social role and purpose of the state should be to establish and maintain certain economic and social "background conditions of justice"—for example, by securing the protection of basic liberties and by redistributing wealth so as to limit economic and political inequalities—the social role and purpose of other associations should be to function as arenas for the cultivation of freedom, that is, the free expression of ideas and the origination and pursuit of particular ends and comprehensive conceptions of the good. By discharging burdens that would in their absence fall (at least in part) on individuals or on their associations, political institutions leave the latter with more time and resources to develop and exercise the capacity to form and pursue their own ends and conceptions of the good. So regarded, one of the fundamental roles of the division of institutional labor is to secure and preserve the substantive conditions of independence, understood, in Kantian terms, as the capacity to form and pursue ends without these being imposed on us by someone else. As Rawls explains:

> If this [institutional] division of labor can be established, individuals and associations are then left free to advance their ends more effectively within the framework of the basic structure, secure in the knowledge that elsewhere in the social system the necessary corrections to preserve background justice are being made.[9]

It is, however, unclear why an appeal to associations' free purposiveness could ever support a full division of institutional labor between state and associations of the kind defended by Rawls. After all, we could imagine a system where institutions do most, but not all, of the work of justice, while associations do the rest. Within this system, nonpolitical associations would still have plenty of freedom and space to pursue their ends. The functionalist must therefore say more in order to support a full division of institutional labor.

Rawls does so. He argues that there is a further, empirical reason for attributing separate social roles and purposes to the basic structure and associations respectively. Unlike the basic structure, associations lack the epistemic capacities to perform the social function of preserving background justice over time.[10] It is important to notice, however, that nothing in Rawls's empirical argument prevents a state from entirely coopting nonpolitical associations, including charitable organizations and business firms, to act as its agents, or from delegating essential functions to them, while maintaining only functions of assurance and coordination. A state could, for example, outsource the entire provision of social services, as well as the management of prisons and the conduct of military operations, to private associations, while maintaining coordination functions. As long as the state maintains such functions, no epistemic deficit would arise. In this case, it seems, private associations would just become an integral part of the basic structure.

If a division of institutional labor must be maintained, then it is the normative argument that must do most of the work in supporting it. Although, as we have seen, this argument cannot support a full division of institutional labor between the state and nonpolitical associations, it can support the more moderate claim that the great bulk of the labor required to secure the background conditions of social justice ought to be done by political institutions, so that nonpolitical associations can be left free to pursue their own ends.

But why should a division of institutional labor, once established, justify a division of moral labor, that is, separate normative principles and evaluative standards for different agents? The answer has to do with the nature of constructivism, as a method for the justification of moral principles. As a constructivist, Rawls believes that different principles can be justified to the participants in the process of moral construction, depending on the normative context to which they are directed. This is because different contexts generate different reasons in support of different principles.[11] Parties charged with the task of constructing principles for the basic structure will proceed to select principles that are consonant with its role. Since the point of social justice is defined not as the pursuit of a particular comprehensive conception of the good but as the maintenance of economic and social conditions that make possible for everyone to pursue their own ends, the principles that regulate the basic structure, unlike principles for associations, will not make space for the state's ability to pursue particular conceptions of the good or to cultivate particular loyalties, beyond those required by justice itself.

In sum, for the functionalist, an appeal to both securing and safeguarding the substantive conditions of independence, whatever their content, is ultimately what supports the case for a division of institutional labor between states and associations. A commitment to methodological constructivism in turn explains why different institutional roles call for different moral principles. The result is that the state and nonpolitical associations should be governed by different principles insofar as, and to the extent that, they are charged with the task of performing radically different social roles.

No Division of Institutional Labor, No Division of Moral Labor

But what happens to the functionalist justification for the division of moral labor when we situate it in the context of the privatized state? The justification becomes untenable. This is because privatization blurs the division of institutional labor—the division of social roles—between state and private associations, thereby leaving the division of moral labor with no grounds. The reason is that what are generally regarded as forms of privatization are also forms of publicization, through which a part of the nonpolitical sphere (including for-profit and nonprofit organizations) is transformed into an integral part of the basic structure of society itself. To understand the nature of this institutional transformation, we must distinguish it from other ways in which state and associations can become entangled.

It is common practice for governments to provide associations with public support. For example, many governments support scientific research and cultural production by providing universities, museums, and artists with public funds, often in the form of grants or subsidies. Political philosophers have long debated the compatibility of such policies with liberal neutrality.[12] Leaving these disputes aside, we should notice that, although receipt of public funding by an association certainly creates a new institutional relationship between the latter and government, this institutional relationship need not be of the kind that blurs, let alone abolishes, a division of institutional labor between the two entities. This is because the mere receipt of public funding need not transfer to the nonpolitical association the social role and responsibility of promoting, or participating in the promotion of, the background conditions of justice. Rather, public funds may be simply given by a government with the purpose of helping particular associations to further their own independently defined ends, in order to, say, foster civic pluralism or different forms of excellence. I shall refer to this institutional relationship between public and private agents

as *the institutional relationship of beneficence*. This relationship encompasses all those cases in which a government acts as a benefactor who helps other agents pursue their own independently defined purposes.

Privatization generates a categorically different institutional and normative relationship between public and private actors. When a government contracts out the delivery of welfare services or the management of prisons or the conduct of military operations, the expectation is that the associations that sign those contracts will act as government's agents. In this way, privatization contracts, unlike the mere receipt of public funds, provide the beneficiary association with new ends and a new social role. The task of pursuing the end of justice is transferred, typically through contract, from government to the association. Alternatively, we may say that now government pursues the end of justice precisely through the agency of associations. I shall call this institutional relationship *the institutional relationship of partnership* insofar as government and associations come to share the social role of securing and maintaining background conditions of justice.

What are the normative implications of these different institutional relationships? The institutional relationship of beneficence creates new obligations on the part of the recipient, most obviously an obligation to use public funds for the exclusive purpose for which they were given. It also creates an obligation to respect the constraints attached to the receipt of such funds—for example, respect for antidiscrimination norms. Yet this institutional relationship creates no obligation on the part of the association to adopt the end of government as its own. The association remains entitled to pursue its own ends, whatever these may be. The institutional relationship of partnership, by contrast, changes the very social role of private actors. It imposes on these actors a contractual obligation to cooperate with government in the very pursuit of a public responsibility and in the exercise of political power. This is the precise sense in which privatization dissolves the division of institutional labor, as envisioned by the functionalist.

Yet, if privatization blurs the division of institutional labor between political institutions and nonpolitical associations, it also blurs the division of moral labor between them. Recall that, for the functionalist, associations could be left free to pursue their own purposes insofar as, and only insofar as, background conditions of justice were priorly and independently secured by political institutions. Therefore, in those privatized contexts where government comes to secure the conditions of justice through associations, by having the latter act as its delegates, the justification for a division of moral labor becomes inapplicable.

This means that within the privatized state, many, if not most, associations should be themselves governed by the same fundamental principles of political justice that apply to the basic structure, for they ought to be regarded as an integral part of such structure.

Before discussing what applying principles of political justice to the internal life of associations may entail in practice, let's first investigate if similar normative conclusions can be supported by alternative justifications for the division of moral labor.

The Structural Account

Whereas the functionalist defense of a division of moral labor between the state and nonpolitical associations puts emphasis on their different social roles, an alternative view puts emphasis on their different structural properties, including the distinctively coercive and nonvoluntary nature of the basic structure, as opposed to the noncoercive and voluntary nature of associations.[13]

Those who justify the division of moral labor by appealing to the distinctively coercive nature of state institutions tend to advance two main claims: that (1) those subject to state coercion, and only those subject to it, are owed a special justification; and that (2) this justification can, in turn, take the form only of certain substantive principles of political justice—principles that do not apply to other forms of noncoercive association. Michael Blake, for example, argues that state coercion triggers special justificatory demands, in the form of principles of political justice, because it imperils individuals' autonomy in a special way.[14] In Blake's own words:

> Churches and universities . . . distribute goods to their members, but [Rawlsian] principles of justice do not apply to such institutions . . . since the state can do something churches and universities cannot—directly and coercively *determine the sorts* of *returns flowing to various positions*. . . . Coercion, unlike the simple division of a good, implicates the ability of individual agents to live their lives according to their own plans.[15]

From this passage it seems clear that for Blake the ultimate reason why principles of justice apply only to state institutions is that only political institutions implicate the ability of individual agents to pursue their plans, by determining what individuals are entitled to as a matter of justice. The special feature that distinguishes political from nonpolitical associations is not, then, coercion per se but rather the authority to change the normative situation of

citizens.[16] It is, in other words, that very legislative authority that, according to Kant, as we saw in chapter 2, must be necessarily exercised in accordance with a public framework of rules in order to be compatible with the freedom as independence of all.

If this is correct, Blake's argument that nonpolitical associations are not appropriate sites of principles of political justice can work only if we assume that (1) the entitlements-determining authority of the state is a necessary condition for principles of political justice to apply; and that (2) nonpolitical associations lack (should lack?) this kind of legislative authority. The first argument is normative, whereas the second can be either normative or empirical.

I will assume, for the sake of argument, the validity of claim (1). I wish, however, to question the empirical validity of (2). Blake's argument that nonpolitical associations are not directly subject to principles of political justice can work only if and insofar as it is true that these associations lack the presumptive authority to ultimately determine the extent of people's entitlements and obligations of justice. However, as I have argued in chapter 3, through the cases of medical care organizations and private prisons, in the privatized state, private organizations do often come to exercise a quasi-legislative kind of authority.

Three main considerations emerged from our analysis of those cases. First, within the privatized state, putatively nonpolitical associations come to exercise relevant rule-making and policy-making power. Second, the public policy developed by private associations ultimately determines not simply whether particular citizens have access to particular justice-required goods but also the rules according to which who is effectively entitled to what as a matter of justice is established. Third, the quasi-legislative discretion of private associations cannot be eliminated through either formal rules or a full specification of contracts at entrance, and courts take themselves to have good reasons to defer to the associations' decisions.

The upshot is that, within the privatized state, the kind of decision-making power and presumptive authority exercised by many private associations, whether profit or nonprofit, would seem to meet the conditions established by the coercion view for triggering special demands of political justification.

One could object that, even if private associations make quasi-legislative and entitlements-determining decisions, it is only the government that ultimately owes a justification to its citizens for those decisions, given that the government is the principal. Yet, to the extent that the constraining capacity of formal rules eventually ends and nonpolitical associations retain

substantive residual discretion in interpreting and implementing policy norms, their exercise of this residual discretion must itself be publicly legitimized. The special standards of political justification that, according to the coercion view, should apply to the state exercise of political power should then extend to private associations as well. The coercion view thus provides us with further reasons to support the normative conclusion that, in the privatized state, the division of moral labor between political institutions and associations loses its moral ground and justification.

One could, however, argue that it is not coercion (or only coercion) that marks the relevant normative difference between political institutions and nonpolitical associations. Rather, it is the distinctively nonvoluntary character of the political association (beyond, or instead of, its entitlements-defining authority) that ultimately explains why the demands of political justice govern the state but do not extend to other associations. Andrea Sangiovanni provides an account of this view as follows:

> What makes norms for the internal governance of secondary associations less stringent [than the ones that apply to the state], is that those subject to them have viable alternatives to membership which are not excessively burdensome. If they dislike the rules of a particular association, there are always associations they could choose instead, or none at all. . . . This would not hinder their access to any of the basic goods and services necessary for developing and acting on a plan of life, and so membership, we say, remains voluntary in the relevant sense.[17]

Since the state is the only association that, by assumption, has overall control over the production of, and access to, basic goods and services, it is also the only association within which egalitarian entitlements of justice can be rightfully claimed. To our fellow citizens who claim a fair or even equal share of the social product, we cannot simply say, as we may do in the case of our fellow church or club members, "love it or leave it," for the "leave it" option is precisely what is not available in the case of the state, at least not without great costs.

Richard Arneson makes a similar point in relation to democratic norms. For him, as long as the members of an association are free to leave without loss of access to the basic conditions of autonomy, a requirement for democratic participation is unnecessary to protect people's basic interests and thus should be regarded as superfluous.[18]

As I have argued elsewhere, I find these views unpersuasive.[19] But even if we assume their normative validity, the factual premises that underpin them

become unwarranted in the privatized state. In privatized contexts, it is not uncommon for private associations to come to hold quasi monopolies over access to basic material goods. In the United States, one striking example of this monopolist control is provided by Catholic nonprofit hospitals. These associations represent about 12 percent of all hospitals nationwide.[20] More than a quarter of these hospitals are located in rural areas, where there are often no other viable health-care options, especially for the poor, who may not be able to afford to travel to another institution, should one of these organizations refuse, on religious grounds, to deliver particular medical services such as reproductive health services. It would certainly be mistaken to regard these organizations as "voluntary," for individuals cannot choose to exit, or not enter, them without losing access to their basic conditions of autonomy.

It may be argued, however, that it is the duty of a liberal state to secure reasonable alternatives for accessing important goods and services, for example, health-care services through nonreligious providers, and that, if a state complies with this duty, cases of nonvoluntary associations would not arise. This argument, however, may be too quick, even from the perspective of ideal theory, insofar as, depending on circumstances, it might be all things considered unjustificable for a government to provide alternative providers. To illustrate: suppose that the region where the religious hospitals operate is mainly populated by religious communities, which live far removed from urban centers. Suppose that, for this reason, it is difficult to motivate highly skilled citizens, external to those communities, to move to and live and work in these rural regions. As a result, there are not enough people who are willing to work in the region as doctors or nurses. Lacking the necessary labor, an alternative hospital cannot be set up unless (1) people with the relevant skills are forced to relocate to that area and take up hospital jobs, or (2) sufficient incentives are provided to motivate those with the relevant skills to voluntarily move to that area. However, (1) violates freedom of occupational choice.[21] Option (2) may be overly expensive. It is not unreasonable to think that, in conditions of scarcity, a state can be all things considered justified in spending its revenue on other causes. In this situation we would say that it is justifiable for the state to let private organizations have quasi-monopolistic control over health-care provision within that area. Yet, given this quasi monopoly, those organizations should be regarded as nonvoluntary, and subject to principles of justice, according to the very criteria proposed by the voluntariness view.

Further, in order to count as voluntary, on a par with market transactions, associations must operate against background conditions of justice priorly

secured by the state. As Rawls points out, the existence of a just state is a necessary condition for the voluntariness of all other associations. This is why the state cannot be treated as one association among others. Background conditions of justice are necessary to secure that agreements (including the agreements through which associations are formed) are fairly arrived at and can be voluntary exited without loss of autonomy. The necessary conditions of voluntariness reasonably include, beyond protection of property rights, also adequate access to basic goods such as a social minimum, health care, and education. Yet, as long as states secure these very conditions by acting through private associations, rather than independently from them, these associations can no longer claim their own "voluntariness" as a valid reason to be exempted from the demands of political justice, for they come to share the responsibility for securing the conditions that make that voluntariness possible in the first place. This is true whether they hold a quasi monopoly over certain goods or not.

We then arrive to the following conclusion: no matter what justification (functionalist or structuralist) one wishes to adopt in support of a division of moral labor between state and associations, no such justification can maintain its force in circumstances of widespread privatization such as the ones that have, since the 1970s, increasingly characterized most contemporary liberal democracies, and are likely to persist for a long time ahead. As privatization blurs the division of institutional labor between political institutions and private actors, it also undermines the justification for the division of moral labor between them. This means that, once we take seriously certain sociopolitical facts, even defenders of a radical division of moral labor have at least *pro tanto* reasons to extend to many private associations the very same principles of political morality that apply to the basic structure. But what does it mean, in practice, that principles of political morality must directly regulate these associations?

The Associational Duty of Democratic Justice

The claim that principles of political morality should apply to private associations could be interpreted as simply meaning that the set of legal rules through which relevant public functions are delegated to these associations should itself be regulated by the same principles of justice that apply to political institutions. For example, when privatization happens through contracts, the first way in which principles of justice can govern private associations is by directly governing that part of the law that regulates such contracts. In the same way

in which, if the family is recognized as a part of the basic structure, family law should establish the legal rights and duties of equal citizens in their roles as spouses, parents, and children, similarly, the law regulating delegation contracts should establish the legal rights and duties of contracted parties (e.g., associations' managers and caseworkers) and beneficiaries, in accordance with principles of political justice. This means that the system of privatization contracts, taken as a whole, should be designed so as to contribute to, or at least be compatible with, the requirements of political justice, however exactly understood. This would, for example, imply that caseworkers who are employed by private organizations under state contracts may be bound, by those very contracts, to follow rules that allow inequalities in the treatment of beneficiaries if and only if these inequalities can be justified in light of more general principles of distributive justice.

Further, insofar as these associations are required to act as partners or delegates of government in securing or maintaining the background conditions of justice, the legal rules that regulate privatization contracts should not be treated as a part of the private law of contract and regulated according to its standards. They should rather be treated as an integral part of public administrative law, that is, that part of law that is in charge of regulating relationships between different branches of government.[22] As we saw in previous chapters, even in countries like the United States where privatization is pervasive, private actors are often exempted from the demands of public law, including administrative law. This reflects the fact that private contractors are regarded as participants in a horizontal market transaction, governed by private contract law, in which government is just a bargaining party on a par with other bargaining parties. Applying public norms to these actors through contracts would then also be a way to publicly acknowledge that, through those very contracts, those actors enter an administrative relationship with government. They become a part of government itself. As an integral part of government, in turn, private actors should retain no "special prerogative," of the kind envisioned by G. A. Cohen, to depart from the demands of political justice whenever doing so would be too costly for their own organizational purposes or ends, for qua public administrators, private associations should no longer have comprehensive ends beyond those of justice (at least within the scope of the exercise of the delegated functions).

However important, reconceptualizing the framework of law that should govern privatization contracts, from one of private contract law to one of public administrative law, and then designing such a framework according to

principles of political justice, is not all that justice requires. This is so even if we assume that this is all that justice would require in the case of the family, when considered as an integral part of the basic structure.[23]

The main reasons why the application of principles of political justice, in the privatized state, should not stop at the level of legal rules should, by now, be clear. First, privatization contracts are different from other types of contracts, including marriage, for they delegate quasi-legislative, policy-making authority to private agents. There is an important sense in which private associations' managers and employees are more similar to legislators than to romantic partners. Second, privatization contracts leave associations with a significant margin of discretion in exercising the above de facto authority.

For both these reasons, justice cannot stop at the level of a general legal framework. It must directly reach and guide internal decisions and, more importantly, the organizational practices and routines through which those decisions are made and individuals' entitlements are ultimately defined. This is to say that a just system of delegation contracts should be complemented by a process of internal public justification at the associational level.

One way of understanding this process is through the requirement of hypothetical justifiability. We could argue that entitlements-affecting decisions made within private associations should be justifiable to all those subject to them (such as service recipients, beneficiaries, patients, etc.) in light of reasons that appeal to a shared conception of political justice. This would certainly limit the range of policies that could result from associations' internal exercises of discretion. However, extending in this way the requirements of justice to the exercise of substantive discretion within particular associations suffers from the same limits of hypothetical justifiability that we saw in chapter 6. Legitimate exercises of administrative discretion, as we have argued, should be constrained by substantive principles of justice (call this the *justice desideratum*), yet these exercises must also result from appropriate procedures that both construct and carry out a will that is actually shared by those subject to those decisions. Only in this way can the resulting decisions be regarded as something more than the imposition of someone's unilateral interpretation of what justice is and requires of others (call this *the legitimacy desideratum*).

Further, and relatedly, the content of hypothetical justification is indeterminate. Multiple allocative principles at the local level could be derived from general principles of justice, or compatibly with affirming the standing of recipients as free and equal citizens. Rather than flipping a coin among different reasonable alternative interpretations, what Henry Richardson calls "practical

intelligence," would seem to demand a procedure through which general principles can be specified into particular directives in a way that takes advantage of, and remains sensitive to, newly available information, judgments, and experiences.[24] Within the range of allocative principles compatible with justice, different associations should then be permitted to endorse different allocative policies, depending on the particular needs, as well as the sociological or demographic reality of the area within which they operate. This requires mechanisms that connect democratic procedures through the continuous gathering of new information and engagement with new experiences. Call this *the epistemic desideratum*.

The problem, however, is that whether a particular allocative policy or set of regulations is just cannot be entirely determined independently of other allocative policies or regulations, and how they fit together. This means that justice also requires that the exercise of discretion by any particular organization responsible for making allocative decisions be coordinated, through a range of practices and institutionalized means, with similar exercises of decisional discretion carried out by other organizations. Associations must have the ability to learn from the experiences of similarly situated agents, as well as the willingness to arrive at a reasonable level of substantive uniformity among localized decision makers. Call this *the coordination desideratum*.

If my reasoning is correct, then, applying principles of political justice to the internal decisions, practices, and routines of associations requires neither complete forms of top-down legal regulation (which may simply be ineffective or eliminate the benefits of discretion), nor that caseworkers, managers, or street-level policy makers, monologically and *in abstracto*, refer to public reasons when justifying their decisions to their colleagues or clients. Applying principles of justice to the internal decisions of associations must rather require that these organizations themselves become coordinated sites of participatory and deliberative decision-making procedures, designed so that the making of their internal and discretionary policy decisions can meet the four desiderata above. In practice, it requires that the same democratic practices that we have argued should extend to the administrative process (we alluded to a system of codetermination as applied to the composition of administrative boards in chapter 3 and to a system of deliberative rule making as applied to the process of public consultation in chapter 6) should also extend to private actors.

The extension of participatory and deliberative mechanisms to nonpolitical associations would generate a system similar to what Joshua Cohen and Charles Sabel have called "directly-deliberative polyarchy" (hereafter

deliberative polyarchy).[25] Importantly, however, unlike Cohen and Sabel, I see deliberative polyarchy neither as a pragmatic means of problem solving nor as a demand of radical democracy. I rather see it as the best available institutional means to give practical content to the otherwise abstract requirement that principles of political justice directly apply to the internal policy-making and administrative decisions of (many) nonpolitical associations, in conditions of widespread privatization. Deliberative polyarchy is a means of bringing justice to the associational level.

To clarify, a deliberative polyarchy is a localized democratic system, where "collective decisions are made through public deliberation in arenas open to citizens who use public services."[26] In this context, deliberation, similarly to what we have called "deliberative rule making" in the case of public agencies, would involve "debating the implications of general principles . . . in light of the particulars of local experience, and inviting discussion of such experience."[27] Examples of such arenas range from school governance, inclusive of both parents and teachers, to umbrella organizations for local or urban economic development, whose governance may include service providers and representatives of local grassroots organizations and community interests, as well as officials from the regional or national government.

As Cohen and Sabel explain, three distinctive features distinguish deliberative polyarchy from other models of localized democracy. First, the model is deliberative rather than aggregative. Second, it requires that policy be made "with express reference to both constitutional and relevant policy reasons," and thus be constrained by preexisting constitutional commitments, as well as by the intention of the legislature, whenever such intention is relevant. If these conditions are met, "all bodies making collective decisions share responsibility for upholding the democratic constitution by treating its principles and values as regulative of their own decisions."[28] Finally, the deliberative process must be intra-organizational and coordinated, in the sense that "citizens must examine their own choices in the light of the relevant deliberations and experiences of others facing similar problems in comparable jurisdictions."[29]

I believe that these features provide a sound way of at least approximating the four desiderata mentioned above. With regards to the legitimacy desideratum, the use of deliberative mechanisms provides a way of legitimizing policy decisions to those subject to them, which is superior to both hypothetical consent and mere aggregation. Deliberative processes are supposed to treat all participants as equals, and to admit only reasons that are acceptable to other participants, as opposed to merely self-interested considerations that no one

else could possibly consider valid reasons. As we argued in chapter 2, if everyone enjoys a roughly equal opportunity to influence the outcome of the decision, if everyone's judgment is given equal authority, and if decisions on policy result from a process in which everyone is offered relevant reasons, then, even if not everyone agrees with the policy outcome, the minority still have second-order reasons to regard those outcomes as legitimized in everyone's name, including their own, rather than simply regarding them as the imposition of the unilateral will of another.

Deliberation also serves to meet the epistemic desideratum, helping participants reflect on the plausibility of alternative ways of specifying principles of justice in light of a rich array of diverse information. This is something that review processes alone cannot do. Through a deliberative process, as we saw in the *Asarco* case of deliberative rule making in chapter 6, participants can bring their relevant local knowledge, as well as knowledge derived from their particular experiences, to bear in decision making. This generates a process of mutual learning that is necessary to intelligently develop and choose among different ways of specifying general principles of justice, but which is not available through mere aggregation.

The deliberative process can also meet the justice desideratum, if and insofar as participants are required to expressly refer to constitutional reasons in support of their policy choices. On the one hand, proposals backed by reasons rooted in the demands of justice (as procedurally interpreted at higher levels of decision making within society) can be rejected only if better proposals, also rooted in those demands, are advanced. On the other hand, proposals backed by reasons that are incompatible with the demands of political justice, and a society's constitutional essentials, must be set aside.

To illustrate with a concrete example: take the case of a nonprofit welfare organization that provides disability benefits under state contract and which routinely uses a certain practice of classification that interprets the category of "disabled" very narrowly, thereby electing for benefits only those who are unable to work because of a medical condition.[30] Suppose also that the decision to use such classification, even if in principle compatible with the contractual mandate, is challenged because it leaves out and systematically disadvantages those who, despite their medical condition, are able to work and yet, because of that very condition, are systematically excluded from opportunities in the job market. In this case, what deliberative polyarchy requires is that, in light of new information, and by including in the deliberative process both the disadvantaged and other organizations, which faced similar problems in the

past, the organization responsible for the development of the classification revisit the decision. In the process, the organization should attend both to the importance of fair equality of employment opportunity and nondiscrimination, understood as constitutional essentials, and to the past experience of similarly situated agents. In this way, the organization itself treats principles of justice as directly regulative of its own decisions but does so by remaining sensitive to local experiences and new information.

Finally, deliberative polyarchy responds to the cooperation desideratum, by constraining associational autonomy in two ways. First, the decisions organizations can arrive at must be made in dialogue with, and with responsiveness to, similar decisions made by similarly situated agents. Second, a certain level of coordination and uniformity in decision making among different associations should be facilitated by adopting benchmarking—metrics of comparison—and good practices as shared standards of decision making between different organizations. Ultimately, however, legislatures and courts remain the guarantors of a substantive level of uniformity, by securing that different practices and routines, as well as patterns of policy making adopted by different associations, are both individually and overall compatible with relevant constitutional essentials, as well as with the central thrust of legislative statutes.

How should we understand the constituencies of such deliberative bodies? Here different values point to different answers. If the legitimacy desideratum points to the equal inclusion of those whose normative situation—entitlements and duties—are directly determined by the policy decisions of the organizations in question, the justice desideratum points to the inclusion of the broader citizenry, or their political representatives, since the holistic nature of justice is such that the justice of particular allocative decisions cannot be determined independently of the justice of other decisions. Finally, the epistemic desideratum would seem to point toward the inclusion of a variety of viewpoints including, at least, those of representatives of other organizations and members of affected groups. Given these multiple demands, deliberative polyarchy should be thought of as supporting constituencies with a mixed membership, inclusive of affected parties and randomly selected citizens who are not directly affected by the decision or political representatives at the regional and national level, as well as employees and administrators of similarly situated organizations. Ultimately, as we discussed in chapter 3, legitimacy requires that those subject to the decisions in question retain control rights over the resulting decisions. In order for this control to be assured, a

mechanism along the lines of the model of administrative codetermination, also introduced in that chapter, should be adopted. A jury, composed of randomly selected members among those subject to the regulations, should be given a right to veto regulations or allocative policies proposed by the deliberative bodies, or by boards of directors charged with implementing the results of deliberation, that, although perhaps compatible with constitutional essentials and legislative statutes, do not appropriately take into consideration their claims, as they emerged throughout the deliberative process.

Much more could be said about the appropriate shape of such constituencies and the functioning of relevant procedures, but for our purpose it is sufficient to be clear as to why "applying" principles of political justice, however exactly defined, to the internal governance of associations within privatized contexts would require the adoption of participatory and deliberative mechanisms at the associational level, along the lines illustrated above.

To sum up the argument so far: even those who adopt a division of moral labor should be committed, on the basis of reasons internal to their view, to the claim that principles of political justice should directly apply to the internal conduct of many nonpolitical associations, in the privatized state. In practice, directly applying principles of justice to the internal decisions of associations would entail instituting a polyarchic system of associational democracy. Justice is brought to the associational level through participatory and deliberative mechanisms. This means that associations in turn acquire a justice-based duty to uphold the norms of a democratic, polyarchic system. This is what I call *the duty of (associational) democratic justice*.

However, as I now turn to argue, the blurring of the division of institutional and, in turn, moral labor between state and associations comes with normatively relevant costs—costs that require qualifying associations' duty of democratic justice in particular ways, and ultimately reversing the process of privatization itself.

The Provisional and Transitional Nature of the Associational Duty of Democratic Justice

Recall that some of the conditions that underpin a plausible case for a division of institutional labor between political institutions and nonpolitical associations have to do with respecting individuals' independence—the ability of individuals to act as originators and pursuers of ends, through their

associations, without these ends being imposed on them by someone else. The value of independence supports the idea that individuals need access to a non-public sphere of action, freed, at least in part, from the burdensome constraints and demands of political morality. Even feminists who remind us the many ways in which the personal can indeed be political would generally recognize the importance of this sphere.[31] The justification for the division of both institutional and moral labor between states and private associations can then be regarded as resting on very much the same value that underpins Kant's justification of rights to usable means. The right to freely form associations with others is itself a "usable means" that is necessary for individuals' development and exercise of their capacity for purposiveness. This, of course, means neither that the associational sphere should be entirely free from interference nor that individuals and associations should be exempted from the constraints of just laws. All it means is that individuals should be granted the real freedom to associate with others and pursue particular ends through their associations, free from excessively burdensome intrusions.

The problem is that, as we saw, by blurring the division of institutional labor between state and associations, privatization renders it obligatory to impose on these associations the very same moral demands that apply to political institutions. Yet, by doing so, it simultaneously threatens the very conditions that make the enjoyment of freedom as independence secure, or so I will now turn to argue.[32]

In order to grasp how, exactly, privatization threatens independence, by threatening freedom of association, we need a brief sketch of what it is that freedom of association protects.

Freedom of association can be reasonably regarded as protecting more than just one interest or value. Yet, if there is something this freedom protects, this certainly includes the ability of individuals to form, develop, and pursue, jointly with others, their ends or conceptions of the good. These ends need not entirely preexist a given association. Rather, individuals' ends may be reinterpreted and reconstituted through the very process of associating with others. As Seana Shiffrin points out:

> [Freedom of association] must protect the process by which ideas and expressions are generated, nurtured, and mooted, both in individuals and within groups. . . . The members of the group should have the ability to determine the conditions on which they interact and the people with whom they share and recognize the relations of identification and trust.[33]

We can then distinguish at least three ways in which an institutional arrangement can threaten (without necessarily directly violating) freedom of association and thus individuals' independence. First, the arrangement can compromise the ability of individuals to exercise control over the process of ends formation and development within their associations. Second, it can undermine their ability to voluntary define the conditions of interaction among members within their associations. Third, it can substantively reduce opportunities for individuals to voluntarily form, join, and exit particular associations according to their own ends, thereby rendering freedom of association merely formal.

In what follows, I shall argue that privatization undermines freedom of association in all these respects. It does so, respectively, by (1) imposing on voluntary associations external ends, previously established at the political level according to political priorities; (2) rendering it impermissible that the members of an association define their own conditions of interaction according to their associations' particular missions; and (3) significantly reducing individuals' opportunities to form associations according to their own particular ends and ideas.

Privatization, we saw, renders the division of moral labor between state and associations unjustifiable. This means, among other things, that insofar as they enter into an institutional relationship of partnership with government, associations acquire a duty, grounded on justice, to enlarge their membership or group of beneficiaries so as to include those who might not have otherwise been a part of their intended sphere of action. They further acquire an obligation to democratize their internal governance, and to abandon their associative prerogative to pursue comprehensive ends. This narrowing of a division of moral labor between state and associations in turn compromises the ability of the latter to act as channels through which individuals can freely originate and pursue particular ends.

To substantiate this claim, it is worth considering actual instances of associations that have experienced a loss of control over their own ends as a consequence of entering into close relationships of partnership with government.[34] For example, US shelters for battered and sexually abused women have lamented the way in which their ideological commitment, as well as their relations with clients, changed as a consequence of signing a contract with the state. These associations were independently founded and directed by nonprofessional feminist activists. The US government then started hiring them, through grants and contracts, to provide the above services on its behalf. It has

then required these associations to hire human service professionals as a condition of winning state support. This is in part because the original founders of these nonprofit organizations were judged as being too partial and ideologically oriented, and not sufficiently trained to meet the needs of shelter clients, according to public standards. As a consequence of the change in staffing and governance, not only has the motivational commitment behind, and the mission of, the association changed, but so has its method of distributing services become more impersonal and less expressive of the original values of the association.

Another example is provided by voluntary associations that were informally founded by groups of committed nonprofessional volunteers in many US states to help children with adjustment problems in specific neighborhoods. When the provision of emergency services for abused children became a political priority, the state started to make contracts conditional on the ability of associations to deliver these new forms of services, and to deliver them according "the priority to the worst-off" principle, one considered morally suitable for public agencies. "This shift," as Lipsky and Smith argued at the time, "represent[ed] a sharp break from the founding vision of these organizations."[35] It also required these associations to change their staff according to the competences that their new public function demanded.

These are just two cursory examples of how privatization can, and often does, undermine the control that members and employees have on the ends of their own association, by changing the modality of interactions among them, as well as the social role and responsibility of the associations themselves. When 64 percent of overall registered civil society associations perform critical service-delivery functions on behalf of government (e.g., under government's contracts), as is currently the case in the United States, this becomes a pressing concern.[36] The concern can be cast both in terms of the decreased democratic and contestatory function of civil society, as well as in terms of the diminished value of associative freedom as a necessary means of personal independence.

One could object that, insofar as associations retain the option not to enter into a relationship of partnership with government, an association's loss of control over its ends should be regarded as a natural consequence of a voluntary choice for which the association and its members should be held responsible. Such loss may be even regarded as a part of the association's end itself. No threat to freedom of association would then be at stake.

Before answering this objection, I should make clear that my purpose is not to argue that every isolated act of privatization constitutes a violation of

freedom of association, but rather to emphasize how the systematic practice of using the private for the public results in the creation of structural conditions that imperil the free exercise of freedom of association, by significantly reducing the social space where the cultivation of such freedom is possible. In this respect, a government facing the choice of whether to systematically privatize, say, the delivery of public services to nonprofits, should take into serious account this cost in the overall policy assessment—a cost that is most often neglected in instrumental assessments of privatization. For even if associations could easily exit the system of state contracts, such a system can work only on the assumption that many private associations will accept such contracts. Governments pursuing privatization intend to make associations compete for such contracts. Whether such intention is appropriate in part depends on the foreseeable effects of such policy on the overall structure and constitution of associational life.

Regardless, the strength of the above objection ultimately depends on how we understand the term "compelled." If by compelled we mean coerced by force, then certainly no government coerces private associations to perform public functions on its behalf, simply by offering a contract for the performance of those functions. Yet, it could be argued that an association is de facto "compelled" to accept an offer if there are no reasonable alternatives for its long-term survival. For without reasonable alternatives, a choice cannot be regarded as fully voluntary.[37] In many cases it can be a system or structure, rather than a particular agent, that makes the particular acceptance of an offer "compelled." So the question is: are associations "compelled" by the system of privatization to accept offers to act as government's agents? It depends on the alternatives this system leaves open to private associations. Because of the background context and logic of privatization, the idea that associations can voluntarily reject these offers is often illusory, in particular for nonprofit or charitable associations. These associations are generally not self-sufficient. They tend to rely on public money and fees for services, while private donations constitute only a minor part of nonprofits' budget. Acting as government's partners in the pursuit of justice then becomes the best way for many associations to secure their own self-preservation.[38] This is why many current associations in societies like the UK and the United States are born in response to the availability of state grants or contracts. Further, once an association has entered into a system of state contracts, it is likely to become increasingly dependent on such contracts. For example, in order to serve state-referred clients and to deliver services in a cost-effective and competitive way, an

association will likely have to hire professionalized staff, the cost of which can, in turn, be sustained only if the association keeps accepting government's contracts. The upshot is that either an association becomes or remains an efficient state proxy or its existence is at risk. All these factors make the choice of nonprofit associations to become contractual agents of government "compelled" in a relevant sense.

The result is that in societies characterized by systemic privatization, so-called civil society is increasingly populated by entities that have little, if anything, to do with the kind of associations Tocqueville talked about (and which are still considered as paradigmatic examples of associational life by many political theorists). By contrast, these entities are fast becoming hybrids between market firms and bureaucratic agencies.[39] This instrumentalization of civil society, in turn, significantly reduces the opportunities that individuals have to form and join associations for the formation and cultivation of new ideas and pursuits, whether personal or political.

Someone could object that the ideal of a Tocquevillian civil society is a chimera anyway, since associations are never spontaneous creations; they always reflect features of the political structure.[40] Insofar as the survival of some nonpolitical associations rather than others is an unavoidable consequence of how public resources are distributed across society, which associations flourish will always depend on political choices.

I agree that associations are not spontaneous creations and that the capacity of individuals to exercise their right to freedom of association is ultimately dependent on background predistributive and redistributive policies. A vibrant civil society presupposes a just basic sociopolitical structure, and this structure unavoidably conditions the shape of civil society. But, as we saw, there is a relevant difference between being dependent on the support of a political structure for the pursuit of one's own ends (what I have called the institutional relationship of beneficence) and being, instead, transformed into an agent of such a structure for the public pursuit of justice (what I have called the institutional relationship of partnership). It is by transforming associations into state proxies that privatization, by threatening freedom of association, also compromises the substantive conditions of independence.

We then reach an interesting impasse: on the one hand, privatization, by blurring the division of institutional labor, also renders void the justification for a division of moral labor. Hence, it makes it morally obligatory to directly apply principles of political justice to the internal conduct of associations, under the vests of a duty of democratic justice. Without imposing such

requirements on associations, the independence of those subject to these associations' discretionary authority would be threatened, for the exercise of this authority would be left free to track the associations' idiosyncratic will. On the other hand, however, by extending the demands of political justice to associations, a different aspect of the independence of citizens is threatened: their ability to freely form and pursue ends through a largely autonomous associative sphere. The value of independence thus seems to require both that we extend the demands of political justice to private associations, in order to prevent undue forms of subjection, and that we exempt them from those very same demands, in order to preserve the capacity to freely form and pursue ends.

This contradictory state demands that we understand the associations' duty of democratic justice within the privatized state as a provisional and transitional duty. What independence ultimately demands is that we restore a division of both institutional and moral labor between political institutions and nonpolitical associations. However, before that restoration can be achieved, nonpolitical associations are required, on grounds of independence itself, to act as if they were legitimate agents of political justice, and to comply with a duty of democratic justice as this form of political agency demands. Like in the case of the philanthropists' duty of reparative justice, this duty is provisional because the value (independence) that grounds its binding force simultaneously demands its overcoming. It is transitional because it ought to be exercised in a way that facilitates, rather than obstructs, the overcoming of those very conditions that ground its existence in the first place. Whether for-profit or nonprofit, private associations should refrain from advocating for policies that would lead their government to delegate an increasing range of public functions and responsibilities to them. These associations should certainly be free to act, as independent complements of government, for the common good, however exactly defined, or as providers of a plurality of goods beyond those required by justice. What they should not do is contribute to reproducing a system that co-opts a large part of the associational sphere into acting as an arm of government itself.

Conclusion

In both this and the previous chapter I have defended an account of private actors' provisional and transitional duties of justice, in the context of the privatized state. These proposals, however, raise an important concern. Motivating private agents to act on their duties may turn out to be very costly, as it would

require a fairly radical change of their organizational culture. Assuming conditions of resource scarcity, we may well have reasons to invest these resources in efforts to limit state privatization and to bring about a more legitimate political order. Further, effectively implementing the above duties might end up being counterproductive, if a restoration of a division of institutional labor and a legitimate political order, along Kantian lines, is our end. This is because realizing those duties may end up legitimizing the role of private agents as appropriate political organs. Once we have reached that stage, it might become difficult to retreat from it and to redirect our efforts toward our ultimate end.

The above concern is a serious one. It raises a problem that affects many theories of social change: how should we balance short-term improvements with long-term progress, when these happen to conflict? We should, however, keep in mind that this problem does not defeat the principled case for private actors' transitional duties. It more modestly shows that the case for implementing these duties can be, on strategic grounds, outweighed by competing considerations. Whether these competing considerations succeed in defeating the case for realizing the above duties will, in turn, depend on a complex balance of factors, including, among others, how far a given society is from realizing the ultimate end of rebuilding a legitimate public order, how malleable its political culture and the culture of its civil society are, and how likely it is that the society in question will ever move closer to the desired end to begin with.

9

Rebuilding the Public

IN THE PREVIOUS two chapters I have developed an account of the provisional duties of private agents within the context of an already-privatized state. In this short, final chapter, I want to sketch the central ingredients of a program for overcoming the privatized state itself and for rebuilding a more democratic system of public administration. My purpose here is more to draw lessons from arguments that have been previously developed in this book than to build new arguments from scratch.

What would it take to move toward a more legitimate system of public administration? Questions of policy change and political reform are necessarily contextual and often admit of multiple reasonable answers. It is not, therefore, the job of the political theorist or philosopher to provide any categorical answer to these questions. Yet the theorist can, like any other citizen, advance proposals, supported by reasons, for other participants in the public sphere to consider, in the knowledge that there might be plenty of other reasonable proposals.

This concluding chapter is dedicated to sketching one such proposal, by extrapolating from the argument of the book some of the main policy implications that follow from it. These implications, to wit, are that we need a constitutional amendment to limit the privatization of public functions, as well as a set of both educational and administrative reforms to restore the legitimacy of a system of public administration.

The above reforms, of course, are not meant to be a blueprint for immediate action, regardless of circumstances. For example, if a government is deeply corrupted or largely dysfunctional, and if privatization is, empirically speaking, the only way of getting anything done, there can be an all-things-considered justification for undertaking forms of privatization that should, in a less corrupted context, be constitutionally limited. However, it is doubtful whether this is the kind of situation many contemporary democracies face.

Indeed, the opposite would seem to be true: as we saw, privatization contributes to, rather than reduces, several aspects of institutional corruption, and its promised gains in terms of justice and efficiency are highly debatable. In any case, even in contexts where they cannot be immediately applied, the above reforms are meant to provide an aspirational goal—something we can hope for and should strive toward.

Constitutional Limits to Privatization

The claim that some limits should be imposed on the privatization of at least some public functions may sound uncontroversial to many, although, as we saw, disagreement persists on the reasons for these limits. Rarely, however, are these limits presented as having constitutional status. Those few legal scholars who defend some constitutional restrictions on privatization tend to see these limits as grounded on a controversial "constitutional norm prohibiting the privatization of 'core' governmental functions."[1]

The argument developed in this book leads to a different conclusion, by first urging us to distinguish between aggregative and nonaggregative rationales for constitutional limits. As I have argued in chapter 4, since a democratic people lacks the moral power to abdicate its own self-rule, government necessarily lacks the power to undertake policies that amount to such abdication. To the extent that privatization, understood as a transformation of the system of governance, can be regarded as a process of abdication of collective self-rule, the delegations that directly contribute to such abdication must be regarded as invalid and must be constitutionally constrained. This argument implies that aggregative considerations can *pro tanto* justify constitutional limits on privatization, even if no delegation of supposedly "core functions" is at stake (unless, of course, we include among "core governmental functions" the government's overall function to preserve the minimal collective capacities for self-rule, but this understanding would stretch the concept beyond its common use). The aggregative rationale would be defeated (as opposed to being merely outweighed) if and only if the opportunity costs, in terms of overall efficiency and quality of service, were such that they would themselves undermine some of the minimal substantive and procedural conditions of legitimacy. However, in light of the (admittedly scarce) available evidence on privatization, some of which we have reviewed, it is very unlikely these considerations would be sufficiently strong to outweigh the case for constraining privatization through *ex ante* constitutional limits.

Beyond limits justified on the basis of aggregative considerations, we also saw that, in some cases, constitutional limits can be justifiably imposed on the performance of certain delegations taken serially. This is, however, not because of the inherently public essence of certain "core functions," but rather because certain discretionary powers can be exercised legitimately only if exercised omnilaterally. Constitutional limits are therefore *pro tanto* justified also in those cases where (1) the nature of the delegated function entails that the private actor is left with the discretion to exercise a quasi-legislative kind of power, and (2) the delegation in question generates what I have called, respectively, the problem of representative agency (chapter 5) and the problem of delegated activity (chapter 6), so that the delegated agent cannot successfully exercise that power in the name of all and in a way that can be attributed to the democratic, legislative community.

My argument for constitutional limits constitutes therefore an invitation to abandon the notion of core governmental functions altogether. This notion is too vague and, as I have argued, must be further disaggregated into different forms of discretionary powers. For example, collecting taxes may be regarded as a core governmental function, but the delegation of the task of actually collecting taxes does not violate any constitutional norm. It is only when the aspects of collecting taxes that have a regulative or legislative component are at stake that the nonaggregative argument for constitutional limits gains force. In the case of the privatization of prisons, for example, it is not the fact that prison guards can inflict physical punishment on inmates, and that inflicting punishment on them is a "core governmental function," that explains why there should be constitutional limits on this kind of privatization. It is rather the fact that, for the reasons explained in chapter 3, prison personnel is left with a certain kind of discretionary authority to set the rules according to which punishment should be inflicted. Constitutional limits on such privatization should be imposed insofar as the exercise of the discretion it demands (as opposed to the act of infliction itself) can be legitimate only if carried out by public as opposed to private agents, insofar as these agents, for the reasons explained in chapters 5 and 6 respectively, are better suited to exercise that discretion in a way that avoids the problems of both representative agency and delegated activity.

Although it is outside of the purpose of this book to specify, in detail, the doctrinal nature of the constitutional norm on the basis of which limits on privatization should be imposed, some general considerations directly follow from the above argument. Consider, for example, a recent decision by the

Israeli Supreme Court to invalidate, as unconstitutional, the privatization of prisons. The court based its decision on human rights law, arguing that private entities are more likely than public entities to abuse coercive force owing to their for-profit culture, and that the exercise of coercive power by for-profit entities is inherently disrespectful, and, therefore, incompatible with human dignity.[2] Having rejected in chapter 1 both of these arguments as insufficient to justify constitutional limits on privatization, the argument of this book provides reasons to go beyond the framework of human rights law when deciding on the basis of what legal grounds privatization ought to be limited. The fundamental problem with privatization is not, or not necessarily, that private actors, because of their motivational mindset, are more likely to behave in a dehumanizing way or to abuse power. Rather, the problem is that these actors, because of some of their constitutional and positional features, lack the standing to exercise certain kinds of powers legitimately. Importantly, this is true of not only for-profit entities but also nonprofit ones.

At the same time, my argument also provides reasons to rethink those accounts that would ground constitutional limits on privatization on a norm of separation of powers or on the traditional version of the nondelegation doctrine, understood as a norm aimed at preventing the legislature from delegating its legislative power to all those bodies, whether public or private, not originally vested with legislative authority. As argued in chapters 4–6, it is not only the kind of delegated discretionary power that matters, but also the kind of agents, whether public or private, to which that power is delegated. Delegations of legislative power to bodies not originally vested with that power (e.g., administrative agencies) are not, in principle, as problematic as delegations of that same power to private firms or even nonprofit entities, which, unlike public entities, are normatively defined by a capacity for free purposiveness and the nature of whose obligations is contractual in nature.

In this respect, the argument developed in this book supports both a narrower and a broader version of the nondelegation doctrine as the constitutional norm on the basis of which restrictions on privatization should be imposed. The norm is narrower in the sense that it would limit delegations only to a subcategory of those actors not originally vested with legislative authority. It would be more expansive insofar as it would include aggregative considerations as well. In the case of widespread privatization, it would prevent further delegations of public functions even when the latter lack a legislative character and even when they fail the "core functions" test, however exactly defined.

Limiting privatization, however, will not do without a program for simultaneously regenerating a system of public administration. In what follows, I will outline two fundamental dimensions of this program: an educational and an institutional one.

Educating Civil Servants

The imposition of limits on the outsourcing of public functions must go hand in hand with the progressive reinsourcing of those functions, if already privatized. This process would, in turn, require an expansion of the number of "civil servants," broadly understood as including both low-level and high-level public administrators. Quantity, however, is of little value without quality. A civil service that fails to be governed by an appropriate bureaucratic ethos and that operates within conditions of widespread citizens' mistrust toward government and its administrative apparatus will tend to reproduce the very same conditions that seem to justify, at least prima facie, the privatization of public functions in the first place.

As we discussed in chapter 3, following Hegel, the appropriate maintenance of a bureaucratic ethos is partly a function of the institutional context within which civil servants operate. However, the development of this ethos is obviously also a function of civil servants' education. This raises the important question of what an education for the civil service should look like. Unfortunately, whereas political philosophers have long debated the purposes and practices of civic education—education for citizenship—they have paid considerably less attention to the purposes and practices of a system of education for those in charge of administering the public. Since the concluding chapter of an already-long book is not the place to develop any such account in great detail, I will limit myself to highlighting a range of desiderata that I think any such account should meet and the questions it should answer.

The first question is whether there are reasons to think that a model of civil service education should be at all different from a model of citizenship education. After all, it could be thought that since a legitimate system of public administration should itself be partly democratized, and since every citizen should have equal opportunities to access positions of power and responsibility, including positions within the administrative apparatus of the state, then no special education is needed. All citizens should be, in some sense, educated to be civil servants, and this should be one of the goals of general public

education. There is, I think, some merit to this view. Indeed, when we think about what virtues civil servants should exhibit, we see that many of them are general virtues of citizenship. For example, the disposition to obey rules even when one personally disagrees with them, unless they are profoundly unjust, is a virtue not only civil servants but also citizens must possess if a democracy is to function at all. Similarly, the ability to maintain a capacity for vigilance and independent judgment, and for voicing disagreement—a capacity that, we saw, is central to the civil service's ability to protect the integrity of the constitutional state—is also a virtue that citizens must cultivate and sometimes exercise through forms of disobedience. Public discussion, whether among citizens, or among citizens and civil servants, requires the same ability to be open to considering other points of view, and to revising, on the basis of a certain epistemic modesty, one's own views in light of new evidence. At the same time, while civil servants certainly require a kind of expertise, this is not a virtue that should be reserved entirely for them alone. Citizens must also pass informed judgments and retain trust in their ability to assess available evidence and information; otherwise their ability to judge, central to any functioning democracy, would be paralyzed. Finally, citizens, like civil servants, are also partly required to detach from their own personal interests, conceptions of the good, and partial loyalties when arguing about the justified use of collective coercive institutions.[3]

These considerations support the view that much of the education civil servants need must come from a model of universal education for citizenship, aimed at fostering the above virtues. There are, however, some aspects of being a civil servant that should trigger supplementary educational requirements. First, and most obviously, within complex administrative states, there is a need for in-depth technical expertise. Although it is a mistake to reduce the question of expertise to a question of technocratic competence, the fact remains that it is unreasonable to expect all citizens to develop the needed levels of required expertise to, say, introduce particular environmental regulations or solve complex administrative problems. If, on the one hand, we must be wary of the neoliberal tendency to transform all political questions into technical ones—a tendency that the critique of privatization developed in this book explicitly rejects—on the other hand, we must also reject the opposite tendency to completely dismiss the role of technical expertise in politics.

Second, the role of the civil servant requires a particular kind of detachment that may be considered too demanding for even the most virtuous citizen. While a good citizen is certainly required to take others' interests into

account as constraints on his or her own actions, a good citizen is not required to make the service of both society and the state his or her own exclusive source of reasons for action. It follows that the kind of detachment from one's personal point of view that civil service demands is different from that demanded of each citizen. As a citizen acting within the public sphere, although I may not be permitted to argue and act (e.g., vote) on the basis of my comprehensive doctrines or private conceptions of the good alone—I owe to others a justification for my actions that they can reasonably accept or, at minimum, access—I can still regard my conception of the good as an important reason for holding a certain position or for acting in a certain way. As a civil servant, instead, my main responsibility is to "serve" the constitutional democratic state both by being faithful to the democratic will of the people, as constituted through the lawmaking process itself, and by departing from that will whenever strictly necessary to protect the rule of law, as well as constitutional essentials. The civil servant's own personal point of view, understood as the ensemble of his or her personal attachments, loyalties, and comprehensive conceptions of the good, provides the civil servant with no reason to hold one view rather than another, at least in his or her professional capacity. The detachment required is thus much more demanding than the detachment required of citizens.

Finally, and as a consequence of the high moral demands of civil service, the level of moral motivation required by a functioning system of public administration is arguably higher than the moral motivation required for good citizenship. Often, the provision of economic incentives like wages, however important, is not sufficient to support the necessary motivation, and, if the incentives are excessive, they may even compromise it. This, in turn, means that any functioning system of civil service must generate its own moral and cultural incentives through internal processes of socialization and identity formation so as to generate a culture of pride and solidarity among its participants. I think that taking seriously these elements should lead us to supplement whatever our preferred model of civic education may be with extra educational requirements.

On one long-standing view, recently rehabilitated by Jon Michaels, such requirements are taken as calling for the establishment of special educational programs in the form of national academies.[4] France's Ecole National d' Administration (ENA) is the paradigmatic example of these kinds of institutions. The ENA is an extremely selective postgraduate school, entirely dedicated to the formation of high administrators. The school, founded in 1945, is famous

for both its elitism and its technocratic and specialistic character. Only those with a "relevant" college education, generally upper-middle-class students at elite French universities, who already possess certain specialized competences, can be admitted through an extremely competitive selection process. Although it is arguably true that the ENA has succeeded in creating a class of civil servants who share a strong identity and a strong ethos of public service, it has also contributed to form an understanding of the civil service as a separate caste of technocrats, who are often out of touch with society's interests and needs.[5] It is not a coincidence that some have proposed to close the ENA in response to recent popular protests against the elitism and privilege of the current class of functionaries.

Two general lessons can, I believe, be learned from the limits of the French model of administrative education. First, educational programs for the civil service, whatever precise shape they take, should adopt a broader understanding of what expertise, and thus merit, is. Relevant qualifications cannot be reduced to specialist and technocratic knowledge. Elizabeth Anderson makes a similar point in the case of admission to colleges and universities for the general population, which I think can be fruitfully extended to our topic.[6] As high-level administrators or lower-level government employees, civil servants must be responsive to the problems society faces, whether these be environmental, educational, or economic, and in order to be so responsive they must be aware of these problems and their specificity. Part of this awareness can be acquired through secondary sources, but secondary sources are generally not enough. Only direct experience, or indirect experience through close interactions with those who face those problems, can provide an in-depth and sensitive knowledge of social problems. In this respect, technocratic competence, however relevant, is only one aspect of the competence that a system of education for civil servants should provide. Another important aspect of this system would consist in developing and retaining over time the ability (and opportunity) to interact with people from different sectors of society, so as to maintain the necessary knowledge that only these interactions can provide. The idea of competence and merit, in the selection of future civil servants, should thus be broadened to include different dimensions of diversity, including not only diversity on the grounds of race, gender, and social class, but also diversity of life experiences such as, for example, having lived in rural areas where public services are scarce or difficult to access, or having grown up in regions that are subject to climate threats. Diversity, in turn, should not be considered a

tiebreaker among those who are roughly equal in terms of academic and technocratic qualifications. Rather, diversity, broadly understood, should be included in the very understanding of what counts as a qualified candidate. This in turn should lead to the formation of what some political scientists call a "representative bureaucracy"—a civil service whose composition more closely mirrors different social realities.[7]

There is a second reason why, unlike ENA functionaries, civil servants should be prevented, throughout their education and career, from segregating from the rest of society. A certain kind of continuous social integration between civil servants and the society they are meant to serve is necessary to acquire and maintain the capacity for detachment that is an essential part of the bureaucratic ethos. There are, in principle, two ways in which such capacity can be acquired. On one model, one can master, through reflection and practice, the ability to neatly separate one's personal from one's political identity. For example, it is in principle possible for me, as a private person, to have a preference for elite private schools, as a way to boost my children's competitive advantage, while at the same time, as a civil servant, working hard to improve the condition of public schools. There is, however, the obvious risk that the more my personal life and interests become detached from my public responsibilities, the less I will be motivated to act on the latter. Indeed, this model risks generating a sort of moral schizophrenia between the personal and the political life of an agent. On a different, more sustainable, model, one should aim for the alignment, at least to some extent, of the civil servant's personal and political incentives. What would that mean in practice? It means, for example, that access to the civil service, including to the educational programs aimed at forming civil servants' multiple competences, should be made conditional, whenever possible, on civil servants being required to maintain direct involvement in those areas of social life they will be formed to administer. This may include a requirement to use public services rather than private alternatives, or to reside, for a while, in certain geographical areas, so as both to gain more in-depth knowledge of the problems inhabitants face and to maintain a personal stake in the object of their public responsibility.

A similar policy has been recently proposed by Claudio López-Guerra.[8] According to López-Guerra, we should prohibit high political officials from using private (or foreign) substitutes for the basic goods and services that the state has a responsibility of justice to provide. While the content of my proposal aligns with López-Guerra's conclusion, my argument here differs from

his in two important respects. First, I do not see the proposal as limited to "high" officials who "run for office." After all, as we discussed throughout this book, relevant policies are often made in low-level administrative offices, or even at the "street level." Second, my proposal, unlike López-Guerra's, is not based on a principle of justification. The point I want to make is not the epistemic one that it is easier for citizens to trust civil servants' justifications for their actions if the latter share a stake in the consequences of those actions. The point is rather that the civil servant's disposition to interpret the ends of policy in a way that is responsive to the problems society faces, and his or her ability to act on the appropriate kinds of reasons, is more easily sustained if civil servants maintain close knowledge of, as well as a personal stake in, the sort of problems they are meant to address. Although, as I argued at length in chapter 5, what matters is that public officials, including civil servants, ultimately make their decisions on the basis of certain kinds of reasons, that is, reasons not positively excluded by their authorized mandate, regardless of their motives for doing so, nevertheless closely aligning personal and political interests may be a way of providing the motivational support instrumentally required to maintain an appropriate responsiveness to reasons over time.

Of course, imposing stringent conditions on civil servants may dangerously disincentivize citizens from choosing this profession. There are, however, multiple ways to counteract these disincentives. Some of these ways are economic. In a country like the United States, for example, the federal government could commit to repay the debts of those who would like to start a training in civil service. This may provide many with a sufficient incentive to begin a career in the civil service, even if demanding requirements are attached to it. Symbolic incentives are also important. Through educational programs, TV shows, and even national holidays, governments around the world could do more to elevate the social standing of public work.[9] Of course, it is difficult to rebuild the social reputation of the civil service in contexts of widespread mistrust in government. However, the question of public trust cannot be separated from the question of limits to privatization. Although levels of trust are often conditioned by historical and contextual factors, it is generally more difficult to trust someone with whom we lack direct contact or experience. Yet, for the reasons explained in chapter 4, a privatized government is a government that remains opaque to the citizenry. Limiting the outsourcing of governmental functions should thus be regarded as a necessary first step toward rebuilding trust in the public sector. A second step consists in an internal (albeit partial) democratization of the administrative apparatus itself, to which I now turn.

Legitimizing Public Administration

Through the integrative model of administrative legitimacy developed in chapter 3, we saw that legitimizing the administrative state requires a complex set of interventions. In particular, the model I defended included four kinds of requirements: (1) a qualified system of top-down controls, in the form of legal constraints imposed by elected officials on agency action; (2) a clear separation, in the constitution of offices, between officeholding and merely contractual employment; (3) a system of tight procedural integration between the democratic and the bureaucratic, the salience of which we further examined in chapter 6; and last but not least (4) a bottom-up, qualified democratization of administrative rule making.

In line with the spirit of this concluding chapter—a place to sketch the practical implications of the book's main arguments, while at the same time indicating new areas for further research—I want to analyze some of the concrete ways in which each of the above modalities of administrative legitimation could achieve practical realization.

Let us start with mechanisms of top-down control over administrative action. There are many forms these controls can take, including the imposition of constraints, by the legislature, through the structural design of administrative agencies, and thus, for example, the narrowing of the scope of delegated authority through mandates, review requirements, and restrictions on funding allocation. Which types of controls, exactly, will better support fidelity to democratic mandates and a custodial disposition toward the constitutional state at any given time is a contextual matter, and in any case not for political philosophers to determine. There are, however, some general limits that a system of top-down control would seem to be required to respect, if the independence of the civil service that democratic legitimacy itself requires is to be upheld, and if the rationale for having an administrative state in the first place is to be retained. First, the ability of elected officials (including, in presidential systems, the president) to remove administrators at will must, at least to some extent, be constrained. In the United States, for example, some of these limitations are already in place. Congress can constitutionally restrict the president's removal authority through the use of "for cause" removal protections so as to prevent the president from removing an identified official except in cases of "inefficiency, neglect of duty, of malfeasance in office." However, these protections have come under serious attack during the current Trump administration.[10] It is thus important that courts, and other branches of government,

adopt a protective role in making sure that these limits are respected. Further, removal protections are generally confined to appointed agency leaders. However, insofar as these protections should support the independence, unity, and integrity of the administrative system as a whole, and insofar as this unity and integrity are, as we saw in chapter 6, a cooperative achievement among agents positioned at different levels of the legislative-administrative process, it is unclear why such protections ought to be necessarily limited to the highest administrative offices alone. "For cause" protections should arguably be extended to lower public officials as well. Note that to claim that elected officials lack the right to fire administrators in the absence of gross violations of office duties does not mean that they do not have a duty to express disapproval of executive branch officials, even in cases where they lack removal authority. A negligent failure to be transparent may, in some cases, not be sufficiently severe so as to constitute a good cause for dismissal but may still be sufficient to trigger public disapproval, and even softer kinds of sanctions.

Another set of important limits concerns the legislature's direct control over administrative action. Although, in order to prevent unilateral subjection, the legislature should retain the authority to change the terms of its delegated authority to administrative agencies, and should also have the authority to set sunset limits to temporally constrain the duration of an agency's delegated authority, the legislature's veto on final agency action should be subject to constraints. The reason is partly the same as the reason for constitutional limits on removal power—administrative action should be protected from undue partisan pressures. However, this power should be limited also because an unconstrained veto power would contradict the very reason for delegating authority in the first place, the reason being that the legislature, owing to constraints on time and expertise, is not best positioned to assess the substantive merits of each and every regulation. The legislature's authority to exercise veto power should then also be limited by something along the lines of a "for cause" clause. This means that although the legislature cannot exercise this power as it pleases, it retains the authority to veto the outcomes of the process whenever (1) the administrative process fails to abide by required procedural constraints, or (2) the outcomes are in clear violation of the agency's duty to provide a reasonable interpretation (and reconstitution) of the goals of the enacted statute, or (3) the legislature has developed, in the meantime, compelling and publicly justifiable new reasons for changing the original ends of the statute. This way of understanding the limits of top-down mechanisms of control

suitably integrate, I think, the co-original and at times conflicting demands of procedural and substantive legitimacy that I introduced in chapter 2. While the former requires administrative deference, the latter calls for a sphere of independent judgment and action.

I shall turn now to the second demand of administrative legitimacy—the distinction between office and private contractual employment. This Weberian feature requires the de-marketization of the bureaucracy. In recent years, in many countries, we have seen what law scholar Jon Michaels has called "the marketization of the bureaucracy," including a reduction of compensation for government jobs, the weakening of trade unions and of government workers' collective-bargaining rights, the progressive erosion of tenure protections, the conversion of many civil service posts into market-like employment positions, and the rise of a managerial, market-centered culture within public organizations themselves, partly generated by the increasing copenetration of market and state modes of organization.[11] Yet legitimacy, if the argument of this book succeeds, requires a neat separation between office and contract, between positions that come with a clear set of nonnegotiable obligations to pursue exclusively public purposes attached, and positions that leave open the negotiation of obligations to horizontally situated parties, according to preexisting loyalties. Restoring the separation between office and contract in turn requires that we reverse the above process of marketization through legislation, and through political support for stronger protections for labor unions and public-sector workers' labor rights.

The third pillar of administrative legitimacy consists in the procedural integration between the bureaucratic and the democratic. We have already discussed in chapter 6 how certain procedural mechanisms, like the APA in the United States, should be regarded not simply as having the function of making administrative action more accountable to the public, but also, and importantly, as sites of public practical reasoning, through which the will of the people is constituted and reconstituted throughout the administrative process. Without appropriate procedural integration, we have argued, ordinary laws and policies lose their democratic legitimacy because they fail to carry out the will of the people, and they cannot be attributed to the lawmaking community as a whole. We have also seen how the practical value of procedural integration requires the insertion of participatory and contestatory elements within the administrative apparatus. These elements should, in turn, be protected through certain juridical mechanisms, for example, by requiring courts not simply to scrutinize, whenever necessary, the substantive merits of an agency's

determination, but also to insist that the agency engage in appropriate deliberative processes.[12]

We have now reached the final pillar of administrative legitimacy: the bottom-up legitimation of residual discretion. As I have explained above, the legislature can veto only regulations that radically distort the ends of policy (that clearly violate the spirit of legislative statutes) or that fail to meet certain procedural constraints. This means that administrators are left with final authority to exercise residual discretion in selecting specific kinds of regulations among reasonable alternatives, that is, among alternatives that are compatible overall with the spirit of legislative mandates.

However, as I explained in chapter 3, a commitment both to the procedural legitimation of residual discretion and to active citizenship (which, as we argued in chapter 2, is, in turn, justified by an appeal to the Kantian notion of rightful honor) calls for further, bottom-up constraints on the administrative exercise of final authority. One form these constraints may take, for reasons also specified in chapter 3, is that of randomly selected citizens' juries, endowed with the authority to veto particular specifications of policy that, even if not in violation of statutory terms, may still fail to take into adequate account certain specific social concerns, as they emerge throughout an appropriately deliberate process. In this way, not only would those subject to administrative regulations be given residual control rights over public administrators' exercise of quasi-legislative discretion; but also the exercise of such discretion would be qualitatively improved by their being forced to consider all relevant social concerns. I have argued that one possible way for meeting these desiderata would be to extend mechanisms of codetermination, usually discussed in relation to the governance of business corporations, to public agencies and even lower public administrative bodies. As sketched in chapter 3, a system of codetermination, where quasi-legislative decisions are ultimately made by a board constituted by agency leaders, civil servants, and people's representatives (in the form of a randomly selected jury), would have the distinctive merit of balancing the demands of procedural legitimacy with those of substantive legitimacy. The procedure would guarantee that residual regulatory discretion is not exercised unilaterally, while also preserving the independence and expertise of public administrators. A system of codetermination, appropriately operationalized, would also contribute to preserving active citizenship and promoting trust in government by mitigating the technocratic, passive, and at times even dehumanizing aspects of the administrative state.

The above elements of reform, taken as a unified package, provide a general sketch of what moving toward a more legitimate system of public administration would require. Another book would be needed to transform this sketch into a detailed painting—a comprehensive normative theory of a legitimate system of public administration. Importantly, the proposal here defended should not be regarded as performing the same function as the proposals developed in the previous two chapters. Indeed, these proposals belong to different stages of social change. While the previous two chapters develop temporarily binding norms for private actors who operate within the privatized state—a state that, in spite of due compliance with those requirements, would remain a defective state and a state of merely provisional justice—the purpose of this chapter has been to sketch a set of reforms that would need to be actualized in order for exit from that state to be possible.

Epilogue

SOMETIMES AT A SLOWER and other times at a faster pace, this book has brought us from a very abstract reflection on the philosophical foundations of democratic state authority to the more mundane, but equally important, details of administrative decision making and their contextual bases. This has required moving across a diverse, and often clashing, set of theoretical spaces, ranging from Kantian universalism to moral particularism, from conceptual analysis to the interpretation of legal doctrines, from political philosophy to organizational theory, and more. Of course, not all these spaces have received equal attention. But the gamble of this book has been that their interconnections may be generative and worth exploring.

As anticipated in the introduction, this approach is not meant to be a form of methodological schizophrenia. My intention, instead, was to follow Kant's insight that we can move from the universal to the particular only through a "principle of politics" that is "drawn from experiential cognition of human beings, that have in view only the mechanism for administering right and how this can be managed appropriately."[1] The journey from philosophical foundations to the contextual and contingent bases of public administration and back that this book has attempted to offer is meant to reproduce precisely this movement.

The nature of the claims the book has tried to defend is also diverse. Overall, the book defends three interrelated, overarching theses.

One thesis is sociopolitical in character and is diagnostic of the nature and trajectory of neoliberalism. The claim is that neoliberalism, of which the privatization of governance is a signature feature, is haunted by an internal and irresolvable contradiction between ideology and practice. As an ideology, neoliberalism promises a free world where individuals, all entrepreneurs of their own lives, can fully realize and express their independent selves through free and competitive markets, organized but not directed by a smaller, lighter, and

more efficient government. As a practice of governance, however, what neoliberalism delivers is exactly the opposite: a privatized government that is often bigger, if somewhat more invisible. If the argument of this book is correct, rather than individual independence, the result is the creation of a new system of institutionalized dependence.

From a historical perspective, the pathology of privatized, neoliberal governance amounts to the progressive development of a renewed feudal order where the exercise of public power is systematically oriented toward private purposes. In this respect, as premised in the introduction, the critical thrust of this book can be read as a continuation and, at the same time, an inversion of the story that Jürgen Habermas recounts in *The Structural Transformation of the Public Sphere*. If Habermas argues that the entanglement of public and private, state and society, in the nineteenth century led to a refeudalization of society, culminating in the destruction of the bourgeois public sphere, I have tried to show how the ever-greater entanglement between public and private, brought about by processes of privatization since the late twentieth century, leads to a refeudalization of the state itself, a collapse between public offices and private loyalties, status and contract, which undermines the very rationale that justifies the existence of the modern state, and the exercise of political power and authority by its government.

From a normative perspective, the resulting privatized state is a condition that is structurally similar to the Kantian state of nature—a state of unilateral subjection. In the Kantian state of nature, justice is merely provisional because no private individual can have the authority to unilaterally legislate the normative conditions, including the rights and duties, under which others can freely act. Similarly, in the privatized state, justice is also merely provisional because the scope of individuals' entitlements of justice, and of their spheres of freedom, is often legislated by private actors (as argued in chapter 3). These actors lack valid omnilateral authorization (as argued in chapter 4), or have that authorization but fail to do what they are omnilaterally authorized to do (as argued in chapter 6), or do what they are authorized to do but fail to do so in the name of all—they fail to enact a form of judgement that is properly representative (as argued in chapter 5). The result is that the privatized state is a state where the power of choice of some is made systematically dependent on the merely unilateral and legislative determinations of those whose pretense is to publicly administer justice. It is, as such, a state of dependence and unfreedom.

The second thesis of the book is a philosophical one. In brief, the claim is that democratic legitimacy has an important agency-centered component. The

question of democratic legitimacy is not simply a question about how things are done (e.g., according to which principles are institutions arranged), or about the grounds of authority and the origin of authoritative rules (e.g., whether they have been consented to, or whether they could be agreed on by a relevant constituency), or about available mechanisms of accountability. Legitimacy is also a matter of the kind of agents who bring those rules to bear on individual lives on a daily basis. More precisely, legitimacy is conditional: on the ability of different agents, or lack thereof, to orient themselves toward the right kind of purposes and to act on the right kind of reasons; on the socio-organizational practices within which these agents are embedded and operate; on their ethos and cultural norms; and on their capacity, or lack thereof, to act in concert, as a part of a coherent and unified juridical community.

In this respect, the book also attempts to tell us something important about the way in which we should understand the public/private binary. Although there are many ways of drawing the distinction between public and private agents (a distinction that, it is worth repeating, is often blurred in the real world), the argument here developed should help us pick out certain features that are, from the perspective of political morality, particularly salient in drawing this distinction normatively. These features include the normative difference between contractual and official duties; the presence or absence of free purposiveness and the different intentional orientations that from this feature derive; and the rationale for the sake of which different organizations are created and the normative functions they distinctively serve within the broader social system, as well as their ownership structures. We may, then, say that although the argument of this book presupposes a rudimentary, commonsensical distinction between public and private agents, the way this distinction should be normatively understood is itself a result, rather than a premise, of the argument itself. Of course, many of those familiar with feminist critiques of the public and private distinction may be skeptical of any sharp divide between public and private, even when this divide is applied to organizational entities rather than spheres of life. But note that my reason for reaffirming a certain clear separation between public and private is not that dissimilar from the reason feminists have to criticize it.[2] If the argument of this book is correct, reaffirming one version of this distinction is necessary to unmask certain undue forms of dependency and domination that the blurring of the public/private binary, through privatization, obscures.

This book can also be read as an invitation for political philosophers to move beyond the still-dominant focus on basic institutional structures and to

give more centrality to daily practices of governance as worthy objects of philosophical inquiry. In line with more continental philosophical traditions, especially those inspired by Foucault, my argument emphasizes how the site of political power is decentered.[3] Political power is diffuse throughout society, manifest not only in the state but also within institutions like the (perhaps for-profit) prison and the (perhaps nonprofit) hospital. Of course, the kind of decentralization Foucault has in mind is more radical, resting on the assumption that power transcends institutions altogether, being ultimately located in discursive practices. Unlike this tradition, my argument still relies on a conception of state power as a distinctive form of political power and does not abandon the juridical state apparatus as the central object of analysis for political theory; rather, it tries to decenter and broaden the dominant account of the juridical-institutional edifice itself, by giving centrality to low-level institutions and practices (this, of course, by no means entails that the juridical-institutional edifice should be the only object of analysis for political theory). However, my argument does include a more Foucauldian aspect to the extent that it emphasizes how different organizational *ethoi* discipline subjects who live within them in different ways. This aspect is particularly central to my discussion of the difference between the bureaucratic ethos of public service and the market-driven, managerial ethos of for-profit providers, and of how this difference influences their respective representative capacities (see especially chapter 6).

The third and final central thesis of the book is prescriptive. Where should we go from here? As previously noted, questions of policy change are necessarily contextual, and the philosopher, like any other citizen, can only advance proposals for other participants in the public sphere to consider, in the knowledge that there might be plenty of other reasonable proposals. The prescriptive proposals that follow from the argument of the book, as developed in its last three chapters, include first an account of the moral requirements that bind private actors within a state that is already privatized. Complying with these requirements, however, does not make the privatized state a legitimate state. This remains a defective state, and the duties of private actors remain merely provisional and transitional. A further proposal is therefore needed; one that provides concrete strategies for exiting the privatized state itself, and for reconstituting a public system of governance. As a part of this proposal, I have defended a constitutional amendment to limit the privatization of public functions, as well as a series of both educational and administrative reforms to restore the legitimacy of current systems of public administration.

I do not claim these reforms are sufficient, but I have tried to argue that they are steps in the right direction.

I want to conclude with a note to the skeptic. On the one hand, a skeptic could argue that this book is excessively conservative. Rather than imagining a radically new politics, a utopian world with no states and no bureaucracy, it limits itself to working within existing political frameworks. To this kind of "radical" skeptic, I answer that my political imagination may be limited, but intentionally so. Although I share the emancipatory desire for a more participatory and active politics, I see the presence of a complex administrative apparatus as a both inevitable and, to some extent, desirable feature of our political world. As I have tried to show, attempts to abolish this apparatus often end up in new forms of patronage and domination rather than emancipation from the exercise of power and authority.

On the other hand, it could also be argued that the book is too idealistic, putting exaggerated faith in political institutions and in their ability to renew themselves and regain trust. To this second, "realist" skeptic, I answer that my realism is limited, but, also, intentionally so. This is a work that aims to take seriously sociological constraints on our political organization. It is also a work that shares with critical theory an attention to the factual reality and historical relevance of ongoing institutional transformations. Yet it is primarily a work of philosophy and, as such, a work of hope. As Kant argues, and Joshua Cohen recently reminds us, philosophy presents us with three distinct questions: What can I know? What should I do? What may I hope?[4] Only the third question combines the theoretical and practical uses of reason. On the basis of what we know about political institutions, and given our understanding of the demands of morality, I have tried to ask: What sort of political reforms is it reasonable to hope for?

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NOTES

Introduction

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5. Sarah Pettijohn and Elizabeth Boris, "Nonprofit-Government Contracts and Grants: Findings from the 2013 National Survey" (Washington DC: Urban Institute, 2013), https://www.urban.org/sites/default/files/publication/24231/412962-Nonprofit-Government-Contracts-and-Grants-Findings-from-the-National-Survey.PDF.

6. Gillian Metzger, "Privatization as Delegation," *Columbia Law Review* 103, no. 6 (2003): 1367–502, 1385.

7. Ibid.

8. Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton, NJ: Princeton University Press, 2013).

9. Paul C. Light, "The True Size of Government: Tracking Washington's Blended Workforce, 1984–2015," *Volcker Alliance*, October 2017, https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf.

10. Jody Freeman, "The Contracting State," *Florida State University Law Review* 28, no. 1 (2000): 155–214.

11. During the 1970s many administrative states experienced a crisis of legitimation, with a sharp decline in citizens' trust in the civil service and public bureaucracies. As a consequence, the outsourcing of public functions to private agents, as well the inclusion of market strategies in the management of public affairs, became regarded as the only available escape from the burdensome, constraining, and alienating nature of the bureaucratic red tape. See Pierre

Rosanvallon, *Democratic Legitimacy: Impartiality, Reflexivity, Proximity* (Princeton, NJ: Princeton University Press, 2011).

12. There is a growing philosophical literature on plutocracy and on undue forms of private influence in politics. This literature, however, is rarely concerned with the privatization of government itself. For a discussion of plutocracy and philanthropy, see, e.g., Rob Reich, *Just Giving: Why Philanthropy Is Failing Democracy and How It Can Do Better* (Princeton, NJ: Princeton University Press, 2018). For a (Machiavellian) defense of populist institutions as a response to plutocracy, see John P. McCormick, *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2001). Privatization has been, however, at the center of some legal scholarship. See, e.g., Jody Freeman and Martha Minow, eds., *Government by Contract: Outsourcing and American Democracy* (Cambridge, MA: Harvard University Press, 2009); Jon Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* (Cambridge, MA: Harvard University Press, 2017); Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do about It* (Cambridge: Cambridge University Press, 2007).

13. For how, empirically, these two transformations feed each other, see Henry Farrell, "Privatization as State Transformation," in *Privatization: NOMOS LX*, ed. Jack Knight and Melissa Schwartzberg (New York: New York University Press, 2018), 171–99.

14. For representatives of the first camp, see, e.g., Joseph Heath, "Three Normative Models of the Welfare State," *Public Reason* 3, no. 2 (2011): 13–43; Mathias Risse, "Should Citizens of a Welfare State Be Transformed into 'Queens'?," *Economics and Philosophy* 21, no. 2 (2005): 291–303. For representatives of the second camp, see, e.g., Avihay Dorfman and Alon Harel, "The Case against Privatization," *Philosophy and Public Affairs* 41, no. 1 (2013): 67–102; Eric Beerbohm, "The Free-Provider Problem: Private Provision of Public Responsibilities," in *Philanthropy and Democratic Societies*, ed. Rob Reich, Chiara Cordelli, and Lucy Bernholz (Chicago: University of Chicago Press, 2016), 207–25. For a somewhat middle position, see Debra Satz, "Markets, Privatization, and Corruption," *Social Research: An International Quarterly* 80, no. 4 (2013): 993–1008; James Pattison, *The Challenge of Private Military and Security Companies* (Oxford: Oxford University Press, 2014).

15. Oliver Hart, Andrei Shleifer, and Robert W. Vishny, "The Proper Scope of Government: Theory and an Application to Prisons," *Quarterly Journal of Economics* 112, no. 4 (1997): 1127–61, 1148.

16. Dorfman and Harel, "Case against Privatization."

17. See, e.g., Satz, "Markets, Privatization, and Corruption."

18. For an exception, see Debra Satz, "Some (Largely) Ignored Problems with Privatization," in *Privatization, NOMOS LX*, ed. Jack Knight and Melissa Schwartzberg (New York: New York University Press, 2018), 9–29.

19. On this point, see John Gardner, "The Evil of Privatization," unpublished manuscript, 2014, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2460655.

20. More precisely, following Philip Pettit, I take political legitimacy to concern the way in which certain aspects of the normative order of a society, especially the rules and decisions that establish people's claims of justice and their responsibilities of citizenship, are imposed on people, and in particular whether they are imposed on them by agents who have the appropriate standing to do so; and in their own name, as rulers, rather than as subjects. Legitimacy is thus distinct from justice and other values, which instead concern the substantive nature of that

order (its legal rules and system of government), i.e., whether it distributes the benefits and burdens of social cooperation fairly. See Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012). This conceptual distinction persists even if, as I will argue, a full *conception* of legitimacy should include, as its own demand, the meeting of certain requirements of justice.

21. For a forceful defense of this point, see Arthur Ripstein, *Force and Freedom: Kant's Political and Legal Philosophy* (Cambridge, MA: Harvard University Press, 2009).

22. See Pettit, *On the People's Terms*; Anna Stilz, "The Value of Self-Determination," in *Oxford Studies in Political Philosophy*, vol. 2 (Oxford: Oxford University Press, 2016), 98–127.

23. For accounts of privatization as a form of either cultural or institutional corruption, see Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1998); Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (New York: Farrar, Straus and Giroux, 2012); Satz, "Markets, Privatization, and Corruption." For the view that privatization makes the provision of inherently public goods impossible, see Dorfman and Harel, "Case against Privatization." For an argument that privatization reproduces a hegemonic form of neoliberal rationality, see Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* (Cambridge, MA: MIT Press, 2016). For a motivational argument against the privatization of military functions, see James Pattison, "Deeper Objections to the Privatisation of Military Force," *Journal of Political Philosophy* 18, no. 4 (2010): 425–47. For an accountability-based argument against privatization, see Martha Minow, "Public and Private Partnerships: Accounting for the New Religion," *Harvard Law Review* 116 (2003): 1229–70.

24. For a defense of this Kantian conception of freedom, see Ripstein, *Force and Freedom*. For how it differs from, despite resembling, Philip Pettit's conception of freedom as nondomination, see Louis-Philippe Hodgson, "Kant on the Right to Freedom: A Defense," *Ethics* 120, no. 4 (2010): 791–819.

25. As examples of the recent Kantian revival, see Anna Stilz, *Liberal Loyalty: Freedom, Obligation, and the State* (Princeton, NJ: Princeton University Press, 2009); Ripstein, *Force and Freedom*. For a Kantian justification of cosmopolitan political institutions, as necessary to establish rightful political relationships between states, see, e.g., Lea Ypi, "A Permissive Theory of Territorial Rights," *European Journal of Philosophy* 22, no. 2 (2014): 288–31.

26. Max Weber, *Economy and Society: An Outline of Interpretative Sociology*, ed. Guenther Roth and Claus Wittich, vol. 2 (Berkeley: University of California Press, 1978 [1921]).

27. Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society*, trans. Thomas Burger and Frederick Lawrence (Cambridge, UK: Polity, 1989 [1962]). What I mean by "refeudalization" is, however, different from what Habermas means. For Habermas, refeudalization consists in "the public sphere becom[ing] the court 'before' which public prestige can be displayed, rather than 'in' which public critical debate is carried on" (201). I use the term refeudalization to indicate the fact that, by blurring the distinction between contract and office, the privatized state makes the exercise of political power dependent on the personal loyalties and comprehensive ends of those who exercise it, rather than on procedures and public purposes alone.

28. Neoliberalism is a notoriously vague concept. However, the analysis in this book does not depend on the viability of the concept in any way. I understand neoliberalism to indicate both a specific configuration of governance—a set of economic policies and ways of

implementing those policies—as well as a cluster of ideas, both of which progressively have acquired global hegemony since the 1970s. As a configuration of economic governance, we may see neoliberalism, following Daniel Rogers, as an expression of a "global capitalism that . . . does not rely on the state in the same way that the 'embedded' corporate capitalism of the mid-twentieth century did, but it is not a creature of the minimal state either." Daniel Rogers, "The Uses and Abuses of 'Neoliberalism,'" *Dissent*, Winter 2018, https://www.dissentmagazine.org/article/uses-and-abuses-neoliberalism-debate. Its signature policies include an almost unfettered liberalization of capital mobility, the weakening of labor protections, and austerity measures in the forms of cuts to welfare programs and state budgets, as well as the systematic privatization of both state assets and public services, in order to curb the putatively dominating command-and-control powers of the state, and to maximize individual utility satisfaction. Neoliberalism treats state power with suspicion, while at the same time relying on this power as the indispensable protector and savior of putatively free markets. As a set of ideas, neoliberalism centers on what may be regarded as a three-part ideal of freedom: freedom from bureaucratic constraints; freedom as maximal options for choice, treated as necessary to achieve preference satisfaction; and freedom as self-realization, the individual being understood as an entrepreneurial self who self-realizes through market competition.

29. Years ago Samuel Freeman addressed this same critique to libertarianism. See Samuel Freeman, "Illiberal Libertarians: Why Libertarianism Is Not a Liberal View," *Philosophy and Public Affairs* 30, no. 2 (2001): 105–51.

30. Henry Richardson, *Democratic Autonomy: Public Reasoning about the Ends of Policy* (Oxford: Oxford University Press, 2002); Bernardo Zacka, *When the State Meets the Street: Public Service and Moral Agency* (Cambridge, MA: Harvard University Press, 2017). For further exceptions, see Dennis F. Thompson, "Democracy and Bureaucracy," in *Democratic Theory and Practice*, ed. Graeme Duncan (Cambridge: Cambridge University Press, 1983), 235–50; Joseph Heath, "A General Framework for the Ethics of Public Administration," unpublished manuscript, 2013.

31. See Pettit, *On the People's Terms*.

32. See Katrina Forrester, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy* (Princeton, NJ: Princeton University Press, 2019).

33. Immanuel Kant, "On the Supposed Right to Lie from Philanthropy," in *Practical Philosophy*, ed. Mary J. Gregor and Allen W. Wood (Cambridge: Cambridge University Press, 1996 [1797]), 605–16, 612.

Chapter 1. Privatization and Its Discontents

1. Gardner, "Evil of Privatization."

2. See, e.g., Jocelyn Johnston and Barbara S. Romzek, "The Promises, Performance, and Pitfalls of Government Contracting," in *Oxford Handbook of American Bureaucracy*, ed. Robert Durant (New York: Oxford University Press, 2010), 396–420.

3. For some of the complexities that empirical scholars face in defining privatization, see Paul Starr, "The Meaning of Privatization," *Yale Law and Policy Review* 6, no. 1 (1988): 6–41.

4. Michaels, *Constitutional Coup*, 29. See also Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780–1940* (New Haven, CT: Yale University Press, 2013).

5. Heath, "Three Normative Models of the Welfare State." Heath argues that a normative theory of the welfare state and its functions ought to be based on a theory of market failure.

6. See Michael J. Trebilcock and Edward M. Iacobucci, "Privatization and Accountability," *Harvard Law Review* 116, no. 5 (2003): 1422–54.

7. For why a state may have non-efficiency-based reasons to undertake expansive welfare functions, see Robert E. Goodin, *Reasons for Welfare: The Political Theory of the Welfare State* (Princeton, NJ: Princeton University Press, 1988). For an argument, grounded on values other than efficiency, in defense of a pluralistic system of provision, see Rutger Claassen, "Institutional Pluralism and the Limits of the Market," *Politics, Philosophy, and Economics* 8, no. 4 (2009): 420–47.

8. Satz, "Some (Largely) Ignored Problems with Privatization," 27. See also discussion in Debra Satz, *Why Some Things Should Not Be for Sale: The Moral Limits of Markets* (Oxford: Oxford University Press, 2010), ch. 1.

9. For the economic definition of a public good, see Paul A. Samuelson, "The Theory of Public Expenditure," *Review of Economics and Statistics* 36, no. 4 (1954): 386–89.

10. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 283.

11. Liam Murphy and Thomas Nagel, "Taxes, Redistribution and Public Provision," *Philosophy and Public Affairs* 30, no. 1 (2001): 53–71, 53.

12. See Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

13. For a discussion of these arguments, see Rutger Claassen, "The Marketization of Security Services," *Public Reason* 3, no. 2 (2011): 124–45.

14. For a version of this claim, see Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, MA: Harvard University Press, 2002). For a critical response, see Satz, *Why Some Things Should Not Be for Sale*, ch. 3.

15. See Thomas Scanlon, "Preference and Urgency," *Journal of Philosophy* 72, no. 19 (1975): 655–69; Satz, *Why Some Things Should Not Be for Sale*, ch. 3.

16. Risse, "Should Citizens of a Welfare State Be Transformed into 'Queens?'" 302. See also Murphy and Nagel, "Taxes, Redistribution and Public Provision."

17. For an argument of the latter kind against the privatization of education, see Harry Brighouse, "What's Wrong with Privatising Schools?," *Journal of Philosophy of Education* 38, no. 4 (2004): 617–31. Debra Satz has also made the case that the privatization of education through a voucher system would increase social segregation by assigning children to schools according to the (often racially biased) preferences of their parents, and would provide incentives to refuse hard-to-educate children. Satz, "Some (Largely) Ignored Problems with Privatization."

18. Satz, "Markets, Privatization, and Corruption."

19. See John Rawls, "Two Concepts of Rules," *Philosophical Review* 64, no. 1 (1955): 3–32.

20. For arguments along these lines, see Beerbohm, "Free-Provider Problem"; Avihay Dorfman and Alon Harel, "Against Privatisation as Such," *Oxford Journal of Legal Studies* 36, no. 2 (2016): 400–427, 400.

21. Pattison provides a qualified defense of this argument in his "Deeper Objections to the Privatisation of Military Force," 433–35 (emphasis mine), although Pattison's more recent account of the privatization of war does not rely on this argument.

22. Satz, "Some (Largely) Ignored Problems with Privatization," 22.

23. See Arthur Ripstein, "Beyond the Harm Principle," *Philosophy and Public Affairs*, 34, no. 3 (2006): 215–45.

24. Immanuel Kant, *The Metaphysics of Morals* (1797), ed. and trans. Mary Gregor (Cambridge: Cambridge University Press, 1996), 20 (6:219) (hereafter *MM*).

25. This is compatible with claiming that a state should not compel people to behave unethically.

26. Walzer, *Spheres of Justice*, ch. 1.

27. For an excellent critique, see Joshua Cohen, "Review of Spheres of Justice: A Defense of Pluralism and Equality," *Journal of Philosophy* 83, no. 8 (1986): 457–68.

28. Crucial contributions to the debate on the moral limits of markets include, among others, Satz, *Why Some Things Should Not Be for Sale*; Sandel, *What Money Can't Buy*; Elizabeth Anderson, *Value in Ethics and Economics* (Cambridge, MA: Harvard University Press, 1993).

29. Heath, "Three Normative Models of the Welfare State," 29.

30. See Satz, "Markets, Privatization, and Corruption."

31. For a more radical version of this claim, one that sees neoliberal rationality as all pervasive and transformative of both social meanings and social relationships, see Brown, *Undoing the Demos*.

32. See Jason Brennan and Peter M. Jaworski, "Markets without Symbolic Limits," *Ethics* 125, no. 4 (2015): 1055–73.

33. Satz, "Markets, Privatization, and Corruption." See also Beerbohm, Free-Provider Problem."

34. Dorfman and Harel, "Case against Privatization"; Alon Harel, *Why Law Matters* (Oxford: Oxford University Press, 2014).

35. Dorfman and Harel, "Case against Privatization," 94.

36. Ibid., 93.

37. Ibid.

38. Ibid., 70.

39. Ibid., 74.

40. Ibid., 75.

41. Ibid., 73.

42. Ibid., 88–89.

43. Ibid., 80.

44. See Gardner, "Evil of Privatization."

45. Dorfman and Harel, "Case against Privatization," 69.

46. Ibid., 95.

Chapter 2. What Are Political Institutions For?

1. Gary S. Becker and George J. Stigler, "Law Enforcement, Malfeasance, and Compensation of Enforcers," *Journal of Legal Studies* 3, no. 1 (1974): 1–18. See also, William Landes and Richard Posner, "The Private Enforcement of Law," *Journal of Legal Studies* 4, no. 1 (1975): 1–46.

2. See Bryan Caplan and Edward P. Stringham, "Privatizing the Adjudication of Disputes," *Theoretical Inquiries in Law* 9, no. 2 (2008): 503–28, 503. For a recent revival of political pluralism—roughly, the view that the state is just one source of political authority among others within the same territory—see Victor M. Muñiz-Fraticelli, *The Structure of Pluralism: On the Authority of Associations* (Oxford: Oxford University Press, 2014); Jacob T. Levy, *Rationalism,*

Pluralism, and Freedom (Oxford: Oxford University Press, 2015). For a compelling critique, see Cécile Laborde, *Liberalism's Religion* (Cambridge, MA: Harvard University Press, 2017).

3. Liam Murphy, "Institutions and the Demands of Justice," *Philosophy and Public Affairs* 27, no. 4 (1999): 251–91, 282.

4. Katrin Flikschuh, *Kant and Modern Political Philosophy* (Cambridge: Cambridge University Press, 2000); Stilz, *Liberal Loyalty*; Ripstein, *Force and Freedom*.

5. For a version of these claims, see, respectively, Japa Pallikkathayil, "Deriving Morality from Politics: Rethinking the Formula of Humanity," *Ethics* 121, no. 1 (2010): 116–47; Hodgson, "Kant on the Right to Freedom"; Thomas Sinclair, "The Power of Public Positions: Official Roles in Kantian Legitimacy," in *Oxford Studies in Political Philosophy*, vol. 4, ed. David Sobel, Peter Vallentyne, and Steven Wall (Oxford: Oxford University Press, 2018), ch. 4; Niko Kolodny, "Rule over None I: What Justifies Democracy?," *Philosophy and Public Affairs* 42, no. 3 (2014): 195–229.

6. See A. John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001).

7. John Locke, *The Second Treatise on Civil Government* (Amherst, NY: Prometheus Books, 2009 [1690]), chapter 6, sec. 54.

8. Simmons, *Justification and Legitimacy*. This point is also stressed in Stilz, *Liberal Loyalty*, ch. 2.

9. Simmons, *Justification and Legitimacy*, 154–55.

10. Murphy, "Institutions and the Demands of Justice," 282; G. A. Cohen, *Rescuing Justice and Equality* (Cambridge, MA: Harvard University Press, 2008), 375; Robert E. Goodin, "What Is So Special about Our Fellow Countrymen?," *Ethics* 98, no. 4 (1988): 663–86. Also Rawls, in spite of the Kantian grounding of his theory, partly justifies a division of responsibilities between "the basic structure" and "nonpolitical associations," on the basis of empirical assumptions concerning the superior epistemic capacities of the former. Rawls, *Theory of Justice*, 267–68. See discussion in chapter 8.

11. Murphy, "Institutions and the Demands of Justice," 259.

12. Locke, *Second Treatise*, chapter 6, sec. 54.

13. For an illuminating discussion of this point, see Hodgson, "Kant on the Right to Freedom," 796–98.

14. Kant, *MM*, 30 (6:237).

15. See Ripstein's discussion in *Force and Freedom*, 101. A violation of independence does not require direct interference. In this respect, the Kantian notion of freedom as independence is similar to the neorepublican notion of nondomination. See Pettit's *On the People's Terms*. However, there are some important differences between the two conceptions. For an excellent account of these differences, see Hodgson, "Kant on the Right to Freedom," 808–17.

16. Although Kant seems to endorse a purely formal understanding of the capacity to pursue ends, it is possible to adopt a more substantive conception of this capacity. Insofar as dependency on the will of others for the acquisition of what Kantians refer to as "usable means" is incompatible with a person's ability to set and pursue ends for him- or herself, and insofar as the very idea of usable means can be expanded to include what John Rawls calls "all purpose means," including social and economic resources, the secure possession of which is a necessary condition to exercise our capacity for purposiveness, then, the idea of freedom as independence

can be reinterpreted as justifying a general right to control an (at least) adequate level of such means. See John Rawls, *Justice as Fairness: A Restatement*, ed. Erin Kelly (Cambridge, MA: Harvard University Press, 2001), 58–59. Although Kant himself does not recognize an individual right to economic and social resources, he argues for a collective duty, exercised through the state, to coercively provide the needy with the means of subsistence. For a compelling argument as to why a commitment to Kantian independence may justify even more expansive forms of redistribution and predistribution, see Rafeeq Hasan, "Freedom and Poverty in the Kantian State," *European Journal of Philosophy* 26, no. 3 (2018): 911–31.

17. This does not mean, however, that independence requires a capitalist system of property rights. A system of common ownership of resources can be compatible with freedom as independence, as long as individuals are granted well-defined rights to temporarily use and control those resources.

18. Kant, *MM*, 41 (6:251).

19. See, e.g., Ripstein, *Force and Freedom*, chap. 6.

20. Kant, *MM*, 30 (6:237).

21. Ibid.

22. In the words of Louis-Philippe Hodgson, the problem with the private acquisition of rights is that "I coerce you in a way [i.e., unilaterally] that I would not allow you to coerce me, and hence I take myself to have a power over you that I would not allow you over me. It is this failure of reciprocity . . . that disqualifies my justification." Hodgson, "Kant on the Right to Freedom," 804. See also Hodgson's "Kant on Property Rights and the State," *Kantian Review* 15, no. 1 (2010): 57–87, 57.

23. Ripstein, *Force and Freedom*, 90, 150–51.

24. This is, of course, not to say that equality as reciprocity does not matter. A rightful condition indeed entails a condition of *equal and simultaneous* nonsubjection, for, as Kant puts it, "the innate right [to freedom] . . . is altogether equal with respect to the authorization to coerce every other to remain always within the bounds of the consistency of use of his freedom with mine." Immanuel Kant, "On the Common Saying: That May Be Correct in Theory, but It Is of No Use in Practice" (1793), in *Practical Philosophy*, ed. and trans. Mary J. Gregor (New York: Cambridge University Press, 1996), 273–310 (8:292–93).

25. Kant, *MM*, 8 (6:255–56).

26. Pallikkathayil, "Deriving Morality from Politics," 137 (emphasis mine).

27. This, note, would not be the same as consenting to be assaulted because consent entails waiving a right that I already hold.

28. See Niko Kolodny, "Being under the Power of Others," in *Republicanism and the Future of Democracy*, ed. Yiftah Elizar and Geneviève Rousselière (Cambridge: Cambridge University Press, 2019), 94–114.

29. Kolodny, "Rule over None I." See also Elizabeth S. Anderson, "What Is the Point of Equality?," *Ethics* 109, no. 2 (1999): 287–337.

30. The conclusion I have reached here is in line with Arthur Ripstein's account of domination as the main concern with private right. See Ripstein, *Force and Freedom*, 42. Later, I will further specify this idea in ways that go beyond Ripstein's own account.

31. Katrin Flikschuh, "Reason, Right, and Revolution: Kant and Locke," *Philosophy and Public Affairs* 36, no. 4 (2008): 375–404, 392.

32. Hodgson, "Kant on the Right to Freedom." See also David Sussman, "The Authority of Humanity," *Ethics* 113, no. 2 (2003): 350–66, 359.

33. My view radically departs, in this respect, from Hodgson's claim that individuals in the state of nature would have a right to stand by their own judgment even if rights were fully determined and self-evidently so. Hodgson, "Kant on Property Rights and the State."

34. Hodgson, "Kant on Property Rights and the State"; More arguably this position can also be attributed to Martin Stone and Rafeeq Hasan, "Kant on Provisional Right," unpublished manuscript, 2018, 55.

35. Rainer Forst's recent attempt to ground the validity of norms of social and political justice in a discursive test of reciprocal and general justification among free and equal persons is an instantiation of the latter solution. Rainer Forst, *The Right to Justification: Elements of a Constructivist Theory of Justice* (New York: Columbia University Press, 2012).

36. Ripstein, *Force and Freedom*, 43.

37. A. J. Julius, "The Possibility of Exchange," *Politics, Philosophy, and Economics* 12, no. 4 (2013): 361–74.

38. Christine M. Korsgaard, "Acting for a Reason," in *The Constitution of Agency: Essays on Practical Reason and Moral Psychology* (Oxford: Oxford University Press, 2008), 207–29, 217.

39. Someone could object that my argument has the following implausible implication. If, in the state of nature, I repel an aggressor's assault by force, I do something wrong because I displace the aggressor's reasons for action and try to get him or her to act for reasons (avoiding the consequences of being killed by me) that would have no force independently of my own threat. The objection, however, misfires. For one thing, unlike property rights, bodily rights are not external to a person. Whereas the requirements of freedom alone cannot settle a determinate outcome for the acquisition of external objects, the requirements of freedom alone arguably include a clearly defined right to control one's body, without which the very idea of independent action would cease making sense, because there would be no person who can pursue ends to begin with. If this is the case, then, unlike in the case of acquired rights, I would not need to appeal to my own (unilateral) authority when I try to defend my bodily rights in the state of nature. I could instead appeal to the authority of the requirements of freedom directly. Insofar as being coerced for the sake of preserving another person's freedom is something we have nonrefutable reasons to accept, there would be no problematic rational displacement in this case. If, by contrast, we think that the scope of bodily rights, as well as what counts as an attack to these rights, generates an indeterminacy problem on a par with acquired rights, then, given this indeterminacy, although the putative victim of the assault retains a provisional right to defend him- or herself, the victim's doing so may still problematically supplant the other's equal authority to judge what counts as the correct determination. See Japa Pallikkathayil, "Persons and Bodies," in *Freedom and Force: Essays on Kant's Legal Philosophy*, ed. Sari Kisilevsky and Martin Jay Stone (Oxford: Hart, 2017), 35–54.

40. Hodgson, "Kant on the Right to Freedom," 799.

41. See, e.g., Ripstein, *Force and Freedom*, 196.

42. Kant, *MM*, 456 (6:312).

43. Some contemporary Kantians, including Ripstein and Stilz, acknowledge this problem and defend a democratic form of government on Kantian grounds. However, they do not fully explain how a commitment to reciprocal nonsubjection alone can justify representative

democracy, as opposed to forms of dictatorship authorized by a democratically sanctioned constitution or lottocratic forms of government.

44. Sinclair makes a similar point in "Power of Public Positions."

45. See also Christoph Hanisch, "Kant on Democracy," *Kant-Studien* 107, no. 1 (2016): 67–88, 84.

46. Ibid.

47. See Beerbohm, "Free-Provider Problem," 209.

48. But some argue that authorization is not a necessary condition of representation. See Michael Saward, *The Representative Claim* (Oxford: Oxford University Press, 2010). Indeed, Kant himself has a different, because fiduciary, conception of representation. According to this conception, the same way that parents can represent their children without the latter's authorization, as long as they act in in the children's interests, a government can represent the people's will, even without the latter's authorization, as long as it acts for purposes the latter could not reasonably reject. However, as I will further explain in the next chapter, I believe this conception of fiduciary representation is problematic because inherently paternalistic.

49. Hodgson, "Kant on the Right to Freedom," 799.

50. This is a long-standing objection to republican justifications of democracy. See, e.g., Assaf Sharon, "Domination and the Rule of Law," in *Oxford Studies in Political Philosophy*, vol. 2, ed. David Sobel, Peter Vallentyne, and Steven Wall (Oxford: Oxford University Press, 2016), 128–55, 140. Sharon's objection is addressed to Pettit's account of democracy.

51. On this point, see Daniel Viehoff, "Democratic Equality and Political Authority," *Philosophy and Public Affairs* 42, no. 4 (2014): 337–75. While Viehoff argues that democratic "egalitarian procedures have authority because, by obeying them, we can avoid acting on certain considerations that must be excluded from our intrinsically valuable egalitarian relationships" (340). I argue that what makes these procedures ultimately authoritative is that, by excluding those considerations, they ensure equal respect for individuals' rational independence.

52. Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon, 1986).

53. It could be objected that my argument for regarding democratic procedures as the solution to the problem of rational dependence is self-defeating. If individuals have independent reasons to endorse democratic procedures, they should also be regarded as having independent reasons to endorse a just scheme of, say, property rights, since this is also a requirement of freedom. But if they have such independent reasons, then the problem of rational displacement would not arise in the first place. If, by contrast, this problem occurs even when a justified set of property rights is being enforced in the state of nature, then why can't it also occur when an objectively justified set of democratic procedures is enforced? My answer to this objection rests, once again, on a distinction between refutable and nonrefutable reasons. As rational agents and given the presence of reasonable disagreement about justice—generated by the structural indeterminacy of principles of right—we can always wonder why we should be coerced in the name of a Lockean account of property rights, as opposed to a Rawlsian one, without incurring any contradiction. On grounds of our humanity, however, we cannot refuse to be coerced for the sake of freedom itself, including for the sake of supporting the procedural conditions that make it possible to determine, without unilateral subjection, the content of rights, for example, whether a Lockean or a Rawlsian account of property rights ought to be adopted. Now, whereas the requirements of freedom alone cannot settle a determinate

outcome for the acquisition of external objects, the requirements of freedom alone do establish some necessary constraints on the procedures that should be adopted to make that outcome determinate. These constraints, as we saw, provide strong presumptive reasons in favor of democracy.

54. Christian F. Rostbøll attributes a similar conclusion to Kant in his "Kant, Freedom as Independence, and Democracy," *Journal of Politics* 78, no. 3 (2016): 792–805.

55. For an argument with a similar structure, although grounded on a different set of values, see Thomas Christiano, *The Constitution of Equality: Democratic Authority and Its Limits* (Oxford: Oxford University Press, 2008).

56. Unlike orthodox Kantians, I am not wedded to a purely formal understanding of the capacity to pursue ends. Yet even those Kantians have resources to justify a state duty to provide an adequate level of material means. See note 16 above. Further, the Kantian notion of active citizenship, itself a demand of independence, can be interpreted as instrumentally justifying the public provision of some in-kind goods (e.g., education and health care), the precise extent of which could itself be procedurally determined.

57. On deliberation as a means of constructing a shared will, see, in particular, Jürgen Habermas, "Further Reflections on the Public Sphere," in *Habermas and the Public Sphere*, ed. Craig J. Calhoun, Studies in Contemporary German Social Thought (Cambridge, MA: MIT Press, 1992), 421–26. On the notion of "shared reasons," see Joshua Cohen, *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, MA: Harvard University Press, 2009).

58. On this point, see Pettit, *On the People's Terms*.

59. I take this example from Gardner, "Evil of Privatization," except for the assumptions of moral motivation and just outcomes.

60. I draw the terms of this distinction from Ripstein, *Force and Freedom*, 151–52.

61. Ibid.

62. Gardner, "Evil of Privatization."

63. For an account of the nonvoluntary nature of employment contracts, see Elizabeth Anderson, *Private Government: How Employers Rule Our Lives* (Princeton, NJ: Princeton University Press, 2017).

64. This paragraph follows Hodgson, "Kant on Property Rights and the State," 71.

65. Judith Resnik, "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights," *Yale Law Journal*, Faculty Scholarship Series, 124 (2015): 2804–939, 2852.

66. Ibid., 2853.

67. Ibid., 2806.

68. See Seana Shiffrin, "Remedial Clauses: The Overprivatization of Private Law," *Hastings Law Journal* 67 (2016): 407–42.

69. See *Guyden v. Aetna Inc.*, 544 F.3d 385 (2nd Cir. 2008).

70. Resnik, "Diffusing Disputes," 2855.

71. See *Epic Systems Corps v. Lewis*, 584 U.S. (2018).

72. Resnik, "Diffusing Disputes."

73. Quoted in Jessica Silver-Greenberg and Robert Gebeloff, "Arbitration Everywhere, Stacking the Deck of Justice," *New York Times*, October 2015, https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html.

74. Miles B. Farmer, "Mandatory and Fair? A Better System of Mandatory Arbitration," *Yale Law Journal* 121 (2012): 2346–94.

75. Resnik, "Diffusing Disputes."

76. Ibid., 2806 (emphasis mine).

77. See Shiffrin, "Remedial Clauses."

Chapter 3. Legitimizing Administrative Discretion

1. Habermas, *Structural Transformation of the Public Sphere*, 144–46.

2. See Richardson, *Democratic Autonomy*.

3. Important exceptions include Richardson, *Democratic Autonomy*; Thompson, "Democracy and Bureaucracy"; Zacka, *When the State Meets the Street*; Heath, "General Framework for the Ethics of Public Administration"; and Arthur Applbaum, "Democratic Legitimacy and Official Discretion," *Philosophy and Public Affairs* 21, no. 3 (1992): 240–74. Of these accounts, however, only Richardson's focuses on the problem of bureaucratic unilateralism. His solution mostly focuses on a bottom-up democratization of the bureaucracy, while I argue for a more pluralistic account.

4. Locke, *Second Treatise of Government*, 415.

5. Thompson, "Democracy and Bureaucracy," 236.

6. Rawls, *Theory of Justice*, 235.

7. Weber, *Economy and Society*, ch. 11.

8. Ronald Dworkin, "The Model of Rules," *University of Chicago Law Review* 35, no. 1 (1967): 14–46, 35.

9. Ripstein, *Force and Freedom*, 192.

10. Ibid., 193–94.

11. See, e.g., Richard B. Stewart, "The Reformation of American Administrative Law," *Harvard Law Review* 88, no. 8 (1975): 1667–813.

12. On this point, see also Sarah Holtman, "Kantian Justice and Poverty Relief," *Kant-Studien* 95, no. 1 (2004): 86–106.

13. Zacka, *When the State Meets the Street*, 49.

14. Richardson, *Democratic Autonomy*, 122–26.

15. Metzger, "Privatization as Delegation," 1395. See also Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* (New York: Russell Sage Foundation, 1980).

16. Metzger, "Privatization as Delegation," 1395.

17. Indeed, also Richardson limits his concern with bureaucratic domination to cases of high-level administration.

18. For an overview of the role of MCOs in health-care delivery, see Jody Freeman, "Extending Public Law Norms through Privatization," *Harvard Law Review* 116, no. 5 (2003): 1285–352.

19. For a discussion of a similar case, see Norman Daniels and James Sabin, "Limits to Health Care: Fair Procedures, Democratic Deliberation, and the Legitimacy Problem for Insurers," *Philosophy and Public Affairs* 26, no. 4 (1997): 303–50.

20. Victor Thompson, *Modern Organization* (New York: Knopf, 1961), 15.

21. See Lipsky, *Street-Level Bureaucracy*. See also Zacka, *When the State Meets the Street*.

22. On why contractual agreements do not change individuals' normative situation in a fundamental sense, see Ripstein, *Force and Freedom*, 151–52.

23. Jerome Carlin, Jan Howard, and Sheldon Messinger, *Civil Justice and the Poor: Issues for Sociological Research* (New York: Russell Sage Foundation, 1967), 31.

24. American Correctional Association, *Standards for Juvenile Correctional Facilities*, 3-JTS-3A-31, February 2003.

25. Hart, Shleifer, and Vishny, "Proper Scope of Government," 1152.

26. Joseph E. Field, "Making Prisons Private: An Improper Delegation of a Governmental Power," *Hofstra Law Review* 15, no. 3 (1987): 649–75, 662 (emphasis mine).

27. See, e.g., Jonathan Macey, "Separated Powers and Positive Political Theory: The Tug of War over Administrative Agencies," *Georgetown Law Journal* 80 (1992): 671–703; Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, "Administrative Procedures as Instruments of Political Control," *Journal of Law, Economics, and Organization* 3, no. 2 (1987): 243–77.

28. See, e.g., Evan J. Criddle, "Fiduciary Foundations of Administrative Law," *UCLA Law Review* 54 (2006): 117–83; Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford: Oxford University Press, 2011).

29. See, e.g., D. Thompson, "Democracy and Bureaucracy"; Richardson, *Democratic Autonomy*.

30. See, e.g., Criddle, "Fiduciary Foundations of Administrative Law"; Heath, "General Framework for the Ethics of Public Administration" (both privileging the fiduciary model over the other two models); D. Thompson, "Bureaucracy and Democracy" (privileging the bottom-up model).

31. For a review and critique of these means, see Lisa Schultz Bressman, "Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State," *New York University Law Review* 78, no. 2 (2003): 461–553, 461–69.

32. The idea that ordinary laws and policies ought to carry out or track the shared will of the people is common in the republican literature. For recent interpretations of this idea, see Stilz, "Value of Self-Determination"; Pettit, *On the People's Terms*; Richardson, *Democratic Autonomy*.

33. Criddle, "Fiduciary Foundations of Administrative Law," 167.

34. Ibid., 126.

35. The fiduciary model adopts a conception of representation—acting in another person's name is to act for that person's interest, regardless of the latter's authorization to do so and of his or her understanding of that interest—that is unsatisfactory because excessively paternalistic.

36. Criddle, "Fiduciary Foundations of Administrative Law," 153.

37. Carl Shaw, "Hegel's Theory of Modern Bureaucracy," *American Political Science Review* 86, no. 2 (1992): 381–89.

38. I borrow the term "free purposiveness" from Ripstein, *Force and Freedom*. Ripstein uses it to indicate the capacity to form and pursue ends in which, according to Kant, our humanity consists. I use it more broadly to indicate an agent's moral power to form and pursue comprehensive ends.

39. This distinction tracks Hardimon's distinction between role and contractual obligations. Michael O. Hardimon, "Role Obligations," *Journal of Philosophy* 91, no. 7 (1994): 333–63.

40. Weber, *Economy and Society*, 959. This feature is also central to Elizabeth Anderson's relational egalitarian defense of bureaucracy. See her "Expanding the Egalitarian Toolbox: Equality and Bureaucracy," *Proceedings of the Aristotelian Society, Supplementary Volumes* 82, no. 1 (2008): 139–60. Whereas Anderson sees the distinction between persons and offices as a constraint on inequalities of esteem, I see it as a demand of freedom as independence. See also, Parrillo, *Against the Profit Motive*.

41. Allen Buchanan, "Toward a Theory of the Ethics of Bureaucratic Organizations," *Business Ethics Quarterly* 6, no. 4 (1996): 419–40, 427.

42. For an account that underlines the importance of resistance and that makes an important distinction between resistance and obstructionism, see Heath, "General Framework for the Ethics of Public Administration."

43. A more complex and detailed version of this framework is defended by Applbaum in "Democratic Legitimacy and Official Discretion."

44. Richardson, *Democratic Autonomy*.

45. We might, however, not be able to determine the precise constitution of a "people" in advance, for new relevant constituencies may emerge throughout the process of administration. Further, in the case of some regulations, everyone may be a potential subject. There is always the chance that one could unexpectedly fall into unemployment, be incarcerated, have children, etc. I thus want to leave open the possibility that, in many cases, the relevant constituency still amounts to the people as a whole. The fact remains, however, that the fiduciary account, as generally understood, ignores this kind of complexity.

46. Weber, *Economy and Society*, 985.

47. My account of these problems closely follows Heath, "General Framework for the Ethics of Public Administration."

48. Ibid.

49. For a proposal along these lines, developed in much further detail, see Jerry Frug, "Administrative Democracy," *University of Toronto Law Journal* 40, no. 3 (1990): 559–86.

Chapter 4. The Problem of Authorization

1. Dorfman and Harel, "Case against Privatization."

2. Beerbohm, "Free-Provider Problem."

3. Constitutional law scholars disagree as to whether particular constitutions should be interpreted as including any such doctrine. For a recent overview of these disputes in the United States, see Cynthia Farina, "Deconstructing Nondelegation," *Harvard Journal of Law and Public Policy* 33, no. 87 (2010): 96–99.

4. Paul R. Verkuil, "Outsourcing and the Duty to Govern," in *Government by Contract*, ed. J. Freeman and Minow, 310–34.

5. However, as Richard Tuck shows, a distinction between sovereignty and government is central to modern republican and democratic thought. While *sovereignty*, including the power to make fundamental laws (i.e., to establish a constitution), and the power to elect political representatives, could not be delegated and should stay with the people, government, instead, including the power of making ordinary legislation, could be not only delegated to representatives but also exercised nondemocratically by such representatives. See Richard Tuck, *The*

Sleeping Sovereign: The Invention of Modern Democracy (Cambridge: Cambridge University Press, 2016).

6. Some define legislative power as the power to choose policy ends rather than mere means to those ends. See Laurence H. Tribe, *American Constitutional Law*, 3rd ed. (New York: Foundation, 2000), 982. Others define it as the power to make binding rules for the governance of society. See Larry Alexander and Saikrishna Prakash, "Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated," *University of Chicago Law Review* 70, no. 1297 (2003): 1297–329, 1305. Others define lawmaking power as any kind of decision-making power that "has the effect of altering the legal . . . relations of persons" or that "make[s] rules of private conduct" by "demarcating permissible from impermissible conduct" or by allocating rights and duties. *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919, 952 (1983).

7. *Association of American Railroads v. U.S. Department of Transportation*, 135 S. Ct. 1225, 1252 (2015) (Alito, J., concurring opinion) quoting *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

8. Office of Management and Budget, Circular A-76, Attachment A, Part B, cited in Verkuil, "Outsourcing and the Duty to Govern," 326.

9. Patrick W. Duff and Horace E. Whiteside, "Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law," *Cornell Law Review* 14, no. 2 (1929): 168–96. The maxim is embedded in several constitutional systems including the United States, the United Kingdom, and India.

10. See discussion in Horst P. Ehmke, "Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law," *Cornell Law Review* 47 (1961): 50–60, 54–56.

11. Duff and Whiteside, "Delegata Potestas."

12. Joseph Story, *Commentaries on the Law of Agency, as a Branch of Commercial and Maritime Jurisprudence* (Boston: Charles C. Little and James Brown, 1839), sec. 13 digest 49.1.4.5 (emphasis mine), quoted in Duff and Whiteside, "Delegata Potestas," 168.

13. Annette Baier, "Trust and Antitrust," *Ethics* 96, no. 2 (1986): 231–60.

14. A similar view of the function of political representatives is held by those who endorse a "trustee" model of representation, as opposed to a "delegate" one. A trustee acts for the public good on the basis of his or her own discretionary judgment about that good, rather than on the basis of her constituents' judgment or precise instructions. A delegate, instead, is fully or for the most part deferential to the constituents' own judgment and instructions. For a recent review and critical discussion of these models, see Andrew Rehfeld, "Representation Rethought: On Trustees, Delegates, and Gyroscopes in the Study of Political Representation and Democracy," *American Political Science Review* 103, no. 2 (2009): 214–30.

15. This is what Jane Mansbridge calls "the promissory model of representation." See her "Rethinking Representation," *American Political Science Review* 97, no. 4 (2003): 515–28.

16. Rawls, *Theory of Justice*, 317.

17. For a middle-ground view according to which legislators should enjoy wide discretion, while being constrained in their reasoning by citizens' principles of justice, see Eric Beerbohm, *In Our Name: The Ethics of Democracy* (Princeton, NJ: Princeton University Press, 2012).

18. James Kent, *Commentaries on American Law* (New York: O. Halsted, 1826–30), 633, quoted in Duff and Whiteside, "Delegata Potestas," 169.

19. For a discussion of this point, see Chiara Cordelli, "Justice as Fairness and Relational Resources," *Journal of Political Philosophy* 23, no. 1 (2015): 86–110.

20. Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union*, 8th ed. (Boston: Little, Brown, 1927), 224.

21. Locke, *Second Treatise*, ch. 11, sec. 134.

22. Although the fiduciary account and the Lockean account share similarities—indeed Locke himself adopts a fiduciary account of legislative power—they are conceptually separate insofar as it is possible to have nonconsensual fiduciary relationships, the parents-children one being an obvious example.

23. Larry Alexander, "The Moral Magic of Consent (II)," *Legal Theory* 2, no. 3 (1996): 165–74, 166.

24. Locke's own controversial endorsement of an executive prerogative would seem to support this reasoning. Locke, *Second Treatise*, 375. For a discussion of this passage with regards to the nondelegation doctrine, see Thomas W. Merrill, "Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation," *Columbia Law Review* 104, no. 8 (2004): 2097–181, 2133.

25. Tom Dougherty, "Yes Means Yes: Consent as Communication," *Philosophy and Public Affairs* 43, no. 3 (2015): 224–53.

26. Locke, *Second Treatise*, sec. 141, 362–63.

27. A. John Simmons, "Tacit Consent and Political Obligation," *Philosophy and Public Affairs* 5, no. 3 (1976): 274–91.

28. Locke, *Second Treatise*, sec. 141.

29. For this interpretation of Locke, see Eric Posner and Adrian Vermeule, "Interring the Nondelegation Doctrine," *University of Chicago Law Review* 69 (2002): 1721–62, 1728. Also, and importantly, by "Legislative" Locke did not always mean the legislature's power to make ordinary law (the equivalent of Congress's power today). He often meant the people's sovereign (constituent) power.

30. Alexander and Prakash, "Reports of the Nondelegation Doctrine's Death."

31. Merrill, "Rethinking Article I," 2134.

32. Charles de Secondat, Baron de Montesquieu, *The Spirit of the Laws*, trans. Thomas Nugent (New York: D. Appleton, 1900), 182.

33. Thomas W. Merrill, "The Constitutional Principle of Separation of Powers," *Supreme Court Review* 1991 (1991): 225–60, 225.

34. *Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952).

35. William Paley, *The Principles of Moral and Political Philosophy* (Indianapolis: Liberty Fund, 2002), 219.

36. Ibid.

37. James Madison, Federalist No. 10: "The Same Subject Continued: The Union as a Safeguard against Domestic Faction and Insurrection," *New York Daily Advertiser*, November 22, 1787, https://iowaculture.gov/history/education/educator-resources/primary-source-sets/american-political-parties/federalist-paper.

38. David Schoenbrod, "Separation of Powers and the Powers That Be: The Constitutional Purposes of the Delegation Doctrine," *American University Law Review* 36 (1986–87): 355–89, 374.

39. See Merrill, "Constitutional Principle of Separation of Powers."

40. Ibid.

41. For a discussion of this case, see Martha Minow, "Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy," in *Government by Contract*, ed. J. Freeman and Minow, 110–27, 115.

42. Posner and Vermeule, "Interring the Nondelegation Doctrine," 1722.

43. I call it the principle of authority "transmission," since the principal's lack of moral authority transmits to the agent.

44. A. John Simmons, "Inalienable Rights and Locke's Treatises," *Philosophy and Public Affairs* 12, no. 3 (1983): 175–204 (arguing that while Rousseau and Kant hold the first account, Locke holds the second).

45. Here I closely follow Arthur Kuflik's account of self-rule in his "The Inalienability of Autonomy," *Philosophy and Public Affairs* 13, no. 4 (1984): 271–98, 272.

46. Ibid., 273–74.

47. Ibid., 274.

48. Obviously, determining a precise threshold is not easy. Following Rawls, we may think of the threshold in terms of a "range property." To possess a range property is to possess some scalar capacity, within a certain range. For example, Rawls claims that while "individuals presumably have varying capacities for a sense of justice," only "a certain minimum" need be met for an individual to be entitled to equal treatment. Rawls, *Theory of Justice*, 443.

49. It could be objected that agreeing to certain risks has nothing to do with abdicating one's rights. If, for example, I agree to walk across a dangerous neighborhood knowing that I have a 99.9 percent chance of being killed, I am not thereby abdicating my right not to be killed. However, the case of the pill is different because, unlike the right not to be killed, the right to self-rule is conditional on having certain capacities. If I agree to give up these capacities, I do thereby agree to abdicate my right to self-rule. The question is then whether agreeing to take the pill in the knowledge that doing so will lead to the loss of the relevant capacities can be regarded as agreeing to give up those capacities. I believe that the answer to this question depends on the likelihood and foreseeability of the loss in question.

50. However, while for Pettit democratic political institutions are instrumentally related to nondomination (they are meant to minimize instances of domination), a Kantian view of democracy stresses the freedom-constituting role of democratic institutions. On this comparison, see also Rostbøll, "Kant, Freedom as Independence, and Democracy."

51. Pettit, *On the People's Terms*.

52. Ibid., 156.

53. Ibid.

54. Ibid., 173.

55. Ibid.

56. The Kantian notion of active citizenship, which I briefly discussed in chapter 2, can be interpreted as justifying a thicker conception of the conditions of self-rule along these lines.

57. This is obviously not to say that every time a people loses the basic capacities for collective self-rule foreign intervention becomes justified. This is not only because there can be many outweighing reasons against this form of intervention but also because some of the necessary capacities for collective self-rule may be such that they can be only autonomously acquired or developed.

58. Note, to say that self-rule cannot be validly abdicated is not to say that under compulsion a people can never be excused for doing what would otherwise be unworthy of its voluntary agreement. In this case, the people might be *obliged* to obey but not *obligated* to do so.

59. For an excellent discussion of what would be required for secession to be justified, see Anna Stilz, "Decolonization and Self-Determination," *Social Philosophy and Policy* 32, no. 1 (2015): 1–24.

60. For a review of the empirical evidence in support of this claim, see Minow, "Outsourcing Power."

61. Ibid., 116.

62. Jody Freeman and Martha Minow, "Reframing the Outsourcing Debates," in *Government by Contract*, ed. J. Freeman and Minow, 1–21, 17. See also Michaels, *Constitutional Coup*; Verkuil, *Outsourcing Sovereignty*.

63. Verkuil, "Outsourcing and the Duty to Govern," 313.

64. Michaels, *Constitutional Coup*, 131.

65. J. Freeman and Minow, "Reframing the Outsourcing Debates," 5.

66. Pippa Norris, *A Virtuous Circle: Political Communications in Postindustrial Societies* (Cambridge: Cambridge University Press, 2000), 309.

67. Suzanne Mettler, *The Submerged State: How Invisible Government Policies Undermine American Democracy* (Chicago: University of Chicago Press, 2011), 5.

68. Ibid.

69. For an application of this argument to developing countries, see, e.g., Dambisa Moyo, *Dead Aid: Why Aid Is Not Working and How There Is a Better Way for Africa* (New York: Farrar, Straus and Giroux, 2009).

70. For an overview of the concept of institutional corruption, see Dennis F. Thompson, "Two Concepts of Corruption," Edmond J. Safra Working Papers, No. 16, 2013, https://ssrn.com/abstract=2304419 or http://dx.doi.org/10.2139/ssrn.2304419.

71. J. Freeman and Minow, "Reframing the Outsourcing Debates."

72. Farrell, "Privatization as State Transformation," 175. Less obviously, contracting becomes a way to build and control specific voting constituencies. As Nicole Marwell argues: "By reciprocally distributing services to residents and binding residents to the organization, machine politics CBOs (community-based organizations) create reliable voting constituencies for local elected officials. These officials trade these constituencies at higher levels of the government system and steer government human service contracts to favored CBOs. Through this process, nonprofit CBOs can influence the allocation of service-based social provision." This is a mechanism through which the contracting system gives certain private organizations disproportionate influence over public policy and the spending of public resources. See Nicole Marwell, "Privatizing the Welfare State: Nonprofit Community-Based Organizations as Political Actors," *American Sociological Review* 69, no. 2 (2004): 265–91.

73. Buchanan, "Toward a Theory of the Ethics of Bureaucratic Organizations," 427.

74. Peter Singer, *One World: The Ethics of Globalization*, 2nd ed (New Haven, CT: Yale University Press, 2004), ch. 2.

75. *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010) (Stevens, J., concurring/dissenting in part) quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788–89 (1978).

76. J. Freeman and Minow, "Reframing the Outsourcing Debates," 15.

Chapter 5. The Problem of Representative Agency

1. There is an important debate as to whether authorization is necessary for genuine representation. See, e.g., Saward, *Representative Claim*. My view is that authorization is necessary for democratic, political representation, although I do not exclude that other kinds of

representation are possible. However, I can leave this question aside since I am assuming, for the purpose of this chapter, that private actors act under valid democratic authorization.

2. The concept of representation is broader than that of representative agency. Many forms of representation are not forms of representative agency—the ability to act or speak in the name of another. A national flag symbolically represents a country. Yet a flag can neither act on behalf nor speak in the name of the country it represents. I will assume, however, that substantive democratic representation ought to entail representative agency. The reason for this, as I explained, ultimately rests on the agent-relative character of justice-based claims. I thus depart from Jane Mansbridge's claim that "the representative does not have to conceive of him or herself . . . as 'acting for' the constituent." Mansbridge, "Rethinking Representation," 521.

3. To say that the question of what makes A a genuine representative of B, as opposed to a failed one, can be distinguished from the further question of whether A is a good or bad representative of B, is not to say that the first question is descriptive, while the second is normative. For reasons that will become clear, I believe that representation is an inherently normative concept. I can be your representative only if you can be reasonably regarded as acting or speaking through me. I thank Robert Audi for pushing me to clarify this point.

4. Andrew Rehfeld, "Towards a General Theory of Political Representation," *Journal of Politics* 68, no. 1 (2006): 1–21, 17.

5. Kant, *MM*, 481 (6:34) (emphasis mine). However, for Kant, political representation, like other forms of fiduciary representation, does not necessarily entail democratic authorization through elections. Further, the content of what ought to be represented—the people's omnilateral will—is derived a priori from reason, rather than empirically, through a democratic process.

6. Dorfman and Harel, "Case against Privatization."

7. Ibid., 73.

8. Only if the web designer acted under detailed descriptions of what he or she should do would his or her actions count as my intentional actions (it would be a bit like if I directly moved the arm of the web designer guiding him or her step by step to design the web page). See Jennifer Lackey, "Group Assertion," *Erkenntnis* 83, no. 1 (2018): 21–42.

9. Ripstein, *Force and Freedom*. See also Stilz, "Value of Self-Determination."

10. Ripstein, *Force and Freedom*, 192–94.

11. This is a revised version of an example discussed in Lackey, "Group Assertion."

12. See ibid., 31.

13. This point is also stressed by Jennifer Lackey, although my conception of the conditions of representative agency ultimately differs from hers.

14. The question of whether Liz acts in the name of BP is different from the question of whether BP should be held responsible for Liz's speech. BP may be justified in disavowing Liz's claim as not done in its name and yet not be justified in disavowing outcome responsibility or liability for her claim, insofar as BP empowered Liz to make the relevant claim in the first place. See Lackey, "Group Assertion."

15. For Lackey, a group's spokesperson S acts in virtue of her authority as a representative of the group G if and only if S "aims to reflect the view G intends for S to assert on its behalf." Lackey, "Group Assertion," 32.

16. Hanna Pitkin, *The Concept of Representation* (Berkeley: University of California Press, 1972).

17. Ibid., 155 (emphasis mine).

18. Suzanna Dovi, "Political Representation," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, Winter 2017, https://plato.stanford.edu/entries/political-representation/.

19. Rehfeld, "Towards a General Theory of Political Representation," 17.

20. Ibid., 2.

21. Jennifer Lackey uses a similar example to reject Ludwig's account of group assertions, as developed in Kirk Ludwig, "Proxy Agency in Collective Action," *Noûs* 48, no. 1 (2014): 75–105.

22. Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986), 86.

23. My view shares similarities with what Eric Beerbohm calls "principled representation." Democratic officials, for Beerbohm, must be directly responsive to citizens' beliefs about justice, and such beliefs must operate as side constraints (in the form of exclusionary reasons) on the former's practical reasoning. See Beerbohm, *In Our Name*, 197. The internalist view I defend, however, is less demanding than Beerbohm's view in one respect: it is a view as to what conditions must be met for an agent to count as acting in the name of another, rather than a view about what good political representation ought to entail. My view, unlike Beerbohm's, remains agnostic as to how much decisional authority ought to be delegated to representatives, bureaucrats, or spokespersons in the first place.

24. Janice Johnson Dias and Steven Maynard-Moody, "For-Profit Welfare: Contracts, Conflicts, and the Performance Paradox," *Journal of Public Administration Research and Theory* 17, no. 2 (2006): 189–211.

25. Ibid., 209.

26. Ibid., 202.

27. Ibid., 202.

28. Ibid.

29. Ibid., 202–3.

30. Ibid., 201.

31. Ibid., 204.

32. Following Kant and Rawls, I understand a political society, unlike nonpolitical associations, as having neither final ends nor particular comprehensive purposes beyond the one of justice. See Rawls, *Justice as Fairness*.

33. A reason to do X, I take it, is a fact that "counts in favor" of a certain action, in terms of either permitting or requiring it.

34. Onora O'Neill, "Instituting Principles: Between Duty and Action," in *Kant's Metaphysics of Morals: Interpretive Essays*, ed. M. Timmons, vol. 36 (Oxford: Oxford University Press, 2002), 331–47, 343.

35. This paragraph closely follows Garrett Cullity, "The Context-Undermining of Practical Reasons," *Ethics* 124, no. 1 (2013): 8–34. Cullity persuasively argues against the objection that the reason why I should not hire my friend just because she is my friend is not that friendship loses the status of a reason altogether within the hiring context but rather that reasons of friendship are generally weak within that context.

36. Ibid.

37. I thank Brendan de Kenessey for suggesting this example.

38. Lipsky, *Street-Level Bureaucracy*, 41.

39. See Criddle, "Fiduciary Foundations of Administrative Law." In chapter 3, I explained how my account differs from Criddle's. The duty of loyalty, in my view, entails wider deference to the democratic will than for Criddle. The loyalty is due to both the people and the constitutional state.

40. David Wiggins, "Deliberation and Practical Reason," *Proceedings of the Aristotelian Society* 76, no. 1 (1976): 29–52, 38.

41. Dias and Maynard-Moody, "For-Profit Welfare," 200 (emphasis mine).

42. For an excellent discussion of how perception guides the decision-making process of "street level" welfare bureaucrats, see Zacka, *When the State Meets the Street*.

43. John McDowell, "Deliberation and Moral Development in Aristotle's Ethics," in *Aristotle, Kant, and the Stoics: Rethinking Happiness and Duty*, ed. Stephen P. Engstrom and Jennifer Whiting (Cambridge: Cambridge University Press, 1998), 19–36, 23.

44. Barbara Herman, *The Practice of Moral Judgment* (Cambridge, MA: Harvard University Press, 1996), 77.

45. Ibid.

46. For the situationist challenge to virtue ethics, see, e.g., Gilbert Harman, "Moral Philosophy Meets Social Psychology: Virtue Ethics and the Fundamental Attribution Error," *Proceedings of the Aristotelian Society* 99 (1999): 315–31.

47. Yeheskel Hasenfeld, "Organizational Forms as Moral Practices: The Case of Welfare Departments," *Social Service Review* 74, no. 3 (2000): 329–51, 348.

48. See, e.g., John Brehm and Scott Gates, *Working, Shirking, and Sabotage: Bureaucratic Response to a Democratic Public* (Ann Arbor: University of Michigan Press, 1997).

49. Scott D. N. Cook and Dvora Yanow, "Culture and Organizational Learning," *Journal of Management Inquiry* 2, no. 4 (1993): 373–90, 384.

50. Johnston and Romzek, "Promises, Performance, and Pitfalls of Government Contracting," 406.

51. David Farnham and Sylvia Horton, "Managing Private and Public Organisations," in *Managing the New Public Services*, ed. David Farnham and Sylvia Horton (London: Palgrave, 1996), 25–46, 37.

52. It could be objected that this depiction overemphasizes the difference between public and private organizations. After all, the boundaries between for-profit, nonprofit, and public organizations in relation to management, culture, practices, and values have become progressively blurred, especially as a consequence of the "new public management"—a dominant model of governance since the 1980s, the goal of which was to import business practices into public administration. However, this fact does not undermine the *normative* appeal of differentiating between different ideal types of organizational forms. We can always ask whether the blurring of public/private boundaries is indeed desirable or should rather be resisted on normative grounds.

53. Richardson, *Democratic Autonomy*, 108.

54. This paragraph follows Kimberly N. Brown, "'We the People,' Constitutional Accountability, and Outsourcing Government," *Indiana Law Journal* 88, no. 4 (2013): 1347–403, 1362.

55. Ibid., 1364.

56. J. Freeman, "Contracting State," 183.

57. Habermas, *Structural Transformation of the Public Sphere*.

58. John Donahue, *The Privatization Decision: Public Ends, Private Means* (New York: Basic Books, 1999), 218.

59. Steven Globerman and Aidan R. Vining, "A Framework for Evaluating the Government Contracting-Out Decision with an Application to Information Technology," *Public Administration Review* 56, no. 6 (1996): 577–86, 577.

60. Janet Pack, "Privatization and Cost Reduction," *Policy Sciences* 22, no. 1 (1989): 1–25.

61. Johnston and Romzek, "Promises, Performance, and Pitfalls of Government Contracting," 401.

62. Elliot Sclar, *You Don't Always Get What You Pay For: The Economics of Privatization* (Ithaca, NY: Cornell University Press, 2000).

Chapter 6. The Problem of Delegated Activity

1. Edward L. Rubin, "Law and Legislation in the Administrative State," *Columbia Law Review* 89, no. 3 (1989): 369–426, 382.

2. Tim Büthe and Walter Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton, NJ: Princeton University Press, 2013), 1.

3. Metzger, "Privatization as Delegation."

4. This example is a modification of an example discussed in Ludwig, "Proxy Agency," 78.

5. Ibid.

6. This paragraph closely follows Ludwig, "Proxy Agency."

7. Christopher Kutz, "The Judicial Community," *Philosophical Issues* 11, no. 1 (2001): 442–69; Scott J. Shapiro, "Laws, Plans, and Practical Reason," *Legal Theory* 8, no. 4 (2002): 387–441; Jules L. Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2003); Michael Bratman, *Faces of Intention* (Cambridge: Cambridge University Press, 1999), chs. 5–8. For a skeptical view, see Matthew Smith, "The Law as Social Practice," *Legal Theory* 12 (2006): 265–92.

8. See Pettit, *On the People's Terms*.

9. Kant, "On the Common Saying," 296 (8:297) (emphasis mine).

10. See, e.g., Richardson, *Democratic Autonomy*.

11. Christopher Kutz, "The Collective Work of Citizenship," *Legal Theory* 8, no. 4 (2002): 471–94; Richardson, *Democratic Autonomy*; Stilz, "Value of Self-Determination."

12. Stilz, "Value of Self-Determination," 105.

13. Bratman, *Faces of Intention*, chs. 5–8.

14. Stilz uses the example of a coffee shop. See her "Value of Self-Determination."

15. Ibid.

16. Ibid., 107.

17. Ibid., 105.

18. Stilz further argues that neither the introduction of coercion nor the fact that the partners can change over time makes a difference to whether the partners can share a will and to whether the manager can appropriately carry out that will.

19. Stilz, "Value of Self-Determination."

20. Richardson, *Democratic Autonomy*.

21. Stilz, "Value of Self-Determination," 109 (emphasis mine).

22. Ibid., 106.

23. Richardson, *Democratic Autonomy*.

24. Ibid.

25. Ibid., 122–27.

26. See Assaf Sharon, "Populism and Democracy: The Challenge for Deliberative Democracy," *European Journal of Philosophy* 27, no. 2 (2019): 359–76.

27. I take this example from Christopher Kutz, "Acting Together," *Philosophy and Phenomenological Research* 61, no. 1 (2000): 1–31, although Kutz uses it to make a different point.

28. See Dennis F. Thompson, *Political Ethics and Public Office* (Cambridge, MA: Harvard University Press, 1987), ch. 4.

29. Bratman, *Faces of Intention*, 105. See also Smith, "Law as Social Practice."

30. On the distinction between jointly intentional action and SCA, see ibid., 105n21.

31. This is a revised version of an example provided in Smith, "Law as Social Practice."

32. See Richardson, *Democratic Autonomy*.

33. I use this label rather than "negotiated rule making" precisely to emphasize the deliberative component. In comparing the two kinds of administrative processes, through the example of the *Asarco* case, I closely follow Robert Reich, "Public Administration and Public Deliberation: An Interpretive Essay," *Yale Law Journal* 94 (1985): 1617–35. This case is also discussed in Richardson, *Democratic Autonomy*, to which my discussion of the limits of costs-benefits analysis is greatly indebted. See, especially, chs. 7 and 8.

34. Reich, "Public Administration and Public Deliberation."

35. Ibid.

36. Ibid.

37. Ibid., 1635, citing interview with William Ruckleshaus (February 27, 1985).

38. The Clean Air Act requires the EPA "to promulgate national emissions standards for hazardous air pollutants, so as to provide an 'ample margin of safety' to protect the public health." Ibid., 1632.

39. For a defense of the thesis that the administrative process changes the very ends of policy, see Richardson, *Democratic Autonomy*, 107–8.

40. Ibid., ch. 9.

41. This is also a threat of domination, as Richardson points out. Ibid., 8.

42. Ibid.

43. Ibid.

44. Also for Richardson the legislature retains the right to bring closure to the administrative process, by selecting among proposed alternatives through majority voting. Ibid., 213

45. See McCubbins, Noll, and Weingast, "Administrative Procedures as Instruments of Political Control."

46. Ibid.

47. Richardson, *Democratic Autonomy*.

48. For an analysis of both preconditions, see Smith, "Law as Social Practice."

49. See Kutz, "Judicial Community."

50. Smith, "Law as Social Practice."

51. Ibid.

52. Ibid.

53. Kutz, "Judicial Community."

54. Ibid., 460.

55. Michael Bratman, *Structures of Agency* (New York: Oxford University Press, 2007).

56. The description of the case is taken from Dias and Maynard-Moody, "For-Profit Welfare."

57. Scott J. Shapiro, "Massively Shared Agency," in *Rational and Social Agency: Essays on the Philosophy of Michael Bratman*, ed. M. Vargas and G. Yaffe (New York: Oxford University Press, 2014), 258–89.

58. Wouter Vandenabeele, "Toward a Public Administration Theory of Public Service Motivation: An Institutional Approach," *Public Management Review* 9, no. 4 (2007): 545–56, 547.

59. House of Commons, "Select Committee on Public Administration Seventh Report," 2002, ch. 2, par. 32.

60. For a review of these studies, see Hayo C. Baarspul and Celeste P. M. Wilderom, "Do Employees Behave Differently in Public- vs. Private-Sector Organizations? A State-of-the-Art Review," *Public Management Review* 13, no. 7 (2011): 967–1002.

61. Ibid., 987.

62. Jody Freeman, "Private Parties, Public Functions, and the New Administrative Law," *Administrative Law Review* 52, no. 3 (2000): 813–58. The APA applies only to entities that constitute an "agency," which it defines as an "authority of the Government of the United States." *Administrative Procedure Act, U.S. Code* 5 (2014), sec. 551, 1.

63. Michaels, *Constitutional Coup*, 131.

64. Dorfman and Harel rightly emphasize this point in "Case against Privatization."

65. Allen Buchanan, "Political Legitimacy and Democracy," *Ethics* 112, no. 4 (2002): 689–719.

66. Ibid.

67. Ibid., 717.

68. Michaels, *Constitutional Coup*, 135, 197–98.

Chapter 7. The Duties of Private Donors

1. This chapter is a revised version of Chiara Cordelli, "Reparative Justice and the Moral Limits of Discretionary Philanthropy," in *Philanthropy in Democratic Societies: History, Institutions, Values*, ed. Rob Reich, Chiara Cordelli, and Lucy Bernholz (Chicago: University of Chicago Press, 2016), ch. 10.

2. See, e.g., Anand Giridharadas's *New York Times* best seller *Winners Take All: The Elite Charade of Changing the World* (New York: Alfred A. Knopf, 2018), which criticizes the self-understanding of contemporary philanthropists as agents of social change. For a political theory of philanthropy, see Reich, *Just Giving*.

3. For an estimate of cuts in education spending in the United Kingdom in recent years, see Haroon Chowdry and Luke Sibieta, "Trends in Education and Schools Spending," London, Institute for Fiscal Studies, October 2011, www.ifs.org.uk/bns/bn121.pdf. For cuts to the American federal budget, see the *Washington Post* Editors, "What's Getting Cut in the FY 2011 Budget?," *Washington Post*, April 12, 2011, http://www.washingtonpost.com/blogs/federal-eye/post/whats-getting-cut-in-the-fy-2011-budget/2011/04/11/AFMIynLD_blog.html. On cuts to

police forces in the United Kingdom, see Alan Travis, "Police Forces Set to Cut 5,800 Frontline Officers by 2015," *Guardian*, July 5, 2012, http://www.guardian.co.uk/uk/2012/jul/02/police-forces-cut-5800-officers.

4. The White House, "President Obama to Highlight Innovative Programs That Are Transforming Communities across the Nation," June 30, 2009, https://obamawhitehouse.archives.gov/realitycheck/the_press_office/President-Obama-To-Highlight-Innovative-Programs-that-are-Transforming-Communities-Across-the-Nation.

5. Giving USA, "Giving USA 2018: Americans Gave $410.02 Billion to Charity in 2017, Crossing the $400 Billion Mark for the First Time," Giving USA, June 13, 2018, https://givingusa.org/giving-usa-2018-americans-gave-410-02-billion-to-charity-in-2017-crossing-the-400-billion-mark-for-the-first-time/.

6. Her Majesty's Government, "Giving White Paper," London, 2011, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/78915/giving-white-paper2.pdf.

7. The Cabinet Office, "Building the Big Society," London, May 18, 2010, https://www.gov.uk/government/publications/building-the-big-society.

8. Andrew Carnegie, "The Gospel of Wealth," *North American Review* 183, no. 599 (1906): 526–37.

9. Peter Singer, "Famine, Affluence, and Morality," *Philosophy and Public Affairs* 1, no. 3 (1972): 229–43; William MacAskill, *Doing Good Better: How Effective Altruism Can Help You Make a Difference* (New York: Gotham Books, 2015).

10. Her Majesty's Government, "Giving White Paper."

11. Reich, *Just Giving*.

12. Giving USA, "Giving USA 2018."

13. Reich, *Just Giving*.

14. Kant, *MM*, 523 (6:393).

15. Even in this case, donors must, of course, respect some moral constraints when giving. For example, they should make sure not to produce more harm than good.

16. Nozick, *Anarchy, State, and Utopia*.

17. Ibid., 178.

18. Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (Oxford: Oxford University Press, 2002).

19. Rawls, *Theory of Justice*.

20. Ibid., 245–46.

21. Ryan Pevnick, "Philanthropy and the Democratic Ideal," in *Philanthropy in Democratic Societies: History, Institutions, Values*, ed. Rob Reich, Chiara Cordelli, and Lucy Bernholz (Chicago: University of Chicago Press, 2016), 226–43.

22. Carol Merz and Sheldon S. Frankel, "School Foundations: Local Control or Equity Circumvented?," *School Administrator* 54, no. 1 (1997): 28–31; Rob Reich, "A Failure of Philanthropy," *Stanford Social Innovation Review* 3, no. 4 (2005): 24–33.

23. William C. McGinly, "The Maturing Role of Philanthropy in Healthcare," *Frontiers of Health Services Management* 24, no. 4 (2008): 11–22.

24. Kevin Rawlinson, "Should the Met Be Allowed to Accept Private Donations and Sponsorship—or Does That Make an Ass of the Law?," *Independent*, November 1, 2012, http://www

.independent.co.uk/voices/debate/should-the-met-be-allowed-to-accept-privatedonations-and-sponsorship--or-does-that-make-an-ass-of-the-law-8273657.html.

25. For a recent defense of this thesis, see Daniel Butt, "'A Doctrine Quite New and Altogether Untenable': Defending the Beneficiary Pays Principle," *Journal of Applied Philosophy* 31, no. 4 (2014): 336–48.

26. Robert K. Fullinwider, *The Reverse Discrimination Controversy: A Moral and Legal Analysis* (Totowa, NJ: Rowman and Littlefield, 1980).

27. Norbert Anwander, "Contributing and Benefiting: Two Grounds for Duties to Victims of Injustice," *Ethics and International Affairs* 19, no. 1 (2005): 39–45.

28. Ibid.

29. See Christopher Kutz, "The Difference Uniforms Make: Collective Violence in Criminal Law and War," *Philosophy and Public Affairs* 33, no. 2 (2005): 148–80, 148–49.

30. For a recent account of the many ways in which, in contemporary societies, the wealthy contribute to the reproduction of an unjust system from which they benefit, see Giridharadas, *Winners Take All*.

31. For a Kantian defense of this view, see Anna Stilz, "Collective Responsibility and the State," *Journal of Political Philosophy* 19, no. 2 (2011): 190–208.

32. Complicity does not entail that all citizens bear an identical share of responsibility. Those who voted for unjust policies and those who design those policies may bear a higher burden. Beerbohm, *In Our Name*.

33. Note that this argument avoids the controversies of Thomas Pogge's well-known argument that the citizens of affluent countries owe duties of justice to the global poor because they contribute to global poverty by supporting an unjust global order. First, at the domestic level, unlike at the international level, contribution is more direct, and responsibility can be more easily determined. Second, I do not claim that wealthy citizens violate the human rights of poor citizens, which would entail individual blame. I more modestly claim that, blameworthy or not, they can be liable for the injustices committed by the institutions they—by way of their citizenship—support. Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (Cambridge, UK: Polity, 2002).

34. Beerbohm, *In Our Name*, 11.

35. Debra Satz, "Countering the Wrongs of the Past: The Role of Compensation," in *Reparations: Interdisciplinary Inquiries*, ed. Jon Miller and Rahul Kumar (Oxford: Oxford University Press, 2007), 176–92, 182.

36. Ibid. See also Martha Minow, *Between Vengeance and Forgiveness* (Boston: Bacon, 1998).

37. Alec MacGillis, "The Billionaire's Loophole," *New Yorker*, March 14, 2016, https://www.newyorker.com/magazine/2016/03/14/david-rubenstein-and-the-carried-interest-dilemma.

38. Satz, "Countering the Wrongs of the Past," 183.

39. Satz, *Why Some Things Should Not Be for Sale*, ch. 3; Scanlon, "Preference and Urgency."

40. Neil Levy, "Against Philanthropy: Individual and Corporate," *Business and Professional Ethics Journal* 21, no. 3 (2002): 95–108.

41. See Janna Thompson, *Taking Responsibility for the Past: Reparation and Historical Injustice* (Cambridge, UK: Polity, 2002).

42. Neorepublicans argue against philanthropy on these grounds. See Pettit, *On the People's Terms*.

43. Holtman, "Kantian Justice and Poverty Relief."

44. Once donors have satisfied their duty of reparative justice, they may (arguably) still have a supplementary duty of beneficence to give extra resources away, or an obligation of good citizenship to contribute to those "civilizational" projects that aim to create new collective capacities. Both duties would go, however, beyond the requirements of justice.

45. For an ethnography of this way of thinking and advocating, see Giridharadas, *Winners Take All*.

46. See also Reich, *Just Giving*.

47. Rawls, *Theory of Justice*, 192.

Chapter 8. The Duties of Private Providers

1. The term "division of moral labor" is generally used to indicate the idea that while institutions are assigned the pursuit of values such as impartiality, justice, and equality, private actors, including individuals and associations, can be left free to pursue other values, such as partiality, love, and friendship. See, e.g., Samuel Scheffler, "The Division of Moral Labour: Egalitarian Liberalism as Moral Pluralism," *Proceedings of the Aristotelian Society* 79 (2005): 229–53. Here I will use the term more broadly to indicate the idea that principles of justice should directly regulate political institutions alone (in the literature, this idea is sometimes referred to as "the basic structure restriction"), while private actors can be governed by different moral principles, however exactly defined.

2. Rawls, *Justice as Fairness*, 11, 54, 163–64.

3. Ibid., 11.

4. G. A. Cohen, *Rescuing Justice and Equality*; Susan Okin, *Justice, Gender and the Family* (New York: Basic Books, 1989).

5. G. A. Cohen, *Rescuing Justice and Equality*, 10.

6. I advance a version of this claim in Chiara Cordelli, "The Institutional Division of Labor and the Egalitarian Obligations of Nonprofits," *Journal of Political Philosophy* 20, no. 2 (2012): 131–55.

7. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), 262.

8. On this point, see Forrester, *In the Shadow of Justice*.

9. Rawls, *Political Liberalism*, 269.

10. Ibid., 267–68.

11. Ibid., 262.

12. For a recent discussion and a review of the debate, see Alan Patten, *Equal Recognition: The Moral Foundations of Minority Rights* (Princeton, NJ: Princeton University Press, 2014).

13. The content of this section is revised from Chiara Cordelli, "Justice below the State: Civil Society as a Site of Justice," *British Journal of Political Science* 46, no. 4 (2016): 915–36.

14. Michael Blake, "Distributive Justice, State Coercion, and Autonomy," *Philosophy and Public Affairs* 30, no. 3 (2001): 257–96, 268. See also Thomas Nagel, "The Problem of Global Justice," *Philosophy and Public Affairs* 33, no. 2 (2005): 113–47.

15. Blake, "Distributive Justice, State Coercion, and Autonomy," 288 (emphasis mine).

16. See also Andrea Sangiovanni, "Global Justice, Reciprocity, and the State," *Philosophy and Public Affairs* 35, no. 1 (2007): 3–39, 12.

17. Ibid.

18. Richard Arneson, "Democratic Rights at National and Workplace Levels," in *The Idea of Democracy* (Cambridge: Cambridge University Press, 1993), 118–48, 139.

19. Chiara Cordelli, "Democratizing Organized Religion," *Journal of Politics* 79, no. 2 (2017): 576–90.

20. Catholics for a Free Choice, "The Facts about Catholic Health Care in the United States," September 2005, https://www.catholicsforchoice.org/wp-content/uploads/.

21. But see Lucas Stanczyk, "Productive Justice," *Philosophy and Public Affairs* 40, no. 2 (2012): 144–64.

22. See also J. Freeman, "Extending Public Law Norms through Privatization."

23. Even Okin is unclear as to whether principles of justice should govern the decisions of family members or should rather apply only to the legal framework of family law.

24. See Richardson, *Democratic Autonomy*.

25. Joshua Cohen and Charles Sabel, "Directly-Deliberative Polyarchy," *European Law Journal* 3, no. 4 (1997): 313–42, 313–14.

26. Ibid., 313.

27. Ibid., 330.

28. Ibid., 335.

29. Ibid., 313.

30. This is an adaptation of a case discussed in Zacka, *When the State Meets the Street*, 54–58.

31. See, e.g., Iris Marion Young, *On Female Body Experience* (Oxford: Oxford University Press, 2005), ch. 7.

32. I advance a similar version of this argument in Chiara Cordelli, "How Privatisation Threatens the Private," *Critical Review of International Social and Political Philosophy* 16, no. 1 (2013): 65–87.

33. Seana V. Shiffrin, "What Is Really Wrong with Compelled Association?," *New York University Law Review* 99 (2005): 839–99, 873.

34. I take both examples from Michael Lipsky and Steven Smith, "Nonprofit Organizations, Government, and the Welfare State," *Political Science Quarterly* 104, no. 4 (1989): 625–48, 638.

35. Ibid., 640.

36. Lester Salamon and Helmut Anheier, "The Nonprofit Sector in Comparative Perspective," in *The Nonprofit Sector*, ed. Woody Powell and Richard Steinberg (New Haven, CT: Yale University Press, 2006), 89–114, 97.

37. Serena Olsaretti, "Freedom, Force and Choice: Against the Rights-Based Definition of Voluntariness," *Journal of Political Philosophy* 6, no. 1 (1998): 53–78.

38. Steven Smith and Michael Lipsky, *Nonprofits for Hire: The Welfare State in the Age of Contracting* (Cambridge, MA: Harvard University Press, 1993).

39. See, e.g., Theda Skocpol, *Diminished Democracy: From Membership to Management in American Civil Life* (Norman: University of Oklahoma Press, 2003), ch. 4.

40. Joshua Cohen, Joel Rogers, and Erik Olin Wright, *Associations and Democracy*, vol. 1 (London: Verso, 1995).

Chapter 9. Rebuilding the Public

1. E.g., Barak Medina, "Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization," *International Journal of Constitutional Law* 8, no. 4 (2010): 690–713, 690. Verkuil, *Outsourcing Sovereignty*.

2. For a summary and discussion of the case, see Medina, "Constitutional Limits to Privatization."

3. See John Rawls, *The Law of Peoples with "The Idea of Public Reason Revisited"* (Cambridge, MA.: Harvard University Press, 2003).

4. Michaels, *Constitutional Coup*, 210–12.

5. Catherine Mackenzie, "The Ecole Nationale d'Administration and the Civil Service College," *Comparative Education* 15, no. 1 (1979): 11–16.

6. Elizabeth Anderson, "Fair Opportunity in Education: A Democratic Equality Perspective," *Ethics* 117, no. 4 (2007): 595–622.

7. For a recent overview, see Kenneth J. Meier, "Theoretical Frontiers in Representative Bureaucracy: New Directions for Research," *Perspectives on Public Management and Governance* 2, no. 1 (2019): 39–56.

8. Claudio López-Guerra, "Equal Subjects," *Philosophy and Public Affairs* 45, no. 4 (2017): 321–55.

9. On this point, see also Michaels, *Constitutional Coup*.

10. See, e.g., Adam Liptak, "Supreme Court to Rule on Trump's Power to Fire Head of Consumer Bureau," *New York Times*, October 19, 2019, https://www.nytimes.com/2019/10/18/us/politics/supreme-court-trump-consumer-bureau.html.

11. Michaels, *Constitutional Coup*, 34.

12. Ibid., 183.

Epilogue

1. Kant, "On the Supposed Right to Lie from Philanthropy," 612.

2. See, e.g., Ruth Gavison, "Feminism and the Public/Private Distinction," *Stanford Law Review* 45, no. 1 (1992): 1–45.

3. Michel Foucault, *Discipline and Punish: The Birth of a Prison*, trans. Alan Sheridan (London: Penguin, 1991 [1975]).

4. Immanuel Kant, *Critique of Pure Reason*, trans. Paul Guyer and Allen Wood (Cambridge: Cambridge University Press, 1998 [1781]), A805–B833; Joshua Cohen, "Minimalism about Human Rights: The Most We Can Hope For?," *Journal of Political Philosophy* 12, no. 2 (2004): 190–213.

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