

2001

## Living with Privatization: At Work and in the Community

Follow this and additional works at: <https://ir.lawnet.fordham.edu/ulj>



Part of the [Accounting Law Commons](#)

---

### Recommended Citation

*Living with Privatization: At Work and in the Community*, 28 Fordham Urb. L.J. 1397 (2001).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol28/iss5/12>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Urban Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

## LIVING WITH PRIVATIZATION: AT WORK AND IN THE COMMUNITY

MS. O'CONNOR: Good afternoon. Welcome back to the *Fordham Urban Law Journal's* Tenth Annual Symposium on Contemporary Urban Challenges. The title of our Symposium is *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*.

This third panel will be on "Living with Privatization: At Work and in the Community." It is moderated by Professor Jerry Mashaw from Yale Law School. Thank you.

PROFESSOR MASHAW: Thank you very much. I am delighted to be here. You know that you are at a cutting-edge gathering when the panelists start arguing about what the topic is, which of course is what we have done through part of the morning. This suggests that there actually *is* something interesting to talk about.

This afternoon, we have a remarkable panel of people, both practitioners and academics, and some of them both academics and practitioners. Indeed, as I look at their bios, I want to ask them, "What is your day job?" Everybody on this panel seems to have about six jobs, and I am not sure which job they are going to be speaking from, but we will find out. Sheryll?

PROFESSOR CASHIN: It is an honor and a pleasure to address you.

I am going to talk about a phenomenon known as "common interest developments."<sup>1</sup> We are a nation of homeowners. I am a former Clinton Administration official.<sup>2</sup> The Clinton Administration took great pleasure in noting that home ownership in the United States reached an all-time high of sixty-seven percent on its watch.<sup>3</sup>

Common interest developments—and I am going to use the acronym CID—are residential developments with a homeowners' as-

---

1. Common Interest Developments ("CIDs") are typically residential planned unit developments that require owners to pay monthly fees to a residential association that provides all necessary management services. EVAN MCKENZIE, *PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT* 2-7 (1994).

2. Deputy Assistant Secretary for Empowerment Zones, Department of Housing and Urban Development ("HUD").

3. Press Release, Housing & Urban Development Commission, Cuomo Says America's Homeownership Rate Hits Record High of 67 Percent, With 70.5 Million Families Owning Their Homes (Oct. 28, 1999), <http://www.hud.gov/library/bookshelf18/pressrel/pr99-220.html> (on file with the Fordham Urban Law Journal).

sociation. CID residents are required to pay a fee, like a tax, to a homeowners' association, which in turn provides an array of services. The most common services provided by the homeowners' association are landscaping, snow removal, garbage pick-up, swimming pools, street lights, and street cleaning. So the fee feels like a tax to residents. Typical examples of CIDs are planned unit developments, condominiums, and apartments.

As of 1998, forty-two million Americans were living in CIDs—approximately fifteen percent of the U.S. population.<sup>4</sup> About eight million of those people live in what are called “gated communities,” where an actual gate or barriers encircle the development.<sup>5</sup>

We have seen an explosion of private governance arrangements—homeowners' associations—that govern neighborhoods both through the provision of services and through mutual, restrictive covenants and agreements that the homeowner's associations enforce.

In 1964, there were only 500 homeowners' associations in the United States.<sup>6</sup> By 1998, that number had reached 205,000. Observers of this trend estimate that every year 10,000 new homeowners' associations are being created.<sup>7</sup> By one estimate, in the year 2000, approximately twenty percent of all homeowners in this country lived under the governance of a homeowners' association.<sup>8</sup>

In my paper, I argue that the private contractual arrangement for the provision of formerly publicly-provided services is putting the nation on a course toward civic secession.<sup>9</sup> I am not the first person to say something like this. Robert Reich, the former Secretary of Labor, wrote a famous article in *The New York Times*, called *The Secession of the Successful*, in which he discussed this phenomenon.<sup>10</sup>

---

4. Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 829 (citing CLIFFORD J. TREESE, COMMUNITY ASSOCIATIONS FACTBOOK 3 (Frank H. Spink ed., 1999)).

5. EDWARD J. BLAKELY & MARY GAIL SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* 180 n.1 (1997).

6. MCKENZIE, *supra* note 1, at 11.

7. Nelson, *supra* note 4, at 829.

8. *Id.* at 863 (citing ROBERT J. DILGER, *NEIGHBORHOOD POLITICS* 145 (1992)).

9. Professor Cashin's discussion is based upon an article, appearing in its entirety, *infra* this volume of the *Fordham Urban Law Journal*. Sheryll D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675 (2001).

10. Robert B. Reich, *Secession of the Successful*, N.Y. TIMES MAG., Jan. 20, 1991, at 16.

The wedge begins with the creation of a class of property owners, members of which increasingly feel that they are paying twice, in the form of local taxes and their fee assessments, for services. This attitude threatens to predominate among the upper and affluent classes because in many areas where there is new development, particularly in the South and West, common interest development is the dominant form of ownership.

The schism widens when you consider the quality of response to community membership that the CID cultivates. Surveys have shown that CID members, particularly in gated communities, tend to think of themselves as taxpayers rather than citizens.<sup>11</sup>

Several states—including New Jersey, Texas, Maryland, and Missouri—already allow for adjustments to local taxes paid by CID residents.<sup>12</sup> At first blush, that seems fair. The residents' argument is that: "We pay for things ourselves that are public goods; we maintain open spaces that the public gets to use."<sup>13</sup>

But an intellectual firewall already has been crossed. The prevailing theoretical argument was that the Tax Code should never be used to support things that are not public in nature and that are not wholly available to the public.

As of 1996, there were a couple of examples violating this principle. There is a private gated community in New Jersey, called Panther Valley, and its residents currently deduct from their federal and state income tax returns the fees they incur for the maintenance of private roads that the public is not allowed to use.<sup>14</sup> And there are other examples of such tax adjustments in Florida.<sup>15</sup>

This and other forms of what I call civic secession have been happening across the country. At its extreme, a CID incorporates and becomes its own municipality, thereby gaining the right to regulate, primarily through zoning powers. It also uses powers in a way that is the familiar, unfortunate way of the American suburb—to wall out undesired populations.

In my paper, I present what I call a "theory of secession." I analyze how CIDs attenuate the social contract. I am neutral as to the benefits that CIDs provide to the people who live in them. It is

---

11. BLAKELY & SNYDER, *supra* note 5, at 139-40.

12. *Id.* at 24.

13. Andrew Stark, *America, The Gated?*, WILSON Q., Winter 1998, at 58, 67 (noting that advocates for tax rebates to common interest community residents "believe that the purpose of government is to give you back everything in services that you give it in payments, not to take your money and use it for the benefit of others").

14. *Id.* at 78-79.

15. *Id.* at 79.

probably more efficient for residents; they probably receive better service. I am neutral as to that. However, in this paper, I am arguing about the larger social cost.

My central theoretical argument is that a governance mechanism, the primary impetus of which is the protection and maintenance of private property, cultivates an attitude of selfishness because it is premised on private property. I am not against private property, but the whole theory that brought private property rights into creation—at least one of the predominant theories—is that it enabled people to maximize as much of the benefit as possible and internalize more of the costs associated with a piece of land.

The quality of the relationship that cultivates between the individual and the state is one of a private property owner, rather than a citizen.<sup>16</sup> Empirical surveys show that the quality of community within a CID, or a gated community in particular, is not better than non-CID communities.<sup>17</sup> In fact, CIDs tend to have a heightened free-rider problem, in which people rely on the fact that the homeowners association takes care of everything.<sup>18</sup> An agreement in which the basis of the arrangement is simply the ability to facilitate people collectively paying for services does nothing to engender a participatory consciousness. Consider the implications of this type of community ethos when, in twenty-thirty-four years, most homeowners, certainly in the outer-ring suburbs, live in these kinds of communities.

The more important point is that CIDs are highly homogeneous by race and class.<sup>19</sup> Again, that is no different than what you see in suburban development. I think this homogeneity contributes to the phenomenon of civic secession.

There is empirical research—which you can read in my article about localism, in the July 2000 issue of the *Georgetown Law Journal*—showing that communities are much less likely to cooperate with other communities that are different from them in terms of racial or social backgrounds.<sup>20</sup>

---

16. BLAKELY & SNYDER, *supra* note 5, at 35.

17. *Id.*

18. *Id.* (citing ROBERT J. DILGER, *NEIGHBORHOOD POLITICS* (1992) (stating “Robert Dilger attributes this effect to flaws in the structure of [homeowner associations] and to the free-rider problem—because participation is voluntary, a few individuals do most of the work, and as long as there are no glaring problems, the majority feel safe leaving those few to bear the burden of running the association”)).

19. *Id.* at 148-49.

20. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 *GEO. L.J.* 1985, 1993 (2000).

Indeed, gated communities and CIDs are generally most common in those parts of the country where foreign immigration has been highest.<sup>21</sup> There is definitely a fear element that animates the formation of these communities.

Another potential problem that contributes to the likelihood of further secession, or further receding from civic engagement, on the part of people who live in these communities is that this form of privatization is going on mainly in new developing communities.

CIDs are going to continue to predominate in new developing communities, where there is the highest population growth.<sup>22</sup> You are not going to see many of them in existing communities, because the transaction costs are higher for organizing people in an existing community to agree to a set of rules and regulations.

We already are beginning to see evidence of secessionist attitudes. Many CIDs now have associations that lobby state governments, particularly for tax adjustments.<sup>23</sup> I think you are beginning to see—and I will discuss this in my paper—evidence of secessionist voter attitudes in electoral politics.<sup>24</sup>

The outcomes of most fiscal debates, particularly at the state level, are determined primarily by middle-class suburban voters,<sup>25</sup> and I contend in my paper that you are going to see an acceleration of parochial attitudes with CID development.<sup>26</sup> Thank you.

PROFESSOR DONAHUE: I also am a former Clinton Administration official.<sup>27</sup> I always enjoyed working with Sheryll. We were sort of colleagues, but always working in different areas, and I

---

21. BLAKELY & SNYDER, *supra* note 5, at 152 (citing the examples of Florida and California).

22. *Id.* at 25.

People find these new cities, created by secession, attractive for many reasons. Using housing and growth regulations, the new jurisdictions can pass regulatory ordinances that restrict new entrants. And they can direct publicly collected taxes to locally specified goals, rather than allowing them to be used over a larger area.

*Id.*

23. *Id.* at 24 (stating that several states, including Maryland, Missouri, New Jersey, and Texas, permit local tax adjustments for CID residents to cover similar services provided by their residential associations).

24. See Cashin, *supra* note 9.

25. Sheryll D. Cashin, *Federalism, Welfare Reform, and the Minority Poor: Accounting for the Tyranny of State Majorities*, 99 COLUM. L. REV. 552, 583-91 (1999).

26. See Cashin, *supra* note 9.

27. Professor John D. Donahue served in the first Clinton Administration as an Assistant Secretary, and then as Counselor to the Secretary of Labor. For additional information, see [http://ksgnotes1.harvard.edu/people/john\\_donahue](http://ksgnotes1.harvard.edu/people/john_donahue).

feel like we are continuing that tradition. My topic is quite different from hers, illustrating the richness of this broader conversation.

The context of my observations, and really the content of my broader research,<sup>28</sup> has a lot to do with the subject of the first panel today,<sup>29</sup> and I would like to echo a few of those themes again, just to set the context.

One, government is undergoing a period of accelerated evolution somewhat comparable to, somewhat parallel to, but different in important details and somewhat delayed from, what the private sector has gone through in recent decades.<sup>30</sup> This evolution entails significant risks, for sure—the imperative to update our conceptual apparatus to catch up with reality—but I am moderately hopeful that, on balance, this evolution will bring more good news than bad news.

One thing I am pretty sure about is that government's mission is likely to become more complex and challenging, more a matter of orchestrating relationships and obligations across and beyond the public sector defined narrowly, and this will require a heightened role for careful analysis. I guess, as an analyst and a teacher of analysts, I find more good news than bad news in this, too.

But this is not what I am going to be talking about today specifically. Instead, I am going to be talking about a narrower piece of the puzzle, although still a pretty big issue. The issue is a political flash point, but also—sort of a personal comment in my research—a place where I am kind of stuck. My topic has to do with how to think about the interests of public workers and how to think about public employment as an American institution: as a factor in decisions about the structure of how government gets its work done; and as a factor in the privatization decision.

I want to start with a little bit of background data; then try to frame the conundrum; and, if I have time, make some very tentative gropings toward how I am trying to come to terms with it.

You might think, from both the conversations earlier today, and from the general buzz about privatization in the air, that the Amer-

---

28. Professor Donahue's discussion is based upon an article, appearing in its entirety, *infra* this volume of the *Fordham Urban Law Journal*. John D. Donahue, *Privatization and Public Employment: An Essay on the Current Status and the Stakes*, 28 FORDHAM URB. L.J. 1693 (2001).

29. Panel Discussion, *The Changing Shape of Government*, in Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1319 (2001).

30. U.S. CENSUS BUREAU, GOV'TS DIV., 2000 U.S. CENSUS (2000) (showing the public workforce total at roughly eighteen million government workers in 2000).

ican public servant is sort of like the American bison, which used to cover the plains in uncounted millions and now has dwindled away to a few protected preserves. Now, some people fear that that will happen, some people hope that that will happen, but it is not really a very good description of what has been going on so far.

[Slide] This simply gives a breakdown of public-sector employment as a share of the overall U.S. work force.<sup>31</sup> You can see the story here is nothing very radical: government employment consisted of around fifteen to twenty percent of the U.S. work force for pretty much the whole half-century following World War II.<sup>32</sup> It peaked in the late 1960s, as the Great Society and Vietnam coincided with the school system's ramping-up for the Baby Boomers.<sup>33</sup> The share has dwindled away pretty gradually; mostly that has been because of faster growth in the private economy than in the public sector, and partly because of real federal head-count shrinkage, mostly in defense and defense-related areas—but no sharp, discontinuous shift toward outsourcing.<sup>34</sup>

[Slide] You do, by the way, see a pretty big shift in the composition of public workers, with a real move away from Washington, D.C.<sup>35</sup> Right after World War II, there were four big categories of public workers, mutually exclusive and exhaustive, each with between three and four percent of the overall work force: military personnel; federal civilian workers, including the Postal Service; state and local employees involved in education; and state and local employees involved in everything but education. Those were all about the same size in 1948.<sup>36</sup>

---

31. Donahue, *supra* note 28, at fig.2: *Public Sector as Share of U.S. Full-Time Equivalent Employment, 1948-98*. This figure compares the percentage of public sector work to the overall workforce. The four graph lines represent all government workers, federal civilian workers, state and local workers, and the military. Government workers comprised about 14% of the workforce in 1948, peaked at 21% in 1970, and slowly returned to 16% by 1999.

32. *Id.*; see also BUREAU OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2000) (providing statistics on number of civilian workers from 1948 to 2001), <http://stats.bls.gov/text%5Fonlydcpshome%5Ftxt.html>.

33. Donahue, *supra* note 28, at fig.2: *Public Sector as Share of U.S. Full-Time Equivalent Employment, 1948-98*.

34. *Id.*

35. Donahue, *Privatization and Public Employment, supra* note 28, at fig.3: *Public-Sector Workforce as Share of U.S. Full-Time Equivalent Employment, 1948-98*. This figure compares public sector workers as a share of Full Time Equivalent ("FTE") employment. In 1948, all public sector work comprised between 3% and 4% of FTE employment. By 1998, state and local workers and educational workers rose to 6%, while federal civilian and military workers dropped to between 1% and 2%. *Id.*

36. *Id.*



In 1998, you see they diverge widely, with state and local education workers alone or state and local other workers alone, greatly outnumbering federal civilian and military combined.<sup>37</sup> But this is a shift in the overall structure of government, away from Washington, D.C. and toward the states—an interesting topic on its own—but not really, again, an artifact of outsourcing.

I keep bumping against a fascinating but frustrating fact in my research, which is that there is really no good database on outsourcing. We find a lot of surveys, a lot of individual cases, a lot of anecdotes, horror stories, cheerleading, and so on, but it is surprisingly hard to get a fix on just how much of the government's work is delegated to outside organizations. The closest approximation is a Commerce Department data series.<sup>38</sup> I am going to show you some numbers from there, but the data are a little squishy.

[Slide] If you look at the records that are kept of what government spends to compensate employees, and what government spends to buy outside services, you see a trend for the 1990s that is about as close to flat as you can expect.<sup>39</sup>

Over that decade, the share of outsourced services went up a little and then down a little in the federal government, and down a little and up a little in the state and local governments, but it is pretty much the same.<sup>40</sup> I do not see a revolution here. That does not mean we will not see a lot more privatization in the future. The two biggest groups of public workers, which are teachers and other education workers, and U.S. Postal Service employees, are in some folks' cross hairs these days.<sup>41</sup>

What I want to focus on here is: How do we think about the interest of public employment? Why is this an interesting issue? Why do we have to think this through? Well, for one thing, government jobs tend to be pretty good jobs. Since the time of the

---

37. U.S. OFFICE OF MGMT. & BUDGET, BUDGET OF THE U.S. GOVERNMENT, FISCAL YEAR 2001, tbl.17.5 (2001), <http://w3.access.gpo.gov/usbudget/fy2001-/hist.html>.

38. See U.S. DEPT. OF COMMERCE, BUREAU OF ECON. ANALYSIS, NATIONAL INCOME AND PRODUCT ACCOUNTS, SURVEY OF CURRENT BUSINESS (various years), <http://stats.bls.gov>.

39. Donahue, *supra* note 28, at fig.7: *Non-Employee Services as Share of Total Services, 1990-2000*. This figure shows outsourced services as a percentage of all services. Between 1991 and 1999, Federal spending outsourced between 0.36% and 0.4% of its services, while state and local spending outsourced between 0.04% and 0.06%. BUREAU OF ECON ANALYSIS U.S. DEP'T OF COMMERCE, NATIONAL INCOME AND PRODUCT ACCOUNTS, SURVEY OF CURRENT BUSINESS, at tbl.3.7, "Government Consumption Expenditures and Gross Fixed Investment by Type."

40. Donahue, *supra* note 28, at fig.7.

41. U.S. CENSUS BUREAU, GOV'TS DIV., 1999 U.S. CENSUS (1999), <http://www.census.gov/govs/apes/99locus.txt>.

Great Society, average pay has surged in all categories of the public sector, relative to the economy as a whole.<sup>42</sup>

I used to think—I even used to write—that the special thing about public compensation was its compression.<sup>43</sup> Government pay tended to be much higher at the low end and much lower at the high end than in the private sector. When I actually went to get the latest data on that for this Symposium and realized I had never really looked at this particular detailed data series before, I found that this is not exactly correct. It is close, but it is not exactly correct.

[Slide] The Bureau of Labor Statistics has a National Compensation Survey,<sup>44</sup> which is the best available data on big trends, big patterns in compensation. I pulled the numbers from that on the tenth percentile, that is, the compensation levels ten percent up from the bottom; the ninetieth percentile, those ten percent down from the top; and the median, and compared public and private.<sup>45</sup>

What you see here is that state and local government outpaced the private sector at the bottom, at the top, and in the middle, on average. Now, this excludes annual bonuses and overtime, which probably biases the private sector down a bit. But it also excludes higher-paying federal government jobs, so it is probably close to a wash. Government jobs are good jobs. You see this for white-collar workers as a group. You see it for blue-collar workers as a group, if you look at specific categories such as janitors, bus drivers, auto mechanics, or high school teachers. The only place the pattern is reversed is in the very-highest-paid occupations, such as computer analysts, attorneys, and physicians.<sup>46</sup> Why do you see this? Well, one part of the explanation is that government jobs

---

42. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL COMPENSATION SURVEY: OCCUPATIONAL WAGES IN THE UNITED STATES, 1998 Supplemental Tables (1999) (showing hourly wages (or the annual salary equivalent) for many categories of workers, both private sector and in state and local government), <http://stats.bls.gov/blshome.html>; see also Donahue, *supra* note 28, at fig.8: *Average Wage/Salary per Full-Time Equivalent Employee, 1948-98*.

43. See generally JOHN D. DONAHUE, *THE PRIVATIZATION DECISION* (1989).

44. BUREAU OF LABOR STATISTICS, *supra* note 42.

45. See Donahue, *supra* note 28, at fig.9: *Compensation for All Full-Time Workers, 1998*. This figure compares hourly compensation rates for private industry and state and local government workers by looking at the median rate, the top 10%, and the bottom 10% of the workforce. In the lowest 10%, the private worker received \$7/hour, while the government worker made \$9/hour. In the median range, the private worker received \$13/hour, while the government worker made \$16/hour. In the top 10%, the private worker received \$27/hour, while the government worker made \$32/hour. *Id.*

46. BUREAU OF LABOR STATISTICS, *supra* note 42.

tend to require higher skills than average, so, appropriately, they are paid more.

[Slide] Though, if you compare government work with the wages paid to college-educated workers, you see the public sector is holding up pretty well on that basis as well.<sup>47</sup>

[Slide] Why else might there be a difference? Well, public workers tend to be a lot older, on average, than private workers. There is a huge discrepancy between the average age and the age distribution of the public and private sector.<sup>48</sup> Government workers also tend to have more seniority. And pay tends to rise with age, especially for the college-educated workers that predominate in the public sector.<sup>49</sup> What else is different about the public sector?

[Slide] Well, it is no news to this group, but worth emphasizing, that as the labor movement has lost ground in the private sector, it has shored up its standing in government.<sup>50</sup> There is now an enormous difference in union membership between public and private sectors. Union membership is more than four times as high in government as in the private sector.<sup>51</sup>

The most-organized part of the private economy has much lower union membership than the least-organized part of the public sector. So, public employment accounts for about fifteen percent of the work force, getting pretty close to half of all union members.<sup>52</sup> I think that is a big part of the explanation for what is going on.

I am done with the data. On to the conundrum. So, public employment tends to be relatively well-paid and secure and rich in benefits, especially for the rank and file of the work force, and for

---

47. This figure, entitled *Full-Time Equivalent Government Salaries Relative to Median Earnings for College-Educated Full-Time Workers 25 and Over, 1987-98* shows that between the years of 1987 and 1998 college-educated government workers made between 75% and 80% of the median salaries of all college-educated workers in a gradually increasing line. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL COMPENSATION SURVEY: OCCUPATIONAL WAGES IN THE UNITED STATES.

48. *See id.*, at fig.10: *Age Distribution, Wage and Salary Workers, 1999*. This figure indicates that before age 35, private workers receive a higher salary than government workers. After age 35, government pay continues to increase until age 54, but private industry pay declines to less than that of the government counterpart. *Id.*

49. ROBERT B. REICH, *THE FUTURE OF SUCCESS 93-94* (2000) (discussing the belief in steady work with predictably increasing pay).

50. *Id.*

51. *See Donahue, supra* note 28, at fig.11: *Unionization Rate, 2000*. This figure shows the unionization of public employers, at 37%, to be significantly greater than that of private employees, at only 9%. *Id.*

52. *Id.*

pretty much everybody except those at the top of the heap.<sup>53</sup> How do we factor this into the mix of other considerations affecting the desirability of privatization? Maybe we will not need to. Maybe privatization will always turn out to be a bad idea from the perspective of citizens as a whole and we can dodge this bullet. I think we are not going to get that lucky. Sometimes it makes sense; sometimes it does not. We are going to have to face this. I have been trying to think about this these days. Let's start by bracketing the issue with the pure positions.

One pure position would be that the stakes of public workers have no independent standing in and of themselves. The way our economy works, after all, is you pay your dues on the producer side and you get your benefits on the consumer side. So if public employment turns out to be the best way to organize the production of postal services, or welfare-to-work, or primary and secondary education, fine; and, if not, turn it over to the private sector. If public employment drops from fifteen percent to ten percent or five percent, or even zero, so be it.

Well, this does not feel too comfortable. Among other things, it would almost surely increase economic inequality. That fifteen percent of the work force is a bulwark against the merciless meritocracy of the private economy that has done some terrific things, but also has rendered the current American economy less equal today than ever in the lifetime of anybody in this room.

It also seems pretty tough on people who have invested their lives in public jobs. It surrenders the function of public employment as the pacesetter and benchmark for civilized employment practices—not least importantly, race and gender equity. It also would, of course, trigger the mother of all political battles.

What about the other pure position? If privatization would hurt workers, it should be rejected even in cases where privatization credibly promises to lower costs or improve accountability or boost performance. Now again, you can wiggle out of this if you say there are no such cases, but I am afraid there are.

Well, this position is not too comfortable either. It would at least be logically consistent if we were to say, "Let's reverse the capitalist logic and say you pay your dues on the consumer side and get your benefits on the producer side, so pretty much everything should be done through government." But we have tried that experiment here and there and we mostly did not like it.

---

53. See Donahue, *supra* note 28, at fig.9: *Compensation for All Full-Time Workers, 1998* (comparing compensation of private and public workers).

Declaring workers' interests a trump to keep some things public, and to protect some workers, seems pretty random on the ethical front. Even if it could be squared ethically, I submit that it is unsustainable politically. Again, unless privatization is always a bad idea from the perspective of citizens as a whole, then asking eighty-five percent of Americans to pay more or get less than they otherwise would so that fifteen percent of Americans can have superior conditions of employment, seems pretty sure to deepen hostility to government and to the labor movement.

Both pure positions are deeply troubling. We need to find middle ground. If I had time, I would give you my gropings towards that, but they are not particularly satisfying anyway, so maybe we can make some more progress in our conversations here.

MS. KORPI: Professor Donahue provided a pretty good segue into my topic. But, first off, I want to thank Fordham University School of Law for putting on this Symposium. From AFSCME's<sup>54</sup> perspective, there is far too little reasoned discussion about privatization; and, even when there is some discussion, the perspective of the working stiffs is glaringly absent. So I am glad that we have both perspectives today.

AFSCME represents about 1.3 million working stiffs in jobs ranging from trash collectors to driver's license examiners, corrections officers, even M.D.s. And, as Professor Salamon and others have pointed out, that really represents a minuscule portion of total government expenditures.<sup>55</sup>

But, from our perspective, when the discussion is about privatization, the focus is on our members. So I am going to take us from the kind of broad, big-picture theory that we were talking about earlier today right down to the workplace and the perspective of the folks who are throwing trash on trucks or being forced to tell somebody in need that they are not eligible for public assistance.

The title of this panel is *Living with Privatization*. As I thought about that, I could not help but think about those pamphlets you see at doctors' offices—*Living with Diabetes* or *Living with High Blood Pressure* or something like that. I must say that, from our members' perspective, that accurately reflects our point of view.

---

54. AFSCME stands for American Federation of State, County, and Municipal Employees, and general information is available at [www.afscme.org](http://www.afscme.org).

55. See Remarks of Dr. Lester Salamon, in Panel Discussion, *The Changing Shape of Government*, in Symposium, *Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1319 (2001).

To flog that analogy just a little bit further, like diabetes or high blood pressure, it sometimes seems that public officials are genetically predisposed toward privatization.

Actually, *Living with Privatization*, for our members, can be translated as living with the understanding that “you are doing a lousy job and, because you work for the government, you cannot do anything but a lousy job, so we can turn your job over to the private sector at any moment and you are out of here. You are a cost to be reduced; you are not an asset to be utilized.”

That is not exactly a message that most management gurus would say leads to a high-performance workplace. In fact, I assume that some of you folks here either have tenure or hope to someday, and you would probably disagree with the notion that if only you had *less* job security, you would do *better* work. I would disagree with that, too.

In fact, what most management gurus will tell you is that when you are looking at service failures, more often than not, the problem is with the system, as opposed to the individual. But, more often than not, the solutions are pointed at the individual rather than the system.

Now, our members realize this, and they are typically more than happy to work with management to change inefficient systems. And I am not just blowing smoke here. We do a survey of our members every couple of years, and in our last survey, ninety-one percent said that the role of a union should be to work with management to improve service for taxpayers.

Unfortunately, our members too rarely get that opportunity to work with management. Instead, when services are privatized, front-line workers typically are replaced, and managers, the ones who created the inefficient systems in the first place, keep their jobs. On a personal note, it is a mystery to me how anybody can believe that a manager who is incapable of managing their *own* work force is going to be able to manage a contractor's work force, where you have less control and less accountability. If it is that easy to identify, demand, and monitor performance, do it.

In some situations, our members do get jobs with a contractor, but typically they are nonunion jobs, as Professor Donahue has pointed out, which pay less and which have inferior health insurance and pension benefits. Some theorists may think this is a good thing, but I would wager that just about all of them make a whole lot more than the average trash collector.

In fact, what you may realize is that it may be a cost saving for one particular jurisdiction, but I doubt that it is really a cost saving for society as a whole, when there are folks who cannot afford decent health care and cannot retire in comfort.

So why isn't more effort put into changing inefficient systems? Why isn't that the first option considered, if our goal is cost-effective, quality public services? I am going to assume for a minute that that is our goal, although too often it seems like privatization is discussed as a goal in and of itself.

Well, changing inefficient systems is not easy, for a number of reasons. One is that it requires a real commitment by management and labor to change behaviors, to examine everything, and to be in it for the long haul.

Secondly, the long haul is pretty difficult in the public sector. Many of our members are long-term civil servants, but public officials have as their time horizon only the next election. You cannot blame them—it is human nature, and it is probably a systems problem, too. But it is a whole lot easier to campaign on the theme that “I have cut the government payroll”—pay no attention to the fact that the cost of service contracting has gone through the roof—than it is to say that “I am working in partnership with my public employees to improve services and cut costs and we have figured out how we can make our own pothole filler for three dollars a gallon instead of paying twenty dollars a gallon to buy it from a private company,” or “the error rate in servicing Medicaid applications has dropped significantly.” It does not make for a good sound bite, although it might, in the long run, improve services even more.

And then, thirdly, the recurring theme we have heard throughout the day is that we need to acknowledge some of the systems that have been put in place and that increase the cost of delivering government services have been put there for sound social policy reasons.

For example, procurement rules. One of the reasons given for privatizing public assets, in particular, is that capital projects can be done much faster in the private sector than they can in the public sector, because the private sector does not have to follow these “cumbersome procurement rules” and “red tape.” Those cumbersome rules were put in place to ensure that the taxpayers got the best bang for the buck and that contracts did not go to cronies.

The same can be said for open meetings laws,<sup>56</sup> and freedom of information laws,<sup>57</sup> as we heard this morning. And if, in fact, those rules are cumbersome or not serving a purpose, then let us face that head-on and debate it. We should not just give public money to folks who do not have to follow the same set of rules.

In fact, though, just the opposite has happened. Professor Salamon gave us some staggering figures about government expenditures this morning.<sup>58</sup> And, from a slightly different angle, Paul Light from The Brookings Institution<sup>59</sup> has calculated that when you look at federal dollars, they support about 1.8 million federal employees, traditional civil service employees.<sup>60</sup> They also support about seventeen million private sector employees.<sup>61</sup> So basically, the vast majority of people paid by federal dollars are not subject to the same rules by which we decided government should operate. This has happened with little thought to the consequences for an open, accountable society.

Now, changing systems is hard, but there is case after case of success. And, from our point of view, there are a few conditions for success. One is a commitment to true collaboration. Some of our members are a little bit cynical about quality initiatives because, too often, they mean a suggestion box outside the boss's door. If your suggestion is picked, you get your picture on the wall, you are employee of the month, and you get a good parking space. That is not how we define true collaboration. What we mean is true input in partnership with front-line workers through their union.

A second is investing in the resources it takes to make this partnership work. That is time. That is training, both in the processes of quality improvement and the performance of whatever jobs might be changed.

A third is employment security. Notice I am not saying "job security," because we can assume that jobs will change. But you can-

---

56. 29 C.F.R. § 102.137(5) (2000).

57. Freedom of Information Act, 5 U.S.C. § 552 (2000).

58. See Salamon, *supra* note 55.

59. Paul Light is the Vice President and Governmental Studies Director at the Brookings Institution, and related articles are available at <http://www.brook.edu>.

60. *Smaller Government*, WALL ST. J., Nov. 3, 2000, at A20 (quoting Paul Light); Paul Light, *Cupcakes of Reform*, GOV'T EXECUTIVE, July 1, 2000, <http://www.GovExec.com/features/0700/0700lastword.htm>.

61. PAUL C. LIGHT, THE TRUE SIZE OF GOVERNMENT 155-70 (1999) (stating that most of these seventeen million people work in the "shadow of government" as non-federal employees working under federal contracts, grants, and mandates to state and local governments), <http://www.brook.edu/gs/projects/truesizeofgovt.ppt>.



not expect folks to collaborate when the outcome might be that they are out on the street. It just is not human nature.

Now, this is a lot harder than just washing your hands of a problem and contracting out, but from our perspective, and I hope from the perspective of folks who care about our society, it is the only alternative.

Thank you.

MS. BAKER: It is my understanding that I am here today to be a local community voice and to be a voice that has been analyzing and articulating the implications of charitable choice in the public/private debate.

Many understand charitable choice to be simply a gracious overture to the faith community, a way of saying to these groups that they are now officially welcome to play ball in this new world of contracting and subcontracting. And, although that is the case, charitable choice is actually a lot more complex and represents a convergence of several agendas in the public/private debate—libertarian, free market, and conservative religious agendas.

Let me begin by defining what charitable choice is and what is new about it. Two weeks ago, you may have needed this explanation more than you do today, because President Bush announced on Monday the new Office of Faith-Based and Community Initiatives.<sup>62</sup> But basically, charitable choice is a provision within the 1996 Welfare Reform Act,<sup>63</sup> one sponsored by Senator John Ashcroft, which states that local congregations and faith-based organizations can compete for government funding on equal footing with public agencies, nonprofit organizations, and for-profit corporations.<sup>64</sup> In addition, faith based initiatives can be explicitly religious, as long as they can prove that public money is not directly supporting the religious part of their services.<sup>65</sup> For years, faith-based organizations (“FBOs”) have offered critical social services

---

62. OFFICE OF THE PRESS SECRETARY, THE WHITE HOUSE, EXECUTIVE ORDER, ESTABLISHMENT OF THE WHITE HOUSE OFFICE OF CENTER FOR FAITH BASED INITIATIVES (2001) (creating the office to “develop, lead, and coordinate the Administration’s policy agenda affecting faith-based and other community programs and initiatives, expand the role of such efforts in communities, and increase their capacity through executive action, legislation, Federal and private funding, and regulatory relief”).

63. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

64. *Id.*

65. *Id.*

in struggling communities and, like the nonprofit-sector, FBOs have tended to fill gaps in public services.<sup>66</sup>

So what is new about this provision? What is new is all the emphasis on maintaining religious distinctiveness. Underlying this is the belief that the faith factor of religious social services is what makes them more successful and, therefore, the faith, or religious elements, need to be encouraged. Religious distinctiveness is encouraged by allowing any local congregation, even those without a 501(c)(3)<sup>67</sup>—the church down the street, the mosque on the corner, the synagogue next door—to compete for public funding of social services along with MAXIMUS<sup>68</sup> or Goodwill.<sup>69</sup>

In contrast to the past, religious symbols and prayer are permitted, as long as clients are informed that they have the option to find an alternative social service provider. It is this fuzziness in separation of church and state that has many concerned. How can a church that is essentially evangelical suspend its essence? How can FBOs separate their religious and social services for their accounting? And will alternative social service providers, secular or of different faiths, actually exist in all geographic areas?

---

66. Some examples of FBOs in New York include Catholic Charities, Good Shepherd, Little Sisters of the Assumption, the Federation of Protestant Welfare Agencies, United Jewish Appeal, Harlem Congregations for Community Improvement, and Abyssinian Development Corporation. See, e.g., DOROTHY M. BROWN & ELIZABETH MCKEOWN, *THE POOR BELONG TO US: CATHOLIC CHARITIES AND AMERICAN WELFARE* (1997) (describing the role of Catholic Charities as the largest private system of social service provision in the United States); Penny Singer, *Aiding the Poor With Low-Interest Loans*, N.Y. TIMES, June 28, 1998, at 14WC8 (diverting money received from selling investments in South Africa to financing loans to the poor through faith-based organizations); Laune Goodstein, *Bush Aide Tells of Plan to Aid Work By Churches*, N.Y. TIMES, Mar. 8, 2001, at A10 (stating that social service programs that regard religious conversion as a central mission will not receive direct grants, but may receive government assistance through vouchers); R.A. CNAAN, *SOCIAL AND COMMUNITY INVOLVEMENT OF RELIGIOUS CONGREGATIONS HOUSED IN HISTORIC RELIGIOUS PROPERTIES—A FINAL REPORT TO PARTNERS FOR SACRED PLACES* (1997); V. Hodgkinson et al., *From Belief to Commitment: The Activities and Finances of Religious Congregations, in UNITED STATES: FINDINGS FROM A NATIONAL SURVEY* (1993).

67. I.R.C. § 501(c)(3) (2001).

68. MAXIMUS is a private corporation providing health and human service program management and consulting services to state and local governments. For more information, see <http://www.maximux.com>; see also Remarks of David Mastran, CEO of MAXIMUS, in Panel Discussion, *Privatization in Practice: Human Services, in Symposium, Redefining the Public Sector: Accountability and Democracy in the Era of Privatization*, 28 *FORDHAM URB. L.J.* 1435 (2001).

69. Goodwill Industries International, Inc. comprises the world's largest network of privately operated vocational rehabilitation programs, with 187 autonomous, community-based organizations located throughout the United States and Canada. For more information, see <http://www.goodwill.org>.

In the past, it was clear that one could not discriminate with public funds. Now that has been reversed and, even with public funds, FBOs can hire their own.<sup>70</sup> This element of charitable choice has been contested by many members of the Congressional Black Caucus.<sup>71</sup> A lawsuit last year between the ACLU and the Kentucky Baptist Homes for Children illustrates this complexity.<sup>72</sup> The Kentucky Baptist Homes for Children fired one of its caseworkers after it found out that she was a lesbian, arguing that her being a lesbian went against Baptist principles.<sup>73</sup>

As a soon-to-be-ordained minister in the United Church of Christ, and a person who has spent a decade in the welfare rights movement, I have deep concerns about charitable choice. I think it presents dangers both to poor families and to the integrity of the religious community.

In many states, charitable choice has emphasized mentoring and basic supports, like transportation or childcare, for people moving from welfare to work.<sup>74</sup> Here, in New York City, we have seen a dramatic reduction in welfare rolls. Although we do not know how many people have actually found work, we do know that religious

---

70. *E.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (holding that permitting school property to be used for the presentation of all views on an issue except those dealing with it from a religious standpoint constitutes prohibited viewpoint discrimination).

The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The constitution decrees that religion must be a private matter for the individual . . . and while some involvement and entanglement is inevitable, lines must be drawn.

*Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971).

71. *E.g.*, David Nather, *House Passes Child Support Bill Amid Growing Reservations About "Charitable Choice"*, CQ WEEKLY, Oct. 3, 2000; Gustav Niebuhr, *Public Lives*, N.Y. TIMES, Apr. 7, 2001, at A8 (discussing potential conflict between new faith-based initiative and more "secular figures" such as the Congressional Black Caucus). The Congressional Black Caucus Foundation sponsored a forum "Charitable Choice—A New Threat to Civil Rights" on Sept. 14, 2000.

72. Plaintiff's Complaint, *Alicia Pedreira v. Kentucky Baptist Homes for Children*, at 2 (W.D.K.Y. filed Apr. 17, 2000), <http://www.aclu.org>.

73. *Id.*

74. See DR. AMY L. SHERMAN, CTR. FOR PUB. JUSTICE, *THE GROWING IMPACT OF CHARITABLE CHOICE: A CATALOGUE OF NEW COLLABORATIONS BETWEEN GOVERNMENT AND FAITH-BASED ORGANIZATIONS IN NINE STATES* (2000); Robert Polner, *City Plan Has Clergy Helping the Needy*, NEWSDAY, Nov. 23, 2000, at A19 (discussing a city pilot program that allocated \$1.9 million dollars to seventeen houses of worship to counsel former welfare recipients); *e.g.*, Paul Zielbauer, *Connecticut Budget Proposal Calls for Modest Increases*, N.Y. TIMES, Feb. 8, 2001, at B5 (discussing Connecticut's decisions regarding charitable choice).

congregations are experiencing an increase in emergency food requests. At the same time, many welfare cases have been sanctioned. This troubling dynamic has also fallen into the laps of religious congregations.

In September of last year, a faith-based demonstration project was initiated in which fifteen FBOs are working with sanctioned families to help them cure their sanctions.<sup>75</sup> Sanctioned families are those families in which a parent has been cut off from benefits but the children are still receiving benefits.<sup>76</sup> This has been a particularly troubling problem for Mayor Giuliani, who at one point had sought to have full-family sanctions, but this went against the safety net safeguards in New York State.<sup>77</sup>

This faith-based demonstration project differs from charitable choice, however, because, it is not clear if or when a Request for Proposal ("RFP") was released. In addition, it is unclear if there is any evidence of an open and competitive bid process.<sup>78</sup>

While it appears that the FBOs are carrying out the work of the Human Resources Agency ("HRA"), New York City's welfare department, HRA is not itself named in any of the contracts.<sup>79</sup> The contracts are between the State University of New York Research Foundation and five larger FBOs acting as administrative entities, and then they subcontract to local congregations and smaller FBOs.<sup>80</sup> I am not quite clear where the money came from for this project, though I've been told the source is the New York State Department of Labor.

Members of the advocacy community had some questions about this project, so we began a very positive and fruitful dialogue with nine of the FBOs involved. We learned from them that their contracts were performance-based. As they began their work, we also heard from them about times when both punitive welfare policies and the constrictive milestones in their contracts created conflicts with their mission. Many of the FBOs have been working far beyond what their contracts require, offering training and advocacy whenever they can.

---

75. Peter Mickulas & Mark Berkey-Gerard, *Turning To Faith-Based Organizations*, GOTHAMGAZETTE, Dec. 18, 2000, at 1 (stating that in Spring 2000, the city contracted with fifteen churches to get welfare recipients into city job programs).

76. See SHERMAN, *supra* note 74.

77. *Id.*

78. Mickulas & Mark Berkey-Gerard, *supra* note 75.

79. See Polner, *supra* note 74.

80. See *id.*

This demonstration project ends at the end of this month and its success will be evaluated. Many welfare cases will be closed. Is this a success? Many people will be reengaged in the welfare-to-work process. Is that a success in a welfare system focused on reducing welfare rolls? Will they measure success based on how the FBOs have been impacted by this program? Is it a success to extend government so that more and more FBOs are carrying out social welfare programs? Is it a success to increase FBO's dependency on fickle government funding?

We in the advocacy community suspect that the project will be deemed a success and that all the FBOs will have their contracts renewed. It is important, however, to ponder what constitutes a charitable choice success or what is the real end goal of charitable choice.

Charitable choice cannot be separated from the 1996 welfare reform legislation.<sup>81</sup> It is easy to connect the morality-laden language of welfare reform to the voice of conservative Christians that impacts U.S. policy. Much of the language was generated by members of the same think tanks and associations that designed charitable choice.<sup>82</sup> The rhetoric states that poverty is the result of a moral breakdown in our society and the dissolution of institutions of civil society. Community, civil society, citizenship, compassion—remember all the Cs in Bush's inaugural address.<sup>83</sup>

The logic goes like this: before there was a welfare state, people used to just take care of each other, but, since the development of big government programs, people have forgotten how to do it. The hope is that by strengthening the institutions of civil society—families, congregations, and schools—there will be no need for government programs.<sup>84</sup> This is where the devolution agenda and the conservative religious agenda meet—get religion and compassion in and government out.

The authors of charitable choice who have this particular vision for restoring civil society and reducing the role of government in

---

81. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 42 U.S.C. § 608.

82. Some of the think tanks include: Center for Public Justice (Stanley Carlson Thies, James Skillen), Hudson Institute (Amy Sherman), Manhattan Institute, FAMily REsearch Council (Amy Sherman), and the Christian Legal Society.

83. President George W. Bush, Inaugural Address, (Jan. 20, 2001) ("Today, we affirm a new commitment to live out our nation's promise through civility, courage, compassion and character."), <http://www.whitehouse.gov>.

84. See Brigid Kennedy-Pfister, *Continuity And Contradiction In the Theory and Discourse of Dependence*, 28 FORDHAM URB.L.J. 667, 709 (2001) (quoting H.R. Rep. No 104-651, at 3-4 (1996), reprinted in 1996 U.S.C.C.A.N. 2183, 2184-85.)

our lives cite one particular theologian as their darling. Just go to the Center for Public Justice's Web site.<sup>85</sup> They are the main proponents of charitable choice and also school choice. You can read any of the immense volumes of literature they have generated on religious pluralism, civil society, or Christian perspectives on welfare reform.<sup>86</sup>

Many of them will cite Abraham Kuyper, Calvinist theologian and Dutch Prime Minister at the turn of the century.<sup>87</sup> Kuyper, too, sought to emphasize the distinctiveness of religious traditions and to strengthen the private spheres of family and church. Kuyper, too, was concerned about social welfare. Kuyper had a theory, called *verzuiling*,<sup>88</sup> which means pillarization. The idea was that each religious and/or moral community would have its own schools, hospitals, and social service agencies; each faith and its own institutions would constitute a pillar. Sometimes, however, if Kuyper got impassioned, he would admit that the Calvinist pillar would reign supreme.<sup>89</sup> In the end, it did not prove to be a sound structure on which to build society. The community with the most power and resources inevitably had a taller pillar, so the structure was kind of unbalanced, instead of a nicely standing building of Greco-Roman structure.

Those who follow Kuyper have spent the past decade actually reviving his name and reputation because it was very tarnished when his theories were used both to support and fight apartheid in South Africa.<sup>90</sup> His thinking was very caught up in that struggle.

As we see our public sector being redefined through devolution or through charitable choice legislation, we need to know what is really at risk. I believe that we risk losing the public sphere, that space where the diverse groups in this country bump into each

---

85. The Center for Public Justice's website is <http://www.cpjustice.org>.

86. See e.g., LUIS E. LUGO, *EQUAL PARTNERS: THE WELFARE RESPONSIBILITY OF GOVERNMENTS AND CHURCHES* (1998); STANLEY W. CARLSON-THIES ET AL., EDs., *WELFARE IN AMERICA: CHRISTIAN PERSPECTIVES ON A POLICY IN CRISIS* (1996).

87. See e.g., ABRAHAM KUYPER, *THE PROBLEM OF POVERTY* (1898).

88. For a description of *verzuiling*, see CHARLES L. GLENN, *THE AMBIGUOUS EMBRACE: GOVERNMENT AND FAITH BASED SCHOOLS AND SOCIAL AGENCIES* 137 (2000).

89. See JAMES D. BRATT EERDMANS, *DUTCH CALVINISM IN MODERN AMERICA: THE HISTORY OF A CONSERVATIVE SUBCULTURE* (1984). For a contemporary collection of essays, see PETER SOMERS HESLAM, *CREATING A CHRISTIAN WORLDVIEW: ABRAHAM KUYPER'S LECTURES ON CALVINISM* (1998). See generally *Lectures on Calvinism*, <http://www.kuyper.org/stone/preface.html>.

90. H. Russel Botman, *Is Blood Thicker than Justice? The Legacy of Abraham Kuyper for Southern Africa*, in *RELIGION, PLURALISM AND PUBLIC LIFE: ABRAHAM KUYPER'S LEGACY FOR THE TWENTY-FIRST CENTURY* (Luis E. Lugo ed., 2000).

other—in the welfare office, at the school, at the hospital. This is a sacred piece of the American story and an element that must be included in any discussions of how we discern what is public and what is private.

PROFESSOR HARPER: I was asked only yesterday to participate in this forum because it was not clear that Floyd Flake was going to be able to make it, so Fordham Law School held a Floyd Flake look-alike contest, and I won.

In my professional life, I work on a lot of privatizations, most recently on two recent airport privatizations. But airport privatizations generally do not bring out high constitutional theory, except when one is using tax-exempt bonds to build an airport chapel. However, if you pray “to whom it may concern” in that chapel, there is no problem.

I am going to discuss what I now know are called FBOs. But first, I want to talk about three fundamental concepts, and then apply them to social services and education.

First, I do not think there is any conflict between—and this is maybe too theoretical a level—religion and science. Science deals with observable, measurable phenomena, tests hypotheticals for verifiability or falsifiability, and presupposes that matter is coextensive with the reality studied. Science is only the study of physical matter, and that is it. When science moves into a metaphysical presupposition—that matter is all there is—it begins to clash with the metaphysical presuppositions of most religions. Most religious groups believe that there is more to reality than matter. Most religious groups would concede to science the observation, measurement, and testing of material phenomena, but not the metaphysical presupposition that matter is all there is to reality. So the conflict between science and religion is not really a conflict between science and religion. Religious groups concede to science its primacy in observing matter. The conflict is between the metaphysical presuppositions that underlie the outlook of most of science and the outlook of most of religion. The First Amendment does not resolve these metaphysical presuppositions.<sup>91</sup>

Second, the meaning of the Establishment Clause is sometimes blurred in these discussions. It was originally intended to forbid the Congress from establishing a national church, but, at the same time, to forbid the Congress from disestablishing state churches that were established throughout many of the thirteen original col-

---

91. U.S. CONST. amend. I.

onies.<sup>92</sup> So the states had established churches at the time that the Establishment Clause was enacted.<sup>93</sup>

It was only seventy-five or one hundred years after the “Civil War Amendments” that the courts really began to use the Establishment Clause with the metaphor of separation of church and state,<sup>94</sup> and probably those who fought the Civil War would be surprised to learn that what they were really fighting over was whether or not there should be prayer in school or a wall of separation between church and state.

But even if you concede that the Establishment Clause now really means that one should not favor one religion over another, or religion over no religion, that is not to say that no religion should occupy the field completely. No religion is *not* neutral; it is simply a way of looking at the world. What we frequently find is that people believe that having a totally secular public square or public school is neutral. It is not neutral. It is a way of looking at the world, and it has its own metaphysical presuppositions as well. So it is hard for me to say that the Establishment Clause, if it is construed to be indifferent as to religion or no religion, really means that the public square should have no religion.

Third, in doctrinal developments recently in the United States Supreme Court, the shift has been from looking at the *nature* of the institution that is ostensibly getting government aid to the *criteria* for eligibility for the ostensible government aid.<sup>95</sup> Particularly in the education area, the Brennan Court looked at whether or not an institution was pervasively sectarian and was wary about giving aid or embarking on a government program that would result in assistance to a pervasively sectarian institution.

More recent constitutional developments, particularly led by Justice O'Connor, basically have concluded that neutrality with re-

---

92. *Id.* (prohibiting any law “respecting an establishment of religion”).

93. The Establishment Clause was ratified in 1791. Christian churches arrived with the earliest settlers, for example, the first British settlers established the Church of England in the 1607 colony at Jamestown, Virginia. J. GORDON MELTON, *THE ENCYCLOPEDIA OF AMERICA RELIGIONS*, VOL. 1 (1978).

94. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 305 (1963) (Goldberg, J., concurring) (stating that the Establishment Clause requires “that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief”).

95. *Agostini v. Felton*, 521 U.S. 203, 234 (1997) (articulating three primary criteria to guide the determination whether a government-aid program impermissibly advances religion: (1) whether the aid results in governmental indoctrination, (2) whether the aid program defines its recipients by reference to religion, and (3) whether the aid creates an excessive entanglement between government and religion).



spect to religious organizations and non-religious organizations, and neutrality of secular organizations that fall under the same 501(c)(3) class, is the test under the Establishment Clause.<sup>96</sup> Parochial schools were eligible for the use of government-funded computers in the most recent 6–3 decision at the Supreme Court, *Mitchell v. Helms*, last term.<sup>97</sup> Justice O'Connor believes that so long as eligibility for government assistance, government money, and government projects, is essentially neutral, one does not need to look to the nature of the institution as a criterion for eligibility.<sup>98</sup>

In the social service model, one can view the social service organizations as benefiting the government, not the other way around. This raises the constitutional question: should the government be funding or assisting FBOs? One could look at it as FBOs doing something for the public and look at it as a service contract model.

I think one could even look at educational institutions that way. Clearly, the parochial schools in New York City do an incomparably better job of educating the children in New York City than the public education system does. One wonders whether or not schools, such as the AME School System that Reverend Flake represents,<sup>99</sup> could do a magnificent public service by making their resources, talents, and skills available to the children of the City of New York. And that should be seen as a service *for* the public, rather than the other way around, *from* the public.

In addition to that, there are a couple of legal issues that are currently pressing. One is whether tax-exempt financing is available to parochial schools on the same basis that it is available to private nonsectarian schools.<sup>100</sup> Obviously, the argument is that they are. If the Spence School or the Chapin School or the Night-

---

96. *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 2 (1993) (holding that government programs that neutrally provide benefits to a broad class of citizens without reference to religion are not subject to an Establishment Clause challenge because a sectarian institution also receives a financial benefit); *Agostini*, 521 U.S. at 203.

97. 530 U.S. 793 (2000) (holding that Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 7301-7373, under which federal government distributes funds to state and local governmental agencies, which, in turn, lend educational materials and equipment to public and private schools, does not violate the Establishment Clause of the First Amendment).

98. *Id.* at 706 (O'Connor, J., concurring) (stating that "presumptions of religious indoctrination are normally inappropriate when evaluating neutral school-aid programs under the Establishment Clause").

99. For information on Rev. Floyd Flake's Allen African Methodist Episcopal Church, see <http://www.allennamechurch.org>. The 500 student Allen Christian School for elementary school children is affiliated with the church.

100. Jennifer Preston, *Investing in Future, States Spend More on Preschool Classes*, N.Y. TIMES, Mar. 21, 1998, at 35.

ingale School can finance their facilities through the issuance of tax-exempt bonds, why not St. David's?<sup>101</sup>

The other issue on the education front—and I think Reverend Flake will talk more about this—is the charter school movement.<sup>102</sup> Charter schools are public schools and they receive per-capita payments for the children they educate. At the moment, community-based organizations can get together and form charter schools. And, while there would be no sectarian instruction, very frequently the community-based organization has a facility that it can operate the charter school in and lease to the charter school the facility from 9:00 to 3:00. What goes on in the building outside of 9:00 to 3:00 is not an issue for the charter school. But I am sure Floyd Flake will have more to say about charter schools than I.

Thank you.

REVEREND FLAKE: Let me see if over the next few minutes I might be able to condense the discussion around the paradigm shift that is taking place, and in some instances has taken place, in public education as we know it. I will discuss what that shift means in relation to new models that are evolving for the delivery of educational services, how I see these new models having come about, and where I think these new models are taking us in the future.

I think most of us, as we have looked to the traditional public sector for delivery of education, almost have considered it sacrosanct, as it relates to the ability to do what it does within a traditional modality. This often has not been challenged even where there have been inequities in the service delivery system of the public sector, and inequities in its ability to have the proportionate funds for all children of all communities, races, and classes.

Over the years, I think we have seen an established pattern. That pattern often has denied access to quality education for all races and classes, in spite of various programs that have been designed to remedy inequity.<sup>103</sup>

There was the sense that one of the problems involved in trying to educate children in these unequal environments was that the environments themselves were intentionally created by government through laws resulting in de facto segregation, ensuring that certain

---

101. The Spence School, Chapin School, and The Nightingale-Bamford School are private prep schools in Manhattan. St. David's School is a Catholic high school.

102. See *infra* notes 120-122.

103. The Head Start Program is an example. For more information, see HeadStart's webpage at <http://www.nhsa.org>. For the history of magnet schools, see their webpage at <http://www.magnet.edu/history.html>.

children of certain classes would not be allowed to mix with others.<sup>104</sup>

And then we thought we had resolved the problem in the 1960s and 1970s by saying that if children mix with each other, perhaps all of them will be able to learn equally, only to discover that here we are, at the start of a new century, realizing that they are not learning equally.<sup>105</sup> Now we talk about “the gap”—the educational gaps, cultural gaps, achievement gaps.<sup>106</sup> In many instances, there are those who would suggest that the gaps are brought about by the fact that certain classes of people, certain races of people, do not really have the cerebral capacity or ability to acquire and to hold knowledge.<sup>107</sup> In other words, there is some kind of mental disfunctioning that defines a whole race and, therefore, members of that race are stereotyped as people who cannot learn.

As we begin to examine the gap, though, one of the things that becomes very obvious is that through kindergarten and generally into the first few years of public school, children of all races and classes, are generally equal in their level of sensory skills and

---

104. *Compare* *Plessy v. Ferguson*, 163 U.S. 537 (1896) (upholding “separate-but-equal” racial segregation); *with* *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (overturning *Plessy*, and stating that racial segregation “generates in [black students] a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone”).

105. *Columbus Bd. of Educ. v. Penick*, 443 U.S. 449, 455-58 (1979) (holding that “[p]roof of purposeful and effective maintenance of a body of separate black schools in a substantial part of the system itself is prima facie proof of a dual school system and supports a finding to this effect absent sufficient contrary proof by the Board”); *Keyes v. Sch. Dist. No. 1*, 413 U.S. 189, 208 (1973) (ruling that “a finding of intentionally segregative school board actions in a meaningful portion of a school system . . . creates a presumption that other segregated schooling within the system is not adventitious”).

106. *E.g.*, Mary Hurley, *School Report Shows Same Gaps*, BOSTON GLOBE, Mar. 4, 2001, at 8 (“The annual report on student performance in the Cambridge Public Schools shows a continuing *achievement gap* between white and middle-class students and those who are low-income and students of color.”) (emphasis added); Martha S. West, *Equitable Funding of Public Schools Under State Constitutional Law*, 2 J. GENDER, RACE & JUST. 279, 280-81 (1999) (“We must acknowledge the increasing economic and *educational gap* between our suburban white worlds and the impoverished worlds of the inner cities, where most African American and Latino students go to school.”) (emphasis added); GARY ORFIELD & SUSAN E. EATON, *DISMANTLING DESEGREGATION: THE QUIET REVERSAL OF BROWN v. BOARD OF EDUCATION* 53 (1996). *See generally* JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA’S SCHOOLS* (1991) (documenting the relationship between race, poverty, and inferior educational opportunities).

107. Kevin Brown, *Has the Supreme Court Allowed the Cure for De Jure Segregation to Replicate the Disease?*, 78 CORNELL L. REV. 1, 53 (1992) (arguing that the Supreme Court’s approach to school desegregation from the beginning was premised on the inferiority of African American children).

I.Q.s.<sup>108</sup> Something happens, however, to those children who are put into the public system.

In the system, suddenly it would appear that expectations are lowered. When I worked for the Head Start Program in Dayton, Ohio in the late sixties, many of our preschool students initially were tested as being competent at the second and third grade level in reading and math. By the time they got into public education and reached the second or third grade, they were still scoring at second and third grade level, because the system did not have the capability to absorb those students who did not fit in with the rest of the class. Rather than continuing to be ahead in their skills development, they became just like everybody else, because they represented too much of a challenge for a teacher with too-limited institutional resources to manage them.

Also, in kindergarten they generally had parents who walked them to school. By the time they got to second and third grade, there was not that continual kind of parental relationship. And, of course, when we look at preschool, we generally are looking at situations where there was more than one person in the classroom, so a teacher could give attention to other children because there were teacher aides available.

So now we are in this era of paradigm shifts, coming at the end of an era where most cities, like Boston and St. Louis, tried to solve the problem of the gap through busing and other desegregation programs.<sup>109</sup> I happened to be Dean of Students at Boston University at the time Judge Garrity issued the order in Boston for communities to integrate.<sup>110</sup>

As children boarded buses from their communities and went to other communities, they met with hostility and found themselves

---

108. Christopher Jencks et al., *The Black White Test Score Gap* (1998), <http://www.prospect.org/print/v9/41/jencks-c.html>.

109. The Metropolitan Council for Educational Opportunity in Boston created a busing program in 1966, which took 220 inner-city black children to schools in largely white suburban areas. SUSAN EATON, *THE OTHER BOSTON BUSING STORY* (2001). Court-supervised desegregation began in 1974, when the court found that the Boston School Committee had engaged in "affirmative acts [which] intentionally created or maintained racial segregation." *Morgan v. Hennigan*, 379 F. Supp 410, 427 (D. Mass. 1974).

110. Judge Garrity entered the decree in 1994, pursuant to instructions in *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987), which enjoined the School Committee "from discriminating on the basis of race in the operation of the public schools of the City of Boston and from creating, promoting or maintaining racial segregation in any school or other facility in the Boston public school system." *Id.* The provision operates as a negative injunction, forbidding the defendants from engaging in the acts that supported the original cause of action.

feeling a sense of isolation in their new environment. They, all too often, made a decision to withdraw and to retreat, even in the midst of that environment, by placing themselves in the back of the lunch-rooms and/or choosing their own dormitories when they entered college. They gave support to one another out of a feeling that the institution was not providing that level of support and security for them.

The challenges became so great that, in many instances, persons like myself, who had the challenge of trying to minister to or be dean of these students on these mixed campuses, had a responsibility and requirement of trying to make them understand that they made the choice to come to these institutions, and not historically black colleges or universities, which numbered about one hundred ten back in the 1970s. Therefore, they had to learn how to participate and function in this kind of environment. Many of them, of course, drifted away, because of the pressure related to assimilation, not because they could not compete academically. They did not get the kind of education that would have allowed them to be competitive, because they felt isolated.

Now we come to a time in which the various kinds of disappointment that are obvious in our communities and our society have brought us to a realization that homes, families, and communities are now destabilized, in large measure because certain races and classes of people do not have access to quality education.

I want you to understand that I am a tremendous proponent of public education, but I also deal with a certain reality as a community builder/developer, who is rebuilding communities through building homes and commercial strips. Immediately following the white flight of the 1960s and 1970s, there was a black middle-class flight into the suburbs, which left many black communities destabilized.<sup>111</sup> Without resources flowing to those communities, you are looking at deteriorated properties, with many cavities left over from the riots of the 1960s. There has been commitment to try to redevelop and save the communities.<sup>112</sup> And, even where development has taken place, there is still the out-migration, simply be-

---

111. *Milliken v. Bradley*, 418 U.S. 717, 744-45 (1974) (upholding a cross-district remedy, such as between a wealthier white suburb and a poor primarily black inner city, only where the acts of the state or local school districts "have been a substantial cause of interdistrict segregation").

112. Karen De Witt, *Suburban Expansion Fed By an Influx of Minorities*, N.Y. TIMES, Aug. 15, 1994, at A1 (noting that sociologists contend, "the departure of more affluent minorities to the suburbs from inner-city neighborhoods is simply adding to urban deterioration").

cause people realize that they are not going to get the quality of education for their child within that community.<sup>113</sup>

That kind of destabilization ultimately continues to drive out those persons who represent a viable possibility for an increased tax base and those persons who can make a significant contribution by being positive role models for a community. Those people often are no longer living, as I did, in a segregated community—next door to the doctor, or to the teacher, or worshipping in the same church as those people—because they have now moved from that community and left it behind.

So I came to the realization that if we are going to solve the problem, it has to start with education. Education is essential because it contributes to preparing people by giving them that key that opens the door to the possibility of competition and by providing a more stable family and community environment. So I see education evolving in several sectors and in several categories. First, you obviously have the traditional public system as we know it, which will educate or miseducate the masses of young people of color. There will always be a public system, because I do not believe we can replicate the system while garnering enough resources to replace it to adequately address the needs of enough young people.

So the challenge becomes: How do you change the public school system from within? I think that there are several things that can be done in terms of changing it from within. Many people react to them, but I think all of them have some merit and all of them, perhaps, have some measure of deficiency.

Obviously, we have seen the growth of the magnet schools.<sup>114</sup> The magnet schools in many communities have become the place where there is a major cross-pollination of persons, cultures, races, and classes, which allows them to be able to function in an environment together. I think it is a good movement. The problem is that there are not enough magnet schools to be able to take in all of those young people who seek to get into them.

---

113. *Id.* (“Members of minority groups, like others who choose to flee the cities, move to the suburbs for many reasons: affordable housing, better schools, lower cost of living and amenities like space and greenery. But most often, they say, they move to escape the violence and incivility associated with cities.”).

114. The Magnet School Assistance Program, created pursuant to the Elementary and Secondary Education Act (ESEA) of 1965, Title V, Part A as amended, 20 U.S.C. § 7201-7213, was appropriated \$105 million dollars in 2001. For more information, see <http://www.ed.gov>.

Second, I think there is a great emergence of home schools.<sup>115</sup> More and more each year, there are parents who are choosing to educate their children at home. It is partially an educational issue, but it is also partially a safety issue.<sup>116</sup> Parents feel more comfort in educating the child at home because they themselves have direct responsibility for the child's education. You cannot ask for more parental involvement than that. They are certain of what kind of environment that child is learning in. Furthermore, in the best situation, they have a level of quality control. This is a fast growing segment in the education marketplace.

Third, there are also many proponents of vouchers.<sup>117</sup> I looked very closely at the voucher movement, and I actually got involved in it in a large way, only to come to the realization that it, too, has its deficiencies, in that most jurisdictions do not give a voucher large enough to guarantee enough children a quality education. And those vouchers generally require additional resources that are not available to the particular families to which they are targeted. In a school like my own school, where we ask \$3,800 tuition per child, if you give them a \$1,200-to-\$1,300 voucher, it is not enough to cover the cost of their education.<sup>118</sup> Those who are pushing the voucher idea really do not understand that the differential generally cannot be made up by those families. And so, unless we can find programs like the Milwaukee one,<sup>119</sup> which I think is great, we cannot possibly hope to use vouchers as a solution. However, it may be a part of the solution, and it may help in some situations because some of these families will find a means to bridge the gap.

Lastly, of course, are charters.<sup>120</sup> I am a true believer in charters. I believe that charters represent one of the parallel tracks in the two-tier system that will ultimately emerge as the public education of the future. You will have traditional schools and you will have

---

115. See Committee on Education and the Workforce, Press Release, "No Child Left Behind" Education Bill, H.R. 1 (Mar. 22, 2001) (protecting home-schooling).

116. See Mindy Sink, *Shootings Intensify Interest in Home-Schooling*, N.Y. TIMES, Aug. 11, 1999, at B7.

117. The Institute of Justice, in Washington, D.C. is an example; Mary Morgan Edwards, *Lawyer Defends School Vouchers*, COLUMBUS DISPATCH, Nov. 22, 1996, at S.G. (stating that "[t]his is the only reform program that . . . gets kids out of failing schools").

118. See EDISON SCHOOL, FISCAL REPORT 2000-2001, <http://www.edisonschools.com>.

119. Adam Cohen, *Victory for Vouchers*, TIME, June 22, 1998, at 38 (discussing the extension of the Milwaukee school-voucher program to religious schools).

120. See CRAIG E. RICHARDS, EPI, RISKY BUSINESS: PRIVATE MANAGEMENT OF PUBLIC SCHOOLS 48-53 (1996) (describing recent movements in school reform).

charter schools. Charter schools give governance back to parents. Parents generally are sitting on the board of that particular school. Contracts are negotiated generally between school boards, parents, administrators, and teachers. Everyone is involved in the process of creating a contract, by which they all abide. They represent direct control, responsibility, and accountability.

Let me close with these words. Through my role at Edison,<sup>121</sup> our model is one in which we deal with charters and contract schools. We do that because we believe it is critical that as providers of public education, we must have a great deal of concern for humanity, the humanity of the teachers, workers, students, and the parents. So we negotiate with the union and involve the parents. We are not a company that says that "We are private and, therefore, we don't need a union, or the input of parents." We work best when all parties are in agreement.

We actually negotiate a contract that may be different from the traditional contract. It allows us to go into those schools and work with teachers, who have been in those schools for years, but may not have had the resources they needed because the public system could not provide them. We bring extra resources and try to assist in solving the educational problem.<sup>122</sup> Further, through that contract, we are able to ensure that teachers and parents still have an understanding that their rights are being protected. But our primary concern and the goal of the contract is protecting the rights of the child. These are services making up a good quality, equal educational opportunity.

I think that if we are serious as a nation about education, we must put the rights of the child before everything else we do. We must guarantee that every child gets a good education by all means necessary. When we do that, we will see future generations of our young people, regardless of race, regardless of color or culture, be better able to be competitive in this society. Thank you very much.

**PROFESSOR MASHAW:** We owe a great debt to our panel, both for the substantive matter that they have put on our plate and the discipline with which they did it. I will forgo the moderator's usual prerogative to torment the panel with an incisive question that demonstrates that, although I did not give a paper, I could have, and turn directly to questions from the audience.

---

121. Floyd Flake is the President of Edison Charter Schools.

122. Edison Schools is a publicly traded company (EDSN, common stock), and investment information is available at <http://www.corporate-ir.net>.



QUESTION: In thinking about privatization, it seemed a bit like you either had to be all privatization or all public, and it might well be the case that a little bit of privatization can go a long way. I was thinking of research, that suggests that some privatization has consequences far beyond the effect of just a small number of people involved. So my question to the panel is whether or not one might want to think in terms of some positive competitive effects of privatization without a gobbling-up effect of privatization.

REVEREND FLAKE: I think I can respond in one way. Particularly as it relates to education, I think that some measure of privatization within the system is essential, because of the unique ability of the private sector to raise capital and make investments. Public schools cannot tax more or get the kind of bond financing necessary to access the resources they need now or make the investments they need for the future.

I think the leveraging of public resources with private resources, in public/private-type partnerships—which is essentially what Edison does, either through contract or through charter—gives an opportunity for the public system alone to do what it could not do, in terms of jump-starting some of those low-performing schools. We believe that we can take more of those schools off of the S.U.R.R. list,<sup>123</sup> or whatever list they have in other states, and in so doing, we could enhance and give added value to what the public system is trying to do in education.

So I think we ought not be close-minded to the idea that public/private partnerships are a good idea and that these sectors can in fact work together.

QUESTION: I just have a question on the move to privatize some of education. You said that parents would have a greater role in charter schools based on the agreement that they forge. This may be compared to the role of the shareholders of the private organization, which exists to make a profit. So how do you reconcile that, specifically in education and then in other fields, where you are trying to provide a service to help people or to provide effective education, but yet you also have to make money?

---

123. Schools Under Registration Review (S.U.R.R.) is a state watchlist for schools that fall below certain benchmarks on state-wide exams. 8 N.Y.C.R.R. § 100.2(p)(4). Once on the S.U.R.R. list, a school has three years to improve. 8 N.Y.C.R.R. § 100.2(p)(5)(iii)(v). If a school does not improve within this time, the commissioner “shall recommend to the Board of Regents that the registration be revoked.” *Id.*

REVEREND FLAKE: I do not think that there necessarily has to be a dichotomy between profit and product. When I look at what is happening in public education and I look at the number of dollars that are available, the largest percentage of services are not what you would call public services. Those services are provided by private entities already. Whether that is from toilet paper to meat in the cafeteria to books, most of those services are provided by some private entity.

The difference, I think, is in large measure the ability for a private entity to go to the marketplace. As long as the market has some comfort in what that entity is doing, that entity then has more resources to put in than the Board of Education itself could ever generate.

Now, my position is simply this. New York City has a \$11–13 billion public education budget.<sup>124</sup> If you are going to spend \$13 billion anyway and in the public system there is a large number of persons who do not feel satisfied with the product they are receiving, but you spend the same \$13 billion on someone who *can* provide the product and still make a profit out of it, you have not lost anything. What, in fact, has happened is you have actually used the same dollars better. If an Edison comes in, for instance, and we make a contract with the Board of Education—say it is the whole school district—then we get the \$13 billion. They put \$54 in every classroom and we put \$79, so we get a better product out of that \$13 billion in the end. Whether or not the public system got it or whether we got it, if you cannot get any more dollars and you've got a better product, that is what ought to be the final determination of whether this is workable.

But my argument is still public and private together. One does not necessarily negate the other. I think they can work together and you can find that profit margin right within the dollars that are already there.

MARK WARD:<sup>125</sup> Given the theme of the conference as to accountability, and the diversity of the current panelists, there seems to be a desire, at least among some, to extend the same rules of the game with respect to accountability to all participants, be they public providers, not-for-profit, or for-profit. In doing some scratch thinking, it seems that perhaps there are three elements in an ac-

---

124. IND. BUDGET OFFICE OF N.Y. CITY, ANALYSIS OF THE MAYOR'S PRELIMINARY BUDGET FOR 2001, EDUCATION (2001), [http:// www.ibo.nyc.ny.us](http://www.ibo.nyc.ny.us).

125. Mark Ward works for the United States General Accounting Office.

countability, oversight, and enforcement system that might be comprised of certain policies with regard to efficiency and effectiveness—certain key organizations, including attorneys general, program managers, inspector generals, and the like; as well as certain practices with regard to reporting, sanctions, and incentives—and the whole evaluation community.

Again, if we are interested in applying the same rules of the game and holding all entities accountable for efficient and effective services, from your perspectives, which one or more of those elements, if not all of them, would be applicable to government providers, for-profits, or not-for-profits? Should everybody, in fact, be pulled into or under the same umbrella for accountability; and, if so, what elements would be common to all?

PROFESSOR MASHAW: Do we have any takers on that?

PROFESSOR DONAHUE: I will give it a stab. That, of course, is an enormous question, as you know. One important thing is picking the right services to privatize. Pick the things that you can delegate. Those are defined mostly by whether it is very easy to ask for what you want. Where performance is relatively easy to measure—you know if you've got it—and where you care about the result and not the means by which it is produced, the privatization decision is easier, as it is if you are willing to brush off, or otherwise resolve, the questions about the public work force. Then you can focus on the outcome, and ask if you have performance or not. Then you can dispense with a lot of the process measures.

Now, is that often the case? I would say sometimes it is in some important categories, but, by and large, it is not. Usually, you have to get more aggressive accountability measures. They generally will be different, however, when you are dealing with private organizations and public. The goals will be the same. The means of achieving the goals of accountability will often be different, reflecting the different organizational form.

MR. RIEMER: I wonder if from a legal perspective any of the panelists see a distinction between charitable choice and voucher choice in terms of the constitutional framework for what government does? In charitable choice, government is actually picking a particular religious organization over another one. You might put out an RFP to provide day care services and say it is okay if you include within them religious instruction, and then the Jews, the Muslims, the various Christian denominations come in and you pick one that you like. How do we know whether the deci-

sionmaker's preferences or dislikes for religion in general or a particular religion were not a factor in the decision?

Whereas in the voucher choice program, you might give \$5,000, or whatever the dollar amount is, to parents to decide to go to a school of their choice; *they* make the decision about the religion. Or if it is child care, they make the decision about whether they want religion or nonreligion as part of their child's background in the child care center or in the school. The government does not play a part in that decision. Is that an important distinction constitutionally, as the Supreme Court has evolved the theory, or not?

The second part of the question is: In terms of accountability and what government should do in holding these arrangements accountable, does it make a difference whether, in essence, the bureaucrat picks the vendor based on perhaps the bureaucrat's preferences or lack thereof in the area of religion, versus the parent making the decision with government money?

PROFESSOR MASHAW: Gene, you get the first part and the other panelists gets the rest.

PROFESSOR HARPER: Well, as you probably know, the Sixth Circuit Court of Appeals invalidated Cleveland's voucher program,<sup>126</sup> but my own view is that it is pretty certain that the Sixth Circuit will be reversed. So I have no problem with vouchers. In terms of a bureaucrat's decision about which sect would provide services that are being provided by religious organizations, I think that is a problem. I would like to push that decision back to the consumers of the service so that they would choose which group to seek the service from.

MR. RIEMER: I understand that. But what if the structure of the procurement was such that the bureaucrat was picking one vendor over another?

PROFESSOR HARPER: Well, not on the basis of sectarian criteria. You just do not trust a person who is religious not to make his decisions based on his religious preferences. Is that basically the question?

MR. RIEMER: No, no.

PROFESSOR HARPER: Maybe Ms. Baker could answer.

MS. BAKER: I think that what is more likely to happen is that if it is a real charitable choice process, there is an RFP that is re-

---

126. See *Simmon-Harris v. Zelman*, 234 F.3d 945 (6th Cir. 2000).

leased, several groups apply, and then the best providers are picked, the best faith-based service providers. The real question is: In any given region, will you have the diverse representation of faith groups that have institutions that have the capacity to apply for something like this? So will there be contracts given to a Muslim place, a Hindu place, and many different denominations of Christian, and then the choice, in terms of welfare services, is supposed to be the welfare recipient's choice? They may be told by their caseworker to see such-and-such a faith-based organization, but they do not have to. They could go to a secular provider or a provider of their own faith. But do those options actually exist? That is one real issue.

PROFESSOR HARPER: I think that limiting to secular organizations the ability to do this probably does not cut, because you are picking one particular world view and saying "that is the world view that is neutral."

MR. DAVID RIEMER: I do not think I have been clear enough. I support the rule of choice and I wrote an amicus brief in the Wisconsin Supreme Court in favor of that.<sup>127</sup> The virtue of that is that the vendors can be any vendors and the consumers can pick anything they want.

My concern is this. You put out an RFP, you get ten organizations that come in, and at the end of the process the government picks five of them. Yes, there are Muslims; yes, there is the Reformed Jewish organization, but not the Orthodox one. The contracting organization gets the message from the Episcopalians, the Baptists, the Catholics, and the Lutherans, and now you have all these choices. And also there are some non-sectarian choices, but a whole bunch of religious choices were excluded by the bureaucrat. Someone then comes in and challenges that on constitutional grounds, on the grounds that, although they said they used *non-religious* criteria in picking the winning vendors, they are doing that—using religious criteria. One of the reasons why the vendor list was narrowed is based upon allegedly religious criteria. Now we get ourselves tied up in complex constitutional issues.

PROFESSOR MASHAW: I know that there is behind that statement a question of the form "what do you think of that?" But,

---

127. See *Jackson v. Benson*, 578 N.W.2d 602 (Wis. 1998).

while the subject matter has not been exhausted, the time of this panel has been exhausted. So we should thank the panel and continue our discussions afterwards.

