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With Whose Hands: Privatization, Public Employment, and Democracy

Craig Becker*

Privatization is the public sector analogue of the "runaway shop." In the private sector, the increasing mobility of capital has spawned unprecedented forms of labor discipline by allowing firms to transfer operations between states and even to foreign countries. Privatization—diverting work from the public to the private sector—serves a similar purpose. Both privatization and capital flight enable employers to continue providing services or producing products while shedding a web of existing obligations to their employees. In the public sector, however, the rights of labor are coextensive with legislative and constitutional guarantees of fair, open, and vigorous government. The trend toward privatization amounts to a deliberate effort to evade the rules and procedures intrinsic to democratic government.

This Article opens by arguing that privatization is not a coherent social policy but instead a labor relations strategy designed to cut labor costs by circumventing the rights of public employees. Examining the links between the rights of civil servants and democratic government, it demonstrates that principles of openness, merit, and independence, which are enunciated in civil service laws and also guaranteed by the Constitution, are essential to the administration of a democratic state. By annulling the rights of public employees, the Article concludes, privatization may give rise to a more tractable workforce, but one ill-suited to carrying out public policy in a democracy.

I. Privatization As Labor Discipline

Privatization is fundamentally a labor policy: an overt challenge to public employment defended in the language of efficiency. Whether its proponents marshal cost-benefit statistics or speak of utility-maximization, privatization merely substitutes one set of

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hands for another. This substitution has profound implications. It removes the relationship of employer and employee from one sphere of regulation, consisting of civil service laws and constitutional restraints, and places it within another, governed by the rules of the marketplace, as well as the provisions of the National Labor Relations Act and other statutes applying to private employment.

Those who endorse privatization discount the right of private employees to organize, bargain collectively, and strike. Public employees, in contrast, have a constitutional right to organize, yet only 26 states and the District of Columbia have enacted legislation providing for collective bargaining. And only nine states have affirmatively granted their employees a right to strike. The underlying presumption of arguments for privatization is that workers in the private sector will remain unorganized. In the public sector, however, the prerogatives of workers are not achieved solely by organizing and collective bargaining. To the contrary, their peculiar rights in the workplace—which privatization is designed to eliminate—attach to their status as government employees.

In 1977, the Wisconsin Supreme Court rejected the proposition that privatization "represent[s] a choice among alternative social or political goals or values." The case concerned the duty of a school district to bargain with its employees about the contracting-out of food services. The court found that "the policies and functions of the district are unaffected by the decision. . . . The same work will be performed in the same places in the same manner." In the court's opinion, the principal consequence of privatization is that it "substitute[s] private employees for public employees." Although the school district contended that contracting-out work was a question of public policy committed to the exclusive discretion of the state,

5. This assumption is firmly based on recent experience. Between 1956 and 1978, union membership grew only 1% among private employees while expanding 296% among public workers. Developments in the Law—Public Employment, supra note 4, at 1615.
7. 259 N.W.2d at 732.
8. 259 N.W.2d at 732.
the court held that contracting-out primarily affected the terms and conditions of employment and therefore fell within the purview of collective bargaining.

Few public employers or advocates of privatization have fully explicated its significance for labor relations in the public sector. However, in *The Unions and the Cities*, which remains the most articulate and far-reaching critique of collective bargaining in the public sector, Professor Harry Wellington and Judge Ralph Winter expressly recognize that privatization constitutes a fundamental restraint on the power of organized labor in the public sector. Wellington and Winter underscore "the value of interposing a private employer." While acknowledging that "[i]n no circumstances will government shed its labor problems by shedding functions," they nevertheless assert that "contracting out, all other things being equal, is preferable to retaining a function that has been unionized." In their view, privatization effectively counters the disproportionate power that organized labor allegedly exerts in the public sector.

In several instances, public employers have contracted-out services with clear anti-union animus. In 1977, for example, janitors at Mt. Anthony Union High School in Vermont began to organize. The local school board had considered, but rejected, the idea of contracting for custodial services just two years earlier. But once the "union sought recognition," the Vermont Supreme Court found, "the idea was quickly . . . put into effect." The school board, moreover, abandoned its prior position that a 60-day trial contract was necessary and instead let the contract for a full year. The contract began in the middle of the school year and five of six employees known to be involved in the organizing activity were discharged. The Vermont Labor Relations Board found this action to be an unfair labor practice "inherently destructive" of employee rights and ordered the employees reinstated.

Most who advocate privatization, however, have neither stated its labor relations objectives as starkly as Wellington and Winter nor acted with the heavy hand of the Mt. Anthony School Board. None-

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10. Id. at 62 (capitalization and italicization deleted).
11. Id. at 65.
12. Id. at 62.
13. See infra text accompanying notes 21-25.
15. 396 A.2d at 125.
16. 396 A.2d at 124.
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theless, the standard rationales for privatization—improving efficiency and eliminating red tape—reduce to cutting labor costs. These rationales counterpose "efficiency" and "bureaucracy," which is portrayed as the dreaded bogey of public administration. "Government is inherently wasteful," contends Donald Hutto, the vice-president of Corrections Corporation of America, the nation's largest private provider of custodial services. "Every time you want something, you have to go through a complex political process."17

Figuring out from whose pocket the savings from privatization will be clipped is not a complex calculation. Like all service industries, government is labor intensive. Collecting garbage, guarding prisoners, dispensing welfare, cleaning, shelving, filing, and most other governmental functions require the work of many hands. Personnel costs in state and local governments account for 70-90% of total expenditures.18 Any substantial savings from providing government services privately will necessarily result from reducing labor costs.

In 1984, for example, National Medical Enterprises contracted with St. Louis, Missouri, to manage the city's hospital and clinics. The private operator promptly discharged the entire workforce to eliminate all accrued benefits, cut jobs, and break the union.19 In other cities, National Medical Enterprises has cut the percentage of registered nurses on staff from 40% to 25% and replaced them with lower-paid aides and other unlicensed personnel.20

Threats of privatization also have been used to exact concessions from public employees. Louis A. Witzeman, chairman of the board of the private fire-fighting company, Rural Metro Fire Department, complains, "[I]f I had a dollar for every time somebody in city hall put out a bid or started talking about private fire services and strung me down the primrose path while all he was really doing was trying

20. Id. Similarly, private security guards—representing one of the main labor pools from which private prisons presumably would draw their employees—are paid 15% less than public prison guards, and private guards are less likely to be high school graduates, to work full time and year round, and to be of prime working age. J. Donahue, Prisons for Profit 15 (1988).
George Latimer, mayor of St. Paul, Minnesota, put the issue bluntly, "Private contracts act as good discipline on our own operations." In Newark, New Jersey, one-third of the city's sanitation services were contracted-out to a private firm. "It's amazing what a little competition will do," noted Mayor Kenneth A. Gibson, while also adding that he planned to increase the private share of sanitation work to two-thirds.

One study found that from 1965-68 management threatened to contract-out during 16 local government strikes and that the threats were implemented to end five of the disputes. President of the National Treasury Employees Union, Robert M. Tobias, charges that the federal policy of relying on private providers is "being used not as a management tool to make reasoned, prudent judgments in the process of governing but as a political club to bludgeon the Federal Government workforce."

As well as cutting costs, its advocates argue, privatization circumvents cumbersome public regulations. As a procurement specialist with the General Services Administration contends, "the contractor has a flexibility that the government does not have to do the job." Central to the regulations governing public administration, however, is a set of carefully constructed civil service laws that guarantee employee selection and advancement in accordance with merit and also protect public workers from arbitrary and oppressive treatment. Civil service rules govern the entire range of personnel practices, including hiring and promotion, as well as detail, discipline, and discharge. These rules have been harshly attacked in the President's Private Sector on Cost Control's Report on Privatization, and evading them has been a major catalyst in the trend toward privatization. "[G]overnmental-run operations," the President's Report finds, "are constrained by regulated 'safeguards' that inhibit a manager's freedom to manage, such as Civil Service regulations governing personnel pay and dismissal." It is precisely such "inefficient Govern-

21. Public Services and the Private Alternative, Gov't Union Rev. 44 (special ed. 1982).
23. Id. at D17, col. 4.
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ment policies and practices," the Report suggests, that could be "corrected via privatization." 28

II. Rights of Labor and Democracy

Political and legal restraints on government administrators can be labelled inefficient only by equating the purpose of public administration with that of private business. Indeed, this is the key premise underlying arguments for privatization: The state should function like any corporation, and the laws of the market should prevail in government administration. Governed by these principles, private companies have moved from providing services at the periphery of government, which may be characterized as commercial, to assuming core public functions. 29

The gradual privatization of corrections exemplifies this trend. Private firms initially assumed merely ancillary functions within public prisons, ranging from job training to meal preparation; 39 states and the District of Columbia currently contract for such services. 30 Simultaneously, the private prison business developed in institutions where the lines between punishment and care, deviance and dependence are blurred; hundreds of halfway houses for prisoners are now managed by private groups. According to the Justice Department, six states have contracted with private firms to operate juvenile detention facilities. 31 Expanding the reach of their authority, private operators just recently have begun to exercise the sovereign power of punishment. The federal government spends $21 million a year to house 3,200 inmates, largely illegal aliens, in 300 private institutions. 32 And approximately 1,200 adult citizens now are held in secure correctional facilities run by private jailers. 33

Advocates of privatization affirm the universality of management principles developed in the private sector. According to John King,

28. Id. Dissenting in In re Local 195, IFPTE, AFL-CIO, Justice Daniel J. O'Hern made a point of noting that "troublesome efforts to comply with the rules and regulations of the Civil Service Commission may encourage some to seek alternative means to deliver state services." 443 A.2d 187, 207 (O'Hern, J., dissenting in part and concurring in part).


31. Id.

32. Id.

former secretary of the Louisiana Department of Corrections and a strong supporter of commercial convict labor, "the principles of management are the same whether you're making chocolate chip cookies or incarcerating people." E.S. Savas, a former member of the Reagan administration, argues that government should withdraw from providing child care and predicts that private enterprises will meet the need. He speculates hopefully that "one can even imagine McDonald's starting a franchise day-care business."

King and Savas, as well as other publicists of privatization, suggest that rolling dough and guarding inmates, flipping burgers and raising children, all should be governed by the same set of principles. However, the Supreme Court expressly and repeatedly has rejected the premise that government operates like a private corporation. In Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, Justice Potter Stewart held for the Court that "state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer." Both the Constitution and civil service laws restrain the authority of the state as employer, and these restrictions protect the public as well as its employees. Privatization purports to promote efficiency, but only by stripping civil servants of freedoms essential to the administration of democratic government.

A. Civil Service Laws: Openness, Merit, and Independence

Justice William O. Douglas termed the civil service system "'the one great political invention' of nineteenth century democracy." The Pendleton Act of 1883 first introduced a merit system into federal law, providing the basis for the current web of civil service regulation. New York and Massachusetts adopted the merit principle in 1883 and 1884, respectively, and seven other states followed by

35. Mr. Savas was Assistant Secretary of Housing and Urban Development until, confusing public and private, he used his staff to type and proofread his book and appointed a panel that awarded a contract to a firm that had paid him $33,000 in consulting fees. Travel, Reimbursements and Perquisites, Wash. Post, Apr. 27, 1986, at A12, col. 3; Inside: Housing and Urban Development, Wash. Post, July 18, 1983 at A11, col. 1.
36. E. Savas, Privatizing the Public Sector 120 (1982).
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the close of World War I.40 Today, the vast majority of federal employees are in the classified service,41 and all states have adopted some form of civil service system,42 many guaranteeing the merit principle in their state constitutions.43 By 1970, approximately 85% of all public employees occupied classified positions.44

1. Principles and Goals of Civil Service Laws Historians differ in their assessments of the motives and accomplishments of early civil service reforms. Some agree with Justice Douglas and root them in a democratic impulse.45 Others find they were designed to ensure government by an elite cadre of experts and thereby to curb urban ward bosses and their immigrant constituencies.46 Notwithstanding the contradictory purposes in which they originated, however, civil service laws now extend beyond an elite corps of public officials, providing job security to secretaries, custodians, and garbage collectors. Moreover, women and minorities have tended to find jobs in the civil service more readily than in the private sector.47 Thus, the significance of civil service principles in the late twentieth century cannot necessarily be identified with the concerns animating the creation of the administrative state.

Today, civil service laws establish two central requirements: (1) appointment and promotion must be in accord with merit and fitness and (2) discharge may only be for just cause. These restraints not only prohibit the "spoils system," which awards jobs on the basis of political fealty,48 but also embody a set of positive principles of public administration. These principles are openness,

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43. See, e.g., N.Y. Const. art. 5, § 6.
47. See infra text accompanying notes 49-50.
48. Indeed, if this were the sole purpose of civil service laws, they would have been rendered largely superfluous by Elrod v. Burns, 427 U.S. 347 (1976), which held that patronage dismissals trespass on the first amendment.
merit, and independence. Privatization of public services is incompatible with each of these ideals.

Civil service laws guarantee that vacancies in government are publicly announced, qualifications are clearly articulated, application is open to all, and selection is according to objective criteria. The commitment to openness in the civil service is designed to ensure that it will be representative of the electorate. Although merit is difficult to define and harder to measure, the system of examinations and qualification standards required by civil service laws provide some assurance that the public business is not delegated simply to workers of a particular color, workers who have given something in return, or workers willing to accept the lowest wage. Private contractors are barred from engaging in certain types of discrimination, but they remain relatively free to hire through a closed and private process. It is not surprising, therefore, that government service opened an avenue to secure and well-paying jobs for women and minorities, while the doors to the corporate boardroom remain closed.

In 1980, 27.1% of black workers were employed by government, as compared with 15.9% of white employees. Black employment in the public sector is even more pronounced at the higher levels of government. Fifty-three percent of all black managers and professionals are in the public service in contrast to only 29% of whites. 49 Similarly, women have found unique opportunities in government service. Only 16% of working men are employed in government, while 21% of working women are employed there. Fifty-five percent of all female professionals are civil servants, compared with only 35% of male professionals. 50 Public employees, then, are more


50. Dantico & Jurik, Where Have All the Good Jobs Gone? The Effect of Government Service Privatization on Women Workers, 10 Contemp. Crises 421, 426 (1986). Women and minorities also are better paid in government than they are in the private sector. Adjusting for skill, the federal government pays white women 20% more than private industry. Minority women are paid 30% more. Id. at 426. In addition, unions of public workers represent a high percentage of women and minorities. For example the American Federation of State, County & Municipal Employees, AFL-CIO is 51% female and 17% black. Interview with William Wilkinson, Labor Economist/Information Specialist, American Federation of State, County & Municipal Employees, AFL-CIO, March 8, 1988. Correspondingly, these unions have always been in the forefront of the struggle for equal employment opportunity. The United Federal Workers of America, CIO, formed in 1937, was the first national union to be headed by a woman, Eleanor Nelson. Hanson, United Public Workers: A Real Union Organizes, in The Cold War Against Labor, Vol. 1, 172, 175-76 (A. Ginger & D. Christiano, eds. 1987). After the Federal
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representative of both the racial and gender composition of the workforce than are employees in private business.

Because the civil service does not simply execute, but also interprets and initiates policy, this "representative bureaucracy" is a critical element of a functioning democracy. According to political scientist Norton Long, "the bureaucracy is not just an instrument to carry out a will formed by the elected Congress and President. It is itself a medium for registering the diverse wills that make up the people's will and for transmuting them into responsible . . . public policy." Furthermore, the composition of the civil service "symbolize[s] values and power realities" and thereby influences practices in private business. When federal agencies, for example, segregated black and white employees under presidents William Howard Taft and Woodrow Wilson, segregation in housing, employment, and public accommodations also increased notably in the District of Columbia. Consequently, it is a profoundly disturbing sign that Equal Employment Opportunity officers in many federal agencies have already witnessed an adverse impact on minority employment resulting from contracting-out. A recent study of privatization's effect on women workers suggests that because of greater subjectivity in hiring and promotion procedures, privatization may contribute to a stabilization or increase in the gender, racial, and ethnic segregation of occupations.

51. J. Donald Kingsley coined this term in Representative Bureaucracy (1944). See also S. Krislov, Representative Bureaucracy (1974).

52. Long, Bureaucracy and Constitutionalism, 46 Am. Pol. Sci. Rev. 808, 810 (1952). Long goes so far as to argue that the civil service is "more responsive to the desires and needs of the broad public than [legislators] whose responsiveness is enforced by a mechanism of elections that frequently places more power in the hands of campaign-backers than voters." Id. at 813. But see Subramaniam, Representative Bureaucracy: A Reassessment, 61 Am. Pol. Sci. Rev. 1010 (1967).


56. Dantico & Jurik, supra note 50, at 429.
Once hired, public employees acquire job security under civil service laws and therefore a degree of independence. Civil servants can be terminated or otherwise disciplined only for just cause, that is, only for misconduct affecting their job performance; they do not serve at the pleasure of their employers. In theory, such independence promotes fidelity to law rather than loyalty to superiors. A civil servant cannot be discharged for insubordination based on his or her refusal to obey an unlawful order. The civil service system thus fortifies the democratic process, guaranteeing that changes in public policy can be secured solely through legislative action rather than by altering the identity of those who administer the laws. In the private sector, however, most employees may be discharged at their employer’s will, with the exception of those covered by collective bargaining agreements. Two centuries ago, Thomas Jefferson pointed out that, “[d]ependence begets subservience and venality,” impairing the “vigour” necessary to republican government. Since the discretion of workers in private business may be compromised by the insecurity of their employment, they are no substitute for an independent civil service.

The tension between privatization and the civil service system is reflected in Office of Management and Budget (OMB) Circular No. A-76, the leading statement of federal support for privatization. The “general policy” of the federal government, according to the OMB circular, is “to rely on commercial sources to supply the products and services the Government needs.” Yet the circular also states that contracting-out will not be used to “justify departure from [civil service] law[s] or regulation[s] . . . [or] for the purpose of avoiding established salary or personnel limitations.” These stated intentions—diverting public functions to commercial enter-

58. Although exceptions to the employment-at-will rule are developing in many jurisdictions, most unrepresented workers in the private sector can still be fired for any reason not specifically prohibited by law or for no reason at all. See generally W. Holloway & M. Leech, Employment Termination (1985); H. Perritt, Jr., Employee Dismissal Law and Practice (1984); L. Larson, Unjust Dismissal (1987).
59. T. Jefferson, Notes on the State of Virginia 165 (W. Peden ed. 1954). Jefferson was concerned with the link between ownership of property and the rights of citizenship. In an age in which “more and more of our wealth takes the form of rights or status rather than of tangible goods,” however, Charles Reich more recently argued, it is necessary to create a “new property” consisting of enforceable rights and entitlements—such as those contained in civil service laws—to fulfill the function once fulfilled by property and to safeguard the independence and integrity of individual citizens and public servants. Reich, The New Property, 73 Yale L.J. 733, 738, 787 (1964).
61. id. at § 7(b)(6).
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prise while also safeguarding civil service regulations—are plainly inconsistent.

2. Civil Service Law v. Privatization in the Courts  The conflict between privatization and civil service law has been carried to the courtroom and underscored in several key rulings. In 1937, in one of the earliest cases, the California Supreme Court refused to compel the state comptroller to compensate an attorney who represented a state agency under contract.62 The court found the contract inconsistent with the guarantee of a civil service system contained in the state constitution as well as with the statute creating the system.63 Holding that the civil service provisions were "comprehensive" and meant to apply to every state employee not expressly exempted,64 the court concluded:

There undoubtedly is a field in which state agencies may enter into contract with independent contractors. But the true test is, not whether the person is an "independent contractor" or an "employee," but whether the services contracted for, whether temporary or permanent, are of such a nature that they could be performed by one selected under the provisions of civil service. If the services could be so performed, then in our opinion it is mandatory upon such appointing power to proceed in accordance with the provisions of the Constitution and statute. . . . Any other construction of the constitutional provision would have the effect of weakening, if not destroying, the purpose and effect of the provision.65

The inconsistency between privatization and civil service requirements was recognized in the late 1970s by the Washington Supreme Court.66 In Washington State Federation of State Employees, AFL-CIO v. Spokane Community College, the court held that a community college's contract for custodial services "directly contravene[d]" the "basic policy and purpose" of the state's Higher Education Personnel Law.67 While accepting the college's contention that its plan would cut costs, the court countered that "the civil service laws embody a determination that the interests of the state are best served by a system of merit selection of personnel"68 and that "[a]n anticipated or real savings in cost cannot be a basis for avoiding the policy and

63. 69 P.2d at 989.
64. 69 P.2d at 989.
67. 585 P.2d at 477.
68. 585 P.2d at 477-78.
mandate of civil service laws." Absent a "showing that civil servants could not provide ... [the] services," the contract was held to be void.

Three years ago, the Ohio Supreme Court found that Ohio State University could not impose a hiring freeze—reducing its classified workforce by attrition—while simultaneously contracting for private provision of services previously performed by civil servants. Like the Washington court, the Ohio court identified, but flatly rejected, the economy rationale, finding instead that preserving the civil service was of paramount public concern. "While it is true that the university is seeking, and succeeding in, the cutting of costs by contracting out custodial services, in so doing it is insidiously accomplishing another goal which is totally at odds with the purposes of the civil service system." Foreseeing the long-term effect of privatization, the court predicted:

Slowly and inevitably, the civil service system is eroded and ultimately, eradicated entirely. The result is that the university obtains a free hand to let out all services on a contract by contract basis without any moderation or restriction by the civil service system. ... [T]he laudable purpose of the civil service system is sidestepped completely.

A civil service law treatise summarizes the principle embodied in these holdings: The "general rule is that public services are to be performed whenever practicable by public employees. Neither a private individual nor a firm may be hired to perform the normal and routine duties of a public agency."

69. 585 P.2d at 478.
70. 585 P.2d at 477.
72. 466 N.E.2d at 914.
73. 466 N.E.2d at 915. This holding was subsequently limited in Communications Workers of America (CWA), Local 4501 v. Ohio State University, 494 N.E.2d 1082 (Ohio 1986). In the latter case, the Court recognized that between the times the two cases arose, Ohio's public employees had obtained the right to engage in collective bargaining. See Ohio Rev. Code Ann. §§ 4117.01 et seq. (Anderson 1984) (effective Apr. 1, 1984). The court found the practice of contracting-out for services previously performed by civil servants to be a mandatory subject of bargaining and that "[c]ivil servants, themselves, are thus in a position to 'protect' the civil service system at the bargaining table." 494 N.E.2d at 1086. Based on this premise, the court limited its prior holding to those "rare instances in which the civil service positions affected by the hiring freeze are (or may be) filled by public employees who have no statutory right to collective bargaining agreement." 494 N.E.2d at 1087.
Other courts, however, have attempted to accommodate government administrators' keen interest in contracting for services within the framework of civil service law. Such contracts violate civil service laws, these courts have ruled, only if they involve functions fulfilled by existing civil servants or result in replacement of such employees. In *California State Employees Association v. Williams*, the California Court of Appeal rejected a "nature of the services" test, which holds contracts unlawful unless it can be shown that the tasks could not be performed by civil service personnel, and instead engaged in a "functional inquiry." According to the court, contracts for services are valid, "if the services cannot be adequately rendered by an existing agency of the public entity or if they do not duplicate functions of an existing agency." The court thus held that civil service laws do not restrict the means by which the state can perform a new function. Civil service requirements, the court found, impose "no demand for achieving expansions of state function exclusively through the traditional modes of direct administration." Civil service law, the court continued, "compels expansion of civil service with expansions of state agency structure but does not force expansions of state agency structure to match expansions of state function."

The court reached this equivocal accommodation only by finding that the sole aim of a merit system is the "protection of the existing civil service structure." The court denied that the state constitution's civil service provision sets forth "a principle of public administration" or "an organic blueprint for the structure of agencies within the state's executive branch." But the assumption that civil service laws are designed simply to preserve the state in its existing form is untenable. For as demonstrated above, the requirements of a merit system plainly were intended to serve as the guiding principles of public administration. Moreover, the laws contain no temporal qualifications distinguishing existing positions from future state functions. Civil service laws are indeed a "blueprint" for carrying out the public's business whether old or new.

76. 7 Cal. App. 3d at 396-97.
77. 7 Cal. App. 3d at 397.
78. 7 Cal. App. 3d at 399.
79. 7 Cal. App. 3d at 397.
80. 7 Cal. App. 3d at 397. (emphasis added).
81. 7 Cal. App. 3d at 397-98.
82. *See supra* text accompanying notes 45-59.
Even more narrowly circumscribing the scope of civil service laws, other courts have held that contracting for services transgresses the laws only when it represents a direct attempt to "thwart" the civil service system.\textsuperscript{83} These courts have required that in order to prevent contracting-out, plaintiffs must come forward with proof of defendants' "bad faith" or intent to "circumvent the purposes of the civil service system" and reinstate the "spoils system."\textsuperscript{84} According to these courts, a public employer whose sole motive is economy acts in "good faith."\textsuperscript{85}

Yet, in most instances, the efficiency gained through contracting-out follows directly from escaping civil service restrictions. The courts' unwillingness to recognize this fact is illustrated by University of Nevada v. State of Nevada Employees Association.\textsuperscript{86} In this case, the Nevada Supreme Court held that the university could contract for food services if it acted "in good faith . . . for substantial rather than arbitrary or capricious reasons."\textsuperscript{87} The court went on to specify that "no such action can be justified by reference to supposed advantages derived from eliminating tangible or intangible emoluments which Nevada law intends classified state employees to have."\textsuperscript{88} Having formulated this coherent test, however, the Nevada court failed to apply it rigorously. Citing the private provider's "free choice of methods" in all areas from employment practices to accounting procedures, the court merely asserted that "eliminating civil service status for employees" was not the primary motive behind the contracting-out.\textsuperscript{89} The court made no real inquiry into the relative importance of freeing the contractor from the restraints of civil service law in achieving the economy that was the express justification for contracting-out.

All these efforts to square privatization with the principles of civil service rely on an increasingly narrow construction of civil service

\textsuperscript{83} Sigall v. Aetna Cleaning Contractors, 345 N.E.2d 61 (Ohio 1976) (state university's contracting-out for certain custodial services does not thwart purposes of civil service system).


\textsuperscript{85} 345 N.E.2d at 65. See also Michigan State Employees Ass'n v. Civil Service Comm'n, 367 N.W.2d 850, 852 (Mich. App. 1985) (economic motives are proof of good faith); Moncrief v. Tate, 593 S.W.2d 312 (Tex. 1980) (same).

\textsuperscript{86} 520 P.2d 602 (Nev. 1974).

\textsuperscript{87} 520 P.2d at 606.

\textsuperscript{88} 520 P.2d at 607.

\textsuperscript{89} 520 P.2d at 605.
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laws—a construction entirely at odds with the public's interest in civil service reform. Reading civil service laws to permit private parties to perform public functions, courts have transformed the laws from models of public administration into protections of the individual interests of particular office holders. According to Justice Floyd V. Hicks, who dissented in Washington Federation of State Employees, Washington's Higher Education Personnel Law protects only employees, not any "particular services or types of work." Civil service law, Justice Hicks maintained, "merely regulates the manner in which existing positions of employment are filled and governs the promotion, transfer, and dismissal of employees once they have been hired." Civil service principles, other courts have held, govern the relationship between employees or prospective employees and existing offices, but "[n]o provision [of civil service law] commands that particular services to be performed exclusively by civil service employees." According to this argument, civil service laws regulate only the distribution of public offices and are indifferent to how the public's business is performed. Only within this narrow and privatized vision of civil service reform is contracting-out consistent with merit principles. But such an interpretation completely disregards public interest in the civil service.

B. Constitutional Protections: Public Employees' Freedom to Speak

The independence of government workers is ratified by civil service rules and is even more fundamentally grounded in the Constitution. Precisely because the state is their employer, public employees can exercise citizens' rights within the employment relationship; they carry their guarantees of speech, association, and due process as a badge of employment, while those in the private sector lose many of these constitutional entitlements at the threshold of

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90. 585 P.2d at 479 (Hicks, J., dissenting).
91. 585 P.2d at 479.
93. See Michigan State Employees Ass'n, 367 N.W.2d at 855 (Danhof, C.J., dissenting); In re IFPTE Local 195, 443 A.2d 187, 206 (N.J. 1982) (O'Hern, J., concurring in part and dissenting in part) ("it is clear that substitutional subcontracting conflicts with the goal of maintaining democratic accountability in state government").
the workplace. Here again, privatization threatens to eradicate immunities integral to government service.

In a series of cases beginning with *Pickering v. Board of Education* in 1968, the Supreme Court held that citizens cannot be compelled to cede the rights of free speech and association in order to become public workers. Nor can public employees be discharged or otherwise disciplined for exercising these rights. In each case that affirmed this rule, the speech at issue was in no way divorced from the employment relation, but, in fact, arose out of and concerned conditions of employment. In *Pickering*, a teacher criticized a board of education’s allocation of funds. In *Mt. Healthy v. Doyle*, a teacher informed a radio station about an administration memorandum concerning teachers’ appearance. Finally, in *Givhan v. Western Line Consolidated School District*, a teacher protested against employment discrimination at her school. In all three cases, the Court barred the public employer from penalizing the employee’s speech. These cases establish the proposition that employees’ rights as citizens cannot be separated from their role as public servants. As Justice William Brennan observed in a later dissent, “speech about ‘the manner in which government is operated or should be operated’ is an essential part of the communications necessary for self-governance.”

Nevertheless, in the recent case of *Connick v. Meyers*, the Supreme Court circumscribed the first amendment rights of public employees when their speech concerns “only internal office mat-

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94. It must be acknowledged, however, that public employees lose rights outside the employment relationship. Under the Hatch Act and parallel state laws, they are prohibited from taking an active part in partisan political campaigns. See infra, note 116.

95. Under certain circumstances, it may be possible for employees of private providers of public services to argue that the action of their employer is “state action” subject to the appropriate constitutional restraints. For example, if the private firm is fulfilling a traditionally governmental function, such as guarding prisoners, it is clearly a state actor and subject to suit as such. See *Medina v. O’Neill*, 589 F. Supp. 1028, 1038 (S.D. Tex. 1984). But even in this situation, it is unclear whether the private operator is a state actor only in relation to prisoners or also in relation to its employees. In any case, the mere fact that a private firm contracts with the state to provide service does not subject it to the constraints of the Constitution. See *Rendell-Baker v. Kohn*, 457 U.S. 830, 840-41 (1982).


98. 391 U.S. at 564-66.

99. 429 U.S. at 282.

100. 439 U.S. at 412-13.


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ters. The Court justified its abrupt departure from *Pickering*, *Mt. Healthy*, and *Givhan* by identifying a tension "'between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" But in *Connick*, the tension between citizens’ rights and their role as employees was overdrawn, for the Court misread the nature of the employment relation in the public sector. In a republican polity the employer is neither District Attorney Connick nor even the governor, but ultimately the populace in its sovereign capacity. Efficiency, therefore, cannot be measured solely by reduced costs or increased discipline, but must also register whether civil servants carry out the public’s will. Which is why public employees’ free speech is not only an entitlement of citizenship, but also required by their role as public servants.

Public employees play a pivotal part in informing citizens about government institutions and services. Consumers, in contrast to citizens, can ordinarily judge the quality and value of goods and services in the market without directly communicating with producers of the commodities. The buyer is usually the consumer, the purchase is usually for immediate consumption, and, in theory, consumer demand may be relied on to drive the market.

But government does not operate by the rules of the market. In many cases, citizens who purchase government services—taxpayers—are not the consumers of those services. For example, constituents may require that state government provide humane care and treatment to the mentally ill, but only the mentally ill will actually receive these services. And in this case, as in many others concerning social services, the recipients may lack effective means to advise the public about the quality of services they receive. Where government services are provided to a disabled or relatively inarticulate sector of the population, often remote from public view, as in prisons or hospitals, it is critical that providers of services be free to communicate directly with citizens.

103. 461 U.S. at 143.
104. 461 U.S. at 140 (quoting *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968)).
105. This simple model of the market ignores the importance of private employees’ exposing social costs of production that do not register in the price paid by the consumer, such as pollution, and providing information to the consumer that is neither evident on the face of the commodity nor trumpeted through advertising, such as data on design defects that pose a risk to safety.
Even when the public at large gains from a government service, the broad diffusion of the benefit often renders individual citizens unable to gauge its quality. National defense is the classic "collective good," but individuals cannot as easily evaluate whether their tax dollars are being spent wisely at the Pentagon as they can determine the quality and value of a hammer. Public employees are uniquely situated to inform voters on such matters of public concern. "Teachers," for example, "are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent," observed Justice Thurgood Marshall in Picketing.

Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal. Beyond performing assigned tasks, the role of civil servants entails participating in and informing public discussion about the goals of public policy and the practical means of achieving them. According to Justice Felix Frankfurter, restraints on public employees' rights are "not merely unjustifiable restraints on individuals," they produce "an atmosphere of repression uncongenial to the spiritual vitality of a democratic society." Such inhibitions, Frankfurter maintained, "are hostile to the best conditions for securing a high-minded and high-spirited public service."

Although enforcing legal rights is an uncertain, expensive, and protracted remedy for the swift and palpable retaliatory actions of government managers, it nevertheless gives conscientious public employees a degree of protection not afforded their counterparts in private industry. In 1969, for example, an employee of the Air Force, Ernest Fitzgerald, testified before Congress about huge cost overruns in the development of the C-5A transport plane. After Fitzgerald was isolated, assigned new duties, and finally dismissed, he sought redress before the Civil Service Commission and in the United States District Court for the District of Columbia, where 11 years later he was ordered reinstated to his original position. When "privatized," however, free speech can more easily be desig-

107. 391 U.S. at 563.
108. 391 U.S. at 572.
110. 341 U.S. at 728.
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ated insubordination or disloyalty. In the absence of clear constitutional protections, relatively few employees who speak out in the private sector retain their jobs. A study of 55 whistleblowers in both government and private industry found that not one of the industrial whistleblowers survived on the job. Another study found that many whistleblowers also have been blacklisted in the corporate world. Given the enormous power of the modern state, democracy cannot afford to delegate public authority to private businesses whose employees lack constitutional protection when they undertake to expose abuses of that authority.

By severing civil servants' direct links to the state, advocates of privatization propose to cure bureaucracy of its supposed defects. It is in the private sector, however, where constitutional guarantees and principles of citizenship exert no countervailing influence, that employers can readily introduce hierarchical systems of discipline—especially when workers remain unorganized. The objective of privatization, then, is the quintessence of bureaucracy: administrative personnel cut off from public discussion, who execute assigned tasks without attending to their social consequences.

In Broadrick v. Oklahoma, Justice Douglas declared in dissent that "[a] bureaucracy that is alert, vigilant, and alive is more efficient than one that is quiet and submissive. It is the First Amendment that makes it alert, vigilant, and alive. It is suppression of First Amendment rights that creates faceless, nameless bureaucrats who are inert in their localities and submissive to some master's voice." Privatization distances the state from the individuals who actually perform the mundane tasks of government. Dissolving the connection between citizen and employee, privatization threatens to replace the civil service with the ranks of "faceless, nameless" ser-

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112. Even jurisdictions that have recognized a "public policy" exception to the employment-at-will rule rarely extend protection to employees who report wrongdoing to company officials or to the public. See, e.g., Adler v. American Standard Corp., 830 F.2d 1305 (4th Cir. 1987) (rejecting claim of employee who was discharged after he advised superiors he would report kickbacks to headquarters).

113. Glazer & Glazer, supra note 111.


116. 413 U.S. at 621 (Douglas, J., dissenting). The first amendment rights of most public employees are, however, sharply restricted by the Hatch Act, 5 U.S.C. §§ 7321-7327 (1980) or "little Hatch Acts" enacted by states and localities, such as the Oklahoma law at issue in Broadrick, which prohibit active involvement in partisan politics. There have been repeated efforts to lift these restraints. The House of Representatives recently approved legislation which would amend the Hatch Act to eliminate virtually all restriction on off-duty political activity. House Votes to Loosen Hatch Act, Wash. Post, Nov. 18, 1987, at A1, col. 5.
vants that Justice Douglas found corrosive to democratic government.

Conclusion

Without challenging the assertion that privatization will reduce the costs of governing, this Article nevertheless questions the legal and political consequences of diverting public tasks to private hands. As the size and function of government have expanded during the last century, public employees have won rights in their workplace. Derived from civil service laws and constitutional guarantees, these rights neither vest public servants with a form of private property in their jobs nor simply protect their individual interests as citizens against the state; rather, these rights are integral to carrying out public policy. Both by definition and design, privatization eliminates the direct relation between civil servants and the state and thereby destroys entitlements of public employment that are essential to democratic government.

Privatization seeks to substitute the discipline of the market for these legal and political ties. But the market’s animating principle is competition, which drives capital to seek the cheapest set of hands, whether located across state lines or foreign borders. Carried to its logical conclusion, then, the argument for privatization implies that tax refunds may soon be calculated in South Korea and city purchase orders processed in the Philippines. When coupled with the strategy of the runaway shop, the trend toward privatization may as easily detach public service from citizenship as unfasten the links between civil servants and the state.