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"We the People," Constitutional Accountability, and Outsourcing Government

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“We the People,” Constitutional Accountability, and Outsourcing Government

KIMBERLY N. BROWN*

The ubiquitous outsourcing of federal functions to private contractors, although benign in the main, raises the most fundamental of constitutional questions: What institutions and actors comprise the “federal government” itself? From Abu Ghraib to Blackwater, a string of scandals has heightened public awareness that highly sensitive federal powers and responsibilities are routinely entrusted to government contractors. At the same time, the American populace seems vaguely aware that, when it comes to ensuring accountability for errors and abuses of power, contractors occupy a special space. The fact is that myriad structural and procedural means for holding traditionally government actors accountable do not apply to private contractors exercising identical powers. This accountability vacuum is not remedied by prevailing constitutional doctrine, which ignores the realities of modern government by drawing an artificial line between the public and private spheres. I have thus argued previously that all private contractors should be viewed as anatomically related to other quasi-government entities such as independent agencies, residing along a single continuum of constitutional accountability. This Article builds on that premise by positing that private-public relationships be structured to ensure accountability as a matter of constitutional law.

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INTRODUCTION

It is easy to picture the following. Federal agency “A” contracts with private corporation “B” for goods or services that the government would normally provide. Corp. B’s job is a mundane one. It provides linens to a veterans’ hospital and does so without incident. Few members of the public care enough to monitor Corp. B or its relationship with the federal government. The scenario remains in obscurity. But imagine instead a very different contract. Corp. B is given a substantial role in the administration of a nuclear nonproliferation agreement with another country.¹ It involves big dollars and the exercise of real discretion. Serious problems arise in the execution of the contract. Press coverage is extensive. Politicians run for cover. Corp. B becomes infamous, prompting resounding cries for reform—but of what kind?

The latter narrative has become a staple of popular culture, and law scholars have puzzled greatly over what to do about it. Private contractors engaged in interrogations at Abu Ghraib prison that included sexual assault, beatings, and the deprivation of food and water.² Halliburton was hastily awarded multibillion dollar contracts for nation building and military logistical support in Iraq, and wound up facing numerous allegations of fraud, overcharging, kickbacks,³ and criminal liability.⁴ Hired to provide security in Iraq and Afghanistan, Blackwater personnel were charged with killing seventeen civilians in Baghdad.⁵ Such high-profile cases have prompted civil lawsuits, congressional investigations, and criminal liability. Yet no systemic legal framework governs the federal government’s decisions to outsource in the first place. President Obama has sought to “‘in-source’ defense-related jobs”⁶ in reaction to former President Bush’s massive outsourcing initiative.⁷ All this shows, however, is that the government’s overall approach to federal contracting remains ad hoc and politically vulnerable.

1. See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1001 (2005) (discussing such a contract entailing an agreement with Russia under the Clinton administration).

2. See *Al Shimari v. CACI Int’l, Inc.*, 658 F.3d 413, 415–16 (4th Cir. 2011); see also Jane Mayer, *A Deadly Interrogation: Can the C.I.A. Legally Kill a Prisoner?*, THE NEW YORKER, Nov. 14, 2005, http://www.newyorker.com/archive/2005/11/14/051114fa_fact?currentPage=all.

3. See Abigail H. Avery, Comment, *Weapons of Mass Construction: The Potential Liability of Halliburton Under the False Claims Act and the Implications to Defense Contracting*, 57 ALA. L. REV. 827, 837–38 (2006).

4. See Charles R. Babcock, *Ex-KBR Worker Tied to Iraq Contract Fraud*, WASH. POST (Mar. 18, 2005), <http://www.washingtonpost.com/wp-dyn/articles/A45442-2005Mar17.html>.

5. See David Johnston & John M. Broder, *F.B.I. Says Guards Killed 14 Iraqis Without Cause*, N.Y. TIMES (Nov. 14, 2007), http://www.nytimes.com/2007/11/14/world/middleeast/14blackwater/html?pagewanted=all&_r=1&.

6. Matthew Potter, *Small Businesses Are Starting to Organize Against Federal “In-sourcing” of Contractor Jobs*, CBS NEWS (May 12, 2010, 5:45 AM), <http://www.bnet.com/blog/government/small-businesses-are-starting-to-organize-against-federal-insourcing-of-contractor-jobs/6471>.

7. See Kevin P. Stiens & Susan L. Turley, *Uncontracting: The Move Back to*

Many of the myriad structural and procedural means for holding government actors accountable simply do not apply to private contractors exercising identical powers. This accountability vacuum is not remedied by prevailing constitutional doctrine, which ignores the realities of modern government by drawing an artificial line between the public and private spheres. In short, no constitutional actor—not the Supreme Court, Congress, or the President—is minding the constitutional store to protect against the kinds of systematic abuses by private actors holding federal power that the Constitution was structurally designed to avoid.⁸ When Congress diverted prosecutorial powers to an independent branch of government, Justice Scalia warned that “an issue of this sort will come . . . clad, so to speak in sheep’s clothing,” with the potential “to effect important change in the equilibrium of power [that] is not immediately evident.”⁹ Privatization is similarly redefining federal government as we know it without robust constitutional dialogue.

By contrast, the Constitution has featured heavily in the many legal debates over whether independent agencies are structurally sound and, more generally, whether redistribution of constitutional power *in any form* is proper. When Congress crafted a new federal agency to regulate the accounting industry after the Enron debacle, for example, its legislation faced sharp—and successful—constitutional attack¹⁰ for failing to render the agency sufficiently accountable to the President. When the Amtrak Corporation was created to further federal objectives, the Supreme Court declared it a part of the government for purposes of the First Amendment, notwithstanding legislative language to the contrary.¹¹ These kinds of precedents should drive the discussion of how to manage and render accountable private contractors, as well.

This Article urges recognition of a constitutional accountability doctrine that would operate to tether the exercise of federal power to the people themselves. It does so by deriving substance from the procedural framework of the Constitution.

Performing In-House, 65 A.F. L. REV. 145, 159–60 (2010) (discussing the Bush Administration’s goal of “competitive sourcing”).

8. See Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1510 (2001) (“[F]ederal constitutional law has little, if anything, to say about a decision to contract with private entities for provision of public services, such as police and fire protection, operation of jails and prisons, street cleaning, garbage collection, inspectional services, and maintenance of public parks and buildings. There is no general federal anti-privatization doctrine requiring that particular government activities, state or federal, be conducted only by traditional government employees.”).

9. *Morrison v. Olson*, 487 U.S. 654, 699 (1988); see also *Mistretta v. United States*, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting) (noting in dissent from decision upholding United States Sentencing Commission that “I foresee all manner of ‘expert’ bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.’s, with perhaps a few Ph.D.’s in moral philosophy) to dispose of such thorny, ‘no-win’ political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research. This is an undemocratic precedent that we set—not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government”).

10. See *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

11. See *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 400 (1995).

Because the Constitution assumes that the ultimate source of all federal power is the people, *anyone* who exercises the people's power must be structurally accountable to the people. Acknowledging that the Constitution requires accountability for the exercise of the power of the people is a first step towards identifying constitutional boundaries around the practice of privatized government. The Article then gives some definition to constitutional accountability and what it might mean in practice.

Part I identifies the problem: an accountability imbalance between public actors and private contractors exercising similar powers. To give a sense of the issue's scope, this Part describes three examples of federal contracting—a McDonald's restaurant at the Smithsonian's Air and Space Museum, the outsourcing of special military operations to the Blackwater Corporation, and the privatization of airport security by the Transportation and Safety Administration (TSA)—and reviews the barriers to holding contractors accountable that exist under current constitutional and administrative law.

Deriving substance from the Constitution's procedural structure, Parts II and III identify and apply the foundations and characteristics of a constitutional accountability doctrine. Because the Constitution is a mere conduit for the *people's* power, that power does not magically lose its constitutional character when it is contractually delegated to private parties. Thus, the federal government cannot outsource its powers without putting mechanisms in place for rendering contractors accountable to the people and to the President. Part II outlines five particular characteristics of constitutional accountability, and Part III revisits the scenarios introduced in Part I as a platform for developing a preliminary doctrinal framework for applying a constitutional accountability principle to outsourcing.

I. THE ACCOUNTABILITY PROBLEM OF PRIVATIZED GOVERNMENT

"Accountability" connotes a range of meanings. A common dictionary definition associates accountability with being answerable, explainable, and "subject to giving an account" or reckoning for one's actions.¹² Scholars have similarly identified "the original or core sense of 'accountability'" as that which is "associated with the process of being called 'to account' to some authority for one's actions."¹³ This mainstay conception of accountability has been refined to encompass dual features:

[I]t is *external*, in that the account is given to some other person or body outside the person or body being held accountable; [and] it involves *social interaction and exchange*, in that one side, that calling for the account, seeks answers and rectification while the other side, that being held accountable, responds and accepts sanctions.¹⁴

12. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 50 (1981).

13. See Richard Mulgan, "Accountability": *An Ever-Expanding Concept?*, 78 PUB. ADMIN. 555 (2000).

14. *Id.* at 555 (emphasis in original). Professor Mulgan adds a third element—the right to impose sanctions—but then notes that this "may appear to go beyond the notion of 'giving

In the democratic context, a variant of core accountability takes shape. For government actors, “the key accountability relationships . . . are those between the citizens and the holders of public office and, within the ranks of office holders, between elected politicians and bureaucrats.”¹⁵ As Part II explains, the fundamental role of the people under the structural Constitution gives substantive meaning to the idea of democratic accountability that distinguishes it from accountability in the more generic sense.

Inevitably, democratic accountability is compromised with the practice of government outsourcing, which occurs when the government contracts with private parties to provide goods or services for which the government is responsible.¹⁶ As a result of hiring caps on federal employees, a desire for flexibility and short-term “surge capacity,” and a lack of in-house expertise,¹⁷ the practice has become widespread within the federal government. From 2000–2013, the federal government paid over \$5.469 trillion to private contractors.¹⁸ Private contractors now perform a broad range of functions for the federal government, including formulating federal policy, interpreting laws, administering foreign aid, managing nuclear weapons sites and intelligence operations, interrogating detainees, controlling borders, designing surveillance systems, and providing military support in combat zones.¹⁹ Under these circumstances, contract terms—and not the

an account.” *Id.* at 556.

15. *Id.* Richard Mulgan adds that public accountability further encompasses the sense of individual responsibility and concern for the public interest expected from public servants[.] . . . the various institutional checks and balances by which democracies seek to control the actions of governments[.] . . . the extent to which governments pursue the wishes or needs of their citizens . . . regardless of whether they are induced to do so through processes of authoritative exchange and control[.] . . . [and] the public discussion between citizens on which democracies depend.

Id.

16. See Beermann, *supra* note 8, at 1525; Ellen Dannin, *Red Tape or Accountability: Privatization, Public-ization, and Public Values*, 15 CORNELL J.L. & PUB. POL’Y 111, 113–17 (2005); Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecutions?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 266. This Article does not address other related forms of privatization, such as deregulation of personal relations (including marriage), deregulation of markets, regulatory moves toward performance standards and other cooperative strategies, vouchers, tax reductions, user fees, and the creation of government corporations. See generally Beermann, *supra* note 8, at 1529–53.

17. ACQUISITION ADVISORY PANEL, REPORT OF THE ACQUISITION ADVISORY PANEL TO THE OFFICE OF FEDERAL PROCUREMENT POLICY AND THE UNITED STATES CONGRESS 393 (2007) [hereinafter AAP REPORT]. The AAP Report was statutorily commissioned to “review[] laws, regulations, and government-wide acquisition policies ‘regarding the use of commercial practices, performance-based contracting, the performance of acquisition functions across agency lines of responsibility, and the use of Government-wide contracts.’” *Id.* at ix (quoting Pub. L. No. 108-136, 117 Stat. 1663 (2003)).

18. See *Total Federal Spending*, USA SPENDING, http://www.usaspending.gov/trends?trendreport=default&viewreport=yes&maj_contracting_agency_t=&pop_state_t=&pop_cd_t=&vendor_state_t=&vendor_cd_t=&psc_cat_t=&tab=Graph+View&Go.x=Go (reflecting data reported by agencies up until May 10, 2013).

19. See Laura A. Dickinson, *Government for Hire: Privatizing Foreign Affairs and the Problem of Accountability Under International Law*, 47 WM. & MARY L. REV. 135, 138

relational hierarchies that exist within a government bureaucracy and constitutional democracy—govern contractor performance. To the extent that democratic accountability is defined in part by the structures and procedures that are put in place for federal actors, it suffers when private parties are routinely hired to do things that federal actors would otherwise do. This is so even if accountability in the basic sense of holding one to account to an authority is addressed by contractual terms.

To put the problem in context, this Part describes three federal contracting examples that characterize the range of public functions at stake in the outsourcing context—from the mundane to the highly sensitive—with an eye toward revisiting each after the foundations and characteristics of the constitutional accountability requirement are established. It then walks through the existing legal means of holding private contractors accountable for the misuse of federal powers and observes, as others have, that federal employees exercising identical powers are subject to more scrutiny and mechanisms for establishing democratic accountability than are their private counterparts. Importantly, there is no constitutional doctrine for identifying and enforcing boundaries on the outsourcing of federal powers in the first place. Because the private delegation and state action doctrines have failed to serve this important function, an alternative constitutional theory is needed.

A. Three Federal Contracting Variants

This subpart introduces three modern contracting scenarios—McDonald’s at the Air and Space Museum, Blackwater in the military theatre, and the outsourcing of airport security responsibilities by TSA—as foils for exploring what public accountability means, a concept that is constitutionally moored yet marginalized under the modern regime of ad hoc and inconsistent federal contracting policy.

1. McDonald’s at the Smithsonian

The federal government enters into thousands of contracts for routine goods and services each year.²⁰ Over nine million people visit the Smithsonian’s Air and Space Museum annually, and many of them go to the McDonald’s restaurant

(2005) (discussing the privatization of foreign affairs); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551–52 (2000) (discussing the pervasiveness of private actors in “regulation, service provision, policy design, and implementation”); William C. Nicholson, *Seeking Consensus on Homeland Security Standards: Adopting the National Response Plan and the National Incident Management System*, 12 WIDENER L. REV. 491, 498–503 (2006) (describing the outsourcing of the “Response Plan” in greater detail); Griff Witte & Charles R. Babcock, *A Major Test for FEMA and Its Contracting Crew*, WASH. POST, Sept. 13, 2005, at A1 (reporting that the Department of Homeland Security first outsourced to the Rand Corporation the creation of a national emergency “Response Plan” before the work was eventually reassigned to the federal government).

20. See *Selling to the Federal Government*, PROCUREMENT TECHNICAL ASSISTANCE CENTER, <http://www.sbtcdc.org/programs/ptac/selling-to-fed-government> (describing the thousands of government contracts that are available to businesses); see also U.S. SMALL BUS. ADMIN., FEDERAL GOVERNMENT CONTRACTING 2, available at http://archive.sba.gov/idc/groups/public/documents/sba_homepage/serv_pub_contracting.pdf (describing the U.S. government as the world’s largest buyer of goods and services).

there.²¹ As a matter of public accountability, McDonald’s agreement with the Smithsonian can be grouped alongside commonplace contracts for “highway maintenance, solid waste collection, and mail delivery.”²² The public cares that the goods and services delivered by McDonald’s meet basic expectations—that the food is of acceptable quality, that the facility is non-hazardous, and that the employees who work there satisfy the basic requirements of their jobs. The public no doubt also wants judicial recourse for torts and other private law violations committed by McDonald’s employees.

Individuals hardly fret, however, over whether federal employees would make and serve hamburgers better or whether the Smithsonian is contractually or legally empowered to hold McDonald’s accountable for failing to meet expectations.²³ Although a handful of people might be interested in knowing whether the federal procurement process that produced the McDonald’s contract was sound,²⁴ this concern is probably more theoretical than real. Food service does not involve the exercise of powers that conventionally belong to the federal government. The McDonald’s contract thus stakes out a pole on a constitutional accountability spectrum for federal contracts. It reflects the many federal contracts for garden-variety goods and services that do not warrant constitutional scrutiny because they do not involve the outsourcing of “government” powers.

2. Blackwater

The infamous Blackwater Security Consulting firm, now Xe Services, is at the opposite pole of a constitutional accountability spectrum for private contractors. Its story entails the most *nonroutine* of government functions “that directly and substantially affect health, liberty, safety, and personal autonomy,”²⁵ such as contracts involving national security and military operations. When such highly

21. In 1846, Congress established the Smithsonian as a trust to be administered by a board of regents and a Secretary of the Smithsonian. H.R. 5, 28th Cong. (1846) (enacted); 20 U.S.C. § 76b (2006). It has a congressionally funded annual budget of nearly \$800 million. *Smithsonian Fiscal Year 2011 Federal Budget Request Totals \$797.6 Million*, SMITHSONIAN NEWSDESK (Feb. 1, 2010), <http://newsdesk.si.edu/releases/2011-budget?>

22. Jody Freeman, *Extending Public Accountability Through Privatization*, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 83, 106–07 (Michael W. Dowdle ed., 2006) [hereinafter PUBLIC ACCOUNTABILITY].

23. See Beermann, *supra* note 8, at 1522 (“In my view, contracting out of support goods and services does not raise serious accountability issues since the source and quality of such goods and services are not normally something the public cares much about.”). Professor Freeman notes, however, that “we might demand that contractors provide universal access, comply with antidiscrimination norms, and put procedures in place to prevent arbitrariness in termination decisions,” particularly where vulnerable populations are affected (prisoners, welfare and Medicaid recipients, school-age children). Freeman, *supra* note 22, at 106–07.

24. See Beermann, *supra* note 8, at 1522 (describing “contracting out” and the possibility of corruption in the contracting process). Opposition to the contract might also come from “government workers who either would lose their jobs [or] face transfer to different units” once the decision was made to privatize food service at this federal museum. *Id.* at 1523.

25. Freeman, *supra* note 22, at 106.

sensitive government functions are outsourced to private parties by contract, a constitutional boundary mandating at least minimal accountability becomes a practical imperative.

In April of 2011, “there [we]re more contractors in Iraq and Afghanistan than there [we]re uniformed soldiers.”²⁶ Contractors participate in a wide range of activities for the military, from the provision of food services and mail delivery to the running of active operations at the forefront of the battlefield.²⁷ Those engaged in actual combat are known as military provider firms, which act like a “quasi-military”—their personnel dress like military and are armed with sophisticated weaponry.²⁸ During the troop surge in 2007, private military contractors “in Iraq outnumbered military personnel 180,000 to 165,000, with between 20,000 and 30,000 contractors in quasi-military roles.”²⁹

Private military contractors have been linked to numerous accounts of criminal activity involving dead or injured civilians.³⁰ The company now known as Xe—which has existed as Blackwater in various corporate forms since 1997—has been prominently implicated in a number of them. In 2010, the Obama administration awarded Blackwater over a quarter of a billion dollars in contracts to work for the State Department and the Central Intelligence Agency (CIA) in Afghanistan and other global “hot zones.”³¹ Secretary of Defense Leon Panetta reportedly explained that, given the company’s competitive bid and unparalleled experience, “there really was not much choice.”³² All totaled, Blackwater has received over a billion dollars in federal contracts.³³ Its responsibilities have included tactics and weapons training for military, government, and law enforcement agencies, including Navy SEALs;³⁴ high-risk security details for diplomats and other officials; and protection of sensitive installations, including CIA offices abroad.³⁵

26. Jeff Shear, *A Professional Military and the Privatization of Warfare*, PAC. STANDARD (April 22, 2011), <http://www.psmag.com/culture/a-professional-military-and-the-privatization-of-warfare-30468>.

27. See Katherin J. Chapman, Note, *The Untouchables: Private Military Contractors’ Criminal Accountability Under the UCMJ*, 63 VAND. L. REV. 1047, 1049 (2010).

28. See *id.*

29. *Id.* at 1050 (citing Michael Hurst, *After Blackwater: A Mission-Focused Jurisdictional Regime for Private Military Contractors During Contingency Operations*, 76 GEO. WASH. L. REV. 1308, 1310 (2008)).

30. See *id.* at 1051.

31. Jeremy Scahill, *Blackwater’s New Sugar Daddy: The Obama Administration*, NATION (June 28, 2010, 11:19 AM), <http://www.thenation.com/blog/36756/blackwaters-new-sugar-daddy-obama-administration>.

32. *Id.*

33. *Blackwater’s Rich Contracts*, N.Y. TIMES (Oct. 3, 2007), <http://www.nytimes.com/2007/10/03/opinion/03iht-edblack.1.7733227.html>.

34. See James Dao, *Attack Turns Spotlight on Private Security Firms*, REGISTER-GUARD, Apr. 2, 2004, at A2; *Blackwater Worldwide*, N.Y. TIMES, http://topics.nytimes.com/top/news/business/companies/blackwater_usa/index.html.

35. See *Blackwater Worldwide*, *supra* note 34; Mark Landler & Mark Mazzetti, *U.S. Still Using Security Firm It Broke With*, N.Y. TIMES (Aug. 21, 2009), <http://www.nytimes.com/2009/08/22/us/22intel.html?ref=blackwaterusa>; Mark Mazzetti, *Blackwater Loses a Job for the C.I.A.*, N.Y. TIMES (Dec. 11, 2009), <http://www.nytimes.com/2009/12/12/us/politics/12black>

The company remains under investigation by multiple federal agencies and Congress for a series of alleged wrongdoings, including “weapons charges, murder, manslaughter, conspiracy, making false statements[,] using shell companies to win contracts that may not have been awarded to Blackwater if the company’s true identity was clear,” and “violat[ing] U.S. export control regulations in Sudan, Iraq and elsewhere.”³⁶ In April of 2010, five of the company’s top officials—including a former Blackwater president, two former vice presidents, and its former legal counsel—were indicted on fifteen counts of conspiracy, weapons, and obstruction of justice charges.³⁷ Federal prosecutors “are still pursuing the Blackwater operatives alleged to be responsible for the single greatest massacre of Iraqi civilians by a private U.S. force, the infamous Nisour Square massacre.”³⁸ In 2010, Senator Carl Levin, chair of the Senate Armed Services Committee, formally called upon the Departments of Justice (DOJ) and Defense (DOD) to investigate what he called “‘the reckless use of weapons by Blackwater personnel and a failure by the company to adequately supervise its personnel’ in Afghanistan.”³⁹

Compounding this disquieting picture of Blackwater are the longstanding gaps in federal oversight of military contractors in general. A congressional investigation found in 2007 that, although Blackwater “charge[d] the government \$1222 per day for each private military operative—more than six times the wage of an equivalent soldier,” its high tab did not keep the company from overcharging.⁴⁰ An audit by the State Department’s inspector general in 2005 revealed, for example, that Blackwater was billing “separately for ‘drivers’ and ‘security specialists’ who were, in fact, the same people.”⁴¹

In 2008, DOD’s inspector general released a gloomy report on the challenges in oversight of military contractors involved in Iraq and Afghanistan from 2003 and 2007.⁴² The report stated that contract requirements were not met, funds were either inappropriately spent or missing, goods and services were either undelivered or unaccounted for, individuals involved in the acquisition process lacked integrity, and adequate documentation was not retained or prepared regarding the contracting process.⁴³ Additionally, “[t]he sheer number of contracting actions and the pressures on contracting officials to award procurements faster ma[d]e the challenge of correcting the problems more difficult.”⁴⁴ DOD had “limited visibility over contractors and contractor activity, [a] lack of adequate contract oversight

water.html?ref=blackwaterusa.

36. Scahill, *supra* note 31 (internal quotation marks omitted).

37. *Id.*

38. *Id.*

39. *Id.*

40. *Blackwater’s Rich Contracts*, *supra* note 33.

41. *Id.*

42. See OFFICE OF INSPECTOR GEN. FOR THE DEP’T OF DEF., CHALLENGES IMPACTING OPERATIONS IRAQI FREEDOM AND ENDURING FREEDOM REPORTED BY MAJOR OVERSIGHT ORGANIZATIONS BEGINNING FY 2003 THROUGH FY 2007 (2008), *available at* <http://www.dodig.mil/Audit/reports/fy08/08-086.pdf>.

43. *Id.* at 2.

44. *Id.* at 1–2.

personnel, limited collection and sharing of institutional knowledge, and limited or no information on contractor support in predeployment training.”⁴⁵

Fallout over the Blackwater scandals prompted *The New York Times* editorial page to decry in 2007 “the folly of using a private force to perform military missions in a war zone” and the need for “[t]hese jobs . . . to be brought back into government hands as soon as practicable.”⁴⁶ Although Secretary Panetta suggested that Blackwater has “shaped up [its] act,” Rep. Jan Schakowsky, chair of the House Intelligence Subcommittee that led classified investigations of Blackwater, called the company’s relationship with the federal security apparatus “just outrageous.”⁴⁷ She reportedly quipped, “What does Blackwater have to do to be determined an illegitimate player? . . . The CIA should not be doing business with this company no matter how many name changes it undergoes.”⁴⁸

As with McDonald’s employees, the public has an interest in having Blackwater personnel satisfy the requirements of the job—providing security details for diplomats, protecting U.S. installations overseas in an effective and proper manner, and providing federal troops the tactics and weapons training they need to execute their missions, for example. Much of the public would understandably expect, moreover, that violations of export regulations, criminal conspiracy, obstruction of justice, murder, weapons abuses, and even torts are brought to light and dealt with—just as men and women in uniform are rendered susceptible to penalties for violations of law committed while in service.

The awarding of Blackwater contracts is also likely a matter of public importance.⁴⁹ Not only do contracts involving national security and military operations implicate the lives and liberty of civilians, they strike at the heart of executive military power that the Constitution confers on the President in Article II.⁵⁰ To the extent that Blackwater contractors exercise discretion that would otherwise be lodged with federal actors, the public might be interested in knowing that they use their discretion in a way that benefits the American public as a whole and not just the company, and that they are meaningfully supervised by military officials within the President’s supervisory chain of command who can impose consequences for wrongdoing. Accountability measures are not consistently imposed on federal contractors, however. Blackwater exemplifies the need for a less cavalier constitutional approach to outsourced government.

45. *Id.* at 6.

46. *Blackwater’s Rich Contracts*, *supra* note 33.

47. Scahill, *supra* note 31.

48. *Id.* (internal quotation marks omitted).

49. See generally Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates*, in *GOVERNMENT BY CONTRACT* 1, 3 (Jody Freeman & Martha Minow, eds., 2009) (observing that federal contracts have been made “literally off the books,” “awarded under suspicious circumstances, hurriedly and without competition,” or under terms that “are so underspecified as to afford contractors almost unlimited discretion”).

50. See John D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001, 1006–09 (2004).

3. Privatizing TSA

The third contracting scenario appears less headline-grabbing than the “worst-case” example just described, yet it is potentially no less serious. Blackwater’s actions overseas affect most U.S. citizens only tangentially, if at all. But travel from domestic airports is an everyday occurrence. Housed within the Department of Homeland Security, TSA is a relatively new federal agency that employs tens of thousands of airport screeners, federal air marshals, and other employees.⁵¹ Since its inception, it has outsourced its core responsibilities to private contractors in several airports.

In the immediate aftermath of the September 11 attacks, President George W. Bush signed the Aviation and Transportation Security Act (ATSA),⁵² making the federal government responsible for aviation and airport security.⁵³ Prior to ATSA, passenger screening was the responsibility of airlines, with the actual duties of operating the screening checkpoint contracted out to private firms.⁵⁴ Since 9/11, passenger screening and inspection of baggage have been further enhanced.⁵⁵ In 2011, former Minnesota Governor Jesse Ventura sued TSA, alleging that airport screeners’ invasive pat-downs and body-imaging scans of his person constituted an unreasonable search and seizure under the Fourth Amendment.⁵⁶ Ventura’s suit spoke for many U.S. citizens frustrated with post-9/11 enhanced airport security practices.⁵⁷ It was notable, however, that Ventura was able to identify and sue TSA as the federal entity accountable for alleged violations of his constitutional rights that occurred during that screening.

Were Ventura to experience identical violations at the San Francisco airport today, he would not have a constitutional claim. San Francisco is one of sixteen U.S. airports for which the federal government has, since 2004,⁵⁸

51. See *September 11, 2001 and TSA*, TRANSP. SECURITY ADMIN., <http://www.tsa.gov/about-tsa/september-11-2001-and-tsa>.

52. Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (2001).

53. U.S. GOV’T ACCOUNTABILITY OFFICE, AVIATION SECURITY: SCREENER TRAINING AND PERFORMANCE MEASUREMENT STRENGTHENED, BUT MORE WORK REMAINS 7 (2005), available at <http://www.gao.gov/new.items/d05457.pdf>.

54. *Id.*

55. Garrick Blalock, Vrinda Kadiyali, & Daniel H. Simon, *The Impact of Post 9/11 Airport Security Measures on the Demand for Air Travel*, CORNELL UNIV. DYSON SCH. OF ECON., Feb. 2005, at 2.

56. Michael Sheridan, *Jesse Ventura Files Lawsuit Against TSA, Homeland Security Over Body Scanners, Pat-Down Searches*, NYDAILYNEWS.COM (Jan. 25, 2011, 1:54 PM), http://articles.nydailynews.com/2011-01-25/news/27096713_1_body-scans-strip-search-law-suit. The United States District Court for the District of Minnesota dismissed the case for lack of jurisdiction in November 2011. *Ventura v. Napolitano*, 828 F. Supp. 2d 1039 (D. Minn. 2011).

57. See, e.g., PLEASE REMOVE YOUR SHOES (Frederick C. Gevalt III, 2010), available at <http://pleaseremoveyourshoesmovie.com>.

58. U.S. GOV’T ACCOUNTABILITY OFFICE, AVIATION SECURITY: PRELIMINARY OBSERVATIONS ON TSA’S PROGRESS TO ALLOW AIRPORTS TO USE PRIVATE PASSENGER AND BAGGAGE SCREENING SERVICES (2004), available at <http://www.gao.gov/assets/250/244856.pdf>.

approved the wholesale replacement of TSA personnel by private contractors.⁵⁹ Airports can apply to TSA to opt out of the federal program and hire their own screening company, and there is no apparent framework for oversight or review of that decision-making process.⁶⁰ Yet contractors employ the same search techniques as TSA employees, including x-ray scans and back-of-the-hand pat-downs of individual passengers' private areas, in airports at which TSA has outsourced security.⁶¹

TSA's private contractor program has run into a number of problems. According to the GAO, both government and private airport screening workers have failed to find concealed bomb components during covert checkpoint testing,⁶² and a number of reports of groping of passengers by private contractors have surfaced.⁶³ The Office of Inspector General (OIG) in 2010 issued a report criticizing the TSA's oversight of private contractors.⁶⁴ In fiscal year 2009, TSA had twenty-nine contracts with private companies, worth \$662 million.⁶⁵ OIG reviewed the thirteen

59. Derek Kravitz, *As Outrage Over Screenings Rises, Sites Consider Replacing TSA*, WASH. POST, Dec. 31, 2010, at A1.

60. See Kravitz, *supra* note 59; *Screening Partnership Program*, TRANSP. SECURITY ADMIN., <http://www.tsa.gov/stakeholders/screening-partnership-program> (last modified Dec. 19, 2012); *Frequently Asked Questions—Program*, TRANSP. SECURITY ADMIN., <http://www.tsa.gov/stakeholders/frequently-asked-questions-program> (last modified Feb. 08, 2013). Under ATSA, the head of TSA may approve an application to outsource screening to “qualified” contractors if it certifies to Congress, first, that “the level of screening services and protection provided at the airport will be equal to or greater than the level that would be provided at the airport by Federal Government personnel” and, second, that the company is owned and controlled by a U.S. citizen. 49 U.S.C. § 44920(a)–(d). Additionally, TSA must provide supervisory personnel at airports, and they may fire contractors for “fail[ure] repeatedly to comply with any standard, regulation, directive, order, law, or contract applicable to the hiring or training of personnel to provide such services or to the provision of screening at the airport,” although airport operators have no liability for contractor errors. *Id.* § 44920 (e)–(g). There are no implementing regulations to date.

61. See *Frequently Asked Questions—Program*, *supra* note 60 (“While the searches at the airport will be conducted by private screening companies, such searches will continue to be subject to the Fourth Amendment requirements of reasonableness because they are conducted at the instigation of the federal Government and under the authority of federal statutes and regulations governing air passenger screening.”). Somewhat ironically, Professor Verkuil observed in 2009 that the enhanced credibility of “wearing [a] badge” is what “helped lead Congress to make airport security personnel public officials under the Transportation Security Act” in the first place. Paul R. Verkuil, *Outsourcing and the Duty to Govern*, in GOVERNMENT BY CONTRACT, *supra* note 49, at 310, 327.

62. Mike M. Ahlers & Jeanne Meserve, *TSA Shuts Door on Private Airport Screening Program*, CNN (Jan. 29, 2011, 2:07 AM), http://articles.cnn.com/2011-01-29/travel/tsa.private_1_tsa-government-screeners-screening-program?s=PM:TRAVEL.

63. Elizabeth Fuller, *Air Travelers Tweet: TSA Pat-Downs and Scans Evoke Humor, Tears*, CHRISTIAN SCI. MONITOR (Nov. 23, 2010), <http://www.csmonitor.com/USA/2010/1123/Air-travelers-tweet-TSA-pat-downs-and-scans-evoke-humor-tears>.

64. See U.S. DEP'T OF HOMELAND SEC., TRANSPORTATION SECURITY ADMINISTRATION'S ACQUISITION OF SUPPORT SERVICES CONTRACTS (2010) [hereinafter TSA'S ACQUISITION OF SUPPORT SERVICES CONTRACTS].

65. *Id.* at 2.

most lucrative contracts, which represented 92 percent, or \$609 million, of the total amount contracted.⁶⁶ It found that TSA contractors performed “inherently governmental functions” in contravention of the Office of Management and Budget’s (OMB) Circular A-76, which sets forth the President’s policy for outsourcing “commercial activities” to the private sector.⁶⁷ Although contract administration is an inherently governmental function, three TSA contractors performed that work under contracts worth \$265 million.⁶⁸ In one instance, a contractor performed the contract oversight and invoice review for its own contract.⁶⁹ A \$10 million contract for strategic planning was so vague that it allowed the company to develop a system for passenger screening.⁷⁰

OIG further found that TSA did not properly oversee the companies’ performances. For all thirteen contracts reviewed, government files were missing vital paperwork, preventing TSA from monitoring whether the companies were performing the contracted work.⁷¹ The contractors submitted vague invoices and were permitted to give their own progress reports, with no independent TSA follow-up.⁷²

TSA’s heavy reliance on Lockheed Martin to perform its statutorily mandated functions⁷³ has drawn particular scrutiny. In the spring of 2011, hackers penetrated Lockheed’s computer system in an apparent effort to obtain “security information that could be used to target defense secrets.”⁷⁴ Lockheed also entered into a \$2 million settlement with the Department of Justice (DOJ) over charges that it conspired to obtain sensitive, nonpublic information for the purpose of winning additional government contracts.⁷⁵ Lockheed continues to perform work for TSA pursuant to an eight-year, \$1.2 billion contract awarded in 2008 to manage its hiring and personnel program, with the option of expanding the contract to

66. *Id.*

67. OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76 REVISED, at attachment A & Part B (2003); Verkuil, *supra* note 61, at 326. OMB’s role in the process has led to tensions with Congress over the effectiveness of private sourcing, the propriety of inherently governmental classifications by agencies, and the lack of sufficient federal personnel to administer the standards. PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY* 126 (2007). An agency’s decision regarding what is “inherently governmental” is effectively not reviewable. *See id.*; *infra* notes 108–13 and accompanying text (discussing Circular A-76).

68. TSA’S ACQUISITION OF SUPPORT SERVICES CONTRACTS, *supra* note 64, at 4.

69. *See id.*

70. *Id.* at 6.

71. *See id.* at 5.

72. *See id.* at 6–7.

73. *See generally* 49 U.S.C. § 114 (2006 & Supp. 2011).

74. Chloe Albanesius, *RSA to Replace SecurID Tokens After Lockheed Cyber Attack*, PCMAG.COM (June 7, 2011, 10:47 AM), <http://www.pcmag.com/article2/0,2817,2386512,00.asp#fbid=V40ujCkx1eY>; *see also Lockheed Martin Hit by Computer Breach*, L.A. TIMES, May 29, 2011, at A25; accord Mathew J. Schwartz, *Lockheed Martin Suffers Massive Cyberattack*, INFO. WK. (May 31, 2011, 8:00 AM), <http://www.informationweek.com/news/government/security/229700151>.

75. *See* Press Release, Dep’t of Justice, Lockheed Martin to Pay \$2 Million to Resolve Allegations Resulting from Fraudulent Submission of Government Contract, Jan. 24, 2011, *available at* <http://www.justice.gov/opa/pr/2011/January/11-civ-095.html>.

over \$3 billion in work.⁷⁶ The contract gives Lockheed responsibility for undefined tasks such as “workforce planning and program and project management” as well as “recruitment and retention services” for TSA’s 40,000+ employees.⁷⁷ In a letter to TSA’s administrator, the Chair of the House Homeland Security Committee criticized this contract for attempting to “‘outsource[]’ away” TSA’s personnel problems.⁷⁸

As with the Blackwater contracts, the public might be concerned that the TSA procurement process is sufficiently competitive and fraud-free, and that TSA does not overspend in comparison to what it would pay to hire federal employees to perform the same job. TSA’s contracts with private security firms raise a heightened public interest in the proper execution of the contracts, however, that differs from even the Blackwater example. As with 9/11, a major screening error could lead to catastrophic consequences, including losses of human life. Whereas Blackwater contractors’ human rights abuses are more likely to occur overseas, U.S. citizens fall vulnerable to groping and other violations by TSA contractors operating domestically. TSA contractors reportedly exercise an inappropriate level of discretion with insufficient oversight, despite the post-9/11 national security implications of airport screening.⁷⁹ It is therefore also a matter of deep public concern that, despite their private status, TSA contractors are exercising discretion with the interests of the U.S. citizenry at heart rather than for pure corporate profit.

Moreover, as described below, the public’s ability to influence policy-making decisions involving personal privacy and transportation safety is arbitrary to the extent that meaningful discretion is exercised at the airport level by an unprincipled mix of public and private employees. These concerns are distinct from the question of whether travelers can enforce in court the government’s obligation to respect individual constitutional rights,⁸⁰ and thus warrant their own constitutional framework for review and analysis.

B. Legislative, Regulatory, and Judicial Nonsolutions

As government outsourcing continues, the need to ensure proper oversight of private contractors becomes all the more salient.⁸¹ As with questions of the per se

76. See Elizabeth Newell Jochum, *Lawmaker Raises Concerns Over Huge TSA Personnel Contract*, GOV’T EXECUTIVE (July 18, 2008), <http://www.govexec.com/dailyfed/0708/071808e1.htm>. For a summary of TSA’s top contractors and the dollar amounts of their contracts, see Nick Wakeman, *Transportation Security Administration Overview*, WASH. TECH. (Jan. 28, 2011), <http://washingtontechnology.com/articles/2011/01/31/upfront-tsa-agency-snapshot.aspx>.

77. Jochum, *supra* note 76 (internal quotation marks omitted).

78. *See id.*

79. *See supra* notes 62–72 and accompanying text.

80. *See* Beermann, *supra* note 8, at 1527–28.

81. *See generally* Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, in PUBLIC ACCOUNTABILITY, *supra* note 22, at 115, 136 (“The problem [with privatization] as many see it is that state power has been added without customary accountability arrangements for the use of that power.”); Paul R.

constitutionality of independent agencies,⁸² debate over whether the federal government should outsource is a futile exercise. It is here to stay. The more interesting and perhaps urgent task fixates on procedure: identifying how the government should structure its contractual relationships with the private sector to foster conformity with democratic and constitutional norms.

One such norm is political accountability. Yet, there is an accountability disconnect when it comes to government-by-contract. Although one might debate the effectiveness of the individual mechanisms that exist for holding public actors accountable, as a whole the system captures numerous formal and informal checks in a multilayered fashion.⁸³ Federal officers and employees are susceptible to statutorily mandated transparency, regularity through bureaucratic processes, electoral accountability at the highest, cabinet-level echelons,⁸⁴ the judicial enforcement of the rule of law,⁸⁵ market competition and correction,⁸⁶ and public exposure through the press and the “court of public opinion.”⁸⁷ The majority of these mechanisms do not apply to private contractors.⁸⁸

As the dominant mode of modern government, administrative bureaucracy incorporates a particularly complex set of accountability modalities.⁸⁹ The administrative state is a hierarchy, with the President at the top by constitutional prerogative.⁹⁰ Decision makers are aware that they will be held accountable to a

Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 400–01 (2006) (discussing the private contractor “accountability gap” and suggesting that “inherent government functions” should be preserved for the public sector). As Paul Verkuil explains, while outsourcing “involves the private sector potentially supplanting both public functions and public norms of administration[.] . . . unrestrained delegation of government functions to private hands challenges the role of government and the rule of law that sustains it.” Verkuil, *supra*, at 419.

82. See *Morrison v. Olson*, 487 U.S. 654, 687, 696 (1988) (discussing Supreme Court precedent upholding the constitutionality of independent agencies); Richard H. Pildes, *Separation of Powers, Independent Agencies, and Financial Regulation: The Case of the Sarbanes-Oxley Act*, 5 N.Y.U. J.L. & BUS. 485, 489 (2009) (“[A]t least since *Humphrey’s Executor v. United States*, the Supreme Court has consistently affirmed the constitutionality of independent agencies.” (citation omitted)).

83. See Mashaw, *supra* note 81, at 117–18.

84. But see John Braithwaite, *Accountability and Responsibility Through Restorative Justice*, in PUBLIC ACCOUNTABILITY, *supra* note 22, at 33, 33 (“[O]ur vote is mostly not the accountability tool it once was.”); Edward Rubin, *The Myth of Non-Bureaucratic Accountability and the Anti-Administrative Impulse*, in PUBLIC ACCOUNTABILITY, *supra* note 22, at 52, 70–71 (“The highly attenuated nature of electoral accountability means that it will be of limited value for the purposes that proponents of accountability have recommended, that is, arguing against open-ended delegations by the legislature, in favor of a unitary executive, or in favor of federalism.”).

85. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1401–02 (2003) (discussing the legal form of accountability through judicial review).

86. See Michael W. Dowdle, *Public Accountability: Conceptual, Historical, and Epistemic Mappings*, in PUBLIC ACCOUNTABILITY, *supra* note 22, at 1, 3–5.

87. Jerry Brito & Drew Perraut, *Transparency and Performance in Government*, 11 N.C. J.L. & TECH. 161, 170 (2010).

88. See *infra* notes 124–42 and accompanying text.

89. See Rubin, *supra* note 84, at 74–75.

90. See U.S. CONST. art. II.

defined person or group with supervisory authority.⁹¹ Thus, “[a]n administrative hierarchy is frequently a chain of accountability, and the idea of accountability serves as an essential feature in the construction and operation of the hierarchy.”⁹² Elected leaders might respond to deeply felt views of the electorate, but they are not obligated to justify their behavior in the same sense as someone who is incentivized by the direct rewards or punishments of a supervisor within “a tightly integrated hierarchy, such as those found within the administrative apparatus.”⁹³

Within the administrative hierarchy, moreover, a wide range of standards have been imposed on federal agencies by Congress, the President, and the courts for limiting the discretion exercised on behalf of the constitutional branches, and for imposing transparency and modes of public participation. The Administrative Procedure Act (APA)⁹⁴ is the primary statutory source for public disclosure, public involvement in rule making, and judicial review of government decision making. Its Freedom of Information Act (FOIA) provisions mandate public disclosure of government activities.⁹⁵ The Federal Advisory Committee Act restricts and makes public the advice that federal advisory committees provide agencies,⁹⁶ and the Government in the Sunshine Act makes statutorily defined agency meetings public.⁹⁷ The Federal Register Act requires publication of regulatory documents for public inspection⁹⁸ and the Information Quality Act (also known as the Data Quality Act) directs OMB to issue government-wide “policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, objectivity, utility, and integrity of information . . . disseminated by Federal agencies.”⁹⁹ This is far from an exhaustive statutory list. Presidential oversight is brought formally into the mix with Executive Orders 12,291 and 12,498, which require OMB oversight of the regulatory process¹⁰⁰ through its Office of Information and Regulatory Affairs (OIRA).¹⁰¹ And “[s]ince 1970, the courts have expanded judicial supervision of agencies by broadening the rules of standing, issuing more specific criteria

91. See Rubin, *supra* note 84, at 75.

92. *Id.* at 76.

93. *Id.* at 77. *But cf.* Freeman, *supra* note 19, at 549 (arguing that there has been an inordinate focus on formal accountability to the three branches of government while aggregate accountability for private contractors—which would include contractual terms—is a better model).

94. Administrative Procedure Act, 5 U.S.C. §§ 551–59 (2006); see also Metzger, *supra* note 85, at 1434 (noting that, whereas the APA applies only to agencies, regulations governing contractors focus on preventing fraud versus providing a way to challenge contractors’ actions).

95. Freedom of Information Act, 5 U.S.C. § 552 (2006).

96. Federal Advisory Committee Act, 5 U.S.C. app. § 2.

97. Government in the Sunshine Act, 5 U.S.C. § 552(b) (2006).

98. Federal Register Act, 44 U.S.C. §§ 1501–11 (2006).

99. Consolidated Appropriations Act, Pub. L. No. 106-554, § 515, 114 Stat. 2763, 2763A-154 (2001).

100. See Exec. Order No. 12,291, 46 Fed. Reg. 13,193 (Feb. 17, 1981); Exec. Order No. 12,498, 50 Fed. Reg. 1036 (Jan. 8, 1985).

101. See 44 U.S.C. §§ 3501–21; see also 2 JACOB A. STEIN, GLENN A. MITCHELL & BASIL J. MEZINES, ADMINISTRATIVE LAW § 7.09 (2011) (describing the Paperwork Reduction Act, which created the Office of Information and Regulatory Affairs).

regarding the development and use of a factual record, expanding notice and comment requirements, and . . . tak[ing] a ‘hard look’ at the reasonableness of proposed regulations.”¹⁰² Federal officers must take an oath to uphold the Constitution, regardless of who happens to occupy the White House.¹⁰³

In contrast, administrative law places relatively lax legal constraints on private contractors.¹⁰⁴ The APA, the FOIA, and other disclosure statutes apply only to agencies.¹⁰⁵ To be sure, OMB Circular A-76 forbids the outsourcing of “inherently governmental” functions,¹⁰⁶ but agencies overlook its provisions,¹⁰⁷ which eschew judicial review.¹⁰⁸ The Federal Activities Inventory Reform (FAIR) Act of 1998 codifies Circular A-76’s definition of “inherently governmental function,”¹⁰⁹ but it has not been construed to enable judicial review of contracting decisions, either.¹¹⁰ It requires, rather, that agencies publish lists of activities performed by government employees that are *not* inherently governmental.¹¹¹ Although the FAIR Act emphasizes competitive outsourcing, it does not provide for challenges to the decision to outsource itself.¹¹² The Federal Acquisition Regulation (FAR)¹¹³ is the

102. Lawrence Susskind & Gerard McMahon, *The Theory and Practice of Negotiated Rulemaking*, 3 YALE J. ON REG. 133, 136 (1985) (citations omitted).

103. See David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 84–86 (2009).

104. See David H. Rosenbloom & Suzanne J. Piotrowski, *Outsourcing the Constitution and Administrative Law Norms*, 35 AM. REV. PUB. ADMIN. 103, 104–05 (2005).

105. See 5 U.S.C. § 551(1) (2006).

106. See CIRCULAR NO. A-76 REVISED, *supra* note 67, at attachment A, pt. B. Circular A-76 predated the Federal Activities Inventory Reform Act, which also provides a statutory definition of “inherently governmental function.” 31 U.S.C. § 501(5)(2)(A) (2006) (“The term ‘inherently governmental function’ means a function that is so intimately related to the public interest as to require performance by Federal Government employees.”). The statute then lists examples of the types of “functions included.” 31 U.S.C. § 501(5)(2)(B)(i)–(v).

107. See Freeman & Minow, *supra* note 49, at 3; see also Correction of Long-Standing Errors in Agencies’ Unsustainable Procurements Act of 2009, S. 924, 111th Cong. § 3 (2009) (finding that inherently governmental functions “have been wrongly outsourced”); Concurrent Resolution on the Budget for Fiscal Year 2010, S. Con. Res. 13-42, 111th Cong. § 502(5) (2009) (requiring DOD to “review the role that contractors play in its operations, including the degree to which contractors *are* performing inherently governmental functions” (emphasis added)).

108. CIRCULAR NO. A-76 REVISED, *supra* note 67, at 5(g) (“Noncompliance . . . shall not be interpreted to create a substantive or procedural basis to challenge agency action or inaction.”); see also *Courtney v. Smith*, 297 F.3d 455, 463 (6th Cir. 2002) (holding that Circular A-76 does not provide standing because it is not a law and thus “the internal administrative appeals process . . . is intended to be the sole basis for challenging agency action that allegedly violates the Circular”); VERKUIL, *supra* note 67, at 128 (“The agency’s designation of what is ‘inherently government’ is not subject to administrative review.”).

109. 31 U.S.C. § 501(5)(2)(A).

110. Verkuil, *supra* note 81, at 452.

111. See 31 U.S.C. § 501(2).

112. See 31 U.S.C. § 501(2)(d).

113. The FAR is codified in Title 48 of the Code of Federal Regulations and is promulgated by the General Services Administration (GSA), DOD, and the National Aeronautics and Space Administration (NASA) under the authority of the Office of Federal

principal set of regulations governing the process through which the government purchases goods and services, but only disappointed bidders have succeeded in challenging contract awards for noncompliance.¹¹⁴ Private tort and contract law might apply, but lawsuits are often stymied by successful contractor immunity defenses.¹¹⁵ Although the government retains contractual power to sue private contractors under the Contract Disputes Act,¹¹⁶ it may contract out of certain protections in the negotiating process¹¹⁷ or lack the resources and motivation to pursue common law remedies.¹¹⁸ The False Claims Act¹¹⁹ allows for *qui tam* suits to recover penalties from private contractors for fraud, but its requirements are difficult to satisfy.¹²⁰

Consequently, Jerry Mashaw has suggested that a “retreat from accountability” results when public functions are outsourced at the expense of transparency: “Private actors are presumptively entitled to privacy; public officials are not. Private actors generate ‘proprietary’ information; the information produced by public agencies is ‘owned’ by the public. Public actors must often give public reasons for their actions; private preference motivates markets.”¹²¹ Whereas bureaucratic accountability engages vertical hierarchies (much like a principal-agent relationship), contractual arrangements are horizontal.¹²² If a contractor is in breach, the government stands as a party to the contract with common law remedies rather than as a superior with review and removal powers within an administrative structure. And although contract terms and private law contain a variety of standards for contractor behavior, such standards are not constitutionally moored,

Procurement Policy Act of 1974. *See* 41 U.S.C. §§ 401–38 (2006).

114. Bidders can either challenge the agency’s failure to comply with Circular A-76 under the APA or file bid protests with the GAO under 31 U.S.C. § 3551. Robert H. Shriver III, *No Seat at the Table: Flawed Contracting Out Process Unfairly Limits Front-Line Federal Employee Participation*, 30 PUB. CONT. L.J. 613, 627 (2001) (citing *CC Distribs. v. United States*, 883 F.2d 146 (D.C. Cir. 1990) (finding no constitutional standing to sue)); *see also* Verkuil, *supra* note 81, at 453 (“This leaves contractors themselves the most likely candidates to achieve judicial review and makes such review dependent upon the government denying rather than granting a request to privatize a government function.”); *cf. id.* at 454 (suggesting that the Subdelegation Act might provide an avenue for judicial review of delegations to private parties) (citing 3 U.S.C. §§ 301–02 (2000)).

115. *See, e.g.,* Bartell v. Lohiser, 215 F.3d 550, 557 (6th Cir. 2000) (applying immunity to private foster care contractor in action under federal disability laws); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67 (2d Cir. 1998) (applying immunity to private insurance company in Medicare dispute); *see also* Richard J. Pierce, Jr., *Outsourcing Is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1228 (2008) (reviewing VERKUIL, *supra* note 67) (arguing that private contractors should not be immunized for government work performed).

116. 41 U.S.C. §§ 7101–09 (2006).

117. *See* Freeman, *supra* note 19, at 591.

118. *See* Freeman, *supra* note 22, at 97–98 (explaining how both the executive and legislative branches may lack the motivation to hold private actors accountable).

119. 31 U.S.C. §§ 3729–33 (2006).

120. *See* Laura A. Dickinson, *Public Values/Private Contract*, in GOVERNMENT BY CONTRACT, *supra* note 49, at 335, 356.

121. Mashaw, *supra* note 81, at 136.

122. *See* Freeman, *supra* note 22, at 109–10.

thus placing private contractors in a less accountable posture than their public counterparts who might exercise identical authority.¹²³

C. Two Failed Constitutional Doctrines

Although the Constitution sets forth standards that dictate how the implements of government are established¹²⁴ and the respective roles of the tripartite branches,¹²⁵ its text does not provide a “standard set of institutional designs that we recognize as responsive to the[] . . . accountability concerns” that characterize outsourcing today.¹²⁶ Of course, the founders could not have anticipated the complex administrative behemoth that currently sprawls across Washington, D.C., or the extent to which corporate America influences government both politically and vicariously through the execution of government contracts. Scholars have attempted to retool existing constitutional doctrine to capture excesses in outsourcing, but these efforts have not borne fruit doctrinally. There is in all likelihood a practical reason for this: both the federal contracting apparatus and the administrative state are buttressed by current understandings of the nondelegation and state action doctrines. If the Supreme Court were to tinker with existing law to limit government outsourcing, it could jeopardize key supports for the administrative bureaucracy itself.

1. Private Delegation

Although tailor-made for confining the outsourcing of federal powers to private parties, the private delegation doctrine does not fulfill its constitutional potential.¹²⁷ To be sure, it serves up a promising argument against excessive privatization: that the powers vested by the Constitution in the respective branches must be exercised

123. Public actors are also bound to respect individuals’ constitutional rights to the extent that their actions intersect with them. Thus, a social security recipient has a right to due process in the processing of her claims. Under the state action doctrine, a contractor charged with processing benefits would be liable for due process violations only if it qualified as a state actor. *See infra* Part I.C. This Article does not argue for the complete constitutionalization of federal contractors, however. It suggests that the structure of outsourced relationships could be designed to conform to constitutional norms without rendering private contractors constitutionally liable in private litigation.

124. *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2 (appointment clause); *id.* art. I, §§ 1, 7, cl. 2 (bicameralism and presentment requirements); *id.* art. III, § 1 (clause establishing the Supreme Court).

125. *See, e.g., id.* art. II, § 1, cl. 1 (executive vesting clause); *id.* art. II, § 3 (take care clause); *id.* art. I, § 8, cl. 18 (necessary and proper clause); *id.* art. III, § 2, cl. 1 (case or controversy clause).

126. Mashaw, *supra* note 81, at 139; *see also* Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, in *GOVERNMENT BY CONTRACT*, *supra* note 49, at 291, 291 (“[C]onstitutional law has had little to say about privatization, even as privatization is fundamentally reshaping government.”).

127. *See* Freeman, *supra* note 22, at 88 (arguing that despite the nondelegation doctrine, Congress has the power to delegate “broad powers that afford private actors considerable discretion”).

in the precise way they are constitutionally authorized and cannot be transferred elsewhere.¹²⁸ Such a claim featured prominently in post-New Deal litigation around the propriety of the burgeoning administrative state.¹²⁹ In *Panama Refining Co. v. Ryan*,¹³⁰ the Court struck down a provision of the National Industrial Recovery Act (NIRA)¹³¹ that empowered the President to manage a statutory prohibition on interstate shipment of petroleum on the grounds that Congress had set “no criterion to govern the President’s course.”¹³²

A challenge to private delegations reached the Supreme Court around the same time, with similar results. In *Schechter Poultry Corp. v. United States*,¹³³ the Court famously held unconstitutional a statute that authorized the promulgation of regulations to govern the sale of chickens. NIRA empowered private trade and industrial groups to draft codes of fair competition, which were subject to the President’s approval.¹³⁴ The Court declared the legislation a violation of the separation of powers, since it enabled businesses “[to] roam at will and the President [to] approve or disapprove their proposal as he may see fit.”¹³⁵ Congress, the Court explained, “is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested.”¹³⁶ With rhetorical flourish, the Court went on to suggest that an alternative ruling—enabling delegations of legislative power to private parties—would border on the unthinkable:

[W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.¹³⁷

The Supreme Court long ago declined to extend the holdings in *Panama Refining* and *Schechter Poultry* to further confine congressional delegations of legislative power, concluding that Congress has broad authority to delegate so long as its enabling legislation includes an “intelligible principle” to guide the exercise

128. *See* *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government. . . . Congress generally cannot delegate its legislative power to another Branch.”).

129. *See, e.g.*, *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); Metzger, *supra* note 85, at 1437–45 (discussing nondelegation cases in the Supreme Court following the New Deal).

130. *Panama Ref. Co.*, 293 U.S. at 388.

131. 15 U.S.C. § 703 (2006).

132. *Panama Ref. Co.*, 293 U.S. at 415.

133. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 495.

134. *See id.* at 521–53 & 521 n.4.

135. *Id.* at 538.

136. *Id.* at 529.

137. *Id.* at 537.

of discretion.¹³⁸ In *Mistretta v. United States*,¹³⁹ the Court explained that this principle “has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”¹⁴⁰ “Intelligible principle” has since devolved into a toothless term, with the Court sustaining vague legislative instructions to act, for example, “in the ‘public interest.’”¹⁴¹

A modern doctrinal version of nondelegation would be a tricky fix for privatization run amok. The argument hinges on a diligent reading of the vesting clauses—that the legislative branch and only the legislative branch can exercise legislative power, for example—and not on the public versus private status of the delegatee. Thus, a ban on private delegations would be difficult to fashion without calling into question the propriety of legislative delegations to administrative agencies as well. And to the extent the Justices adhere to *Mistretta*’s pragmatic approach to doctrine, they are unlikely to wade into such perilous waters. The private delegation doctrine is thus poorly suited for the work of setting constitutional limits on outsourcing.¹⁴²

2. State Action

In theory, the state action doctrine provides an alternative mechanism for holding private actors constitutionally accountable for malfeasance by virtue of the government’s control or coercion over them. In effect, it converts private actors into state ones for purposes of liability for violations of individual plaintiffs’

138. *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)); Freeman, *supra* note 22, at 88.

139. *Mistretta*, 488 U.S. at 361.

140. *Id.* at 372.

141. *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 474 (2001) (citing *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932)) (“[W]e have found an ‘intelligible principle’ in various statutes authorizing regulation in the ‘public interest.’”).

142. Justice Scalia suggested in *Mistretta* that “the doctrine of unconstitutional delegation” of legislative and policy-making power is so “essential to democratic government” that “[o]ur [m]embers of Congress could not, even if they wished, vote all power to the President and adjourn sine die.” *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) (emphasis omitted). Nor, he added, could some lawmakers hand off their constitutional duties, such as voting on bills. *See id.* at 425. “By a parity of reasoning,” Paul Verkuil has argued, “the President cannot turn the executive power over to the Vice President and retire in office.” Verkuil, *supra* note 81, at 425. Professor Verkuil thus suggests that the powers exercised by principal officers who were confirmed by the Senate and have taken oaths to uphold the Constitution are similarly nondelegable. *See id.* The President can delegate to subordinates under the Subdelegation Act, Verkuil adds, with limits; he can only delegate to Officers of the United States. *Id.* at 426 (citing 3 U.S.C. §§ 301–02 (2006)). By the same token, the statute limits the President’s ability to delegate to lesser officials or outside parties. *See id.* at 427. The Subdelegation Act notwithstanding, Professor Verkuil argues that “[t]he President could never claim an inherent power to delegate official duties to private hands.” *Id.* at 427–28.

constitutional rights.¹⁴³ In *Blum v. Yaretsky*,¹⁴⁴ the Supreme Court described the doctrine as enabling states to be held “responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”¹⁴⁵ As a means for triggering accountability, however, the test’s requirement of coercive state power over the private actor has it exactly backwards: It relieves from constitutional scrutiny altogether those contractors who exercise the *most* discretion pursuant to the *least* amount of government involvement or oversight.¹⁴⁶ Thus, the powerful contractor who exercises extensive discretion without government intervention evades the test for state action; this is precisely the profile that raises the greatest potential for unmitigated abuse.

Moreover, courts rarely sustain state action challenges.¹⁴⁷ The Supreme Court has preserved “private” status where the commingling of government and private functions is significant. In *Blum*, for example, the Court found that privately owned nursing homes were not state actors susceptible to due process challenge by disgruntled residents, even though the state “subsidized the operating and capital costs of the nursing homes, and paid the medical expenses of more than 90% of the patients.”¹⁴⁸ In *Rendell-Baker v. Kohn*,¹⁴⁹ the Court insulated a privately owned school from constitutional scrutiny over employee discharges.¹⁵⁰ In doing so, the Court suggested that the school’s posture vis-à-vis the government was comparable to that of private contractors:

The school, like the nursing homes, is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the

143. See Verkuil, *supra* note 81, at 431 (observing that the state action doctrine “constitutionalizes” after-the-fact delegations that amount to the exercise of public authority” rather than limit them in the first instance).

144. 457 U.S. 991 (1982).

145. *Id.* at 1004 (citations omitted). Gillian Metzger summarizes the state action doctrine as having two prongs:

[F]irst, whether “the [challenged] deprivation . . . [was] caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible”; and second, whether “the party charged with the deprivation . . . [is] a person who may fairly be said to be a state actor.”

Metzger, *supra* note 85, at 1412 (quoting *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982) (omissions and alterations in original)). Professor Metzger notes that, because the first prong is easily satisfied, the key step is the second, which is “often alternatively characterized as determining whether ‘there is a sufficiently close nexus between the State and the challenged action.’” *Id.* at 1412 & n.149 (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 52 (1999)).

146. See Metzger, *supra* note 85, at 1425.

147. See *id.* at 1419–21 & n.185.

148. *Rendell-Baker v. Kohn*, 457 U.S. 830, 840–41 (1982) (discussing *Blum*, 457 U.S. at 1005).

149. *Id.* at 830.

150. *Id.*

government. *Acts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.*¹⁵¹

The state action doctrine’s formalist approach to the line between public and private leaves bare an ineluctable question: Are there any constitutional limits on the exercise of governmental power per se, regardless of the actor? Whereas the private delegation doctrine has been construed to allow virtually limitless legislative delegations, the state action doctrine omits analysis altogether of the *nature* of the power being exercised by a government contractor.¹⁵² As a consequence, prevailing constitutional doctrine places no boundaries on the federal government’s ability to transfer what might be considered core government functions to private parties in the first place.

What results is an unsettling anomaly: “a government entity may do only what the law permits and prescribes; a private entity may do whatever the law does not forbid.”¹⁵³ Although the Constitution enumerates the functions of the federal government, it does not indicate whether they must be carried out by federal employees.¹⁵⁴ Government agencies operate under complex accountability bureaucracies, with the Constitution at their apex. It is largely taken for granted that public values such as fair process and public participation will accompany the exercise of governmental power. With private contractors, however, federal hierarchies that exist in part to preserve those values are replaced by contractual terms.¹⁵⁵ No existing constitutional doctrine injects into the private exercise of governmental power the important norms that animate the public exercise of such power.

II. ACCOUNTABILITY AS A CONSTITUTIONAL REQUIREMENT

This Part asserts that the Constitution is nonetheless fundamentally concerned with the oversight lapses outlined in Part I. It posits that public accountability for those who exercise the power of the people is, in fact, inherent in the document’s design. Properly applied, such a principle gives rise to otherwise elusive constraints on the manner in which public functions are outsourced to private parties. This Part identifies two strains of constitutional accountability—accountability to the people and accountability to the President—and then gives doctrinal shape to each by

151. *Id.* at 840–41 (emphasis added).

152. Metzger, *supra* note 85, at 1370, (“Current doctrine pays little attention to whether the government is, in fact, delegating power to private entities to act on its behalf.”).

153. KEVIN R. KOSAR, CONG. RESEARCH SERV., PRIVATIZATION AND THE FEDERAL GOVERNMENT: AN INTRODUCTION 20 (2006) (citing Ronald C. Moe, *The Importance of Public Law: New and Old Paradigms of Government Management*, in HANDBOOK OF PUBLIC LAW AND ADMINISTRATION 41, 41–57 (Phillip J. Cooper & Chester A. Newland eds., 1997)).

154. GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE 130 (2004) (“The Constitution does not tell us which of the millions of federal employees rise to the level of ‘Officers of the United States’ whose appointments much conform to [the Appointments Clause].”).

155. *Id.* at 21–22.

deciphering the Supreme Court's consideration of such issues in a range of constitutional decisions.

A. Accountability to the People

The smattering of available tools for surveillance of privatized activities is systematically inadequate, particularly as compared to the constitutional and statutory oversight mechanisms that bind government actors performing identical functions. This imbalance is problematic not just for practical reasons but also as a matter of constitutional theory. Although the means of implementation have varied, history reveals public accountability as a fundamental principle underlying the Constitution's structure.¹⁵⁶ It is a necessary corollary to the American constitutional premise that all governmental power flows from the people.

1. Foundations of Accountability to the People

The mainstream assumption that outsourcing is fundamentally a matter of contract law and political will overlooks a contradiction posed by one of the Constitution's foundational premises. Under the Constitution, the people are the sole source of governing power.¹⁵⁷ Every exercise of that power flows through—not from—the Constitution. Accordingly, every person exercising that power remains ultimately and exclusively accountable to the people. Taken together, these bedrock procedural ideas support the intuitive conclusion that private contractors exercising federal power in the peoples' name must—like their government counterparts—be structurally accountable.¹⁵⁸

a. "We the People"

The founders believed that all governmental power should flow from the people.¹⁵⁹ Having fled a tyrannical monarchy, they understandably wanted a

156. In his recent book, *America's Unwritten Constitution: The Precedents and Principles We Live By*, Akhil Reed Amar elegantly argues that "no clause of the Constitution exists in textual isolation. We must read the document as a whole. Doing so will enable us to detect larger structures of meaning—rules and principles residing between the lines." AKHIL REED AMAR, *AMERICA'S UNWRITTEN CONSTITUTION: THE PRECEDENTS AND PRINCIPLES WE LIVE BY* 6 (2012).

157. See Martin S. Flaherty, *Relearning Founding Lessons: The Removal Power and Joint Accountability*, 47 CASE W. RES. L. REV. 1563, 1586 (1997) (citing GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 550 (1969)) ("Because the Federalists regarded the people as 'the only legitimate fountain of power,' no department was theoretically more popular and hence more authoritative than any other."). Furthermore, "by placing sovereignty in the people, both liberal theory and the Constitution make the political sovereign the source of delegated, not inherent, powers." Verkuil, *supra* note 81, at 4007.

158. See Dowdle, *supra* note 86, at 3 ("At its heart, the idea of public accountability seems to express a belief that persons with public responsibilities should be answerable to 'the people' for the performance of their duties.").

159. See, e.g., U.S. CONST. pmbi.; THE FEDERALIST NO. 49 (Alexander Hamilton).

government that not only granted its people more freedoms but also responded to them. *The Declaration of Independence* thus provides that “to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,” and adds that “whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it.”¹⁶⁰ In Federalist No. 49, Alexander Hamilton reiterated that the people should be consulted whenever the structure of government is altered “[a]s the people are the only legitimate fountain of power.”¹⁶¹ He similarly emphasized in Federalist No. 78 that “[n]o legislative act, . . . contrary to the Constitution, can be valid. To deny this would be to affirm, that the deputy is greater than his principal; that the servant is above his master; that the representatives of the people are superior to the people themselves.”¹⁶²

Ultimately, the founders did not create a true democracy, which Madison defined as government in which a small group of people assemble and participate personally.¹⁶³ The first state constitutions did establish strong legislatures that were structured to closely represent the people, primarily by concentrating power in the lower assembly.¹⁶⁴ Most early state legislatures passed laws, appointed judges and governors, and amended their constitutions by statute without the threat of executive branch veto.¹⁶⁵ Constituents were empowered to literally “‘instruct’ their representatives.”¹⁶⁶ But this pure form of democracy was rejected by the founders of the Federal Constitution. Madison deemed such democracies “spectacles of turbulence and contention; . . . incompatible with personal security, or the rights of property; and . . . as short in their lives, as they have been violent in their deaths.”¹⁶⁷ Early state legislatures were perceived to have been captured by “selfish factions and demagogic leaders” who “enacted ill-advised laws infringing rights of contract, property, and trial by jury” at the expense of the public good.¹⁶⁸

The founders instead opted for a republic, whereby power is run through a small number of wiser government representatives.¹⁶⁹ When a republic extends to cover an extremely large population, opinions are more diverse, making it more difficult for a majority faction to take hold.¹⁷⁰ In making this choice, the founders retained the guiding mantra that the ultimate source of the power remains with the people. It

160. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

161. THE FEDERALIST NO. 49 (Alexander Hamilton).

162. THE FEDERALIST NO. 78 (Alexander Hamilton).

163. See Dowdle, *supra* note 86, at 4.

164. Flaherty, *supra* note 157, at 1581–82.

165. *Id.* at 1582.

166. *Id.*

167. THE FEDERALIST NO. 10, at 57 (James Madison) (Ian Shapiro ed., 2009).

168. Flaherty, *supra* note 157, at 1583; see also Dowdle, *supra* note 86, at 3–4 (noting early critiques of “patronage-based politics”).

169. The Founders offered vague definitions of the term at times. Alexander Hamilton defined a republic as a government that “requires that the sense of the majority should prevail,” THE FEDERALIST NO. 22, at 109 (Alexander Hamilton) (Ian Shapiro ed., 2009), and James Madison defined it as “a government in which the scheme of representation takes place.” THE FEDERALIST NO. 10, at 51 (James Madison) (Ian Shapiro ed., 2009).

170. THE FEDERALIST NO. 10 (James Madison).

is the Constitution's opening salvo: "WE THE PEOPLE of the United States . . . do ordain and establish this Constitution for the United States of America."¹⁷¹ Madison explained in Federalist No. 37 that "[t]he genius of republican liberty, seems to demand on one side, not only that all power should be derived from the people; but that those intrusted [sic] with it should be kept in dependence on the people."¹⁷² The Supreme Court has repeatedly reinforced the notion that government exercises only delegated powers that are channeled from the people through the Constitution.¹⁷³ Several Justices once declared that "[t]o hold otherwise is to overthrow the basis of our constitutional law."¹⁷⁴ In its relatively recent invalidation of a statutory provision embedding an independent agency within an independent agency, the Court expressed concern that the expanding government might be "slip[ping] from the Executive's control, and thus from that of the people."¹⁷⁵

171. U.S. CONST. pmb.; *see also* *Vieth v. Jubelirer*, 541 U.S. 267, 356 (2004) (Breyer, J., dissenting) (observing that the Preamble's "We the People" language reflects a "fundamental principle" of American government that anchors a constitutional design that is "basically democratic"); *United States v. Int'l Union United Auto., Aircraft & Agric. Implement Workers*, 352 U.S. 567, 593 (1957) (Douglas, J., dissenting) ("Under our Constitution it is We The People who are sovereign. The people have the final say. The legislators are their spokesmen.").

172. THE FEDERALIST NO. 37 (James Madison).

173. *See* *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 821 (1995) ("[T]he Framers, in perhaps their most important contribution, conceived of a Federal Government directly responsible to the people, possessed of direct power over the people, and chosen directly, not by States, but by the people."); *Hawke v. Smith*, 253 U.S. 221, 226–27 (1920) (noting that "[t]he Constitution of the United States was ordained by the people," who "grant" authority to Congress, and "[i]t is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed"); *Downes v. Bidwell*, 182 U.S. 244, 359 (1901) (Fuller, Harlan, Brewer, & Peckham, JJ., dissenting) ("[N]o utterance of this court has intimated a doubt that in its operation on the people, by whom and for whom it was established, the national government is a government of enumerated powers, the exercise of which is restricted to the use of means appropriate and plainly adapted to constitutional ends, and which are 'not prohibited, but consist with the letter and spirit of the Constitution.'"); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 403 (1819) ("The government proceeds directly from the people; is 'ordained and established' in the name of the people . . ."); *see also* *INS v. Chadha*, 462 U.S. 919, 951 (1983) ("When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it."); *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 667 (1966) (observing that the Equal Protection Clause "is an essential part of the concept of a government of laws and not men" and "is at the heart of Lincoln's vision of 'government of the people, by the people, [and] for the people'" (alteration in original) (quoting *Reynolds v. Sims*, 377 U.S. 533, 568 (1964))); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 640 (1952) (Jackson, J., concurring) ("[T]he Federal Government[,] as a whole, possesses only delegated powers. The purpose of the Constitution was not only to grant power, but to keep it from getting out of hand.").

174. *Downes*, 182 U.S. at 359.

175. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3156 (2010).

b. Derivative Power

The founders’ idea that the power flows from the people is necessarily linked to the understanding that those who exercise power in the people’s name must be accountable to them.¹⁷⁶ The Constitution’s very structure reflects a number of safeguards that foster accountability.¹⁷⁷ First, the framers established the federal government as one of limited and enumerated powers.¹⁷⁸ Before the government can act, it must be able to trace derivative authority for its actions directly back to the Constitution, which was “ordain[ed] and establish[ed]” by the people.¹⁷⁹ The Constitution grants the government specific powers, lays out its structure, and explains how the government will make decisions and function.¹⁸⁰

James Madison accordingly described the interplay between state and federal governments as a “compound republic” that provided “double security.”¹⁸¹ State governments were intended as separate laboratories that could be used to experiment with different forms of government, but the founders did not grant states *carte blanche*. The Constitution’s Guarantee Clause requires the federal government to ensure that states employ republican forms of government,¹⁸² and empowers the people of each state to create a government independent of other state governments and the federal government itself.¹⁸³

Second, the founders created a government of separated powers, an idea derived from Montesquieu.¹⁸⁴ Rather than mixing government by social class, it would be

176. As Harold Bruff has observed, “*The Federalist Papers* are replete with emphasis on the need to ensure public knowledge of accountability for particular actions.” Harold H. Bruff, *On the Constitutional Status of the Administrative Agencies*, 36 AM. U. L. REV. 491, 507–08 (1987) (citing THE FEDERALIST NO. 70, at 456 (Alexander Hamilton) (B. Wright ed., 1961)).

177. See Rebecca L. Brown, *Liberty, the New Equality*, 77 N.Y.U. L. REV. 1491, 1518 (2002) (citing U.S. CONST. art. I, § 7, cl. 2 (requiring concurrence of two differently constituted legislative houses to pass legislation); U.S. CONST. art. IV, § 2, cl. 1 (ensuring that states do not discriminate against citizens of other states); U.S. CONST. amends. I–VIII (limiting power of Congress to legislate in areas affecting certain individual rights)).

178. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2577 (2012).

179. U.S. CONST. pmb.; see also Lillian BeVier & John Harrison, *The State Action Principle and Its Critics*, 96 VA. L. REV. 1767, 1793 (2010) (“The structural provisions of the Constitution embody the delegation of power from the people to their rulers and provide convincing evidence that the power to govern flows from the people—who, as principals, ‘ordain[ed] and establish[ed]’ the Constitution—to the government actors to whom they delegated it.” (alterations in original) (emphasis omitted)).

180. See BeVier & Harrison, *supra* note 179, at 1793–95.

181. THE FEDERALIST NO. 51, at 265 (James Madison) (Ian Shapiro ed., 2009).

182. U.S. CONST. art. IV, § 4.

183. See Deborah Jones Merritt, *Republican Governments and Autonomous States: A New Role for the Guarantee Clause*, 65 U. COLO. L. REV. 815, 819–22 (1994). Many state constitutions include accountability clauses. Freeman, *supra* note 22, at 93.

184. Although the founders were influenced by the writings of multiple political thinkers, historians have identified Montesquieu as the most influential, particularly in matters of constitutional design. See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 192

comprised of separated powers—legislative, executive, and adjudicative—allocated to assemblies, a single magistrate, and judges, respectively.¹⁸⁵ As the legislature posed a risk of amassing too much power, it was split into two houses “on ground that each House will keep the other in check.”¹⁸⁶ They also shifted power from the legislature to a unitary presidency with veto power, salary protection, and constraints on removal.¹⁸⁷ Unlike state magistrates, the President would be elected, albeit indirectly.¹⁸⁸ The election of a single executive created a more direct line of accountability to the public.¹⁸⁹ The third branch—the judiciary—would be selected by both the President and the Senate, rather than by just one branch.¹⁹⁰ Thus, “each branch of government should have some direct or indirect democratic basis.”¹⁹¹ This system of separated powers was necessary, as Madison famously stated in Federalist No. 51, as “[a]mbition must be made to counteract ambition.”¹⁹² Because the system of checks and balances made direct appeals unnecessary,¹⁹³ Madison anticipated that government would function in a grinding fashion, through constant compromises, to provide the people the most security.¹⁹⁴

Accountability and the idea of government by the people thus operate as reciprocals: because the people retain the ultimate power of government, those who hold public power must be accountable to the populace. Likewise, in order for there to be accountability under our Constitution, the source of federal power—the people—must have some say in how it is exercised. The readiness of the populace to accept the Constitution itself reflects a consensus about procedure—not substance.¹⁹⁵ “We the People” agreed through the Constitution on “fair terms of cooperation for their own sake [as] an essential social virtue.”¹⁹⁶ Such terms operate to check against the illegitimate exercise of power. People accept the Constitution because it establishes a “specifically constituted, democratically deliberative lawmaking system to which all primary legal content is constantly

(1984); *see also* *Myers v. United States*, 272 U.S. 52, 116 (1926) (citing James Madison, *Thursday, July. 19. in Convention, in 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 51, 56 (Max Farrand ed., 1911) (“Montesquieu’s view that the maintenance of independence as between the legislative, the executive and the judicial branches was a security for the people had [convention members’] full approval.”)).

185. *See* Flaherty, *supra* note 157, at 1583.

186. *United States v. Munoz-Flores*, 495 U.S. 385, 394 (1990) (citing *THE FEDERALIST* No. 63 (James Madison)).

187. Flaherty, *supra* note 157, at 1583.

188. *See* U.S. CONST. art. II, § 1, cl. 1–3; *see also* Flaherty, *supra* note 157, at 1583–84.

189. *See* Bruff, *supra* note 176, 508.

190. *See* Flaherty, *supra* note 157, at 1583–84.

191. *Id.* at 1583.

192. *THE FEDERALIST* NO. 51, at 264 (James Madison) (Ian Shapiro ed., 2009).

193. *See* *THE FEDERALIST* NO. 49 (James Madison); *THE FEDERALIST* NO. 50 (James Madison).

194. *See* Hans A. Linde, *Who is Responsible for Republican Government?*, 65 U. COLO. L. REV. 709, 730 (1994) (“Madison and Wilson relied on elected representatives to defuse, to compromise, and, at best, to prevent the abuse of government power from motives of personal self-interest or majoritarian passion.”).

195. Frank I. Michelman, *W(h)ither the Constitution?*, 21 *CARDOZO L. REV.* 1063, 1070 (2000).

196. JOHN RAWLS, *POLITICAL LIBERALISM* 54 (Columbia Univ. Press 1996).

accountable.”¹⁹⁷ The Constitution binds generations to this way of doing business.¹⁹⁸ If the Constitution were not immutable, it would be useless beyond the politics of the moment.¹⁹⁹

Moreover, the system assumes that the populace is safer if government adheres to principles of constitutional structure even if it is cumbersome to do so and even if departures from that structure seem innocuous.²⁰⁰ Accountability structures promote public access, responsiveness, sound policy, and rationality in decision making.²⁰¹ They also serve to squelch “the potential of tyrannical use of government power over the people.”²⁰² Ideally, self-interest and corruption, which destabilize the political system, are marginalized.²⁰³

In sum, the Constitution sets forth a procedural framework for the definition and allocation of the people’s power to self-govern—one to which the populace has consented. When Congress or the executive branch sub-delegates their powers to a private party, the powers themselves do not morph into something “private”; they retain their fundamental character as powers derived from the people through the Constitution. As a consequence, the Constitution is the guiding force behind the exercise of *any* power that flows through it from the people—even if that power’s chain of delegation leads to private hands.

197. Michelman, *supra* note 195, at 1071.

198. See James O. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 311 (1976).

199. See *id.* See generally *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (rejecting Maryland’s attempt to tax the Second Bank of the United States and holding that the Necessary and Proper Clause allows Congress to pass laws not specifically enumerated in the Constitution).

200. Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 65 n.11 (1990).

201. See Freeman, *supra* note 19, at 665. The bureaucracy that enables government to act predictably and fairly also hampers innovation and flexibility. See David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 654 (1986).

202. Barbara Hinkson Craig & Robert S. Gilmour, *The Constitution and Accountability for Public Functions*, 5 GOVERNANCE 46, 48 (1992) (“Ironically this fundamental purpose—to protect the people from the tyrannous exercise of power—is the one more ignored in contemporary debate and analysis.”); see also Lawrence, *supra* note 201, at 661 (observing that the public accountability considerations implied by the Constitution’s structure include Article III’s provisions for judicial review, which protect against deprivations of due process and prevent private interests from dominating the exercise of public power). The Supreme Court has hawkishly protected against congressional attempts to aggrandize its own power. See *INS v. Chadha*, 462 U.S. 919, 946–59 (1983) (invalidating a provision for a one-house veto in the Immigration and Nationality Act). Indeed, the anti-aggrandizement principle is the only real limitation on congressional power that has survived the demise of the nondelegation doctrine. See Craig & Gilmour, *supra*, at 59.

203. See Lawrence, *supra* note 201, at 661–62.

2. Characteristics of Accountability to the Public

Although the Supreme Court has not expressly recognized a constitutional accountability doctrine, the Constitution's procedural architecture gives rise to substantive criteria for the exercise of public power. Repeatedly, the starting point for doctrinal analysis of express constitutional provisions is an abiding respect for the people's power and public accountability. Read together, these decisions reveal at least three definitional characteristics of constitutional accountability. The first is that the people's power must be exercised on behalf of the common good and not out of self-interest. The second is identity transparency—the public should be clear on whether it is dealing with a private contractor versus a government actor. Third, the public should be informed of contractors' responsibilities and performance to facilitate public participation in the outsourcing process.²⁰⁴

a. Acting in the Public Interest

Implicit in the concept of “We the People” is the almost moralistic assumption that government actors are entrusted to do the right thing on behalf of the common good.²⁰⁵ The question of whether government is “honest or corrupt . . . dedicated to the public good or overtaken by faction”²⁰⁶ was in the foreground of the founders' decision to form a republic.²⁰⁷ This brand of government does not necessarily mirror public sentiments in the political sense but will champion the public interest even if that means alienating a dominant political faction.²⁰⁸ It forbears pure democracy in the interest of something greater. The oath of office taken by many federal officials—with its regular reference to protecting and defending the Constitution—is fashioned to instill in public actors this “sixth sense” of accountability that is absent from private sector contractual arrangements.²⁰⁹

Mainstream due process and equal protection precedents imply such a public interest component of constitutional accountability to the people. The Court has required that an asserted government interest serves the public good, rather than merely private interests or biases, in order to qualify as “legitimate” under the rational basis test.²¹⁰ Cass Sunstein has expanded this concept to identify a theory

204. These factors are not necessarily exclusive.

205. See Mulgan, *supra* note 13, at 557 (discussing discourse around a public servant's “inner responsibility . . . to his or her conscience or moral values”).

206. Peter M. Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 617 (1989).

207. See *supra* notes 167–70 and accompanying text.

208. See Shane, *supra* note 206, at 614.

209. *In re Lindsey*, 158 F.3d 1263, 1273 (D.C. Cir. 1998) (“[The oath taken by Executive Branch officials] is a solemn undertaking, a binding of the person to the cause of constitutional government, an expression of the individual's allegiance to the principles embodied in that document. Unlike a private practitioner, the loyalties of a government lawyer therefore cannot and must not lie solely with his or her client agency.”).

210. See, e.g., *Romer v. Evans*, 517 U.S. 620, 634 (1996) (“[A] bare . . . desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.” (omission in original) (emphasis in original) (quoting *U.S. Dep't of Agric. v. Moreno*, 413 U.S. 528,

of “naked preferences,” which he argues the Constitution was designed to avoid.²¹¹ The naked preferences theory bans the “distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want.”²¹² It is a common theme in the doctrinal tests that have developed under “many of the most important clauses of the Constitution: the dormant commerce, privileges and immunities, equal protection, due process, contract, and eminent domain clauses.”²¹³ All of these constitutional provisions have been construed to filter out “discrimination based on an impermissible purpose.”²¹⁴

534–35 (1973)); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446–47 (1985) (“[S]ome objectives—such as ‘a bare . . . desire to harm a politically unpopular group,’—are not legitimate state interests” for equal protection purposes. (omission in original) (citations omitted) (quoting *Moreno*, 413 U.S. at 534)); *Moreno*, 413 U.S. at 534–35 (finding that “a purpose to discriminate against hippies cannot, in and of itself and without reference to some . . . considerations in the public interest, justify [the statute]” on equal protection grounds); Timothy Sandefur, *In Defense of Substantive Due Process, or the Promise of Lawful Rule*, 35 HARV. J.L. & PUB. POL’Y 283, 325 (2012) (observing that “[b]ecause the statute [in *Lawrence*] did not realistically advance any genuine public good, it was simply an arbitrary attempt to ‘demean’ adults ‘who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle’” (quoting *Lawrence v. Texas*, 539 U.S. 558, 578 (2003))). See generally Timothy Sandefur, *Insiders, Outsiders, and the American Dream: How Certificate of Necessity Laws Harm Our Society’s Value*, 26 NOTRE DAME J.L. ETHICS & PUB. POL’Y 381, 423 (2012) (“[E]ven the cases applying the most lenient level of scrutiny to government action have almost always required that the government serve *public-oriented* goals—generally referred to as the protection of public health, safety, and welfare—rather than for private interests.” (emphasis in original)).

211. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984); see also CASS R. SUNSTEIN, *THE PARTIAL CONSTITUTION* 25–37 (1998).

212. Sunstein, *supra* note 211, at 1689.

213. *Id.* (footnotes omitted).

214. *Id.* at 1690 (footnotes omitted). Professor Sunstein explains:

The privileges and immunities clause, for example, prohibits a state from preferring its citizens over outsiders unless there are perfectly valid independent reasons for the preference. The dormant commerce clause allows discrimination against interstate commerce, with its attendant costs to out-of-staters, only if the discrimination is a means of promoting some goal unrelated to protectionism. The equal protection clause allows a state to distinguish between one person and another only if there is a plausible connection between the distinction and a legitimate public purpose. The contract clause does not forbid an impairment of contractual obligations if the impairment is the incidental consequence of a generally applicable rule of conduct designed to promote legitimate government goals.

Id. at 1689–90 (citations omitted) (internal quotation marks omitted). Other scholars have similarly observed that the “public use” inquiry under the Takings Clause “focuses on the government’s *actual* ends—that is, the goal it was actually trying to achieve by taking property.” Eduardo M. Peñalver & Lior Jacob Strahilevitz, *Judicial Takings or Due Process?*, 97 CORNELL L. REV. 305, 324 n.79 (2012) (emphasis in original) (citing *Kelo v. City of New London*, 545 U.S. 469, 478, 479–81 (2005) (“Nor would the City be allowed to take property under the mere pretext of a public purpose, when its actual purpose was to bestow a private benefit.”)).

Another way of viewing the widespread requirement that a legitimate public interest animate government decision making is to consider it substantive due process in the reverse. While substantive due process requires that government interference in a fundamental right be justified by a sufficient purpose, the government's "right" to take actions that affect individual citizens must correlatively be grounded in a legitimate public purpose to be valid in the first instance.²¹⁵

Professor Sunstein links the naked preferences ban to the framers' "fear that government power would be usurped solely to distribute wealth or opportunities to one group or person at the expense of another."²¹⁶ Constitutional doctrine that rejects naked preferences for powerful groups thus serves as "a means . . . of ensuring that government action results from a legitimate effort to promote the public good rather than from a factional takeover."²¹⁷ Moreover, "[t]he notion that government actions must be responsive to something other than private pressure is associated with the idea that politics is . . . the transcending of the different interests of the society in the search for the single common good."²¹⁸ The naked preferences theory logically flows into the idea that anyone who exercises power derived from the people through the Constitution, therefore, must do so pursuant to legitimate government purposes, which do not include pure self-interest or corporate profit.

In *Young v. United States ex rel. Vuitton et Fils S.A.*,²¹⁹ the Supreme Court expressly relied upon the normative idea of government in the public interest to reverse a criminal conviction for contempt. The district court entered an injunction pursuant to a settlement of a trademark infringement suit. After a private sting operation revealed a possible violation of the injunction, the court appointed the plaintiff's lawyers as special counsel to prosecute a criminal contempt action, which resulted in a jury conviction.²²⁰ The Supreme Court held that a prosecutor's duty to the public interest disqualified private attorneys from prosecuting a violation of a court order benefiting their civil client.²²¹ Quoting its rebuke of prosecutorial misconduct in *Berger v. United States*,²²² the Court declared federal prosecutors "the representative[s] . . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . is not that it shall win a case, but that justice shall be done."²²³ Because

215. See *Lawrence*, 539 U.S. at 578 (finding statute that criminalized private homosexual conduct a violation of substantive due process where "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual").

216. Sunstein, *supra* note 211, at 1690.

217. *Id.*

218. *Id.* at 1691 (citation omitted) (quoting GORDON WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* (1972) (internal quotation marks omitted)).

219. 481 U.S. 787 (1987).

220. See *id.* at 789-91.

221. *Id.* at 802-09.

222. 295 U.S. 78 (1935).

223. *Young*, 481 U.S. at 803 (quoting *Berger*, 295 U.S. at 88).

the private attorneys appointed in *Young* were not “as disinterested as a public prosecutor,”²²⁴ the Court reversed.²²⁵

Notably, the Court was persuaded by “the *potential* for private interest to influence the discharge of public duty,”²²⁶ regardless of the facts. It found that “[p]ublic confidence in the disinterested conduct of [such an] official is essential”—particularly when “expansive powers and wide-ranging discretion” are involved²²⁷—and struck a sharp contrast between the motivations of government actors versus private ones. Whereas “[t]he government’s interest is in dispassionate assessment” of criminal charges, a private party might prosecute a weak case or turn a blind eye to a strong one if either course “promises financial or legal rewards for the private client.”²²⁸ In *Young*, therefore, the Court fashioned non-constitutional doctrine around the policy objective of ensuring that the people’s power is exercised on their behalf, that is, of “hav[ing] assurance that those who would wield [prosecutorial] power will be guided solely by their sense of public responsibility for the attainment of justice.”²²⁹

Concededly, the precise holding in *Young* created a “categorical rule against the appointment of an interested prosecutor” rather than a working doctrine of disinterested government.²³⁰ In *New York v. United States*,²³¹ however, the Court applied the Tenth Amendment to similarly confine the powers of a constitutional branch—Congress, in that case—due to “the possibility that powerful incentives might lead . . . officials to view departures from the federal structure to be in their personal interests.”²³² The question in *New York* was whether Congress could legislatively commandeer a state to dispose of radioactive waste. The Court said no,²³³ in part because members of Congress had an interest in avoiding the “personal responsibility” they would face from constituents if they passed federal legislation that identified radioactive disposal sites instead.²³⁴ Under such circumstances, it reasoned, “[t]he interests of public officials thus may not coincide with the Constitution’s intergovernmental allocation of authority.”²³⁵

Young and *New York* thus lend support to the idea that federal power should be primarily exercised in a manner that benefits the interests of the public. This foundational principle does not wither away simply because an executive branch officer or employee decides to hire a private party to perform a public function contractually. To the extent that a private party exercises federal powers, structural constraints must be in place to ensure that private interests do not trump the public good.

224. *Id.* at 804.

225. *Id.* at 814.

226. *Id.* at 805 (emphasis in original).

227. *Id.* at 813.

228. *Id.* at 805.

229. *Id.* at 814 (Blackmun, J., concurring).

230. *Id.*

231. 505 U.S. 144 (1992).

232. *Id.* at 182.

233. *See id.* at 149.

234. *Id.* at 182–83.

235. *Id.* at 183.

b. Identity Transparency

A second component of accountability to the people is what one might call “identity transparency.” This factor is implicit in the Court’s federalism jurisprudence, which contains express assertions of a constitutional accountability principle in that context.²³⁶ More particularly, the Supreme Court has invalidated federal regulation of state government for confusing the public as to who to blame for malfeasance.²³⁷ Private contracting similarly muddles the public’s ability to hold political actors accountable for abuses of federal power.²³⁸

Three cases especially support the idea that governmental powers should be allocated in such a way as to make clear who is responsible for actions taken on behalf of the people. In *FERC v. Mississippi*,²³⁹ Justice O’Connor dissented from the majority’s decision to uphold federal regulation of state utility regulatory agencies under the Tenth Amendment.²⁴⁰ She wrote at length on “the most valuable aspects of our federalism,” which enable citizens to hold their local utilities accountable for their actions.²⁴¹ Unlike federal preemption, she reasoned, “[c]ongressional compulsion of state agencies [to carry out federal regulation] blurs the lines of political accountability and leaves citizens feeling that their representatives are no longer responsive to local needs.”²⁴²

Later, in *New York* and *Printz v. United States*,²⁴³ the Court embraced Justice O’Connor’s theory of accountable government transparency while striking down federal legislation regulating the states. As noted previously, *New York* involved a challenge to a statute requiring states either to enact legislation providing for the disposal of radioactive waste or take title to it. The Court found the legislation unconstitutional in light of the dual sovereignty principle embodied in the Tenth Amendment, explaining that, “where the Federal Government compels States to regulate, the accountability of both state and federal officials is diminished.”²⁴⁴ Under the statute in question, the states “b[ore] the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.”²⁴⁵ As a result, “[a]ccountability is . . . diminished.”²⁴⁶ *New York* thus indicates that government

236. See generally Beermann, *supra* note 8, at 1507, 1515–16 (suggesting that an accountability doctrine can be erected “in relatively short order” from Tenth Amendment cases).

237. *Id.* at 1515–16.

238. See *id.*

239. 456 U.S. 742 (1982).

240. See generally *id.* at 775–97 (O’Connor, J., concurring in part and dissenting in part).

241. *Id.* at 787–88.

242. *Id.* at 787.

243. 521 U.S. 898 (1997).

244. *New York v. United States*, 505 U.S. 144, 168 (1992).

245. *Id.* at 169.

246. *Id.* The Court elaborated:

[W]hile it would be well within the authority of either federal or state officials to choose where the disposal sites will be, it is likely to be in the political interest of each individual official to avoid being held accountable to the voters for the choice of location. If a federal official is faced with the alternatives of

power cannot be formulated in such a way as to pass the buck, as it were, or to confuse the public as to who is responsible for a particular action.

From "the Tenth Amendment's assertion that 'the powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people,'" the Court again identified a principle of public accountability in *Printz*.²⁴⁷ *Printz* involved a constitutional challenge to the Brady handgun law, which required local law enforcement to conduct background checks on prospective handgun buyers.²⁴⁸ Finding no constitutional text addressing the propriety of congressional attempts to compel state officers to execute federal laws,²⁴⁹ the Court turned to the Constitution's structure to "discern among its 'essential postulate[s]' a principle that controls."²⁵⁰ To that end, Justice Scalia wrote for the Court that "[t]he Constitution . . . contemplates that a State's government will represent and remain accountable to its own citizens."²⁵¹ The Brady statute allowed Congress to evade public accountability for its effects; Congress could take credit for "'solving' problems" related to handguns without raising federal taxes, while at the same time putting states "in the position of taking the blame for its burdensomeness and for its defects."²⁵²

Printz underscores that the Constitution's structure gives rise to essential principles that, though not express in its text, can do real doctrinal work in evaluating reallocations of power. One such principle is the requirement of identity transparency. To the extent that a reallocation of power obscures clear lines of responsibility, it may unconstitutionally render the exercise of those powers unaccountable to the people. This element of constitutional accountability to the people can and should be extended to constrain the federal practice of outsourcing.

c. Public Disclosure and Responsive Government

The Supreme Court's First Amendment jurisprudence suggests a third element of public accountability: that those who exercise the people's power should disclose information as to how that power is being exercised. Without such transparency, responsive and adaptive government cannot exist. Although the Constitution "lacks a general-purpose public access provision, a special procedure for enacting laws affecting public access, or an explicit obligation to pass such legislation,"²⁵³ the Supreme Court has repeatedly indicated in First Amendment

choosing a location or directing the States to do it, the official may well prefer the latter, as a means of shifting responsibility for the eventual decision.

Id. at 182–83.

247. 521 U.S. at 919 (quoting U.S. CONST. amend. X).

248. Brady Handgun Violence Prevention Act, 18 U.S.C. § 922(s)(1)(A)(i)(III, IV), (s)(2) (2006).

249. *Printz*, 521 U.S. at 905.

250. *Id.* at 918 (alteration in original) (citation omitted) (quoting *Principality of Monaco v. Mississippi*, 292 U.S. 313, 322 (1934)).

251. *Id.* at 920 (citing *New York*, 505 U.S. at 168–69; *United States v. Lopez*, 514 U.S. 549, 576–77 (1995) (Kennedy, J., concurring)).

252. *Id.* at 930.

253. Adam M. Samaha, *Government Secrets, Constitutional Law, and Platforms for Judicial Intervention*, 53 UCLA L. REV. 909, 932 (2006); see also *Houchins v. KQED, Inc.*,

cases that it is “well established that the Constitution protects the right to receive information and ideas.”²⁵⁴ The Court has accordingly characterized the framers’ intention behind the First Amendment as “assur[ing] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”²⁵⁵ The ability of the people to speak and debate freely operates to ensure that government remains responsive and accountable to the people.²⁵⁶

Repeatedly, the Court has equated First Amendment rights with the central idea of public accountability. In *Gravel v. United States*, it noted that the First Amendment protects not just speakers but listeners—a protection that aids public access to information about government and thus its ability to hold government accountable.²⁵⁷ The Court in *Stromberg v. California* highlighted the importance of “free political discussion” to democratic accountability, “to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, [which] is a fundamental principle of our constitutional system.”²⁵⁸ In *New York Times v. Sullivan*, it noted that the First Amendment protects freedom of speech and dissemination of ideas that is “uninhibited, robust, and wide-open” because public debate ensures that government can be changed.²⁵⁹ Likewise, in *West Virginia State Board of Education v. Barnette*,²⁶⁰ Justice Jackson wrote fervently about the First Amendment’s role in ensuring an accountable government, as

438 U.S. 1, 15 (1978) (plurality opinion) (“Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government’s control.”). Adam Samaha observes, however, that, “[t]hree justices dissented [in *Houchins*], stressing their opposition to total denial of public access to information about jail operations.” Samaha, *supra*, at 942 n.151 (citing *Houchins*, 438 U.S. at 29–39) (Stevens, J., dissenting)).

254. *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *see also* *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (“[W]here a speaker exists, . . . the protection afforded is to the communication, to its source and to its recipients both. This is clear from the decided cases.”); *Mills v. Alabama*, 384 U.S. 214, 218 (1966) (“[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs.”); *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (“The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official’s fitness for office is relevant.”); Samaha, *supra* note 253, at 941–42 (“One can logically read the Amendment as promoting a system of communication in which audiences possess interests in parity with speakers. In fact, the Court had long accepted listeners’ First Amendment interests. And the judiciary was indicating that ‘political speech’ and ‘robust’ debate on ‘public issues’ were at the core of its concerns.” (footnotes omitted)).

255. *Roth v. United States*, 354 U.S. 476, 484 (1957) (citing a 1774 letter by the Continental Congress in 1 JOURNALS OF THE CONTINENTAL CONGRESS 108 (1774)); *accord Mills*, 384 U.S. at 218–19.

256. *See, e.g.*, THE FEDERALIST NO. 84 (Alexander Hamilton); *Mills*, 384 U.S. at 219; *cf. Gravel v. United States*, 408 U.S. 606, 640–41 (1972).

257. *Gravel*, 408 U.S. at 640–41 (quoting U.S. Senator Sam Ervin anecdotally).

258. 283 U.S. 359, 369 (1931).

259. 376 U.S. 254, 269–70 (1964) (Brandeis, J., concurring) (citing *Whitney v. California*, 247 U.S. 357, 375–76 (1927)).

260. 319 U.S. 624 (1943).

“[a]uthority . . . is to be controlled by public opinion, not public opinion by authority.”²⁶¹ Justice Brandeis, in a concurring opinion in *Whitney v. California*,²⁶² similarly described the origins of the First Amendment as intending to protect minorities against “the occasional tyrannies of governing majorities,” to ensure broad debate, and to allow for lawful correction of government.²⁶³ Most recently, in *Citizens United v. FEC*,²⁶⁴ Justice Kennedy wrote for the majority that “[s]peech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people,” as it creates “transparency [that] enables the electorate to make informed decisions and give proper weight to different speakers and messages.”²⁶⁵

The Supreme Court has thus construed the Free Speech Clause as enabling the citizenry to correct government through wide-open debate. This exchange of ideas renders government accountable and responsive to the people. To be sure, a constitutional accountability doctrine should not be construed to confer private liability for First Amendment violations (or otherwise upend the state action doctrine) or to constitutionalize the FOIA in individual cases. But the Court’s First Amendment jurisprudence gives some definition to what public accountability encompasses: the public’s ability to debate and react to how the government exercises power. Doctrinally, it suggests that the government’s decision to hand off power to private contractors, as well as the exercise and management of that power, must be sufficiently transparent to enable a debate of ideas that creates a responsive government.²⁶⁶ Absent minimal disclosure of information relating to the scope and execution of contractors’ federal responsibilities, the use of public opinion to correct government is frustrated.

B. Accountability to the President

Missing from the foregoing discussion of the meaning of constitutional accountability is the visceral idea that, without mechanisms for punishing wrongdoers, accountability cannot exist. This concept is both inherent in the Constitution’s structure and woven into Supreme Court case law addressing the constitutionality of departures from the express three-branch apparatus. Because they reveal themselves in connection with a distinct line of accountability—accountability to the President—retributive systems are dealt with in this subpart, which goes on to specifically suggest that accountability to the President requires

261. *Id.* at 641.

262. 274 U.S. at 357.

263. *Id.* at 375–76.

264. 130 S. Ct. 876 (2010).

265. *Id.* at 898, 916. The *Citizens United* decision is controversial because the Court granted these rights to corporations and refused to distinguish between natural persons and corporations. *Id.* at 929–31 (Stevens, J., dissenting); *see also id.* at 925–29 (Scalia, J. concurring) (“The Amendment is written in terms of ‘speech,’ not speakers.”).

266. This is not to say that matters of national security entrusted to the President must be made public if public contractors are involved. The argument is that public and private employees acting at the public’s behest should be treated similarly for purposes of fostering the democratic norms reflected in the First Amendment.

removability and a clear supervisory chain of command to the highest executive officeholder.

1. Foundations of Accountability to the President

As the majority of federal contracts involve executive branch agencies,²⁶⁷ the concept of accountability to the President is particularly salient for purposes of the outsourcing debate. The sources of this requirement are Article II and the more common democratic notion that the President's subordinates are indirectly accountable to the public by virtue of the people's ability to vote him out of office.

a. Article II

Article II embodies accountability to the President in several places. First, the term "executive Power" in Article II's Vesting Clause implies broad presidential power to supervise and control the use of that power by nongovernmental actors.²⁶⁸ Second, the directive that the President "take care that the Laws be faithfully executed"²⁶⁹ suggests that the President must retain sufficient authority to manage a private party's exercise of executive power if he is to fulfill the President's constitutional obligations of executive branch fidelity to the law.²⁷⁰

Third, the Appointments Clause specifies the procedure for appointing "Officers of the United States."²⁷¹ The President appoints principal officers "with the [a]dvice and [c]onsent of the Senate," whereas Congress may empower the President alone, a court, or a department head to appoint inferior officers.²⁷² As Justice Souter has observed, by dividing the appointment process between the President and the Senate, the Appointments Clause sets up a system of checks and balances that works to "ensure accountability."²⁷³ The Court reinforced the accountability function of the Appointments Clause in *Freytag v. Commissioner*,²⁷⁴ in which it held that the Tax Court, although an Article I court of limited jurisdiction, is a "court of law" empowered to appoint special trial judges within the meaning of the Appointments Clause. The Court stated that "[t]he Framers understood . . . that by limiting the appointment power, they could ensure that those who wielded it were

267. See Verkuil, *supra* note 81, at 436–37.

268. See U.S. CONST. art. II, § 1, cl. 1.

269. U.S. CONST. art. II, § 3.

270. See Shane, *supra* note 206, at 600–01.

271. U.S. CONST. art. II, § 2, cl. 2.

272. *Id.* In *Buckley v. Valeo*, 424 U.S. 1, 126, 139 (1976), the Court held that an appointee exercising "significant authority" pursuant to the laws of the United States is an officer of the United States who, unlike lesser functionaries, must be appointed in the manner prescribed by the Constitution. To the extent that private contractors fall within the scope of this definition, an Appointments Clause challenge could conceivably arise. This Article relies on Article II case law to develop a doctrine of constitutional accountability; analyzing the propriety of outsourcing under Article II per se is beyond its scope.

273. See *Weiss v. United States*, 510 U.S. 163, 186 (1994) (Souter, J., concurring).

274. 501 U.S. 868 (1991).

accountable to political force and the will of the people.”²⁷⁵ Although the Constitution’s text says nothing of the President’s removal power, the Supreme Court has long made it clear that, for similar reasons, the President has the constitutional power to remove federal officers as well.²⁷⁶

Fourth, although there is considerable debate over the scope of presidential power,²⁷⁷ a unitary executive theorist might point to the placement of a single person at the head of the Executive Branch as support for the importance of accountability to the President.²⁷⁸ In *Printz*, Justice Scalia wrote for the Court that the framers insisted on a unified executive “to ensure both vigor and accountability,” and “[t]hat unity would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him”²⁷⁹ Similarly, in his *Morrison v. Olson*²⁸⁰ dissent, Justice Scalia assailed the majority’s upholding of the independent counsel law because the statute set in motion a process “that is *not* in the full control of persons ‘dependent on the people,’ and whose flaws cannot be blamed on the President.”²⁸¹ If things went wrong with the investigation, he complained, “*there would be no one accountable to the public to whom the blame could be assigned,*” despite what “the Founders envisioned when they established a single Chief

275. *Id.* at 884. Harold Krent has further suggested that privatization undermines the Appointments Clause by permitting Congress to “exercise both a de facto appointment and removal authority” when it creates an office for contractors and designates an office holder extraconstitutionally. Krent, *supra* note 200, at 78.

276. *Myers v. United States*, 272 U.S. 52 (1926) (holding the President has the absolute authority to fire a principal executive officer). The Supreme Court later upheld legislative restrictions on the President’s removal power. *See Wiener v. United States*, 357 U.S. 349 (1958) (preventing President Eisenhower from removing member of War Crimes Commission without cause because of the quasi-judicial nature of the Commissioner’s duties); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (upholding restrictions on President’s ability to appoint and remove members of the Federal Trade Commission).

277. Compare Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1241–46 (1994) (describing scholarly debate over whether Article II Vesting Clause requires presidential control over agencies’ discretionary authority or whether Congress may vest such authority in subordinate officers free from direct control of the President), Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 527 (2005) (defining executive power as including the authority to oversee prosecutions), and David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 ADMIN. L.J. AM. U. 309, 317–20 (1993) (arguing that executive power grants broad authority to steer policymaking), with Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 20–32 (1994) (debunking the unitary executive theory and arguing that, historically, prosecutors were not answerable to the President; nor were all Departments according to the framing Congress).

278. *See Morrison v. Olson*, 487 U.S. 654, 728–29 (1988) (Scalia, J., dissenting).

279. *Printz v. United States*, 521 U.S. 898, 922–23 (1997) (citing FEDERALIST NO. 70 (Alexander Hamilton)); accord 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 495 (Merrill Jensen ed. 1976) (statement of James Wilson)).

280. 487 U.S. 654 (1988).

281. *Id.* at 729 (Scalia, J., dissenting) (emphasis in original).

Executive accountable to the people: the blame can be assigned to someone who can be punished.”²⁸²

b. The Franchise

Of course, Article II’s provisions for effectuating accountability to the people have no effect unless means exist to enforce them.²⁸³ Citizens’ ability to choose the President to whom they have delegated power through Article II further supports a requirement of constitutional accountability for those who exercise that power. Madison expressly associated accountability with elections in Federalist No. 52.²⁸⁴ If the President abuses his executive authority, or if those whom he appoints abuse executive powers, the people can fire the President.²⁸⁵ A new President would be positioned to appoint officers who, at her command, would better effectuate the public’s intentions. The power of the franchise thus suggests that private parties who enter into contractual arrangements with a member of the executive branch must be situated within the President’s chain of command so that, if the contractors err, the President can take responsibility for miscreants and citizens can hold the chief executive accountable at the voting booth.

2. Characteristics of Accountability to the President

The constitutional imperative of accountability to the President has dual definitional parts: while the President must have the power to remove subordinates, subordinates must also be situated within his supervisory chain of command. These factors enable the President—and the citizenry through the process of electing a new President—to punish wrongdoing by anyone who exercises the power of the people, regardless of whether the actors hold private or public status.

a. Removal

The Court has recognized the President’s removal power as an important tool for effectuating control over subordinates and holding them accountable.²⁸⁶ It

282. *Id.* at 731 (emphasis in original).

283. *See id.* (observing that “a single Chief Executive accountable to the people” means that “the blame can be assigned to someone who can be punished”).

284. THE FEDERALIST NO. 52 (James Madison) (“[I]t is particularly essential that [the legislative branch] should have an immediate dependence on, & an intimate sympathy with the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.”).

285. Scholars debate the meaningfulness of the electoral process. *See generally* Ethan J. Leib & Christopher S. Elmendorf, *Why Party Democrats Need Popular Democracy and Popular Democrats Need Parties*, 100 CAL. L. REV. 69, 86 n.81 (2012) (citing competing scholarship showing that “the political science discipline is not of one mind about the possibilities for retrospective accountability”).

286. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151–55, 3164 (2010) (holding that two layers of for-cause removal is unconstitutional because “[t]he President[’s] . . . ability to execute the laws—by holding his subordinates accountable

stands to reason that the desire to keep a job motivates employees to comply with an employer’s requirements. Justice Scalia recognized this concept in *Printz* when he pondered whether the President could feasibly control those who execute the laws “without the power to appoint and remove.”²⁸⁷ In turn, employers hold their hires accountable through the threat of removal partly because bad performance reflects poorly on them. Chief Justice Marshall acknowledged this convention in *Marbury v. Madison*, noting that the President is accountable for the exercise of discretion that includes appointment decisions and that his subordinates are accountable to him.²⁸⁸

Repeatedly, the Supreme Court has identified the Vesting Clause and the Take Care Clause as grounding the notion that the President must have the power to fire subordinates so he can hold them (and the public can hold him) accountable. In *Printz*, the Court emphasized that, although the Constitution empowers the President to execute the law, the Brady legislation “effectively transfer[red]” this power to state law enforcement officers “who [we]re left to implement the program without meaningful Presidential control.”²⁸⁹ *Printz* thus suggests that the exercise of executive authority must be controllable through the President’s removal power not just as a matter of the Appointments Clause; his ability to meet his constitutional obligations under the Vesting and Take Care Clauses also hinges on that power.

The Supreme Court reaffirmed these principles in *Free Enterprise Fund v. PCAOB*,²⁹⁰ which involved an Article II challenge to Congress’s creation of the Public Company Accounting Oversight Board (PCAOB) in reaction to problems with the accounting industry that were brought to light after Enron’s failure.²⁹¹ Under the Sarbanes-Oxley Act,²⁹² which created the PCAOB, only the SEC could fire PCAOB members and could only do so for cause.²⁹³ Thus, if the President sought to control the PCAOB’s exercise of delegated authority through the threat of removal, the best he could do was fire SEC members for cause on the theory that the SEC improperly failed to fire PCAOB members for cause.

for their conduct—is impaired”). Scholars dispute *supra* whether the removal power actually serves the accountability function. *See* Lawson, *supra* note 277, at 1244 (“A presidential removal power, even an unlimited removal power, is . . . either constitutionally superfluous or constitutionally inadequate.”).

287. *Printz v. United States*, 521 U.S. 898, 922 (1997) (emphasis added).

288. 5 U.S. (1 Cranch) 137, 165–66 (1803) (“By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers, who act by his authority and in conformity with his orders.”).

289. 521 U.S. at 922 (citing U.S. CONST. art. II, §§ 2, 3).

290. 130 S. Ct. 3138 (2010). *See generally* Kimberly N. Brown, *Government by Contract and the Structural Constitution*, 87 NOTRE DAME L. REV. 491 (2011) (discussing *Free Enterprise Fund*).

291. *See generally* Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and Its Public/Private Status*, 80 NOTRE DAME L. REV. 975, 977–78, 1007–22 (2005) (describing the powers of the PCAOB).

292. 15 U.S.C. §§ 7211(c), 7215 (2006).

293. *Id.* §§ 7211(e)(6), 7217(d)(3).

The Court struck down the so-called “double layer of for-cause removal” provisions that insulated PCAOB members from presidential control,²⁹⁴ “reaffirm[ing] the principle that Article II confers on the President ‘the general administrative control of those executing the laws.’”²⁹⁵ The lack of removal power, Chief Justice Roberts wrote for the majority, denied the President the tactical ability to “hold the Commission fully accountable for the Board’s conduct,”²⁹⁶ resulting in “a Board that is not accountable to the President, and a President who is not responsible for the Board.”²⁹⁷ When this happens, an unconstitutional interference with Article II’s Vesting and Take Care Clauses occurs.²⁹⁸ As the executive power includes “the power of appointing, overseeing, and controlling those who execute the laws,”²⁹⁹ the Court suggested, “the Constitution . . . empower[s] the President to keep [executive] officers accountable.”³⁰⁰ The power to remove private parties who exercise executive power, therefore, is also central to the vitality of the President’s Article II powers.

A key distinction exists between independent agencies and private contractors, however. Congress’s creation of independent agencies gives rise to separation of powers difficulties that are not at play when the executive branch outsources its own powers to private parties. If the executive were to afford two levels of insulation to a private contractor without reserving policy-based grounds for its dismissal, it would not amount to a constitutional interference with executive power by another branch of government. The question would become whether the executive can abdicate its own power rather than whether Congress can statutorily confine the power of the executive. Yet under either scenario, *Free Enterprise Fund*’s characterization of executive power per se as including the ability to hold subordinates accountable identifies and gives shape to the Constitution’s normative expectation of accountability to the President.

294. *Free Enter. Fund*, 130 S. Ct. at 3164; see also *id.* at 3171 (Breyer, J., dissenting).

295. *Id.* at 3152 (quoting *Myers v. United States*, 272 U.S. 52, 164 (1926)).

296. *Id.* at 3154.

297. *Id.* at 3153; see Jonathan H. Adler, *Thoughts on Free Enterprise Fund v. PCAOB, THE VOLOKH CONSPIRACY* (June 28, 2010, 3:25 PM), <http://volokh.com/2010/06/28/thoughts-on-free-enterprise-fund-v-pcaob/> (observing that “[t]he Court drew a line in the sand to safeguard executive power and ensure greater accountability,” as it recognized that “separation of powers is about protecting liberty by ensuring accountability, not about protecting one branch or another for its own sake”).

298. The majority accepted the parties’ agreement that the SEC is removable only for cause, despite the lack of statutory language to that effect. See *Free Enter. Fund*, 130 S. Ct. at 3148. Incredulous, the dissent disagreed. See *id.* at 3182 (Breyer, J., dissenting) (“How can the Court simply *assume* without deciding that the SEC Commissioners themselves are removable only ‘for cause?’” (emphasis in original)).

299. *Id.* at 3151 (Roberts, C.J.) (quoting 1 ANNALS OF CONG. 463 (1789)); see also *id.* at 3152 (“The landmark case of *Myers v. United States* reaffirmed the principle that Article II confers on the President ‘the general administrative control of those executing the laws.’” (quoting *Myers*, 272 U.S. at 164)).

300. *Id.* at 3146 (emphasis added).

b. Chain of Command

Article II implies an additional characteristic of accountability to the President: the requirement that all those who exercise executive power fall within the President’s supervisory chain of command. The Court in *Free Enterprise Fund* emphasized that an “active obligation to supervise” goes along with “Article II’s vesting of the executive power in the President.”³⁰¹ The statute also offended the Take Care Clause by compromising the President’s ability to maintain “the general administrative control of those executing the laws.”³⁰² Without the ability to effectively oversee subordinates, “[t]he President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired.”³⁰³

The Court thus held the statute unconstitutional for its “diffusion of power[, which] carries with it a diffusion of accountability.”³⁰⁴ This diffusion means that “[w]ithout a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’”³⁰⁵ This chain-of-command component of accountability to the President is similar to the identity transparency feature of accountability to the people, but it serves a slightly different purpose. Maintaining within the President’s chain of command *all* those who exercise executive power enables the President to address malfeasance in response to public sentiment. Indeed, the viability of removal authority itself is contingent on the existence of traceable lines of authority. The *Free Enterprise Fund* Court justified its decision in part because, if it had allowed the statute to stand, “this dispersion of responsibility could be multiplied” allowing officers to be “immune from Presidential oversight, even as they exercised power in the people’s name.”³⁰⁶ The freewheeling use of federal power is perhaps the most pernicious kind; as such, the Constitution forbids it.

Free Enterprise Fund thus makes a case for identifying a stand-alone principle of constitutional accountability to the President to properly effectuate the power delegated by the people. It recognizes that the very structure of the Constitution is synonymous with accountability. While the President must, as a practical matter, be able to hold accountable those who execute the law, his power of oversight and

301. *Id.* at 3154 (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring in judgment)).

302. *Id.* at 3152 (quoting *Myers*, 272 U.S. at 164); *see also id.* at 3147 (noting that “[t]he President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them”); *id.* at 3154 (“Without the ability to oversee the Board, or to attribute the Board’s failings to those whom he *can* oversee, the President is no longer the judge of the Board’s conduct”) (emphasis in original)).

303. *Id.*

304. *Id.* at 3155.

305. *Id.* (quoting FEDERALIST NO. 70 (Alexander Hamilton)).

306. *Id.* at 3154. Similarly, in his dissenting opinion in *Morrison v. Olson*, Justice Scalia objected to the independent counsel statute’s assignment of “purely executive functions . . . to a person whose actions are not fully within the supervision and control of the President.” 487 U.S. 654, 708 (1988) (Scalia, J., dissenting).

control falls squarely within the definition of executive power. Hence, an outsourcing arrangement to private parties can only be constitutional if, *first*, the President retains—through removal—the ability to hold accountable private contractors who exercise executive power, and *second*, the delegation of power is not so disbursed that the President cannot reasonably oversee his inferiors. Absent this ability, the President cannot take care that the laws are faithfully executed.

III. BUILDING AN ACCOUNTABILITY FRAMEWORK

The Constitution vests the power of the people in three branches of government and sets up a structure for ensuring that their occupants remain accountable to the people. There are no caveats to this architecture that would convert the President's executive power into private power when delegated to private parties. The vested powers retain their constitutional character always and everywhere. Thus, some *constitutional* framework for the structuring of privatized government is minimally in order.³⁰⁷

This Article has endeavored to locate a principled system for configuring federal outsourcing in a doctrine of constitutional accountability. Parts I and II argued that constitutional accountability can be derived from the procedural framework embedded in the Constitution, with each of the doctrine's characteristics rooted in the foundational concept that all power stems from the people.

This Part wrestles with the practical implications of a constitutional accountability principle. It revisits the scenarios introduced in Part I to explore how constitutional accountability could bring scrutiny to the structuring of outsourcing decisions that implicate the power to self-govern.³⁰⁸ It starts from the visceral assumption that McDonald's does not raise constitutional accountability concerns, but that Blackwater and TSA do. From this crude distinction, it identifies a threshold question for a doctrinal framework for constitutional accountability: Is a contractor exercising constitutionally delegated, executive powers? If the ready answer is no, as in the case of McDonald's, the inquiry ends. If the answer is yes, as in the cases of Blackwater and TSA contractors, the question becomes whether a particular contractual relationship between the government and a private contractor reflects sufficient indicia of accountability to satisfy constitutional concerns.

This Part then addresses how one might inject elements of constitutional accountability into federal contracts like those with Blackwater or the private

307. Jody Freeman similarly suggests a process of "publicization," whereby private contractors are embraced and brought within mainstream legislative, executive, judicial, and social oversight norms. Freeman, *supra* note 22, at 83–84.

308. Others have made proposals for enhancing contractor accountability as well. See, e.g., VERKUIL, *supra* note 67, at 103–12, 149–50, 165–69 (suggesting that some functions cannot be outsourced on separation of powers and Appointments Clause grounds, that due process precludes delegations to private parties with conflicts of interest, that Circular A-76 and the FAR could be amended, and that political appointees could be decreased and highly skilled government employees increased); Freeman, *supra* note 22, at 93 (reiterating that courts could scrutinize contracts to ensure adequate legislative supervision); Metzger, *supra* note 85, at 1456 (arguing for a flexible inquiry into whether delegations are adequately structured to preserve accountability).

companies performing airport security for TSA. It leaves for future research and analysis a number of important related questions, such as how to precisely map the pertinent policy considerations into manageable criteria for judges, who would have standing to bring a suit challenging a federal outsourcing contract on constitutional grounds, the institutional and societal costs of a working doctrine of constitutional accountability, and the possible remedies for violations, including whether liability would attach to public actors, private actors, or both.

A. The Trigger: Federal Executive Power

Not all government contracts raise accountability issues of constitutional dimension. This subpart accordingly posits that a contract should be initially scrutinized for constitutional accountability if one of two triggers exist: *First*, a contract delegates to private parties executive power under the Constitution’s express terms, or, *second*, a contract affords to a private party the ability to exercise enforcement power in a manner that could lead to a realistic risk of interference with civil liberties.

To begin with, Article II of the Constitution provides that executive power minimally encompasses negotiating treaties, directing troops in battle, making pardon decisions, and appointing “Officers.”³⁰⁹ Although scholars continue to debate the constitutionality of per se delegations of express constitutional powers, suffice it to say that settled doctrine leaves that debate more theoretical than real. As Parts I and II explain, therefore, an alternative constitutional theory for reining in federal outsourcing is warranted. Such a theory springs from the Constitution’s structure, which is based on the principle that those who exercise federal powers will be accountable to the people and the President. As a consequence, private contractors should not be empowered to exercise the President’s express constitutional functions unless mechanisms are in place to establish such lines of accountability. Put another way, if the terms of a contract effectively outsource Article II’s textual powers to a private party, the second element of constitutional accountability, discussed in the next subsection, applies.

The other trigger for a constitutional accountability requirement arises under Article II’s requirement that the President “take Care that the Laws be faithfully executed,”³¹⁰ and the Appointments Clause’s³¹¹ specification of the processes for appointing federal officers. The Supreme Court has indicated that the President’s power “to enforce the[laws] or appoint the agents charged with the duty of such enforcement . . . are executive functions.”³¹² The power to execute the laws “necessarily [encompasses] power to command obedience, preserve order, and

309. U.S. CONST. art. II, § 2, cl. 1–2. *See generally* Brown, *supra* note 290, at 514–15.

310. U.S. CONST. art II, § 3.

311. U.S. CONST. art. II, § 2, cl. 2.

312. Buckley v. Valeo, 424 U.S. 1, 139 (1976) (quoting Springer v. Philippine Islands, 277 U.S. 189, 202 (1928)). *But cf.* Edmond v. United States, 520 U.S. 651, 661 (1997) (“Our cases have not set forth an exclusive criterion for [defining] inferior officers.”); United States v. Germaine, 99 U.S. 508, 509–10 (1878) (defining inferior officers as those who can hold office).

keep the peace.”³¹³ The outsourcing of law enforcement powers is particularly ripe for application of a constitutional accountability requirement because of the related implications for individual civil liberties. The Supreme Court has emphasized the need, “in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty”—even if it interferes with the President’s exercise of his military prerogatives.³¹⁴ The President consequently has no authority, for example, “to authorize unreasonable searches and seizures” in violation of the Fourth Amendment or any other provision of the Bill of Rights.³¹⁵ Before the government can empower a private contractor to exercise enforcement power in a manner that realistically risks interference with civil liberties, therefore, it must ensure that the contractor is similarly accountable to the people through the political system and the Office of President.³¹⁶

The three contractor scenarios introduced in Part I illustrate how the two triggers just outlined would operate in practice. The McDonald’s Smithsonian contract undoubtedly delegates none of the President’s express constitutional powers to a private party. Nor does it involve the enforcement of federal laws against individual citizens. Private parties providing other routine services for the federal government—such as custodial support or office supplies—do so without invoking law enforcement powers either.

Blackwater’s contracts, in contrast, involve battlefield operations, which fall within the Constitution’s explicit enumeration of presidential powers. Even the brightest-line definition of executive power would thus render Blackwater constitutionally accountable to the President when it engages in military operations. The people have an interest in monitoring Blackwater’s actions relating to war and national security as well. Because the source of executive power is the people, Blackwater’s relationship with the federal government requires incidents of democratic accountability to them as well as to the President.

The airport screening responsibilities of TSA contractors do not similarly ensnare the President’s military powers under Article II’s express terms.³¹⁷ TSA

313. *Cunningham v. Neagle*, 135 U.S. 1, 61 (1890).

314. *Hamdan v. Rumsfeld*, 548 U.S. 557, 588 (2006).

315. *McDonald v. City of Chi.*, 130 S. Ct. 3020, 3094 (2010).

316. I do not mean to advocate here for the expansion of the state action doctrine to cover all contractors exercising federal governance power but rather to argue that the elements of constitutional accountability must be in place for private actors who are in a position to interfere with individual civil liberties.

317. For providers of services that do not fit the Constitution’s textual definitions, it can be difficult to identify the point at which contractor activity should prompt constitutional review. Indeed, OMB has defined “inherently governmental function” with little practical success. See AAP REPORT, *supra* note 17, at 393 (finding that “[a]gencies must retain core functional capabilities that allow them to properly perform their missions and provide adequate oversight of agency functions performed by contractors,” that “[s]ome agencies have had difficulty in determining strategically which functions need to stay within government and those that may be performed by contractors,” and that “[t]he term ‘Inherently Governmental’ is inconsistently applied across government agencies”); *supra* notes 67, 106–11 and accompanying text. Moreover, scholars have long debated the definition of executive power. See, e.g., Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 44 (arguing that Congress cannot deny the President the power to remove

does, however, perform law enforcement functions. To the extent that TSA outsources its ability to exercise enforcement power in a manner that could lead to a realistic risk of interference with civil liberties, its contracts qualify for further constitutional scrutiny.

After 9/11, Congress made TSA “responsible for security in all modes of transportation,”³¹⁸ including the critical task of “day-to-day Federal security screening operations for passenger air transportation.”³¹⁹ TSA must screen all those seeking to board a commercial airline flight to ensure they are not “carrying unlawfully a dangerous weapon, explosive, or other destructive substance.”³²⁰ As the D.C. Circuit explained in addressing a constitutional and statutory challenge to TSA’s use of advanced imaging technologies, “[t]he Congress generally has left it to the agency to prescribe the details of the screening process, which the TSA has documented in a set of Standard Operating Procedures not available to the public.”³²¹ TSA promulgated regulations barring passengers from entering a “sterile”—or departure-side—area of an airport without first complying with its screening procedures.³²² Since 1972, such official passenger screening has included physical searches,³²³ and, increasingly, it involves full body scans with “backscatter” x-rays³²⁴ or radio frequency technologies.³²⁵ These technologies are “designed to produce a crude image of an unclothed person,” allowing the machine

a policy-making official for refusing to comply with *any* presidential order that falls within that officer’s statutory duty); Richard J. Pierce, Jr., *Morrison v. Olson, Separation of Powers, and the Structure of Government*, 1988 SUP. CT. REV. 1, 25 (promoting a “policymaking” standard whereby Congress cannot hinder a President’s power to remove individuals for failure to comply with his valid policy decisions).

318. 49 U.S.C. § 114(d) (2006). *See generally id.* §§ 44901–45.

319. *Id.* § 114(e)(1).

320. *Id.* § 44902(a)(1).

321. Elec. Privacy Info. Ctr. v. U.S. Dep’t of Homeland Sec., 653 F.3d 1, 3 (D.C. Cir. 2011). The court found no constitutional violation but remanded the case with directions that TSA engage in notice and comment procedures. *See id.* at 10–11. The TSA began the notice and comment procedures in March of 2013. Passenger Screening Using Advanced Imaging Technology, 78 Fed. Reg. 18,287 (Mar. 26, 2013) (to be codified at 49 C.F.R. pt. 1540). The notice and comment procedure closed on June 24, 2013. *See id.*

322. *See* 49 C.F.R. § 1540.5 (2011) (“*Sterile area* means a portion of an airport defined in the airport security program that provides passengers access to boarding aircraft and to which the access generally is controlled by TSA . . . through the screening of persons and property.” (italics in original)); *id.* § 1540.107(a) (“No individual may enter a sterile area or board an aircraft without submitting to the screening and inspection of his or her person and accessible property in accordance with the procedures being applied to control access to that area or aircraft under this subchapter.”). *See generally* M. Madison Taylor, *Bending Broken Rules: The Fourth Amendment Implications of Full-Body Scanners in Preflight Screening*, 17 RICH. J.L. & TECH. 1, 5–11 (2010) (describing screening methods).

323. *See* United States v. Davis, 482 F.2d 893, 900 (9th Cir. 1973), *overruled by* United States v. Aukai, 497 F.3d 955 (9th Cir. 2007); *see also, e.g.*, United States v. Mendenhall, 446 U.S. 544, 548–49 (1980) (describing airport strip search incident).

324. *See* Anahad O’Connor, *Airport Scanners Are Safe, Government Says*, N.Y. TIMES WELL BLOG (Feb. 29, 2012, 4:34 PM), <http://well.blogs.nytimes.com/2012/02/29/airport-scanners-are-safe-government-says/>.

325. *See Q&A: Controversial Full-Body Scanners*, CNN (Dec. 30, 2009, 12:34 PM), <http://www.cnn.com/2009/TRAVEL/12/30/airline.terror.scanners/index.html>.

operator to detect dangerous objects without touching the passenger.³²⁶ Those who refuse a full-body screen must opt for a physical pat down if they wish to board a flight.³²⁷ Screening personnel are also empowered to make warrantless arrests “if the individual reasonably believes the individual to be arrested has committed or is committing a felony.”³²⁸

In the ten years since TSA’s creation, “[p]at-down horror stories” have circulated widely in response to the agency’s enhanced screening procedures.³²⁹ The American Civil Liberties Union (ACLU) reported that in November 2010 alone it received over 1000 complaints of travelers “feeling humiliated and traumatized” by the screening process,³³⁰ which has allegedly involved “gawking by agents,” the infliction of physical harm, and graphically disturbing stories of “unnecessary repeated touching of intimate areas.”³³¹ Some people felt punished for refusing to submit to body scanners; one such woman missed her flight when the pat down agent declared the sanitary napkin she was wearing a “foreign object.”³³² Victims’ advocates point out that “[s]exual assault survivors in particular may experience severe panic, anxiety, stress and confusion” during the screening process because of past traumas.³³³ The ACLU has criticized TSA for the civil liberties implications posed by other aspects of its passenger screening procedures as well, including “[p]assenger profiling” programs that rank “the ‘trustworthiness’ of everyone who flies,” the airline “watchlist” program, and behavioral profiling measures reportedly used to screen would-be passengers.³³⁴

For its part, TSA has repeatedly contracted out these screening responsibilities to private companies.³³⁵ In February 2012, the TSA Administrator reported to Congress that sixteen of the 450 airports under federal jurisdiction “have screening carried out by a qualified private screening company.”³³⁶ The president and chief

326. *Elec. Privacy*, 653 F.3d at 3.

327. *See id.*

328. 49 U.S.C. § 44903(d)(2) (2006).

329. Jay Stanley, *The TSA’s First 11 Years*, AM. CIV. LIBERTIES UNION (Nov. 30, 2012, 12:21 PM), <http://www.aclu.org/blog/national-security-technology-and-liberty/tsas-first-11-years>.

330. Press Release, ACLU, ACLU Continues to Receive Complaints About New Airport Screening Procedures (Dec. 2, 2010), *available at* <http://www.aclu.org/national-security-technology-and-liberty/aclu-continues-receive-complaints-about-new-airport-screeni>. On its blog, TSA encourages passengers to file civil rights or civil liberties complaints if they believe they were mistreated by screeners. *See* Bob Burns, *TSA’s Civil Rights and Liberties Program*, TSA BLOG (May 2, 2012), <http://blog.tsa.gov/2012/05/tsas-office-of-civil-rights-and.html>.

331. *Passengers’ Stories of Recent Travel*, AM. CIV. LIBERTIES UNION, <http://www.aclu.org/passengers-stories-recent-travel/>.

332. *See id.*

333. Press Release, National Sexual Violence Resource Center, National Organization Calls for End to Invasive TSA Screening Methods (Nov. 24, 2010), *available at* <http://www.nsvrc.org/news/3274>.

334. *See* Stanley, *supra* note 329.

335. Congress gave TSA the express statutory authority to do so. *See* 49 U.S.C. § 44920(a) (2006); *see also supra* note 60 and accompanying text.

336. *Screening Partnership Program: Why Is a Job-Creating, Public-Private Partnership*

executive of Orlando Sanford International Airport reported that his airport’s unsuccessful request for TSA authorization to outsource screening “was motivated by hundreds of complaints from passengers.”³³⁷ As stand-ins for TSA, TSA contractors are equally positioned to exercise executive enforcement power in a manner that could lead to violations of individual civil liberties, such as physical groping and unlawful profiling. Private providers of such screening services should, accordingly, be just as structurally accountable to the people and the President as TSA agents are as a matter of constitutional law.

Notably, private contractors may exercise government powers that are more properly characterized as administrative,³³⁸ legislative,³³⁹ or adjudicative,³⁴⁰ as well.

Meeting Resistance at TSA?: Hearing Before the Subcomm. on Transp. Sec. of the H. Comm. on Homeland Sec., 112th Cong. 2 (2012) (statement of John Pistole, Administrator, Transportation Security Administration). Administrator Pistole added that he “did not see any clear and substantial advantage to expanding the program.” *Id.*

337. Ron Nixon, *New Law Clears the Way for Airports to Drop T.S.A. Screeners*, N.Y. TIMES, Mar. 16, 2012, at A10, available at http://www.nytimes.com/2012/03/16/us/airports-with-new-law-are-freer-to-split-from-tsa.html?_r=1&.

338. Administrative power includes functions such as “rulemaking, advisory opinions, and determinations of eligibility for [federal] funds,” which are more quasi-judicial or quasi-legislative in nature than are enforcement powers. *Buckley v. Valeo*, 424 U.S. 1, 140–41 (1976).

339. Congress has many enumerated powers in the Constitution, including the powers of the House to impeach and the Senate to convict or acquit, *see* U.S. CONST. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6; the power to initiate appropriation measures, *see id.* art. I, § 7, cl. 1; the Senate’s power to consent to Article II appointments and treaties, *see id.* art. II, § 2, cl. 2; the power to override a presidential veto, *see id.* art. I, § 7, cl. 2; the power to create lower federal courts and define their jurisdiction, *see id.* art. I, § 8, cl. 9; *id.* art. III, §§ 1, 2, cl. 2; the power to declare war, *see id.* art. I, § 8, cl. 11; the power to admit new states to the Union, *see id.* art. IV, § 3, cl. 1; and the power to send constitutional amendments to the states, *see id.* art. V. *See generally* LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW § 5-1 (3d ed. 2000) (describing Congress’s explicit and implicit powers). Chief among these additional powers, of course, is the power to legislate, *see* U.S. CONST. art. I, § 1 (vesting “[a]ll legislative Powers herein granted . . . in a Congress of the United States”); *id.* art. I, § 8, cl. 18 (empowering Congress “[t]o make all Laws which shall be necessary and proper for carrying into Execution” its legislative and other powers). Congress’s investigative power can also be inferred from the Constitution. *See Buckley v. Valeo*, 424 U.S. 1, 137 (1976). For purposes of defining legislative power under an accountability doctrine, the Court’s nondelegation jurisprudence is instructive, but a thorough analysis of the issue is beyond the scope of this Article. *See, e.g., Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (reiterating that “when Congress confers decisionmaking authority upon agencies Congress must lay down by legislative act an intelligible principle” to guide the exercise of discretion (emphasis in original) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928) (internal quotation marks omitted))).

340. The Constitution defines judicial power as extending to “Cases” and “Controversies.” U.S. CONST. art. III, § 2, cl. 1. Although private contractors do not function as federal courts by, for example, reviewing the actions of the executive branch, *see Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803), they do perform functions that are adjudicative within the meaning of administrative law. *See, e.g., Martha Minow, Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1232 (2003) (noting contractors’ role in welfare program management). The APA effectively defines adjudication as any action that is not a rulemaking and that, at the end of the

Lockheed Martin, for example, performs “surveillance and information processing for the CIA [and] the FBI,” trains TSA agents, produces cluster bombs and nuclear weapons, hires interrogators for U.S. prisons overseas, “manag[es] a private intelligence network in Pakistan[,] help[ed] write the Afghan constitution,”³⁴¹ and administers welfare and social security programs on behalf of the government.³⁴² The trigger for constitutional accountability could thus be expanded to the extent that contractors exercise delegated functions that are judicial or legislative—as well as executive—in nature.

It bears emphasis, in addition, that whether a function is “inherently governmental” within OMB’s existing definition³⁴³ may depend on a multitude of factors that apply to *an individual contract worker*, including how much latitude that person has to make a decision, how much power she has to bind the government without approval, how “extensive” the contractor’s role is in a given action, whether the action involves policy formation or directing federal employees, and whether it involves the disposition of federal property, among others.³⁴⁴ The trigger for constitutional accountability more narrowly focuses on whether *a particular contract* implicates well-defined Article II functions and law enforcement responsibilities that implicate individual civil liberties. Just as all people on the federal payroll who perform nongovernmental tasks are considered federal employees,³⁴⁵ all individuals operating under a contract that delegates executive power should be subject to scrutiny for constitutional accountability. A presumption of the requirement of accountability would thus apply to all contract employees where the terms of a contract delegate law enforcement responsibilities or other Article II powers under existing doctrinal definitions. The Supreme Court has probed and refined such definitions in determining the constitutionality of legislative schemes creating independent agencies.³⁴⁶ Those doctrinal templates should be employed here as well.³⁴⁷

administrative process, produces a “final disposition” of a matter involving a particular person. *See* Administrative Procedure Act (APA), 5 U.S.C. § 551(6)–(7) (2006).

341. William Hartung, *Is Lockheed Martin Shadowing You?*, THE NATION (Jan. 11, 2011), <http://www.thenation.com/article/157626/lockheed-martin-shadowing-you>.

342. *See, e.g.*, Catherine Donnelly, *Privatization and Welfare: A Comparative Perspective*, 5 LAW & ETHICS HUM. RTS. 335, 337 (2011); Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 571–72 (2001).

343. *See supra* note 67 and accompanying text.

344. *See* DEP’T OF ENERGY, GC GUIDANCE ON INHERENTLY GOVERNMENTAL FUNCTIONS 1–3 (2011), available at http://energy.gov/sites/prod/files/gcprod/documents/GC_Guidance_on_Inherently_Governmental_Functions_012411.pdf.

345. *See* Stephen L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263, 272 (2004) (noting that the private sector competes with the government for the ability to perform tasks that are not inherently governmental).

346. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 685–93 (1988) (assessing the constitutionality of the independent counsel statute under Article II); *Wiener v. United States*, 357 U.S. 349, 356 (1958) (preventing President Eisenhower from removing a member of War Crimes Commission without cause because of the quasi-judicial nature of the Commissioner’s duties); *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 629 (1935) (upholding restrictions on the President’s ability to remove members of the Federal Trade Commission).

347. *See generally* Brown, *supra* note 290.

In sum, the first question in testing a federal outsourcing relationship for constitutional accountability is whether a contract delegates (1) express Article II power or (2) law enforcement power that presents a realistic possibility of being exercised in a way that interferes with civil liberties. If either trigger is satisfied, the next question is what kinds of accountability controls are appropriate for inclusion in specific contracts, a topic to which this Article now turns.

B. Contractual Incidents of Accountability

Where federal governance power is delegated to private parties, the second step in a constitutional accountability analysis would require that the contracts include terms reflecting adherence to the central components of accountability to the people and to the President. Using Blackwater and TSA contractors as examples, this subpart discusses how the elements of accountability could be manifested and enforced through the terms of federal government contracts and public disclosure requirements.³⁴⁸

1. Accountability to the People

Constitutional accountability to the people means at least three things: (1) that those who exercise the power of the people act in the public interest, (2) that their identities are transparent to the people, and (3) that the public has access to information regarding how its government is operating so that the people can effect change.

For federal employees, the first criterion is normatively reflected in the choice to enter public service, which, for professional career employees in particular, can be less lucrative than private practice—sometimes substantially so. A primary objective of private contractors, by contrast, is to make money for their companies.³⁴⁹ Given the staying power of modern federal outsourcing, it is not an answer to ban federal contractors from performing all but routine goods and services altogether. Although private parties can bet on financially profiting from federal contract work, they should assume the risk that their private interests could be compromised when they effectively take the contractual equivalent of a federal oath of office. Federal contracts should thus include terms that make clear that contractors must serve the public interest, even at the expense of private financial gain.³⁵⁰ Although it is not immediately evident what “acting within the public

348. Further thought must be given to the question of how courts would apply the test’s second element to the thousands of federal contracts that exist. As with equal protection and other constitutional doctrines, it may be appropriate and beneficial to develop tiers of scrutiny that are tied to the relative level of federal governance power delegated to a private contractor under step one. *Cf., e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 688 (1973) (plurality opinion) (applying strict scrutiny to gender classifications).

349. *See* Fairfax, *supra* note 16, at 284–86 (describing how private prosecutors may not serve the public interest because of competing private interests).

350. For a thoughtful discussion of ethics standards for government contractors, see generally Kathleen Clark, *Ethics, Employees and Contractors: Financial Conflicts of Interest in and out of Government*, 62 ALA. L. REV. 955 (2011).

interest” means, in the case of both Blackwater and TSA contractors it would minimally forbid purely arbitrary actions and include respect for privacy, public safety, and civil liberties.³⁵¹ Agencies should be legislatively required to provide guidance and oversight regarding proper public interest objectives. They might also employ oversight ethics boards in addition to bringing breach of contract litigation to help ensure that “good government” policy objectives are both meaningful and enforceable when it comes to private contractors.

Second, when the federal government engages in wars that kill Americans, the public should know the status of the actors as private parties and who within the federal government is in charge of them. Federal contracts should accordingly mandate such disclosures in a manner that is consistent with competing national security considerations. Public identification of the private status of personnel operating under battlefield contracts could highlight the elusive distinctions amongst the legal protections and remedies available to federal employees and the private military. It would also make it harder for politicians to diffuse responsibility to private contractors when things go awry, leaving them more accountable to their constituents for the decision to outsource federal powers in the first place.

TSA currently discloses which airports contract out screening functions,³⁵² and it should make the identities of its contractors transparent to the public, as well.³⁵³ Although McDonald’s customers at the Air and Space Museum immediately know they are dealing with private employees, airport travelers going through security do not. The San Francisco airport no doubt posts prominent signs directing travelers to remove shoes and place containers with fluids in plastic bags. Constitutional accountability might additionally require posters or videos disclosing to passengers that they are about to be searched by employees of a private screening company. Passengers would thus be made aware of whom to contact or sue when they are mistreated, or whom to identify to the press or members of Congress in urging policy changes in airport security. Although such measures could complicate airport security in the short term as the public becomes attuned to these important distinctions, the resulting pushback might be necessary to prompt adjustments to the prevailing privatization model, which keeps the public largely in the dark until a catastrophe makes headlines.

Third, the people must be made aware of *how* their delegated power is being exercised. Otherwise, they lack the most basic knowledge required to hold contractors accountable. For companies like Blackwater, a possible implication of a public disclosure element of constitutional accountability is a requirement that the President make public the projected use of private contractors as part of his annual budget request and any request to commit troops under the War Powers Resolution

351. Public interest objectives might align with private firms’ financial goals to the extent that those hinge on the provision of quality security services.

352. See *Screening Partnership Program*, TRANSP. SECURITY ADMIN., <http://www.tsa.gov/stakeholders/screening-partnership-program> (describing “Screening Partnership Program” and providing a link to a map of participating airports).

353. Such information is not on TSA’s website, *see id.*, or on the websites of all participating airports. See, e.g., *Airport Information*, LEWISTOWN MUN. AIRPORT, <http://www.lwtairport.com/airinfo.html>.

of 1973.³⁵⁴ Congress would then be aware of how much spending goes to private contractors in the prior fiscal year, and political debate over appropriations would kick in as serious questions arise. Agencies would have to justify their use of outsourcing to an elected branch of government that is answerable to voters.

The disclosure element of accountability to the public might further require that, in seeking to commit troops to war, the President announce the projected use of private contractors to perform functions that otherwise would be undertaken by military personnel. Unanticipated fallout from the stealth use of private contractors in Iraq and Afghanistan continues. *The New York Times* has reported that “[m]ore civilian contractors working for American companies than American soldiers died in Afghanistan last year for the first time during the war,” but “because many contractors do not comply with even the current, scanty reporting requirements, the true number of private contractor deaths may be far higher.”³⁵⁵ If the American public knew in advance of the Iraq and Afghan wars the extent to which private contractors such as Blackwater would be fighting side-by-side with U.S. soldiers, support for the wars or scrutiny of its progress may have taken a different tone in public debate. Questions surrounding the manner in which military contractors are hired and managed, as well as the proper scope of their responsibilities, are more likely to reach the public’s consciousness if they are made part of the decision to go to war at the outset.

For TSA, a number of public disclosures would enhance accountability to the people. On its signs revealing the identities of private contractors at a particular airport, TSA should give notice that the legal options available in the event of a privacy or constitutional violation are different than they would be if TSA employees were responsible for the screening. TSA should also disclose data regarding how well private security firms are actually diverting terrorist threats as compared to TSA employees.³⁵⁶

As a constitutional matter, a resource that is equivalent to President Obama’s initiative for revealing how the government is spending the stimulus money under the American Recovery and Reinvestment Act of 2009³⁵⁷ should be implemented around federal contracting to enhance government and private contractor accountability to the public. The Act’s corresponding website, *Recovery.gov*, has an “accountability” link,³⁵⁸ which in turn refers viewers to agency-specific OIG reports regarding the management of recovery programs,³⁵⁹ including financials;³⁶⁰

354. 50 U.S.C. §§ 1541–48 (2006) (providing that the President can send troops into action only by authorization of Congress or in the case of a national emergency).

355. Rod Nordland, *War’s Risks Shift to Contractors*, N.Y. TIMES, Feb. 12, 2012, at A1.

356. See Mulgan, *supra* note 13, at 557 (“Accountability depends on the free flow of appropriate information and on effective forums for discussion and cross-examination.”).

357. Pub. L. No. 111-5, 123 Stat. 115. See generally RECOVERY.GOV, <http://www.recovery.gov>.

358. *Accountability*, RECOVERY.GOV, <http://www.recovery.gov/Accountability/Pages/Accountability.aspx>.

359. *All Inspectors General Reports*, RECOVERY.GOV, <http://www.recovery.gov/Accountability/inspectors/Pages/oigfindings.aspx>.

360. *Recipient Projects*, RECOVERY.GOV, <http://www.recovery.gov/Transparency/RecoveryData/Pages/RecipientReportedDataMap.aspx>.

to information on actions taken to address fraud, waste and abuse,³⁶¹ to information about so-called noncompliers, who received federal money but bypassed reporting requirements;³⁶² to GAO reports on the federal and state use of recovery funds;³⁶³ and to audits of recipients' compliance with state and federal regulations.³⁶⁴ The site also provides a breakdown of all funding by category, including education, health, housing, unemployment benefits, and tax benefits.³⁶⁵ A master link for "interested citizens"³⁶⁶ takes users to social media sites, interactive maps with information on recovery awards by region, government press releases, and much more. Although Acquisition.gov³⁶⁷ is the leading public website for government contracting information, it contains only coded information for contractors, not lay citizens. According to the site, there is no central repository of federal contracting documents.³⁶⁸ A comprehensive and searchable outsourcing website should be created to similarly shed light on the performance of TSA contractors and the sufficiency of oversight, and to pressure agencies and individual contractors to make good decisions under scrutiny of the public eye.

Such a website could be managed by a federal contracting analogue to OIRA, a division of OMB that was established by Congress in 1980³⁶⁹ to oversee the regulatory process and to coordinate administrative policy for the President.³⁷⁰ Although theoretically controversial,³⁷¹ this now-established form of presidential oversight draws a direct line of accountability between regulatory decision making and the President himself. An "OPRA" or Office of Privatization Review Assessment would accordingly serve to tighten the linkages between those who exercise federal powers and the President. In striking down the portion of the Sarbanes-Oxley Act that constrained the SEC's removal of PCAOB members to a finding of cause, the Court made such a structural adjustment in *Free Enterprise Fund*—one borne out of concern over the *degrees* of separation between the

361. *Oversight Actions*, RECOVERY.GOV, <http://www.recovery.gov/Accountability/Pages/investigations.aspx>.

362. *Non-Compliers*, RECOVERY.GOV, <http://www.recovery.gov/Accountability/Pages/noncompliers.aspx>.

363. *GAO Findings*, RECOVERY.GOV, <http://www.recovery.gov/Accountability/Pages/GAOFindings.aspx>.

364. *Audits*, RECOVERY.GOV, <http://www.recovery.gov/Accountability/Pages/Audits.aspx>.

365. *Breakdown of Funding*, RECOVERY.GOV, <http://www.recovery.gov/Transparency/fundingoverview/Pages/fundingbreakdown.aspx>.

366. *I Am an Interested Citizen*, RECOVERY.GOV, http://www.recovery.gov/Pages/audience_citizen.aspx.

367. ACQUISITION.GOV, <https://www.acquisition.gov>.

368. *See Frequently Asked Questions About FPDS-NG*, ACQUISITION.GOV, https://www.acquisition.gov/faqs_whataboutfpds.asp.

369. *See* 44 U.S.C. § 3503 (2006).

370. *See generally* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 30–37 (2010).

371. *See* Robert V. Percival, *Who's in Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2488–90 (2011) (discussing debate over whether the President has directive authority).

exercise of executive authority and the President versus an objection to the *kind* of authority delegated to the PCAOB under the statute.

2. Accountability to the President

Constitutional accountability also requires external accountability to the President, which is reflected in the removal power and the executive chain of command. As things currently stand, a citizen who is concerned over Blackwater’s use of government power has no democratically tethered means of effecting change. Although the FAR provides for termination of federal contracts for convenience or default,³⁷² the law should recognize that Blackwater and TSA contractors cannot *constitutionally* escape presidential at-will removal—or its implications—if they are to exercise federal powers.³⁷³ In particular, the relationship between the people and private actors who exercise government power must be made less attenuated under the terms of federal contracts.

Perhaps the most obvious way to do this is to mandate broad presidential at-will removal clauses in every federal contract. If the public is made aware of this ubiquitous requirement, and the President fails to exercise it in connection with particular contractor abuses of the public trust, the people can hold the President accountable at the ballot box. Thus, if Blackwater were to overcharge taxpayers, violate export regulations, or fail to adequately train employees on the public interest objectives that govern the exercise of their delegated authority, the President or his subordinates could terminate the contract immediately. Accountability to the President would likewise require that TSA include presidential at-will removal provisions in its contracts with private screening companies.

The second element of constitutional accountability to the President—an effective chain of command—might further require that Blackwater and TSA contracts involving federal governance power be signed by a principal or inferior officer within the President’s close chain of command and that the officer retain sufficient oversight to make informed termination and removal decisions, as necessary, at the President’s behest. What sufficient oversight means—and whether constitutional accountability requires that the federal bureaucracy be expanded for this purpose despite a tight budgetary environment—are significant issues,³⁷⁴ but

372. See 48 C.F.R. § 49.101(a) (2011).

373. Although members of independent agencies are generally removable only for cause, such limitations are the result of bicameralism and presentment through the legislature and have no evident place in public/private contracting relationships executed by individuals within the executive branch who lack the constitutional power to fashion federal agencies under the Necessary and Proper Clause. See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb—Framing the Problem, Doctrine, and Original Understanding*, 121 HARV. L. REV. 689, 735 (2008).

374. Nor is the government given incentive to rigorously review Blackwater’s actions to the extent that it is uniquely capable of rapidly providing the military with a resource it cannot produce on its own—experienced veterans of the Special Forces, complete with security clearances. See Scahill, *supra* note 31 (“Blackwater has been involved with so many sensitive operations for a decade and knows where the bodies are buried and who buried

they do not undermine the need to ensure that contractors fall in line with the President.

In effect, this tightening of the chain of command between the President and his subordinates is what the Supreme Court accomplished in *Free Enterprise Fund*.³⁷⁵ By invalidating the double for-cause provision from the Sarbanes-Oxley Act, the Court narrowed the linkage between the President's democratic constituency and those at the PCAOB who exercise the people's power.³⁷⁶ The Court characterized its ruling as facilitating administrative control, the duty to supervise, and accountability to the President.³⁷⁷ Technically, the holding in *Free Enterprise Fund* would only apply to the few contractors that could be characterized as "officers" within the meaning of Article II.³⁷⁸ But as a practical matter, the PCAOB is now positioned alongside any other SEC "employee" susceptible to termination by an entity that is only one step removed from the President.³⁷⁹ One implication of the ruling is that federal powers must be configured in a way that enables the citizenry to prompt change through public pressure on the President. If contracts delegating military powers to Blackwater are executed by federal employees who are situated many layers below the President within the deep federal bureaucracy, the President's supervisory power is frustrated in much the same way as it was with respect to the PCAOB.

them. Those are not the kind of people you simply cut loose without fear of consequences.").

375. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

376. The efficacy of the President's power to influence the SEC through the threat of for-cause removal is subject to debate. Compare Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. 1191, 1199 (2011) (discussing the D.C. Circuit's finding that there was "the availability of practical methods of presidential influence over the SEC and the Board other than removal or the threat of removal"), with Hans Bader, *Free Enterprise Fund v. PCAOB: Narrow Separation-of-Powers Ruling Illustrates that the Supreme Court Is Not "Pro-Business,"* CATO SUP. CT. REV., 2009-10, at 269, 275 ("[T]he president has more influence over the SEC's chairman than he does over other commissioners. For example, the president can reassign at will which commissioner acts as chairman, but he cannot remove a commissioner from the commission without cause.").

377. See *Free Enter. Fund*, 130 S. Ct. at 3153-54.

378. The plaintiffs argued that PCAOB members were principal officers who must be appointed by the President or, alternatively, that even if the PCAOB members were inferior officers, their appointment by the SEC would be unconstitutional as the SEC was not a department and its commissioners were not collectively a "department head" under Article II. *Id.* at 3149.

379. The D.C. Circuit applied *Free Enterprise Fund* in declaring unconstitutional Congress's grant of power to Copyright Royalty Judges (CRJs), who are appointed to staggered six-year terms by the Librarian of Congress and empowered to establish licensing terms and rates of royalty payments for webcasting. See *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1334-35 (D.C. Cir. 2012). The court found that the CRJs were principal officers under *Edmond v. United States*, 520 U.S. 651 (1997), because they are not subject to significant supervisory constraints, *Intercollegiate Broad.*, 684 F.3d at 1339, they are removable by the Librarian only for misconduct or neglect of duty, *id.* at 1340 (citing 17 U.S.C. § 802(i) (2006)), and their rate determinations "are not reversible or correctable by any other officer or entity within the executive branch," *id.* The court therefore invalidated and severed the restrictions on the Librarian's ability to remove the CRJs to "eliminate[] the Appointments Clause violation," consistent with *Free Enterprise Fund*. See *id.* at 1340-41.

To be sure, there are a number of hurdles that a constitutional accountability doctrine presents. The precise details of what must be included in federal contracts to satisfy an accountability doctrine are not immediately apparent and would have to be developed through litigation or legislation, which takes time. Moreover, with further transparency, the public might make demands for insourcing, which could lead to increases in the number of federal employees exclusively taking on the more sensitive of government functions. But if outsourcing is to have any limitations, some lines must be drawn. Under current law, there is no constitutional doctrine that can feasibly operate to define one. Constitutional accountability—rooted in the unassailable premise that all power stems from the people who ultimately oversee its exercise—could provide a way out of a dilemma that otherwise shows no sign of abating.

CONCLUSION

Constitutional accountability stems from the foundational concept that the power of government flows from the people through the Constitution. That power retains its constitutional character even if a federal actor happens to sign a contract empowering private parties to exercise such power. Accordingly, accountability to the people is an ineluctable component of *any* exercise of federal power, regardless of whether public or private actors are involved. The Supreme Court has repeatedly reinforced these principles doctrinally, sending a powerful message about the baseline limits on the outsourcing of federal power. This Article identified some features of public accountability that are implicit in the Court’s constitutional jurisprudence that might operate to narrow the current gulf that exists between private parties exercising federal power and the source of such power: the people themselves. Recognition of a constitutional accountability doctrine would enable courts, legislators, and the executive branch to proactively design and structure public-private relationships to conform to constitutional minima where there exist no established means for systematically managing the entrenched but unbounded practice of privatizing federal power.

Just as there is no magic bullet for making federal actors accountable to the populace, there is no single remedy for the accountability problem with outsourcing. The mechanisms for keeping government workers accountable are nuanced and complex—a tapestry that is greater than the sum of any one of its parts. A constitutional accountability approach to privatization would not comprehensively solve the problem of unaccountable contractors, but it lays the groundwork for creating an infrastructure from which a similar network of controls might arise. If just one seminal case were to reach the Supreme Court, application of the concepts set forth in *Free Enterprise Fund* to the privatization context would prompt outsourcing agencies to begin shaping their behavior around a constitutional accountability norm. In turn, the culture surrounding privatization could change, giving rise to more narrow and established rules and practices around the decision to delegate in the first place. With broader dialogue and analysis, the normative payoffs that constitutional accountability implicates will only be revealed further.