
Alfred C. Aman
Indiana University Maurer School of Law, aaman@indiana.edu

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Abstract

This Article analyzes the privatization of traditional government services by placing such changes in governance in a global context. Looking into what domestic institutions have to do with the global economy, this Article argues that the privatization of governmental services is very much a piece with deregulatory trends in the United States and elsewhere in which state-centered approaches to a variety of regulatory problems increasingly have given way to markets and market discourses at all levels of government. This Article then considers the effects of such privatization trends on the public/private distinction itself, and its implications for democracy in general. This Article comes to the conclusion that we must reform our domestic legal procedures and approaches to issues in order to ensure democratic participation in decisions that have broad societal effects and that involve public and private aspects. The local politics of administrative governance can help shape and transform the law, locally and globally, in important ways. The reforms suggested here can help mitigate some aspects of a democracy deficit, thereby helping to shape a politics that affects issues that can no longer be understood solely in domestic terms.
IN THIS ARTICLE I WILL ANALYZE THE PRIVATIZATION OF TRADITIONAL GOVERNMENT SERVICES BY PLACING SUCH CHANGES IN GOVERNANCE IN A GLOBAL CONTEXT. THE CONNECTIONS BETWEEN, FOR EXAMPLE, PRIVATE PRISONS AND GLOBALIZATION MAY APPEAR, AT FIRST, SOMewhat TENUOUS. WHAT, AFTER ALL, DO SUCH INTENSELY DOMESTIC INSTITUTIONS AS PRISONS HAVE TO DO WITH THE GLOBAL ECONOMY? I ADDRESS THIS QUESTION IN A THREE-PART DISCUSSION. I WILL ARGUE IN PART I THAT THE PRIVATIZATION OF GOVERNMENTAL SERVICES IS VERY MUCH OF A PIECE WITH Deregulatory TRENDS IN THE UNITED STATES AND ELSEWHERE IN WHICH STATE-CENTERED APPROACHES TO A VARIETY OF REGULATORY PROBLEMS INCREASINGLY HAVE GIVEN WAY TO MARKETS AND MARKET DISCOURSES AT ALL LEVELS OF GOVERNMENT.  

The reasons for the shift from states to markets are many and complex. They involve much more than simply a cyclical swing of the regulatory pendulum from liberal to conservative. Rather, this shift in perspective and the fundamental ways in which government conceives of and then carries out its responsibilities is closely tied to how decision makers at all levels of the public and private sectors conceptualize globalization. The privatization of governmental services resonates with primarily an economic conception of

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globalization based on markets and the competition they engender. These markets differ and often can be seen as more metaphorical than real. They are more often an alternative form of regulation than a substitution of something "wholly private" for what once was "wholly public."

Part II will consider the effects of such privatization trends on the public/private distinction itself, and its implications for democracy in general. The "democracy problem" under globalization involves the diminishment of transparency, public participation, and the information flows necessary to make public participation influential. This problem arises from the disjunction between global economic and political processes on the one hand, and local processes of democratic participation on the other. The global economy and the competition it engenders encourage cost-cutting on the part of both private and public sectors. When cost-cutting occurs by way of privatization in the public sector, however, the democracy problem can intensify, particularly when some approaches that delegate regulation to markets treat these markets as essentially "private," and the actions individuals take pursuant to market forces as voluntary or, in effect, merely administrative. Such an approach can undercut substantially public involvement in various policy-making processes.3 Even more important, the information that can make public participation meaningful no longer may be available when government services are privatized.4

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3. Mark Aronson, A Public Lawyer's Responses to Privatisation and Outsourcing, in The Province of Administrative Law 40-70 (Michael Taggart ed., 1997) (arguing that one cannot fully separate administration from government or policy making).

4. This is especially true when the private nature of the entities involved means that state or federal freedom of information laws may not apply. See Forscham v. Harris, 445 U.S. 169 (1980) (holding the Freedom of Information Act, 5 U.S.C. § 552 (1994), inapplicable to private grantees of federal money who were neither agencies of the federal government or controlled by it).

One of the by-products of regulation at all levels is the information flow that results. Alfred C. Aman Jr., Deregulation in the United States: Transition to the Promised Land, a New Regulatory Paradigm, or Back to the Future?, in The Liberalization of State Monopolies in the European Union and Beyond, 263, 294, 305 (Damien Geradin ed., 2000). For example, the regulation of electricity rates results from the natural monopoly characteristics of the utilities involved. Id. at 297. To properly regulate rates, regulators require a good deal of pricing information and market analyses, including alternative rates of return and the like. Id. at 302. When such entities are privatized or deregulated, even if only at the generation level of electricity, information can become more difficult to collect in a timely manner and, in any event,
As I also note in Part II, there are many types of markets and various forms of democracy. New procedural approaches to decision making are necessary to make different kinds of markets appropriately accountable to citizens. To this end, I discuss various forms of public participation or democracy, including shareholder democracy, consumer democracy, and administrative democracy. To help explain how certain markets and forms of democracy are best matched, I develop the concept of "global currency." I argue that the more metaphorical the markets involved are, the more need there may be for public participation in decision making, lest illegitimate forms of currency be used in the various global economic competitions now underway.

Finally, in conclusion, I suggest that two related ideas are significant to understand fully the relationship of globalization to democracy: global citizenship and a global public interest. Making some domestic markets more accountable to the public can mitigate a significant externality of globalization—the "democracy deficit"—but global processes also can help shape and influence domestic law trends as well. Processes that are linked to a politics that transcends our own local views offer the possibility of new ideas and new avenues of change. Processes at the local level can link up with networks and political movements that transcend the local and introduce new ideas as well as external sources of political pressure on local majorities. New networks and new ideas can enrich as well as engender a more globally conscious discourse at the local level.

I. Globalization and Markets

"Globalization" is a term of art used to mean many things—from traditional notions of internationalization, to Americanization, to fragmentary in its availability. Id. at 294, 305. For a discussion of deregulation in the United States in three different industries, the impact of various legislative approaches to competition, and the flow of information these approaches either created or eliminated, see id. at 263-306.

5. E.g., DAVID HELD ET AL., GLOBAL TRANSFORMATIONS 52-58 (1999) (distinguishing internationalization and transnationalization). For a discussion of the various ways in which the term "globalization" is used, see Alfred C. Aman Jr., Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy, and the Furtherance of a Global Public Interest, 6 IND. J. GLOBAL LEGAL STUD. 397, 404-10 (1999) [hereinafter Aman, Proposals for Reforming the Administrative Procedure Act].

For an analysis of the relationship of globalization to international law, see Jost Delbrück, The Role of the United Nations in Dealing with Global Problems, 4 IND. J. GLOBAL LEGAL STUD. 277 (1997). See also Stephan Hobe, Global Challenges to State-
an all encompassing notion of "world-wide." My own reference is to dynamic and highly concrete legal, economic, and social processes that, in effect, denationalize public and private approaches to the conception and resolution of problems and the advancement of economic opportunities. Whether the issue is environmental pollution or the most efficient manner of manufacturing and distributing automobiles or running shoes, governmental boundary lines at all levels are decreasing in importance in terms of the way such problems and their profit-making possibilities are conceptualized and carried out. Traditional, nation-state centered regulation is often in conflict with this way of doing business and resolving problems. When this occurs, globalization almost invariably is associated with private markets and market-based approaches. In and of itself, however, globalization does


7. E.g., RICHARD O'BRIEN, GLOBAL FINANCIAL INTEGRATION 5 (1992) ("A truly global service knows no internal boundaries, can be offered throughout the globe, and pay scant attention to national aspects . . . . The closer we get to a global, integrated whole, the closer we get to the end of geography.").


Transnational corporations decide where it is most cost effective to locate various activities in the value chains connected with the production and marketing of goods and services. They may locate research and development in one country, component assembly in another, final assembly in yet another country, and distribution networks in yet another. Aman, supra note 2, at 781.

10. Focusing on the economic aspects of trade to the exclusion of the environmental values is exemplified by the World Trade Organization ("WTO") in its recent report on the United States law prohibiting certain shrimp and shrimp products. WTO
not necessarily militate totally in favor of markets or a hands-off governmental approach to the externalities of globalization. The state can play a role; however, for many reasons, that role cannot result in traditional command-control regulation. Indeed, the multiplicity of jurisdictions involved, the inability of any one governmental unit to solve global problems on its own, as well as the incentives to retain current industry and attract new investment and jobs are all significant factors in fueling competition in state-centered regulation itself, whether it is regulatory, economic, or cultural. The various forms in which these competitions occur are what I call "global currencies." Competition in these arenas yields, at best, a cost-effective approach to the issue at hand and, at worst, a least common denominator resolution of the issue involved. Races to the top, middle, and the bottom are all possible and new mixes of public and private power emerge. Different kinds of markets or market approaches thus result, raising different problems concerning fairness, transparency, and the creation of legitimate and illegitimate forms of global currency. Indeed, how one conceptualizes and applies the public/private distinction can have a great deal to do with the extent to which the public has a role in deciding what kinds of currencies are available for use in competitions in various economic, regulatory, or cultural arenas.

A. Defining Global Currency

The idea of "global currency" is helpful in defining when activities might best be viewed as public, no matter the identity of the actors involved. Global currency is, in effect, the price government is willing to pay to remain economically competitive on behalf of the residents already living and investing within its jurisdiction, as well as to be attractive to new investors of all kinds. The most common form of currency is money, generated from the provision

Dispute Panel Report on Import Prohibition of Certain Shrimp and Shrimp Products, May 15, 1998, WT/DS58/R, available at 1998 WTO DS LEXIS 14. "Even though the situation of [endangered] turtles is a serious one, we consider that the United States adopted measures which, irrespective of their environmental purpose, were clearly a threat to the multilateral trading system." Id. at § 7.61.


14. See Appadurai, supra note 13; see also DAVID VOGEL, TRADING UP (1995).
of fewer or more efficiently provided governmental services or both, lower taxes, and lower regulatory costs, as well as investments in the infrastructures and human capital necessary to create, stimulate, and sustain economic growth.15

Not all forms of global currency are legitimate. If, for example, a competitive edge for a particular governmental/economic unit includes money saved on privatizing prisons and those savings flow, in part, from the fact that private prisoners effectively are deprived of their constitutional rights, such a competitive edge would be illegitimate.16 Similarly, if global currency is generated by economic decisions with short-term gain, but foreseeable, long-term costs, and information about these trade-offs was not given in a useful way to the affected public, legitimacy problems may arise.17 Child labor,18 poor wages,19 and unsafe working conditions20 also are arguably illegitimate forms of global currency. They all provide a

15. Reich, supra note 9.
   [I]nmates of the privately run prison regularly appear at the infirmary with black eyes, broken noses or jaws or perforated eardrums from beatings by the poorly paid, poorly trained guards or from fights with other boys. Meals are so meager that many boys lose weight. Clothing is so scarce that boys fight over shirts and shoes. Almost all the teachers are uncertified, instruction amounts to as little as an hour a day, and until recently there were no books . . . From the beginning, the company . . . pursued a strategy of maximizing profit from the fixed amount it received from the state for each inmate . . . The plan was to keep wages and services at a minimum while taking in as many inmates as possible . . .

Id.

17. For example, the deregulation of electricity rates at the generation level has turned out to be more complex than first imagined. E.g., Nancy Vogel, How State's Consumers Lost With Electricity Deregulation, L.A. Times, Dec. 9, 2000, at A1. It is, therefore, important that there be public input into both the creation and continuation of these markets. Id. The tradeoffs involved are, essentially, public questions that require public input. E.g., id.; Richard B. Stewart, Environmental Regulation and International Competitiveness, 102 Yale L.J. 2039 (1993) (toxic dumping); Bill Maurer, Cyberspatial Sovereignties: Offshore Finance, Digital Cash, and the Limits of Liberalism, 5 Ind. J. Global Legal Stud. 493 (1998) (money laundering); Geoffrey W. Smith, Competition in the European Financial Services Industry: The Free Movement of Capital Versus the Regulation of Money Laundering, 13 U. Pa. J. Int'l Bus. L. 101, 124 (1992) (noting that the banking laws of countries such as Switzerland, Austria, Monaco, Hong Kong, the Cayman Islands, Uruguay, Gibraltar, and the Bahamas tend to provide secrecy and tax havens that attract money launderers as well as legitimate business). The tradeoffs involved are, essentially, public questions that require public input. E.g., id.; Richard B. Stewart, Environmental Regulation and International Competitiveness, 102 Yale L.J. 2039 (1993) (toxic dumping); Bill Maurer, Cyberspatial Sovereignties: Offshore Finance, Digital Cash, and the Limits of Liberalism, 5 Ind. J. Global Legal Stud. 493 (1998) (money laundering); Geoffrey W. Smith, Competition in the European Financial Services Industry: The Free Movement of Capital Versus the Regulation of Money Laundering, 13 U. Pa. J. Int'l Bus. L. 101, 124 (1992) (noting that the banking laws of countries such as Switzerland, Austria, Monaco, Hong Kong, the Cayman Islands, Uruguay, Gibraltar, and the Bahamas tend to provide secrecy and tax havens that attract money launderers as well as legitimate business).

competitive advantage to a particular location and individuals associated with it, but at a cost borne by people unable to choose fully for themselves or unaware of the true costs of the "bargain" being struck. For example, the costs of a toxic dump may not be fully apparent to those likely to bear them, or those individuals may have little or no effective power to resist them.21

Conceptualizing globalization primarily in economic, competitive terms can easily reinforce domestic political discourses that favor markets over government intervention, individualism over more communitarian approaches to issues, and an increasing skepticism (often unhealthy) of government in general.22 It encourages the management of development through global currency. But the move to privatization can be disentangled from political rhetoric and ideological goals and beliefs. To explain more fully how the public/private distinction can be applied in new and more democratic ways, I shall differentiate among various kinds of markets and the politics that might best accompany them.

B. Differentiating and Matching Markets and Politics

Governments, at every level, can be viewed as territorially bounded, economic units attempting to maximize their resources and compete effectively with other economic units, whether they be the state, municipality, or county next door, or jurisdictions located halfway around the world.23 It does not always follow that the scale of governmentally run services is efficient. At times, it


[A] company arranges to build a prison and promises to fill it with inmates, instead of contracting in advance with the state for a prison that state officials have decided they want . . . . [T]he company usually negotiates directly with a town or city, often one desperate for jobs and corporate taxpayers because its factories or mines have dried up . . . . There is often no contract outlining the prison's responsibilities to that city or its state; the prison's only contract is with the supplier of the inmates.

Id. The prison company buys land cheaply (in some cases, it is free) in exchange for providing jobs, but local officials are given no control over prison conditions. Id. "It's sort of like hazardous waste. . . . When you bring in something that is potentially dangerous, which inmates are, what, if any, obligations do states have to regulate them?" Id.

22. So much of the deregulation debates, particularly in the 1980s, were unfolded with less analytical market discussion and with more political rhetoric aimed at the "end of big government." AMAN, ADMINISTRATIVE LAW IN A GLOBAL ERA, supra note 5, at 44-45 & n.1. For a discussion of the shift from New Deal conceptions of regulation to more market oriented approaches, see id. at 42, 53-55, 63-65.

23. HELD ET AL., supra note 5, at 45-52.
may be more efficient to provide certain services\(^{24}\) if the unit of service is larger or it may be more efficient to combine forces with another economic unit and eliminate duplication.\(^{25}\) Given the territorial constraints of governmental units, private actors often are in a better position to conceptualize problems and implement solutions that are not limited by arbitrary territorial boundaries. This is one reason why, in theory at least, contracting out certain services to private entities can yield efficiencies beyond what even an efficient governmental unit might provide. Of course, the efficiencies that come with the discipline of market competition are most likely to occur in private enterprises that have profit maximization as their primary goal. In many instances, the efficiency goals of the private sector are in accord with those of the public, but as we shall see below, the market discourse alone may not be broad enough to encompass all relevant public values.

These efficiencies are even greater if a private unit capable of operating in many jurisdictions at once can count on minimal or at least the same kinds of regulation and regulatory costs throughout the service area. Thus, pressures for regulatory harmonization are likely to increase as services are provided by actors, parts of whose efficiencies derive from being able to operate simultaneously in multiple jurisdictions. One of the easiest ways to harmonize is to privatize. Markets can provide a kind of uniformity. The mere shift from public to private can, in effect, lessen certain kinds of regulatory burdens that automatically apply to public entities, but not necessarily to private entities. In short, another reason to privatize is to realize the kind of “natural” harmonization that results.

Finally, and even more important, low tax political approaches at all levels of government may help attract or retain some businesses,

\(^{24}\) This includes “regulatory services” as well. For example, within the United States, there often are economies of scale to be achieved between state clean air acts and clean water acts. Pollutants do not follow boundaries, making interstate air compacts (ozone) and watershed management necessary. See, e.g., Charles E. McChesney II, The Interstate Ozone Pollution Negotiations: OTAG, EPA, and a Novel Approach to Negotiated Rulemaking, 14 OHIO ST. J. ON DISP. RESOL. 615 (1999).

\(^{25}\) For example, rather than two contiguous counties both buying snow removal equipment and clearing only their respective county roads, it may be more efficient for the counties to divide the workload between the two snow removal crews. E.g., Todd Wildermuth, Counties Consider Swapping Some Snow Removal Road Duties, TRINIDAD PLUS & THE RATON RANGE (Mar. 24, 1998) (“Certain roads in one county are more easily accessible from the neighboring county, making it convenient and time-effective for the neighboring county’s crews to handle snow removal on those portions of road.”), available at http://www.trinidadco.com/stories98/news/-03/24/road.html.
but they obviously yield few resources and almost force govern-
mental units to seek new efficiencies through the reallocation of
their resources and re-engineering of the services they already pro-
vide. These kinds of financial changes usually pose difficult, politi-
cal challenges, but markets can allocate scarce resources in ways
that can seem to be neutral. Cuts are made and efficiencies created
because the market demands them, not because a particular indi-
vidual, who must at some point run for reelection, has mandated
them. The fundamental political decision is to opt for the market
in the first place—in other words, to choose to privatize. But once
this has been done, the winners and losers that result can be seen
as the impersonal outcomes of neutral market processes. The im-
personal qualities of the market, however, easily can lead to the
creation of illegitimate global currencies. These kinds of outcomes
often are hidden. If there is a lack of information available to the
public about the effects of market processes and how they are be-
ing implemented, those effects may be generally unknown for
some time.  

Challenging the actions of a private as opposed to a
public provider of services can be difficult, if a simplistic approach
to the public/private approach is taken.  

But even if constitutional protections are available, federal or state freedom of information

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26. For example, the public is slow to realize the effects of excessive concentration
that often result from deregulation without antitrust enforcement. See, e.g., John Bur-
ritt McArthur, Antitrust in the New Deregulated Natural Gas Industry, 18 ENERGY L.J.
1, 87 (1997) (describing the effects of deregulation in the natural gas industry, a
widely touted example of successful deregulation). McArthur further argues that even
antitrust enforcement is difficult when the public lacks access to information:

A big problem facing those trying to understand the economic effects of
deregulation is that information is scarce. The formerly regulated are less
than eager to disclose their costs, prices, profits, and terms of service. Natu-
ral gas is no exception to the paucity of data. Many pipelines . . . keep their
market positions and pricing secret . . . .

. . . .

[M]any market abuses involve costs and profits or the pattern of prices. As
long as pipelines were regulated, they had to make this information public.
Pipelines filed detailed cost, revenue, and contract information annually . . . .
Whenever they wanted a higher rate, their pricing got a full hearing.

Once free of these requirements, pipelines have every incentive to hide
information. Customers are unlikely to have any way to uncover a pipeline’s
cost structure or pricing pattern short of litigation that will cost hundreds of
thousands of dollars.

Id. at 33, 86-87.

decision of a state regulated public utility to discontinue service does not constitute
state action); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (finding that a private
organization’s official position against homosexuality was protected by the First
Amendment as “expressive association”).
acts often are unlikely to apply and the kind of information necessary to empower public interest groups may be lacking.\textsuperscript{28}

In short, economic logics similar to those that apply at the international level apply at all levels of government. The multiplicity of jurisdictions; the inherent limitations of territorially bounded governmental entities; the relative freedom, flexibility, and efficiency of private actors; and the need to conserve funds and create global currencies with which to compete in a global economy all militate in favor of privatization. Markets bring discipline and anonymity. They bring uniformity too, as well as a means of making difficult political decisions in relatively impersonal ways. Markets are perceived as neutral, perhaps because of their complexity and impersonal nature. Some markets and some market approaches might improve public services, but are all markets the same? When is the market primarily a regulatory scheme designed to achieve certain public policy results and when is it a manifestation of individual freedom, the outcome of which is, by definition, correct? When is only the rhetoric of the market, rather than the discipline it is supposed to provide, all that is involved? These are the questions to which I now turn.

\section*{C. Markets and Metaphors}

Economic discourses are seldom broad enough to encompass fully issues involving human values such as the aesthetics of the environment, the moral justifications for welfare, and a host of other social justice and human rights issues.\textsuperscript{29} It is not that you cannot do the economics of welfare or prisoners' rights, but, like translating a poem from one language to another, it is the poetry itself that is lost in translation.\textsuperscript{30} Rights that are subject to market

\textsuperscript{28} For a discussion of the Freedom of Information Act, 5 U.S.C. § 552 (1994), and privacy concerns in general that arise when private actors undertake public responsibilities, see Alfred C. Aman Jr., \textit{Information, Privacy, and Technology: Citizens, Clients, or Consumers?}, in \textit{FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION} 325 (Jack Beatson & Yvonne Cripps eds., 2000).

\textsuperscript{29} See, e.g., Jerry L. Mashaw, \textit{Bureaucratic Justice: Managing Social Security Disability Claims} 29 (1983). Mashaw defines a moral judgment model that allows for moral justifications in the exclusion of certain individuals from the workforce. \textit{See generally Mark Sagoff, The Economy of the Earth} 7 (1988) ("There are important shared values, for example, health, well-being, safety, cleanliness, and respect and reverence for nature, however, that unlike the goal of efficiency, justify governmental intervention in markets, whether or not these markets are efficient. These values . . . provide a sound basis for social regulation.").

forces are no longer rights. But quite apart from the inability of a purely economic discourse to encompass all of the values at stake, issues of politics and ideology tend to merge the economic means of achieving certain goals with economic ends in themselves. When the tools of economics are used primarily as a means to an end, there is no reason why those ends cannot be conceived of and articulated in non-economic terms. In other words, our goal may be affordable housing for all, and that goal can be achieved in efficient ways. In theory, at least, the values underlying the goals involved can be quite separate from the economics of their accomplishment.  

Nevertheless, there are limits to what markets can achieve and accordingly there are limits to the use of markets as a means to an end. Political discourse often blurs ends and means, especially in the context of the market. Similar to the ways in which the uses of technology can affect goals and outcomes, the efficiency of the market and the individualistic philosophy that underlies it also can color the substantive ends as well.  

Finally, closely related to the ends-means confusion that can result, many problems that are translated into market terms, in fact, use references to the market more as a metaphor than as an analysis of the relations between willing buyers and willing sellers, the primary focus of a neo-classical economic model. A market approach may make sense from the point of view of the one who is to provide certain management services, such as prisons, and at what scale they are most efficiently provided, but the discourse of the market hardly carries through to all of the affected parties in ways that are similar to buying and selling natural gas or oil at the wellhead. Are the prisoners really consumers of the product? Are the citizens of the jurisdiction in which prisons are located really just customers? How does the analysis of the market change when we ask what role citizens have to play? The markets we are talking about become more metaphorical than real when one looks at the relationships among the groups involved in privatized services.  

The fundamental workings of markets do not always match completely the public interest goals that are sought. Just as traditional

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32. See, e.g., Andrew Feenberg, Critical Theory of Technology 7-8 (1991) (discussing the impact of technology when it is thought of only as a means to an end).
33. See Sagoff, supra note 29, at 7.
34. See Ian Harden, The Contracting State 6-28 (1992). For a more detailed analysis of the market and private prisons, see Aman, supra note 2, at 798-800, 831-37.
governmental approaches to markets have their limits, so too do market approaches to law.\textsuperscript{35} The more metaphorical the market, the more directly regulatory it is likely to be. This does not mean that we should look immediately through the private corporate veil and simply declare the entity involved as public.\textsuperscript{36} The matter is more complex than that because the issues involved are neither wholly public nor wholly private, but something with aspects of both regimes. The questions to be asked are not those that simply seek to assign the label of public or private. Three questions, in particular, are relevant to the privatization of public functions such as prisons: (1) what are the political values that the use of the market seeks to achieve? (2) what is the impact of the power exercised by entities involved in these markets on the individuals involved, be they customers, consumers, or citizens? and (3) what kinds of procedures are best to ensure the kind of public participation and transparency necessary for political legitimacy?

II. GLOBALIZATION AND THE PUBLIC/PRIVATE DISTINCTION

Public/private partnerships and the use of private entities to achieve public-oriented goals did not begin with, nor result from globalization. The public and the private sectors long have been in dialogue.\textsuperscript{37} The United States Constitution highlights the distinction between private and state action.\textsuperscript{38} Though the state action doctrine is less than clear, in many instances, the insistence on a division between the public and private sectors remains an impor-


\textsuperscript{36} Jody Freeman, Private Parties, Public Functions and the New Administrative Law, 52 ADMIN. L. REV. 813, 847 (2000) [hereinafter Freeman, Private Parties] (noting that "the task is more complicated than merely delineating a threshold test to determine when a private actor is performing a 'sufficiently public' function to justify the imposition of public law constraints" and raising a number of new questions that need examination); see also Jody Freeman, The Private Role in Public Governance, 75 N.Y.U. L. Rev. 543 (2000).


tant part of constitutional jurisprudence. There has, therefore, always been the need to differentiate the public from the private for some issues, and this distinction continues to be relevant, even though globalization means that the state functions in new ways. Transnational processes necessitate new approaches for determining where the public/private line might be and whether we should draw such a line in the first place. Some of the modern partnerships that carry out mixed market and public goals result in entities that are neither wholly public nor wholly private. They are powerful, though, and they do affect people's lives, sometimes dramatically. But how to describe them, much less govern them, should turn on a discourse that is more complex and flexible than the simplistic labeling exercises that traditional public/private analyses often encourage. Richardson v. McKnight is a case in point.

A. The Public/Private Distinction and Private Prisons: Richardson v. McKnight

Richardson v. McKnight arose from a suit filed by a prisoner in a private prison claiming damages for injuries incurred when his handcuffs were put on too tightly by prison guards. McKnight brought suit under 42 U.S.C § 1983 even though the prison in which he was incarcerated was private. The fundamental question in this case was whether private contract law should apply, thereby depriving the guards of an governmental immunity defense, or whether, given the fact that a private prison is engaged in what is clearly a public function, the guards should be treated the same as they would in a public prison. This was, in essence, the primary issue for Justice Scalia in his dissenting opinion. He sought to draw a very bright line between the public and private, label the activities involved as one or the other, and then act accordingly. Justice Scalia maintained that this prison was public for purposes of this lawsuit because no "real market" was at work:

[I]t is fanciful to speak of the consequences of "market" pressures in a regime where public officials are the only purchaser,

39. See Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 121 S. Ct. 924, 939 (2001) (“If the Fourteenth Amendment is not to be displaced, therefore, its ambit cannot be a simple line between States and people operating outside formally governmental organizations.”).  
40. Aman, supra note 28, at 333-36.  
42. Id.  
43. Id. at 401.  
44. Id. at 414.
and other people’s money the medium of payment. Ultimately, one prison-management firm will be selected to replace another prison-management firm only if a decision is made by some political official not to renew the contract. . . . This is a government decision, not a market choice.45

In short, for Justice Scalia, the private prison was carrying out a public function. Private prison guards were no different than the prison guards in public institutions. Immunity should, therefore, be granted to them, just as it would have been granted in a public setting.

The majority, writing through Justice Breyer, disagreed. First, Justice Breyer differentiated the private from the public by emphasizing the regulatory regime within which the guards were working:

[G]overnment employees typically act within a different system. They work within a system that is responsible through elected officials to voters who, when they vote, rarely consider the performance of individual subdepartments or civil servants specifically and in detail. And that system is often characterized by multidepartment civil service rules that, while providing employee security, may limit the incentives or the ability of individual departments or supervisors flexibility to reward, or to punish, individual employees.46

Having done this, however, the majority then examined the regulatory aspects of the market, noting that a suit of this type was an important incentive, given the private nature of the prison, its prisoners, and its employees. Indeed, given that the private prison guards operated “within a different system,” they needed different incentives to carry out their duties appropriately. Moreover, the concerns that troubled the dissent—that guards would be deterred from doing their duty47—easily were handled in this private setting by insurance, not official immunity.48

For the majority, the market in this case may not have been “real” in the microeconomic sense demanded by Justice Scalia, but it was a coherent system, with a logic of its own and a set of incentives and disincentives that encouraged certain kinds of behavior and discouraged others. This was, in fact, a regulatory market and in this context, McKnight’s lawsuit was important because such potential liability on the part of the guards would discourage activity

45. Id. at 418-19.
46. Id. at 410-11.
47. Id. at 411.
48. Id. at 420.
that could undermine the private prisoners' constitutional rights. The suit was also a means of ensuring public input into this privatized system. It was a way of holding the guards accountable. Having said this, though, the kind of market-regulatory regime that this private prison represented cannot be analyzed with only private-market logic. Justice Scalia was correct in concluding this was not a "real" market, but it did not necessarily follow that the "public" label applied. The fundamental purpose of this hybrid regulatory regime was to use market incentives to carry out public responsibilities. The result was, in a sense, neither public nor private. It had within it elements of both.

Refusing to treat the public/private distinction as an either/or discourse forces an analysis based more closely on the nature of the power being exercised, the relative strength or bargaining power of those most directly affected by this power, and a thorough examination of the nature of the market sought to be created, its purposes, and likely effects. Bright lines between markets and regulation or public and private are, therefore, neither necessary nor desirable. There can be many kinds of markets and their regulatory nature requires they be transparent and thus accountable.

B. Multiple Markets and Multiple Forms of Democracy

The classic microeconomic market model posits willing buyers and willing sellers in situations where there is competition for the goods involved and the price ultimately paid is equal to the marginal cost of producing the last unit of that good. Microeconomic theory thus provides an important rationale for deregulating the price of oil or gas at the wellhead, as well as the generation of electrical power. These are all resources for which markets exist and scarcity can be allocated in accordance with prices set by market forces. Similarly, a decision to deregulate airlines or telecommunications also is premised on the fact that markets can exist in

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these industries.\textsuperscript{52} A decision to delegate the management of prisons to the private sector, however, is a different use of the market. It is not intended to substitute the market for regulation, but rather to use the market as a means of providing the same services as those provided by the state. This, however, does not necessarily mean that it will be relatively easy to make a state action argument and conclude that these entities are, by and large, public for certain constitutional purposes.\textsuperscript{53} The procedural implications of this form of governance are more complex than the question of whether the constitution applies or not. Due Process procedural protections, particularly as applied to prisons, welfare, and social services, generally have declined considerably.\textsuperscript{54} Moreover, the issues involved with municipal services are broader than the individual rights perspective that the constitution often can encompass. The types of markets created by contracting out municipal services, the management of prisons, or the eligibility of welfare recipients can be differentiated. At least three different kinds of markets can be discerned—each, I will argue, made transparent in a way appropriate for the primary societal role it is intended to play.

\textsuperscript{52} For a discussion of some of the complexities of the deregulation of airline and television broadcasting industries, see Aman, supra note 4, at 270-88.

\textsuperscript{53} Courts generally find state action where: (1) a deprivation is "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 (2) the party charged with the deprivation [is] a person who may fairly be said to be a state actor. This may because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State.


1. **The Classical Market—Consumer and Shareholder Democracy**

The classic theoretical market is one in which competition is perfect and transaction costs are minimal. When Alfred Kahn, then Chair of the Civil Aeronautics Board ("CAB"), advocated deregulation of airline pricing and routes, he described the airplane as "marginal cost with wings."55 In theory, at least, the airline industry was one in which competition was possible and prices could be set by the market mechanism. Though it was not as easy as many thought to move from a history of regulation to a truly free market,56 such forms of deregulation rely on the proper assignment of private property rights and the antitrust laws to assure the competition necessary to keep prices fair.57

Abolishing the CAB and opting for a market approach to airline pricing eliminated direct public participation of the kind for which the regulatory process provided—rulemaking and adjudication under the Administrative Procedure Act ("APA").58 Yet one reasonably could argue that the democracy of the market could and, indeed, should replace the form of regulatory democracy provided by the APA. This is because the ability of consumers to "vote with their feet" would achieve the basic goals that the CAB sought to foster: fair, competitive prices and good availability of flights on various routes.59 The pricing mechanism and consumer reaction to airline prices and routes provided the discipline needed, in theory, to achieve the optimal service in the industry. The fact that this turned out to be far more difficult than originally thought is beyond the scope of this discussion.60 For our purposes, however, it is

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While it was recognized that regional carriers had a higher cost structure than national carriers, it was thought that this would be eliminated by permitting free entry and exit. As Alfred Kahn once expressed it, airplanes are "marginal costs with wings" that can readily be deployed in newly opened markets.

56. Alfred Kahn, *Airline Deregulation—A Mixed Bag, But a Clear Success Nevertheless*, 16 Transp. L.J. 229, 236 (1989); see also Aman, supra note 4, at 273 (noting especially that "deregulation without antitrust enforcement is an ineffective policy").

57. Aman, supra note 4, at 273. See generally Kahn, supra note 56, at 236-37.


60. Aman, supra note 4, at 272-73. Of course, as will be discussed more fully below, even when a market is established, the better the information that consumers have, the more competitive and effective the market can be.
clear that a market was possible and that market was intended to replace fully the regulatory regime then in place.

Closely related to the kind of market democracy that was sought by deregulation in this case is shareholder democracy. The individual competitive companies involved are run to please their shareholders. They, too, can vote and have a say not only over who runs the companies involved, but how. Usually, however, the purposes of such organizations rarely stray from profit maximization, but there can be, for example, ethical limits in how these profits are generated and shareholder meetings can be a forum for a variety of views on such questions. The essence of market democracy is this: competitive companies participating in competitive markets are held accountable by their shareholders and the consumers they seek to serve. Transparency is achieved when prices are competitive, known to the consumer, and the services offered are freely chosen. The purposes of the participation made possible through shareholder meetings are primarily to ensure that the company is being run efficiently and that profits are maximized.

2. Regulatory Markets—Administrative and Judicial Democracy

Another approach to markets is to use the incentives they create as a regulatory tool. Rather than relying on so-called command and control regulations governing pollution, the Environmental Protection Agency ("EPA") some time ago initiated a variety of market approaches to various pollution issues. These include, for example, selling pollution permits and allowing companies to exchange them. Such attempts seek to use the discipline of market incentives to encourage certain behavior and to do so in as efficient a way as possible. Market approaches give individual regulated entities more opportunity to choose for themselves how best to achieve certain regulatory goals. The end result is usually lower regulatory costs and an expectation of more effective regulation. This often is achieved because enforcement is more difficult and

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62. Id.
64. Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law: The Democratic Case for Market Incentives, 13 COLUM. J. ENVTL. L. 171 (1988) ("[A] reformed regulatory system will, over time, promote a public dialogue that will enable a . . . resolution of the choices Americans face in shaping the future of environmental law.")
less likely to occur. The market approach to the environment has been in effect in various areas of the law for some time. We are now at a point where careful, empirical work is possible to determine how well these regulatory markets have delivered.\footnote{One area of environmental regulatory markets that has empirical data is the trading of sulphur dioxide allowances under the Clean Air Act Amendments of 1990. For a discussion of the results of trading programs and a comparison with traditional instruments, see Daniel H. Cole & Peter Z. Grossman, \textit{When is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection}, 1999 Wis. L. Rev. 887, 932 (1999).}

The participation and transparency associated with these regulatory approaches are provided by traditional administrative processes and judicial review. Rulemaking, adjudication, and contractual individualized approaches to environmental issues all provide visibility and opportunities for the public to participate in these processes. The Clinton Administration's reinvention of government programs utilized these approaches in a wide variety of environmental and other regulatory arenas.\footnote{See Alfred C. Aman Jr., \textit{A Global Perspective On Current Regulatory Reform: Rejection, Relocation, or Reinvention?}, 2 Ind. J. Global Legal Stud. 429 (1995).}

3. Privatized Services and Contractual Democracy

Quite apart from the relatively competitive markets that are, at least theoretically, possible with airlines (or natural gas pricing at the wellhead), and the regulatory uses of the market by government agencies described above, privatization of or contracting out of governmental services presents a different use of the market with different approaches to and a different rationale for public input and participation. As a member of society, each of us has multiple identities that come into play in the variety of social contexts we encounter every day. We exercise our right and duty as citizens when we vote. We purchase goods of all kinds as consumers and, collectively, we may be the customers, or, in effect, the third-party beneficiaries, of a variety of contracts entered into by our elected (or appointed) representatives to provide services for the public good. In many ways, privatizing traditional governmental services merges the roles and aspects of individuals' multiple "identities" as consumers, citizens, and customers. Purely competitive markets deal primarily with consumers; regulatory markets are created by government agencies on behalf of citizens. However, privatized services emphasize the role of citizens as the beneficiaries of the services provided. But these customers may, in some instances, be consumers too, as in the case of snow removal or gar-
bage collection. Given the public aspects of the functions performed by private actors, they are citizens as well. Too often, however, the politics of privatization and the market populism\textsuperscript{67} that is often a dominant part of the political rhetoric that comes into play make it seem as if the privatization of prisons or the determination of welfare eligibility were similar to the deregulation of airlines or cable television.\textsuperscript{68} The transparency that comes with consumers or customers voting with their feet, as it were, is not likely to materialize in the context of such privatized governmental services without processes designed to provide the kind of information that can empower citizens and make their participation meaningful. Quite apart from the rhetoric of markets, however, many of the functions being performed by private actors should not be beyond traditional public law statutes such as the Freedom of Information Act; nor should transparency be assumed simply because a market discourse is employed.

As I argued in Part I, the reasons for privatization need not be ideological nor anti-government in spirit. The ability of private providers to conceptualize problems in terms that transcend geographical boundary lines can, under some circumstances, provide a cost-effective edge to municipalities, states, or the federal government in carrying out their respective responsibilities for providing various services. Moreover, it may be that in some circumstances such private providers are not just the agents of government, but agents of positive change as well. The innovative aspects of some markets can be beneficial to us all. It does not follow, however, that privatization means private in the traditional way we usually use the term, namely to designate the line between purely voluntary market actions and those collectively and publicly concerned and executed.

Like the complexities of the public/private distinction that such “reforms” invoke, the complex market and market-like relationships created by privatization of governmental services highlight the multiple identities of the various groups of individuals involved—the decision-makers, the beneficiaries of the services, and the consumers of those services. Just as there are many complexities involved in trying to understand the capacity in which the various individuals affected by decisions to privatize governmental

\textsuperscript{67} For a lively analysis of how markets and market rhetorics have been overextended to a variety of contexts that make the use metaphorical at best, see Thomas Frank, \textit{One Market Under God} 51-87 (2000).

\textsuperscript{68} \textit{Id.}
services are acting—consumers, customers, citizens—that there is also a need to recognize that various forms of citizen participation also may be available as well. Some situations may call only for consumer or marketplace democracy, but others will demand more complex mixtures of citizen/consumer/customer perspectives and levels of transparency that transcend the information coded solely in the form of market prices.

For example, the decision to contract out prison services to the private sector is a political one and should engage all citizens in the relevant jurisdiction. Once a political determination is made, however, do we really relegate citizens solely to the role of customers? Can the administration of this kind of public responsibility be separated so completely from policy and politics? What of the consumers of this service on a daily basis? If they are the prisoners, do they have any rights at all, since their consumption is, to say the least, involuntary? If so, democratic input may be appropriate only when the contract is up for renewal and judgments can be made as to the success or failure of the enterprise at that time. What was the extent of participation at the contract stage and is there a mechanism for producing the kind of information necessary to ensure appropriate public monitoring of the responsibilities carried out under the contract? These are the kinds of questions that

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69. Private prisons are treated as “state actors” for purposes of civil rights suits. Street v. Corrections Corp. of Am., 102 F.3d 810 (6th Cir. 1996); Payne v. Monroe County, 779 F. Supp. 1330 (S.D. Fla. 1991); DOUGLAS MCDONALD ET AL., PRIVATE PRISONS IN THE UNITED STATES 59 (1988) (citing West v. Atkins, 487 U.S. 42 (1988)). In West, the Supreme Court held that a physician who is under contract with the state to provide medical services to inmates at a state prison hospital on a part-time basis acts “under color of state law,” within the meaning of 42 U.S.C. § 1983 (1994), when he treats an inmate. West, 487 U.S. at 57. In the context of private prisons, the court in Payne reiterated the basic principle that:

A section 1983 action can be maintained when it can be established that the defendant acted under color of state law or exercises power possessed by virtue of state law. In West, the court found the requisite state action where a private physician was employed by the state to perform a duty of the state. Where a function which is traditionally the exclusive prerogative of the state is performed by a private entity, state action is also present. Payne, 779 F. Supp. at 1385 (internal citations omitted).

It also is clear that a state cannot absolve itself of responsibility for its prisoners simply by contracting its duties over to a private entity. For example, in Scott v. District of Columbia, Civil Action 98-01645, 1999 U.S. Dist. LEXIS 21616 (D.D.C. 1999), the court found that, just as “contracting out medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody . . . the [state] may not avoid its Eighth Amendment obligations to its prisoners by delegation to an independent contractor.” Id. at *15-16 (internal citation omitted). For a discussion of common law remedies, see Richardson v. McKnight, 521 U.S. 399 (1996).
can help structure both our conception of the process involved and the kinds of processes we believe necessary for it to work. The new administrative law is and should be about determining how best to conceptualize public/private relationships not only to assure fairness for those affected by these decisions, but information that will enable us to assess how best to determine whether these new arrangements are working and are workable from a democratic point of view.

Such issues are and should be at the heart of administrative law reform today. They transcend the privatization of governmental services and embrace similar issues involving the significance and the impact of global information technologies that are also private, but should not be unaccountable because they are private.⁷⁰ Administrative democracy needs to be imagined anew, not from the either/or vantage point of public or private, but from an understanding of the complex, multiple roles markets now play in our overall governance structure and the multiple identities that we as individuals express in our various societal interactions. I turn now to some principles that should guide our evaluation of proposals for reform.

C. Making Markets More Transparent: Expanding Administrative Democracy

Three avenues of reform are important to pursue if we not only are to enhance administrative democracy by making markets accountable, but if we are to do so without simply recreating a purely public model and imposing it on the hybrid markets that now have emerged. It is important to transcend the either/or thinking embedded in U.S. public law by recognizing that the state action doctrine and procedural due process are not the only touchstones we have in determining when participation and transparency is required. Another set of questions involves the power relationships between and among those providing and those receiving services, what those services are, and what function they provide in society.⁷¹ Second, though I shall talk in terms of the Administrative Procedure Act ("APA"), it is with the intention of transforming it

⁷⁰ I have addressed the public/private distinction in this context in Aman, supra note 28.

⁷¹ The approach taken to natural justice issues in Great Britain and elsewhere is instructive. See, e.g., Regina v. Panel on Take-overs and Mergers, ex parte Datafin, Plc 1987 Q.B. 815, 846-49 (Eng. C.A.) (rejecting a formalistic approach to when procedures apply in favor of criterion which requires the court to consider the nature of the power wielded by a particular entity—public or private).
for public/private partnerships, not simply applying concepts designed for another age to the present. The APA is, thus, an important symbol of the statutory possibilities that might exist to increase transparency and participation in hybrid governance structures. It is not a blueprint to be applied in a mechanical fashion. Finally, placing these procedural issues in a global context not only helps explain some of the driving economic forces involved, and the interrelated nature of the changes taking place in other parts of our economy and government, but this context suggests that we can learn from some of the so-called softer law approaches that are developing in the international law arena. Not unlike the kinds of transparency provided in the context of treaty compliance, the multi-district, blurred public/private aspects of domestic governance structures also require procedural approaches that may be more informational, rather than obligatory, in nature.\footnote{72}{See generally Abram Chayes \& Antonia Handler Chayes, The New Sovereignty 135-73 (1995). For a discussion of the topic of informational regulation, see Paul R. Kleindorfer \& Eric W. Orts, Informational Regulation of Environmental Risks, 18 Risk Analysis 155, 156-57 (1998). But see Freeman, Private Parties, supra note 36, at 853 (noting that “informational regulation not subject to adequate oversight would likely pose accountability problems itself because of the potential for industry manipulation of the information disclosure process.”).}

1. Beyond State Action and Due Process

The constitutional limitations of the application of the Bill of Rights are based, in part, on the state action doctrine. For example, before courts will order agencies to grant hearings, pursuant to the Due Process clauses, there must be a state actor involved.\footnote{73}{Ronald J. Krotoszynsky Jr., Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations, 94 Mich L. Rev. 302 (1995).}

For due process purposes, either an individual property or a liberty interest also must be involved to trigger the protections of the Constitution. As noted above, however, courts have cut back significantly on the application of due process generally and to prisoners in public institutions.\footnote{74}{Supra note 54 and accompanying text.}

There has been a constitutional deregulatory trend occurring in the courts that, in many ways, parallels the shift from states to markets in various regulatory contexts.\footnote{75}{Compare Goldberg v. Kelly, 397 U.S. 254 (1970), with Matthews v. Eldridge, 424 U.S. 319 (1976); see also Sandin v. Conner, 515 U.S. 472 (1995); Colson ex rel. Sillman, 35 F.3d 106 (2d Cir. 1994).} If one simply were to opt for treating private prison inmates just like those in public prisons for purposes of due process, constitutional
procedural protections would be minimal. To label certain services as public will not necessarily bring much, if any constitutional procedural rights to the individual litigants involved. The Due Process Clause remedies developed pursuant to Goldberg v. Kelly and other "new property" cases no longer apply in ways that effectively provide the kinds of rights and remedies as in the past.

Similarly, the state action doctrine has been and continues to be remarkably resistant to any clear statement of principle. Nevertheless, given the complex nature of the hybrid markets that privatized governmental services create, it should not be hard to find some connections to state action. The focus of such an enterprise, however, is beside the point. Where powerful institutions control important aspects of individuals' lives, there should be a legal commitment to a level of process necessary to assure transparency in the decision-making process regardless of the label we place on the entities involved.

To accomplish the basic goals set forth in a non-state focused approach to procedure, it is necessary to privatize the Administrative Procedure Act, not by eliminating procedures for public actors, but by devising and extending new procedural approaches to non-governmental private entities exercising substantial power with wide ranging societal effects. The state-centered notion of our public law must be brought into alignment with the realities of the de-centered state in the global economy of which we now are a part. The challenge is to do this in a way that does not raise costs unduly, but furthers the basic goals of fairness, transparency, and participation. The public nature of the powers wielded by private actors should not simply trigger the same public law remedies that were devised for very different entities. Rather, more nuanced ap-

77. Diller, supra note 54, at 1191; Pierce, supra note 54.
78. Krotoszynsky, supra note 73, at 321-24. This, of course, has been proceduralized to the point where it is now almost counter-productive. The basic approach in informal rulemaking is still a good model for the new administrative law developing. See generally Kenneth C. Davis, Administrative Law Treatise §§ 6-7, at 161-251 (3d ed. Supp. 2000) (calling informal rulemaking "one of the greatest inventions of modern government").
79. The court's approach in Regina v. Panel on Take-overs and Mergers, ex parte Datafin, Plc 1987 Q.B. 815 (Eng. C.A.), is helpful. In that case, the English court looked at the functions a particular entity was exercising to determine whether the power being exercised was, in effect, public. Such an approach rejects institutional analyses that focus on the public or private character of the entity involved in favor of an approach that looks to the impact of the power a society and the individual litigants. See Paul Craig, Public Law and Control over Private Power, in The Province of Administrative Law 196 (Michael Taggart ed., 1997).
proaches are necessary, in which flexible procedures such as an unadorned approach to informal rulemaking, or new, information-based models of procedure are employed.

2. Privatizing the APA

To extend procedural requirements to the private or privatized public sector is best accomplished through statutory reform, rather than constitutional interpretation. The APA, like almost all of the law governing bureaucratic discretion, is state or agency oriented. The Freedom of Information Act and the Privacy Act, for example, are limited in their application solely to "agencies." Similarly, the APA itself applied only to "agencies," defined as authorities of the "Government of the United States." The first goal of privatized procedural reform is, thus, to extend coverage to private actors engaged in public functions. There will be problems of scope and definition to be worked out, but the guiding principles should be that processes that go beyond market democracy are required when (1) the individuals affected are acting more in their capacity as citizens than as consumers or customers, or (2) that the individuals affected by the decisions involved are subject to a disproportionate application of power, given the position they occupy relative to the service provider.

In addition to broadening the statutory coverage of the APA to include private actors, there are some specific provisions of that Act that need to be expanded because of the greater role they play today in important policy-making areas. As I have argued elsewhere, the contracts provision of the APA was intended to play a much different role than, in fact, it does today. There are, of course, a variety of rules that apply to government contracts, including bidding procedures, procurement, and conflict of interest rules. These rules and procedures are designed primarily to en-

81. Id. § 552a.
82. For a discussion of these Acts, their state-centered focus, and a proposal to extend them to the private sector, see Aman, supra note 28, at 325.
83. 5 U.S.C. § 551(1).
85. Aman, Proposals for Reforming the Administrative Procedure Act, supra note 5, at 412-19.
sure the integrity of the process up to and at the time the contract is made. The procedural focus of public service contracts, however, also should be on the day-to-day aspects of how such contracts are administered. The public nature of the functions to which they apply requires ongoing transparency. To this end, public service contracts should be seen as detailed rules, and the process, rather than being exempt from rulemaking, should be subject to an unadorned form of informal notice and comment proceedings. The contracts should be published for comment on the policy-making aspects inherent in the duties to be undertaken.

Moreover, once a contract is set, just as a rule, there should be opportunities to petition the governmental agency involved for its amendment, even before the contract expires. It may be that it is only with the application of the contract to the facilities that new problems emerge. It is at that point that public input may be necessary. Contracts should be seen as part of an evolving process of governance, not the final culmination of private negotiations. Indeed, this process will differ from traditional contracts that are finalized at the time of agreement. Negotiation, flexibility, feedback and opportunities to amend and change one’s approach to various policy issues must remain open, if input is to matter. This does not mean the basic framework of the agreement must change, but if policy questions arise within that framework, the flexibility must exist to react to them on the part of the private entities involved as well as the opportunity to comment on them by the public. To this end, issues of finality need to be reassessed since the fluidity of governance differs from the kind of certainty that traditional contracts between buyers and sellers usually imply.

Quite apart from the procedures for contracting suggested above, there is a more fundamental aspect of the transparency involved and this is information. Information empowers those who have it and it is at the basis of any realistic politics of reform. A reliable source of current information can reaffirm the decisions to privatize in the first instance, or it can undermine those decisions, indicating the weaknesses of market approaches to some issues. It also can provide an opportunity to correct problems with the market approaches that have developed so as to further societal goals in a more effective way, without changing the market-oriented

character of the regulatory approach involved. An information-based approach resonates with procedural developments in international law, developments from which we can draw inspiration in our approach to domestic reform.

3. Globalizing the APA

Placing domestic procedural reform in a global context highlights the global political-economic forces that now drive governmental reform at all levels. This does not mean that there are not some aspects of globalization that domestic legal regimes should resist. Indeed, one important role for the domestic administrative law of the future is to provide the procedural basis for mitigating, if not correcting, some of the externalities of globalization. Indeed, this transformative role of domestic law is premised on the assumption that the economic aspects of global processes are not necessarily inevitable, nor are they linear in nature. Rather, an important role for domestic law, and in particular domestic administrative law, is to transform global forces in ways that enhance rather than undercut democracy. In so doing, approaches to globalization that rely extensively on laissez-faire market approaches at both the international and domestic levels of governance are overstated. At the same time, approaches to resistance premised on the idea that global forces can be rejected if only there is the political will to do so can be counterproductive and, in some contexts, unrealistic as well. A more transformative approach to globalization sees the impact of global forces as neither linear nor inevitable, but capable of being shaped and influenced by local political desires and preferences. This kind of approach encourages

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88. Id.; see Held et al., supra note 5, at 2-10.

89. For a discussion of what David Held calls the “hyperglobalist approach” to globalization, see Held et al., supra note 5, at 3-5.

90. Protectionist trade legislation, as well as extremely stringent legislative approaches to immigration, may fall into this category. See, e.g., Nora V. Demleitner, The Fallacy of Social “Citizenship,” or the Threat of Exclusion, 12 Geo. Immigr. L.J. 35, 50 (1997). Demleitner explains the negative fallout from many organizations and local governments concerning the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 115, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.), and its limitation of statutory benefits to permanent resident aliens. One backlash was the consideration of granting local voting rights to permanent residents, signaling that “globalization does not imply merely freedom of movement of capital, services, and goods, but also of people.” Demleitner, supra, at 58.
new procedural models and a recognition that market-based public/private partnerships may require "softer," informational procedural approaches rather than traditional public law approaches or the privacy of markets.

Procedures can help to provide citizens and policymakers important information about important problems—be they the environment, public health, or issues involving the administration of public-oriented contracts. Individual state agencies and representatives can respond as they see fit, but information plays another key role: it is the basic ingredient for informed political debate. I believe that creating a global politics at the local level is one of the foremost challenges of our time. This is not only because it is not always easy to see connections between the global and the local. Rather, market approaches can make the fact that choices are involved more hidden than they, in fact, are. An information procedural approach to the public/private sector could, at a minimum, provide information to the public about the cost and cost-effectiveness of market approaches to issues. It also could do so by comparing purely public sector approaches to the problems at hand as well as comparing service approaches and results in other countries—both developed and developing. The perspectives created by such an approach can play an important role by providing the bases for evaluation of market approaches to public functions. In this way, governance as opposed to mere consumerism can take place. An information approach to procedure has, of course, historically played an important role in U.S. domestic administrative law, with various reporting requirements in a variety of contexts.91

Indeed, there have been a variety of attempts to deregulate certain information requirements. Cost is a factor and "one size fits all" reporting requirements may work. Nevertheless, the basic idea of information, particularly as applied to the contracting function, is critical if the public is to play a significant and ongoing role in monitoring the public functions of private entities. Contracts, in this sense, can be analogized to treaties and, as such, compliance is necessary as are public opportunities for comment and suggested amendments. A global context can lead not only to more cost-effective procedures, but can do so in a way that does not see the shift from states to markets in purely ideological ways, but rather as a means of creating a more interactive, interdependent world, in which the values of public law are preserved in new ways.

**Conclusion: A Global Perspective on Local Responsibilities**

In this article I have argued that we must reform our domestic legal procedures and approaches to issues in order to ensure democratic participation in decisions that have broad societal effects and that involve public and private aspects. It is important to note that this is a two-way street. Not only do global trends inspire local reforms, but by so doing, local approaches can have an impact on globalization processes as well. Global processes and the outcomes they produce are not inevitable. Nor are they linear. The local politics of administrative governance can help shape and transform the law, locally and globally, in important ways.

Concepts of global citizenship and a global public interest are capable of flourishing at the local level, particularly if there is information about decision-making processes and their impact necessary to create the politics for this to occur. Process at the local public/private level can link local issues to global political movements and networks, thereby helping to create a politics of reform, even for issues long thought beyond either the interest or respect of the majority of local voters involved. The death penalty and some aspects of women's rights, such as the Violence Against Wo-

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94. See generally Delbrück, supra note 5; Aman, Proposals for Reforming the Administrative Procedure Act, supra note 5.
men Act\textsuperscript{95} are examples of domestic issues that may be affected by new perspectives from beyond our borders. The reasons to understand local issues as part of a global framework not only make clear that what is at stake is nothing less than public law values such as transparency, fairness, and participation, but also the opportunity to shape, influence, and transform global forces in constructive ways. The reforms suggested here can help mitigate some aspects of a democracy deficit, thereby helping to shape a politics that affects issues that can no longer be understood solely in domestic terms.