Dear Legal Theory Workshop Participants:

I circulate a paper co-authored with Avihay Dorfman entitled: "Against Privatization as Such" and the introduction to my book *Why Law Matters*. My presentation will focus exclusively on the paper and there is no need to read the introduction. However those who are interested in the general methodology that I use in the paper and in the way this methodology is used to analyze other legal phenomena will find answers to these questions in the introduction. My argument there is that often the justness of a legal institution or a legal procedure is not based on its propensity to bring about the right or the just decision. Law in other words is not merely a means. Instead sometimes legal institutions and procedures are necessary prerequisites for the realization of certain values.

Best,
Alon
Against Privatization As Such

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I INTRODUCTION

For the last several decades, privatization—roughly speaking, the shifting of responsibility from public to private entities1—has affected modern societies in deep and profound way and this shift forces us to consider what privatization really means and what its underlying costs and benefits are.2 This Article identifies a fairly neglected kind of costs: The undermining of political solidarity. To establish this claim we differentiate between two conceptions of privatization: First, the reason conception under which privatization has to do with transforming the reasons that guide the decision-maker (whoever it is); and second, the agency conception under which privatization transforms the decision-maker itself, namely, it shifts responsibility from a public official to a private entity. In contrast to most discussions of privatization, we rely on the agency conception and establish that the mere shifting of responsibility from public officials to private entities has freestanding normative consequences, that is, ones that do not depend on the type of reasons that happen to guide the private entity.

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2 For the dramatic changes resulting from privatization, see, e.g., PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT CAN BE DONE ABOUT IT (2007).
The typical arguments concerning privatization proceed by comparing the performance of a public functionary with that of a private functionary.³ In that, they must presuppose some function that each functionary is expected to perform. By contrast, we argue that even given that a private entity is better at providing a certain good or service, there are other important consequences of shifting responsibilities and functions to private entities that are not reflected in the quality of the privatized good. More specifically privatization has detrimental effects concerning public responsibility and political solidarity. Furthermore, we suggest that the costs of privatization are not merely contingent; they do not hinge upon empirical concerns only. Instead, they are a byproduct of the shared responsibility of citizens for the decisions and the actions of public officials. We reject therefore the misguided effort to make recommendations concerning privatization simply by examining empirically the virtues and vices of privatization and, in particular, by comparing the quality and the costs of the provision of privatized and non-privatized goods and services.

This Article defends the agency conception of privatization. It argues that for certain purposes the question of who the agent is becomes crucial for establishing political solidarity. This view rests on a certain conception of public officials which we defended in the past.⁴ Under this view what turns an act or a decision into a public one is the fact that it is done in conformity with a practice which at least in principle is governed by the sovereign. Public officials are unique in that their acts and decisions are governed (in the right sense) by practices that are, in principle, subject to the power of the polity. We also argue that this fact implies that, under the appropriate circumstances, citizens assume responsibility for the decisions made by public officials. The decisions of public officials can properly be described as decisions performed in the name of citizens and, consequently, they give rise to political solidarity among citizens. Privatization cuts off the link between the decisions and the citizens and erodes therefore the sense of shared responsibility and consequently also the sense of political solidarity.

Our view has important implications concerning contemporary debates about privatization. Most opponents of privatization justify their opposition on the grounds that privatization undermines the realization of public goods because private agents are not disposed to act in a way that promotes the public good; in particular it is often argued that private agents are not “accountable.” The soundness of this view depends on factual contingencies; it depends on the conjecture that private agents are unlikely to promote public ends because on the whole they are more likely to act purely on the basis of selfish concerns or sectarian ideology. This claim is of course hotly debated precisely because of its empirical nature. In contrast, our position need not settle these debates as we argue that the concern with the identity of the agent is not merely empirical. Privatization distances the polity from major decisions that affects the well-being of its members and therefore it undermines its responsibility for these decisions and, finally, it erodes political solidarity among its members.

Further our argument deviates in another respect from the traditional arguments concerning privatization—it develops an objection to privatization at the wholesale, rather than retail, level. Most arguments for and against privatization are based on a comparison between the quality of one-good-at-a-time before and after privatization; they proceed by judging the desirability of privatization at a retail level on the basis of such a comparison. By contrast, we argue that privatization as a general phenomenon—viz., privatization as such—may weaken and erode political solidarity

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5 Minow, supra note 1, at 1259-60; Jody Freeman, Private Parties, Public Functions and the New Administrative Law, 52 ADMIN. L. REV. 813, 823 (2000); Gillian E. Metzger, Privatization as Delegation, 103 COLUM. L. REV. 1367, 1372 (2003). The concern that private contractors act in a way that is detrimental to the public interest is a real concern and various initiatives to privatize led to such opportunistic behavior on the part of contractors. For an investigation of the defense industry, see Martha Minow, Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy, 46 B.C. L. REV. 989, 994-95 (2005). For the context of privatization of welfare, see Michele Estrin Gilman, Legal Accountability in an Era of Privatized Welfare, 89 CAL. L. REV. 569, 596-7 (2001). In the context of prisons, see Sharon Dolovich, State Punishment and Private Prisons, 55 DUKE L. J. 429, 503-04 (2005). Needless to say, each one of the claims made in these articles is controversial. Furthermore, public officials can also act in self-serving ways and often are not more accountable than private entities. As advocates of privatization are quick to observe, it is not sufficient to note that private entities are opportunistic. To make decisions concerning privatization one ought to compare the performance of the private entity with its public counterpart. See, e.g., Joseph Stiglitz, The Private Uses of Public Interests 12 THE JOURNAL OF ECONOMIC PERSPECTIVES 3-22 (1998).

6 For opposing views arguing in favor of privatization on empirical grounds, see Cass, supra note 1 at 469-70; Michael J. Trebilcock & Edward M. Iacobucci, Privatization and Accountability, 116 HARV. L. REV. 1422 (2003).

7 See note 3.
insofar as it distances and alienates citizens from judgments, decisions, and actions concerning their society. This does not imply that privatizing the provision of a particular good or service are not desirable *in terms of the provision of the good or service*. Even values that are often associated with public provision such as impartiality, deliberativeness, fairness etc. can at times be realized by private entities.\(^8\)

We suggest that the costs of privatization should be measured not only in terms of the quality of the provision of the privatized goods or services but in wholesale terms concerning the relations of citizens to other citizens and to the polity. This does not imply by any means that privatization of a particular good or service is undesirable. It only implies that there are costs to privatization which may be disregarded by policymakers as they are not easily monetizable.\(^9\)

The proposed approach accounts better for the intuitive resistance to privatization which, if examined by using the traditional method of comparing the quality of the publicly and privately provided goods is sometimes irrational.\(^10\) Arguments against privatization that focus on the quality of the privatized goods or services cannot account for a wholesale resistance to privatization.\(^11\) Indeed, it is one thing to identify compelling instrumental or non-instrumental reasons against the privatization of a particular good (or cluster of goods); quite another to articulate an argument against privatization itself. This Article is designed to make good on the latter ambition by explaining why privatization can undermine public responsibility and, as a result, political solidarity.

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\(^8\) Thus Freeman argued: “Conceivably, public-private contracts could function not only as mechanisms for delivering social services or effecting regulatory purposes, but as vehicles for achieving public law values, such as fairness, openness, and accountability... Contracts could also require private homes to observe minimal administrative procedures such as notice and hearing requirements, which might help to eradicate the most arbitrary decisions and slow the pace of others...”. See Jody Freeman, *The Contracting State*, 28 Fl. St. U. L. Rev. 155, 201-02 (2000).


\(^11\) More generally for the inclination of theorists to rationalize institutions and procedures in terms of their consequences when the underlying motivation is not consequentialist, see Alon Harel, *Why Law Matters* 1-9 (2014).
To forestall misunderstandings, let us register two important observations. First, it might be protested that the intuitive resistance to privatization at a wholesale is better explained by reference to the distributional-egalitarian opposition to the regressive implications to which privatization gives rise. The thought is that privatization is a surface manifestation of a broader libertarian agenda. We do not deny that some (and perhaps even most) decisions to privatize public services and goods nowadays are influenced by such agenda. However, although it purports to focus on the wholesale level, an objection to privatization based on distributional grounds cannot generate an argument against privatization as such. Indeed, private provision of goods need not (as a matter of conceptual truth) be categorically objectionable from a liberal-egalitarian point of view.\textsuperscript{12} Moreover, the so-called agenda behind the decision to privatize need not be that of laissez-faire libertarianism. Our approach seeks to capture the intuitive resistance to privatization even when it results in just distribution.

Second, the fact that privatization erodes political solidarity does not imply that it is always wrong or undesirable. Political solidarity is only one value among many. Sometimes instrumental considerations favoring privatization may override it. More than drawing any conclusive inference as to the desirability of privatization of a particular function or service, we seek to identify a less familiar consideration that could help to explain the intuitive resistance to privatization as such. Further while we believe that our arguments provide a reason against privatization, we recognize that values such as political solidarity could themselves be controversial. Yet even those who resist this value can benefit from our analysis as under our view it is not only a normative argument; it also explains the intuitive resistance to privatization which, at times is not fully understood even by those who share these intuitions.

\textit{II TWO CONCEPTIONS OF PUBLIC LAW: REASON AND AGENCY}

\textbf{A. Introduction}

\textsuperscript{12} In fact, it is quite plausible to suppose that the private provision of some goods is perfectly consistent with the demands of distributive justice. See Starr, supra note 1 at 131. Starr believes, however, that even if privatization does not lead to injustice, it “signals a diminished commitment to include the poor in the national household.” See Starr, supra note 1 at 135. It seems here that Starr contrasts between the actual effects of privatization (which need not necessarily be detrimental to distributive justice concerns) and the symbolic or communicative effects of privatization.
To set the stage, we begin by examining two ways to understand what privatization could mean. On the one hand, privatization may trigger a loss of accountability, impartiality, and other publicly-acknowledged virtues and norms that purport to guide the conduct of public officials in the service of the general interest. On the other hand, privatization may give rise to what has been called the publicization of private service, namely, the creation of publicly-oriented private actors.

One may argue that if “privatization” is accompanied by publicization, which is to say a change in the way private actors act such that they act in conformity with the reasons to which public officials are expected to conform, this should not count as genuine act of privatization. Instead it should be described as a rather technical or technocratic institutional change; changing the titles of the people in charge without changing the substance of their decisions. In other words what counts is *what the reasons underlying the performance of the agent are* rather than *who performs the act*. In contrast one may claim that privatization is nothing but transferring the responsibility from a public entity to a private entity independently of whether the new entity acts to promote public ends. In other words what counts is *who performs the act* rather than (merely) *what the reasons underlying the performance are*.

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13 See Minow, *supra* note Error! Bookmark not defined. at 1259-60; Metzger, *supra* note 5 at 1372; Freeman, *supra* note 5 at 823.


The claim that privatization is merely a technocratic change has also been made by courts. In his dissenting opinion in a case concerning private prisons, Justice Scalia criticized the majority decision because in his view:

“Today’s decision says that two sets of prison guards who are indistinguishable in the ultimate source of their authority over prisoners, indistinguishable in the powers that they possess over prisoners, and indistinguishable in the duties that they owe toward prisoners, are to be treated quite differently in the matter of their financial liability.”

See Richardson v. McKnight, 521 U. S. 399, 422 (1997).
Although theorists of public law are not always explicit which conception they hold one can identify in the literature, especially literature concerning privatization, both a reason conception and an agent conception of privatization. Section B analyzes the reasons-based view of publicness. Section C explores the agent-based view.

B. The Reason-based Characterization of Publicness

What is it that makes an act or a decision a public one? This question is important for both political philosophers and for legal practitioners. Political philosophers may be concerned about the legitimacy of the decisions of private or public institutions; practitioners may be concerned given that ‘publicness’ may be relevant to the determination of the legal validity of a decision and it has many other legal implications.

One prevailing view is that a decision is ‘public’ (and consequently the individual making the decision can claim to be acting in the name of the state) if the decision is grounded in appropriate publicly-oriented reasoning. More specifically it is claimed that a decision is public if it meets certain conditions of equality and impartiality. Malcolm Thorburn expressed this view as follows:

In order for an individual to successfully claim to be exercising a state power, he must meet the accountability standards set out in public law – roughly, reasonableness and fairness – in the exercise of his discretionary powers. This is because state power (unlike private power) is always answerable to the individuals over whom it is exercised... but the justification for the state’s power turns on its ability to act impartially in the name of all. If it fails to do so, then it undermines its own legitimacy.

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16 In previous work we argued that sometimes the identity of the agent dictates the reasons that ought to be attributed to it. We argued that the difference between public and private agents follows directly from the type of reasons that such agents are capable of using (simply by virtue of their different status). Hence, in effect we argued that there are conceptual considerations that bear on the question of which agents can reason in publicly-oriented ways. Dorfman & Harel, supra note 4.


18 See Cass, supra note 1 at 497-522. Even those who are skeptical about the usefulness of the distinction between public and private believe that legal practitioners make extensive use of these terms to resolve legal questions. See Karl E. Klare, Public/Private Distinction in Labor Law, 130 U. Pa. L. Rev. 1358, 1359 (1982).

This view seems to be an influential view both among opponents and proponents of privatization. The underlying rationale is clear: arguably the status of the agent is a technical matter. What really count is why the decision was made and what its effects are likely to be. The agent is merely a means for the implementation of publicly oriented decisions or actions. If it successfully does so, her decision is public. If she fails to do so her decision is private.20

Yet despite its initial plausibility it is evident that in reality very often the concept of privatization includes important institutional aspects, namely components concerning the status of the agent (rather than the reasons underlying the decision). In his attempt to characterize privatization Bauman identified features such as:

1) the complete or partial sell-off (through asset or share sales) of major public enterprises; (2) the deregulation of a particular industry; (3) the commercialization of a government department; (4) the removal of subsidies to producers; and (5) the assumption by private operators of what were formerly exclusively public services, through, for example, contracting out.21

In examining closely what Bauman identifies as paradigmatic instances of privatization one can differentiate the reasons and the agency-based understandings. Some forms of privatization identified by him (such as commercialization) are characterized on the basis of the reasons underlying the decision. Other forms of privatization (such as sell-off of public enterprises and deregulation) are forms of transferring power from the state to private entities. This form of privatization rests on the agency-based understanding of publicness, namely on the view that the status of the agent determines whether a decision is considered public or private. Given the importance attributed to the agency-view in political theory and in legal doctrine, it is

20This is the view that is labelled by Freeman a pragmatist view:

“To the pragmatic privatizer, it matters little whether the service in consideration is waste collection, power generation, education or incarceration. Similarly irrelevant are the vulnerability of the population being served, its exit options or its political power. Any of these services may be ripe for privatization if they present opportunities to cut costs and improve service quality through innovation.”

See Freeman, note 14 at 1298.

As Dolovich pointed out, the view that privatization is merely a technical change has often been used to legitimize privatization. See Sharon Dolovich, How Privatization Thinks: The Case of Prisons, in GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 128, 145 (Jody Freeman & Martha Minow eds., 2009).

21 Richard W. Bauman, Foreword, 63 LAW & CONTEMP. PROBS. 1, 2 (2000).
evident that proponents of the reasons-based view must provide a rationale for the concern given to the status of the agent. If they fail to explain the prevalent concern with the status of the agent, their theory deviates too much from existing doctrine.  

The standard way of advocates of the reasons-based view to explain the concern with the status of the agent is to distinguish between the fundamental normative core of publicness (resting on the reasons used by the agent to reach the decision) and the contingent means to guarantee that the agent is guided by these reasons. The reasons guiding the agent are what ultimately determine whether the decision is public or private; it is public if it is impartial, fair, deliberative, and therefore promotes the public interest. To guarantee fairness and impartiality one needs at time to use public agents as those agents are typically, generally or frequently moved by the right type of reasons. Given the institutional environment and the type of incentives operating on them public officials or public entities are more likely to be guided by public rather than private reasons.  

The reasons-based view is shared by both prominent advocates of privatization and by prominent opponents. Yet there are often differences in the type of reasons being used by advocates and opponents. Advocates of privatization often emphasize efficiency-
based reasons. They argue that private entities can provide high quality goods and services at a lower cost given that they are subjected to the discipline of the market. Such pragmatic arguments are taken largely from the discourse of economics.\textsuperscript{24} Opponents in contrast emphasize other concerns which in their view should characterize public decisions: impartiality, fairness, responsiveness etc. At times they also rely on procedural values that ought to guide the decision such as due process.\textsuperscript{25} Private agents, so it is argued, are not sufficiently accountable to the public; they are partial and consequently do not act in accordance with the public interest. The “public law perspective” as Freeman labels it “prioritizes legally required procedures designed to guarantee public participation and due process…Compliance with these procedures has an inherent value in the public law view; it is part of the minimum obligation a state owes to its citizens.”\textsuperscript{26} But while the reasons that are provided by advocates and opponents of privatization may be different: efficiency on the one hand and fairness and impartiality on the other hand in both cases what characterizes publicness is the type of reasons guiding the decision. The agent that ought to make the decision has to be the one that is the most likely to be guided by these reasons.

Note that while opponents of privatization emphasize fairness impartiality and due process, there is nothing in principle which prevents private agents to be fair, impartial or to satisfy requirements of due process. As Freeman argued:

> “Conceivably, public-private contracts could function not only as mechanisms for delivering social services or effecting regulatory purposes, but as vehicles for achieving public law values, such as fairness, openness, and accountability.”\textsuperscript{27}

Those who oppose privatization on the grounds that it is detrimental to fairness, impartiality or due process are not exempted therefore from the burden of establishing that privatization is detrimental to these values. The question of whether private agents can (or are likely to) act for ‘public’ reasons is ultimately an empirical

\textsuperscript{24} Trebilcock & Iacobucci, \textit{supra} note 6 at 1435; Cass, \textit{supra} note 1 Freeman, 14 at 1296. For an opposition to the dominance of economic considerations, see Dolovich, \textit{supra} note 20 at 134.

\textsuperscript{25} David J. Kennedy, \textit{Due Process in a Privatized Welfare System, 64 BROOK. L. REV. 231 (1998).}

\textsuperscript{26} Freeman, \textit{supra} note 14 at 1302.

\textsuperscript{27} See \textit{supra} note 8.
question. Martha Minow – an influential opponent of privatization -- defended her view along these lines and argued:

Inviting new providers into a market-based system to provide schooling and social services will produce at least some failures, with harms to vulnerable children and adults, and will rely on informed choosers when that may be precisely what we do not have. Privatization may also undermine public commitments both to ensure fair and equal treatment and to prevent discrimination on the basis of race, gender, religion, or sexual orientation.28

In contrast Jody Freeman suggested that privatization is not a “means of shrinking government”. Instead it is “a mechanism for “publicization”, namely a means by which private actors commit themselves to traditionally public goals. Freeman argues:

“Instead of seeing privatization as a means of shrinking government, I imagine it as a mechanism for expanding government’s reach into realms traditionally thought private. In other words, privatization can be a means of ‘publicization’, through which private actors increasingly commit themselves to traditionally public goals as the price of access to lucrative opportunities to deliver goods and services that might otherwise be provided directly by the state. So rather than compromising democratic norms of accountability, due process, equality and rationality – as some critics of privatization fear it will – privatization might extend these norms to private actors through vehicles such as budgeting, regulation, and contract.”29

Both Minow and Freeman rely implicitly on the reason conception of publicness. Advocates of the reasons-based view of public law maintain that the reason the status of the agent matters is that public agents are more likely as an empirical matter to be guided by public reasons. Other theorists dispute this view and believe that the status of the agent matters not merely for empirical reasons. We shall explore this view in sub-section C.

C. The Agency-Based View of Public Law

Assume now that a theorist agrees with Freeman that private institutions can operate impartially and can be guided by concerns which are typically understood to be ‘public’ and which are associated with public officials. Assume for instance that the state operates public prisons and also pays for the operation of private prisons and,

28Minow, supra note 1 at 1230.
29Freeman, supra note 14 at 1285.
also assume, that both public and private prisons provide identical conditions to prisoners. In both private and public prisons directors are moved by public concerns such as the concern to promote prisoners’ welfare, protect their rights and provide opportunities for rehabilitation. Should we not conclude (as the reason-based view of publicness requires us) that in an important respect both prisons are ‘public’ as in both of them public values have been used to dictate the decisions?

There is a prevalent intuition that there is a difference between the two cases and that this difference is important independently of the empirical considerations described earlier. Arguably the legitimacy of the decision hinges on the ‘public’ status of the agent not simply because the agent is more or less likely to be guided by public reasons. Instead some agents are the appropriate agents to make public decisions simply because of their status. Take the three following discussions all of which are taken from the context of punishment:

Locke, who is otherwise famously considered as a prominent supporter of the reason-based view, argues that:

To justify bringing such evil [i.e., punishment] on any man two things are requisite. First that he who does it has commission and power to do so. Secondly, that it be directly useful for the procuring of some other good…Usefulness, when present, being but one of those conditions, cannot give the other, which is a commission to punish.”

Malcolm Thorburn argues:

Those who are acting in the name of the polity as a whole are entitled to do things (such as using force when making an arrest, when executing a search, and in many other contexts) that private citizens may not, and they have the power to decide questions (such as the setting of pollution standards or the allocation of public housing or taxi licences) that private citizens do not; but in all this, they are answerable to others for their conduct and their decisions in a

30 A good indication for this strong intuition is the historical work on mercenaries. In her comprehensive historical survey, Sarah Percy illustrates that there is a persistent opposition to mercenaries in European history. Yet, the reasons provided for this opposition shift and change in time. Percy’s survey indicates that while most reasons provided for this opposition are instrumental the sense of discomfort is deeply entrenched and cannot easily be explained in instrumental terms. This provides support for the conjecture that the reasons are mere rationalizations of a much deeper resistance to privatization which this chapter aims to explicate. See Sarah Percy, Mercenaries: The History of a Norm in International Relations (2007).

way that private citizens are not... All of these rules are concerned not merely with the quality of an individual’s acts but, first and foremost, with her legal standing to undertake it in the first place. 32 (Emphasis ours A.D. & A.H.)

Last David Lyons says:

“it is not generally accepted that I have the right simply to hurt another who has done something wrong, just because he has done it, where there is no special relation between us.” 33

Each one of these paragraphs suggests that the mere fact that an agent is likely to punish rightly or correctly is not sufficient for the agent to justify the infliction of the punishment. Locke believes that in addition to the fact that the punishment is “directly useful for the procuring of some other good” the agent must also have “commission and power” to inflict it; Thorburn believes that the “quality of the individual acts” of the agent is not sufficient to justify the infliction of punishment. In addition the agent must have legal standing. Finally Lyons sharply distinguishes between two questions: (a) whether an agent “deserves” to be punished or ought to be punished for other reasons, and (b) whether a particular agent is the “appropriate agent” (namely “has a commission” or “legal standing”) to inflict the sanction. To justify the infliction of punishment X by an agent Y on a wrongdoer Z, it is not sufficient to show that X should be inflicted on Z and that Y is the most likely or the most capable agent to inflict it. Something else needs to be shown. 34

A useful distinction which captures this intuition has been made by Thomas Hill. In discussing criminal punishment Thomas Hill distinguishes between practical or action-guiding desert theories and merely faith-guiding or wish-expression desert theories. The former argue that perpetrating crimes provides one a reason to inflict sufferings on the guilty while the latter argue merely that perpetrating crimes

32 Thorburn, supra note 19 at 442.

33 David B. Lyons, Rights Against Humanity, 85 Phil. Rev. 208, 210 (1976).

34 The analogy to parents helps to clarify the concern with the status of the agent. Disciplining children is typically done by parents. Traditional common law has even recognized the privileges of parents with respect to performing “moderate and reasonable chastisement and correction.” While parents may be perceived to be instrumentally better in inflicting such punishment the reasons underlying this privilege have to do with their status as parents. For the common law position on this, see William Blackstone, Commentaries on the Law of England Book I chap. 16.
provides one a reason to wish that the guilty suffer.35 Thus in Hill’s view the mere conviction that a person ought to suffer does not imply that I (or anybody else) has a reason to bring this suffering about.

Legal doctrine also provides ample support for the view that the identity of the agent matters. Some courts have explicitly acknowledged that the identity of the agent matters independently of the prospects that the resulting decisions of the agent are right or wrong. As illustrations let us use two cases:

In Sundar and Others v. Chattisgarh, The Indian Supreme Court decided that appointing special police officers for short periods is unconstitutional. Although the Court emphasized also instrumental concerns such as the poor education of the special police forces it also resorted to principled arguments against privatizing security. The Court said:

Consequently, such actions of the State may be an abdication of constitutional responsibilities to provide appropriate security to citizens, by having an appropriately trained professional police force of sufficient numbers and properly equipped on a permanent basis. These are essential state functions, and cannot be divested or discharged through the creation of temporary cadres with varying degrees of state control. They necessarily have to be delivered by forces that are and personnel who are completely under the control of the State… (Emphasis ours, AD AH)36

The Israeli Court has been even more explicit in its rejection of instrumental considerations and his principled resistance to the privatization of prisons. A recent (highly controversial) Israeli case barred the privatization of a prison on the grounds that such privatization violates the human dignity of prisoners.37 The Court emphasized that it rests its decision on principled grounds, namely that the transfer of the prison to private entity is in itself a violation of the right to dignity of prisoners. It explicitly highlighted the importance of the identity of the agent and argued that

“The special constitutional status of the right to personal liberty and the fact that it constitutes a condition for exercising many other human rights mean that the legitimacy of denying that liberty depends to a large extent on the identity of the party that is competent to deny that liberty and on the manner in which that liberty is denied.” (Emphasis ours AD & AH)

The Court also emphasized that its judgment is grounded in principles of political philosophy rather than in pragmatic concerns. It argued as follows:

According to the basic principles of modern political philosophy, the violation of the right to personal liberty resulting from giving a private enterprise the power to deny liberty within the context of the enforcement of criminal law derives ipso facto from the fact that the state is giving that party one of its most basic and invasive powers, and by doing so the exercise of that power loses a significant part of its legitimacy.38

This intuition seems prevalent and it could be extended more generally to public law. There is something in the status of the agent which is crucial for characterizing some acts as public and more importantly crucial for the legitimacy of these acts. This also implies that the desirability of privatization does not hinge merely on empirical or contingent factors.

But can this intuition be defended? Why should the status of the agent (rather than the reasons guiding her) be important or relevant? What makes it the case that agents cannot be chosen simply on the basis of their ability to ‘get it right’ namely to reason correctly, weigh all the relevant considerations and reach the right conclusions?

While advocates of the agency view can find ample support in legal doctrine and in political practices, the normative foundations of this view remains mysterious. And although the thought that agency matters strikes an intuitive chord, it is not clear why so. It is not surprising, therefore, that so many of the opponents of privatization try to rationalize their opposition in terms of the reason-based framework. The reason-based framework provides theorists with an intelligible and seemingly rational framework to articulate their opposition. But an apparently intelligible framework to justify an institution may often turn out to be a mere rationalization or a smoke-screen for what

38 Id. at 599.
is really at stake; the inclination for theoretical clarity and preciseness may often lead theorists astray. More particularly, it may induce theorists to resort to instrumentalist explanations at the risk of distorting what really matters.\textsuperscript{39}

Part III defends the agency-based view of publicness. To do so we examine in part III the concept of public officials and later defend the view that a proper understanding of the concept of ‘public officials’ can provide an explanation for the appeal of the agency view of public law.

III IN DEFENSE OF THE AGENCY-VIEW OF PUBLICNESS: THE DIFFERENCE THAT PUBLIC OFFICIALS MAKE

A. Introduction

This Part develops a defense of the agency view. More specifically we argue that a ‘public’ reason is one that can reasonably be attributed to us as members of a polity. It is one with which we (as members of a polity) are responsible for. What determines whether citizens are responsible for an act is not (only) the reasons that the agent used (or is likely to use) but its status and, in particular, whether the agent is a public official rather than a private entity. Privatization, understood in terms of the agency paradigm, erodes shared responsibility and, as a result, undermines political solidarity.

Being a public official is a condition in virtue of which an act can be attributed to the state and become the responsibility of its citizens. For certain acts to succeed in being acts of the state, they must satisfy certain conditions; such acts must count as deferential to the polity, and, as we show below, to be deferential to the polity, only individuals with certain characteristics – public officials – can perform them. Being a public official is therefore not merely contingently conducive to the execution of a task that, in principle, can be performed by anybody; it is conceptually required for the very ability to perform certain tasks that need to be done “in the name of the state.”

\textsuperscript{39} See Harel, supra note 11 chap. 1. In this chapter it is shown that many of the arguments provided by political theorists to justify institutions and procedures are ‘‘insincere’’ in that they do not capture underlying sentiments that sustain these institutions and guarantee public support for them.
Section B develops the concept of public officials. It argues that public officials are those decision-makers whose decisions are properly performed in the name of the polity. In this section we define public officials in a way which emphasizes their link to the polity. Section C develops the concept of political solidarity and establishes why privatization (understood in terms of the agency view as transferring functions from public officials to private individuals) may undermine or at least erode political solidarity.

B. Public Officials as Agents of the State

This section provides a characterization of public officials. This characterization is designed to capture some features that are legally relevant and, also to provide the foundations for a normative analysis. Under the proposed view, public officials are characterized by their deference to the polity represented by politicians. It is their deference which makes them public officials and which explains why their decisions are attributable to the polity.

In analyzing the concept of deference of public officials one confronts a serious problem. On the one hand it is evident that public officials often act without direct orders from the state. In fact exercising such discretion is almost inevitable for successfully promoting the public interest. On the other hand, there is a strong sense that the decisions made by public officials are decisions of the polity. How can these two observations be reconciled? If public officials exercise discretion why should their decisions count as decisions made by the polity?40

To address this issue we explore here the nature of deference required of public officials. Two initially plausible understandings of deference should be dismissed from the outset. First, the government cannot simply make a private citizen its agent by asking him to undertake some government tasks, say, imprisoning convicted criminals. A person cannot merely approach the performance of the task at stake from  

40 This concern is similar to the concerns of legal philosophers with respect to the discretion exercised by judges. Judges are bound by law. It is precisely their deference to the law which justifies attributing their decisions to the state. But it is often claimed by positivists that judges have legal discretion. When they exercise such discretion they cannot defer to the law and therefore they make decisions that are not dictated by law. This concern was partially the motivation for Dworkin’s attempt to establish that judges do not exercise discretion as judicial discretion in his view undermines the legitimacy of judicial decisions. Similarly it can be argued that to the extent that officials have discretion, their decisions cannot properly be attributed to the polity and are therefore illegitimate.
the point of view of the state—there is no such ready-made perspective lying out there. The reason that the government cannot turn a willing individual into its agent simply by asking the individual to perform “a task” is that, in reality, the tasks dictated by the state are typically underspecified such that they leave broad margins of discretion.41

Given the underspecified nature of the “guidance,” it would be presumptuous to attribute the act performed by the agent to the state. The different ways of performing the act may have different consequences; they may affect people’s well-being and impact their rights. Choosing among the different ways of performing the act must (at least in some cases) be guided in ways that could render it the doing of the state.

For a similar reason, deference to the modern state cannot simply mean deference to the actual will of an identifiable natural person, for example, the sovereign. With respect to most decisions there is simply no concrete will of any such person. Surely, however, if there is no fact that one can point out that determines what deference to the polity requires, it follows that deference to the sovereign cannot be required. Should we not then turn to the reason conception of publicness to solve the mystery of what it takes to act in the name of the state?

We reject this conjecture. The requirement of deference can be reconstructed so as to render it perfectly available to modern state agents insofar as they assume—as they inevitably do—an active role in determining what acts are done in the name of the state.42 On this view, deference requires the existence of a practice that satisfies certain conditions in order to count as deference to the state. The deferring agent defers to a community of practice to which he or she belongs—a community that collectively determines what the public interest dictates—and takes this determination as a baseline against which to measure what fidelity of deference requires in each particular case. Perhaps ironically, therefore, deference to the state involves collective

41 We say “typically underspecified” in recognition of the (theoretical) possibility that the state could provide the executor with comprehensive guidance as to how to proceed with the task in question. In such hypothetical cases we acknowledge the permissibility of outsourcing the execution of the task, as in such cases where the state fully controls the manner of execution, the execution remains the doing of the state.

42 Scholars of administrative law long ago acknowledged that public officials are no mere “transmission belt[s].” The locus classicus is Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667, 1671-88. (1975).
determination by the deferring agents themselves (qua participants in the requisite practice) concerning what choices deference on their part dictates.

Two conditions must be satisfied for persons to act successfully in the name of the state: the existence of a practice and its institutional form. More specifically, speaking and acting in the name of the state require a practice that takes a distinctive form, namely, one that integrates the political and the bureaucratic in the execution of the relevant functions. An integrative practice is characterized by its principled openness to ongoing political guidance and intervention. On this view, political offices ought to be able not only to set the practice into motion but also to determine its content, guide its development, and steer its course. We therefore maintain that the practice in question is crucial for acting from fidelity of deference to be possible. It does not merely help to identify governmental courses of action that, in principle, can be specified apart from that practice; rather, the practice is defined by the deference of the agents participating in it. We take each of the two conditions (the existence of a practice and the institutional form of the practice) in turn.

The first condition involves the existence of an institutional structure in which the general interest as seen from the public point of view is articulated. On the proposed view, approaching the task of execution from the perspective of the state depends on there being an ongoing framework or coordinative effort in which participants immerse themselves together in formulating, articulating, and shaping a shared perspective from which they can approach, systematically, the implementation and execution of government decisions, thus tackling questions such as how one should proceed in general and in the particular instance. The process takes a coordinative form in the sense that participants are responsive to the intentions and actions of one another as they go along with the execution of government policy and decisions. To this extent, a practice of the requisite kind can potentially place a freestanding constraint on the practical deliberations of its participants. For instance, what an official does in a particular case depends on the ways his or her co-officials have approached the matter in similar cases. This form of responsiveness on the part of officials should not be confused with persons being strategically reactive to the acts of others, as in Nash Equilibrium, according to which each person’s act is the best response (from his or her point view) to what other persons have done. Rather, it is
founded on a joint commitment to support the practice of executing laws by taking the intentions and activities of other officials as a guide to their own conduct.

The existence of a community of practice renders deferential fidelity by executors possible. This is because the rules generated through engaging one another in this practice set the baseline against which what deference requires is determined in each particular case.

Privatizing the execution of government functions poses a serious challenge even with respect to private entities seeking to take on the role of public bureaucracy faithfully. As noted above, there are simply too many cases where the state’s commands are underspecified. This shortfall can, in principle, be overcome by forming a practice. This could be a personal practice, in the case of an individual who undertakes to execute government laws, or a group practice featuring a plurality of individuals jointly committed to deferring not to each one’s unilateral conception of the general interest but to the conception they come to share in the course of deliberating toward action from one case to another in a way that is consistent and intelligible. Moreover, the formed practice could then be subject to close supervision by state officials. Can an action dictated by a practice developed by private agents and duly supervised by state officials count as an action done in the name of the state? A positive answer would undermine our primary claim; it would imply that privatization is compatible with acting from the public point of view.

We believe it cannot; even given that a community of practice can arise among private individuals, its mere existence is not sufficient for the purpose of speaking and acting in the name of the state. The practice must be able to integrate the political offices into this community. It must be open to the possibility that politicians change the practice, guide its mode of operation, and reevaluate the norms governing it.

To understand what counts as integrative practice, it is important to begin by observing that an integrative practice is a range property. It seeks to extend its reach to capture some hyperpoliticized agencies (such as the Department of Justice under George W. Bush’s presidency or the Environmental Protection Agency, at least since

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43 The idea of range property is borrowed from JOHN RAWLS, A THEORY OF JUSTICE 508 (1971).
Al Gore’s vice presidency) as well as some professional or semi-academic institutions (such as the Federal Reserve’s Board of Governors). That is, it can be more or less integrative, by which we mean more or less deferential to political officials. We shall argue that a private community of practice falls outside the requisite range; and this is true even in cases where state officials supervise the private practice. This is so because the interaction of participants in a private practice with state officials is mediated through a contractual agreement whose effect is the replacement of deference to the polity with reason that is unconstrained by the polity.

A practice of public officials that takes the integrative form does not merely operate among bureaucrats (with politicians taking the backseat), but rather includes among its engaging participants both politicians and bureaucrats. Thus, the integration of the political offices into the community of practice does not limit the role of politicians to that of setting the practice among bureaucrats in motion by determining the basic rules of conduct and the boundaries of the framework within which bureaucrats deliberate toward action. Nor does it limit their role to that of monitoring and supervising the participants (either directly or indirectly through other state officials). Rather, integration enables political officials to guide, within the limit of their legal powers, the ongoing deliberations and everyday actions performed by bureaucrats. In that, political officials can exert their influence on the other

44 On the phenomenon of hyperpoliticized executive agencies, see DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE (2008); BRUCE ACKERMAN, THE DECLINE AND FALL OF THE AMERICAN REPUBLIC (2010). With respect to the Federal Reserve, while some measure of insulation from political influence is certainly the point of entrusting monetary policymaking in the Fed’s hands, it is nonetheless structurally open to political supervision and intervention at least over the long run. This is especially manifested through the appointment mechanism as well as through Congress’s power to determine the Fed’s goals and the means by which it may achieve them. Moreover, political influence can also be exerted over the short run. As the Princeton economist and former vice chairman of the Fed’s Board of Governors, Alan Blinder, has recently observed, “Congress has both the right and the duty to oversee the Fed’s operations, which it does through periodic hearings and in other ways.” See Alan S. Blinder, How Central Should the Central Bank Be?, 48 J. ECON. LITERATURE 123, 125 (2010).

45 To fix ideas, British-style parliamentarism and U.S.-style separation of powers are two systems of government that reflect different styles of integration. According to the former, the integration of political and civil service occurs at the highest levels on both sides of the equation. According to the latter, and unlike the former, integration penetrates the lower levels of civil service as manifested by the mass appointments, including appointments of the president’s loyalists, made by the president after his or her election. Despite these differences, parliamentarism and separation of powers are arguably of a piece insofar as they engender a sufficiently integrative community of practice between civil servants and politicians.
participants directly (which is the mirror view of the deference bureaucrats owe them).

The exerted influence is direct in the sense that it is not mediated through, and thus not contingent upon, the particular terms of the agreement between the state and the private organization hired for the task in question. Of course, public officials, with the exception of those performing mandatory army service, are also employed on a contractual basis. However, their contractual obligation requires them to concede authority to other public officials who occupy higher places on the governmental hierarchy.

An integrative practice featuring this notion of direct influence is qualitatively different from a private community of practice, including even a private practice duly supervised by state officials.

To see that, consider a typical privatization agreement under which the government is in charge of setting, usually in general and underspecified terms, the desired ends and of imposing basic constraints on the means that the private executor can deploy in pursuit of these ends. As with statutory provisions, the vague and underspecified content of the contract is not coincidental. It reflects different considerations (such as uncertainty and the bounded rationality of the parties) that render it natural to leave the language of the contract sufficiently airy to accommodate foreseeable and unforeseeable future events.

Now, the decisions and rules generated by a community of private practice striving to act within the arena of permissibility necessarily fall short of what deference to the general interest (as judged from the point of view of the relevant political officials) requires. A formally defined arena of permissibility is just an authorization for private contractors to act according to their own views as to what the public interest requires - that is, to pursue the general interest as filtered through their own viewpoints of what impartial concern for this interest requires. Further, what we label “arena of permissibility” is not an accidental feature of privatization – a feature which may be

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48 This typical scenario can accommodate a case where state officials are authorized by the state to renegotiate the terms of the agreement with the other party insofar as circumstances change and modifications become necessary. These modifications (if accepted by the private entity) merely change the scope of the arena of permissibility, but it does not eliminate it. The only way to eliminate it (or even to come close to its elimination) is to require the private entity to defer to state officials in all matters. However, this will be tantamount to converting the participants in the practice to public officials properly conceived.
dispensed. It is a prerequisite for realizing the goals that privatization is designed to realize, in particular, efficiency. As one commentator has noted: “The emphasis on outcomes gives private service providers latitude to develop their own strategies for achieving the desired results. If all tasks were specified in the governing contracts, there would be little room for the beneficial effects of competition to operate.”

Indeed, insofar as they participate in a practice that takes a separatist form, the participants in a private community of practice do not incur an obligation to engage the relevant political offices deferentially in an effort to determine what the general interest requires. They may incidentally be disposed to do so but only because, and only insofar as, thus “deferring” serves the purposes of the (for-profit or not-for-profit) organization to which they belong. Unlike public officials participating in an integrative practice, no such deference to political officials is required from them simply by virtue of being in charge of performing government functions. Were they required to display the requisite deference, participants would in essence become public officials, regardless of their formal title (e.g., private contractors).

Accordingly, the private community of practice is not integrative in the sense that it does not provide politicians adequate opportunity to shape constantly its contours by commanding the unmediated deference of those who are in charge of the execution of the relevant tasks. Privatization, insofar as it cuts political officials off from the community of practice, denies the remaining members of this practice—for example, the employees of a private firm—access to the conception of the general interest as

49 See Matthew Diller, *Form and Substance in the Privatization of Poverty Programs*, 49 UCLA L. REV. 1739, 1745 (2002). The arena of permissibility is typically broader than is conceived by the government at the time of contracting. Freeman argued that:

“In most cases, public agencies believe they are contracting out only policy implementation while retaining authority over policy making, but the distinction is tenuous at best... The distinction between day-to-day management (a private function) and ultimate rulemaking and adjudicative power (a public function) may not be sustainable. Even where agencies retain the authority to accept or reject rules proposed by the private provider, the provider interprets and puts into operation those rules, giving them their practical meaning and blurring the line between the policy making and implementing functions.”

See Freeman, *supra* note 5 at 823-24.
articulated from a point of view shared with the relevant political officials. It is thus implausible to describe their efforts in executing laws or judicial decisions as the doings of the state.

The inclusion of politicians in the practice of execution, then, is necessary to forge a connection between the rules generated by it and the general interest (as seen from the public point of view). The rules generated by the integrative practice—the rules that govern moves within the practice and set the baseline against which to determine what deferential fidelity requires in every particular case—are the product of practical deliberation that can span the entire range of governmental hierarchy, which is to say, all the way up to the highest political office and all the way down to the lowest-level civil servant who happens to push the proverbial button.

Note that the argument does not focus on how much, and to what extent, politicians make actual use of their power to influence the practice. In some cases and with respect to some spheres of state action, politicians seldom use their powers. That said, it is the combination of the potential for intervention in and guidance of the practice, on the one hand, and the readiness of politicians to intervene whenever they are unsatisfied with the ways in which the practice operates, on the other, that counts. Accordingly, the realization of this potential, namely the de facto intervention on the part of politicians is not in and of itself crucial to determine whether the political offices are sufficiently integrated into the community of practice. Instead, what is crucial is the participants’ Hohfeldian liability to the power of political officials to place them under a duty to act in certain ways and the willingness to exercise this power whenever they are unsatisfied with the ways in which the practice operates.

To forestall misunderstanding, it is important to note that nothing in this argument turns on a formal definition of public official or private employee; as a result, the specter of tautology in this respect is groundless. Consistent with our insistence on the constitutive place of an integrative community of practice in the overall non-instrumental argument against privatization, executors are public officials by virtue of

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50 The relevant political offices, as a leading administrative law scholar has observed, may also include top-level bureaucrats who work under conditions that render them highly responsive to the elected officials. See Jerry L. Mashaw, Accountability and Institutional Design: Some Thoughts on the Grammar of Governance, in PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS AND EXPERIENCES 115, 121 (Michael W. Dowdle ed., 2006).
the integrative practice. They are not officials prior to it. Their participation in a coordinated effort, like imprisoning convicted criminals, renders the practice possible, but it is the integrative practice that makes them officials. Accordingly, it is in principle possible that the private employees of a private firm would be considered, for our purposes, public officials. This may be so in the (fantastic) case in which they satisfy the two conditions we have articulated: that of participation in a practice that takes an integrative form.51

Deferential execution of government functions is not available to persons in general. The mere choice of persons to support the government’s cause by invoking the deferential conception of fidelity is not sufficient. Public officials can be characterized as those individuals who act out of deference to the state and its institutions. This section identified two conditions that must be fulfilled for a person to be a public official, that is, to be capable of reasoning deferentially and therefore to be capable of acting successfully in the name of the state: the existence of a practice and the intimate proximity of the community of practice with political authority, that is, the existence of an integrative practice.

C. Public Officials and Apolitical Public Practices

Our argument has so far sought to drive a principled wedge between two practices, an integrative practice and a private one. In the course of fleshing out the character of the former, we have observed that its scope can run the gamut from hyper-politicized to some professional public practices. There exist, however, practices or institutions that are aptly perceived as public even though they defy an integrative character; these

51 Our analysis implies that some contemporary regulatory schemes that are commonly associated with Max Weber’s influential account of bureaucracy and public office are only contingent; they do not capture what is genuinely distinctive and valuable about public officials. For instance, neither the fixed-salary-based structure of official compensation nor the procedural due process and the legal protection against termination of civil service except for cause is necessary for sustaining a community of practice among public officials. It is of course possible that the employment stability and security associated with the Weberian picture of public office plays an important role in sustaining a viable community of practice that takes an integrative form. Other contemporary aspects of public office, such as qualified immunity, may be tightly connected to acting on behalf of the state. However, such aspects may be conducive to the sustaining of a community of practice, but they are not defining features of such a community. The main themes of Weber’s account appear in MAX WEBER, ECONOMY AND SOCIETY 220-01, 235-36, 958-79, 988, 1028-38 (Guenter Roth & Clause Wittich trans., University of California Press 1978) (1922); cf. Nicholas Parrillo, Testing Weber: Compensation for Public Services, Bureaucratization, and the Development of Positive Law in the United States, in COMPARATIVE ADMINISTRATIVE LAW 47 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).
are practices that insulate, to an important extent, the participants from the direct control of political agents. Consider the case of an independent election committee in both post-authoritarian and democratic states authorized to enforce campaign finance laws, redraw election districts, and insure the integrity of the election process, more generally.52 Save for the state’s role of authorizing the particular commission, the committee enjoys formal and substantive independence from political influence. It is beyond the scope of this paper to discuss the case of apolitical public institutions in detail. However, we do seek to explain, negatively, why such apolitical institutions are rightly conceived as non-private entities and, affirmatively, what render them ‘public’ and their members ‘public officials.’

The insulation of a public institution reflects the polity’s choice to release the institution’s agents from the requirement to defer to political officials. The judgment that underlies this choice is that the public interest is sometimes best served not by way of politicians dictating the decisions and actions that participants in the particular practice ought to make, but rather by creating a sufficiently wide arena of permissibility within which the participants could decide, by themselves, what decisions and actions would be best for the polity to have. Depending on the relevant context, there may be any number of reasons for enlisting the discretionary powers of bureaucrats and experts at the expense of political judgment—for instance, the subject matter of the activity requires special expertise, long-term reasoning, confidentiality, and so on. What is important to note, however, is that the resort to their discretion is sometimes the best, and perhaps the only, proxy for a bureaucrat or an expert to display fidelity of deference to the public interest.

It may be protested that this sort of outsourcing is, at bottom, a form of privatization. We think not. This is because the arena of permissibility granted to apolitical public practices is qualitatively different from the one created by the act of privatization. In contrast to public officials, private actors possess a valid claim-right against state interference insofar as they act within the designated arena of permissibility. In other words, instead of being liable to the power of the state to direct their conduct, private

52 See, e.g., India’s Election Commission and the special status (or a par with a supreme court judge) granted to the Chief Election Commissioner in the Constitution of India §324. See also Susanne Hoeber Rudolph & Lloyd I. Rudolph, New Dimensions of Indian Democracy, 13 J. DEMO. 52, 62-63 (2002).
agents enjoy a form of immunity on the basis of which they can invoke their right not to follow the demands of the public interest (as viewed from the polity’s point of view). Agents of apolitical public institutions, by contrast, enjoy no such immunity. Accordingly, they have no valid claim of their own against state intervention whenever the polity determines that the judgments of these agents disserve the public interest.

The fundamental difference is that the arena of permissibility in the case of private entities reflects a concession granted to the private entities and it is designed to allow them to pursue their interests, concerns, and ambitions. Private entities, therefore, have a right that the arena of permissibility be respected. In contrast, the arena of permissibility given to public officials in apolitical institutions is exclusively designed to promote the public interest. It confers no rights on the public officials even though it does form a genuine obstacle to political intervention. In other words, it should be perceived as an exercise of self-constraint on the part of politicians grounded in their judgment that the public interest is better served by apolitical practices.

One implication of this analysis is that sometimes politicians should defer to the decisions made by the private entity insofar as they fall within the arena of permissibility even when these decisions run afoul of the public interest. This is because, and insofar as, the private entity has acquired a right to so acting. In contrast, public officials enjoy no such privilege: in principle, when the arena of permissibility is invoked in ways that are judged, by the polity, as being detrimental to the public interest, it should be revoked. Of course, making a judgment of this sort raises important concerns—for instance, there must be an appropriate political procedure for making such judgments and for intervening in the decision-making processes of the apolitical institution. We shall not belabor these concerns. What is important for the present argument is to observe that the arena of permissibility characteristic of apolitical institutions is qualitatively different from the one granted to private entities and that the difference lies in the absence of a valid claim by the former to act contrary to the public interest, properly conceived. Put affirmatively, whereas a public official of an apolitical institution holds a mandate from the polity, a private agent holds a right against the polity.
We can now return to the dichotomy between the reason-based and the agency-based conception. The analysis of public officials just provided illustrates that this dichotomy fails to capture the complexity of public law. In effect, our proposal implies that public officials are the only agents that can operate for certain reasons – reasons that are internal to the integrative practice. To act in the name of the public, the agent needs to participate in a practice that satisfies conditions which grant the polity power over it. Agency therefore matters because only certain type of agents, namely public officials, can reason in certain ways; only they can defer to the polity by virtue of participating in the integrative practice. Part IV will explore what normative implications this conceptual analysis may carry.

IV. WHY PRIVATIZATION AS SUCH IS PRIMA FACIE OBJECTIONABLE:
PUBLIC OFFICIALS AND POLITICAL SOLIDARITY

The analysis in section B identifies what it means to be a public official. It leaves open however the question of what goods if any must or should be publicly provided. In an earlier paper we argued that there are some goods—intrinsically public goods as we called them—whose goodness hinges upon their public provision whereas public provision meant provision by public officials.53

In contrast, in this Article we do not provide a list of what goods must be publicly provided. Instead we seek to identify the values that are promoted by public provision of goods and services as such. More particularly, we explore the implications that privatization as such has for political solidarity especially in connection with the relations among citizens and the relations between citizens and the state.

It is ultimately the link between citizens and the decisions made by public officials that establish the claim that privatization as such erodes collective responsibility and political solidarity. The link between the polity and public officials has been established in the last section. There we argued that public officials are decision-

53 For instance, we argued that communicating condemnation (understood broadly to capture the process of carrying out a sentence) is ineffective unless done by an agent who holds a privileged status in relation to the one subjected to the condemnation, namely, one whose judgments concerning the appropriateness of behavior are worthy of attention or respect. Otherwise, the infliction of “a sanction” amounts to a mere act of violence that cannot express or communicate censure for the culpable and wrongful acts done. Dorfman & Harel, supra note 4.
makers who participate in a practice which is ultimately governed by politicians. It is
time now to establish the remaining link, namely the connection between citizens and
the politicians. The conjunction of both links is necessary because ultimately the
argument from collective responsibility depends upon whether citizens are
sufficiently involved in the decisions of public officials to justify the attribution of
responsibility to citizens. Collective responsibility, we argue, gives rise to political
solidarity and, so, we suggest, massive privatization erodes political solidarity.

The requirement that citizens have “meaningful role” in making political decisions is
a standard requirement in liberal theory.\footnote{According to Rawls, a society that is a benevolent absolutism fails to count as a well-order society precisely because it denies its members “a meaningful role in making political decisions.” See JOHN RAWLS, THE LAW OF PEOPLES 63 (1999).} A meaningful role presupposes some
degree of influence of citizens over the decisions of politicians.

A meaningful role integrates a normative element of control with a factual element of
institutional convention. To begin with, in order for the decisions made by public
officials to count not merely as the decisions made in the name of the polity, but also
in the name of individual persons in their collective capacity as citizens, there must
exist some, non-trivial measure of control exercised by citizens over the polity.\footnote{In the American context this is particularly evident in the Thayerite tradition. See Kenneth Ward, \textit{Originalism and Democratic Government}, 41 S. TEX. L. REV. 1247, 1271 (2000).} \footnote{Accordingly, we take control to be a range property. See Rawls, \textit{A Theory of Justice} 508 (1971).} \footnote{See, for instance, the analysis of political representation in the historical context of the U.S. in 1 BRUCE ACKERMAN, \textit{WE THE PEOPLE: FOUNDATIONS} 181-86 (1991).}

Arguably, there could be any number of institutional settings capable of generating
some measure of control.\footnote{Note also that, it is an open question, one that we do not address here, whether democracy, or a certain form of
democratic rule, necessarily provides the only or the best institutional framework in
which political representation allows for sufficient popular control.} \footnote{Accordingly, we take control to be a range property. See Rawls, \textit{A Theory of Justice} 508 (1971).} Although certain forms of direct control are conceptually
possible to imagine, it seems more likely these days to expect indirect forms of
control arranged through institutional settings that make those who occupy the
political offices the representatives of the citizenry.\footnote{In the American context this is particularly evident in the Thayerite tradition. See Kenneth Ward, \textit{Originalism and Democratic Government}, 41 S. TEX. L. REV. 1247, 1271 (2000).} Note also that, it is an open
question, one that we do not address here, whether democracy, or a certain form of
democratic rule, necessarily provides the only or the best institutional framework in
which political representation allows for sufficient popular control.
The control that citizens possess (in some measure) over the doings of the polity carries immediate normative implications, but only when public officials, rather than private entities, are in charge of providing the relevant goods. Private contractors enjoy the discretion to make decisions within the scope of what we have termed “arena of responsibility”. As a result, the polity has no control over, and therefore no, responsibility for these decisions and the actions that follow thereof. Privatization, therefore, signifies detachment of the polity from at least some of the decisions made by the private body. By granting (Hohfeldian) immunity to the decisions made by the private entity the polity distances itself from the privatized activity or, at least from those decisions made by the private entity which fall within the scope of the arena of permissibility.

By contrast citizens are responsible for decisions of their polity. Even if they may not be in direct control over these decisions, the rightness or justness of these decisions is, nonetheless, directly their business, for such decisions are done in their name. This is the byproduct of the fact that (1) citizens in a ‘well-ordered society’ have “a meaningful role in making political decisions” and that (2) politicians are active participants in the “integrative practice” of public officials. Hence citizens also participate though indirectly in the integrative practices.

The view that privatization has important consequences concerning control was articulated by Paul Starr as follows:

Privatization does not transform constraint into choice; it transfers decisions from one realm of choice-and-constraint to another. These two realms differ in their basic rules for disclosure of information: the public realm requires greater access; private firms have fewer obligations to conduct open proceedings or to make known the reasons for their decisions. The two realms differ in their recognition of individual desires; the public realm mandates equal voting rights while the market responds to purchasing power. They differ in the processes of preference formation: democratic politics is a process for articulating, criticizing and adapting preferences in a context where individuals need to make a case for interests larger than their own.58

58 See Starr supra note 1, 32.
While we disagree with some of Starr’s observations, it is evident that Starr identified the significance of control to issues concerning privatization. This observation has important implications. Citizens always have good reason to struggle against injustice simply by virtue of being persons; however, there arises an additional reason to do so when the injustice in question is the doing of public officials. This is because the latter instance of injustice is done in their name—that is, by public officials who act in the name of the polity to which they belong. Hence the strong link identified in the last section between public officials and politicians has repercussions concerning the responsibility of citizens, that is, persons acting in their collective political capacity. The citizen’s protest against the injustice committed by a public agency differs from mere protest against injustice committed by an individual, private entity, or another state. It is a protest against injustice (or some other grievance) that can be attributed to the citizen who is, thereby, responsible for its occurrence.

It might be protested that, at bottom, the polity is the one that decides voluntarily to alienate its powers to a private entity. For that reason, the polity should also be held responsible for the decisions made within the arena of permissibility by virtue of having made the initial decision to alienate its powers. It follows that the private entity operates also “in the name of the polity” as ultimately its powers are ones that were granted (in the appropriate sense) by the polity. Under this view the polity is as responsible for the decisions of the private entity as it is for the decisions of the private entity.

We do not deny that the polity and its constituents bear responsibility for making the initial decision to privatize a given activity, selecting the appropriate contractor, and monitoring its conduct. That said, none of these could compensate for the lost control over the manner in which the private entity acts (at least insofar as it acts within the arena of permissibility). Even given that the polity had a specific vision when it privatized the activity, it is barred from reconsidering or changing its course and purpose. Citizens who protest against decisions made by private bodies cannot maintain that such decisions are made in their name. It is this feature which underlies the fundamental difference between public officials and private entities; the former
act in our name while the latter, at best, act for us. Indeed, to repeat, what characterizes public officials is the fact that they are constantly subject to the Hohfeldian power of the polity. The guidance of politicians can therefore become real at any time.

Now, collective responsibility is not in and of itself desirable or undesirable. To complete the argument against privatization as such, it will be necessary to show that the civic detachment from responsibility for major decisions is at least sometimes undesirable.

To do so we now seek to defend the view that the resistance to privatization rests on the conviction that collective responsibility can engender political solidarity among citizens. Thus, privatization (at least privatization on a massive scale) weakens the mutual concern of citizens for the fate and future of their polity and impairs mutual ties among compatriots.

Our proposal rests on the view that the taking of responsibility for the decisions of the polity, because it has a collective dimension, gives rise to political solidarity. Solidarity, in turn, implies some measure of unity of persons or the becoming of a solid community (of some sort). This unity normally arises in connection with the possibility of identifying with at least some aspects of the personalities, identities, circumstances, or roles of others. The notion of political solidarity picks out the role that the members of the political community share—the office of the citizen. In a democracy, for instance, the sharing of this role is implicitly acknowledged by the characterization of the citizens in terms of the co-authors, rather than several independent authors, of the law. More generally, political solidarity results from the responsibility of people qua citizens for major decisions affecting their society (in its internal as well as international affairs). The responsibility they assume together by

59 This difference is of course not a necessary truth applying in each and every society. Public institutions could have developed differently and they may even, as we later suggest, be transformed as a result of massive privatization. We provide a more detailed explanation of the relations between institutions and values later in note.

virtue of sharing the role of citizens manifests itself in the active participation in the making of these decisions in part by exchanging reasons and, so, by taking into account other viewpoints. Thus engaging in the political practice expresses a way of recognizing that, despite the rivalry, citizens possess the power to face and address a common predicament (or fate).

By weakening the collective responsibility for major decisions, privatization narrows the scope of the decisions for which citizens can be held responsible, weakens the mutual interaction between members of the polity, and shifts the concern of citizens from the polity as such to the private sphere.

Political solidarity should not be understood as a mere psychological phenomenon. Our argument does not turn on the state of mind that citizens happen to acquire. Rather, political solidarity ought to be understood in normative terms. Given the structure of the institutions and the type of rationales used to justify these institutions, citizens ought to regard themselves as engaged in a collective enterprise designed to improve society. Political solidarity is an inevitable byproduct of the fact that decisions of public officials are attributable to each and every one of us as these decisions form part of the decisions of the state whose politicians are subject to our control. As Lucas argued:

“It is thus of great importance to have institutions which will nonetheless spread responsibility around, so that we do not feel that decisions taken in our name and affecting us all are decisions taken by ‘them’ but are at bottom decisions taken by us.”

Note that this argument does not deny that sometimes and perhaps often privatization is desirable for the traditional instrumental reasons such as efficiency. It only points out that this consideration has to be balanced against conflicting considerations. Massive privatization has significant costs as it distances citizens from direct and immediate control over the provision of goods and services. Such costs need not

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61 See Scheffler, supra, at 331.

62 Accordingly, the conjecture that political solidarity can also be instrumentally good, especially due to its actual, psychological effects on people's motivations is of course plausible, but it does not form a necessary part of our argument. For more on the instrumental value of solidarity see Cass Sunstein & Edna Margalit, Solidarity Goods, 9 THE JOURNAL OF POLITICAL PHILOSOPHY 129, 139 (2001).

preclude privatization of any particular industry or service when it is found out that those are particularly beneficial. But the gradual transition to a privatized society has grave costs in terms of political solidarity and while those costs are non monetizable, they should be considered and taken into account when making decisions concerning privatization.

This argument differs radically from previous discussions concerning privatization. Both advocates and opponents of privatization judge the instrumental or non-instrumental desirability of privatization in an atomistic manner rather than a holistic one. In other words they perceive the desirability (or undesirability) not of privatization as such but of the privatization of the provision of a particular good or a particular service. To do so they compare the quality of the provision performed by a public entity with the one performed by a private entity.

Even from a purely economic perspective this view is incomplete. Privatizing the provision of one set of goods may have external effects on the provision of other goods and services. For instance, privatizing the provision of some goods and services may decrease the appeal of public service as a whole and the willingness of individuals to serve as public officials. It may also affect the reputation of public officials and worsens the quality of the provision of other public goods and services that have not been privatized. This Article identifies one such externality which is not easily translated into economic terms: a robust system of public service in charge of providing goods and services is needed to sustain political solidarity.

The effects of privatization are not restricted, to whether public prison is better or worse qua prison than a private prison or whether private forestry is better qua forestry than public forestry. It extends to whether stripping the state of its responsibilities erodes political solidarity. For privatization is not only the transformation of detention centers, trains, tax inquiry offices, forestry operations, and so on, considered one service at a time. It is also the transformation of our political system and public culture from one characterized by robust collective responsibility and political solidarity to one characterized by fragmentation and sectarianism.
One may wonder whether the value of political solidarity, or some other mode of human solidarity, could not be realized under a different institutional structure. After all the meaning attributed to institutional entities is not natural; it is constructed by our traditions and, no matter how entrenched they happen to be, they could be transformed.

As a matter of fact, there are reasons to believe that such transformation has been taking place, though it is beyond the scope of the present argument to assess its effects and desirability. Arguably, the weakening of the public sphere is somewhat compensated for by the rising activism of private individuals and NGOs aiming to influence the decisions of private entities, and the so-called social responsibility, of private entities (including, in particular, multinational corporations). One may speculate that the more privatization undermines collective responsibility and political solidarity the more control over privatized bodies is sought by market actors. The proliferation of consumers’ boycotts and the growing trend toward corporate social responsibility may indicate that market activism provides an imperfect compensatory device for the lost collective responsibility that the same activists could have assumed in their capacity as citizens. Political solidarity, if you like, is being partially replaced by market solidarity; accordingly, the ties among members of a political community are being partially replaced by an evolving transnational community of market participants. It remains to be seen whether such transformation proves effective and, more importantly, what moral implications it has for the possibility of persons to relate as free and equal beings. 64

V SUMMARY

64 This is but one instance of the relations between values and institutional forms. More specifically some institutions and procedures gain normative meaning, in part, from the ways they are traditionally understood, from the significance attributed to them and the values associated with them. The fact that people regard the decisions of the polity as decisions done in their name is part of the way citizenship developed in the modern world. The link between the institutions and the values is, in part, a by-product of our understandings and perceptions and, consequently without identifying these public perceptions we may fail to detect an important normative dimension embodied in these institutions and procedures. Such a link between institutional and procedural practices on the one hand and values on the other hand is a prevailing feature of political and legal culture. Hence, at times these institutions and procedures cannot be dispensed with without thereby undermining or eroding the values associated with them. See Harel, supra note 11 chap. 7.
This Article sought to develop an understanding of the “public” in connection with public law and to reconsider the desirability of privatization. The ambition has not been to establish a novel understanding thereof, but rather to reconstruct one which is rooted in our lived experience. We started by exploring the contrast between reason-based and agency-based conceptions of publicness. Ultimately the debate between them is normative through and through. We observed that there is some incongruity between the fact that legal doctrine and decisions often rely on the agency paradigm while the conventional attempts of theorists of privatization has been to rationalize their accounts by reference to the reason-based conception of the public.

We then turned to establish the normative significance of the agency-based conception. Public reasoning is not merely reasoning designed to promote the interest of the public. In addition to being guided by the public interest, it also requires reasoning that can be imputed to the public, namely reasoning for which the public can be held collectively responsible. Such responsibility is built into the notion of publicness; it is part of what publicness means in our society. This is but an instance of a broader phenomenon namely of the fact that some institutions and procedures gain normative meaning from the ways they are understood, from the significance attributed to them and the values associated with them. And to this extent we argued that the standing to assume collective responsibility characteristic of citizens can be of value, as it contributes to political solidarity. We further believe that irrespective of whether it is of value it can explain the intense hostility to privatization.
Why Law Matters

Alon Harel
Fortunately this book has been completed much later than I expected (although perhaps it is still too early to complete it even at this stage). Had it been written when I first planned to write it, it would have been a very different book. I started writing this book (or perhaps another book) believing that law matters only because (under certain circumstances) it is likely (as a contingent matter) to protect rights and bring about justice. More specifically when I started writing a book I believed that: (1) rights are instruments to realize values that exist independently of these rights, and (2) public institutions such as the state, courts etc. are mere contingent instruments to facilitate the making of decisions and performing actions whose desirability, correctness, or appropriateness is independent of the identity of the agent performing them. There is nothing distinctively valuable in public institutions other than their (contingent) greater capacity to achieve worthwhile goals. I also began the project believing that (3) the modes and forms of deliberation are dictated exclusively by the concern to reach the right answer, to act in accordance with reason etc., (4) the desirability of constitutional directives hinges on the question of whether such directives are likely to guide the state or individual agents to act as they ought to, and (5) the desirability of judicial review (and its optimal scope) hinges exclusively on the question of whether judicial review is conducive to the reaching of the right decision/acting in accordance with reason. Had this book been written when I first planned and hoped to write it, I would have defended all these themes as passionately as I defend in this book their negation. I feel lucky that this book was not written when it was first planned.
This book examines various legal and political institutions and procedures and argues that the desirability of these institutions and procedures is not contingent and does not hinge on the prospects that these institutions are conducive to the realization of valuable ends. Instead, various legal institutions and legal procedures that are often perceived as a contingent means to facilitate the realization of valuable ends matter as such.

It is fashionable among legal theorists to maintain that what makes a legal or political institution valuable is its ability to decide correctly or justly, and equally, what makes a procedure valuable is its propensity to generate just decisions. To justify an institution or a procedure one needs therefore to identify what the right or correct decision is and then to identify the institution or procedure which is most likely to get it right. Instead, this book sides with those who believe that sometimes the justness or correctness of a decision depends on the institution making the decision and/or on the procedure by which the decision came about. Justice is not always independent of the institutions and procedures which bring it about. At times those institutions are not mere contingent means to the realization of valuable ends; instead such institutions are necessary prerequisites for the realization of certain values. Let me illustrate.

In some situations, in the case of judicial review for instance (discussed in Chapter 6), the institution (or procedure) is desirable because it protects a right (the right to a hearing). The justification for judicial review is grounded therefore not in the superior quality of the decisions resulting from judicial review but in the willingness to hear individual grievances, consider their soundness, address these grievances in good faith, and act in accordance with the outcomes of the deliberation. Further I argue (in Chapter 3) that some goods—inhernently public goods—can only be provided by public institutions. The value of such goods hinges on the agent providing the good. Thus, the desirability of public provision of some goods does not depend merely on contingent features of public institutions, such as their accountability; instead, the value (and even the nature) of the good provided depends upon its public provision. For instance, I argue that criminal punishment is a communicative practice involving a judgment concerning the wrongfulness of an act, and, consequently, it cannot but be provided by agents that are capable of making authoritative judgments concerning wrongfulness—agents which can speak in the name of the state. The public provision of punishment is not a
contingent feature of punishment; the public provision is what makes it a valuable practice—a practice of condemning wrongful actions. Those are mere illustrations of the approach defended in this book, namely, that legal institutions and procedures are often not mere contingent instruments to realize valuable ends; they are often necessary components of a just society.

As these concerns will be discussed at length in the following chapters, let me turn now to examine some of the difficulties of, what I believe, is the alternative position in political theory, namely the view that legal institutions and procedures are mere contingent means designed to identify what justice requires and to act in accordance with it.

Under such arguments, political and legal institutions are justified by pointing out that they bring about contingently desirable outcomes. For instance it is often claimed that legal or political rights are designed to realize pre-existing values underlying these rights; the state is designed to provide in the most efficient way public goods such as security; constitutional directives are designed to guide state officials to act in accordance with reason, and judicial review is justified only to the extent that it protects rights, amplifies minorities’ voices, or protects the principles and values established by the founding fathers. The justifiability of a political institution or procedure is equated with its usefulness and conduciveness to the prospects of realization of desirable or just decisions and actions. Further, the desirability or justifiability of the decision is deemed independent of the institution making it or the procedure by which it was brought about.¹ Without denying that such explanations are often sound, I wish to explore here the reasons why some of these explanations can fail and why explanations of the type I develop in this book may at times (although by no means always) be superior.

First, the task of establishing that an institution or a procedure is conducive to a worthy goal often requires social science skills. Can social science establish that courts are typically more attentive to minority concerns than legislatures? Are public prisons more accountable

¹ There is one main exception to this generalization, namely democratic or majoritarian institutions which are often considered desirable irrespective of the outcome. It has been famously claimed by prominent political theorists that the democratic process is desirable for ‘process-related reasons’. Jeremy Waldron, ‘The Core of the Case against Judicial Review’, 115 Yale LJ 1346 (2006). Democracy however is not among the institutions or processes I discuss here.
to the public than private ones? Are soldiers more likely to comply with humanitarian law than mercenaries? Are constitutional norms which bind the legislature more, or less, conducive to justice than legislative supremacy? Is judicial supremacy more or less conducive to justice than legislative supremacy? Given the breadth and generality of such sweeping statements even social science is sometimes impotent in substantiating such claims. The question of whether judicial review is conducive to justice or to the protection of rights depends upon the quality of the judges, the methods of nominating them, and other contextual parameters. The soundness of such claims differs from one society to another and one generation to another, while the claims of political theorists often transcend both place and time. To the extent that the political theorist wants to provide an argument that extends beyond a specific place at a specific time, she needs to provide a more solid foundation for its conclusions.

Second, the traditional structure of justifications suffers sometimes from insincerity and inauthenticity; it fails at times to identify (or capture) the real sentiments underlying the urge to sustain or design political institutions or procedures. The sentiments underlying and sustaining the passions of legislators, the public, and even the theorists themselves are grounded in different normative considerations than those officially used to defend the relevant institutions or procedures. There is a sense of incongruity between the official (allegedly rational) justifications of political institutions or procedures (in terms of the quality of the resulting decisions) and the underlying sentiments triggering the interest and passions of those who sustain these institutions, establish them, design them, or simply cherish them. To use an analogy, a theorist may provide a perfectly sound utilitarian justification for a categorical prohibition of slavery, or for an absolute prohibition on torture and other inhumane practices. But such justifications seem to miss the point and fail to explain why torture is wrong, as the revulsion triggered by such practices is not attributable to utilitarian considerations. Similarly, I believe that even perfectly sound contingent arguments for or against certain entrenched political institutions or procedures may miss the point as they purport to rationalize political institutions and procedures in terms that do not capture what make such institutions or procedures politically and morally attractive. A significant part of this book is designed to identify justifications which meet the test of sincerity, namely that address the genuine sentiments underlying the popular support of political institutions and procedures, rather than to
rationalize these institutions and procedures in terms that are alien to those who establish the institutions and sustain them.

Note that I do not wish to argue that instrumental justifications (of the type I criticized above) necessarily fail or that the type of justification provided in this book (namely justifications that reject the view that law is a contingent means to valuable ends) is necessarily superior. I raise these two concerns only to illustrate that instrumental justifications which rest exclusively on contingencies are not free of difficulties. The book does not provide a general argument against a certain type of justification in legal or political theory (e.g., against justifications which rest on contingent sociological or psychological conjectures). It also does not provide an argument in favour of an alternative justificatory methodology (which does not rest on such contingencies). Instead this book seeks to provide sound arguments favouring or opposing the use of certain political and legal institutions and procedures. Hence its success does not hinge on establishing that a certain type of justification is superior to another but merely on the soundness of the particular justifications provided in the following chapters. What the following chapters seek to establish is that there is a close (or strong) affinity between legal and political institutions and procedures on the one hand and the desirable goals or values, such that the latter can, even in principle, be realized only by establishing the former.

Let me provide a very brief exposition of the chapters of this book. Part I (consisting of Chapter 2) discusses the nature of (some) prominent rights and identifies the reasons for protecting such rights. Rights, it is often argued, are valuable because of the values underlying them. Under this standard view rights are designed to realize (or facilitate the realization of) values whose content is independent of these rights. For instance it is claimed that the right to free speech is designed to promote autonomy; the right to freedom of religion facilitates self-realization, etc. But if this is so, I argue, it follows that rights are at least in principle redundant; values can function as well as rights. For instance, instead of protecting narrowly tailored rights designed to promote autonomy, autonomy as such ought to be protected and replace the specific rights designed to protect it.²

² This conclusion is not a mere hypothetical fantasy. As a matter of fact the advocates of the so-called 'rationalist paradigm' wish to distance legal and constitutional discourse from
Chapter 2 disputes this view and argues that certain rights are not mere norms designed to promote the realization of pre-existing values underlying these rights. The values underlying (some) rights are partially constructed by entrenching the rights designed to protect these values, so that the relation between these rights and the values underlying them is reciprocal: rights are grounded in values, such as autonomy and dignity, and justified in terms of these values. At the same time, the values underlying the (legally or politically) entrenched rights are also partly constructed by the rights, such that the (legal or political) entrenchment of the rights ultimately contributes to the construction of the values.

Part II (consisting of Chapters 3 and 4) is devoted to the investigation of dignity, and in particular its ramifications for political theory. Dignity, it is shown, demands that our decisions be based on respectful deliberation. More specifically, dignity imposes constraints on the deliberation of the agents. It dictates not only what agents ought to decide or how they ought to act but also how they ought to reason or deliberate. Further, I argue, the capacity to deliberate in certain ways is often agent dependent, such that only certain agents are capable of engaging in certain forms of deliberation. The primary dichotomy drawn in Chapter 3 is between agents who operate on the basis of fidelity of reason (private agents) and agents who operate on the basis of fidelity of deference (public officials).

The difference between fidelity of reason and fidelity of deference is crucial. There are some goods that can only be provided by agents who operate on the basis of fidelity of reason and other goods that can only be provided by agents who operate on the basis of fidelity of deference. At times it is only public officials (agents who defer to the state) that can provide certain goods; and, at other times it is only private individuals (operating on the basis of fidelity of reason) that can do so. In such cases it is not that the agent (public official or private individual) is chosen on the basis of its (contingent) expected success in providing the good but the value of the good (or even the very possibility of providing the good) depends upon its being provided by the designated agent.

Part III defends 'robust constitutionalism'. Robust constitutionalism contains two components: (i) binding (but not necessarily enforceable) what they regard as the fetishistic, rigid obsession with narrowly tailored rights and use, instead, broad and diffuse values. See the discussion in Chapter 2 C2.
constitutional directives (Chapter 5), and (ii) the judicial power to enforce such directives (judicial review) (Chapter 6).

Chapter 5 argues that the constitutional entrenchment of pre-existing moral or political rights is valuable, independently of whether such an entrenchment is conducive to the protection of these rights. More specifically, the chapter defends what I label 'binding constitutionalism', namely a scheme of constitutional directives binding the legislature. The value of binding constitutionalism is grounded not in its likely contingent effects or consequences, e.g., better protection of rights; but rather in the fact that constitutional entrenchment of rights constitutes public recognition that the protection of rights is the state’s duty rather than a mere discretionary gesture on its part. Decisions that are made in accordance with constitutionally entrenched duties are thus not at the ‘mercy’ of the legislature; instead, the legislature is bound to act in accordance with such decisions. In the absence of binding constitutional directives, a state which protects a right can be analogized to a debtor who gives what he owes to his lender but insists that his act is a charitable donation rather than a repayment of a debt.

Failing to entrench constitutional rights is not merely inconsiderate in the manner that the act of the debtor is. In addition the failure to constitutionally entrench rights is detrimental to freedom, as freedom requires not merely the de facto protection of speech, religion, and other basic rights but protection that is not contingent on the good will of the legislature. Free citizens ought not to live ‘at the mercy of’ their legislatures even if such legislatures are good-hearted and are likely to protect their rights. Constitutional entrenchment of rights is therefore a necessary precondition for freedom rather than merely a contingent instrument for protecting freedom. To put it bluntly, democratic deliberation is (at times) necessarily detrimental to freedom. It is not only detrimental to freedom for contingent reasons (namely, for the reason that democratic deliberation may result in oppressive decisions), but even when democratic deliberation results in decisions or choices that are protective of rights, it sometimes fails to acknowledge the duty to protect rights—duty which is independent of judgments or preferences of the legislature or the people.

Chapter 6 completes the defence of robust constitutionalism by justifying judicial review on non-instrumentalist grounds. This chapter argues that the state has a duty to provide a hearing to its citizens, and that this duty requires the state (a) to provide individuals with the
opportunity to challenge decisions that they believe (rightly or wrongly) violate their rights; (b) to justify its decisions to those who raise such grievances; and (c) to reconsider its decisions on the basis of the deliberation. Judicial review is valuable not because it is likely to result in ‘better’ decisions, or to better promote worthy goals or values, but because judicial review is (nothing but) a hearing to which individuals have a right. I also explore the relevance of this observation to what I label ‘constrained judicial review’, namely systems which grant courts a privileged, but not a supreme, role in shaping constitutional rights. Both Chapter 5 (defending the entrenchment of binding constitutional directives) and Chapter 6 (defending judicial review) challenge the standard dominant justificatory framework used in constitutional theory: constitutional instrumentalism. Under this view the value of constitutions or the value of judicial review depends exclusively upon contingencies such as the likelihood that constitutions, or judicial review, contribute to the quality or the justness of the resulting decisions.

Identifying the non-contingent value of legal institutions and procedures often helps not only to identify why these institutions or procedures are desirable, but also to better understand the nature of the institutions in ways that deviate from conventional understandings. For instance, Chapter 3 identifies who public officials are and what differentiates public officials from other individuals. Public officials are those agents who can speak in the name of the state, and they can do so because they participate in ‘integrative practices’—practices characterized by their principled openness and willingness to absorb ongoing political guidance and intervention. Similarly, Chapter 6 argues that judicial review is not a practice which must be conducted by courts or judges. The rationale underlying judicial review implies that what is important about judicial review is the adjudicative process which is equated with a process of an individualized hearing. It is the process of adjudication that renders the practice valuable; rather than the fact that it is conducted by courts or judges.

My conclusion is that political and legal institutions and procedures matter but they matter not for the reasons many legal and political theorists believe they matter. Legal (and political) institutions matter as such, not merely as contingent instruments to bring about desirable outcomes. In establishing these claims in different areas of law and politics I wish to be attentive to the sentiments of politicians, citizens,
and activists and to theorize their concerns in a way that is as authentic as an academic enterprise can be to these sentiments. It is my wish to capture as much as possible the concerns that are cherished by these groups which has been the trigger for writing this book.