

## ARTICLES

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### GOVERNMENT BY CONTRACT AND THE STRUCTURAL CONSTITUTION

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*Although private parties have performed government functions throughout most of Western history, mainstream administrative law scholarship is dotted with concerns over the extent to which modern federal government activities are outsourced to private contractors. Federal contractors routinely exercise authority that is classically “executive” in nature. They write regulations, interpret laws, administer foreign aid, manage nuclear weapons sites and intelligence operations, interrogate detainees, control borders, design surveillance systems, and provide military support in combat zones. Administrative law places few constraints on private contractors, and prevailing constitutional principles—the state action and private delegation doctrines, in particular—are either inept at holding private contractors to constitutional norms or utterly moribund. A common theme that appears in the vast literature on privatization, therefore, is accountability. There is no recognized constitutional theory that meaningfully prohibits Congress or the President from transferring significant amounts of discretionary governmental power to wholly private entities that operate beyond the purview of the Constitution, and there is relatively sparse scholarly analysis of the subject. This Article searches for a constitutional principle that could be employed to address hypothetical outsourcing arrangements that go too far for the American appetite. In that pursuit, it looks to the law governing independent agencies as a natural starting point for evalu-*

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ating the propriety of outsourcing relationships from the standpoint of the structural Constitution. It then introduces two ideas with an eye toward sparking fresh thinking about the constitutionality of privatization: first, the notion that all actors exercising federal government power should be viewed along a constitutional continuum and not as occupying separate private/public spheres; and, second, that a democratic accountability principle may be derived from the Supreme Court's recent decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*, as a constitutional hook for addressing government-by-contract gone awry.

INTRODUCTION .....	492
I. THE CONSTITUTIONAL DISCONNECT .....	498
A. <i>Private Contractors: The Problem</i> .....	498
B. <i>The Shortcomings of Current Constitutional Doctrine</i> .....	504
II. BRIDGING THE DIVIDE .....	507
A. <i>An Overlooked Constitutional Continuum</i> .....	507
B. <i>Outsourcing and the Constitutional Text</i> .....	512
III. GOVERNMENT BY CONTRACT, INDEPENDENT AGENCIES, AND DEMOCRATIC ACCOUNTABILITY .....	519
A. <i>Independent Agencies and Private Contractors: A Comparison</i>	520
B. <i>Free Enterprise Fund v. Public Co. Accounting             Oversight Board</i> .....	523
C. <i>Accountability and the Constitutional Continuum</i> .....	529
CONCLUSION .....	534

#### INTRODUCTION

"If the founding fathers were to return to observe the organizational landscape of the [modern] national government . . . they would undoubtedly conclude that their constitutional design had been scuttled entirely. . . . [S]urely a revolution must have occurred."<sup>1</sup>

Of course, in the most common sense of the term, no American revolution—no overt unwinding of the tripartite political regime created by the United States Constitution—has succeeded in the history of our constitutional government.<sup>2</sup> No President or Congress has been overthrown by a popular movement. No segment of the historical American populace has fallen subject to an extraconstitutional form of national government. The constitutional provisions establishing the core levers of power—Articles I through III—survive in virtually identical form to those that were ratified in 1789.<sup>3</sup> Yet scholars

1 Barbara Hinkson Craig & Robert S. Gilmour, *The Constitution and Accountability for Public Functions*, 5 GOVERNANCE 46, 46 (1992).

2 See generally JEFF GOODWIN, NO OTHER WAY OUT 9 (2001) (offering both broad and narrow definitions of "revolution").

3 There are some not-insignificant exceptions, including diversity jurisdiction (Article III), the process of presidential and vice-presidential elections (12th Amend-

have expounded on a “drive to shear the federal government of power”<sup>4</sup> that might qualify as a revolution of sorts. Over the last century, the American populace and its national political institutions have come to tolerate a steady transfer of important government functions from the Congress, the President, and his cabinet,<sup>5</sup> to a vast hodgepodge of quasi-governmental and private actors that evade the oversight mechanisms that bind the political branches of government. Under a broader definition of revolution, therefore—one that encompasses efforts “to transform the political institutions and the justifications for political authority in a society”<sup>6</sup>—this massive reshaping of government is historic.

The term “privatization”—or “the range of efforts by governments to move public functions into private hands and to use market-style competition”<sup>7</sup>—covers a broad spectrum of public-private relationships, from the mundane to the extraordinary. The use of common procurement and service contracts for routine supplies and maintenance is uncontroversial. But government contracting is much more audacious, encompassing some of the most highly sensitive functions within the core responsibilities of government. For example, since September 11, 2001, the federal government has hired the Rand Corporation to create a national emergency management strategy for the entire federal government;<sup>8</sup> entered into billions of dollars in no-bid contracts with the Halliburton Corporation to conduct logis-

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ment), direct election of senators (17th Amendment), presidential term limits (22nd Amendment), and presidential succession (20th and 25th Amendments).

4 Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 *RUTGERS L. REV.* 331, 332 (1998).

5 Because it focuses on federal separation-of-powers issues, this Article does not address the outsourcing of federal powers to the states, states’ use of federal funding to hire private contractors, or the privatization of state governments—although privatization at the state level is perhaps an even more pressing issue today. For a discussion of these issues, see, for example, Daniel L. Hatcher, *Poverty Revenue: The Subversion of Fiscal Federalism*, 52 *ARIZ. L. REV.* 675 (2010) (discussing federal grants to states to assist anti-poverty efforts).

6 Jack A. Goldstone, *Toward a Fourth Generation of Revolutionary Theory*, 4 *ANN. REV. POL. SCI.* 139, 142 (2001).

7 Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 *HARV. L. REV.* 1229, 1230 (2003). Martha Minow’s straightforward definition captures privatization and its late twentieth, early twenty-first century form and rationale.

8 See Griff Witte & Charles R. Babcock, *A Major Test for FEMA and Its Contracting Crew*, *WASH. POST*, Sept. 13, 2005, at A1. After national and local emergency responders rejected Rand’s initial draft as inexperienced, the role of private contractors was reduced, and “government officials wrote the final document.” *Id.*

tical planning and other support for the U.S. invasion of Iraq;<sup>9</sup> injected private military contractors into CIA paramilitary units hunting Al Qaeda in Afghanistan;<sup>10</sup> outsourced flood water drainage and the building of 300,000 temporary shelters after Hurricane Katrina;<sup>11</sup> and approved the wholesale replacement of Transportation Security Administration (TSA) personnel by private contractors at sixteen U.S. airports.<sup>12</sup> The federal government routinely hires private contractors to find and supervise other private contractors.<sup>13</sup> At the state level,<sup>14</sup> criminal prosecutions, prison management, and police authority are regularly outsourced in many jurisdictions,<sup>15</sup> while a private firm runs the entire city government of Sandy Springs, Georgia.<sup>16</sup>

The annual federal dollars spent on government contracting are also rapidly increasing. The Office of Management and Budget (OMB) reports that federal contracts accounted for more than one-sixth of all federal spending in 2009, or in excess of \$500 billion a year, which is “more than double the amount that was spent in 2001.”<sup>17</sup> Today, there are 1,931 private companies working in national security fields, including counterterrorism, homeland security, and intelligence—approximately twenty-five percent of which were

9 See Martha Minow, *Outsourcing Power: Privatizing Military Efforts and the Risks to Accountability, Professionalism, and Democracy*, in GOVERNMENT BY CONTRACT 110, 115 (Jody Freeman & Martha Minow eds., 2009).

10 See Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989, 1003 (2005).

11 See Witte & Babcock, *supra* note 8.

12 Derek Kravitz, *As Outrage Over Screenings Rises, Sites Consider Replacing TSA*, WASH. POST, Dec. 31, 2010, at A1; see also Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates*, in GOVERNMENT BY CONTRACT, *supra* note 9, at 1, 2 (“Recent contracts extend to . . . military target selection, interrogation of detainees, border control, security training, surveillance systems design, intelligence operations management, control over the collection and use of classified or confidential information, and significant military support in a combat zone.”).

13 See Dana Priest & William M. Arkin, *National Security Inc.*, WASH. POST, July 20, 2010, at A1 (noting that the Department of Homeland Security uses nineteen private staffing companies to help it find other private contractors).

14 *But see supra* note 6 (noting that government contracting by states is beyond the scope of this Article).

15 See Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecutions?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265, 266.

16 See Doug Nurse, *New City Bets Millions on Privatization*, ATLANTA J.-CONST., Nov. 12, 2005, at B1; see also April Hunt, *City Takes Fresh Look at Private Services*, ATLANTA J.-CONST., Mar. 15, 2010, at B1 (“The only city employees are public safety workers and top administrators.”).

17 OFFICE OF MGMT. & BUDGET, ANALYTICAL PERSPECTIVES 106 (2011); see Memorandum from Jeffrey D. Zients, Fed. Chief Performance Officer, Office of Mgmt. & Budget, to the Senior Executive Service (Sept. 14, 2010).

created in the past ten years.<sup>18</sup> General Dynamics alone collected \$31.9 billion in 2009 for intelligence contracting with the federal government, which outsources approximately twenty-nine percent of all U.S. intelligence jobs at a cost of fifty percent of its intelligence personnel budget.<sup>19</sup>

The burgeoning federal contracting business is so impressive that it has attracted substantial venture capital.<sup>20</sup> In the words of one investor: “Every fund is seeing how big the trough is and asking, How do I get a piece of that action?”<sup>21</sup> In 2005, Fortress America raised \$46.8 million in an IPO—with “no product, no revenue, and certainly no profits”<sup>22</sup>—merely promising to become a holding company for homeland security private contractors, with former Congressional Representative Tom McMillen at the helm.<sup>23</sup> McMillen raised another \$100 million on the same premise for a firm he founded in 2003.<sup>24</sup> Other start-ups are doing the same thing.<sup>25</sup>

Taken together, such anecdotes signal a shift in the very structure of the “federal government” as we know it. If the outsourcing trend were to progress to its logical extreme—if Congress and the President were to cede the majority of their respective powers to a parallel “private” government designed to operate beyond the purview of electoral accountability, constitutional constraints, and judicial review—complacency with government outsourcing would likely falter. Under this scenario, private lawyers employed by a “Justice Corporation” would operate with different incentives than Department of Justice (DOJ) attorneys who take an oath to support and defend the Constitution in their enforcement of the federal criminal laws.<sup>26</sup> A private Justice

18 See Priest & Arkin, *supra* note 13, at A8.

19 See *id.*

20 See Evan Ratliff, *Fear, Inc.*, WIRE, Dec. 2005, at 260.

21 *Id.* at 264.

22 *Id.* at 260.

23 *Id.*

24 *Id.*

25 *Id.* at 262.

26 Roger Fairfax develops a “thought experiment” whereby the Department of Justice is outsourced to private lawyers based on actual scenarios in smaller jurisdictions. Fairfax, *supra* note 15, at 276–79; see also *id.* at 269 (noting that other scholars have similarly theorized about the privatization of the criminal justice system (citing Laurin A. Wollan, Jr., *The Privatization of Criminal Justice*, in PROCEEDINGS OF THE 29TH ANNUAL SOUTHERN CONFERENCE ON CORRECTIONS 111, 124 (1984))). He argues that outsourcing “should not extend to criminal prosecution because such outsourcing is in tension with the constitutional and positive law norms regulating the public-private distinction.” *Id.* at 265. In addition, it raises “concerns about ethics, fairness, transparency, accountability, performance, and the important values advanced by the public prosecution norm.” *Id.*

Corporation would be self-directing—able to perform more efficiently, unencumbered by presidential oversight and bureaucracy. Yet its lawyers might well feel duty-bound to compromise the public's interest in criminal law enforcement if it conflicted with the corporation's primary objective: maximizing profits.<sup>27</sup>

Many Americans would likely assume that the Constitution would have something to say about whether our federal government could be outsourced *in toto*—that, to some degree at least, the government must perform certain core governmental tasks and, if it fails to do so, “We the People” could hold our leaders constitutionally accountable. But the Supreme Court, in “its role as protector of the constitutional design,”<sup>28</sup> has failed to develop a doctrinal framework for meaningfully scrutinizing transfers of governmental power to private parties. There is no accepted constitutional theory that prohibits Congress or the President from handing off significant swaths of discretionary governmental power to wholly private entities that operate beyond the purview of the Constitution. And despite prolific scholarship on the topic of privatization,<sup>29</sup> there has been relatively little contemporary analysis of whether the *structural Constitution*—the “use of structural devices” such as “[c]hecks and balances, separation of powers, and federalism” to enable government “by men and over men ‘to control itself’”<sup>30</sup>—restrains Congress and the President from handing off powers to private actors with impunity.<sup>31</sup>

This Article begins a dialogue about how one might draw support from the structural Constitution for confining the ability of Congress and the executive branch to pass government powers on to extracon-

27 See *id.* at 284–86 (observing that underperformance, lack of transparency, and potential conflicts of interest likely arise with prosecution outsourcing).

28 Craig & Gilmour, *supra* note 1, at 50.

29 See generally GOVERNMENT BY CONTRACT, *supra* note 9 (compiling essays on the role of private contractors); *Restructuring Local Government*, CORNELL UNIVERSITY, [http://government.cce.cornell.edu/doc/viewpage\\_r.asp?ID=Privatization](http://government.cce.cornell.edu/doc/viewpage_r.asp?ID=Privatization) (last visited Oct. 23, 2011) (listing a number of articles and studies about privatization).

30 Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1155–56 (1992) (quoting THE FEDERALIST NO. 51, at 290 (James Madison) (Clinton Rossiter ed., 1999)). Calabresi and Rhodes further describe “the structural Constitution” as operating to “preserve individual liberty” and “creat[ing] opportunities for ‘[a]mbition . . . to counteract ambition.’” *Id.* at 1155 (alterations in original) (quoting THE FEDERALIST NO. 51, *supra* at 322).

31 See PAUL R. VERKUIL, *OUTSOURCING SOVEREIGNTY 2* (2007) (noting that shift from public to private governance and perceived threat to accountability and process have been largely unexamined). *But cf.* Kinkopf, *supra* note 4, at 396 (arguing that legislative assignments of federal power to nonfederal actors are not categorically barred under general separation of powers principles).

stitutional actors. It rejects the sharp public/private divide that shapes prevailing law and unveils a new way of looking at outsourcing relationships: a constitutional continuum. Having indulged the supposition that the Constitution would foreclose the federal government from delegating its powers to private actors, closing up shop, and going home, it then embarks on a search for constitutional authority that undercuts the abdication of constitutional duties and obligations by elected officials and their subordinates.

Finding no clear answer in the constitutional text, the Article turns to the law governing independent agencies, which have long been the subject of analysis and critique for their structural insulation from direct presidential oversight, and identifies overlooked parallels between private contractors exercising significant federal authority and independent agencies. The Article suggests that the Supreme Court's most recent decision regarding the constitutionality of independent agencies—*Free Enterprise Fund v. Public Co. Accounting Oversight Board*<sup>32</sup>—implies a democratic accountability principle that could be extended to the privatization context.<sup>33</sup>

Part I describes the general trend toward increased delegation of federal powers to private entities and the swelling consensus that accountability is a central problem with outsourcing. It then addresses the prevailing constitutional approaches to government outsourcing—the state action and private delegation doctrines, in particular—as well as pertinent common law and statutory law, and suggests that current law is ad hoc and ineffective at ensuring proper execution of government power by private actors, particularly where sensitive public functions are concerned. What is missing is a systematic approach to outsourcing that takes into account the relationship between private contractors exercising government powers and the tripartite constitutional structure of government, which is designed to promote accountability.

Part II rejects the sharp distinction that prevailing doctrine draws between the public and private realms and proposes a new way of looking at government outsourcing: viewing private contractors along a constitutional continuum that begins with the President and his cabinet and includes independent agencies. If private contractors are perceived as bearing some anatomic relationship to established gov-

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32 130 S. Ct. 3138 (2010).

33 The Article leaves for further research and reflection a number of important related issues, such as how best to further support and define the contours of an accountability principle, how courts would apply it in practice, and whether it would operate effectively to address problematic outsourcing arrangements.

ernment entities exercising similar powers, the structural Constitution becomes relevant to the task of evaluating the propriety of outsourcing arrangements. Part II then analyzes privatization from the standpoint of the structural Constitution in an effort to identify textual arguments for drawing outer constitutional boundaries on outsourcing in the extreme. Although answers to the outsourcing conundrum do not lie in the constitutional text alone, the Court has drawn powerful inferences from Article II that may prove helpful in shaping a new constitutional doctrine for privatization.

Part III posits that the law governing independent agencies offers a promising template for analyzing the structural propriety of government outsourcing, introduces a functionalist accountability principle drawn in part from the majority opinion in *Free Enterprise Fund*, and suggests that such an accountability principle could be extended to the privatization context where the structural Constitution has largely escaped the debate to date.

## I. THE CONSTITUTIONAL DISCONNECT

This Part begins with a description of the flourishing privatization trend and a central concern that surrounds it: insufficient oversight and accountability. It then reviews the recognized constitutional doctrines that bear upon privatization, and suggests that their inability to address perceived abuses stems from a myopic view of the relationship between private contractors and the structural Constitution.

### A. *Private Contractors: The Problem*

Much has been written about the increasingly pervasive phenomenon of privatization, or what leading scholars have called “government by contract.”<sup>34</sup> Although privatization takes many forms, this Article concerns itself with the particularly common phenomenon known as outsourcing—where “the government contracts with a private entity to render goods or services previously provided by the government.”<sup>35</sup> Under such arrangements, the government retains the ultimate responsibility for the matters that are outsourced;<sup>36</sup> it provides the funding, establishes programmatic goals, and sets parameters and requirements.<sup>37</sup> Instead of a government officer or employee implementing those goals, however, a private party does so by con-

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34 Freeman & Minow, *supra* note 12, at 1.

35 Fairfax, *supra* note 15, at 266.

36 *See id.* at 268.

37 *See* Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1394–95 (2003).

tract.<sup>38</sup> A private contractor and its government counterpart might perform identical tasks. What distinguishes them is their respective employers—the government actor is an employee of the government and bound by the constitutional, statutory, regulatory, and personnel limitations that apply to government employees, while the private actor is employed by a private company; his primary obligations to the government—and thus to the populace it serves—are defined by contract.

The mere notion that private parties are paid to perform work that the government would otherwise do is not controversial; private actors have performed governmental functions throughout Western history.<sup>39</sup> For most of the nineteenth and twentieth centuries, however, federal and state governments' engagement of private actors was largely indirect—through subsidies designed to encourage private initiatives for the public's benefit, such as efforts to protect the environment or improve public safety.<sup>40</sup> In contrast, as Martha Minow explains, “the government now uses contracts with private providers to accomplish tasks specified by the government.”<sup>41</sup>

Thus, what many find troubling about the current outsourcing trend is the “scope and scale” of the use of private contractors in modern government.<sup>42</sup> In fiscal year 2009, agencies paid over \$541.3 billion—twenty-three percent of federal discretionary spending dollars—to private contractors.<sup>43</sup> Of that sum, \$38 billion went to Lockheed Martin alone,<sup>44</sup> which has contracted with the government for goods and services ranging from military sales to the running of welfare offices.<sup>45</sup>

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38 See Fairfax, *supra* note 15, at 268.

39 See Edward Rubin, *The Possibilities and Limitations of Privatization*, 123 HARV. L. REV. 890, 894–95 (2010) (book review).

40 See Freeman & Minow, *supra* note 12, at 6–7.

41 *Id.* at 7.

42 See *id.* at 1; see also VERKUIL, *supra* note 31, at 3 (“‘Outsourcing sovereignty’ occurs when the idea of privatization is carried too far.”).

43 See *Prime Award Spending Data*, USASPENDING.GOV, [http://www.usaspending.gov/explore?&carryfilters=on&fromfiscal=yes&tab=By%20Prime%20Awardee&fiscal\\_year=2009&tab=By+Prime+Awardee&fromfiscal=yes&trendreport=top\\_cont](http://www.usaspending.gov/explore?&carryfilters=on&fromfiscal=yes&tab=By%20Prime%20Awardee&fiscal_year=2009&tab=By+Prime+Awardee&fromfiscal=yes&trendreport=top_cont) (last visited on Oct. 23, 2011).

44 See *id.*

45 See Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CALIF. L. REV. 569, 571 (2001) (discussing Lockheed Martin's role in the provision of welfare services).

Of course, outsourcing has its benefits,<sup>46</sup> and many federal contracts—such as procurement contracts for laundry services or office supplies for Veterans Administration hospitals—are routine and well-accepted.<sup>47</sup> It is when private contractors are hired to perform sensitive government functions—“activities that fall closer to the ‘core’ of what the public in the twentieth century came to identify as the state’s responsibility in a democratic society”<sup>48</sup>—that deeper concerns arise. Contractors now carry out activities that were once considered the exclusive responsibility of government,<sup>49</sup> such as “writing regulations and budgets for government agencies, producing statutorily required reports, interpreting laws, delivering social services, administering foreign aid, and managing nuclear weapons sites,” among other tasks<sup>50</sup>—many of which entail the discretionary spending of federal taxpayer money. Private contractors support military operations in Iran and Afghanistan, provide security for American diplomats, “certify[ ] that hazardous waste cleanups conform to statutory requirements,”<sup>51</sup> and perform TSA’s recently-enhanced search techniques at sixteen U.S. airports.<sup>52</sup> It is when private contractors perform especially sensitive

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46 It is important to note the many perceived benefits of federal contracting, although the topic is too deep to explore in this Article. A key justification for the increased reliance on federal government contracting is cost containment and efficiency. Because of market competition, private sector entrepreneurs are considered less likely to spend for the sake of spending, more apt to seek low-cost alternatives, and better able to adapt quickly to rapidly changing circumstances. See KEVIN R. KOSAR, CONG. RESEARCH SERV., *PRIVATIZATION AND THE FEDERAL GOVERNMENT* 6 (2006). Critics view the federal government, by comparison, as monopolistic, overly bureaucratic, slow to innovate, and inefficient. See *id.* at 4; Freeman & Minow, *supra* note 12, at 7. Social scientists have noted, however, that there is little empirical research or data about the relative cost-effectiveness and overall effects of privatization. See Ralph M. Kramer, *Voluntary Agencies and the Contract Culture: “Dream or Nightmare?”*, 68 SOC. SERV. REV. 33, 36 (1994) (discussing contracting of social services). Fiscal and administrative expediency—rather than a rational cost-benefit analysis by agency officials—most often accounts for the decision to outsource the delivery of government services. See *id.* at 40–41.

47 See Freeman & Minow, *supra* note 12, at 11.

48 *Id.* at 6.

49 See *id.* at 1.

50 *Id.* at 2; see also VERKUIL, *supra* note 31, at 23–42, 109 (listing examples of government work that is outsourced, including military events, public service obligations for civilian disasters, state prison management, decision and speech writing, document summary and review, draft decision-making, and oversight of government contractors).

51 Freeman & Minow, *supra* note 12, at 6.

52 See *supra* note 12 and accompanying text.

government functions that the need for a constitutional approach to outsourcing is most pressing.<sup>53</sup>

To be sure, government contracting is governed by myriad rules and procedures. The President controls the outsourcing process through the Office of Management and Budget, which in 1976 put in place Circular A-76 to govern the competitive sourcing of federal jobs.<sup>54</sup> Circular A-76 forbids the outsourcing of “inherently governmental” functions, which it defines to include activities that determine, protect, or advance U.S. interests by military action or contract management; that significantly affect the life, liberty, or property of private persons; or that exert ultimate control over the disposition of federal property.<sup>55</sup> As Paul Verkuil has observed, “[t]he use of private military contractors such as Blackwater clearly fails this test,”<sup>56</sup> and it is not difficult to see that other contracts are falling through the cracks, as well.<sup>57</sup>

Although the established procedures work for some contracts, they fail for others. In practice, some agencies ignore the A-76 guidelines,<sup>58</sup> which are not legally binding. As a consequence, billions of dollars in government contracts have been made “literally off the books,” “awarded under suspicious circumstances, hurriedly and without competition,” and executed under terms that “are so underspecified as to afford contractors almost unlimited discretion.”<sup>59</sup> Information about the contracting process and associated costs is difficult to obtain,<sup>60</sup> leaving the public largely in the dark—unable to

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53 The question arises as to how to determine when government functions are sufficiently sensitive to warrant constitutional scrutiny. Further research might consider, for example, whether private contractor activities that influence civil liberties or interfere with the President’s Article II powers fall into this category.

54 See Paul R. Verkuil, *Outsourcing and the Duty to Govern*, in GOVERNMENT BY CONTRACT, *supra* note 9, at 310, 326 (citing Office of Mgmt. & Budget, Exec. Office of the President, Circular No. A-76, Attachment A (Revised) (1999) [hereinafter OMB Circular A-76]). OMB’s role in the process has led to tensions with Congress over the effectiveness of private sourcing, the propriety of classifications by agencies, and the lack of sufficient federal personnel to administer the standards. See VERKUIL, *supra* note 31, at 126.

55 See Verkuil, *supra* note 54, at 326 (citing OMB Circular No. A-76, *supra* note 54). An agency’s decision of what is “inherently governmental” is effectively not reviewable. VERKUIL, *supra* note 31, at 128. Although an “interested party” can lodge a legal challenge, Article III standing problems can preclude judicial review. See *id.*; Verkuil, *supra* note 54, at 326.

56 Verkuil, *supra* note 54, at 326.

57 See, e.g., *supra* notes 8–16 and accompanying text.

58 See Freeman & Minow, *supra* note 12, at 3.

59 *Id.*

60 See *id.*

meaningfully influence the privatization trend, despite the high stakes involved in the private execution of inherently governmental functions.

While the contracting process is flawed, the available legal and political methods for holding private contractors accountable for their actions are lacking as well. At bottom, the government-contractor relationship is defined by contractual terms, rather than broader norms of democratic governance that shape public expectations of federal actors. The parties may contract out of common law protections that the public might consider desirable.<sup>61</sup> An agency can bring a claim for a breach of contract under the Contract Disputes Act,<sup>62</sup> but successful litigation requires clear and enforceable contract terms and sufficient agency resources and motivation to monitor performance and pursue claims.<sup>63</sup> Although the United States Agency for International Development was responsible for approximately \$3 billion in reconstruction projects for Iraq, for example, it had only four contract monitoring personnel as of March 2003 and later outsourced the monitoring function itself.<sup>64</sup> Agencies can exclude underperforming contractors from future procurement activities,<sup>65</sup> but such discretionary oversight is makeshift and inadequate.

There are other avenues to litigation, but they have a limited impact, as well. Private tort law offers the public a means of holding contractors accountable through the courts, but powerful immunity laws often prohibit effective relief.<sup>66</sup> The False Claims Act<sup>67</sup> allows private persons to bring qui tam suits on the government's behalf to recover penalties for presenting false or fraudulent claims, but the statutory scienter requirement is difficult to satisfy.<sup>68</sup>

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61 See Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 591 (2000).

62 41 U.S.C. §§ 7101–7109 (2006).

63 Nina A. Mendelson, *Six Simple Steps to Increase Contractor Accountability*, in GOVERNMENT BY CONTRACT, *supra* note 9, at 241, 245–46 (citing 41 U.S.C. § 601 (2006)).

64 See Laura A. Dickinson, *Public Values/Private Contract*, in GOVERNMENT BY CONTRACT, *supra* note 9, at 335, 343.

65 See Mendelson, *supra* note 63, at 245.

66 See, e.g., *Bartell v. Lohiser*, 215 F.3d 550, 557 (6th Cir. 2000) (applying immunity to private foster care contractor in action under federal disability laws); *Pani v. Empire Blue Cross Blue Shield*, 152 F.3d 67, 76–77 (2d Cir. 1998) (applying immunity to private insurance company in Medicare dispute); see also Richard J. Pierce, Jr., *Outsourcing is Not Our Only Problem*, 76 GEO. WASH. L. REV. 1216, 1227–29 (2008) (book review) (arguing that private contractors should not be immunized for government work performed).

67 31 U.S.C. §§ 3729–3733 (2006).

68 See Dickinson, *supra* note 64, at 356.

To be sure, private contractors are susceptible to hearings by congressional committees, which can request Government Accountability Office (GAO) reports of their activities.<sup>69</sup> As Gillian Metzger has suggested, however, regulatory or contractual measures are essentially a matter of “legislative or executive grace”<sup>70</sup> and rarely capture legislators’ attention, with a few high profile exceptions like Halliburton.<sup>71</sup>

Administrative law, moreover, places no legal constraints on private contractors.<sup>72</sup> The Administrative Procedure Act (APA)<sup>73</sup>—the primary statutory source for public disclosure, public involvement in rulemaking, and judicial review of government decision-making—applies only to agencies,<sup>74</sup> creating an impenetrable legal division between governmental and nongovernmental activity.<sup>75</sup> As a consequence, the APA’s Freedom of Information Act (FOIA)<sup>76</sup> provisions do not require private contractors to make available to the public any records related to their work for the federal government.<sup>77</sup> Thus, in the aftermath of the Space Shuttle Columbia’s tragic disintegration over Texas in 2003, a contractor who was deeply involved in the program had no obligation to produce pertinent documents for investigation under the FOIA.<sup>78</sup>

There is, in short, no overriding legal or political force that is driving implementation of the various oversight mechanisms toward a single goal: ensuring accountability for private contractors engaged in inherently governmental functions. And as described below, because the prevailing constitutional doctrine is unconcerned with the relationship between private actors exercising federal power and the *structural* Constitution, it cannot play the role of policing their adherence

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69 See Mendelson, *supra* note 63, at 245.

70 Metzger, *supra* note 37, at 1404–05.

71 See Mendelson, *supra* note 63, at 245.

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

73 5 U.S.C. §§ 551–559, 701–706 (2006).

74 See *id.* § 551; see also Metzger, *supra* note 37, at 1434 (noting that, whereas the APA applies only to “agencies,” regulations governing contractors focus on preventing fraud versus providing a way to challenge contractors’ actions).

75 See Rosenbloom & Piotrowski, *supra* note 72, at 104–05.

76 5 U.S.C. § 552.

77 See *id.*; see also VERKUIL, *supra* note 31, at 90 (noting that the FOIA is a “force for public legitimacy” that does not apply to documents held by private contractors).

78 See Mendelson, *supra* note 63, at 250.

to the wider democratic values that inform the roles of purely public actors.<sup>79</sup>

### B. *The Shortcomings of Current Constitutional Doctrine*

The primary means available for keeping federal contractors' actions within constitutional constraints is the state action doctrine.<sup>80</sup> The state action doctrine asks whether private parties should be treated as government actors susceptible to liability for violations of individual constitutional rights.<sup>81</sup> It springs from the premise that only the government is bound by the Constitution. In the words of the Supreme Court, the Fourteenth Amendment “affords no shield” against private conduct, “no matter how unfair that conduct may be.”<sup>82</sup> The state action doctrine thus emerged as a means of distinguishing between public and private acts for purposes of determining whether the constraints imposed by the Bill of Rights apply to ostensibly private behavior. But the state action doctrine is inept at meaningfully addressing outsourcing abuses for a number of reasons.

To begin with, it does not enable constitutional challenges to the delegation of government power to private parties or the exercise of that power beyond constitutional limits. It only allows individual plaintiffs to obtain injunctive relief against a private entity or compensation after-the-fact for violations of their personal constitutional rights, leaving agencies constitutionally unmoored in their decision to hand off government functions in the first place.

Second, as a means of securing relief for individuals, the state action doctrine has been widely criticized as wrong-headed and ineffective.<sup>83</sup> Because it is an all-or-nothing proposition—either the full panoply of constitutional strictures applies to a private party exercising government functions, or none at all<sup>84</sup>—it is prone to underinclud-

79 See Gillian E. Metzger, *Private Delegations, Due Process, and the Duty to Supervise*, in *GOVERNMENT BY CONTRACT*, *supra* note 9, at 291, 294 (“[C]urrent constitutional law has little relevance to privatization.”).

80 See Metzger, *supra* note 37, at 1410.

81 See Metzger, *supra* note 79, at 292.

82 *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988); see also Sheila S. Kennedy, *When is Private Public? State Action in the Era of Privatization and Public-Private Partnerships*, 11 *GEO. MASON U. C.R. L.J.* 203, 209 (2001) (discussing the Fourteenth Amendment, which extended the Bill of Rights to the States).

83 See, e.g., Kennedy, *supra* note 82, at 217 (noting “[t]he lack of clarity and consistency in the application of the state action doctrine, and judicial reluctance to find state action where ordinary people would see it”); Metzger, *supra* note 37, at 1410–11 (arguing that “current doctrine is fundamentally ill-suited to [the] task” of “ensuring constitutional accountability in a world of privatized government”).

84 See Metzger, *supra* note 37, at 1431.

siveness or, more rarely, overinclusiveness.<sup>85</sup> According to a survey by Gillian Metzger, lower court decisions “overwhelmingly . . . reject state action claims” in cases involving various privatization arrangements, citing concerns of “individual autonomy, federalism, and the regulatory prerogatives of elected government.”<sup>86</sup> She adds that “few of the Court’s state action decisions even identify—let alone emphasize—the importance of ensuring that exercises of government power do not escape constitutional constraints as an underlying imperative of state action doctrine.”<sup>87</sup> The state action doctrine historically included a public function test, but it was abandoned in part because of ambiguities in the definition of an inherently-governmental responsibility.<sup>88</sup> As a consequence, private contractors routinely exercise government power unrestrained by the myriad constitutional checks that exist to address abuses by government actors.

Third, the state action doctrine targets the *least* problematical public-private arrangements for constitutional scrutiny. To identify state action, there must be evidence of government compulsion, control, or participation in the specific action at issue.<sup>89</sup> Because the state action doctrine turns on a finding of government coercion or involvement in a private act, its practical effect is counterintuitive. The more discretion a private party is afforded to act independently of the government, the less likely the Constitution will apply to limit the arbi-

85 See *id.* at 1421–22. Professor Metzger observes that the doctrine is simultaneously overinclusive “because it makes private actors directly subject to constitutional constraints even when an instance of privatization does not raise the specter of unaccountable government power.” *Id.* at 1421.

86 *Id.* at 1419–21 & n.185.

87 *Id.* at 1421.

88 See Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 203–05 (1989) (“The Supreme Court has so narrowed the public function component of the state action doctrine as to render it almost meaningless.”); *cf.* Metzger, *supra* note 37, at 1449–51 (discussing problems with expanding the public function test).

89 See *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); Metzger, *supra* note 37, at 1416–17. Gillian Metzger summarizes the state action doctrine as having two prongs:

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

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

trary exercise of that discretion.<sup>90</sup> The state action doctrine thus enables government to avoid constitutional responsibility for initiatives that it outsources.<sup>91</sup> As numerous scholars have emphasized, close government oversight of private contractors is necessary to ensure accountability;<sup>92</sup> it is when contractors have more discretion to exercise governmental power that the need for supervision is most essential.

The state action doctrine is not the only constitutional theory available for testing the propriety of outsourcing relationships. The nondelegation or the private delegation doctrine asks whether the assignment of governmental authority to a non-governmental actor is itself precluded by the Constitution.<sup>93</sup> In the New Deal era, the Court famously thwarted congressional attempts to delegate the Article I legislative power to the executive branch<sup>94</sup> and, later, to private hands.<sup>95</sup> But the doctrine has lapsed into desuetude.<sup>96</sup> The Court later upheld legislation enabling private individuals to engage in regulatory efforts on the grounds that public officials ultimately retained review authority.<sup>97</sup> The theoretical prohibition on private delegations, therefore, “is

90 See Metzger, *supra* note 37, at 1425.

91 *Id.* at 1432.

92 See DONALD F. KETTL, *SHARING POWER* 39, 179–211 (1993); ELLIOTT D. SCLAR, *YOU DON’T ALWAYS GET WHAT YOU PAY FOR* 121–29 (2001); Freeman, *supra* note 61, at 605–08, 623–25, 634–36 (2000); Metzger, *supra* note 37, at 1436–37 (citing Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 *VAND. L. REV.* 831, 865–68 (2000)).

93 See Metzger, *supra* note 37, at 1411.

94 See *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

95 See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (striking down a statute authorizing local coal boards to determine coal prices and employee wages and hours). The Court based its decision on the Commerce and Due Process Clauses. See *id.* at 297–304.

96 See Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 *U. CHI. L. REV.* 1613, 1630–31 (2009) (“[T]he nondelegation doctrine is largely moribund at the level of constitutional law.”); cf. Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 *HARV. L. REV.* 2312, 2358–59 (2006) (“Although the Court has invalidated only two acts of Congress on nondelegation grounds, . . . the principle lives on in the form of a number of ‘nondelegation canons’ of statutory construction and is invoked from time to time by Justices calling for its revival. The principle also lives on in the scholarly literature.” (footnotes omitted)).

97 See Metzger, *supra* note 37, at 1438–43. A related problem left unaddressed by the private delegation doctrine has to do with the nature of government oversight; if significant governmental authority is delegated to a contractor but a government official oversees her work, does the government official’s “sign-off” remedy problems with

all but dead in practice,”<sup>98</sup> leaving only the flawed state action doctrine in its place.

## II. BRIDGING THE DIVIDE

This Part suggests that a key shortcoming with current constitutional doctrine is the clean public/private divide that animates the state action doctrine and statutes like the APA. Accordingly, it shifts away from this dichotomous approach and introduces a substitute concept: a constitutional continuum on which all actors exercising federal power lie. This Part then looks to the text of the Constitution to identify available grounds for drawing a perimeter around the scope of government contracting. While the text alone does not resolve the issue, limitations on outsourcing to private figures find support in the Court’s Article II analysis of independent agencies, as Part III goes on to explain.

### A. *An Overlooked Constitutional Continuum*

As shown above, no recognized constitutional standards exist to address the most extreme outsourcing scenario—that is, the creation of a shadow government controlled by corporate America. As a result, no one is at the helm of the rapidly expanding government contracting industry, steering it along a path that adheres to constitutional and democratic norms. The problem stems in part from the state action doctrine’s unrealistic dichotomy between the public and the private spheres. Contractors exercising governmental functions should instead be viewed as anatomically related to government actors within a structure that leads all the way to the President. If a constitutional continuum is accepted as a substitute concept for the public/private divide, new frontiers in the privatization debate might open.

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the delegation itself? Must the oversight be more than a “rubber stamp”? See generally VERKUIL, *supra* note 31, at 109–10 (exploring these questions).

98 Metzger, *supra* note 37, at 1440–41 & n.249 (citing cases upholding delegations). Throughout the many decades that have passed since the trilogy of successful New Deal challenges, scholars have repeatedly urged the nondelegation doctrine’s resurrection, with proposals ranging from a “‘new delegation doctrine’ focusing not on ‘who ought to make law’ but rather on ‘how (or how well) the law is being made,’” Steven L. Schwarcz, *Private Ordering*, 97 Nw. U. L. REV. 319, 343 (2002) (quoting Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1402 (2000)), to a “rethink[ing] [of] state action in private delegation terms,” Metzger, *supra* note 37, at 1456.

Although delegations to private entities have occurred “largely without any consideration of their constitutional justification,”<sup>99</sup> the Constitution still offers a means of ensuring that private contractors are accountable to the public. Yet under the prevailing state action doctrine, the vantage point from which one assesses the legality of public-private arrangements dictates whether structural constitutional norms come into play. A case for state action doctrine begins with the assumption that the contractor is a purely private actor. When governmental duties are added to the private actor’s job description, the state action doctrine asks whether the actor has effectively morphed from private to public status by virtue of governmental control and oversight. Thus, at the outset of the state action analysis, the private actor is completely off the constitutional radar, and the doctrine asks whether she in fact belongs within it because of her susceptibility to government control. Eventually, government control over the private actor is so strong that she transforms into a state actor encumbered—and protected—by constitutional guarantees.

By contrast, the well-developed law governing a close relative of the private contractor—the independent agency<sup>100</sup>—begins its inquiry firmly within the boundaries of the Constitution. Whether Congress can create a novel quasi-government entity, endow it with executive powers, and keep it insulated from direct presidential oversight is a question that has long been answered first and foremost by reference to Article II.<sup>101</sup> Officers of independent agencies are presumptively treated as state actors.<sup>102</sup> As a result, in cases addressing the constitutionality of independent agencies, the inquiry turns promptly to questions of proper constitutional design.<sup>103</sup>

There is no constitutional “comfort zone” in which Congress could theoretically create an entity that is so “privatized” that it

99 Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. REV. 62, 69 (1990).

100 Independent agencies are distinguishable from cabinet-level agencies in several ways: they are generally comprised of multi-member boards from competing political parties; they serve fixed, staggered terms; and the President can only remove them for cause. See Kimberly N. Brown, *Presidential Control of the Elite “Non-Agency,”* 88 N.C. L. REV. 71, 79 (2009).

101 See *Myers v. United States*, 272 U.S. 52, 109–10 (1926) (indicating that the President’s power to remove officers is incident to his Article II appointment power).

102 In *Free Enterprise Fund*, the parties agreed that the Public Company Accounting Oversight Board (PCAOB) was a state actor. See *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148 (2010) (citing *Lebron v. Nat’l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995)).

103 See, e.g., *Morrison v. Olson*, 487 U.S. 654, 689–90 (1988) (assessing the constitutionality of the independent counsel statute under Article II).

escapes constitutional scrutiny altogether under a state action theory. Presumably, the Supreme Court would be hard-pressed to sanction legislation that scrapped the DOJ entirely in favor of a giant private law firm tasked with enforcing the federal criminal laws, for example. Such a scenario is so unthinkable that it is almost silly<sup>104</sup>—it would surely be held unconstitutional under the independent agency line of cases because the President and his appointment and removal powers would be cut out of the equation altogether.<sup>105</sup> The Court might also balk at the practical effect of a private Justice Corporation under the state action doctrine—the Constitution would not apply to hinder private prosecutors' misconduct if the government in fact ceded control, thereby enabling violations of the Due Process and Equal Protection Clauses, for example, with impunity. In sum, while a private contractor can lose its private status for purposes of the Constitution as the level of government influence increases, the inverse is not true; an entity created as part of the public legislative process cannot lose its public status for purposes of the Constitution as Congress decreases the level of government influence over it.

To illustrate, suppose private parties form the Justice Corporation and gradually contract with the government to perform more and more functions formerly performed by the DOJ. The presumption in such a case would be that the Justice Corp. is a private actor, not a state actor; only if its activities are closely enough supervised by the government would it become a state actor. Now suppose, in contrast, that Congress creates, by statute, an independent agency called the Justice Corporation, insulates it entirely from executive branch control, and confers upon it exactly the same functions formerly performed by the DOJ. Not only would the presumption here be that the Justice Corp. is a state—not a private actor—but its operation would be held a violation of Article II under current doctrine. In both cases, we have a virtually identical Justice Corp. performing identical functions with identical freedom from government oversight, and yet their respective constitutional status is diametrically opposite.

This logical disconnect between the state action and independent agency analyses ignores a modern reality: the public and private sectors intersect in myriad and complex ways. While courts remain wedded to the notion that the public and the private are distinct,<sup>106</sup> new

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104 *But see supra* note 26 (discussing scholarship regarding private prosecutors at the state level).

105 *Cf.* Jack M. Beeraman, *Privatization and Political Accountability*, 28 *FORDHAM URB. L.J.* 1507, 1510–11 (2001) (making a similar point about the postal service).

106 Numerous commentators have challenged as unrealistic the notion that the public and the private are separate spheres. *See, e.g.*, Freeman, *supra* note 61, at 598

forms of hybrid public/private entities continue to proliferate. In addition to covering numerous flavors of independent agency such as the Securities and Exchange Commission (SEC) or the Federal Trade Commission (FTC), the federal government umbrella includes wholly-owned government corporations such as the United States Postal Service, corporations partly-owned by the federal government, federally chartered corporations that are privately owned,<sup>107</sup> government sponsored enterprises (GSEs) like Fannie Mae and Freddie Mac,<sup>108</sup> self-regulatory organizations (SROs) such as the New York Stock Exchange, as well as numerous offices, boards, commissions, and foundations with all different sorts of government ties.<sup>109</sup> This impressive collection of quasi-government entities is likewise characterized by varying degrees of executive branch control and accountability; while GSEs are not subject to the FOIA, for example, certain—but not all—federal corporations are treated as agencies within the meaning of the APA.<sup>110</sup>

If the various arrangements by which the many public, private, and quasi-public actors exercising governmental power were plotted on a constitutional graph or continuum rather than within separate public and private spaces, it would be immediately evident that no crisp line exists between the public and the private spheres. To be sure, cabinet-level agencies would reside on one end of this continuum and purely private actors with no government affiliations on the other. But between those poles would lie a vast array of “quasi-” entities.<sup>111</sup> A rough illustration of the continuum follows<sup>112</sup>:

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(critiquing the public/private distinction and related hierarchical accountability structures and proposing aggregate accountability through horizontal negotiation). Critical legal studies developed the realist idea that the private realm is already highly structured and regulated by the state, eroding the public/private divide. *See id.* at 565 & n.84.

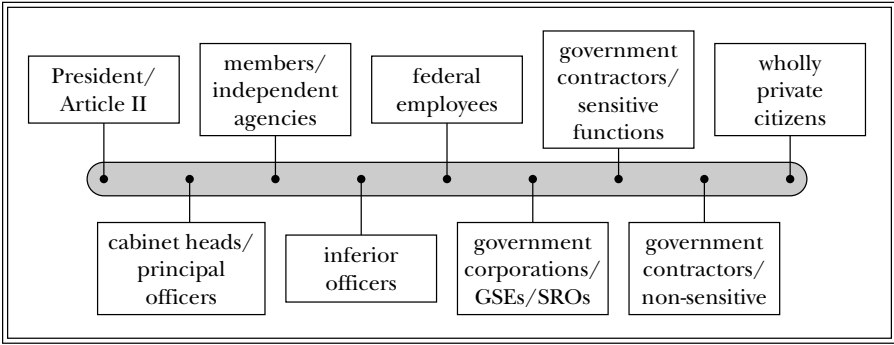
107 *See* Beermann, *supra* note 105, at 1517. *See generally* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1228–31 (2000) (“While they share similar characteristics with the independent agencies . . . [public corporations’] corporate structure is the feature that sets them apart from the independent agency.”).

108 A government sponsored enterprise “is a federally chartered, privately owned, privately managed financial institution that has only specialized lending and guarantee powers and that bond-market investors perceive as implicitly backed by the federal government.” Richard Scott Carnell, *Handling the Failure of a Government-Sponsored Enterprise*, 80 WASH. L. REV. 565, 570 (2005).

109 Breger & Edles, *supra* note 107, at 1199. *See generally id.* at 1228–34 (discussing government corporations and GSEs generally).

110 *See id.* at 1229–30.

111 In his dissenting opinion in *Free Enterprise Fund*, Justice Breyer emphasized that federal statutes broadly delegate a host of powers and responsibilities to “a host of



To treat private contractors engaged in federal regulatory, planning, military, or national intelligence work as if they bear no structural relationship to actors performing identical tasks somewhere else along the continuum is to engage in a fiction. And the fiction is a potentially dangerous one, because it sets privatization adrift with no constitutional mooring. Private contractors are left to perform increasingly sensitive government functions while federal judges and elected officials turn a blind eye to the broader implications because no recognized constitutional principle demands otherwise. If private contractors are properly viewed as falling somewhere on a single continuum alongside all quasi-government actors, consideration of the limits on the extent to which private actors can function as an extra-constitutional proxy for the federal government becomes inevita-

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different organizational structures.” *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3168 (2010) (Breyer, J., dissenting). He explained:

Sometimes they delegate administrative authority to the President directly; sometimes they place authority in a long-established Cabinet department; sometimes they delegate authority to an independent commission or board; sometimes they place authority directly in the hands of a single senior administrator; sometimes they place it in a sub-cabinet bureau, office, division or other agency; sometimes they vest it in multimember or multiagency task groups; sometimes they vest it in commissions or advisory committees made up of members of more than one branch; sometimes they divide it among groups of departments, commissions, bureaus, divisions, and administrators; and sometimes they permit state or local governments to participate as well.

*Id.* (citations omitted). In making the point that “it is not surprising that administrative units comes in many different shapes and sizes,” Justice Breyer did not mention that such administrative units increasingly include private companies. *See id.* at 3169.

112 Of course, the point here is to illustrate the continuum concept, not commit to a particular order of relationships.

ble.<sup>113</sup> This repositioning of the relationship between the public and private spheres is advantageous insofar as it reveals the structural Constitution as an inherent component of all outsourcing relationships—one that has been largely lost in the privatization debate.

### B. *Outsourcing and the Constitutional Text*

The previous section asserts that, as a practical matter, a constitutional continuum is a more accurate depiction of the relationship between government and private actors exercising government powers than a public/private dichotomy. The question that next arises is whether the text of the Constitution has anything to say about limiting privatization. Although, as this subpart shows, the constitutional text alone does not resolve the issue of outsourcing one way or another, the Court has drawn powerful inferences from the language of Article II to justify and shape independent agencies; as Part III explains, such inferences have important implications for the constitutionality of outsourcing.

If the Supreme Court were to analyze the outsourcing of federal power to private parties alongside independent agency delegations, it might begin at the same place: “at the intersection of two general constitutional principles.”<sup>114</sup> On the one hand, Articles I, II, and III of the Constitution “separately and respectively vest ‘all legislative Powers’ in Congress, the ‘executive Power’ in the President, and the ‘judicial Power’ in the Supreme Court (and such ‘inferior Courts as Congress may from time to time ordain and establish’).”<sup>115</sup> One might therefore infer that the text lodges all federal power somewhere in the coordinate branches of government—and nowhere in the private sector. Nothing in the Constitution’s text expressly authorizes Congress or the President to delegate their respective powers elsewhere.

On the other hand, the Constitution gives Congress expansive power to enact legislation “necessary and proper for carrying into Execution . . . all . . . Powers” vested in the government.<sup>116</sup> Although one might construe the word “necessary” narrowly or refuse to defer to Congress regarding the necessity of a particular measure, a liberal reading of the clause would authorize the outsourcing of federal pow-

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113 Arguably, one difference between private contractors and independent agencies lies in the degree to which the latter prompts concern over the division of power amongst the branches.

114 *Free Enterprise Fund*, 130 S. Ct. at 3165 (Breyer, J., dissenting).

115 *Id.*

116 U.S. CONST. art. I, § 8, cl. 18.

ers through legislation if Congress considers it necessary and proper.<sup>117</sup>

The Constitution contains no language that would expressly limit such manifestations of legislative power other than the Tenth Amendment's mandate that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People."<sup>118</sup> While the question whether the Tenth Amendment creates an enforceable constraint on Congress is a matter of debate,<sup>119</sup> the text's emphasis on the protection of state sovereignty and federalism deflects from—rather than elucidates—the federal outsourcing question.

One might look next to the countervailing sources of federal power—Articles I<sup>120</sup> and II—to see whether they contain language curtailing Congress's power to outsource federal authority on necessary and proper grounds. The term "executive power" in Article II's Vesting Clause arguably implies broad presidential power to supervise and control the exercise of executive power by nongovernmental actors. The provision which directs the president to "take Care that the Laws be faithfully executed"<sup>121</sup> similarly suggests that congressional authority to assign federal power to private parties is not unlimited: Congress must leave the President with sufficient authority to manage a private party's exercise of executive authority if he is to ful-

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117 *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819) (construing the Necessary and Proper Clause broadly to permit Congress to legislate freely if necessary and proper to carry out a power enumerated in the Constitution).

118 U.S. CONST. amend. X. *See generally* Beermann, *supra* note 105, at 1515–16 (reading Tenth Amendment jurisprudence as offering a potential accountability-based doctrine for evaluating privatization).

119 *See* ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* 312–13 (3d ed. 2006).

120 The Constitution vests the "Judicial Power" in the Supreme Court, but leaves it to Congress whether to create inferior courts with tenure and salary protections. *See* U.S. CONST. art III, § 1. Article III goes on to define the judicial power to include, most prominently, "cases or controversies" under federal law or arising under diversity jurisdiction. *See id.* art III, § 2. The Supreme Court, of course, has long found administrative courts constitutional, despite their exercise of Article III judicial power and lack of salary and tenure protections. *See, e.g.,* *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833 (1986) (upholding legislative grant of jurisdiction over state law counterclaim to non-Article III court, where counterclaim was relevant to federal statutory proceeding before Article III court); *Thomas v. Union Carbide Agric. Prods., Inc.*, 473 U.S. 568, 592 (1985) (upholding statute that vested administrative authority in arbitral panel of private individuals in part because the courts retained narrowly circumscribed authority to review panel's decisions).

121 U.S. CONST. art. II, § 3.

fill his own constitutional obligation.<sup>122</sup> Further, the Constitution vests executive power in a unitary presidency—a single individual—who must therefore be at the helm of the exercise of all executive power.<sup>123</sup>

The problem with these arguments is that the Constitution does not define executive power. It is therefore difficult to identify from the constitutional text where Congress might be infringing upon the President's prerogative in assigning executive power to nongovernment actors. All one has to go on from the text itself are the enumerated powers set forth in Article II. The President is expressly deemed the "Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States";<sup>124</sup> he has the power "to make Treaties" with the advice and consent of the Senate;<sup>125</sup> and he has the exclusive power to issue pardons,<sup>126</sup> among other things. One might challenge outsourcing arrangements on the grounds that the President—as the head of the executive branch—must have plenary control over executive discretion exercised by a private entity if that discretion involves negotiating treaties, directing troops in battle, or making pardon decisions.<sup>127</sup> For the vast array of administrative discretion that is generically executive in nature—such as setting standards; delivering benefits; implementing, monitoring, or enforcing compliance with regulations; or exerting coercive power<sup>128</sup>—the Constitution is silent. The Take Care Clause empowers the President to make sure that executive branch officers do not flout or ignore the law—that they execute it faithfully—but it is not an independent source of presidential power.<sup>129</sup> The fact of a unitary executive seems

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122 Cf. Peter Shane, *Independent Policymaking and Presidential Power: A Constitutional Analysis*, 57 GEO. WASH. L. REV. 596, 600 (1989) ("A possible inference from [the Take Care Clause] is that the President must be able to dismiss any administrative officer of the government who is not faithfully executing the laws; such would be the most efficient means for fulfilling the President's express obligation.").

123 See *id.* at 611 (making a similar argument regarding the delegation of policymaking discretion to the independent counsel and independent civil administrators).

124 U.S. CONST. art. II, § 2, cl. 1.

125 *Id.* art. II, § 2, cl. 2.

126 *Id.* art. II, § 2, cl. 1.

127 See Shane, *supra* note 122, at 610.

128 See Freeman, *supra* note 61, at 547. Of course, Article II does not address the exercise of legislative or adjudicative power by private parties.

129 See Mary M. Cheh, *When Congress Commands a Thing to Be Done: An Essay on Marbury v. Madison, Executive Inaction, and the Duty of the Courts to Enforce the Law*, 72 GEO. WASH. L. REV. 253, 275 (2003) (explaining that the Take Care Clause creates an affirmative obligation, not a source of power).

merely to supplement the President's ability to effectively fulfill his constitutional obligations; it does not endow him with plenary executive power per se, although scholars disagree on this point.<sup>130</sup>

In any event, even if the language of Article II is properly read to assume plenary presidential control over the exercise of executive power, it says nothing about how the President may effectuate such control. His power is meaningful only to the extent that the President can hold miscreants accountable for disobeying his exclusive directives regarding executive functions. Can the President, in other words, fire subordinates for insubordination? Although the Appointments Clause<sup>131</sup> specifies the processes for appointment to a federal office, the Constitution has no provision for removal of officers except by legislative impeachment.<sup>132</sup> Congress may give the President plenary removal authority under its power to make laws "necessary and proper for carrying into Execution . . . all . . . Powers" vested in the government, including executive power.<sup>133</sup> But the non-specific text of the Constitution gives Congress equal leeway to withhold such authority or even constrain the President's ability to remove officials exercising executive authority.<sup>134</sup>

To the extent that Congress's ability to assign executive powers to private entities is confined at all, one might find some respite in the Appointments Clause itself. Despite the Constitution's silence on removal, it mandates that the President appoint "Officers"—as distinguished from "inferior Officers"<sup>135</sup> whose appointment Congress may vest "in the President alone, in the Courts of Law, or in the Heads of

130 See *id.* at 275 & n.107 ("Some have argued that the president may take any and every measure not expressly forbidden to protect the United States from harm.").

131 U.S. CONST. art. II, § 2, cl. 2.

132 See *id.* art. I, § 2, cl. 5 ("The House of Representatives . . . shall have the sole Power of Impeachment."), *id.* art. I, § 3, cl. 6–7 ("The Senate shall have the sole Power to try all Impeachments . . . Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit . . ."); *id.* art. II, § 4 (Civil officers "shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.").

133 See *id.* art. I, § 8, cl. 18 (emphasis added); see also Shane, *supra* note 122, at 601 (discussing the same).

134 See Shane, *supra* note 122, at 600. The Supreme Court has upheld legislative restrictions on the President's removal power. See *Wiener v. United States*, 357 U.S. 349, 356 (1958) (preventing President Eisenhower from removing a member of the War Crimes Commission without cause because of the quasi-judicial nature of the Commissioner's duties); *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) (upholding restrictions on the President's ability to appoint and remove members of the Federal Trade Commission).

135 U.S. CONST. art. II, § 2, cl. 2.

Departments.”<sup>136</sup> One need not ponder long over the question whether private contractors are principal “Officers” who must be appointed by the President, even if they are not removed by him. Although the Constitution contains no definitions of “Officer” or “inferior Officer,” its language certainly establishes a hierarchy of federal officials. The President has a cabinet comprised of the most senior officers in the administration who are appointed by the President “with the Advice and Consent of the Senate.”<sup>137</sup> If the estimated 10.5 million<sup>138</sup> private contractors working for the federal government fall anywhere within the Appointments Clause, they certainly are lower in stature than members of the President’s cabinet and thus more closely resemble the inferior officer, however that term is defined.<sup>139</sup> As such, Congress can vest their appointment in an agency head who—perhaps by contract—can then make appointments without Senate confirmation.

The question next becomes whether Article II contains restrictions on the appointment of inferior officers that would apply to private contractors. The Supreme Court has defined the criteria for an officer to include the exercise of significant authority, the duration of employment, and the permanent nature of the duties assigned.<sup>140</sup> If a category of private contractors is found to exercise “significant authority,” the contractors arguably become de facto members of the federal government subject to constitutional requirements. In theory, agencies cannot “appoint” such inferior officers by contract or otherwise unless Congress has vested an agency head with the power to do so and the officer-contractors take an oath to uphold the Constitution.<sup>141</sup>

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136 *Id.*

137 *Id.*

138 See Christopher Lee, *Big Government Gets Bigger*, WASH. POST, Oct. 6, 2006, at A24 (noting further that the number of federal contractors increased by 2.5 million from 2002 to 2006).

139 The Supreme Court has defined “inferior officer” in myriad ways. See *Edmond v. United States*, 520 U.S. 651, 661 (1997) (“Our cases have not set forth an exclusive criterion for [defining] inferior officers.”); *Buckley v. Valeo*, 424 U.S. 1, 139 (1976) (defining inferior officers as those charged with the enforcement and administration of the laws); *United States v. Germaine*, 99 U.S. 508, 510 (1879) (defining inferior officers as those who can hold office).

140 *Buckley*, 424 U.S. at 125–26; see *id.* at 160 n.162 (describing employees as “lesser functionaries subordinate to officers of the United States”). See generally Verkuil, *supra* note 54, at 323 (analyzing whether the Appointments Clause deters outsourcing of significant government authority and noting that presidential administrations have differed over the meaning of *Buckley*’s “significant authority” criteria).

141 See U.S. CONST. art. II, § 1 & *id.* art. IV, cl. 3 (“[A]ll executive . . . Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.”).

Paul Verkuil suggests that “[t]he Appointments Clause . . . forbids delegations of significant authority without congressional authorization” under such a reading and instead “demand[s] that reasoned decision making remain a nondelegable duty of agency governance.”<sup>142</sup>

Such an argument, however, may be at odds with existing law. The state action doctrine preserves private status absent sufficient government control. To use the Appointments Clause to forbid private delegations would be to suggest that, because the Constitution divides those who work for the government into the three categories of principal officer, inferior officer, and employee, anyone performing the significant *duties* of one of those categories must be treated as constitutional—or state—actors else their contracts be voided.<sup>143</sup> But the state action doctrine does not take into account the *nature* of a private actor’s activities in determining state status. It focuses on the extent of government control. Basing state actor status on “significant authority” as a matter Article II, therefore, would turn the state doctrine on its head.

To the extent that private contractors in fact exercise significant federal authority, moreover, they still might escape the requirements of Article II because they are temporary workers.<sup>144</sup> As Professor Verkuil observes, most federal contracts are limited in scope—they delegate specific tasks for a specified period of time.<sup>145</sup> A contract for procurement of office supplies surely would not render Staples, Inc. a federal officer under a plain reading of the constitutional language. But even consultants who prepare agency responses to rulemaking comments—a policymaking role of substantial significance—do not have permanent positions with the federal government.<sup>146</sup> And the text of Article II does not itself confine the exercise of significant federal power to the named categories of actors. In *United States v. Maurice*,<sup>147</sup> Chief Justice John Marshall opined as a Circuit judge that “[a]

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142 *But cf. id.* at 321 (“At one time the Supreme Court said that to *exercise* significant authority [a] government official must actually do the work.” (citing *Morgan v. United States*, 298 U.S. 468, 481 (1936))).

143 *See id.* at 318 (discussing the same).

144 *See supra* n.140 and accompanying text.

145 *See id.* at 320 (discussing the same).

146 *See id.*

147 26 F. Cas. 1211 (C.C.D. Va. 1823) (No. 15,747).

man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer.”<sup>148</sup>

One might look beyond the language of the Constitution to “the expectations of the founding generation regarding the precise meaning of their document.”<sup>149</sup> Yet an originalist analysis in all likelihood moves the anti-privatization ball backwards, not forwards. A search for the eighteenth century conception of privatized government to break the impasse leads to the appearance of privatization throughout American history. Many public functions—including taxation, police, and fire control—were once privately performed.<sup>150</sup>

At bottom, then, the clearest textual limit on privatization under Article II is a prohibition on legislative assignments of the exclusive power to make treaties, direct troops in wartime, or issue pardons to private parties. Congress, in turn, is arguably constrained from limiting the President’s ability to remove officers to the extent that removal is necessary to effectuate one of his express powers.<sup>151</sup> As for Article II’s Vesting Clause, scholars have attempted to define “executive power” to encompass, for example, policymaking or the oversight of criminal prosecutions.<sup>152</sup> Yet the Constitution does not include those powers within the enumerated powers of the President. Even if it did, the Necessary and Proper Clause gives Congress the ability to structure the execution of policymaking and criminal prosecutions to include private components.<sup>153</sup> The historical backdrop, moreover, supports privatization: the Framers were certainly aware of the tradition of private execution of government functions, and made no effort to constrain the practice in the Constitution.

A few additional points bear mentioning here. To the extent that powers assigned to private contractors are legislative—versus executive—in nature, Article II falls beside the point. Congress has control over “such areas as trade and financial regulation, product safety regulation, and the regulation of domestic health and environmental con-

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148 *Id.* at 1214; *see also* Kinkopft, *supra* note 4, at 341–42 (discussing *Maurice* and arguing that there is no separation of powers ban to the delegation of federal power to non-federal actors).

149 Shane, *supra* note 122, at 602.

150 *See* Freeman, *supra* note 61, at 552–53.

151 *See* Shane, *supra* note 122, at 600.

152 *See* Saikrishna Prakash, *The Chief Prosecutor*, 73 *GEO. WASH. L. REV.* 521, 527 (2005) (defining executive power as including the authority to oversee prosecutions); David B. Rivkin, Jr., *The Unitary Executive and Presidential Control of Executive Branch Rulemaking*, 7 *ADMIN. L. REV. AM. U.* 309, 317–20 (1993) (arguing that executive power grants broad authority to steer policymaking).

153 *Cf.* Shane, *supra* note 122, at 610 (making similar arguments with respect to the constitutionality of the independent counsel).

cerns,” for example, and nothing in the Constitution precludes the legislature from delegating its regulatory responsibilities.<sup>154</sup> Private contractors’ hands in these matters, therefore, do not raise a conflict with the terms of Articles II or I. Moreover, the tripartite constitutional system was designed to govern the relationship *between* the branches.<sup>155</sup> The procedures contained in the respective vesting provisions might not even apply to assignments *outside* the federal government.<sup>156</sup>

A fair reading of the constitutional text, therefore, leaves no definitive resolution of the question whether outsourcing per se is unconstitutional at the margins. Implicit in the constitutional inquiry, however, are broader constitutional principles from which functionalist analyses emerge. For example, it is appropriate to consider whether, in assigning federal powers to nonfederal actors, Congress is handicapping another branch from performing its respective constitutional role. Although the text and historical backdrop of the Constitution reflect a tolerance for such assignments, the Supreme Court routinely references implicit constitutional values—such as general separation of powers and checks and balances principles—in assessing the constitutionality of structural departures from the three-branch system established by the Constitution. Commentators have acknowledged<sup>157</sup> that such functionalist analysis is essential if there is to be a viable constitutional objection to the outsourcing of what many understand to be core federal powers.

As the next Part explains, the Court has drawn critical inferences from the text of Article II to both support and limit Congress’s ability to fashion novel independent agencies; accordingly, its jurisprudence in the independent agency arena is powerful precedent for limiting the federal government’s ability to outsource with impunity.

### III. GOVERNMENT BY CONTRACT, INDEPENDENT AGENCIES, AND DEMOCRATIC ACCOUNTABILITY

This Part takes a fresh approach to the constitutionality of outsourcing by looking to established doctrine regarding independent

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154 See *id.* Like the private delegation doctrine, the legislative nondelegation doctrine is largely a dead letter. See *supra* note 96.

155 See *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (“The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.”).

156 See Kinkopf, *supra* note 4, at 339.

157 See Warren L. Ratliff, *The Due Process Failure of America’s Prison Privatization Statutes*, 21 SETON HALL LEGIS. J. 371, 382–83 (1997).

agencies for guidance. Independent agencies have much in common with government contractors exercising substantial federal authority, yet the parallels have gone unrecognized. This Part suggests that the Supreme Court's recent decision in *Free Enterprise Fund*—which held that a statute creating an independent agency within an independent agency was unconstitutional<sup>158</sup>—employs a principle of political accountability that may be useful in assessing the propriety of privatization from the standpoint of the structural Constitution.<sup>159</sup>

#### A. *Independent Agencies and Private Contractors: A Comparison*

Although there are glaring differences between private contractors and independent agencies—including that the latter are created by Congress and headed by presidential appointees—there are also fundamental overlapping characteristics that have evaded inspection. The point here is not to suggest that independent agencies and private contractors raise identical issues. Rather, the suggestion is that there are sufficient parallels to warrant closer inspection of the ways in which independent agency law informs the structuring of outsourcing relationships to comport with broader constitutional norms. Consequently, as a backdrop for later discussion of how a new privatization doctrine might emerge from established independent agency case law, this section outlines the practical points of intersection between independent agencies and private contractors.

Independent agencies—such as the SEC, the FTC, and the Federal Communications Commission (FCC)—fall closer to private contractors on the constitutional continuum than other executive branch entities for a simple reason: they are subject to less presidential oversight.<sup>160</sup> With some exceptions, independent agencies are comprised of multiple members—known as boards or commissions—from competing political parties.<sup>161</sup> Although the President generally appoints members of independent agencies, they serve fixed, staggered terms that may exceed a President's time in office.<sup>162</sup> The President can remove members of independent agencies only “for cause” under

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158 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3162 (2010).

159 Gillian Metzger and Jack Beermann also advocate accountability approaches to privatization. See Beermann, *supra* note 105, at 1508, 1515–19; Metzger, *supra* note 37, at 1456.

160 See generally Breger & Edles, *supra* note 107, at 1135–37 (discussing the definition of “independent” agencies).

161 See *id.* at 1236–94 (listing and describing existing independent agencies).

162 See *id.*

express or implied statutory limitations.<sup>163</sup> Cabinet-level agency heads, by contrast, are hired and fired by the President at will.<sup>164</sup>

Private contractors are not appointed by the President at all, and are thus susceptible to presidential oversight only to the extent that an administration heavily polices contract terms (by including liberal termination provisions, for example), compliance, and FCA violations.<sup>165</sup> Thus, as a constitutional matter, neither officers of independent agencies nor private contractors are subject to the President's prerogative to hire and fire at will. If plotted on a constitutional continuum, both private contractors and independent agencies reside somewhere between cabinet-level agencies that function as "alter egos" of the President and purely private citizens with no ties to government whatsoever.

Like private contractors, moreover, independent agencies exercise government authority unencumbered by myriad checks on abuses of power that bind cabinet-level agencies. Both independent agencies and private contractors lie beyond the purview of executive orders and other statutory provisions that impose procedural safeguards on agencies;<sup>166</sup> and some independent agencies—such as the Public Company Accounting Oversight Board (PCAOB)—are similarly exempted from "government-in-the-sunshine" statutes like the APA and the FOIA.<sup>167</sup> Both independent agencies and private contractors, therefore, are poised to undermine the value of centralized accountability in our constitutional structure.<sup>168</sup>

By the same token, both private contractors and independent agencies exercise executive authority that would otherwise fall within the responsibility of a cabinet-level agency. Whereas private contractors are at least theoretically hampered by OMB Circular A-76, there is no legal distinction between what independent agencies and cabinet-level agencies can do; in some instances, such as with the enforcement

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163 *See id.*

164 *See Myers v. United States*, 272 U.S. 52, 176 (1926) (holding the President has the absolute authority to fire a principal executive officer).

165 *See supra* notes 61–78 and accompanying text.

166 *See Lawrence Lessig & Cass R. Sunstein, The President and His Administration*, 94 COLUM. L. REV. 1, 107 & n.438 (1994) (noting that independent agencies are expressly exempted from executive orders that require agencies to undertake cost-benefit analysis in connection with regulations).

167 Because Congress included a provision stating that the PCAOB is not an agency, it does not fall under the APA. *See* 5 U.S.C. § 551(1) (defining "agency" as an "authority of the Government of the United States"); 15 U.S.C. § 7211(b) ("No member or person employed by, or agent for, the Board [is] an officer or employee of or agent for the Federal Government.").

168 *See Shane, supra* note 122, at 597.

of federal antitrust laws by the DOJ and FTC, their jurisdictions overlap. Similarly, private contractors are engaged in a stunning range of high-level government activity. They provide security and military support on the battlefield; make disaster relief payments and prepare hurricane evacuation plans for the Federal Emergency Management Agency;<sup>169</sup> and conduct x-ray scans and back-of-the-hand pat-downs of individual passengers' privates in airports where TSA has succumbed to outsourcing.<sup>170</sup> To the extent, therefore, that independent agency law considers broader constitutional norms in ascertaining the legitimacy of so-called "independent" exercises of executive authority, that law is worth consulting in addressing broader questions relating to the trajectory of outsourcing, as well.

Finally, as a theoretical matter, both independent agencies and private contractors are constitutionally suspect because they do not fall within one of the three established branches of the Constitution. Independent agencies—like modern private contracting—developed without consideration of its broader constitutional justification.<sup>171</sup> As Congress experiments with new forms of independent agencies, accountability questions—largely stemming from Article II—continue to reach the Supreme Court.<sup>172</sup>

Notwithstanding ongoing scholarly declarations of their unconstitutionality, independent agencies have survived these legal challenges. This is partly because the Court has recognized that independent agencies have become an indispensable part of the fabric of the federal government for nearly a century and, as such, cannot realistically be dismantled. So too, if we are to assume that a boundary on outsourcing must be drawn somewhere, the question becomes how to erect one without overruling existing doctrine and upsetting the realities of the modern federal apparatus, which relies heavily on private contracting.<sup>173</sup>

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169 See Verkuil, *supra* note 54, at 320 & n.89.

170 See *supra* note 12 and accompanying text; see also *Privacy: Advanced Imaging Technology*, TSA.gov, <http://www.tsa.gov/approach/tech/ait/privacy.shtm> (last visited Oct. 23, 2011) (addressing privacy issues relating to new search techniques). Somewhat ironically, Professor Verkuil observed in 2009 that the enhanced credibility of "wearing [a] badge" is what "helped lead Congress to make airport security personnel public officials under the Transportation Security Act" in the first place. Verkuil, *supra* note 54, at 327.

171 See Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 43.

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

173 Thus, although theoretically promising, a doctrine that required congressional authorization for the appointment of contractor-officers under Article II might pose insurmountable practical problems. See *supra* notes 141–43 and accompanying text.

## B. Free Enterprise Fund v. Public Co. Accounting Oversight Board

In many contexts, the Supreme Court has construed the structure of the Constitution to embody democratic norms—including checks and balances and the separation of powers—which serve to enable a democratic government “to control itself.”<sup>174</sup> This section suggests—to borrow another phrase—that one such “classic element[ ] of representational democracy” that is missing from the law governing privatization is accountability,<sup>175</sup> and that seeds of a democratic accountability principle can be found in the Supreme Court’s most recent decision regarding the constitutionality of independent agencies, *Free Enterprise Fund v. Public Co. Accounting Oversight Board*.<sup>176</sup>

When it comes to independent agencies, the PCAOB is unprecedented. In the wake of the Enron and WorldCom scandals at the end of 2001, Congress created the Board and gave it primary responsibility for devising and enforcing auditing standards for the accounting industry.<sup>177</sup> The PCAOB promulgates rules; inspects and investigates firms for violations of federal securities laws; imposes censures, suspensions, and monetary fines; and enjoys subpoena authority, official immunity from liability, and privileges from third party discovery.<sup>178</sup>

Congress also gave this powerful independent agency extraordinary independence from the constitutional branches. It exempted the PCAOB from the definition of “agency” for purposes of the APA<sup>179</sup>—without providing strong substitute measures for judicial review in the enabling legislation. Congress also empowered the SEC—not the President—to appoint and remove the PCAOB’s five members, and authorized removal by the SEC only “for good cause shown” after a hearing on the record.<sup>180</sup> In doing so, Congress created an independent agency within an independent agency, severely straining the chain of authority to the President who, under the origi-

174 Calabresi & Rhodes, *supra* note 30, at 1155–56 (quoting THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961)).

175 Brian Galle & Mark Seidenfeld, *Administrative Law’s Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L. J. 1933, 1948 (2008) (suggesting that the other benchmarks are transparency and deliberation).

176 130 S. Ct. 3138 (2010).

177 See Stephen Labaton, *A Push to Fix the Fix on Wall Street*, N.Y. TIMES, Dec. 17, 2006, at C4 (describing events leading up to creation of the PCAOB).

178 See 15 U.S.C. §§ 7211(c), 7215 (2006). See generally Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and its Public/Private Status*, 80 NOTRE DAME L. REV. 975 (2005) (exploring the constitutional status of the PCAOB).

179 See 15 U.S.C. § 7211.

180 *Id.* §§ 7211(e)(1)–(6), 7217.

nal statute, was limited to firing SEC members for cause<sup>181</sup> because they failed to fire the PCAOB members for cause. Congress also made the Board uniquely independent of legislative pressures by allowing it to fund itself through the collection of fees,<sup>182</sup> to set its own budget,<sup>183</sup> and to afford its members a private-sector pay scale with salaries that substantially exceed that of the President himself.<sup>184</sup>

Because the PCAOB operates much more like a private entity than any independent agency in history, the Court's constitutional review of the Board's structure is particularly telling for the outsourcing model. Like a private contractor, the PCAOB is effectively severed from direct presidential control. The Board is perhaps even more protected from congressional influence than are private contractors, as monies paid to contractors stem from legislative appropriations, which can be adjusted. Although a private contractor is not legislatively bound to particular review measures by an agency, the bulk of contractor oversight—like review of the PCAOB by the SEC—comes from the federal contracting agencies themselves. Moreover, as with private contractors, the public's ability to secure judicial review of the PCAOB's decisions is severely hampered as compared to other agencies, including so-called independent ones.

It is therefore notable that in *Free Enterprise Fund* the Supreme Court struck down the portion of the Sarbanes-Oxley Act<sup>185</sup> that rendered the PCAOB subject to removal for cause by the SEC, which is, in turn, subject to removal for cause by the President.<sup>186</sup> Although a handful of scholars have crafted various functionalist arguments for

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181 The decision was five to four. Much to the dissenting Justices' chagrin, the majority simply accepted the parties' agreement that the SEC is removable only for cause, despite the lack of statutory language to that effect; the issue was neither briefed nor argued. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148 (2010) ("The parties agree that the Commissioners cannot themselves be removed by the President except under the . . . standard of 'inefficiency, neglect of duty, or malfeasance in office,' and we decide the case with that understanding." (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 620 (1935))); *see also id.* at 3182 (Breyer, J., dissenting) ("How can the Court simply assume without deciding that the SEC Commissioners themselves are removable only 'for cause?')").

182 *See* 15 U.S.C. § 7219(c)(1) (providing for the collection of "accounting support fees").

183 *See id.* § 7211(c)(7).

184 *See id.* §§ 7211(f)(4), 7219.

185 Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

186 *See supra* note 180.

restraining limitless privatization,<sup>187</sup> the majority's decision is particularly illuminating for such a project, as it underscores the idea that democratic accountability per se is a constitutional value that may be applied in the related outsourcing context.

To be sure, one distinction between the PCAOB and private contractors is that, even though the statute specifies that Board members are *not* government officials, the *Free Enterprise Fund* parties stipulated that the PCAOB is “‘part of the Government’ for constitutional purposes”<sup>188</sup> and that its members are officers “who ‘exercise significant authority’” for purposes of Article II.<sup>189</sup> Although there is a compelling argument that contractors entrusted with significant federal responsibilities are in fact functioning as officers,<sup>190</sup> this Article does not hinge its analysis on these technical distinctions, albeit important ones. What is of interest here is the Court's repeated reference to accountability to the President—a form of *democratic* accountability—as underlying the separation of powers; as such, one might argue, accountability must also be constitutionally preserved with respect to private contractors with attenuated relationships to the President.

At bottom, the *Free Enterprise Fund* majority held that the statute's creation of “dual for-cause limitations on the removal of Board members contravene[d] the Constitution's separation of powers.”<sup>191</sup> The Court employed a formalist reading of Article II to reach its conclusion, but it also implied that a broader theory of democratic accountability is inherent in the Constitution. Such an accountability principle reveals itself through three primary lines of argument contained in the majority's opinion.

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187 See, e.g., James O. Freedman, *Delegation of Power and Institutional Competence*, 43 U. CHI. L. REV. 307, 318 (1976) (emphasizing “considerations of institutional competence implicit in the structural premises of the Constitution—upon the capacity of particular institutions of government uniquely to perform certain tasks committed to them by the Constitution”); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 695 (1986) (discussing idea of constitutional supremacy as guarding against a total surrender of power to a private entity and promoting a due process approach).

188 *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3148 (2010) (quoting *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 397 (1995)).

189 *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976)).

190 See *supra* notes 140–41 and accompanying text. The Court declined to decide whether “‘lesser functionaries subordinate to officers of the United States’ must be subject to the same sort of control as those who exercise ‘significant authority pursuant to the laws.’” *Free Enter. Fund*, 130 S. Ct. at 3160 (quoting *Buckley*, 424 U.S. at 126 & n.162).

191 *Free Enter. Fund*, 130 S. Ct. at 3151.

First, the Court maintained that the President must, as a practical matter, have the power to hold accountable those who execute the laws. Otherwise, “the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.”<sup>192</sup> Under the original statute, the President has no say as to whether good cause exists for removal of Board members. This “added layer of tenure protection makes a difference,” the Court reasoned, because if the SEC is unable to remove Board members at will, the President is unable to “hold the Commission fully accountable for the Board’s conduct, to the same extent that he may hold the Commission accountable for everything else that it does.”<sup>193</sup> As a result, no one “has full control over the Board,”<sup>194</sup> let alone someone responsible to the President, either directly or indirectly (through removal for cause).

The Court repeated the theme of accountability for its own sake several times. It wrote that “[t]he result is a Board that is not accountable to the President, and a President who is not responsible for the Board”;<sup>195</sup> that “[t]he diffusion of power carries with it a diffusion of accountability”;<sup>196</sup> and that “[w]ithout a clear and effective chain of command, the public cannot ‘determine on whom the blame or the punishment of a pernicious measure, or series of pernicious measures ought really to fall.’”<sup>197</sup> The Court worried, moreover, that “if allowed to stand, this dispersion of responsibility could be multiplied” such that “[t]he officers of such an agency—safely encased within a Matryoshka doll of tenure protections—would be immune from Presidential oversight, even as they exercised power in the people’s name.”<sup>198</sup>

Second, the majority made clear that, to the extent that the President is rendered unable to hold accountable those who execute the laws, an unconstitutional interference with Article II’s Vesting and Take Care Clauses occurs. “Since 1789,” Chief Justice Roberts wrote, “the Constitution has been understood to empower the President to keep [executive] officers *accountable*—by removing them from office, if necessary.”<sup>199</sup> Although the Court repeatedly referenced removal,

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192 *Id.* at 3164.

193 *Id.* at 3154.

194 *Id.*

195 *Id.* at 3153.

196 *Id.* at 3155.

197 *Id.* (quoting THE FEDERALIST NO. 70, at 476 (Alexander Hamilton) (Clinton Rossiter ed., 1999)).

198 *Id.* at 3154.

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

its Article II concern did not arise primarily from the Appointments Clause, from which the removal power is traditionally derived.<sup>200</sup>

Rather, the Court's formalist objection to the statute's double-cause provision was that the "arrangement is contrary to Article II's vesting of the executive power in the President."<sup>201</sup> The majority included the ability to hold accountable those who execute the laws as within the very definition of executive power; as such, it cannot be sloughed off. In the words of James Madison, "if any power whatsoever is in its nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws."<sup>202</sup> Accordingly, the President "must have 'some power of removing those for whom he can not continue to be responsible.'"<sup>203</sup> The PCAOB's "multilevel protection from removal" was thus "contrary to Article II's vesting of the executive power in the President"<sup>204</sup> because it "violates the basic principle that the President 'cannot delegate ultimate responsibility or the active obligation to supervise that goes with it.'"<sup>205</sup>

Nor, the Court reasoned, can the President carry out his obligations under the Take Care Clause if he cannot maintain "the general administrative control of those executing the laws."<sup>206</sup> "Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct."<sup>207</sup> As a result, "[t]he President is stripped of the power our precedents have preserved, and his ability to execute the laws—by holding his subordinates accountable for their conduct—is impaired."<sup>208</sup> Under the statute, "[h]e can neither ensure

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200 See generally *Myers v. United States*, 272 U.S. 52, 55 (1926) (holding that the President may unilaterally remove executive branch officials).

201 *Free Enter. Fund*, 130 S. Ct. at 3154.

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

203 *Id.* at 3152 (quoting *Myers*, 272 U.S. at 117).

204 *Id.* at 3154.

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

206 *Id.* at 3152 (quoting *Myers*, 272 U.S. at 164); see also *id.* at 3147 (noting that the President "cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them," which is the case absent the ability to hold PCAOB members accountable for their actions).

207 *Id.* at 3154.

208 *Id.*

that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith."<sup>209</sup>

Third, the *Free Enterprise Fund* Court suggested that the idea of accountability has roots in democratic theory. It observed that in *The Federalist No. 51*, "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."<sup>210</sup> Accordingly, "[o]ur Constitution was adopted to enable the people to govern themselves, through their elected leaders."<sup>211</sup> And in the Constitution, "[t]he Framers created a structure in which '[a] dependence on the people' would be the 'primary control on the government.'"<sup>212</sup> The Constitution thus serves as the people's mechanism for exerting control—a conduit of power from the people to their government. If the source of the President's power is the people, the people's power to govern themselves is impaired if no one is in a position to hold accountable *all* actors entrusted with executive authority. Indeed, the Court warned that "[t]he growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people."<sup>213</sup> The PCAOB's structure was thus objectionable in part because the President could not hold the Board accountable for malfeasance "even though [it] determines the policy and enforces the laws of the United States."<sup>214</sup>

Notably, the Court contended with the argument that the removal power is largely a formality on the ground that the President is in no position to meaningfully oversee all members of the executive bureaucracy in any event. That the PCAOB reflects "the kind of practical accommodation . . . that should be permitted in a workable government,"<sup>215</sup> the Court stated, is no reason to condone an "extraconstitutional government."<sup>216</sup>

Nonetheless, the Court left the bulk of the PCAOB intact. It rendered unconstitutional a layer of "for cause" removal but did nothing

209 *Id.*

210 *Id.* at 3157 (quoting *Bowsher v. Synar*, 478 U.S. 714, 730 (1986)) (citing *THE FEDERALIST NO. 51*, *supra* note 197, at 349 (James Madison)).

211 *Id.* at 3156.

212 *Id.* at 3157 (quoting *THE FEDERALIST NO. 51*, *supra* note 197, at 349 (James Madison)).

213 *Id.* at 3156.

214 *Id.* at 3147.

215 *Id.* at 3155 (quoting *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 276 (1991)).

216 *Id.* at 3157 (quoting *New York v. United States*, 505 U.S. 144, 187–88 (1992)).

to remedy the grievance that gave rise to the lawsuit—the PCAOB’s very power to critically audit and investigate the plaintiff-accounting firm.<sup>217</sup> As with its prior independent agency jurisprudence, therefore, the Court was hesitant to meaningfully disturb a quasi-government entity, however novel. What the Court did do was establish a precedent for ensuring that the *structuring* of future independent agencies adheres to a constitutional norm of accountability; in this instance, a more direct line to the President. As discussed below, such a democratic accountability principle could similarly render constitutionally mandatory the provision of sufficient accountability mechanisms for government contractors as well.

### C. *Accountability and the Constitutional Continuum*

If we assume for the moment that the dearth of constitutional oversight of private contractors should be addressed somewhere in constitutional law, the doctrine governing the constitutionality of independent agencies is a natural place to look. Yet, the logic in linking privatization and independent agencies has largely escaped the purview of courts and scholars to date. This oversight warrants correction because, unlike the state action doctrine, the constitutional law governing the creation of independent agencies reflects legitimate worry about the exercise of inherently executive power by actors who are not directly accountable to the President and, thus, to the people. The concern over preserving democratic accountability for government actors gained theoretical force with the majority’s opinion in *Free Enterprise Fund*. To the extent that the *Free Enterprise Fund* Court’s democratic accountability rationale takes hold as a stand-alone principle within the separation-of-powers rubric, the privatization debate could only benefit, as the private sector is less susceptible to democratic oversight than is its neighbor on the constitutional continuum—the PCAOB.

To a significant degree, current law’s disparate treatment of private contractors under the structural Constitution is justifiable. As noted, the jurisprudence around the constitutionality of independent agencies virtually assumes that the full panoply of Bill of Rights protections constrain the behavior of independent agency actors. At first glance, the notion that independent agency officials are state actors seems too obvious to mention. Of course, if the SEC appoints and effectively supervises the PCAOB, its members are state actors—just like every other government hire in the massive federal bureaucracy.

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<sup>217</sup> The lack of redress for the plaintiffs raises interesting questions as to whether Article III standing to sue was satisfied in this case.

The same assumption does not apply if the actor is a contractor. This, too, makes logical sense at first blush. Private contractors are just that—they are employees of a private entity who perform work for a client that happens to be the federal government. Yet contractors are like federal employees in numerous ways. Contractors are hired by federal officials. Their salaries are paid from federal taxpayer coffers. Their duties, responsibilities, and limitations are governed by rules and standards established by the federal government, albeit memorialized in federal contracts rather than in employment guidelines and internal regulations. They perform governmental functions that federal employees would otherwise perform. But the state action doctrine presumes that an actor is private—as it was before entering into a contract with the federal government—unless proven otherwise. What is it about an employee of an independent agency that flips the presumption?

The state action doctrine would answer the foregoing question by looking at the level of control by superior federal employees. Independent agencies, though headed by officials who cannot be fired at will by the President, are nonetheless ultimately responsible to him. But the case of the PCAOB (and arguably, to a lesser extent, those of other independent agencies) demonstrates the fallacy beneath the state action doctrine's attempted distinction between actors who are "controlled" by federal officials and those who are not. Under the original statute, the only way the President could wield influence over the Board through his removal power was to direct the SEC to direct the PCAOB to take certain action and then fire SEC commissioners if they fail to do so.<sup>218</sup> The President can only fire SEC commissioners for cause, which most likely does not include disagreements with political ideology.<sup>219</sup> As a practical matter, therefore, there may be a narrower gulf between the PCAOB as originally constituted and a private contractor than one would expect when it comes to accountability to the President.<sup>220</sup>

Another distinction between independent agencies and private contractors is that Congress creates independent agencies by statute,

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218 See *Free Enter. Fund*, 130 S. Ct. at 3149.

219 See *id.* at 3148.

220 In *Free Enterprise Fund*, the majority suggested—without further explanation—that “a removal standard appropriate for limiting Government control over private bodies may be inappropriate for officers wielding the executive power of the United States” and that “[w]e do not decide . . . whether ‘lesser functionaries subordinate to officers of the United States’ must be subject to the same sort of control as those who exercise ‘significant authority pursuant to the laws.’” *Id.* at 3158, 3160 (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 & n.162 (1976)).

whereas private initiative and market forces account for the proliferation of government contracting firms. But Congress has also established for-profit corporations like Amtrak, which the Supreme Court deemed a governmental body despite legislative provisions to the contrary, explaining that Congress cannot relieve “what the Constitution regards as the Government” by proclaiming an entity a private corporation.<sup>221</sup> Amtrak is federally funded and controlled by a board of presidential appointees.<sup>222</sup> The appointee-structure only begs the normative question, however, of whether the Constitution requires similar oversight conditions for private contractors. Thus, the mere fact that one entity is created by congressional statute and the other is borne of private sector initiative may be too slender a reed on which to determine the entirety of constitutional doctrine related to the outsourcing of federal powers. What seems important is not who creates the entity but, rather, what powers it actually wields and the extent to which it is accountable, in exercising those powers, to government officials who are themselves politically accountable.

What overshadows these differences is a critical feature that independent agencies and private contractors share: the ability to exercise executive power. Indeed, the query over the constitutionality of independent agencies is shaded by constitutional concerns precisely because of the *nature* of the power being exercised and its potential interference with the *exclusive* powers of the President. In *Free Enterprise Fund*, the Supreme Court characterized the problem as one of accountability.

With private contractors, the accountability problem is only exacerbated. In the privatization world, there is a greater concern that “governmental power—power coercive in nature—will be used to further” private interests at the expense of competing public ones.<sup>223</sup> Public officials are expected to exercise power in a disinterested way,<sup>224</sup> or be held accountable for abuses. Indeed, with federal agencies, the “overwhelming thrust” of the Court’s involvement has been to make administrative processes more open to citizen participation and to ensure an adequate record for judicial review.<sup>225</sup> Private contractors are incentivized to act out of personal interest, without the political process there to oust them.<sup>226</sup> They cannot be ordered by

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

222 See Nagy, *supra* note 178, at 1037–38 (discussing *Lebron*).

223 Lawrence, *supra* note 187, at 659.

224 See *id.*

225 See Craig & Gilmour, *supra* note 1, at 58.

226 See Lawrence, *supra* note 187, at 660.

the government to perform a certain thing, or fired or disciplined for failing to do so, unless the contract allows it.<sup>227</sup>

When it comes to privatization, the collective focus has been on managerial solutions rather than issues of constitutional and democratic governance.<sup>228</sup> Managerial solutions alone, however, are insufficient. It is “inevitable that . . . some contractors will be in a position to define individual rights, withhold information that government agencies would be required to release, frame policy options, set public policy through their street-level interactions, and exercise influence—or even supervision—over public employees.”<sup>229</sup> For both independent agency actors and private contractors, therefore, “[t]he ultimate issue . . . is the exercise of public power, and the creation of public policy, by an entity without democratic credentials or direct political accountability.”<sup>230</sup> Private contractors’ independence from the democratically-accountable branches of government stokes real “fear[s] of arbitrary, unreflective governance”<sup>231</sup> that statutes like the APA were designed to hamper when it comes to federal actors. A values-driven approach to constitutional interpretation can penetrate the dearth, by comparison, of judicial and political mechanisms for holding contractors accountable to the public they are charged with serving.

Drawing upon the Court’s analysis in *Free Enterprise Fund*, therefore, an argument may be made that the outsourcing of especially sensitive federal functions must be accompanied by a framework of democratic accountability for the exercise of such functions. Because private contractors are not subject to the President’s appointment and removal power, they cannot be held politically accountable to the executive branch for the exercise of delegated power under the Appointments Clause. But *Free Enterprise Fund* did not turn on the Appointments Clause; it hinged on a finding that the lack of accountability for actors exercising executive power prevents the President from meaningfully supervising execution of the law under the Vesting and Take Care Clauses of Article II.<sup>232</sup> Private constituencies attuned

227 See Pierce, *supra* note 66, at 1228.

228 See Rosenbloom & Piotrowski, *supra* note 72, at 109.

229 *Id.* at 109.

230 Steven L. Schwarcz, *Private Ordering*, 97 Nw. U. L. REV. 319, 335 (2002) (quoting Jonathan Weinberg, *ICANN and the Problem of Legitimacy*, 50 DUKE L.J. 187, 191 (2000)).

231 Krent, *supra* note 99, at 70; see also Craig & Gilmour, *supra* note 1, at 61–62 (stating that concern with privatization is that society will end up with two governments—one subject to the rule of law and the Constitution and the other “an outlaw government, composed of quasi government and quasi private institutions which are utilizing public authorities for their own purposes”) (internal quotation omitted)).

232 See Krent, *supra* note 99, at 67.

to market forces are not subject to the executive supervision or judicial review that constrains their federal counterparts. As Harold Krent has observed, this result “can only be reconciled with the constitutional structure by abandoning (or at least truncating) [A]rticle II’s requirement that the executive branch must superintend execution of all federal laws.”<sup>233</sup> An accountability principle that is based in Article II would operate by requiring some amalgam of accountability measures as a constitutional matter. The integrity of the entire political system would benefit from the perks of responsible government that accompany accountability structures—such as public access, meaningful responsiveness, sound policy, rationality in decision-making,<sup>234</sup> and judicial review, which promotes fair procedures and prevents private interests from dominating the exercise of public power.<sup>235</sup>

A number of points about the constitutionality of privatization seem clear. Whatever the solution, it will likely vary with the circumstances.<sup>236</sup> It will also require highly trained government staff to craft workable strategies for specific situations.<sup>237</sup> This, itself, will be expensive and difficult to achieve.<sup>238</sup> But the political rationale for accountability is compelling.<sup>239</sup> What is needed is a theoretical rationale—one that captures the relationship of privatization to modern government—if the implications of outsourcing are to be fully understood.<sup>240</sup> The inherent concept of government that is created by the structural Constitution assumes that procedural norms are in place indefinitely to protect against tyrannical use of power. Scholars have searched for a “doctrinal hook”<sup>241</sup> for converting our intrinsic sense of the necessity of accountability for public contractors into a workable principle. That hook, made more concrete by the majority in *Free Enterprise Fund*, could be a principle of democratic accountability that

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233 *Id.* at 68. Professor Krent adds that “the value of political participation” also “arguably underlies our constitutional fabric” and is undermined by free-reign privatization. *See id.* Professor Krent has further suggested that privatization undermines the Appointments Clause by permitting Congress to “exercise both a de facto appointment and removal authority” when it creates an office for contractors and designates an office holder extra-constitutionally. *See id.* at 78.

234 *See* Lawrence, *supra* note 187, at 665. The bureaucracy that enables government to act predictably and fairly, however, hampers bureaucratic innovation and flexibility. *See id.* at 654.

235 *See* Freeman, *supra* note 61, at 559.

236 *See* Rubin, *supra* note 39, at 930.

237 *See id.* at 934.

238 *See* Kramer, *supra* note 46, at 46.

239 *See* Rubin, *supra* note 39, at 908.

240 *See id.*

241 Craig & Gilmour., *supra* note 1, at 63.

springs from the structural Constitution. In the contest between government actors and private ones, public accountability loses unless power is assigned within a distinctly public framework for accountability that “puts people at the center.”<sup>242</sup> Requiring public accountability for private contractors participating in sensitive government functions is justifiable as a constitutional matter; the next question is how to effectuate the principle in practice.

### CONCLUSION

The question this Article attempts to address is whether there is any point at which the Constitution cares about outsourcing and its broader implications. If the entire administrative apparatus other than the constitutionally-named members of the executive branch—the President, the Vice President, and the Treasury Department<sup>243</sup>—were handed off to Lockheed Martin, would that be constitutional? The Supreme Court has never addressed the question, and scholarship advancing affirmative constitutional theories regarding privatization per se is sparse.<sup>244</sup> Yet by most accounts, federal government outsourcing suffers from a lack of systematized accountability,<sup>245</sup> which only a constitutional approach can fully capture.

The reason why the constitutionality of privatization has only marginally come within the purview of courts and scholars is that prevailing doctrine hinges on an inaccurate understanding of the nuanced relationship between private contractors and federal entities. Rather than residing in distinct private/public spheres, all actors exercising the powers of the federal government lie on a constitutional continuum, which begins with the President and his cabinet and ends with purely private entities possessing no federal authority whatsoever. Viewed this way, “government by contract”<sup>246</sup> has inescapable implications from the standpoint of the structural Constitution.

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242 Minow, *supra* note 7, at 1266.

243 See U.S. CONST. art. II, § 1, cl. 1; *id.* art. I, § 9, cl. 7 (mentioning the Treasury).

244 Cogent arguments have been made for the absence of constitutional boundaries on outsourcing arrangements. Cf. Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 400–01 (2006) (describing arguments in defense of privatization).

245 But see Jody Freeman, *Extending Public Accountability Through Privatization: From Public Law to Publicization*, in PUBLIC ACCOUNTABILITY 83, 83 (Michael W. Dowdle ed., 2006) (“Private contributions to service provision, and even to regulation, are not necessarily or exclusively dangerous and corrosive of public accountability—which is how they seem to be perceived in mainstream administrative law.”).

246 Freeman & Minow, *supra* note 12, at 1.

Accordingly, the Article searches for a constitutional principle—distinct from the flawed state action and defunct private delegation doctrines—that could be deployed to establish boundaries on privatization if there were ever public consensus that federal outsourcing has gone too far. It compares private contracting with an entity that is loosely analogous to the private contractor: the independent agency. It then suggests that the Supreme Court in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* sketched out a constitutional accountability principle that could apply with even greater force to private contractors who, under the current legal regime, are less confined than independent agencies by mainstream legal and structural restraints. In short, the structure of outsourcing relationships should be viewed as having constitutional implications, particularly to the extent that sensitive governmental functions are involved. From this perspective, then, government agents and ultimately the courts could systematically screen such relationships to ensure that sufficient mechanisms for ensuring democratic accountability exist.

