

Private Governance as Public Policy: A Paradigmatic Shift*

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Abstract

Private governance and a variant, public-private governance, produce a significant portion of the rules that govern citizens' lives day-to-day. Yet political science has not paid sufficient attention to the full array of governance arrangements (beyond formal government) that impress themselves on the lives of ordinary people. Why not, why is this matter important, and what is the appropriate response to this deficiency? The conceptual framework within which practitioners work and the language they use—specifically, using the phrase “public policy” to refer exclusively to policy made by government—unduly limit the scope of political science. Those who do study policy making activities of private groups encounter a conceptual and linguistic poverty that constrains their work. A recounting of a particular study of private governance in the global arena demonstrates the insufficiency of language as it is currently deployed. An extended example in the area of pension accounting, a highly technical field, is used to establish the fundamentally public nature of the policy work of private groups like the U.S. Financial Accounting Standards Board. Political scientists, as students of democracy, accountability and power, are uniquely trained to study private governance and should work to reconceptualize the discipline's guiding framework fully to incorporate this important phenomenon within its purview.

Keywords: Private governance, global governance, public policy, political science, accountability, democracy, accounting, forestry, FASB, Forest Stewardship Council, public-private governance

- I have been researching this topic with A. Lee Fritschler, my co-author on *Smoking and Politics: Bureaucracy Centered Policy Making* (Pearson/Prentice-Hall, 2007) and several George Mason University Ph.D. students, including Paul Weissburg and Michelle Ranville, who are writing dissertations on some aspect of

private governance. While this lecture is my own creation, delving into the implications of private governance is a joint enterprise, and I have benefited from the ideas of these three collaborators. I greatly appreciate the many colleagues in the profession who have discussed this topic with me and, specifically, the helpful comments on a draft of this manuscript by Kenneth Meier, Helen Gibson, Lynne Rudder Baker, Joyce Murdoch, Howard Palley, James Garand, Sue Tolleson-Rinehart, John Gist, and Cynthia Harrison. I owe a special debt of gratitude to John Geer.

A variety of private institutions is deeply implicated in both creating and addressing serious problems facing the nation and the world. These institutions range in form from non-profit organizations to professional membership associations to, less commonly, multi-national corporations.¹ They vary not only in organizational shape but also in governing processes, purpose, degree of transparency and public participation, and the nature of their connection to the government. The government-like duties which these groups shoulder—for better or worse—are staggeringly complex and varied.

Despite this variety, the characteristic that unifies these groups is that they make decisions which bind not only their members but also others. These others are the wider public who have no opportunity, no ability, and in many cases no apparent inclination to participate in choices that may have a significant impact on them. If politics pertains to the allocation of values (Easton 1953) or who gets what, where and how (Lasswell 1990 (1935)) and if democratic politics demands that people have an equal say in those kinds

¹ Sometimes the institutional form is somewhat illusive, as in the case of private and public-private networks. In discussing contemporary policy making, Maarten Hajer, for example, suggests that “politics is conducted in an institutional void,” characterized by “the loss of territorial synchrony” and that “the constitutional rules of the well-established classical-modernist polities do not tell us about the new rules of the game” (Hajer 2003). See also (Castells 2000; Hajer and Wagenaar 2003; Kjaer 2004; Pierre and Peters 2000; Rhodes 1997).

of decisions, then the prevalence of private governance must be studied and understood by political scientists.

As I will reiterate, private governing is distinct from participating in the decentralized, competitive market system, from the working of quasi-governmental organizations, from the lobbying of government, and from privatizing the administration of public programs.² Like privatization of public services, however, private governing is hardly a new phenomenon though it is growing as rules beyond the nation-state are increasingly needed, as deep expertise is required to solve the kinds of problems confronting society, and as private groups can succeed in excluding a wider, affected public.³

Nor have all political scientists ignored the existence and growth of private governance. Robert A. Dahl and Charles E. Lindblom and then Grant McConnell touched on this idea without fully exploring it (Dahl and Lindblom 1953; McConnell 1966). More recently, some scholars of international relations are studying the actual decision making processes of specific groups that are largely private in nature (Hall and Biersteker 2002; Haufler 2001; Mueller 2002; Sell 2003; Wilkinson 2005; Wilkinson and Hughes 2002; Cutler 2003). Some students of public administration—dating back to John Gaus’ ecological approach (Gaus 1947; Graham 1947) and extending to contemporary work on private rulemaking and on networked governance (Goldsmith and Eggers 2004; Hall and Laurence J. O’Toole 2000; Hall and Laurence J. O’Toole 2004)—

² One of the tasks of political scientists should be to ensure that distinctions like these are clearly made, as these phenomena are not the same and their significance varies.

³ Among his many helpful comments, Kenneth Maier suggested I emphasize this point. At the federal level many such structures originated in the 1930s. From agricultural marketing orders (see, for example, (French 1982)) to other New Deal innovations in the financial services sector (discussed below in this address). Both states and national government have been deferential to the professions (Gilb 1966), though that deference may be fading (Freidson 2001; Sennett 2006), and states and localities have traditionally worked closely with clientele groups who write the rules for their industry (for example, building codes).

have variously recognized the involvement of private groups in governance beyond their traditional lobbying role.⁴

Still, the extent to which the quality of citizens' lives is determined by forces that are beyond their control, but that might fruitfully be more democratically decided, is not well understood. Nor is private governance sufficiently studied within the one discipline whose *raison d'être* is to understand power and whose most telling value is democracy. As I will explain further on, the very language of political science obstructs the ability of its practitioners fully to recognize private governance as within their purview.

My purpose in this address is to encourage the discipline to embrace the following five assertions:

First, as a discipline, political science has not paid sufficient attention to the full array of governance arrangements beyond those that constitute formal government that impress themselves on the lives of ordinary people. Private governance and a variant, public-private governance, produce a significant portion of the rules that govern citizen's lives day-to-day.

Second, by focusing too exclusively on official government entities, political scientists have relegated the field of private governance largely to other disciplines whose perspectives and core values diverge—sometimes quite radically—from that of most political scientists.

Third, because of our discipline's failure, with some important exceptions, to explore private governance in detail and to incorporate it into our profession's self-concept, our

⁴ Note, however, "networked governance," as it is typically used and as it is studied in the three cited articles, again, refers to execution of policy and not policy making. Hajer is especially insightful on networked governance as a form of policy making (Hajer 2003; Hajer and Wagenaar 2003).

students are not taught how much of their lives is governed by rule-making of private groups and processes.

Fourth, the language of political science is inadequate to the degree that it blinds us to the importance of these private and public-private structures of authority. For example, if the phrase “public policy” is not elastic enough to include government-like rules promulgated by private bodies, the phrase “public policy” is in serious need of stretching or replacing with something more useful. Private governance activities routinely affect the opportunities and quality of life of people who have little or no chance to influence the decision making process of the private group. Our placing private governance groups in the congratulatory categories like “civil society” and “self-regulation” shuts off discussion of whether people affected by the decisions of these groups should have a say in their decision making.

Fifth, therefore, political scientists should reimagine the discipline to fully incorporate private governance within its domain.⁵ To the extent that political scientists share a paradigm that identifies the contours of our discipline, private governance should become an integral part of our conceptual framework.

Definitions

One of the difficulties of talking about these under-examined processes and institutions is that we political scientists have no commonly agreed-upon language for them that recognizes their quasi-governmental nature and their relevance to our studies.

⁵ Or, as Maarten Hajer asserts in his discussion, specifically, of the policy sciences, “we much come to grips that [we] can no longer take the political setting as a given.” And, we must “rethink the institutional basis for what we are doing and how we are doing it” (Hajer 2003). Hajer and others who study governance seem to focus primarily on contemporary change. My argument is that political scientists should study private governance and public-private governance, both new and well-established forms.

To begin to fill that language gap, let me indicate generally what I intend by the terms “private governance” and “public-private governance.” *Private governance* is composed of the decision making processes and the binding decisions of private groups that affect the quality of life and opportunities of a larger public. Much private governance has a substantially broader impact than what phrases like “self-governance,” “technical standard setting,” or “self-regulation” suggest. *Public-private governance* combines, to varying degrees and in varying ways, the imprimatur of government on essentially private decision making.⁶

Let me be clear: I am not talking about privatization of the delivery of governmental goods and services, such as faith-based organizations providing social services on behalf of a government, nor am I addressing quasi- or hybrid-government organizations like Fannie Mae or the Federal Reserve, although the issues raised by private policy making are assuredly relevant to these phenomena as well (Moe 2001; Moe and Stanton 1989; Pierre and Peters 2000, 45-6). Private policy making is at least one step further out of the reach of the ordinary citizens.

Nor does this subject focus on competitive markets *qua* markets, though it does directly relate to hierarchical decision making bodies that are said to be “part of the market.”⁷ Unfortunately, the business literature frequently conflates the two. One blatant example of a regulator that might be mislabeled as “part of the market” is the

⁶ Much definitional work needs to be done. Public and public-private governance demand considerably greater specification than that adumbrated here. We need to understand the older forms of private governance (for instance, those processes created in the New Deal and specific to U.S. politics, or forms arising from the professions) and the newer forms to which the words “governance” and “networks” are attached. For the more recent applications see, for example (Kjaer 2004; Pierre and Peters 2000; Rhodes 1997; Slaughter 2004; Cutler 2003).

⁷ Charles E. Lindblom deftly separates the market from hierarchical organizations like corporations that participate in the market in his brief, beautifully written book, *The Market System: What It Is, How It Works and What to Make of It* (Lindblom 2001).

ethically-conflicted cartel of multinational credit-rating corporations that are deeply engaged in decision-making that, in effect, has the force of law. At the same time, they are indeed “part of the market” in that they are competing to sell various services and products, including their regulatory services, that is, credit ratings. As this example suggests, a common point of confusion in any discussion of private governance is that the organizations involved often perform more than one function. For example, they may provide services for their member-firms, lobby for the industry, contract with a government, and (our topic) make binding rules that affect not only their own industry but the life chances of those outside their particular system of private governance.

Examples

Let me give you a handful of examples of private governance in action that only begin to suggest the extensiveness of these groups’ reach: Determining the credit-worthiness of corporations and governments; deciding whether pornographic web sites and internet addresses should be assigned a specific root address; affirming colleges and universities as qualified for receiving federal student aid in the U.S.; determining the eligibility of hospitals and universities for U.S. federal dollars; scoring the relative safety of investments in securities; altering the hiring practices of American private law firms; deciding how much sleep medical residents in emergency rooms must have in order to be deemed capable of treating patients in the U.S.; preventing the estimated 100 million Americans who cannot afford dental care from receiving basic treatment from trained dental hygienists; determining the minimum standards for state prisons and police

officers: These and thousands of other important decisions are made wholly or in part by private entities.⁸

Two other examples of private and public-private governance hint at some of the complexities that make governing by non-governmental entities a daunting subject for research. We are going to take a quick look at private governance and its role in forestry management. Then we will move on to a larger, multifaceted examination of public/private governance in the accounting world.

Forest Stewardship Council. Sometimes when a national government is weak, as in the case of many developing countries, private governance can accomplish what public government cannot. The Forest Stewardship Council or FSC is a private, international group that was established in 1993. The council is comprised of multiple stakeholders—including large retailers, environmentalists, forest managers, and representatives from unions—who share decision making power within the organization (Pattberg 2006, 246).⁹ The council sets “detailed standards for forest managers and enterprises along the supply chain” (247). Compliance is verified by a third-party certification process.¹⁰ *Inter alia*, these standards require signatories to conform to the

⁸ Sometimes private groups that are engaged in self-regulation, one form of private governance, have *too little* power to perform needed coordination and to require honest action on the part of its members, as in the case of North American Electric Reliability Council’s inability to prevent the failure of the electrical grid in the Midwest and Northeast in 2003 or in the case of the failure of Chemical Manufacturers Association’s Responsible Care Program to enforce a minimum level of industry standards (King and Lennox 2000; Revkin and Glantz 2003). In fact, the need for enforcement of rules is a primary reason for public-private governance, with the private entity making the rules and the governmental one having the authority to enforce them. Dieter Kerwer argues that global standard setting can be particularly effective specifically when it is enforced by public actors and when it is based on expertise (Kerwer 2005).

⁹ The concept of “stakeholder” deserves careful analysis. Who is a stakeholder? At present, the answer is in the eye of the beholder. Often the public or subgroups of the public are excluded. Increasingly, in the global realm the public is represented by surrogate, self-appointed non-governmental organizations (NGOs). The claim that an NGO can represent the public should not be taken at face value.

¹⁰ Enforcement by independent third-parties reduces the chance of the kinds of conflicts-of-interest that inhere in self-regulation.

formal agreements of the International Labor Organization (ILO) and thus provide some protections for workers. Countries that do not themselves enforce ILO safeguards find that those protections are nevertheless enforced in their territories by those corporations operating there that have signed onto the forest council's standards. As Philipp Pattberg discovered in his research, the council is "successfully bringing worker rights to people on the ground. (259).^{11, 12}

Pension Solvency. The impact of public/private governance in my second, more extended example is, arguably, much less benign, especially with regard to workers. Until relatively recently, neither government nor business was required to account in their financial statements for the cost of the future pensions and retiree health benefits that they had promised to their workers and executives. Gradually, over the past two decades, accounting standards for these future obligations have become more exacting.¹³

¹¹ At the same time, the private FSC is imposing its will on nominally sovereign nations. For more on environmental governance, see (Cashore et al. 2005; Durant et al. 2004).

¹² Cutler and colleagues ask, "... is the growth of private authority an expression of democracy—a growth in global civil society—or is it the consolidation of an untrammelled domination of capital over our increasingly globalized lives?" (Cutler et al. 1999b) (p. 20). Based on the case studies in the book, the editors conclude the latter (Cutler et al. 1999a) (p 370) .

¹³ Starting in 1987, the key FASB documents (from the FASB website at www.fasb.org) are these: FASB Statements No. 87, (issue date 1987) *Employers' Accounting for Pensions*, No. 88, *Employers' Accounting for Settlements and Curtailments of Defined Benefit Pension Plans and for Termination Benefits*, No. 106, (1990) *Employers' Accounting for Postretirement Benefits Other Than Pensions*, and No. 132 (1998) and No. 132R (Revised 2003) *Employers' Disclosures about Pensions and Other Postretirement Benefits*, No. 158 (2006) *Employers' Accounting for Defined Benefit Pension and Other Postretirement Plans—an amendment of FASB Statements No. 87, 88, 106, and 132(R)*. In February 2007, the Board issued FASB Staff Position FAS 158-1, *Conforming Amendments to the Illustrations in FASB Statements No. 87, No. 88, and No. 106 and to the Related Staff Implementation Guides*. GASB did not require disclosure of unfunded pension liabilities until 1997 in GASB Statement 27, *Accounting for Pensions by State and Local Government Employers*, and then in 1999 in GASB Statement 34, *Basic Financial Statements—and Management's Discussion and Analysis—for State and Local Governments*. The disclosure provided for delayed recognition over a 40 year period. Unfunded health care benefits were finally addressed in GASB Statement 45 (2004) *Accounting for Postemployment Benefits Other Than Pension Benefits by State and Local Governmental Employers*. Even so, GASB 45 does not require that these benefits be funded, simply accounted for as a combination of current year funding for current retirees (PAYGO) plus an amortization of future liabilities. (See Elizabeth K. Keating and Eric S. Berman, (2007) "Unfunded Public Employee Health Care Benefits and GASB No. 45," *Accounting Horizons*, September 21, 3, 245-263. Accessed December 23, 2007 at <http://www.atypon-link.com/AAA/toc/acch/21/3>)

While the repercussions of these innocent-sounding requirements continue to reverberate, it is clear that they are not mere matters of sound accounting practices. These mandates, created through public-private governance, stand accused of sounding the death knell for employer-sponsored pensions and for adding a new element of insecurity to workers' retirement years. As the Government Accountability Office reported in 2006, "the decline in traditional [defined benefit] pensions that provide income for life and their replacement with account-based defined contribution (DC) plans mean that fewer [baby] boomers will have a dependable income during retirement other than that from Social Security" ("Baby Boom Generation: Retirement of Baby Boomers Is Unlikely to Precipitate Dramatic Decline in Market Returns, but Broader Risks Threaten Retirement Security" 2006) (p. 9)

Two bodies hold the responsibility for directing how and whether future liabilities are publicly reported. One is the Government Accounting Standards Board (GASB) and the other is the Financial Accounting Standards Board (FASB). Both boards operate under the auspices of the private, non-profit Financial Accounting Foundation and by law, tradition, and state-government directive¹⁴ have been delegated the authority to develop standards for financial accounting and reporting for state and local government bodies (GASB) and the private sector (FASB).¹⁵ GASB and FASB are prime examples of public-private governance. Although FASB is a private, independent body, its

¹⁴ No single definitive law delegates authority to GASB. An example of budget guidance is provided by the County of Salina, CA in its description of its Budget Construction & Legal Requirements" in its 2007-08 Proposed Budget: "The basis of accounting utilized in this budget document is required by directive of the State Controller and Governmental Generally Accepted Accounting Principles (GAAP) and prescribed by pronouncements of the Governmental Accounting Standards Board (GASB)" p. 57 (available online at www.solanocounty.com/resources/CountyAdministrator/2007-08docs/BudgetConstructionLegalRequirements.pdf).

¹⁵ FASB determines accounting standards for both profit and not-for-profit entities.

decisions are enforced by the Securities and Exchange Commission (SEC), which is, of course, a federal regulatory agency.^{16, 17} (Such public-private governance connections are particularly prevalent in U.S. financial regulation. For example, the SEC works closely with and helps enforce rules made by as many as 25 private, but governmentally designated, self-regulatory organizations.)¹⁸

FASB, the seven-person organization that determines accounting rules for the private sector, took a significant step two decades ago in requiring that companies recognize the costs of pension promises and, five years later, in 1990 extended that concept to other post-retirement benefits such as health care and life insurance. In subsequent years, FASB has strengthened these requirements to ensure clearer, more complete measurement and recognition of such liabilities.¹⁹

¹⁶ GASB rules are not enforced by the SEC but rely on the willingness of state and local governments to comply. This acquiescence is assisted by the fact that governments float bonds to finance their operations. Private credit rating agencies, such as Fitch's, Moody's and Standard and Poor's (themselves private governance groups as well as being large multi-national corporations), based their assessment of governments' creditworthiness on the health of their financial statements and their compliance with GASB standards. For more information on the structure and work of credit rating agencies, see (Sinclair 2000).

¹⁷ The degree of openness in private standard setting varies substantially across groups. FASB's procedures follow those set out by the Administrative Procedure Act. The American National Standards Institute, the private accrediting agency for private standard-setting organizations and the official U.S. representative to the International Standards Organization, follows and mandates APA-like procedures for the organizations that they accredit. Many private groups, however, do not disclose their activities, have members-only web sites, and are generally opaque to the public. Standards-setting organizations may sell their standards as well, thus erecting a barrier to easily obtaining information.

¹⁸ These designated self-regulatory organizations are of two types, *securities exchanges and associations* (American Stock Exchange, Board of Trade of the City of Chicago, Inc., Boston Stock Exchange, CBOE Futures Exchange, LLC, Chicago Board Options Exchange, Chicago Mercantile Exchange, Chicago Stock Exchange, International Securities Exchange, Financial Industry Regulatory Authority (FINRA), the Nasdaq Stock Market, Inc., National Futures Association, National Stock Exchange, New York Stock Exchange, NYSE Arca, OneChicago LLC, Philadelphia Stock Exchange, Municipal Securities Rulemaking Board); and *clearing agencies* (the Depository Trust and Clearing Corporation (parent), the Depository Trust Company, Emerging Markets Clearing Corporation, Fixed Income Clearing Corporation, Mortgage Backed Securities Clearing Corporation, National Securities Clearing Corporation, the Options Clearing Corporation, and Stock Clearing Corporation of Philadelphia).

¹⁹ See note 13. The dates indicate when the Statements were issued. Typically, companies are given time to implement a new or amended rule, usually several years. Many, for example, instituted the 1990 regulations only in 1994.

The consequences of these decisions have been considerable. Because most companies had not been acknowledging the extent of their pension and related obligations, exposing the cost of these obligations potentially meant, cumulatively, billions of lost value on corporations' balance sheets, once the obligations were recognized, and threatened to reduce the availability of sources of needed capital for affected companies.²⁰ To minimize such threats, many businesses have opted to freeze their pension plans, to shift out of defined benefit pension plans—which guarantee a set income until death—into 401 (k) defined-contribution plans, and to reduce or eliminate retiree health benefits for some workers (Weiss 2007; Belt 2005; "On the Runway; America's Corporate Pensions" 2006). From an accounting perspective, the beauty of 401(k) plans is that the cost of the employer contribution—if any—is clear, is limited, is usually a fraction of traditional pension obligations and does not involve any sort of open-ended commitment lasting the life of the employee. At the same time, the employee loses the guarantee of a life-long income stream and the ability to enjoy a more financially secure retirement (Jaffe; Vanderhei and Copeland).

Since the first serious accounting requirements regarding private sector, pension-related liabilities were announced in 1985 and 1990, the number of defined-benefit plans has been dwindling, thus making retirement much less secure for millions of Americans

²⁰ If affected companies did not act to fund those liabilities, for-profit credit rating agencies such as Standard and Poor's could be led to reduce the ratings of the companies with huge unfunded liabilities. In turn, the cost of debt financing increases when a corporation's credit rating falls; and its stock price falls with its credit rating, thus shrinking the capital bases needed to thrive. Standard and Poor's 2005 estimate is that private sector plans are short \$140 billion, while the Director of the Pension Benefit Guarantee Corporation, Bradley Belt, put that number at \$450 billion in 2005 ("On the Runway; America's Corporate Pensions," 2006, *The Economist*, July 20); and (Belt, Bradley D, 2005, Testimony Before the Committee on Education and the Workforce, United States House of Representatives, March 2.)

("An Analysis of Frozen Defined Benefit Plans" 2005).²¹ A Goldman Sachs Group, Inc. report suggested that the more recent FASB amendment of 2003 and the one proposed (and subsequently implemented) for 2006 would "... likely further hasten the decline of the [defined benefit] pension plan' as companies seek 'to escape the potential increased volatility to financial results from their plans under rule changes'" (quoted in Burr 2005).²²

That it has taken nearly 25 years to nudge companies more fully to recognize and more visibly to report their total liabilities for pensions and retiree health care is perhaps justifiable, given the grave impact of FASB's decisions on many corporations. However, this careful approach toward businesses has not been accompanied by a standard for transparency in other areas that may be of less interest to the FASB board but that, nevertheless, deserve attention. For example, corporations can and do mask substantial increases in the pensions that they promised to executives by reducing or eliminating retiree benefits for lower-level workers (Schultz and Francis 2006). In other words, corporations can characterize reducing pensions for workers as financially necessary without revealing that they are simultaneously increasing retirement income for their executives.²³ Current accounting rules permit this misleading practice.

²¹ "The number of private-sector defined benefit plans reached a peak of 112,000 in the mid-1980s. At that time, about one-third of American workers were covered by defined benefit plans. The number of plans now stands at about 30,000.... In recent years, many employers have chosen not to adopt defined benefit plans, and others have chosen to terminate their existing defined benefit plans." (Pension Benefit Guarantee Corporation, 2005).

²² Several years of extensive discussion typically precedes announcements of new requirements. Hence, Goldman Sachs was well aware in 1995 of the likely core of the 1996 Statement. It will now take several years for companies to incorporate the new standard into their financial statements.

²³ Funds to support retiree benefits are invested and typically show gains that can be used to improve companies' balance sheets. There are no dedicated funds for most companies' retired executive compensation. Hence, even though there are many more worker retirees than executive retirees, the impact of the two sets of liabilities on financial statements is quite different for the two groups. For elaboration, see Schultz and Francis (2006).

According to a recent analysis, liability for a single executive can approach \$100 million. Eight percent of pension liabilities—ranging from \$1.1 to \$3.5 billion—at major companies like General Motors, IBM, Pfizer, Bank of America, AT&T, and Exxon Mobil are attributable to pensions for executives. Companies can hide these liabilities because FASB does not require that pay for future retired executives be reported separately from total pension obligations.²⁴

Overall, these pension accounting standards demonstrate that a set of rules that may be justifiable from a technical accounting perspective can have serious negative consequences for individuals—in this case employees and retirees—who were unaware of the rules or their origin, had no say in their creation, and had no power over their employers' response to them.²⁵ These standards also illustrate the importance of the particular values that dominate the decision-making process and that determine what matters receive attention.

Let's shift for a moment to the Government Accounting Standards Board, FASB's counterpart for state and local governmental entities. Recently, GASB decided to follow FASB's lead in requiring state and local governments to reflect in their accounts the

²⁴ Particularly surprising is the situation at carmaker GM, a company which has bemoaned the cost of its pensions, sometimes referred to as "legacy" costs, as a source of its poor performance. Its 2005 annual report stated, "Our extensive pension and [post-employment] obligations to retirees are a competitive disadvantage for us." The truth of the matter is that it has plenty of cash (\$9 billion) for workers' pensions but a liability of \$1.4 billion for pensions for executives. Still, in 2006 the company eliminated pensions for about 42,000 workers. (Schultz and Francis; GM 2006 Annual Statement). That these figures have not been reported by public corporations consistently and in one place makes the overall picture difficult to analyze. Like the tree falling in the forest (not heard), without easily accessible data, much is not seen.

²⁵ Although FASB's procedures for public comment parallel those of the Administrative Procedure Act, as this discussion demonstrates, the content is couched in arcane terms unlikely to attract the interest of average citizens despite the impact that a rule change could have on their well-being. In her discussion of global policy making, Miller notes the increasing effort of international agencies to provide information to help people understand and control such policy making at the global level (Miller 2007). Majone (1989) urges that policy analysts perform this translation role.

estimated cost of their liabilities for pensions and retiree health benefits.²⁶ In so doing, GASB has created an uproar among government officials whose tally sheets had been ignoring the financial implications of the promises that they and their predecessors have made to school teachers, firefighters, police officers, sanitation workers and the like (Walsh 2007b).²⁷ And, GASB's new rule jolted taxpayers who had no idea that sufficient funds were not being set aside to make good on those pensions (Walsh 2007a).²⁸

If broader public interests had been taken fully into consideration 25 years ago when the first serious accounting standards were being handed down, public and private employers could have been encouraged to fully fund their pension obligations and to exercise their fiduciary role by investing pension monies only in sound instruments (Walsh 2004). Instead, fiscal officers of state and local governments at that time chose to establish their own organization, GASB, separate from FASB and virtually to ignore the problem for two decades. FASB, on the other hand, began to grapple with inadequate

²⁶ See note 13.

²⁷ The revolt against GASB is not limited to the retiree health benefits rule. A year ago (December 2006), unhappy that GASB was extending its accounting standard mandate into the politics of governmental effectiveness, the Government Finance Officers Association denounced GASB as unneeded. The officers declared that GASB could be disbanded and that they could instead follow the same rules as the private sector. (See Mary Williams Walsh, "Auditing Rule Is Put at Risk by Texas Bill," NYT, May 18, 2007.)

²⁸ This shortfall stems not only from the near impossibility of estimating health care costs in the future but also from inadequate or nonexistent accounting for future liabilities. According to one news report, Jon Corzine, governor of New Jersey, is allocating more money for health care as four previous administrations put together. Still, New Jersey has a shortfall of \$58 billion. Taking the opposite tack as New Jersey, Texas at first refused to accept the reporting change and then simply decided not to require its local governments to adopt it. Estimates by responsible parties for the costs of retiree health care vary significantly. For example, the actuarial firm for Travis County, TX, estimated a cost of \$89 million to pay future benefits, whereas a separate projection by a leading accounting firm, Deloitte, totaled \$320 million, almost three times as much. As one *The New York Times* reporter noted, "If other governments follow the lead of Texas, it will be nearly impossible for taxpayers, bondholders or anyone else to know how much those governments will be spending on retiree health care in the coming years." (Mary Williams Walsh, "Auditing Rule Is Put at Risk by Texas Bill," NYT, May 18, 2007). At the same time, financial projections, especially to distant out-years and especially for highly variable costs such as health care, are notoriously inaccurate.

recognition of pension-related liabilities in 1985, but as of 2007 had not completed the task of clear reporting and recognition of future liabilities of private firms.

Under current accounting rules, companies are free to choose volatile securities and risky, nearly incomprehensible investments like collateralized debt obligations and special investment vehicles—both products and victims of the sub-prime mortgage debacle (Evans 2007).^{29, 30} When such investments rise in stated value, companies legally can use their paper gains in pension fund investments to post profits for themselves and improve their bottom lines (Coronado and Sharpe 2003). When risky investments turn sour, companies are free to reduce or abandon pension plans altogether, claiming that they are too expensive. Alternatively, they can dump their obligations onto the government-sponsored and taxpayer-backed Pension Benefit Guaranty Corporation (PBGC).^{31, 32}

Similarly, many state and local governments have operated in a fiscally irresponsible manner, unrestrained by accounting rules. For example, one analysis of the situation reported the following, almost comical, case:

²⁹ Florida was particularly hard hit by such investments with at least two funds (the state teachers pension fund and the Local Government Investment Pool—which was frozen and unavailable to local governments that are in dire need of those funds). The teachers fund held \$1 billion in “the same degraded and defaulted debt that sparked a run on a state investment pool for local governments and led officials to freeze withdrawals”(Evans 2007).

³⁰ The PBGC covers only large private sector corporations that, in turn, are taxed to support the PBGC’s operations. However, despite recent legislation to increase those corporate fees, PBGC is in arrears to the tune of \$14 to \$23 billion (for which taxpayers are liable), as its revenues can not keep up with the increasing number of pension plans that the agency is called on to fund. The estimate on the amount of underfunding depends on the interest rate used (“CCH® PENSION AND BENEFITS; Estimates of PBGC underfunding are exaggerated, economic consulting firm says” 2005).

³¹ PBGC may pay retired workers at a much lower rate than originally promised by their employing companies.

³² See Burr’s (2005) discussion of the 2004 FASB amendment that ratcheted up pension liability reporting. Options for companies would be, he suggested, to drop their defined benefit plans or “Pension plans might shift asset allocations to high-quality fixed income from equities to avoid volatility.” This second option would mean less risk and lower rates of return. Another consequence is that the incentive for companies to show paper profits on their balance sheets from their pension plan investments would be eliminated.

In 2005, New Jersey put either \$551 million, \$56 million or nothing into its pension fund for teachers. All three figures appeared in various state documents -- though the state now says that the actual amount was zero.

The phantom contribution is just one indication that New Jersey has been diverting billions of dollars from its pension fund for state and local workers into other government purposes over the last 15 years, using a variety of unorthodox transactions authorized by the Legislature and by governors from both political parties (Walsh 2007c).

The trouble began in the mid-1990s when New Jersey Governor Christie Todd Whitman discovered that she could pay for popular tax cuts by floating bonds rather than making the state's normal contribution to its pension fund. The state legislature was happy to go along with such fiscal ploys, which cumulatively have led to the estimated \$58 billion deficit in post-retirement funding that New Jersey is now facing (Walsh 2007c).³³

What should be clear from these accounting sagas is, first, the public importance of the decisions made by bodies that are nominally private; and, second, the substantive nature of the standards that sound merely like technical bookkeeping rules. Although political science has generally ignored the important political nature of accounting standards, three accounting scholars, uncharacteristically for this field, have studied the rulemaking from a political perspective. "Accounting standard setting could be reorganized," they suggest, "in a way that would call attention to its immutable political nature. Such an alteration would recognize the indeterminacy of "good accounting", the

³³ Consider the contrast between two pension funds for government workers in Texas. One, covering the state's teachers, is now about \$8 billion short of what it owes current and future retirees, and is projected to be \$13 billion short by next August. It is expected to seek a state bailout. The other fund, for municipal workers, is based just three blocks away in Austin, but could not be more different. This fund can readily pay promised benefits to the retirees of some 800 participating cities and towns in Texas, and doesn't need any extra help from taxpayers (Walsh 2007b).

distributive consequences of accounting and the lack of correspondence between desired standard setting and an undisputable economic reality” (Fogarty et al. 1994) [p. 8].

These two examples in accounting rules and voluntary standard setting by the forestry council are indicative of the fertile field that awaits cultivation by political scientists. In the accounting example, what appears to be a matter of expertise is, in fact, equally a matter of making normative choices with gigantic ripple effects.³⁴ Indeed, the application of what seems to be technical expertise may reflect a particular occupational or societal point of view as much as or more than it reflects the result of applying some neutral technique that the word “expertise” seems to connote.³⁵ And, as the forestry example shows, even seemingly admirable private initiatives that supplement or undercut the prerogatives of nations may be double edged, as private power is only accountable to itself (McConnell 1966).³⁶ Before moving on, perhaps a disclaimer is in order.

To suggest that private governance should be understood and studied by political scientists is not to argue that government necessarily should perform the functions of private governing institutions or that such institutions do not sometimes have distinct advantages over government. Private groups and deterritorialized networks may be able to act more flexibly, be better equipped to make technical decisions in a timely manner,

³⁴ It might be noted that even private groups that try to be inclusive typically do so by identifying the “stakeholders” involved. The wider public is rarely, if ever, considered to be a stakeholder, even though some private decision making bodies like FASB nominally include a designated “public member.” This concept would benefit greatly from a clear specification of what constitutes a stakeholder and, in the case of public members, who exactly is being represented, what constitutes the public, and how the representative knows how to vote on specific issues in order to represent that public.

³⁵ For a useful discussion of the role of technical expertise in policy making, see Majone (1989).

³⁶ For two excellent analyses of the concept of “accountability,” as it might be applied to private governance, see (Bovens 2008; Mashaw 2005). As Howard Palley noted in a personal communication, the central issue in private governance is that of accountability: whether decision makers are held accountable for their actions and for what and to whom they are held accountable. This issue is closely related to that of “stakeholders.” For two useful discussions of accountability under contemporary conditions, see (Behn 2001; Minow 2003). The *Harvard Law Review* issue in which the Minow piece appears is helpful in this regard as well (Moore 2003).

forestall more cumbersome government regulation, more directly engage those affected by policy making and spare taxpayers by not asking them to fund their operations. In addition, some private groups may preexist government bodies and hence may have a prior claim to make rules, may arguably be consistent with the neoliberal tide of the times, may be necessary when government fails to act or when no government exists, and, in the case of private professional bodies, may be committed to serving public interests, though not necessarily governmental.³⁷

Regardless of its presumed strengths, private governance is a reality. As more governments become more democratic in some sense, ironically, people's lives are increasingly ruled by non-governmental bodies making government-like decisions.³⁸ But common conceptions of the meaning of "private" and the meaning of "public" interfere with even discussing private governance as a public phenomenon.

What is Public Policy? Can Private Governance Be Public?: The Problem of Language

In their introduction to *Political Innovation and Conceptual Change*, Terence Ball, James Farr and Russell L. Hanson remind readers that "[t]he limits of one's

³⁷ One or more of these points are variously made in (Cutler et al. 1999b; Engel 2001b; Freidson 2001; Hall 2002; Haufler 2001; Ostrom 1990; Porter 2005; Reinicke 1998; Sinclair 1997; Fung and Wright 2001; Hajer 2003; Hajer and Wagenaar 2003). Paul Pierson's (2004) explication of path theory is apt with regard to groups that established their rules prior to government interest or action.

³⁸ Ambiguous terms such as self-governance, private standard-setting, codes of conduct, private regulation, accreditation, hybrid governance, self-regulation, co-regulation, and private authority all capture some aspect of private governance or public-private governance. The language used to describe this sphere is not standardized. (Note that hybrid *governance*, as used, for example by Christoph Engel (Engel 2001b), is different from hybrid *institutions*, like the Pension Benefit Guarantee Corporation or the Federal Deposit Insurance Corporation or the Tennessee Valley Authority.)

language mark the limits of one's world" (Ball et al. 1989).³⁹ Nowhere is this observation truer than when the words "governmental" and "public" are treated as identical. When "public" is equated with "governmental," public policy, by definition, can cover only that policy that is made by a governmental body.⁴⁰ Under this accepted parlance, private groups cannot make public policy; only governments can. So, by this definition, private groups mainly lobby government. Even when private groups are seen as having overweening influence, they are nevertheless conceived as separate from government and as performing a different task from that of government (Lowi 1979). Or, that is what our limited, standard language would lead us to believe.

Political scientists sometimes focus on what is called "privatization" or the role of various groups in carrying out public policy by delivering publicly funded goods and services (Kettl 1993; Kettl 2002; Salamon 2002; Sclar 2001; Sullivan 1987).⁴¹ And political scientists readily acknowledge devices used to distance elected officials from policy making, such as independent regulatory commissions, and "quasi-governments" like the Federal Reserve or the Pension Benefit Guaranty Corporation, or partially privatized operations like AmTrak and the U.S. Postal Service (Moe 2001; Moe and Stanton 1989; Sullivan 1987; Shapiro 1997). As a result of the work of Dwight Waldo and Herbert Simon and their many successors in Public Administration, political scientists are well versed in the virtual impossibility of clearly separating administrative decisions from policy making when executing laws (Lipsky 1983; Simon 1947; Waldo

³⁹ Similarly, Ludwig Wittgenstein famously said, "The limits of my language mean the limits of my world." And Alasdair MacIntyre echoed, "To alter concepts...is to alter behavior" (MacIntyre 1966) [quoted in Ball, Farr and Hanson].

⁴⁰ In legal parlance, "public policy" is a presumed composite of laws that comprise a policy. See, for example, *Bob Jones University v. United States*, [461 U.S. 574](#) (1983).

⁴¹ Many of the same constitutional questions as well as questions of accountability, legitimacy, and representation are raised. See, for example, (Engel 2001a; Kennedy 2005).

1948). However, rarely in the world of political science does one confront the idea that private groups, as private groups, may actually *make* public policy.

Two consequences ensue from treating the words “governmental” and “public” as synonymous. First, logically, such equivalence means that private groups *cannot make* public policy. If the government does not make it, it is not public policy.⁴² Second, confusion abounds in the use of the word “public,” much to the detriment of precision and understanding. For example, public corporations are not government corporations, but are those companies publicly listed on one of the stock exchanges. When the word “public” is used, the listener must surmise what exactly the speaker intends to say. And using “public” loosely allows the speaker to engage, possibly unconsciously, in a verbal sleight of hand by moving back and forth between public in the sense of governmental and public in the sense of public but not governmental.

Of course, this designation of “public” is needed and used all the time to indicate something other than “governmental.” Indeed, a concept like “public interest” allows analysts to make the distinction between what government does and what serves the public. In distinguishing the interests of principals (e.g. citizens) from agents (e.g. public officials), agency theory helps reveal this divergence.^{43 44}

Private Authority. Claire Cutler, Virginia Haufler and Tony Porter try to grapple with this linguistic problem in a book-length study of a specific category of private groups, associations of business firms. Through the development of private authority, these

⁴² This observation is not to gainsay the importance of maintaining a distinction between public and private. After all, constitutional democracy depends on differentiating the two. However, it *is* possible for a private group to make public policy, and our language ought to be able to reflect that fact. If public policy is only that policy made by government, what claim do citizens have when public-affecting decisions are made by private groups? For a thoughtful discussion of public-private distinctions, see (Turler 1988).

⁴³ For an application of agency theory to FASB, see (Mattli and Buthe 2005).

⁴⁴ For a discussion of the need for new language in the international realm, see (Ruggie 1993).

groups make what looks very much like public policy. *Private* authority surfaces when corporations take “the lead in establishing norms, rules, and institutions that guide the behavior of the participants *and affect the opportunities available to others*” (Cutler et al. 1999b) [4, emphasis mine]. Market-oriented private groups, these scholars assert, can and do exercise authority that may be *indistinguishable* from the authority exercised by government.

Based on a series of case studies in the global arena, they conclude that private authority and public authority “merge into the public realm” (p.18). This private authority exhibits the same kind of “structuring effects” (p. 369) that governmental policy exhibits. Examples include rules for online commerce, the work of bond-rating agencies, environmental management guidelines established in conjunction with the International Standards Organization, and the creation of labor standards by clothing manufacturers. Just as we saw with the two examples of forestry management and accounting standards, the resulting policies instituted by private authority reflect the values, interests, mindset, expectations, and purposes of the private decision makers.

The value of the Cutler, Haufler and Porter study is that it defines the phenomenon of private authority, shows how private authority works at the international level, and demonstrates its equivalence in significant ways to what governments do. These researchers are less concerned than many IR scholars with the loss of sovereignty by states *per se* but more engaged in the question of the loss of influence by citizens in democratic society.⁴⁵ The questions raised by private authority are fundamental to our discipline. If Cutler, Haufler and Porter are correct, private authority, a form of private

⁴⁵ The problem, of course, is that neither constitutional protections nor mechanisms of accountability to a broader public exist within schemes of private authority. Only the state can provide these.

governance, can be public in many respects, most notably in its impact on people excluded from the decision making and on public values possibly not even considered in the decision making.⁴⁶

What Is Public Policy? Rather than defining phenomena like private authority out of existence, we political scientists need to use language more precisely. Policy made by a governmental body should be called “policy made by a governmental body” or, more simply, “government policy.” The phrase “public policy” should be reserved for a broader category, one capacious enough to capture the relevant instances of both private and public-private governance, in addition to actual government decisions.⁴⁷

A number of scholars have tried to untie these knotty language problems by suggesting that political scientists study “governance” rather than “government.” This solution is particularly popular among IR scholars (Held and Koenig-Archibugi 2003; Kjaer 2004; Nye and Donahue 2000; Reinicke 1998; Rosenau and Czempiel 1992; Slaughter 2004a; Wilkinson 2002) and those who study new public management, privatization, devolution and the like (Goldsmith and Eggers 2004; Haque 2001; Pierre and Peters 2000; Bache and Flinders 2004; Baker et al. 2005; Bulmer 2002). The problem with this solution is that it seems to have no bounds. Within political science, we have no clear consensus as to what constitutes governance: What is included? What is excluded? How do we know it when we see it? Generically, governance can apply to virtually anything: a club, a subchapter S corporation, one aspect of a larger process,

⁴⁶ See also Hall and Biersteker (2002).

⁴⁷ Accepting this assertion constitutes only a first step in recasting our understanding of public policy. Conceptualizing and operationalizing “significant public impact” and then deciding who should have a say in such decisions and how they should have a say would have to follow. In a private communication, Sue Tolleson-Rinehart has insightfully suggested that how matters get defined as a public good rather than a private one is a significant and related matter, as she has recently argued elsewhere in the context of health care. See Tolleson-Rinehart et al. (n.d.).

Roberts Rules of Order or many, many other possibilities, even though this inclusive understanding of “governance” is not what most PA and IR scholars intend.⁴⁸ The word “governance” is insufficiently precise. Everyone is left to guess what “governance” includes and what it does not.⁴⁹

One reason that IR specialists caught on to policy making beyond government much more quickly than other political scientists is that there is very little formal government or binding law at the international level. Globalization increases the need to solve collective action problems. Hence, governance-without-government has been growing rapidly at the international level.^{50, 51} As the marketplace has become global, multinational corporations in particular have improvised to solve collective problems.⁵² With the increasing degree of interdependence of people and enterprises, government

⁴⁸ Even though “governance” is a nebulous word, IR scholars, in particular, are well aware of the word’s imprecision. One way of conceiving governance is expressed by Ernst-Otto Czempiel: “I understand governance to mean the capacity to get things done without the legal competence to demand that they be done. Where governments, in the Eastonian sense, can allocate values authoritatively, governance can distribute them in a way which is not authoritative but equally effective. Governments exercise rule, governance uses power”(1992, 250).

⁴⁹ This complaint applies as well to my inchoate description of private governance.

⁵⁰ Governance-without-government refers specifically to a lack of an international government, not to the absence of state actors. Two distinct aspects can be delineated in the “governance-without-government” idea in IR. One aspect, less studied, coincides with my topic in this lecture, private and public-private governance. The other approach focuses more on how governments manage to cooperate more or less voluntarily to solve collective problems in absence of authoritative international governing institutions that have a bureaucratic administrative apparatus and powers of enforcement. See, for example, (Drezner 2007; Keohane 1984; Nye and Donahue 2000; Rosenau and Czempiel 1992; Slaughter 2004; Young 1989, 1994).

⁵¹ The IR focus on international governance includes cooperation among states, private authority exercised by firms (Cutler, Haufler and Porter 1999), the development of public policy networks (Reinicke 1998), the influence of transnational activist groups (Keck and Sikkink 1998; Tarrow 2005), the activities of NGOs in general (Willetts 1996; Slaughter 2004), the existence of epistemic communities (Haas 1991), codes of conduct created by business and non profit organizations and others. International aspects of the corporate social responsibility movement are relevant here as well (McBarnet et al. 2007).

⁵² For example, see (Cutler 2003; Hall and Biersteker 2002; Kerwer 2005; Kjaer 2004; Murphy 2002; Pattberg 2005; Pauly 1997; Sell 2003; Slaughter 2004; Wilkinson and Hughes 2002). Susan Strange’s work in the 1990s on the growing power of multinationals vis a vis the state is useful as background in this area, though she is less interested in new forms of governance (Stopford and Strange 1991; Strange 1994, 1996, 1998).

officials, other than diplomats, and non-governmental organizations have become increasingly involved in global governance.⁵³

The phrase “self-regulation” is somewhat less inclusive and more precise than “governance.” However, in U.S. culture, self-regulation is positive phrase, not a neutral one. Groups can and should regulate themselves. Self-regulation is self-justifying. And, like the word “private,” the designation “self-regulation” predetermines who should have a right to participate and whose interests are to be considered. Yet private groups can and do regulate *others*—their available choices and opportunities—in the process of regulating themselves. But the very term “self-regulation” silences the claims of those outside the “self” of the group.⁵⁴

Conclusion: Allowing Room for Private Governance

The heart of the language problem is that the way political scientists and people in general currently use the phrase “public policy” defines out of existence much of the government-like decision making that affects the public. If, however, Harold Lasswell’s definition of politics as who gets what, when and how (Lasswell 1990 (1935)) is correct, certainly private and public-private governance should be covered.

⁵³ Here I am not referring to diplomats and representatives of heads of state but officials in different departments and agencies who enter into negotiations with their national counterparts and other players to set global, norms, rules and standards. Who or what these officials are representing deserves careful study. An apt example here are the national “representatives” to the Bank for International Settlements (BIS), which originally was established to oversee WWI reparations and in 1930 developed its role as coordinator of the activities of central banks, may be evolving into the world’s regulator of these institutions, especially given the apparently dire world economic situation that the BIS itself outlines (“BIS 78th Annual Report: 2007/08” 2008).

⁵⁴ That these groups are considered part of civil society further limits the claims of outsiders to participate, to the degree that civil society operates under a different set of assumptions and rules than and is separate from government. Like self-regulation, civil society is another generally praiseworthy idea. It is widely seen as essential to democratic freedom. It constitutes one leg of a tripod consisting also of the market and government. These categories are often treated as self-defining. They are not. For a careful treatment of civil society see (Kumar 1993).

Private governance is already nudging its way into the IR curriculum. However, a cursory look at the teaching of public policy, normative political theory and American government suggests that much needs to be done. American government courses need to make room for the idea that much “government” policy is actually public-private policy and that some public policy is privately made. Students need to understand how public policy—broadly defined—is made and not simply how government makes policy.

It is important to understand the workings and implications of private governance for the polity at large. Questions of whose interests get served, who gets to make decisions, how these participants view the world and their tasks, whether conflicts of interest are built into schemes of private governance, and how a larger public is affected by privately made decisions are ones that should be of particular interest to political scientists. To the degree that the constitutional order, its protections and forms, are eclipsed by private and public-private governance, political science must pay attention.

As political scientists explore private governance, its definitional boundaries will perforce be sharpened. Most, if not all, of the questions, normative and empirical, that are raised in the discipline about government, will bear fruit when applied to private and public-private groups that make policy affecting the public. Existing theory about representation, self-government, political liberty, personal autonomy, self-regulation, civil society, legitimacy and democratic processes may be found inadequate to meet the challenges raised by private governance.⁵⁵

Yet up to now most study of private government, under rubrics like self-regulation and standard-setting, has been ceded to schools of business, economists, legal

⁵⁵ Most such theory presumes the existence of a state; under such a presumption, governance of the sort I am discussing would be illegitimate.

scholars, and sociologists.⁵⁶ The distinct perspectives, methods and values of political science are largely missing in the area of private government.⁵⁷ The missing values are those of freedom and democracy for individuals, and accountability and legitimacy of governing institutions that rule over individuals.⁵⁸ For anyone interested in democracy and the ability of people to govern themselves, as presumably political scientists are, the growing phenomenon of private governance beckons.

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⁵⁶ Some typical treatments outside political science include:

(Freidson 1988, 2001; Gilb 1966; Gupta 1983; King and Toffel 2007; Gunningham and Rees 1997).

⁵⁷ In 1980 James Q. Wilson articulated some of the distinctive values of political science, as he contrasted economic approaches with political science (Wilson 1980).

⁵⁸ In the global realm, David Held has raised exactly these questions and has attempted to offer solutions (Held and Koenig-Archibugi 2005; Kahler 2005; Held 1996; Held and Koenig-Archibugi 2003).

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