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Rent-a-Regulator: Design and Innovation in Privatized Governmental Decisionmaking

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Privatization of traditionally governmental functions, from police work to education, has been a contentious topic in recent years. Popular debates treating the decision as all-or-nothing overlook the plethora of extant models of privatization that depart from the familiar paradigms of contracting out or selling assets entirely. This Comment examines one such under-the-radar model in the context of environmental regulation, both to highlight an approach that deserves attention and to show the connection between an initiative's design and its results. The model, which this Comment nicknames "rent-a-regulator," transfers regulatory decisionmaking to licensed professionals who directly serve regulated "clients." Rather than contracting out regulatory functions or privatizing them entirely, the government licenses professionals, just as it would doctors or plumbers, to make compliance decisions. A case study of Massachusetts' program reveals systematic regulatory violations in this system. At the same time, it suggests that the program's failings are likely due to specific structural shortcomings, such that the program might be redesigned rather than abandoned. Careful attention to design and structure thus helps establish middle ground between privatization supporters and opponents. Refining existing privatization strategies may provide the most promising way forward.

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INTRODUCTION

Privatization of traditionally public functions has emerged in recent decades as an irrepressible facet of modern governance. Public police

forces contract out their own duties to private actors¹ and are supplemented by a wide array of private security firms.² For-profit, private companies manage prisons and make decisions about inmates' living conditions.³ Recently, public outrage resulted from the planned transfer of management of six major United States ports to a private Dubai-based company⁴ and drew attention to the prominent role that foreign, private companies play in the management of domestic ports.⁵ Even the American military relies on private actors to carry out its mission—not merely to staff cafeterias and delivery trucks, but also to participate in armed conflict and interrogate prisoners.⁶

In these contexts and others, significant debate has contested the *reach* of privatization: Which tasks are appropriate for private control, and which are inherently governmental?⁷ Debunking the traditional

1. See, e.g., Heidi Boghosian, *Applying Restraints to Private Police*, 70 MO. L. REV. 177, 191 (2005).

2. See David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

3. See, e.g., Sharon Dolovich, *Legitimate Punishment in Liberal Democracy*, 7 BUFF. CRIM. L. REV. 307, 433–34 (2004).

4. See David E. Sanger, *Under Pressure, Dubai Company Drops Port Deal*, N.Y. TIMES, Mar. 16, 2006 (describing that after an “unrelenting bipartisan attack,” a Dubai company that had obtained management authority over six major American ports through a \$6.8 billion deal would transfer the leases to an American company); see also Jan Ellen Spiegel, *Who Is Minding the State's Ports?*, N.Y. TIMES, Mar. 5, 2006 (explaining that a private Canadian company and a subsidiary partly owned by Saudi Arabia's national oil company own and operate not only major ports around New York, but also storage tanks within the United States' Strategic Petroleum Reserve).

5. See David E. Sanger, *Big Problem, Deal or Not*, N.Y. TIMES, Feb. 23, 2006, at A1 (“Foreign management of American ports is nothing new, as the role already played by companies from China, Singapore, Japan, Taiwan, and trading partners in Europe attests.”).

6. See PETER W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY 88–100 (2003); Martha Minow, *Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy*, 46 B.C. L. REV. 989 (2005) [hereinafter Minow, *Outsourcing Power*]; Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems With Privatizing War*, 82 WASH. U. L.Q. 1001, 1004–05 (2004).

7. At the federal level, the Office of Management and Budget defines “inherently governmental” as those activities which “require the exercise of substantial discretion in applying government authority and/or in making decisions for the government.” OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-76, PERFORMANCE OF COMMERCIAL ACTIVITIES, at A-2 (May 29, 2003); see also L. ELAINE HALCHIN, CIRCULAR A-76 REVISION 2003: SELECTED ISSUES, at 5–6 (Jan. 7, 2005), available at http://www.opencrs.com/rpts/RL32017_20050107.pdf. In 2002, the Comptroller General stated that “warfighting, judicial, enforcement, regulatory, and policymaking functions” fall within the inherently governmental category. Minow, *Outsourcing Power*, *supra* note 6, at 1015 (quoting DAVID M. WALKER, COMMERCIAL ACTIVITIES PANEL: IMPROVING THE SOURCING OF THE FEDERAL GOVERNMENT, at 21 (2002), available at <http://www.gao.gov/new.items/d02847t.pdf>). Although the Office of Management and Budget's definition does not bind state governments, the duty to govern implicated by A-76 also exists at the state level. See also, e.g., Steven J. Kelman, *Contracting, in THE TOOLS OF GOVERNMENT: A GUIDE TO THE NEW GOVERNANCE* 282, 307 (Lester M. Salamon ed., 2002) (arguing that “certain activities are regarded as

metaphor that the government steers and merely enlists private actors to row,⁸ scholars have noted that privatization tends to entail delegation of substantial policymaking authority to private actors.⁹ For many, such transfers of authority go too far, raising significant democracy concerns. The ensuing conversations tend to focus on issues of democratic legitimacy, accountability, and constitutionality.¹⁰ These democracy concerns are logically heightened when government entrusts private actors with regulatory functions such as standard setting, adjudicative decisionmaking, or enforcement.¹¹

However, saying that privatization has reached too far into policymaking—or defending such a reach—presumes an unrealistic sameness among privatization initiatives. Indeed, critiquing the extent of privatization slights the antecedent question of what functions and operations privatization comprises. Scholars have recognized this as a theoretical matter, exposing the oversimplification of both privatization's nomenclature and its concept.¹² Privatization, they argue, means little

'inherently governmental' because they involve making policy decisions . . . and therefore are inappropriate for contracting no matter what the other advantages of contracting might be.”).

8. See DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* 25 (1992); see also Jeff Jacoby, *Bill Weld's Revolution That Wasn't*, 6 CITY J. 49, 49 (1996) (quoting former Massachusetts Governor William Weld as promising a reinvented government in which the state would strive “to steer rather than row”).

9. See Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1395 (2003); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 636–65 (2000) [hereinafter Freeman, *Private Role*]; Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 169 (2000) (citing Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859, 863 (2000)); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L. REV. 389, 389–90 (2003); Paul Verkuil, *The Nondelegable Duty to Govern, in OUTSOURCING THE U.S.* (Jody Freeman & Martha Minow eds., forthcoming 2007).

10. See, e.g., Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003) [hereinafter Minow, *New Religion*] (urging increased accountability in privatization initiatives); Minow, *Outsourcing Power*, *supra* note 6; Metzger, *supra* note 9 (suggesting constitutional mechanisms for holding private actors accountable); Verkuil, *supra* note 9 (arguing for constitutional limitations on privatization); Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165 (1989); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 659–63 (arguing that due process limitations provide the best constitutional test for evaluating delegations to private parties).

11. See Lawrence, *supra* note 10, at 659 (defining regulatory activities based on their coercive nature); Metzger, *supra* note 9, at 1397 (“When private regulators determine the content and enforcement of standards governing a field of activity, their decisions similarly represent government power in the form of nonconsensual exercises of authority over others.”).

12. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1286–87, 1286 n.6 (2003) [hereinafter Freeman, *Extending Public Law Norms*]; cf. Jody Freeman & Daniel A. Farber, *Modular Environmental Regulation*, 54 DUKE L.J. 795, 799 (2005) (describing, in the context of environmental regulation, that tools and governance structures “can be built, unbuilt, and rebuilt,” in a process of “configuring and reconfiguring the

without information on the tools, strategies, and personnel a particular program deploys.¹³ If this is true, the ideological divide between pro- and anti-privatization camps is likely overblown.¹⁴ The combination and organization of component parts, not merely public or private packaging, must influence evaluations of privatization decisions.¹⁵

Pursuing this argument requires adding greater specificity to existing dialogues. Examining specific privatization initiatives deflects and refocuses overbroad denunciations or praise of privatization itself.¹⁶ Yet aside from plain-vanilla contracting out, the various privatization configurations and nonparadigmatic design options remain largely uncharted territory for analysis.¹⁷

This Comment seeks to examine one such under-the-radar model, both to put another variation of privatization on the table for discussion and to show that the design of a privatization initiative may determine the initiative's success or failure. The model, which I nickname "rent-a-regulator," transfers regulatory decisionmaking to licensed professionals who directly serve regulated "clients." Rather than contracting out regulatory functions or privatizing them entirely, the government licenses professionals, just as it would doctors or plumbers, to make compliance decisions pertaining to regulated parties—their paying customers.

Recent efforts in the governance of hazardous waste remediation provide a revealing case study of the rent-a-regulator model. Hazardous

component parts of the regulatory system, and deploying the actors operating within it, without necessarily replacing existing structures with something wholly new.”).

13. See Freeman, *Extending Public Law Norms*, *supra* note 12, at 1286 (“[T]here is nothing inevitable about the shape privatization might take: it is an artifact.”).

14. See *id.* at 1290.

15. See JOHN D. DONAHUE, *THE PRIVATIZATION DECISION* (1989), for a seminal and thorough treatment of privatization decisions.

16. Compare OSBORNE & GAEBLER, *supra* note 8, at 45–48, and Jacoby, *supra* note 8, with AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES (AFSCME), *GOVERNMENT FOR SALE: AN EXAMINATION OF THE CONTRACTING OUT OF STATE AND LOCAL GOVERNMENT SERVICES* (8th ed. undated), available at <http://www.afscme.org/docs/GovernmentSale.pdf> (last visited Oct. 30, 2006) (“After decades of state and local government experiments with contracting out, the benefits of private delivery of public services have proven to be elusive. And now more than ever, when government is the front line in homeland security, the nation understands the importance of an experienced, dedicated public-sector workforce and the dangers of privatization.”), and *id.* (“Contracting out often results in higher costs, poorer service, increased opportunities for corruption and diminished government flexibility, control and accountability.”), and Ill. Educ. Ass’n, *Issues*, <http://www.ieanea.org/page15415036.aspx> (last visited Oct. 30, 2006) (“In spite of everything you do, public officials may still decide to privatize public services. When that happens, you need to fight back on every front.”). Although less dogmatic, Elliot Sclar also provides forceful arguments against far-reaching privatization. See ELLIOT D. SCLAR, *YOU DON’T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION* (2000).

17. But see Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in *TOOLS OF GOVERNMENT*, *supra* note 7, at 1, 1–47.

waste law, and more prolifically, brownfields law,¹⁸ has increasingly embraced privatization as part of a shift away from heavy-handed, command-and-control regulation.¹⁹ New elements of privatization are part of the innovative regulatory patchwork of voluntary cleanup programs, financial incentives, and liability relief states have woven to address the hundreds of thousands of contaminated properties that perpetuate blight across the country.²⁰

The rigid, lengthy process of state-administered hazardous waste cleanups—in which a regulated party must apply for state permitting and approval through multiple phases of remediation—is among the vestiges of traditional regulation that is giving way. Resonant with privatization in other contexts²¹ and with the philosophy that an entrepreneurial state government “understands that sometimes the most helpful thing to do is to get out of the way,”²² at least six states have aimed to increase expediency, predictability, and flexibility of environmental cleanups by entrusting private professionals with oversight and approval of remediation efforts.²³ Although agencies have long enlisted private actors to carry out environmental protection functions,²⁴ the recent initiatives

18. The Environmental Protection Agency (EPA) defines brownfields as “real property, the expansion, redevelopment, or reuse of which may be complicated by the presence or potential presence of a hazardous substance, pollutant, or contaminant.” EPA, Brownfields Cleanup and Redevelopment, <http://www.epa.gov/swerosps/bf/index.html> (last visited Oct. 4, 2006). Brownfields law and policy encompasses the economic and environmental benefits and challenges that come from redeveloping contaminated properties rather than merely remediating them.

19. See Kris Wernstedt, *A Broader View of Brownfield Revitalization*, in NEW APPROACHES TO ENERGY AND THE ENVIRONMENT: POLICY ADVICE FOR THE PRESIDENT 82, 82 (Richard D. Morgenstern & Paul R. Portney eds., 2004) (noting that estimates of the number of brownfield sites in the nation range from 130,000 to one million).

20. See *id.* at 82–85.

21. See Minow, *New Religion*, *supra* note 10, at 1242–43 (2003) (describing the failures of public schools, prisons, and social services).

22. Jacoby, *supra* note 8, at 49 (quoting Governor William Weld, Inaugural Address (Jan. 4, 1991)).

23. In addition to Massachusetts’ Licensed Site Professional program, see ARIZ. REV. STAT. ANN. § 49-153 (1997) (Arizona’s Greenfields Pilot Program, repealed effective 2008); CONN. GEN. STAT. ANN. § 22a-133v (1995) (Connecticut’s Licensed Site Professional Program); New Jersey Cleanup Star Program Guidance Document, *available at* http://www.state.nj.us/dep/srp/cleanupstar/cstar_guidance.pdf (New Jersey “Cleanup Star” program, created as agency policy); 15A N.C. ADMIN. CODE 13C.0300 (North Carolina “registered environmental consultant” program); OHIO REV. CODE ANN. § 3745.03 (1996) (Ohio’s “certified professionals” in its Voluntary Action Program). Other states certify licensed professionals to perform more minimal functions and require state approval before action is taken. See Heidi Gorovitz Robertson, *Legislative Innovation in State Brownfields Redevelopment Programs*, 16 J. ENVTL. L. & LITIG. 1, 62–63 (2001) (describing cleanup programs in Colorado, Delaware, Kansas, Maine, and Missouri).

24. See DONALD F. KETTL, *SHARING POWER: PUBLIC GOVERNANCE AND PRIVATE MARKETS* 99–129 (1993) (describing use of EPA contractors) [hereinafter KETTL, *SHARING POWER*]. In addition, the federal EPA now requires a landowner to retain a private consultant as part of the due diligence required to qualify as an innocent purchaser under the “all appropriate

step boldly beyond the familiar service delivery model. The privatization initiative in Massachusetts was the first and remains the prototype: state law requires regulated entities to hire private consultants—licensed site professionals (LSPs)²⁵—and receive their approval before mandatory remediation can be considered complete. There is no option for state oversight. Except at the minority of sites that the state audits, the LSPs make the final decision whether the investigation and remedy comport with the best practices embraced by the regulations' broad standards. Unlike typical regulators, however, LSPs often design and carry out a cleanup in addition to approving it. And unlike most private delegates, LSPs are not government contractors; once licensed, they are selected and hired by regulated parties. Free of a government contract and seeking to edge out competitors, LSPs strive to represent the best interests of their regulated clients and minimize the cost of cleanups while performing their regulatory function.

Ascertaining the impact of the LSP program's design on its performance requires a metric by which to measure performance. To focus on the inherent tendencies of a given structure without passing judgment on policy ends, this Comment evaluates privatization initiatives on their own terms. Have private actors done what the government asked?²⁶ In the LSP program, regulatory compliance decisions are the relevant task; performance requires "regulatory adherence," faithful upholding of both the letter of the regulations and the government's understanding of them.²⁷ This means that, despite economic incentives and client demands to cut corners, LSPs must design, perform, and approve cleanups that fully comply with the regulations. The adherence criterion is substance-neutral: it would mandate enforcing regulations that required the LSP to pollute as much as those that require them to remediate. Indeed, the adherence criterion is based in contract

inquiries" provision of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). See EPA Rules and Regulations, 70 Fed. Reg. 66,070 (Nov. 1, 2005) (codified at 40 C.F.R. pt. 312).

25. Different states have different names for the licensed professionals who oversee cleanups. For example, in Massachusetts there are Licensed Site Professionals (LSPs); in Connecticut there are Licensed Environmental Professionals (LEPs); in North Carolina there are Registered Environmental Consultant (RECs) and Registered Site Managers (RSMs); in Ohio there are Licensed Consultants (LCs); and in New Jersey there are Cleanup Stars. To avoid generalizing, I focus on the Massachusetts program and use the term "LSP" throughout this Comment.

26. See Minow, *Outsourcing Power*, *supra* note 6, at 1001 (asking, "[d]o contractors do what they are asked to do—and not do what they are not asked to do?"). The question is slightly more nuanced where, as here, the private decisionmakers are not actually contractors—but the concept of an agent's execution of a principal's goals remains the same.

27. See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 144 (2002) (arguing that public values must be upheld even when government contracts out services).

obligations, not on democratic principles. For instance, if LSPs had pledged to violate the regulations and had instead upheld them, they would not have executed adherence.

Examining the state agency's audits of LSPs' work²⁸ reveals widespread "regulatory slippage"—a failure to take regulatory action or a decision to take action less rigorous than promulgated requirements require.²⁹ The audits indicate that LSPs routinely permit—or execute—deviations from state regulations governing hazardous waste site cleanups, sometimes creating serious risks to human health and the environment.³⁰ Of course, slippage can occur in public agencies too,³¹ and the availability of data on private, but not public slippage,³² creates the risk of drawing unfounded comparative conclusions. Still, when slippage becomes a systematic, built-in tendency with little prospect of being redressed, a model fails on its own terms.

Here, it is worth emphasizing what this Comment does *not* attempt. It does not seek to evaluate the costs, benefits, and overall prudence of the LSP program. Indeed, it does not take up the weighty question of whether the program's comparative expedience, flexibility, and productivity—the program is widely praised for enabling the cleanup of thousands more sites per year—sufficiently offset the decreases in regulatory adherence. This Comment also does not take issue with potential, incommensurable effects of the privatized program, such as the potential for government's withdrawal from hazardous waste decisionmaking to express diminishment of environmental protection as a public value,³³ or the political implications of privatizing functions that may be "inherently governmental."³⁴ For purposes of this analysis, such results are merely interesting second-order effects worthy of further study.

Similarly, this Comment does not suggest that regulatory slippage necessarily warrants a return to publicly administered decisionmaking.

28. See Memorandum from Mass. Dep't of Env'tl. Prot. to author on DEP's Privatized Waste Site Cleanup Program (Oct. 18, 2005) (on file with author) [hereinafter DEP Memorandum] (compiling audit results). See *infra* Part I.D for a discussion of the audit results.

29. See Daniel A. Farber, *Taking Slippage Seriously: Noncompliance and Creative Compliance in Environmental Law*, 23 HARV. ENVTL. L. REV. 297, 301–11 (1999) (defining positive and negative slippage).

30. See DEP Memorandum, *supra* note 28, at 6–8.

31. See Farber, *supra* note 29, at 301–04.

32. Massachusetts DEP does not audit the cleanups it administers itself.

33. See Minow, *New Religion*, *supra* note 10, at 1246–48 (cautioning that privatization may dilute public values). A similar argument is that if privatizing environmental regulation grants discretion to the private decisionmaker, it could obstruct the formation of a continuous set of environmental standards and values across communities. *Cf. id.* at 1253 (warning that privatization in schooling may lead to a set of "disparate activities" lacking "common purpose" and thus frustrating "shared goals").

34. See *supra* text accompanying note 7.

Even if data existed indicating that the public provision produced less slippage,³⁵ designing and redesigning privatization initiatives may be a superior response—and a more practical one.³⁶ Based on budgetary constraints alone, the notion that a state agency could be the sole provider of all of the functions associated with environmental regulation seems impractical if not quaint.³⁷ Currently, public coffers cannot cover all regulatory services, and even states with public hazardous waste oversight utilize a pay-to-play model.³⁸

Careful attention to design issues provides insights into ways to rehabilitate failing privatization programs rather than pursuing impractical, all-or-nothing solutions. The LSP experience suggests that the overarching factor in designing programs that entail private regulatory decisionmaking is the alignment of interests between government principals and their private agents. Thus, the overriding issues are structural rather than procedural; the primary need is not to *do* things differently, but rather to design relationships, incentives and communications that create “a shared understanding of common values and goals.”³⁹ Two main structural pitfalls may impede achievement of this goal. First, conflicts of interest—both within workplaces and with respect to clients—may prompt private regulators to cut corners. Second, a dearth of management procedures and avenues for discipline may prevent detection and remedy of malpractice and, in turn, fail to incentivize good behavior. Each of these factors individually could be

35. Other than the good-faith suppositions of agency staff, no such data exists. See *infra* Part I.D.

36. See Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321, 339 (2004) (stating that in the “real-world context,” “the question is not whether contractors perform regulatory, war-fighting, or law enforcement functions,” but instead how to determine the legitimacy of such contracting).

37. In the Massachusetts program, for example, the estimated DEP staffing requirement for the publicly administered program was 519 full-time equivalent (FTE) staff, compared to 324 for the privatized program. The actual staffing as of September 2005 was 165. See Robert W. Gollodge, *Effective Regulation in Lean Times: A State View*, 35 NO. 5 ABA TRENDS 2, 2 (2004), for a candid discussion by the DEP Commissioner of the pressure imposed by depleted agency resources. See also Freeman, *Extending Public Law Norms*, *supra* note 12, at 1295–1301, 1317 (describing agencies as “already frequently underfunded to carry out their basic regulatory and adjudicative tasks”).

38. States use various cost recovery mechanisms, including application fees, sliding scales, or flat fees per phase, to recoup their expenditures on oversight and related costs. See Joel B. Eisen, *Brownfields of Dreams? Challenges and Limits of Voluntary Cleanup Programs and Incentives*, 1996 U. ILL. L. REV. 883, 966 n.353, for a list of states that use such cost recovery mechanisms. See also *E.I. Du Pont de Nemours & Co. v. N.J. Dep’t Env’tl. Prot. & Energy*, No. A-5349-92T5 (N.J. Super. Ct. App. Div. Aug. 1, 1995) (upholding New Jersey’s authority to recover oversight costs); E-mail from Dale Desnoyers, Dir. of Env’tl. Remediation, N.Y. Dep’t of Env’tl. Conservation (Sept. 1, 2005) (on file with author) (characterizing state cost recovery as “the polluter pays concept carried over to the brownfields arena”).

39. SCLAR, *supra* note 16, at 129.

benign; together, they threaten to transform privatized compliance decisions from a change in means to a change in substantive ends.

Privatization of hazardous waste cleanups through the rent-a-regulator model is instructive on two planes: it provides a window into a model of environmental governance that may jeopardize environmental protection by encouraging regulatory violations, and, more broadly, it demonstrates the likely connection between privatization's design and its performance. In Part I of this Comment, I explain how privatized hazardous waste decisionmaking works in Massachusetts and provide data on its performance. In Part II, I explain the rent-a-regulator model of privatization, building upon existing models of service provision versus regulation and of relationships between private regulators, the government, and regulated entities. Part III draws upon Massachusetts' LSP experience to examine the factors that affect the behavior of private decisionmakers. I suggest that regulatory provisions to limit conflicts of interest, institute procedures for screening and monitoring, and create opportunities for discipline should be focal points of future design.

I. THE MASSACHUSETTS HAZARDOUS WASTE SITE CLEANUP PROGRAM:
A PRIVATIZATION PIONEER

As a case study, the LSP program may be most instructive at a higher level of abstraction. It supports the assertion that privatization initiatives take forms beyond the classic contracting out model and exemplifies the sort of hybrid that some states are implementing. Moreover, the case study demonstrates the importance of design in a governance scheme and the likely effect of design issues on the program's achievement of its stated goals. At the same time, the program is significant in its more immediate context of state approaches to environmental protection; although only six states to date have adopted the private regulator model, others are considering it.⁴⁰ This Part provides a case study of the LSP program as a means of informing both levels of discussion.

A. The Stakes

Imagine that an entity, public or private, is building a school on an abandoned lot that contains PCBs and other toxic pollutants in the soil. Numerous decisions regarding remediation must be made, and the stakes are high. How much investigation must be done to ascertain the scope of the pollution? What models should the engineers use to extrapolate the

40. See E-mail from Dale Desnoyers, Dir. of Env'tl. Remediation, N.Y. Dep't of Env'tl. Conservation (Aug. 26, 2005) (on file with author) [hereinafter August E-mail from Desnoyers]. See *supra* note 23 for the five other states that have adopted the private regulator model.

level of risk presented? Do the pollutants need to be removed altogether, or can they safely be left in the ground? How much should factors like the cost of remediation or the expected usage of the property affect the decision? If contaminants are left in the ground, what kind of precautions—"institutional controls," in the brownfields jargon⁴¹—need to be taken at the site to prevent human exposure to the chemicals? Decisions regarding compliance with environmental regulations may proscribe inadequate remediation or permit it. The decisionmaker, therefore, is a gatekeeper of public health.

The potential for substantial public health threats has historically justified the cumbersome, elaborate nature of hazardous waste remediation regulation. In a traditional, command-and-control cleanup regime like that in New York state, the school in the above hypothetical would first notify the state Department of Environmental Conservation (DEC) and apply to enter a special program for "voluntary" site cleanups.⁴² The DEC would become involved before the school even applied to the program, convening preapplication meetings to facilitate the application process.⁴³ Once the application was complete, and after a thirty-day public comment period, the agency could approve the application and enter into a Brownfields Cleanup Agreement (BCA) with the school—a standardized document confirming the school's commitment to conduct the cleanup according to regulations and under DEC oversight.⁴⁴ Agency oversight would continue during the site investigation and remediation processes, and all work plans would require agency approval.⁴⁵ In addition, agency personnel would supervise major milestones of the remediation in the field.⁴⁶

41. See generally IMPLEMENTING INSTITUTIONAL CONTROLS AT BROWNFIELDS AND OTHER CONTAMINATED SITES (Amy L. Edwards ed., 2003) [hereinafter IMPLEMENTING INSTITUTIONAL CONTROLS].

42. The voluntary label refers to the choice to undertake development of contaminated property—brownfields—rather than uncontaminated property. The cleanup itself is not optional. See David A. Dana, *State Brownfields Programs as Laboratories of Democracy?*, 14 N.Y.U. ENVTL. L.J. 86, 107 n.2 (2005), for the definition of brownfields and "voluntary cleanup programs."

43. See N.Y. DEP'T OF ENVTL. CONSERVATION, DRAFT BROWNFIELD CLEANUP PROGRAM GUIDE 7 (2004) [hereinafter New York Draft Guide], available at <http://www.dec.state.ny.us/website/der/bcp/DraftBCPgide.pdf>.

44. See N.Y. ENVTL. CONSERV. LAW § 27-1409 (McKinney 2005); see also New York Draft Guide, *supra* note 43, at 13–14.

45. See Dale Desnoyers & Larry Schnapf, *Environmental Remediation Process Is Undergoing Sweeping Changes Mandated by New Brownfields Law*, 76 N.Y. ST. B.J. 10, 14 (2004), available at http://www.nysba.org/Content/NavigationMenu/Attorney_Resources/Bar_Journal/Bar_Journal_Archive/2004_Archive/journaloctober04desnoyers.pdf.

46. August E-mail from Desnoyers, *supra* note 40.

The state-administered process, however, can be extremely time-consuming⁴⁷—and delay has its ills.⁴⁸ Slow service can make redevelopment of contaminated properties prohibitively aggravating and expensive, especially given the time sensitivity of real estate transactions. Deals may fold due to unexpected delays. Delay may also perpetuate environmental problems; a state's incapacity to accomplish remediation impedes rehabilitation of blighted areas and prolongs exposure to dangerous chemicals in the air or drinking water. Vulnerable communities thus remain burdened by environmental injustice. Moreover, sprawl and development of greenfield properties result when urban areas cannot be redeveloped.⁴⁹

B. History

Prior to 1993, the ill effects of delay were pervasive in Massachusetts.⁵⁰ The state's command-and-control regime required that all hazardous waste site cleanups proceed pursuant to the processes set forth in Chapter 21E of the Massachusetts General Laws, the Massachusetts Oil and Hazardous Material Release and Response Act.⁵¹ Originally enacted in 1983 as a response to the nationwide public outcry against hazardous waste pollution, the original 21E program required that all hazardous waste releases, no matter how slight, follow the

47. See, e.g., Jennifer Steinhauer, *A Cleanup That's Easier Legislated Than Done*, N.Y. TIMES, Dec. 4, 2005, at B1.

48. Related to this issue, recent research addresses the gains specifically associated with property reuse, including increases in property values, wages, jobs obtained in an area, taxes generated from business activity at redeveloped sites, housing units constructed on redeveloped sites, and acres saved from "recycling" property rather than expanding into greenfields. See Kris Wernstedt, *Overview of Existing Studies on Community Impacts of Land Reuse* 6 (EPA, NCEE Working Paper Series, Paper No. 04-06, Jun. 9, 2004), available at <http://yosemite.epa.gov/ee/epa/eed.nsf/Webpages/WorkingPapersByAuthor.html> (follow "Wernstedt, Kris" hyperlink; then follow "Wernstedt, Kris: 2004-06" hyperlink).

49. Many studies discuss the economic and environmental benefits of brownfields remediation and redevelopment. See, e.g., PETER B. MEYER & H. WADE VANLANDINGHAM, RECLAMATION AND ECONOMIC GENERATION OF BROWNFIELDS 10 (E.P. Systems Group ed., 2000), available at http://www.eda.gov/ImageCache/EDAPublic/documents/pdfdocs/meyer_2epdf/v1/meyer.pdf (listing benefits including "the possibility of new employment for local residents, reduced risks from past contamination and a lower likelihood of additional pollution, increases in the tax base associated with new activities and, increased attractiveness of the community at large to other new businesses").

50. See Ned Abelson, *The Massachusetts Contingency Plan: A Privatized Waste Site Cleanup Program that Works*, Goulston & Storrs, May 12, 1999, http://www.goulstonstorr.com/uploadedFiles/Service_Areas/Environmental_Law/enviromental%20article.pdf [hereinafter Abelson, *Contingency Plan*].

51. MASS. GEN. LAWS ch. 21E, § 5 (2002).

remediation protocol dictated and supervised by the state Department of Environmental Protection (DEP).⁵²

However, DEP lacked the resources it needed to carry out the breadth and depth of its tasks under the command-and-control approach, and the agency became backlogged to the point of ineffectiveness.⁵³ Although the legislature had authorized the staff level that had been estimated for the program—519 staff positions for full implementation, not including staff for the Attorney General's office—it only provided funding for 236 positions as of 1990.⁵⁴ The state attempted to perform triage and focus attention on the most hazardous sites, but in so doing gave inadequate attention to less-contaminated sites.⁵⁵ The long wait and intense efforts required to get any attention at all was perceived as a deterrent to real estate transactions.⁵⁶ Stakeholders on all sides pressed for change. Environmentalists were upset by the paucity and sluggishness of cleanups; developers detested the impediment that DEP delays added to real estate deals.⁵⁷

This widespread dissatisfaction, combined with a rapidly dwindling program budget⁵⁸ and then-Governor William Weld's pro-privatization approach to government,⁵⁹ opened the door to reform as the program's ten-year anniversary approached. In response, DEP created a Chapter 21E Study Committee to investigate alternative programs in 1991. The Committee's work culminated in legislative amendments in 1992, followed by revisions to the Massachusetts Contingency Plan (MCP), the regulations governing response actions to contaminated sites, in 1993.⁶⁰

The new MCP was designed to improve the efficiency and navigability of the remediation process. The regulations made the program requirements clearer, by more specifically articulating steps and standards, while also more flexible, by creating criteria under which less

52. See MASS. GEN. LAWS ch. 7, § 5 (1983); see also Abelson, *Contingency Plan*, *supra* note 50 (noting that if any oil or hazardous material at all was found at a site—even one part per billion—notification of DEP was required).

53. See, e.g., Abelson, *Contingency Plan*, *supra* note 50.

54. See MASS. EXECUTIVE OFFICE OF ENVTL. AFFAIRS & DEP'T OF ENVTL. PROT., INTERIM REPORT: WASTE SITE CLEANUP PROGRAM IMPROVEMENTS AND FUNDING RECOMMENDATIONS 42 (1990) [hereinafter MASSACHUSETTS PRIVATIZATION REPORT].

55. Critics also accused DEP of giving disproportionate attention to those with political connections. See Abelson, *Contingency Plan*, *supra* note 50.

56. See *id.*

57. See *id.*

58. News Release, Boston Bar Ass'n, *Boston Bar Association Supports Chapter 21E Hazardous Waste Cleanup Amendments* (May 21, 1991) (quoting Christopher Davis, Chairman of the BBA's Hazardous Waste Committee, as saying, "Unless the bill is passed, the DEP's waste site cleanup program will run out of money and effectively cease to function as of July 1, 1991.").

59. See, e.g., SCLAR, *supra* note 16, at 29–30.

60. See Abelson, *Contingency Plan*, *supra* note 50. The MCP is codified at 310 MASS. CODE REGS. §§ 40.0000–40.1600 (2006).

than the full process would be permissible.⁶¹ The MCP also embraced a risk-based approach that matched cleanup requirements to future uses and allowed landowners, rather than the state, to set the pace of their remediation progress.⁶² At the core of the new program's efficiency was a novel change. DEP reduced its direct involvement, requiring regulated parties to hire LSPs—state-licensed, private consultants—to guide them through the steps of the new MCP and certify their compliance.

C. *Who Are LSPs?*

Whereas state authority and public participation are central facets of classic publicly administered cleanup programs, LSPs are the driving force in Massachusetts' privatized program. Regulated parties do not have the option of agency oversight; the MCP *requires* them to receive the LSP stamp of approval at all sites contaminated with reportable concentrations. Rather than consulting DEP prior to initiating remediation, parties hire an LSP of their choice to guide them through the remediation process and approve the end result. Although DEP audits 20 percent of all sites within two years of their closure and may require further action in cases of MCP violations, there is no check on LSPs' work at the other 80 percent of sites.⁶³ Because there are few opportunities for public participation, LSPs' decisions have even greater weight. Before highlighting the number and significance of LSP decisions in the remediation process, it is worth exploring who LSPs are and how regulated entities hire them.

1. *Licensing and Specialties*

LSPs are environmental professionals with expertise in hazardous waste remediation. As indicated in Figure 1, LSPs must receive a license from the state Board of Registration of Hazardous Waste Site Cleanup Professionals ("the LSP Board") before they can render official opinions.⁶⁴ Like DEP, the eleven-member LSP Board is under the

61. The new program also established a level of contamination beneath which no action is necessary. Depending on the nature and concentration of the contaminant, the party may be subject to 2-hour, 72-hour, or 120-day reporting—or no reporting at all. See 310 MASS. CODE REGS. §§ 40.0300–40.0371 (2006).

62. See Ned Abelson et al., *Massachusetts, in BROWNFIELDS: A COMPREHENSIVE GUIDE TO REDEVELOPING CONTAMINATED PROPERTY* 639 (Todd S. Davis ed., 2nd ed. 2002).

63. See MASS. GEN. LAWS ch. 21E § 3A(o) (2002). The regulations also require DEP to audit all sites subject to activity and use limitations (AULs). There is no deadline for DEP's audit of these sites. See 310 MASS. CODE REGS. § 40.1110(5).

64. See MASS. GEN. LAWS ch. 21A, § 19A (1992) (establishing the board). Upon licensing, LSPs receive a certification seal, the official mark of approval they imprint upon the paperwork of a compliant site. See 309 MASS. CODE REGS. § 6.00 (2006) (describing design and use of LSP seal).

umbrella of the Massachusetts Executive Office of Environmental Affairs (EOEA). The LSP Board is not an arm of or subordinate to DEP, although the chairman of the Board must be the DEP Commissioner or her designee.⁶⁵ To qualify for the required licensing examination, applicants must possess either a high school degree and fourteen years of total professional experience, or a bachelor of science degree and eight years of total professional experience.⁶⁶ The Board requires that LSPs follow its code of professional responsibility, codified in the Massachusetts regulations,⁶⁷ and can discipline LSPs for proven unprofessional conduct.⁶⁸

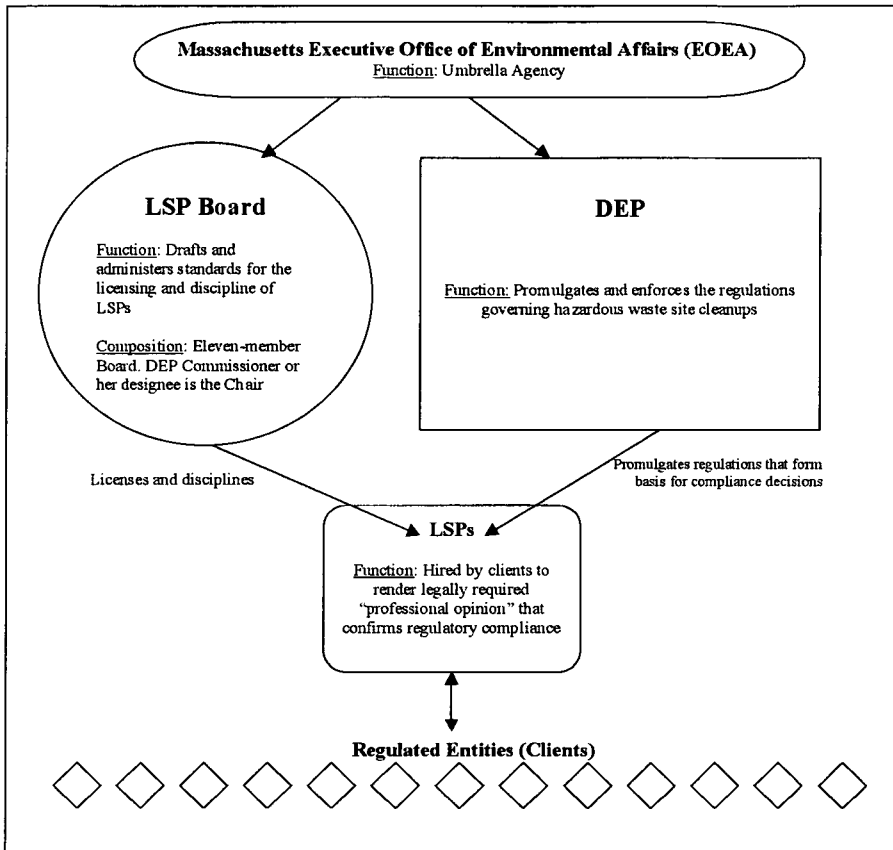


Figure 1. Organization of LSP Program

65. See MASS. GEN. LAWS ch. 21A, § 19A. The other ten Board members are the Governor's appointees and at least five are LSPs themselves. See *id.*

66. See 309 MASS. CODE REGS. § 3.02 (2006). A subset of the "total professional experience" must be "relevant professional experience," of which seven years is required for applicants without college degrees, and five years is required for those with a B.S. *Id.*

67. See *id.* §§ 4.00–4.05.

68. See *id.* §§ 7.00–7.15 (procedures governing disciplinary actions of the LSP Board).

Where can a Potentially Responsible Party (PRP)⁶⁹ find an LSP? Quite literally, they might start in the phone book,⁷⁰ where they would discover that the universe of LSPs encompasses vastly different places of employment and specialties. Some LSPs are solo practitioners. Others work for small, medium, or large consulting or environmental engineering firms. Still others are temporarily retained or permanently employed by private entities—from corporations to developers to public works departments—who may be responsible parties themselves or may do business with responsible parties. Repeat players tend to have a longstanding relationship with their preferred LSP,⁷¹ much like a company would have a preferred outside counsel.

Indeed, though many LSPs would cringe at the comparison, the relationship between PRP and LSP bears significant similarity to that between attorney and client. The LSP signs a contract with the PRP and agrees to render professional advice on the client's behalf. Correspondence between the licensed professional and client beyond the documentation of the official opinion is protected by a work product privilege.⁷² The LSP becomes an advocate for the client, defending the client's wishes to concerned third parties (such as abutters). LSPs, like lawyers, are bound by codes of professional conduct; they must ensure that "the actions undertaken . . . are within the permissible limits of the MCP."⁷³ Within those limits, however, the LSP—again like an attorney—is bound by the client's wishes and financial resources.⁷⁴ The LSP is not an "environmental crusader," and the professional opinion the LSP

69. See 310 MASS CODE REGS. § 40.0006 (2006) (defining PRP as a person who is potentially liable under the Massachusetts Oil and Hazardous Material Release and Response Act.). I use "PRP" and "regulated party" interchangeably in this Comment.

70. The Boston Yellow Pages include listings for "LSP services" under the heading of "Environmental Consultants." The LSP Board also maintains a list of LSPs who are currently in full standing. See Board of Registration of Hazardous Waste Site Cleanup Professionals, <http://www.mass.gov/lsp/> (last visited Sept. 20, 2006).

71. Indeed, Harvard University has its own LSP. See Harvard University, EH&S Issues During Design, Soil Management, <http://www.uos.harvard.edu/ehs/safety/SoilManagementIssues.pdf> (last visited Nov. 1, 2006) (describing the University's approach to potential soil contamination and noting that a specific individual "is retained as the University Licensed Site Professional and works closely with the Office of General Counsel (OGC) and the Environmental Health & Safety (EH&S) Department.").

72. See Elliot Steinberg, *President's Message*, LSPA NEWSL., May 2005, http://www.lspa.org/resources/lspa_news_db/pres_letter.php?ID=4 (citing Mass. Supp. No. 04-5570-BLS (Mar. 10, 2005)).

73. Mark Roberts, *The Accountability of Licensed Site Professionals to Clients and Third-Parties: A Pragmatic View*, at 2, LSP Continuing Legal Education Seminar (on file with author).

74. See *id.* See *infra* Part III.A., for a discussion of the conflicts of interest affecting LSPs.

delivers is not the environmental equivalent of a “Good Housekeeping Seal of Approval.”⁷⁵

2. *The Work of LSPs*

Once hired by a landowner, LSPs’ work can be grouped into two main categories: compliance decisions and supplementary work. Compliance decisions—the “professional opinions” that must be rendered at several stages in the remediation process by marking DEP forms with an official seal—are regulatory in nature. In rendering the opinions, LSPs evaluate the procedures and outcomes of the remediation in light of the broad standards set forth in the DEP-promulgated MCP. Supplementary work, by contrast, includes a wide variety of client services that any environmental consultant might offer—from strategizing to performing the physical drilling and testing itself. Often, LSPs perform both types of work simultaneously—they may investigate, design, and approve a remediation plan. Because the two types of work are conceptually distinct, however, I discuss each in turn.

a. *Professional Opinions*

Regulated entities are required to receive an LSP’s approval whenever a phase of work—as defined in the regulations—has been completed in the remediation process.⁷⁶ Although the MCP revisions were intended to clarify cleanup standards, LSPs inevitably exercise discretion at many stages in the process. Indeed, at the behest of frustrated licensed professionals, DEP changed the name of the performance standards from Best Response Action Management Approach (BRAMA) to Response Action Performance Standard (RAPS) to reflect that there is no single “best” approach.⁷⁷

At the outset, the LSP might instruct a client that her services are not necessary at all. Under the Limited Removal Actions (LRAs) provision, the 1993 MCP gives parties 120 days to address, on their own, small quantities of soil contamination that would otherwise require

75. Allan R. Fierce, *The Accountability of Licensed Site Professionals to the LSP Board*, at 1–2, LSP Continuing Legal Education Seminar (on file with author).

76. Occasions for such submittals include “any Release Notification Form, Status Report, Completion Statement, Phase V Report, Response Action Outcome Statement, Tier I Permit Application, Tier Classification Submittal, LSP Evaluation Opinion, Tier II Extension Submittal, Tier II Transfer Submittal, Periodic Review Opinion, Final Inspection Report, Construction Plan and Specifications, Operation, Maintenance and/or Monitoring Plan, Bill of Lading, Downgradient Property Status Submittal, Modification of Downgradient Property Status Submittal, or other LSP Opinion submitted to the Department pursuant to the MCP.” 310 MASS. CODE REGS. § 40.0009(1) (2006).

77. See MASS. DEP’T OF ENVTL. PROT., THE MCP: 1995 REVISIONS FACT SHEET 4 (1994) (on file with journal) (describing reasons for changes to § 40.0191).

reporting and risk assessment/remediation.⁷⁸ LRAs are regarded as “hugely popular, and done quite often.”⁷⁹

If reporting is necessary, an LSP might then certify that a cleanup is appropriate for an expedited process, known as a Preliminary Response Action (PRA), rather than the full, five-phase remediation process.⁸⁰ There are three types of PRAs: initial site investigations, usually intended to demonstrate that no further action is necessary; immediate response actions (IRAs),⁸¹ required to address imminent hazards; and release abatement measures (RAMs),⁸² designed to allow accelerated, more cost-effective procedures for simple contamination.

Of these, the RAM involves the most discretion. Although only certain remedies—for example, soil excavation of less than 1500 cubic feet—are permitted to be implemented as part of an RAM rather than a full cleanup, the risk is that LSPs will “RAM their way through the MCP”—carry out a cleanup that is inappropriate for the site, perhaps because they did only a very limited site investigation, simply to qualify for the expedited process.⁸³ Although the LSP must submit a RAM plan to DEP before moving forward, approval is presumed and no further permission is necessary to commence the action.⁸⁴

If, however, an LSP concludes that no expedited option is appropriate, the cleanup process enters a five-phased procedure, usually lasting five to seven years, with LSP approvals required at the end of each phase. Commentators compare the process to a highway with multiple exits⁸⁵ because a cleanup may not require all five phases; if at any time in

78. *See id.* § 40.0318.

79. E-mail from John Fitzgerald, Dir. of Response and Remediation, Bureau of Waste Site Cleanup, Mass. Dep’t of Env’tl. Prot. (Feb. 3, 2006) (on file with author) [hereinafter Feb. E-mail from Fitzgerald].

80. *See* Rosanna Sattler & David Y. Li, *Privatized Cleanups: Possible Solutions to Declining Confidence in an Innovative Program*, 15 ENVTL. LIABILITY, ENFORCEMENT & PENALTIES REP. 103, 105 (describing potential “short cut[s]” to site closure).

81. *See* 310 MASS. CODE REGS. § 40.0411. Depending on the extent of the contamination, additional remediation may be required once the imminent hazard is contained. *See id.* § 40.0429.

82. An RAM is invoked not because of time sensitivity, but because the remediation required is straightforward enough not to require the full, phased process. *See id.* § 40.0441(1)

Release Abatement Measures are intended to reduce risks at a disposal site and/or increase the cost effectiveness of response actions by allowing the implementation of certain accelerated remedial actions to stabilize, treat, control, minimize or eliminate releases until such time as a Response Action Outcome is achieved, as described in [310 MASS. CODE REGS. § 40.1000 (2006)], or until Comprehensive Remedial Actions can be implemented, as described in [310 MASS. CODE REGS. § 40.0800].

Id.

83. Telephone Interview with Mark Roberts, former LSP board member, McRoberts, Roberts, & Rainer, LLP (Jan. 14, 2006) [hereinafter Interview with Roberts].

84. *See* 310 MASS. CODE REGS. § 40.0443(2) (2006).

85. *See* Sattler & Li, *supra* note 80, at 105.

the process the LSP acquires sufficient data to justify that no significant risk (NSR) exists at the site, the LSP may file a Response Action Outcome (RAO) and end the cleanup process.

The first phase that the LSP must approve (Phase I) involves an assessment classifying the site into a "Tier" based on criteria specified in the regulations that correspond to point values and result in a numerical score.⁸⁶ Although the point values are fixed, the corresponding criteria may be difficult to identify, potentially leading to flawed tier classifications. A flawed tier classification could lead to a flawed cleanup. For example, if an LSP fails to recognize the proximity of groundwater, the resultant cleanup could jeopardize human health.⁸⁷ This remains true even though DEP has recently abandoned its practice of requiring agency approval of permits at the most complex or hazardous sites (Tier 1A),⁸⁸ meaning that tier classification no longer changes the basic regulatory requirements. However, a flawed assessment of the factors present at a site can skew the rest of the remediation process.

The second phase the LSP must approve (Phase II) is a scope of work plan based on a site investigation.⁸⁹ This is often the most important aspect of the entire remediation process, because the data gathered about the site at Phase II dictates the rest of the work. The LSP must ask whether an actual remedy is needed, or whether they can "risk assess their way out of it" by showing that no significant risk exists at the site.⁹⁰ For this reason, risk assessment must be exceedingly thorough. Not only does the LSP need sufficient data to ensure an NSR finding is justified, but she must also ensure that a remedy, if chosen, will address all of the contamination at the site. If an LSP does not test for certain chemicals at Phase II, she will never require remediation for those chemicals down the road.⁹¹ Moreover, the LSP must be exceedingly careful in carrying out the assessment because variations in the data and calculations can lead to vastly different outcomes. This is especially true if the LSP opts for the most complex of the three different types of risk assessment that exist. Whereas a Method 1 assessment involves a relatively simple comparison to numbers in a table, Method 3 entails a full-blown, modeled risk assessment that compiles data, develops exposure point concentrations, develops a range of exposure scenarios, and runs calculations in order to compare a hazard index and excess lifetime cancer risk number with the

86. See 310 MASS. CODE REGS. §§ 40.0500–0590.

87. Telephone Interview with Deborah Gevalt, Senior Vice President, Haley & Aldrich, Inc., and Licensed Site Professional (Jan. 13, 2006) [hereinafter Interview with Gevalt]. An improper tier classification could also deprive DEP of the fees associated with a Tier 1 site. *Id.*

88. See *infra* Part III.B.

89. See 310 MASS. CODE REGS. §§ 40.0830–0840.

90. Interview with Gevalt, *supra* note 87.

91. *Id.*

Massachusetts standard.⁹² Despite the expertise that such an assessment requires, the vast minority of LSPs—perhaps only six to ten of about 500—are trained in sophisticated risk assessment.⁹³ Many LSPs must therefore rely on the work of others by sub-contracting out the risk assessment, or must act outside their area of expertise in the most sensitive phase of the cleanup.⁹⁴

If the Phase II assessment indicates that remediation is necessary, the LSP moves to Phase III: identification, evaluation, and selection of comprehensive remedial action alternatives.⁹⁵ This involves expertise and judgment, as the regulations do not prescribe remedies or cleanup protocols, and different LSPs prefer different approaches. The LSP must decide whether the proposed remedy will fully address the contamination discovered in Phase II, but may be able to limit the remedy by finding “infeasibility”—either of achieving background contaminant concentrations or of implementing a permanent solution at all. Feasibility depends on several factors: the availability of technology; the results of a cost-benefit analysis (required to include nonpecuniary factors); the availability of experts; the availability of compliant land on which to dispose of the contamination; and the accessibility of the source of the contamination.⁹⁶

Although DEP has issued clear guidance indicating that background conditions *must* be achieved when feasible,⁹⁷ LSPs often hide from this costly requirement by claiming infeasibility even when circumstances do not support such a finding.⁹⁸ Here, they may conclude that no permanent solution is feasible and instead implement a “temporary solution,” which does not require actual remediation, but rather containment and monitoring every five years.⁹⁹ They may also conclude that a permanent solution is feasible, but that achieving background conditions is not. In that case, they resort to an “institutional control,”¹⁰⁰ known in Massachusetts as an “activity and use limitation” (AUL)—a restriction on how the site can be used in the future given that contamination will remain.¹⁰¹ With the plan approved, the LSP oversees the implementation

92. *Id.*

93. *Id.*

94. *Id.*

95. See 310 MASS. CODE REGS. §§ 40.0850–0864 (2006).

96. See *id.* § 40.0860.

97. See MASS. DEP’T OF ENVTL. PROT., CONDUCTING FEASIBILITY DETERMINATIONS UNDER THE MCP, POLICY NO. 04-160, at 7 (July 16, 2004), available at <http://www.mass.gov/dep/cleanup/04-160.pdf> [hereinafter FEASIBILITY DETERMINATIONS].

98. Interview with Gevalt, *supra* note 87.

99. See 310 MASS. CODE REGS. § 40.1050 (2006).

100. See generally IMPLEMENTING INSTITUTIONAL CONTROLS, *supra* note 41.

101. See Ned Abelson et al., *Activity and Use Limitations in Massachusetts, in* IMPLEMENTING INSTITUTIONAL CONTROLS, *supra* note 41, at 189, 189–202.

of the remediation (Phase IV) and issues yet another professional opinion.¹⁰²

Finally, the LSP must approve the Phase V operation, maintenance, or monitoring,¹⁰³ and approve the RAO indicating that work is complete. Although RAOs signify completion, not all RAOs are created equal; the differences they represent mirror the discretion that the LSP retained throughout the process. While a Class A RAO means that an LSP has made a finding of no significant risk based on a permanent solution implemented at the site—either the achievement of sufficient cleanliness to make the site appropriate for any use, or a level of cleanliness appropriate for the selected AUL—a Class B RAO means that the LSP concluded the site posed no significant risk even without remedial action. Indicative of even greater discretion, a Class C RAO means that the LSP decided upon a temporary solution, which does not require actual remediation, but rather containment and monitoring every five years.¹⁰⁴ Thus, although the RAO means cleanup is complete from a regulatory standpoint, completion does not reflect a fixed substantive result; it may be the result of numerous possible courses of action taken by the LSP.

b. LSPs' Supplementary Work

As analyzed in more depth in Part III, LSPs' duties may extend far beyond rendering professional opinions. Although LSPs only act in their official capacity when they approve and seal a document, they often perform the very work they are approving. For example, LSPs frequently design site investigations, crunch the numbers of a risk assessment, and draft work plans. They or their firms may also carry out the physical remediation, and some LSPs also provide legal or regulatory advice, acting as a point person for the entire project. At the other end of the spectrum, subject to minimum requirements for LSP involvement, LSPs may have little to do with a project until providing their opinion at the end.¹⁰⁵ For example, a development company with an on-staff LSP may

102. See 310 MASS. CODE REGS. §§ 40.0870–40.0881.

103. See *id.* §§ 40.0800–40.0897.

104. See *id.* § 40.1050.

105. See 309 MASS. CODE REGS. § 4.03 (2006) (proscribing issuance of LSP opinion if the LSP has not, at a minimum, “periodically reviewed and evaluated the performance by others” of the task in question). Providing official approval based on little to no knowledge of a site can be the basis for disciplinary action by the LSP Board. See, e.g., Maria Pinaud, *The Agency Speaks*, LSPA NEWSL., Sept. 2005, available at http://www.lspa.org/resources/lspa_news_db/article_layout.php?artID=1. Maria Pinaud describes a situation in which an LSP firm

violated the MCP by accepting, and repeating in a September 2004 RAO without adequate verification, representations by the PRP that a stockpile of contaminated soil had been properly removed and disposed of in the early 1990s. In truth, as later acknowledged by the firm and the potentially responsible party (PRP), the contaminated soil stockpile had been inappropriately spread over the site prior to the

do much of the leg-work and strategy and sub-contract an additional LSP firm to approve the work at each phase in which a submittal to the department is required.

D. Program Performance and Regulatory Slippage

The LSP program's most fundamental objective is to continue to ensure that cleanups proceed in accordance with the MCP. Phrased another way, the core, definitional purpose of the regulatory program is to provide for compliance with the regulations. DEP's own audits of LSP performance, however, indicate that LSPs systematically condone—and sometimes execute—regulatory violations.¹⁰⁶ This section provides data on the regulatory slippage within the LSP program. Because DEP does not compile and publish audit results, the data were obtained through a series of requests for information from the agency.¹⁰⁷

Two caveats are necessary. First, regulatory slippage indicates that a program has failed on its own terms, at least in part—but this Comment does not evaluate the program's net benefits and costs to weigh in on whether such slippage makes a program undesirable.¹⁰⁸ My aim instead is to identify how its structure relates to achievement of its most basic purpose. Second, identifying the slippage in the LSP program is not meant to suggest that publicly administered programs necessarily produce greater adherence.¹⁰⁹ Principal-agent problems, resource waste, and abuse of regulatory discretion could produce slippage in government bureaucracy just as in private delegations.¹¹⁰ Thus, the data below merely expose the gap between the government's aspirations for LSPs' decisionmaking and LSPs' actual performance. In Part III, I take up the

firm's involvement at the site. This fact would have been detected had the firm exercised an appropriate level of diligence in reviewing the documented site history.

Id.

106. The line between conduct that LSPs approve as part of their professional opinion, and that which they actually execute in the services they provide to clients, is often blurred. For example, if an LSP designs a sub-standard work plan and then approves it, she has both executed and condoned the violation.

107. See generally DEP Memorandum, *supra* note 28. The LSP Association also publishes monthly and annual columns containing descriptions of audit activity. See Mass. Dep't of Env'tl. Prot., Compliance Assistance, <http://www.mass.gov/dep/cleanup/compliance/audlist.htm> (last visited Mar. 22, 2006).

108. A populace might well approve of less rigor in environmental enforcement in exchange for other benefits, such as the economic and environmental benefits arising from increased expediency, productivity, and flexibility.

109. Although DEP assumes that its own oversight would produce close to 100 percent compliance, it does not track any data that could support this assumption—a perpetual problem in attempts to compare private and public provisions. Feb. E-mail from Fitzgerald, *supra* note 79. The exception to DEP's assumption is missed deadlines, which it concedes happen during agency oversight as well as LSP oversight. *Id.*

110. See Kelman, *supra* note 7, at 308–09.

possibility that slippage may be hard-wired into the LSP program's design.

1. Audit Results Indicate Widespread Noncompliance

By statute, DEP is required to audit 20 percent of all completed sites and all sites subject to an activity and use limitation (AUL).¹¹¹ Within this 20 percent, the agency performs Level I, II and III audits.¹¹² Most audits go no further than Level I, which involves reading through the file of submitted documents for approximately one to two hours.¹¹³ Level II audits evaluate ongoing remediation efforts in greater detail.¹¹⁴ If problems are detected, at either the Level I or Level II phase, the audit can be bumped to Level III. Level III audits require a detailed, thirty- to eighty-hour review of the work done to ensure compliance with the MCP.¹¹⁵

As indicated in Table 1 below, Level III audits can result in four outcomes. "Passing" means the submittal is considered adequate and no further work is required.¹¹⁶ An outcome of "No follow-up work required" means that minor violations occurred.¹¹⁷ These are usually missed deadlines for assessment and cleanup and/or late or nonexistent progress reports.¹¹⁸ Such violations are considered moot at sites that have filed an RAO, but DEP cites the violations in an effort to detect patterns of noncompliance.¹¹⁹ An outcome of "Follow-up required" means that violations occurred that were substantial enough to require further work.¹²⁰ Most commonly, this outcome means that the LSP did not provide enough evidence to support the conclusion that site cleanup was complete, and DEP requires additional investigation or monitoring (such as more soil or groundwater samples or modified risk assessments).¹²¹ Finally, an outcome of "Retraction/Invalidation" means "the document is deemed to be so deficient that a significant amount of additional work

111. MASS. GEN. LAWS ch. 21E, § 3A(o) (2002).

112. See MASS. DEP'T OF ENVTL. PROT., AUDIT PROGRAM FACT SHEET 1 (2004), available at <http://www.mass.gov/dep/cleanup/audfact.pdf> [hereinafter MASS. AUDIT PROGRAM].

113. Level II audits involve going to the site, either to take a general look or to investigate a specific issue. These take approximately six to eight hours, including travel time and submission of a report afterwards. Interview with John Fitzgerald, Dir. of Response and Remediation, Bureau of Waste Site Cleanup, Mass. Dep't of Envl. Prot., in Boston, Mass. (Sept. 12, 2005) [hereinafter Sept. Interview with Fitzgerald].

114. *Id.*

115. *Id.* In addition to those that stem from the triage system, some Level III audits—about 20 to 35 percent—are performed randomly. See DEP Memorandum, *supra* note 28, at 6.

116. See DEP Memorandum, *supra* note 28, at 2.

117. See *id.*

118. See *id.*

119. See *id.*

120. See *id.*

121. See *id.*

will be needed to either clean up the site . . . or prove that it does not pose a significant health risk.”¹²²

Table 1 shows that a minority of sites—as low as 13 percent in fiscal year 2003—receive “Passing” outcomes. Most sites—approximately 70 percent for the past three years—receive “Follow-up required” outcomes. At these sites, LSP errors are significant enough to warrant further remedial work, but not enough to flatly invalidate the LSP’s decision; usually DEP asks for more evidence to fully support a conclusion rather than accusing the LSP of misrepresenting the contaminant data or accidentally releasing water-soluble contaminants into groundwater. Finally, between 5 and 21 percent of sites audited have violations severe enough to invalidate the closure.

	FY94-00	FY01	FY02	FY03	FY04	FY05
Passing	29%	18%	14%	13%	19%	25%
No Follow-up Required	28%	31%	21%	15%	11%	4%
Follow-up Required	43%	50%	65%	71%	70%	71%
Invalidation/Retraction	5%	6%	12%	15%	21%	9%

Table 1: Audit results¹²³

2. *Slipping While Complying*

Even when cleanups are technically compliant, LSPs may exercise their discretion in ways inconsistent with DEP’s perception of the public interest by taking greater risks where DEP would have been more conservative.¹²⁴ This may occur when an LSP finds a response action infeasible, settles on a temporary solution instead of a permanent one, or relies on an AUL instead of requiring remediation to achieve background pollution levels.¹²⁵

122. *See id.*

123. *Id.* at 8.

124. Sept. Interview with Fitzgerald, *supra* note 113.

125. As defined in the regulations:

background means those levels of oil and hazardous material that would exist in the absence of the disposal site of concern which are either:

(a) ubiquitous and consistently present in the environment at and in the vicinity of the disposal site of concern; and attributable to geologic or ecological conditions, or atmospheric deposition of industrial process or engine emissions;

(b) attributable to coal ash or wood ash associated with fill material;

(c) releases to groundwater from a public water supply system; or

(d) petroleum residues that are incidental to the normal operation of motor vehicles.

First, at several points in the MCP, LSPs may refuse to take a certain action—using a certain remediation technology, cleaning all the way to background conditions, or pursuing a permanent solution rather than a temporary one¹²⁶—based on infeasibility.¹²⁷ “Feasibility is [] not solely a function of cost,” but does primarily depend on whether costs outweigh benefits.¹²⁸ Because the benefits of environmental quality are so difficult to quantify, an LSP can often make an infeasibility determination when the agency would have found the remedy feasible.

Although use of infeasibility as a deciding factor is difficult to discern from available records, the use of temporary solutions—intended to apply in very limited circumstances, including due to infeasibility¹²⁹—has been consistently rising. These temporary solutions, also known as Class C RAOs, do not require actual remediation, but rather containment and monitoring every five years.¹³⁰ A party is permitted to pursue a temporary rather than permanent solution upon either a showing that concentrations that exceed applicable limits do not pose a substantial hazard; a showing of “downgradient property status,” a sort of innocent-party provision meaning the pollution is coming from somewhere else; or a showing of infeasibility.¹³¹ Many LSPs have a reputation for interpreting these provisions liberally in their clients’ favor.¹³² As shown in Table 2, whereas less than one percent of sites in the first year of the privatized program received temporary solutions, over 10 percent of sites received approval for temporary solutions in 2004.

310 MASS. CODE REGS. § 40.0006(12) (2006); *see also* FEASIBILITY DETERMINATIONS, *supra* note 97, at 14–15.

126. *Compare* 310 MASS. CODE REGS. § 40.1050 (defining temporary solutions), *with id.* § 40.1035 (defining permanent solutions).

127. Feasibility evaluations are based on the following regulations:

§ 40.0414(3) - Eliminating, mitigating, or preventing a Critical Exposure Pathway;

§ 40.0860 - Implementing a permanent solution or a temporary solution;

§ 40.0860 - Selecting a remedial alternative;

§ 40.0860 - Reducing/detoxifying concentrations of oil and hazardous materials present at site above Upper Concentration Limits;

§ 40.0191(3) - Selecting reduction/detoxification or capping technologies; and

§ 40.1020 - Reducing concentrations of oil and hazardous materials to achieve or approach background levels.

FEASIBILITY DETERMINATIONS, *supra* note 97, at 3; 310 MASS. CODE REGS. § 40.0414(3); *id.* § 40.0860; *id.* § 40.0191(3); *id.* § 40.1020.

128. *See* FEASIBILITY DETERMINATIONS, *supra* note 97, at 1 (emphasis omitted).

129. *See id.*; *see also* Interview with Gevalt, *supra* note 87 (noting that DEP has given “very clear guidance” that LSPs should strive to achieve background conditions).

130. *See* 310 MASS. CODE REGS. § 40.1051 (2006).

131. *Id.* § 40.0861.

132. Interview with Roberts, *supra* note 83.

Year	Number of Sites with Class C RAOs	Total Sites	% Class C of Total
1994	2	554	0.36
1995	9	1829	0.49
1996	17	1540	1.10
1997	27	1901	1.42
1998	24	1780	1.35
1999	33	1721	1.92
2000	42	1752	2.40
2001	52	1816	2.86
2002	85	2250	3.78
2003	107	2060	5.19
2004	295	2807	10.51

Table 2: Temporary Solutions¹³³

The minority of sites that LSPs remediate to background pollution levels according to the regulatory definition is another potential example of LSPs exercising discretion in a way that DEP disfavors. As mentioned previously, DEP guidance instructs that background conditions *must* be achieved unless doing so is infeasible.¹³⁴ However, according to DEP's website, only 32 percent of sites reach a permanent solution that achieves background conditions. Focusing on the 120-day notification category—which excludes spills but includes longer-term brownfields redevelopment—shows an even bleaker picture: only 6.5 percent of sites in this category reach background conditions,¹³⁵ defined in the regulations as A1.¹³⁶ The more common outcomes at these sites are A2 (46.9%), a risk-based permanent solution in which contamination remains,¹³⁷ and B1 (26.4%), a decision not to take any remedial action because the contamination does not pose a significant risk.¹³⁸ Another 14 percent of sites in the 120-day category (8 percent overall) receive an AUL,

133. Mass. Dep't Env'tl. Prot., Response Action Outcomes 1993–2004, <http://www.mass.gov/dep/cleanup/sites/response.htm> (last visited Sept. 20, 2006).

134. See FEASIBILITY DETERMINATIONS, *supra* note 97, at 7.

135. See Mass. Dep't Env'tl. Prot., Waste Site Cleanups Notifications and Status, *available at* <http://www.mass.gov/dep/cleanup/sites/sdown.htm> (follow “release.zip” hyperlink; then open “release.dbf” icon) [hereinafter Mass. Waste Site Cleanups]. The percentages in this section were calculated by sorting DEP's database by category of site and class of RAO.

136. See 310 MASS. CODE REGS. § 40.1036 (2006).

137. See *id.*

138. See *id.*

sometimes preceded by no remediation at all. It is difficult to measure how significantly the rarity of background achievement departs from DEP preferences. However, the agency's clear guidance requiring achievement of background conditions suggests that LSPs are failing to meet expectations, even when technically complying with the regulations.

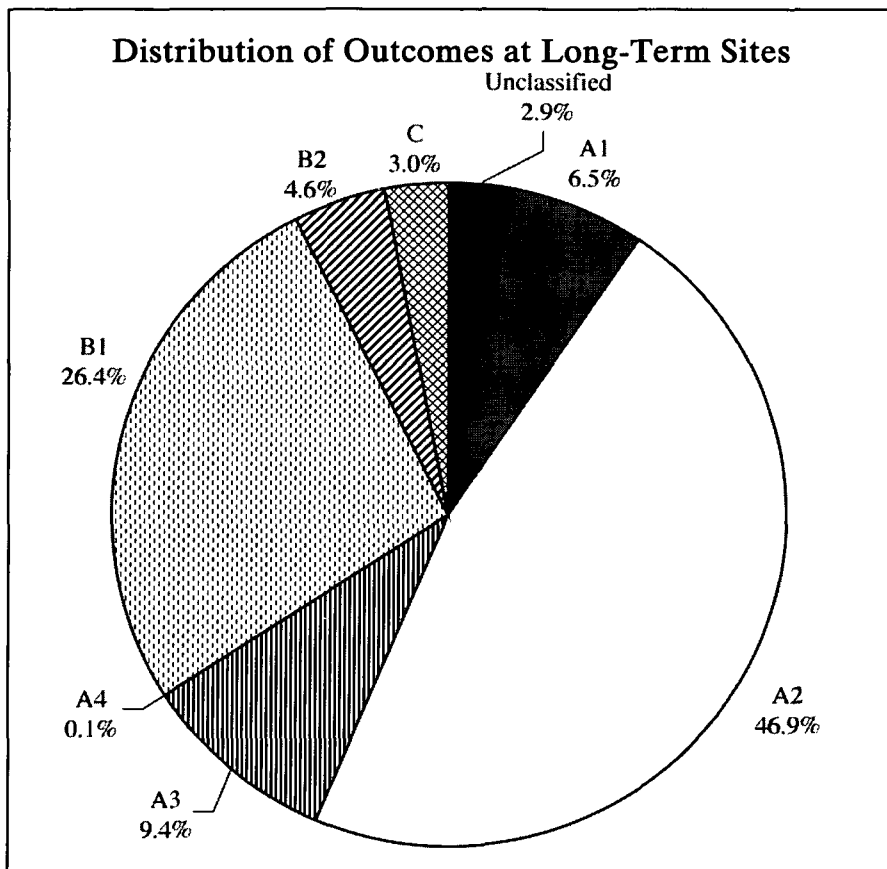


Figure 2: Total Distribution of Outcomes at Long-Term Sites¹³⁹

Unlike missed deadlines or other minor violations, the decreasing likelihood of achieving background conditions and the rising use of AULs could have serious consequences. Whether or not limiting the extent of cleanup necessary based on anticipated future uses is objectionable in principle, the AULs that purportedly lock in the permissible uses are often poorly executed. According to the 1998 Generic Environmental Impact Report (GEIR), 50 percent of AULs reviewed showed inconsistencies between the risk discovered at the site

139. See Mass. Waste Site Cleanups, *supra* note 135.

and the limitations supposedly based on those risks.¹⁴⁰ Some AULs listed no prohibited uses at all; others failed to mention relevant exposure pathways or receptors; others misinterpreted the soil categories altogether.¹⁴¹ Even where the contemplated activity and use limitation was consistent with the risks, DEP found that 79 percent were unclear regarding some permitted or restricted site activities.¹⁴² Perhaps most strikingly, only 48 percent of LSPs surveyed and 10 percent of DEP staff surveyed believed that "AULs can truly be enforced to 'lock in' site uses to prevent future exposure to contamination left on a site after cleanup," and only 12 percent of DEP staff (compared to 63 percent of LSPs) believed that "[m]ost" private parties were complying with the terms of AULs.¹⁴³

Evidence of regulatory violations suggests that the LSP program is failing to meet its most fundamental objective—the cleanup of brownfields in accordance with the MCP. In addition, the extent of regulatory slippage suggests that, even where compliance with the MCP is technically achieved, the program's goals may be undermined. The LSP model's pathologies revealed by this slippage provide a base from which to interrogate the connection between the structure and performance of a regulatory program.

II. A NEW GAME: THE ROLE OF PRIVATE REGULATORS

Despite its important role in Massachusetts and the interest other states have expressed in adopting a similar program, the Massachusetts LSP Program is not a model that appears in the privatization literature. While the enlistment of LSPs is generally consistent with the rise of third-party governance,¹⁴⁴ it does not fit neatly into a delineated conception of privatization. Instead, the private regulator model is among a vast number of potential nonparadigmatic and as-yet unmapped designs for privatization initiatives. In an effort to highlight the realm of possibilities for privatization beyond contracting out, and to put the private regulator model on the table for discussion, this Part situates the LSP program by describing its similarities to and differences from other privatization models.

140. See MASS. DEP'T ENVTL. PROT. AND BOARD OF REGISTRATION OF HAZARDOUS WASTE SITE CLEANUP PROFESSIONALS, DRAFT GENERIC ENVIRONMENTAL IMPACT REPORT 4-41 (1998), available at <http://www.mass.gov/dep/cleanup/priorities/geir.pdf>.

141. *Id.*

142. *Id.* at 4-43.

143. *Id.*

144. See Salamon, *supra* note 17, at 1-47; STEPHEN GOLDSMITH & WILLIAM D. EGGERS, GOVERNING BY NETWORK: THE NEW SHAPE OF THE PUBLIC SECTOR 9-10 (2004); Freeman, *Private Role*, *supra* note 9, at 577.

Many professionals, from lawyers and doctors to plumbers and electricians, must receive licenses from the state before serving consumers—but these professionals do not supplant government actors who would normally be serving the same function. Perhaps the best analog to the LSP model is the “channel partnership” described by Professors Stephen Goldsmith and William Eggers, in which businesses or nonprofits conduct transactions on the government’s behalf.¹⁴⁵ As examples, Professors Goldsmith and Eggers describe the processing of motor vehicle registration by car dealerships, and the Arizona Motor Vehicle Department’s “Third Party Program,” a statutorily-created initiative allowing authorized third parties to provide services like vehicle inspections and driver’s licensing tests.¹⁴⁶ Like the LSP program, these examples involve noncontractual public-private partnerships. However, deciding whether to award a driver’s license involves less discretion, lower stakes, and less regulatory bite than deciding whether to approve a hazardous waste cleanup.¹⁴⁷ The involvement of private regulators in higher-level decisions with broader effects merits in-depth examination of how the program is like and unlike more familiar modes of privatization.

Several key variables distinguish LSPs from other private actors involved in governance: the nature of their tasks, their relationship with the state agency, and their relationship with regulated parties. LSPs exercise power delegated to them by the government,¹⁴⁸ but their regulatory authority is broader, their relationship with the regulated parties is closer, and their relationship with government is more indirect than in more traditional delegations.

A. *Service Provision versus Regulation*

The first defining characteristic of LSPs is that their duties resemble regulation more than service delivery. To the extent that one expects privatization to involve pure “rowing”—execution of discrete and limited tasks—LSPs’ involvement in quintessentially regulatory activities may be the program’s most striking and perhaps controversial innovation. In the most traditional service delivery model of privatization, government sets the agenda and hires private contractors to execute discrete tasks—paradigmatically, services like garbage collection¹⁴⁹ and highway

145. GOLDSMITH & EGGERS, *supra* note 144, at 70.

146. *Id.* at 72–73.

147. Failing a driver’s test, unlike failing to comply with environmental regulations, is usually not highly disputed, imposes no legal obligation to take further action, and can be redone with little cost to the regulated individual.

148. See Metzger, *supra* note 9, at 1371.

149. See DONAHUE, *supra* note 15, at 58–68.

maintenance.¹⁵⁰ Compared to these rote activities, LSPs' responsibilities seem to reach into government's domain.¹⁵¹

To be sure, although less common than plain-vanilla contracting of service tasks like garbage collection, the LSP program is not a rarity. Several other programs delegate regulatory functions to private actors,¹⁵² including those functions that are coercive in nature and may alter legal rights or require action.¹⁵³ These forms of private involvement occupy a space between complete government control and complete or audited self-regulation;¹⁵⁴ the government retains its role as regulator, but delegates quintessential aspects of the regulatory process, such as the development, implementation, and enforcement of regulatory standards, to private partners. For example, private standard-setting organizations may draft regulatory standards for agency adoption.¹⁵⁵ Private actors may also negotiate or certify compliance as LSPs do; analogs exist in the Food and Drug Administration (FDA), the Federal Aviation Administration

150. See SCLAR, *supra* note 16, at 28–44 (discussing privatization of highway maintenance in Massachusetts). Cities around the country contract with private companies for parking enforcement. See, e.g., Anne Kim, *Parking Enforcer May Shift Again*, RICHMOND TIMES-DISPATCH, Aug. 12, 2004, at B2 (describing Richmond, Virginia's private contracts for parking enforcement and meter collection); *Clancy Systems Contracts with Clearwater, Fla.*, BUS. WIRE, Mar. 18, 2004 (noting a private company's contracts for parking enforcement in Clearwater, Tampa, and St. Petersburg, Florida); *Some City Council Votes*, NEWS & OBSERVER (Raleigh, N.C.), Oct. 2, 2003, at B7 (mentioning that Raleigh, North Carolina contracts with a private company for parking enforcement).

151. See *supra* note 7.

152. Professor Sidney Shapiro has developed a useful typology of private involvement in the regulatory process. See Shapiro, *supra* note 9.

153. See Lawrence, *supra* note 10, at 659. Using coercion as a criterion for regulatory power also rules out some actions from the regulatory sphere for the purposes of this Comment. Thus, licensing is a quintessential regulatory function, but nonbinding third-party accreditation is not. See Clark C. Havighurst, *Foreword: The Place of Private Accrediting Among the Instruments of Government*, 57 LAW & CONTEMP. PROBS. 1, 3 (1994) (distinguishing accreditation from public licensure).

154. See Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 177–78 (1995), for an explanation of audited self-regulation. The LSP program is distinct from audited self-regulation because of the continued role of the state agency and the state role in certifying the LSPs. See *id.* at 179.

155. For example, the Consumer Product Safety Act requires the Consumer Product Safety Commission to defer to standards set by private standard-setting organizations. See Dennis B. Wilson, *What You Can't Have Won't Hurt You! The Real Safety Objective of the Firearms Safety and Consumer Protection Act*, 53 CLEV. ST. L. REV. 225, 257 (2005) (citing 15 U.S.C. § 2056(b)(1) (2000)). Similarly, the U.S. Department of Labor Occupational Safety and Health Organization (OSHA) has a long-standing relationship with the American National Standards Institute, which compiles the findings of private standard-setting organizations and recommends conclusions for incorporation into OSHA regulations. See Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 416–17 n.303 (2004); see also David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 449 (2003); Freeman, *Private Role*, *supra* note 9, at 638–44; Michael, *supra* note 154, at 177–78; Abramson, *supra* note 10, at 173 n.47.

(FAA), and the Department of Agriculture (USDA).¹⁵⁶ Finally, private actors may be enlisted to enforce or adjudicate laws or regulations; initiatives in this category range from government-contracted private security companies¹⁵⁷ to Medicare claims contractors.¹⁵⁸

The adjudicative nature of LSPs' compliance certifications positions them squarely within the coercive domain of regulatory decisionmaking.¹⁵⁹ The LSP tells a landowner where she falls within the framework of promulgated regulations: Did she properly determine the level of risk based on the information gathered at the site and its future uses? Was she justified in rejecting a more thorough cleanup as "infeasible"? Depending on the LSP's interpretation of the facts and application of the law, she may alleviate or impose significant burdens on the owner of the contaminated property. Without the LSP's approval, a landowner has not fulfilled her legal obligation to remediate contamination and must take further action. The LSP does not act as an enforcer, but nevertheless acts coercively by telling the party what action is necessary.

Although identifying LSPs' work as regulatory rather than service-oriented is helpful in developing the concept of their role, this distinction alone does not necessarily speak to their policymaking power. Indeed, the dichotomy between service provision and regulation is often a matter of form. Even ground-level implementation is imbued with policymaking power,¹⁶⁰ and the difference in policymaking power between regulation and service provision blurs more when the delegated "services" entail *social* services¹⁶¹ and complex functions like schooling, prison

156. See Michael, *supra* note 154, at 179 (describing the FAA's certification of "individuals to conduct inspections, tests, and training in various areas of pilot and aircraft certification," and USDA's certification of "veterinarians to make various inspections, examinations, and certifications under animal health statutes and regulations," attributing both to scarce agency resources).

157. See, e.g., Boghosian, *supra* note 1, at 191 (discussing state contracting with private security companies to provide stand-alone security services "or allowing them to augment police forces").

158. See generally U.S. GOV'T ACCOUNTABILITY OFFICE, MEDICARE CONTRACTING REFORM: CMS'S PLAN HAS GAPS AND ITS SAVINGS ARE UNCERTAIN 1, 8 & n.13 (2005), available at <http://www.gao.gov/new.items/d05873.pdf>. (describing how Medicare contractors "determine if the claims should be, or should have been, paid," "collect[] overpayments" if they determine that payment was not warranted, and conduct investigations of suspected fraud).

159. See *supra* note 11.

160. As Professor Matthew Diller has noted, even low-level administration inevitably involves discretion and substantive policymaking. See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1130 (2000).

161. See, e.g., Alfred C. Aman, Jr., *Globalization, Democracy, and the Need for a New Administrative Law*, 49 UCLA L. REV. 1687, 1690 (2002) ("Perhaps the most common form of privatization in the United States . . . is the use of the private sector to deliver what once were governmentally provided social services.").

administration, and military operations.¹⁶² Functionally, the contractors who carry out physical cleanup in states that retain public control of compliance decisions may be as powerful as LSPs.¹⁶³ Nevertheless, the LSP program's reliance on private actors in regulation, as opposed to service delivery, is useful descriptively. While LSP involvement in regulatory activities should not by itself raise warning flags about the LSPs' power, the combination of this regulatory authority with two other structural facets of the LSP program reveals an unusual form of governance. The following sections describe two ways in which the LSP program diverges from other privatization initiatives: the nonadversarial relationship between the LSP and the regulated party, and the lack of a formal contract between the LSP and the government.

*B. The Relationship Between Regulator and Regulated:
Nonadversarial Regulation*

A second variable sets LSPs apart from other private policymakers: their relationship with the regulated landowners is not adversarial. True, the LSPs possess potentially coercive power, but who is coercing whom? As described in more depth in Part III, the regulated entities that hire LSPs to represent them heavily shape the work the LSPs do and the decisions they make. Whereas the traditional command-and-control model evokes notions of an agency forcefully and unilaterally dictating the end and means of a regulated party's activity,¹⁶⁴ the third-party role in command-and-control regulation breaks down the regulator/regulated divide. LSPs are a form of openly "captured" regulators; their decisions are dominated by the interests of the entities they regulate.¹⁶⁵ Moreover, although LSPs must base their decision on the relevant regulations, the LSP Board has officially rejected the notion that LSPs have any obligation to the public interest apart from the letter of the regulations.¹⁶⁶ They are thus distinct from two other increasingly familiar phenomena in government: less adversarial (but still agency-controlled) regulation, and privatized (but still adversarial) regulation. LSPs present the rare

162. See, e.g., Minow, *New Religion*, *supra* note 10 (discussing public-private partnerships in schooling, welfare and medicine); SINGER, *supra* note 6, at 66 (warfare); Dolovich, *supra* note 3 (prisons).

163. Cf. KETTL, *SHARING POWER*, *supra* note 24, at 11–14 (discussing the power of federal Superfund contractors).

164. Cf. E. Donald Elliot, *Toward Ecological Law and Policy*, in THINKING ECOLOGICALLY 170, 171–73 (Marion R. Chertow & Daniel C. Esty eds., 1997) (critiquing command-and-control regulation as too "blunt" and "cumbersome").

165. See generally Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335, 341–44 (1974), for an explanation of various versions of capture theory.

166. See *infra* Part III.B.3.b.

situation in which regulation is *both* carried out by a third party instead of government *and* nonadversarial in nature.

Less adversarial regulation usually occurs when government allows regulated entities greater participation, but maintains its own authority.¹⁶⁷ For example, agencies sometimes formally undertake collaborative regulation, in which stakeholders from all sides participate along with government in reaching a satisfactory rule,¹⁶⁸ or they engage in negotiated rulemaking, in which the agency participates, along with interested stakeholders, in formal negotiations over the substance of regulations.¹⁶⁹ In each of these instances the government retains its official involvement in protecting the public interest and thus tempers the increased private role. Similarly, even when agencies “slip”—permitting some violations in exchange for promises to improve unrelated concessions, selectively enforcing regulations, or reducing the amount of penalties¹⁷⁰—they retain their autonomy and official mandate. In the LSP program, by contrast, the government decisionmaker is actually *replaced* by one who is not only employed by the regulated entity, but also free from an obligation to the public interest.¹⁷¹ Moreover, government oversight is limited, and LSPs have the last word in the majority of cases.¹⁷² The difference between modes of decreasingly adversarial regulation and the LSP program is the active participation of government.

The LSP program is also distinct from regulatory processes in which government does not participate, but instead permits the hiring of third parties to perform core regulatory functions, or contracts the functions out to private actors. These models retain the adversarial structure between regulator and regulated. Independence and lack of bias are hallmarks of third-party involvement, and the relationship between the private regulators and their regulated subjects tends to be distant and

167. See, e.g., Freeman, *Private Role*, *supra* note 9, at 551 (noting the significant involvement of regulated entities in the implementation and enforcement of regulation); Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 33–66 (1997) [hereinafter Freeman, *Collaborative Governance*] (providing examples of negotiated rulemaking and permitting).

168. See Freeman, *Collaborative Governance*, *supra* note 167, at 2; see also Lobel, *supra* note 155, at 366–80.

169. See generally Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified as amended at 5 U.S.C. § 581 (2006)); Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 7 (1982); Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255, 1255 (1997) (noting that negotiated rulemaking has “come of age”).

170. See Farber, *supra* note 29, at 301–04.

171. See *infra* notes 272–274 and accompanying text.

172. Cf. Metzger, *supra* note 9, at 1399 (commenting that private actors wield greater power when they act in government’s stead). See *infra* section III.B.2 for data on the infrequency of DEP site audits, which in effect gives LSPs the last word at most sites.

formal.¹⁷³ For example, medical device manufacturers can elect to have third-party inspection in place of inspections by FDA staff, but FDA rigorously patrols the independence of the third-party inspectors.¹⁷⁴ Detailed FDA guidance explains circumstances in which a potential third party-reviewer will be denied accreditation because of organizational or individual conflicts of interest—and on top of those precautions, the FDA must receive and approve the results of the inspection.¹⁷⁵

Similarly, when government *contracts out* core regulatory functions (as opposed to permitting regulated entities to hire third-party inspectors), the functions tend to retain the traditional regulated-regulator relationship; the regulated party interacts with the contractor just as they would have with the government. This is exemplified elsewhere in FDA policy—the use of government contractors to approve prescription drug applications¹⁷⁶—and also in Medicare, where government contractors approve or deny claims and investigate potential fraud.¹⁷⁷ By contrast, as described throughout this Comment, the relationship between the LSP and the landowner is unusually intimate and collusive. The regulated entity becomes a consumer whose preferences and willingness to pay determine the regulation it receives.

These distinctions illustrate the unique relationship between the LSP and the regulated party. In other contexts, less adversarial regulation retains a pivotal role for the agency, or regulation is privatized, but retains a traditional adversarial structure. By contrast, the LSP program combines solely private regulation with a nonadversarial relationship between the regulated and the third-party regulator—much like the fox guarding the henhouse.

173. Although some forms of third-party certification raise greater conflict of interest concerns, these tend to be optional, nonbinding certifications like accreditation by a respected body or eco-labeling rather than the core regulatory functions at issue in this Comment.

174. See The Medical Device User Fee and Modernization Act of 2002, Pub. L. No. 107-250, § 201, 116 Stat 1588, (codified as amended at 21 U.S.C. § 374 (2006)) (requiring that a third-party inspector “shall be an independent organization which is not owned or controlled by a manufacturer, supplier, or vendor of articles regulated under this Act and which has no organizational, material, or financial affiliation (including a consultative affiliation) with such a manufacturer, supplier, or vendor”); see also John R. Manthei et al., *Changing the Landscape for Device Manufacturers: Medical Device User Fee and Modernization Act of 2002*, HEALTH LAW., Dec. 2002, at 10, 11 (“The Act contains stringent conflict of interest standards to ensure that accredited third parties have no financial interest in the company, the products being inspected, or any other FDA-regulated products.”).

175. See U.S. DEPT OF HEALTH AND HUMAN SERVS. ET AL., IMPLEMENTATION OF THIRD PARTY PROGRAMS UNDER THE FDA MODERNIZATION ACT OF 1997: FINAL GUIDANCE FOR STAFF, INDUSTRY AND THIRD PARTIES 8–11 (2001), available at <http://www.fda.gov/cdrh/thirdparty/apguide13.pdf>.

176. See James L. Zelenay, Jr., *The Prescription Drug User Fee Act: Is A Faster Food and Drug Administration Always a Better Food and Drug Administration?*, 60 FOOD & DRUG L.J. 261, 298 (2005) (citing 21 U.S.C. § 379g (2000)).

177. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 158, at 8 nn.13–14.

C. The Relationship between the Government and the Private Regulator

A third distinctive quality of the LSP program is the relationship between LSPs and the government. While undoubtedly a form of public-private partnership, the program does not correspond to any of the familiar incarnations of such partnerships. Rather than the more often-discussed governance “tool” of contracting out service provision¹⁷⁸—or, less commonly, contracting out regulatory functions¹⁷⁹—the LSP program involves mandatory compliance certification by licensed private professionals who do *not* contract with the government. The LSP Board’s licensing (and delicensing) power creates a contract-like arrangement between the LSPs and the agency, and the basis for LSPs’ professional opinions are the very regulations that the agency promulgated, but no formal government contract exists. The result is that the government’s control over the private decisionmakers is indirect and often limited.

When situated in the context of other privatization initiatives, the LSP program’s rent-a-regulator model thus emerges as a unique model of privatized regulation, distinct in the tasks the private actors perform, their relationship with the regulated parties, and their relationship with the state agency. The program’s distinctiveness should serve as a reminder that privatization has no preordained form, but rather involves structures and relationships that governments can and do choose to utilize. The LSP model is merely one of infinite possibilities that should be the subject of future research.

III. DIAGNOSING AND REDESIGNING PRIVATIZED DECISIONMAKING: THE NEED FOR INTEREST ALIGNMENT

Zeroing in on the component parts of the LSP program’s rent-a-regulator model permits analysis of the potential connection between design and performance. This connection is best viewed as an inquiry into the forces that affect how private regulators exercise their discretion. This Part analyzes the importance of aligning the interests of private regulators and their principal agency. It then asks what incentives influence how the LSPs pursue their primary responsibility and the first-order goal of the LSP program, enforcement of the MCP regulations, and explores ways to realign those incentives.

Interest alignment is the dominant theme in both identifying flawed structures and prescribing improvements. Relationships and incentives

178. See Salamon, *supra* note 17, at 21 T.1-5.

179. Medicare and FDA contractors are one example of this. See *supra* notes 176–177 and accompanying text. See generally Peter J. May, *Social Regulation*, in *TOOLS OF GOVERNMENT*, *supra* note 7, at 156 (describing government contracting with third parties to enforce regulations).

must be structured to avoid the "mission conflict"¹⁸⁰ between private decisionmakers and their agency principals that can spell certain slippage. Avoiding mission conflict is complicated by the fact that private decisionmakers, like public decisionmakers, operate in a multiple-principal environment. LSPs' "multiple legitimate masters"¹⁸¹ include not only members of the agency that has delegated power to them, but also current and future regulated entities; colleagues and competitors in the workplace; the institution that employs them; their licensing board; and members of the public.

As always, the influence of multiple principals can produce conflicting mandates. Unlike public decisionmakers, however, private decisionmakers are not part of a bureaucracy shaped by hierarchical authority.¹⁸² This flexibility is at once a virtue and vice of networked governance; the private sector's risk-preferring, profit-seeking professional culture¹⁸³ may enhance performance, but its lack of bureaucratic "honor" and intrinsic motivation to pursue governmental goals¹⁸⁴ may make it vulnerable to deviation from public values. A system structured to give substantial influence and disciplinary power to nongovernment principals, but not to the state agency, can quickly heighten decisionmakers' susceptibility to slippage.

A crucial aspect of privatized decisionmaking, then, is ensuring that the delegating agency is the *principal* principal. Just as the legislature dominates the agency's multiple-principal environment, the agency must trump any other forces influencing the private decisionmaker. This is more challenging in the networked governance structure surrounding private decisionmakers. Deprived of the crutch of hierarchical agency organization, a successful privatization initiative must find innovative ways to align the interests of the government and the entity enlisted to carry out the government's wishes.¹⁸⁵ The touchstone is devising ways to influence behavior through incentives and relationships rather than controlling the behavior directly.¹⁸⁶

180. See SCLAR, *supra* note 16, at 104.

181. Paul L. Posner, *Accountability Challenges of Third-Party Government*, in TOOLS OF GOVERNMENT, *supra* note 7, at 523, 524 (quoting Barbara S. Romzek, *Enhancing Accountability*, in HANDBOOK OF PUBLIC ADMINISTRATION (James L. Perry ed., 2d ed. 1996)).

182. See, e.g., Donald F. Kettl, *Managing Indirect Government*, in TOOLS OF GOVERNMENT, *supra* note 7, at 490, 492 [hereinafter Kettl, *Indirect Government*].

183. See, e.g., Janet Gilboy, *Compelled Third-Party Participation in the Regulatory Process: Legal Duties, Cultures, and Noncompliance*, 20 LAW & POL'Y 135, 145-49 (1998) (arguing that professional and organizational culture, not merely economic compensation, shape the behavior of third parties called upon to facilitate regulatory enforcement).

184. See DONAHUE, *supra* note 15, at 87-89 (discussing the promise of bureaucratic honor, but urging caution in relying on it in the absence of other accountability mechanisms).

185. See GOLDSMITH & EGGERS, *supra* note 144, at 128-30.

186. See Kettl, *Indirect Government*, *supra* note 182, at 493.

The LSP program demonstrates that interest alignment can be a tall order. Several design weaknesses can quickly muddle the mandate of private decisionmakers and encourage deviation from agency practices. The following discussion highlights the incentives influencing LSPs' behavior, flagging problems to avoid in the future. The overriding issues are structural rather than procedural; the primary need is not to *do* things differently, but rather to design relationships, incentives, and communications that create "a shared understanding of common values and goals."¹⁸⁷ Two main structural pitfalls of the LSP program impede achievement of this objective. First, conflicts of interest—both within LSPs' workplaces and with respect to clients—encourage LSPs to cut corners. Second, a dearth of management procedures and disciplinary opportunities fails to detect and remedy LSP malpractice, and in turn fails to incentivize good behavior. Alone, none of these factors is likely to make or break the effectiveness of a privatization initiative; together, they become a reason to worry that privatization will lead to regulatory slippage. In conjunction with each of these flaws, this Part offers recommendations for future restructuring.

A. *Conflicts of Interest*

1. *In-house Bias*

What determines how LSPs will exercise their discretion? The first issue is the simplest. The LSP program involves internal conflicts of interest: the LSP rendering the professional opinion is often approving her own work (often with input from other members of her firm, or subcontractors she hires). Donald Kettl has stated the problem succinctly, noting that "[c]ontractors who check their own work are clearly vulnerable to conflicts of interest."¹⁸⁸ These conflicts may lead to biases that influence the way that the decisionmakers exercise their discretion,¹⁸⁹ potentially reducing the likelihood that the decisionmaker will find that her own work is insufficient. The effect is to push the true moment of decisionmaking to earlier in the process, when the investigation and remediation plans are designed, and to eliminate the check on those decisions.

187. GOLDSMITH & EGGERS, *supra* note 144, at 129.

188. KETTL, *SHARING POWER*, *supra* note 24, at 121.

189. See John R. Allison, *A Process Value Analysis of Decision-Maker Bias: The Case of Economic Conflicts of Interest*, 32 AM. BUS. L.J. 481, 484 (1995) (listing five types of bias, including "a prejudgment about legislative facts" and "a prior commitment on adjudicative facts") (internal quotation marks omitted) (quoting 2 KENNETH C. DAVIS, *ADMINISTRATIVE LAW TREATISE* § 19:1, at 371 (2d ed. 1978)).

Interestingly, the Massachusetts Study Committee¹⁹⁰ did initially consider establishing a system with more checks, in which one LSP would design and perform the remediation and another would review it and sign off on it.¹⁹¹ This idea was dismissed early on.¹⁹² It would, as one LSP explained, “give one guy all the work and all the money and leave the other guy with all the liability.”¹⁹³ The idea was unpopular, and the system of self-checking continues. Some large firms offering LSP services have company policies that require an unbiased set of eyes to approve a plan to ensure the integrity of the decision, but most smaller firms and sole practitioners do not have the resources to voluntarily implement such a check.¹⁹⁴

The toleration of decisionmakers checking their own work decreases the likelihood that an error, whether intentional or accidental, will be detected and corrected. The practice represents a missed opportunity to emphasize the importance of impartial, public-interest-minded judgments in privatized decisionmaking. In a redesigned system, the person deciding whether the site plan is compliant (the decisionmaker) could be separated from the consultants preparing the work plans. This could happen, as discussed below, if relationships were altered so that the decisionmaker contracted directly with the government; the regulated party could hire its own consultants to design and perform the cleanup, and the government could deploy an LSP to approve the work at each stage. As a more modest suggestion, a redesigned system might require the input of an impartial referee before a cleanup could be certified.

2. *External Conflicts of Interest and Client Demands*

In addition to in-house conflicts of interest, the LSP program illustrates several external conflicts of interest that detract from an LSP's objectivity in making compliance decisions. First, the contractual relationship between the decisionmaker and regulated party affords the regulated party substantial power. Second, as the “hirer,” the regulated party can withhold key information, producing informational asymmetry. Third, the contract structure itself may incentivize underperformance. Future privatization efforts should be wary of these forces. As one DEP official summarized in hindsight, the program's design reflects an

190. See *supra* text accompanying note 59.

191. Telephone Interview with Larry Feldman, Licensed Site Professional (Sept. 7, 2005).

192. *Id.*

193. *Id.*

194. Interview with Gevalt, *supra* note 87.

underestimation of the power of market forces over profit-seekers with allegiance to a client in a competitive market.¹⁹⁵

a. *Power Dynamics*

The LSP program underscores the power inherent in the ability to hire, pay, and potentially fire a contractor. When the regulated party is effectively the boss of the decisionmaker, the contractual relationship affords the party short-term and long-term weaponry. The LSPs answer to the regulated parties—regarded as their “clients”—not to the state, the public, or the environment. The clients call the shots and expect loyalty. These long-term relationships take privatization a step further from government control, essentially allowing regulated parties to internalize their own regulation by manipulating the decisionmaker. In clear tension with the traditional notion of independent regulatory decisionmaking, but evoking comparisons to legal practice, LSPs *represent* their clients.

In the short-term, the LSP must be wary of being fired from a given job. A dissatisfied client generally has the ability to terminate an LSP, subject to variations in specific contractual language. The market competition among LSPs—evidenced by DEP’s advice to regulated parties to “shop around” for an LSP¹⁹⁶—compounds the problem, threatening to punish any LSP who might otherwise be inclined to do an A+ rather than D+ job.¹⁹⁷ Indeed, LSP services are analogous to one commentator’s description of the legal profession: a “buyer’s market in which clients call the shots.”¹⁹⁸ If one licensed professional gives an estimate that would provide a robust level of compliance, a less honest LSP may undercut him by seizing opportunities to cut corners.¹⁹⁹ Although simple cleanups may be so textbook as to leave little room for debate, more complex and potentially costly cleanups increase pressure to compromise public values.

In such a competitive market, LSPs do not have the luxury of acting as their clients’ “conscience.”²⁰⁰ An LSP can refuse to approve a cleanup,

195. Telephone Interview with John Fitzgerald, Dir. of Response and Remediation, Bureau of Waste Site Cleanup, Mass. Dep’t of Env’tl. Prot. (Oct. 18, 2005).

196. MASSACHUSETTS DEP’T OF ENVTL. PROT., A MASSACHUSETTS PROPERTY OWNER’S GUIDE TO HIRING A LICENSED SITE PROFESSIONAL (2004), *available at* <http://www.mass.gov/dep/cleanup/lsp.pdf>.

197. See Sept. Interview with Fitzgerald, *supra* note 114 (noting that LSPs have incentives to do a D+ job).

198. Geoffrey Miller, *From Club to Market: The Evolving Role of Business Lawyers*, 74 *FORDHAM L. REV.* 1105, 1114 (2005) (internal quotation marks omitted) (quoting F. Leary Davis, *Back to the Future: The Buyer’s Market and the Need for Law Firm Leadership, Creativity and Innovation*, 16 *CAMPBELL L. REV.* 147, 148 (1994)).

199. See Telephone Interview with Jeff Porter, Member, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC (Oct. 28, 2005) [hereinafter Interview with Porter].

200. *Cf. id.*; Miller, *supra* note 198, at 1124.

but if her recommendations are expensive or complex, a client can fire the LSP and try to find another. For sophisticated regulated entities, such disdain for compliance may be tempered by fears of harm to reputation or future liability—but liability exemptions in the 1998 Brownfields Act,²⁰¹ resource limitations, and perennial shortsightedness limit many firms' desire to comply.²⁰² In response, while many LSPs are regarded as top-notch professionals, others are known to act as "human embossing devices,"²⁰³ violating the regulations and sometimes undermining health and safety by giving clearly insufficient cleanups their seal of approval for the right price.²⁰⁴

These power relations between regulated parties and LSPs become more problematic when considered over the long term. LSPs do not merely want to avoid being fired from a given job; they want to be hired again in the future. The professional costs of displeasing a client are thus higher than if each job were a one-shot deal, and the pressure to yield to a client's preferences is correspondingly stronger. The problem is analogous to the oft-questioned integrity of private arbitrators in light of their desire to be selected by companies for future dispute resolutions.²⁰⁵ The conflict is familiar: barring other sources of discipline, decisionmakers who form a long-term relationship with repeat players are likely to develop bias.

The power of regulated entities is even greater when they employ LSPs as part of their full-time staff. This might be the case with a development company, for example. The in-house LSPs have a significant vested interest—their career—in pleasing the regulated party. Assuming the company relies on their in-house LSP to do the work rather than subcontracting it out,²⁰⁶ the LSP's job literally depends on his or her ability to

201. 1998 MASS. ACTS ch. 206. For example, the Act broadened the exemption of lenders from liability, thereby diminishing the intense scrutiny of environmental compliance that lenders used to carry out.

202. Interview with Porter, *supra* note 199.

203. See Fierce, *supra* note 75, at 1 (describing a common perception of licensed site professionals rather than his own view).

204. For a sense of LSPs' reputation, consider the following description:

[S]ince the beginning, LSPs have been targets.

Consider the poor LSP: he or she is regulated by a Board on which LSPs are a minority; the MCP includes a provision for auditing his or her work; DEP has been moving toward a more punitive and adversarial relationship with LSPs; and there are constant complaints by legislators, government agencies, and citizens' groups that LSPs are the foxes guarding the henhouse, and, as a class, should not be trusted.

Lawrence Feldman, LSP, PhD., *The Accountability of LSPs: A Practitioner's Viewpoint*, LSP Continuing Legal Education Seminar (on file with author).

205. See, e.g., Alan Scott Rau, *Integrity in Private Judging*, 38 S. TEX. L. REV. 485 (1997).

206. Firms occasionally do this to save money. The firm sub-contracts official approvals out to an LSP who bills at a lower rate than the in-house LSP. The in-house LSP, often an engineer who also has non-LSP duties at the firm, acts as a consultant and checks the work of the outside

devise and approve a solution most favorable to the company. The dynamic is similar to that of in-house counsels, as the role of the in-house LSP involves loyalty and being “part of the corporate team.”²⁰⁷ This may produce ethical dilemmas and cloud the decisionmaker’s independent judgment.

Moreover, even if an LSP remains committed to exercising independent judgment, she may be stymied by information asymmetries in the LSP-client relationship. Often, LSPs lack adequate information to make sound decisions. LSPs are not environmental detectives and are limited by how much information the PRP gives them or is willing to pay to obtain.²⁰⁸ If the client does not authorize additional site investigation or does not disclose pertinent information about the site’s history, the LSP may unintentionally undermine the quality of the cleanup or violate a regulatory provision.²⁰⁹

b. Contract Structure

The contract structure itself can also affect a decisionmaker’s mandate and can incentivize behavior inconsistent with regulatory adherence.²¹⁰ In the LSP context, these incentives are tied to the widespread use of fixed-price remediation contracts, in which the client pays the LSP for completion of a cleanup or a phase of a cleanup.²¹¹ These contracts can be problematic because of the incentives they create for shirking. The LSP must complete the cleanup at less cost than the

LSP. See interview with Eli Levine, Vice President, Brownfields Recovery Corporation, in Boston, Mass (Sept. 16, 2005).

207. See, e.g., Geoffrey C. Hazard, Jr., *Ethical Dilemmas of Corporate Counsel*, 46 EMORY L.J. 1011, 1017 (1997) (internal quotations omitted).

208. Fierce, *supra* note 75, at 1.

209. It is worth noting that sometimes *clients* may also be the party with limited access to important information. Some LSPs may take advantage of unsophisticated clients who, unlike repeat corporate players, cannot identify irresponsible or ignorant LSP behavior. PRPs with fewer resources may receive lower-quality services, and at the limit, may be swindled into pursuing a noncompliant cleanup. See Interview with Porter, *supra* note 199. However, competitive forces tend to keep this problem in check. See *id.*

210. The contracting literature predicts that private actors, as profit-seekers, will interpret their mandate in ways that minimize their own costs. See DONAHUE, *supra* note 15, at 89. This theory—known as the “quality-shading hypothesis”—envisioned that where discretion so allows, contractors may skimp on quality in order to maximize their own profits. See also Oliver Hart, Andrei Shleifer & Robert Vishny, *The Proper Scope of Government: Theory and Application to Prisons*, 112 Q.J. ECON. 1127, 1159 (1997). The phenomenon could be generalized to describe the noncontractual relationship between the LSPs and the government—LSPs have discretion in carrying out the government’s mandate, and incentives encourage corner-cutting.

211. E-mail from Larry Schnapf, Schnapf Environmental Law Center (Aug. 10, 2005) (on file with author) [hereinafter Aug. E-mail from Schnapf].

stipulated contract price in order to eke out a profit.²¹² If early tasks consume more time and expense than anticipated, but contract renegotiation is unwarranted, undesirable, or unlikely to succeed, LSPs may be tempted to neglect later tasks. In addition, once they have received a substantial portion of the payment, LSPs have little incentive to complete any remaining tasks.²¹³ For either of these reasons, quality may suffer.

Moreover, if LSPs encounter unforeseen obstacles warranting contract renegotiation, clients may balk. For example, an LSP may discover previously unknown soil contamination requiring large-scale excavation. If clients reject requests for additional fees to complete the necessary remediation, LSPs are left in the unenviable position of walking away from the project without pay or performing a compromised solution (which may well violate the regulations). LSPs may elect to withhold their submittals and official approval until the client pays, but clients may report such "unprofessional" conduct to the LSP Board.²¹⁴ Depending on a number of contractual, practical, and equitable considerations, Board members decide "whether withholding submittals for non-payment was a good business practice or blackmail."²¹⁵

Taken together, the power dynamics and contract structure between LSPs and clients create a degree of influence of the regulated over the regulators that many would regard as governmental failure.²¹⁶ When regulated parties control their regulator, they can undermine regulatory adherence by pressuring the LSP into approving the most inexpensive cleanup possible within the pale of compliance—a D+ job. These dynamics suggest that reform should entail greater separation between client and decisionmaker.

The best way to achieve such separation is to prohibit, through a promulgated rule, any contractual relationship between the regulated entity and the private decisionmaker. LSPs would contract directly with DEP instead of being hired by a landowner. If LSPs were agents of DEP rather than of their regulated "clients," LSPs would be less likely to deviate from agency interests. If a contractual relationship must exist between the LSP and a landowner, its terms should be regulated to

212. See Kelman, *supra* note 7, at 294 (explaining that "if the contractor is able to perform the work for significantly below the fixed price, it reaps a large profit. If it overruns, it loses money.").

213. See Aug. E-mail from Schnapf, *supra* note 211.

214. See E-mail from Allan Fierce, Executive Director, LSP Board of Registration (Nov. 4, 2005) (on file with author).

215. *Id.*

216. See, e.g., James M. Buchanan, *Markets, States, and the Extent of Morals*, 68 AM. ECON. REV. 364, 365 (1978).

encourage performance rather than mere outputs.²¹⁷ Commentators have suggested that pay-for-performance contracts, for example, would improve the quality and reliability of services rendered in the brownfields context and elsewhere.²¹⁸

B. Lack of Management and Discipline

The conflicts of interest plaguing LSPs are more problematic in light of the lack of management of LSPs. Specifically, the program fails to provide adequate screening, monitoring, and discipline. I take each of these structural flaws in turn. In restructuring the management of the LSP program, the agency should acknowledge that market forces alone cannot police third-party regulators.²¹⁹ Active steering, not cruise control, is necessary; agencies must attentively manage the incentives and relationships of authority that govern private decisionmakers to keep them on course.²²⁰

1. Ex Ante: Screening and Assessing

The 21E Study Committee envisioned that DEP would be involved ex ante by screening sites. At complex, risky sites meeting the Tier 1A criteria in the Phase I assessment, DEP would require submission of an initial permit for its approval before a response action could proceed, and would continue to be directly involved throughout the course of the response action as appropriate.²²¹ In addition, the Committee envisioned

217. Cognizant of the potential problems that contract structure can cause, the 1990 Massachusetts Privatization Report did envision that contractual structure would be regulated. The LSP Board, too, has discussed various means of regulating contracts. The original regulations for Professional Conduct prohibited the use of contingency fees; if LSPs were only paid if they rendered a finding of no significant risk, they would obviously have increased incentives to slight the regulations in order to make such a finding. However, the Board subsequently decided against regulating contract structure at all, concluding that truly objectionable contracts would violate the broader prescription of professional responsibility and thus more specific regulation was not necessary. The new regulation, 309 MASS. CODE REGS. § 4.05 (2006), states that “[a]n LSP shall not let his or her ownership interest, compensation, or continued employment affect his or her Professional Services to the extent that said Professional Services do not meet the standards set forth in” the LSP Code of Professional Conduct and the MCP. See Minutes from the Regulations Committee Meeting, Board of Registration of Hazardous Waste Site Cleanup Professionals, Jan. 21, 1999 (agreeing to recommend replacing the contingency fee regulation with the current “accepting compensation” regulation).

218. See JOEL HIRSCHHORN, APPLYING PAY FOR PERFORMANCE PAPER TECHNIQUES TO BROWNFIELDS CLEANUPS (Nat’l Governors Ass’n Center For Best Practices, 2001) (on file with journal). However, the difficulty in articulating performance standards has inhibited widespread use of these contracts. Cf. Kelman, *supra* note 7.

219. See Kettl, *Indirect Government*, *supra* note 182, at 491.

220. Donald Kettl described this need as ironic: “The fundamental irony of privatization and its other third-party variants is that they require very, very strong public management to make them work well.” Kettl, *Indirect Government*, *supra* note 182, at 500.

221. See MASSACHUSETTS PRIVATIZATION REPORT, *supra* note 54, at 5–6.

that the state would be proactive, using a “vigorous site discovery program” to identify sites posing serious threats to public health or the environment.²²² At sites where responsible parties would not or could not conduct remediation, DEP would take the lead.²²³

Initially, the state largely followed through with its plan to retain oversight and perform crucial tasks, despite being underfunded.²²⁴ However, severe budget cuts in 2003—as of September 2005, the agency only had 165 full-time equivalents²²⁵—forced DEP to pare down its oversight. The agency no longer had the resources for formal site discovery.²²⁶ In addition, the agency had to cease its meticulous checking of Tier 1A permits, first approving the permits by default, and ultimately eliminating the requirement of prior agency approval at all.²²⁷

DEP has done its best by striving to focus available oversight resources on immediate response actions (IRAs), which often involve imminent hazards,²²⁸ but budgetary constraints cripple its effectiveness. Without site discovery, the agency cannot address the “self-directed cleanups”—attempts to contain or hide contamination without reporting it at all—that insiders say occur around the country as a way of evading remediation requirements in both publicly administered and privatized schemes.²²⁹ Without screening, the agency is unaware of many response actions altogether, and uninformed of the details of those sites that do cross its radar.

Although the result may not be immediately measurable, the absence of *ex ante* management may lead to negative consequences. First, DEP might become incompetent to exercise “step-in power”²³⁰

222. *Id.* at 6.

223. *See id.*

224. Whereas the 1990 Report estimated that DEP would need 324 full-time equivalents (FTEs) to manage the program, staffing hovered around 200 for most of the 1990s. DEP Memorandum, *supra* note 28, at 10. Interestingly, many parties actually preferred to have direct DEP oversight (some even “rigged” the site scoring to try to be classified as Tier 1A!) and were willing to pay more for the certainty that they would not be audited. E-mail from John Fitzgerald, Dir. of Response and Remediation, Bureau of Waste Site Cleanup, Mass. Dep’t of Env’tl. Prot. (Oct. 28, 2005) (on file with author) [hereinafter Oct. E-mail from Fitzgerald]. DEP did not audit sites at which it had provided direct oversight, since the agency had approved all of the decisions.

225. DEP Memorandum, *supra* note 28, at 10.

226. Oct. E-mail from Fitzgerald, *supra* note 224.

227. *See* Mass. Dep’t Env’tl. Prot., Summary of June 27, 2003 MCP and MCP-Related Fee Amendments, available at <http://www.mass.gov/dep/cleanup/laws/mcpsum03.htm>.

228. Telephone Interview with John Fitzgerald, Dir. of Response and Remediation, Bureau of Waste Site Cleanup, Mass. Dep’t of Env’tl. Prot. (Oct. 7, 2005) [hereinafter Oct. 7th Interview with Fitzgerald].

229. *See* E-mail from Larry Schnapf, Schnapf Environmental Law Center (Jan. 17, 2006) (on file with author).

230. Alfred C. Aman, Jr., *Privatization, Prisons, Democracy and Human Rights: The Need to Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEGAL STUD. 511, 534 (2005)

when LSPs run amok or fail to deliver.²³¹ The agency may also diminish its own capacity to administer related functions,²³² in the hazardous waste context, this might involve planning for area-wide or multi-site remediation and redevelopment, the benefits of which are increasingly recognized.²³³

To avoid such loss of state capacity,²³⁴ public agencies must exercise ex ante oversight of their private partners. The slope is a slippery one; some retraction of government authority may be desired,²³⁵ but too much retraction can erode the state's ability to perform the functions it is allegedly retaining.

Second, the lack of ex ante management is a missed opportunity to identify and cabin the discretion of LSPs.²³⁶ As it did early in the program's implementation, DEP could screen sites into its system and decide that some jobs are too complex or risky to be handled by a private decisionmaker. In such a screening process, the agency could examine the scope of the LSPs' discretion by mapping the range of possible decisions.

(arguing, in the context of prison privatization, that "[t]he state must retain and be able actually to exercise 'step-in' rights—that is, to reclaim any privatized part of its prison system—and to do this it needs to have ongoing capacity and skill levels of its own") (quoting Richard Harding, *Private Prisons*, 28 CRIME & JUST. 265, 282 (2002)).

231. One need look no farther than FEMA's struggle to respond in the wake of Hurricane Katrina to recognize that transferring control to private providers may hamper government responsiveness when it is needed. *See, e.g., Recovering after Katrina: Ensuring that FEMA is Up to the Task: Before H. Comm. on Transportation and Infrastructure and Subcomm. on Economic Development, Public Building, and Emergency Management*, 109th Cong. (2005) (testimony of Albert Ashwood, Vice President, National Emergency Management Association) ("I'm not against privatizing or utilizing the resources out there, but there is a point in which the federal government must accept some responsibility for ensuring that functions exist to respond and recover for whatever the disaster 'du jour' may be.").

232. *See* Freeman, *Extending Public Law Norms*, *supra* note 12, at 1348 (pointing out that "privatization on a broad enough scale could lead to a compromised, even anemic, government").

233. *See* D. Evan Van Hook, *Area-Wide Brownfields Planning, Remediation and Development*, 11 FORDHAM ENVTL. L.J. 743, 762 (2000).

234. *See* Theda Skocpol & Kenneth Finegold, *State Capacity and Economic Intervention in the Early New Deal*, 97 POL. SCI. Q. 255, 260–61 (1982) ("Governments that have, or can quickly assemble, their own knowledgeable administrative organizations are better able to carry through interventionist policies than are governments that must rely on extragovernmental experts and organizations."); *see also* Theda Skocpol, *Bringing the State Back In: Strategies of Analysis in Current Research*, in BRINGING THE STATE BACK IN 3, 9 (Peter B. Evans et al. eds., 1985) (defining "state capacity" as a government's ability "to implement official goals, especially over the actual or potential opposition of powerful social groups").

235. *See, e.g.,* Michelle Estrin Gilman, "Charitable Choice" and the Accountability Challenge: Reconciling the Need for Regulation with the First Amendment Religion Clauses, 55 VAND. L. REV. 799, 812 & n.58 (2002) (citing Paul Starr, *The Meaning of Privatization*, in PRIVATIZATION AND THE WELFARE STATE 15, 42–44 (Sheila B. Kamerman & Alfred J. Kahn eds., 1989) ("arguing that privatization proponents 'call into doubt the nation's capacity and will for collective provision'")).

236. *See supra* Part I.B.2.b, for a discussion of LSPs' broad discretion. *See supra* Part III.A, for a discussion of the forces affecting LSP decisionmaking.

If irresponsible or captured private regulators were inclined to defy government's substantive wishes, how far could the privatized apple fall from the governmental tree? Finding significant breadth of possible outcomes in a high-stakes cleanup could compel DEP to keep the decisionmaking in-house.

Indeed, one way to restrict discretion is to set limiting criteria for the sites eligible for the privatized program. This approach has been successful in New Jersey,²³⁷ where properties involving groundwater contamination, for example, are ineligible for private oversight.²³⁸ In Massachusetts, most parties agree that the LSP system works well for small, uncomplicated releases,²³⁹ but treating all hazardous waste sites the same makes little sense. Some involve vastly more complexity, risk, and public concern than others, and a front-end screening process could identify these sites. A simple, textbook cleanup like the removal of leaked petroleum products from a small former gas station would be a strong candidate for privatization, while a thousand-acre site involving numerous chemicals near the public drinking supply could be kept in-house.

2. *Ex Post: Monitoring Performance*

Although the 21E Committee envisioned that DEP would conduct "vigorous" audits to ensure "compliance with applicable requirements,"²⁴⁰ and that audit rates would increase if the agency detected "significant levels of noncompliance,"²⁴¹ the audit process has been far less robust. As shown in Table 3, only 20 percent of sites are audited to begin with, meaning that the work at most properties goes unchecked. At the 20 percent of sites that do receive an audit, the agency must triage. DEP performs the vast majority of its audits by merely reviewing the file to see if the paperwork appears complete—a Level I audit.²⁴² By contrast, in fiscal year 2004, after the 2003 budget cuts, only 5.7 percent of all audits and 1.9 percent of all sites received a Level III audit—a full-fledged "comprehensive evaluation" involving actions like

237. See N.J. DEP'T OF ENVTL. PROT., CLEANUP STAR PROGRAM GUIDANCE DOCUMENT, http://www.state.nj.us/dep/srp/cleanupstar/cstar_guidance.pdf.

238. Telephone Interview with Colleen Kokas, Brownfield Manager, N.J. Dep't of Env'tl. Prot. (Oct. 7, 2005).

239. See Roberts, *supra* note 73, at 9.

240. MASS. PRIVATIZATION REPORT, *supra* note 54, at 6.

241. *Id.* at 32–33.

242. See MASS. AUDIT PROGRAM, *supra* note 112, at 1.

sample collection and site visits to ensure compliance with the MCP.²⁴³ The agency is currently considering changes to its audit procedures.²⁴⁴

	FY01	FY02	FY03	FY04
Level III Audits	332	208	196	131
Total Audits	1616	1369	2095	2281
Total Sites Paying Annual Compliance Fee	4804	5008	5143	6723
Percent of Audits with Level III	20.5	15.2	9.4	5.7
Percent of All Sites with Level III	6.9	4.2	3.8	1.9

Table 3. Breakdown of Audits²⁴⁵

If review consists of flipping through the LSPs' filed submittals, meaningful oversight is stymied. The audits are unlikely to generate information that will allow a true evaluation of LSPs' performance, either individually or collectively. Indeed, without more data, DEP may not even be able to ask the right questions—and the agency cannot “know what it [does] not think to ask.”²⁴⁶

Perhaps more importantly, DEP is unable to provide long-term monitoring. While the regulations require an audit of all sites for which activity and use limitation (AUL) was the selected remedy and allow unlimited monitoring in light of the long-term threat that AULs pose,²⁴⁷ DEP does not have the resources to audit sites more than once.²⁴⁸

The widespread use of AULs creates an urgent need for the agency to monitor the limitations provided in the deed, inform communities, and enforce violations.²⁴⁹ A leading land use practitioner summarizes the current conundrum as follows:

Only in the past couple of years, however, have we begun to appreciate that many of these controls have been poorly implemented, or not implemented at all. We have also begun to question whether any regulatory agency truly has authority to enforce these controls. Equally importantly, we have come to appreciate that, even when effective institutional controls have been implemented, no one may be responsible for

243. See *id.*

244. See Mass. Dep't of Env'tl. Prot., Audit Program—General Information, <http://www.mass.gov/dep/cleanup/compliance/audinfo.htm> (last visited Jan. 25, 2006).

245. See DEP Memorandum, *supra* note 28, at 5.

246. Donald F. Kettl, *Foreword* to GOLDSMITH & EGGERS, *supra* note 144, vii, viii (discussing NASA's excessive reliance on contractors).

247. See 1998 MASS. ACTS ch. 206.

248. Oct. 7th Interview with Fitzgerald, *supra* note 228.

249. Interestingly, some state and local governments are considering contracting out aspects of long-term monitoring to private companies with superior technology at their disposal. See, e.g., Ravi Arulanantham, Bob Wenzlau & Craig Johns, *Terradex: Using Information Technology to Provide Long-Term Management of Environmentally Impaired Properties*, in IMPLEMENTING INSTITUTIONAL CONTROLS, *supra* note 41, at 49.

monitoring their integrity over the long-term, frequently because of financial or other constraints.²⁵⁰

Without a management plan that provides for long-term monitoring to ensure that property owners adhere to use limitations, institutional controls like AULs do not solve the problem they were implemented to address. The state possesses the authority to enforce the restrictions,²⁵¹ but obviously cannot punish violations of which it is not aware. Under the current system, violations are likely to be detected by chance rather than design. For example, in one case, an AUL prohibited excavation on school grounds, but the school planned an expansion only months later.²⁵² Excavation was only stopped because a local public health official aware of the AUL happened to drive by the site and notice the work being done.²⁵³ Furthermore, AULs often require the maintenance of pavement integrity to prevent exposure to hazardous wastes. To ensure that appropriate action is taken to protect the public, the agency would have to actively monitor the inevitable degradation of pavement over time, something DEP lacks the resources to do.²⁵⁴

More attentive monitoring and evaluation of LSPs' performance would serve dual purposes. First, knowledge that such management is operative may inspire fear of getting caught, making private decisionmakers more faithful to government interests. Second, in the event that private decisionmakers nonetheless deviate from governmental interests, proper oversight can allow government to detect and remedy poor performance.²⁵⁵ The old adage bears repeating: you manage what you measure.²⁵⁶ Absent attentive monitoring, the agency cannot know the extent and source of, and thus cannot address, regulatory slippage. As with the tree that falls in a secluded forest, it is hard to tell if a governance system is working when no one is there to listen.

However, effective management—ex ante or ex post—is no simple task. It is expensive and time-consuming, and often seems likely to burden private providers to the point of eliminating the flexibility and

250. See Amy L. Edwards, *The Sleeping Giant Awakes: The Growing Public Debate About Institutional Controls*, 3 ABA ENVTL. TRANSACTIONS & BROWNFIELDS COMM. NEWSL. 2 (Jan. 2001), available at <http://www.abanet.org/environ/committees/envtab/newsletter/jan00/edwards.html>.

251. See 310 MASS. CODE REGS. § 40.1080 (2006).

252. Margaret R. Stofa, *Massachusetts' Activity and Use Limitations*, in IMPLEMENTING INSTITUTIONAL CONTROLS, *supra* note 41, at 179, 187 n.37.

253. See *id.*

254. Interview with Elizabeth Callahan, Policy Branch Chief, Bureau of Waste Site Cleanup, Massachusetts Dep't of Envtl. Prot., in Boston, Mass. (Sept. 12, 2005).

255. See MINOW, *supra* note 27, at 152–53.

256. See, e.g., Louis Lowenstein, *Financial Transparency and Corporate Governance: You Manage What You Measure*, 96 COLUM. L. REV. 1335 (1996).

innovation that make privatization appealing.²⁵⁷ Relatedly, budgetary constraints limit management efforts.²⁵⁸ As DEP staff have pointed out, providing more thorough screening would “suck resources away from sites that were posing real risks to health and the environment” or would require hiring additional employees—not just entry-level staff, but “senior technical people.”²⁵⁹ Charging parties for the additional oversight might be possible, but would be constrained by political and bureaucratic roadblocks.²⁶⁰ The lesson must be that the substantial costs of robust oversight—and the substantial consequences of compromised oversight—should be acknowledged and weighed when agencies consider privatization. If government lacks the resources to administer a program itself, it should carefully consider whether it nonetheless has adequate resources to successfully manage a privatized regime.²⁶¹

3. *Discipline*

In addition to the lack of monitoring of LSPs’ work, there are few avenues for meaningful discipline of LSPs who underenforce or actually violate the MCP. In theory, three groups possess some form of disciplinary authority over LSPs: DEP, the LSP Board, and the public. However, the design of the relationships between these groups, and the limitations on the power wielded by each one, makes meaningful discipline unlikely. In turn, the disciplinary architecture fails to deter regulatory slippage.

a. *DEP*

DEP retains the responsibility and legal authority of ensuring compliance with the MCP. However, it is hindered in doing so because it can only take direct action against noncompliant parties, not against LSPs. To be sure, vigorous enforcement against parties can shape the incentives of LSPs indirectly, as clients disfavor (and may try to hold responsible) LSPs whose work forces them to incur penalty fines. In recent years, this possibility has increased because DEP has more aggressively pursued noncompliant parties; the agency’s budget cuts have precluded its previous “compliance assistance” approach and spurred an

257. See GOLDSMITH & EGGERS, *supra* note 144, at 122–23.

258. See KETTL, SHARING POWER, *supra* note 24, at 174 (stating that state and local governments devote few resources to oversight, and that “if there is any overriding consensus on social service contracting in state and local governments, it is that oversight is virtually nonexistent”).

259. Oct. E-mail from Fitzgerald, *supra* note 224.

260. See *id.*

261. See Posner, *supra* note 181, at 539–40 (noting that the resource constraints driving reliance on third parties may also limit government’s ability to monitor them).

increasingly enforcement-oriented approach.²⁶² Still, enforcement actions are limited by DEP's own knowledge; absent tips from outsiders, its primary source of site information is its audits. As indicated earlier, these audits are commonly perfunctory paperwork checks and are performed at only 20 percent of sites.²⁶³ Thus, whether the agency's more aggressive enforcement approach will substantially alter LSPs' behavior depends on LSPs' level of risk aversion and the nature of the work they are doing. If LSPs feel comfortable that they will not be audited, or that their slippage is not so glaring as to be noticeable in an audit, they may have little fear. This translates into little force to counteract LSPs' bias toward their clients.

To ameliorate this problem, the LSP program could be modified to create additional means for DEP to discipline LSPs. Without imposing such burdensome constraints that the benefits of private sector flexibility and innovation are lost, the agency could exact agreements to incentivize respect for its authority.²⁶⁴ If DEP switched to a contracting rather than licensing scheme, it could negotiate penalties for noncompliance directly into the contract. Even in the extant licensing system, there is no reason DEP could not, by regulation, include provisions for sanctions and incentives as conditions of licensing. For example, the agency could provide bonuses to LSPs who achieve background pollution levels at a certain percentages of the sites they oversee; the bonus could take the shape of a monetary payment or a marketable endorsement from the agency. Similar benefits could accrue to LSPs who voluntarily participate in a program to increase transparency and recordkeeping at sites with AULs.

Once DEP develops a position of authority, the agency should leverage this authority to express its expectations clearly, provide incentives for adherence, and penalize deviations.²⁶⁵ Ideally, such an

262. See, e.g., MASS. DEP'T OF ENVTL. PROT., DEPARTMENT OF ENVIRONMENTAL PROTECTION COMPLIANCE AND ENFORCEMENT ANNUAL REPORT: FISCAL YEAR 2004, <http://www.mass.gov/dep/images/04cerpt.pdf> (describing a record year for enforcement actions); see also Gollodge, *supra* note 37, at 2 (explaining that the agency's new approach is "to provide greater responsibility to the licensed site professional for managing cleanup of these sites" while "redirect[ing] its resources to auditing the cleanups and using enforcement actions to ensure proper action by the private sector").

263. See *supra* Part I.D.1. DEP has found other ways to crack down on noncompliance. For example, it now detects missed deadlines by checking the dates that Phase submissions enter its database, and issues notices of noncompliance to parties who miss the deadlines. While this vigilance may mark a shift in attitude, it does not reflect an increase in substantive review of LSP work, and does not increase the likelihood of detecting substantive slippage. See Interview with Roberts, *supra* note 83.

264. Cf. Freeman, *Extending Public Law Norms*, *supra* note 12, at 1285 (noting the government's ability to "exact concessions—in the form of adherence to public norms—in exchange for contracting out its work").

265. See GOLDSMITH & EGGERS, *supra* note 144, at 124–37.

incentive/penalty system would infuse the agency's expectations into LSPs' institutional culture²⁶⁶ such that actual disciplinary action is rarely required.²⁶⁷

b. The LSP Board

When DEP wants to penalize LSPs rather than parties themselves, it must refer its complaints to an intermediary: the LSP Board.²⁶⁸ The relationship between the agency and the Board may give DEP little practical power, at least in situations where the alleged infraction is not a clear violation of the MCP. The Board must accept DEP's interpretation of the regulations, but it can choose to not discipline the LSP.

For example, DEP recently disagreed with an LSP's decision—discovered in an audit—to classify a Boston-area school as a “low intensity” site requiring a less stringent soil standard (S-2) than the standard (S-1) traditionally required in residential areas or places where children play.²⁶⁹ In defense, the LSP pointed out that while the MCP specifically requires a finding of “high *frequency*” when children attend school at the disposal site, the regulations do not specifically include schools in the high *intensity* category. The Board decided not to discipline the LSP. As the LSP Board President explained:

This is always the Board's prerogative—not to include a particular MCP violation in the formal disciplinary charges brought against an LSP after an investigation. In such instances, the Board simply finds that the MCP violation “does not rise to the level of one warranting discipline.” If DEP wants the Board to take this particular MCP violation more seriously, it will have to take some action that demonstrates clearly to LSPs that DEP has made this interpretation.²⁷⁰

One such action that DEP could take would be to clarify its interpretation in the regulations. Yet even if DEP forcefully pushes its interpretation of the regulations—which may involve political and procedural obstacles—it does not wield the power to dictate Board decisions regarding LSP discipline.

Of course, the LSP Board could advance DEP's interests of its own accord. Through licensing, discipline, and continuing education,

266. *Cf., e.g.,* Diller, *supra* note 160, at 1127 (“By manipulating the institutional culture of welfare offices, higher-level decisionmakers can steer the direction of the system as a whole, even when they no longer exert direct control.”).

267. *See* GOLDSMITH & EGGERS, *supra* note 144, at 128–29 (discussing the importance of building trust in order to avoid “oversight costs” such as negotiation and enforcement).

268. *See* 309 MASS. CODE REGS. §§ 7.00–7.15 (2006) (procedures governing disciplinary actions of the LSP Board); *see also id.* § 7.03 (pertaining to initiation of complaints and permitting “any person or any member of the Board” to file a complaint against an LSP with the Board).

269. *See* 310 MASS. CODE REGS. § 40.0933 (2006).

270. E-mail from Allan Fierce, Executive Director, LSP Board of Registration (Oct. 27, 2005) (on file with author).

professional boards have substantial influence over professionals' self-concept and identity. Because boards can use these "rituals" to set the tone for the profession, they are well positioned to facilitate the alignment of government and decisionmaker interests.²⁷¹ The LSP Board, however, has not seized this opportunity, choosing an interpretive approach that provides LSPs greater flexibility. The Board does little to detract from an LSP's incentives to exercise discretion in a client's favor. Most fundamentally, it has passed up an opportunity to clarify LSPs' role with respect to the public interest. Although regulations state that LSPs "shall *hold paramount* public health, safety, welfare, and the environment in the performance of professional services,"²⁷² the Board issued an advisory ruling almost immediately after the program's inception noting that "hold paramount" does not impose any extra obligations or liability on the LSP.²⁷³ While the letter of the regulations may suggest a duty to protect public health and the environment, the Board maintains that LSPs have no such duty and has not taken any disciplinary action related to the "hold paramount" requirement.²⁷⁴

Furthermore, the Board rarely invokes its power to discipline LSPs for unprofessional conduct—only twenty-five disciplinary actions have been taken in the thirteen-year history of the program.²⁷⁵ This may be because the Board has established only minimal standards for professional conduct. For example, the requirements for oversight, supposedly in place to prohibit LSPs from rendering professional opinions without adequate information, merely proscribe rendering an opinion if they have not "managed, supervised, or actually performed" the response action or "periodically reviewed and evaluated" the work.²⁷⁶ The regulations also generally prohibit LSPs from rendering opinions outside their field of expertise, but such opinions are allowed if based on the advice of another "professional" (not necessarily an LSP) whom the LSP reasonably determines to be qualified.²⁷⁷ The regulations do include a "Conflicts of Interest" provision, but interestingly, it only proscribes

271. Cf. Geoffrey P. Miller, *The Legal Function of Ritual*, 80 CHI-KENT L. REV. 1181 (2005) (discussing the use of rituals, including installation into a position of authority, to shape social identity). Although licensing board actions are not rituals in the socio-cultural sense, they can be seen as having analogous effects on professional cultures.

272. 309 MASS. CODE REGS. § 4.03(1) (emphasis added).

273. See Board of Registration of Hazardous Waste Site Cleanup Professionals, Distribution of Regulations Committee Minutes Relating to "Hold Paramount" Language in 309 CMR 4.03(1) (Jun. 10, 1993), available at <http://mass.gov/lsp/files/holdpara.htm>.

274. See *id.*; see also Roberts, *supra* note 73, at 6 (noting that the "hold paramount" requirement is aspirational only, and that LSP accountability to third parties is "extremely limited").

275. See Board of Registration of Hazardous Waste Site Cleanup Professionals, Summary of Final Disciplinary Actions (Sept. 19, 2006), available at <http://mass.gov/lsp/files/final.doc>.

276. 309 MASS. CODE REGS. § 4.03(2)(a) (2006).

277. See *id.* § 4.02(3).

conflicts that would undermine the *client's* interests, not environmental interests.²⁷⁸ For example, the provision bars representation of more than one client at the same site (*i.e.*, both neighbors fighting over a migrating plume of pollution) where those clients' interests would conflict. Finally, the professional conduct regulations only apply when the LSP is specifically rendering "professional services." This means that the Board does not regulate advice or services not rendered pursuant to an opinion submitted to DEP;²⁷⁹ response actions on which that opinion is based; or services that an unlicensed environmental professional could have performed.²⁸⁰

DEP's limited influence over LSPs, combined with the LSP Board's deferential posture, fails to align the interests of LSPs and the agency. The systematic noncompliance reflected in the audit results suggests that a closer relationship between DEP and LSPs is appropriate. If DEP contracted with LSPs directly, the agency could make its expectations clearer, offer incentives for adherence, and penalize (or fire) contractors who deviated from expectations. The agency would not have to expend vastly greater resources to do this, as it could recoup the costs of contracting using a variation of its cost recovery provisions.²⁸¹ Through the contractual relationship, DEP could pursue its desire for LSPs to consider the public interest in their decisionmaking. If LSPs needed to adopt a public interest mindset in order to secure a contract, the Board's evasion of the "hold paramount" requirement would be counteracted. DEP could also take the additional step of amending the MCP regulations—something it has been trying to do for years—or issuing a formal policy document explaining how LSPs should exercise their discretion. Because regulations contain inevitable ambiguity, however, the more important step is building a relationship with private decisionmakers, such that carrying out the government's agenda—not a private agenda—is the mission the decisionmaker embraces.

c. *The Public*

Through monitoring and litigation, the public can usually act as a check on private decisionmakers, exerting pressure to comport with the public values expressed by agency regulations.²⁸² However, there are few

278. See *id.* § 4.04.

279. See *supra* Section I.C.2.a. for an explanation of the types of opinions that LSP provides to DEP.

280. See *Fierce, supra* note 75, at 16. The exception to this lack of Board jurisdiction is when an LSP commits a felony, certain misdemeanors, or fraudulent behavior with a substantial connection to his or her professional responsibilities. See 309 MASS. CODE REGS. § 7.01.

281. See *supra* note 38 for a description of state cost recovery provisions.

282. See, *e.g.*, Mark Seidenfeld & Janna Satz Nugent, "The Friendship of the People": *Citizen Participation in Environmental Enforcement*, 73 GEO. WASH. L. REV. 269, 298–302

opportunities for meaningful public involvement in the MCP. Not only are consultations with the public not mandatory, but standing requirements may impede citizen suits that would seek enforcement of the MCP.

First, unlike in publicly administered remediation programs, in which notice and comment procedures accompany nearly every phase of the cleanup, public participation in the LSP program is not required unless a group of ten or more citizens petitions for special involvement.²⁸³ Of course, this possibility is only meaningful if the public knows about the cleanup. In contrast to other states, where potentially interested groups must be identified and notified before remediation activities can take place, the current MCP makes it unlikely that concerned citizens would even find out about a cleanup. Copies of certain documents need to be filed with the Department of Public Health and published in the legal notices section of a local newspaper, and submittals become part of the public record that interested parties can request to view.²⁸⁴ Still, if they do not see the backhoe across the street or search DEP records, they may well be unaware of the response action. However, the proposed MCP amendments would make notice more meaningful by transforming the newspaper notice from a legal notice to a readable advertisement in the news section of the paper.²⁸⁵

The program is theoretically accountable to the public through judicial review, but standing requirements impede citizen suits. Concerned citizens may be able to challenge DEP's decisions about cleanups through an action in Superior Court under the state Administrative Procedures Act,²⁸⁶ which provides for adjudication—without a jury and confined to the administrative record—of claims against state agencies.²⁸⁷ However, to have standing a party must be

(2005) (describing the role of citizens in environmental enforcement). This argument for public involvement is a more instrumental variation of the more common argument that public involvement is essential to legitimate democratic government. *See* Minow, *New Religion*, *supra* note 10, at 1260 (“[W]ithout public involvement and public reporting on the results of various public-private ventures, democracy is itself in jeopardy. Self-government will not retain meaning if major decisions about public resources and the shape of collective experiences occur without the knowledge or participation of the nation's citizens.”).

283. *See* 310 MASS. CODE REGS. § 40.1404 (2006) (Public Involvement Plan Site Designation).

284. *See generally id.* § 40.1403 (Minimum Public Involvement Activities in Response Actions).

285. *See* MASS. DEP'T OF ENVTL. PROT., FINAL AMENDMENTS MASSACHUSETTS CONTINGENCY PLAN 310 CMR 40.0000 at 18, *available at* <http://www.mass.gov/dep/cleanup/laws/mcp-rs-0106.pdf>. The amendments to 310 MASS. CODE REGS. § 40.1403 would still allow a traditional legal notice rather than an advertisement if the advertisement was more than twenty percent more expensive than the legal notice, or if the newspaper did not agree to run the advertisement. *See id.* at 145.

286. MASS. GEN. LAWS ch. 30A, § 14 (2006).

287. *See id.*

aggrieved by a final state agency action.²⁸⁸ Give the agency's minimal role in the decisionmaking process, a citizen would be hard-pressed to find a final action by DEP with respect to the MCP. This lack of DEP involvement might similarly impede a citizen suit against the agency under another statutory judicial review provision—the MCP's "Citizen Enforcement" provision.²⁸⁹ However, a suit against an LSP or PRP might fare better.

Short of retooling standing requirements, the LSP program could incorporate the public involvement provisions present in some publicly administered programs such as New York State's Brownfields Cleanup Program (BCP).²⁹⁰ Accordingly, the MCP could require notification of all parties who might be affected by a cleanup,²⁹¹ and could provide for notice, comment, and public hearings through the phases of the remediation process.²⁹²

However, like augmenting management procedures, increasing opportunities for public participation would not be without costs. Political insulation may expedite cleanup efforts, and the public may base its concerns on irrational fears rather than sound science. Still, inserting additional opportunities for public participation could increase the disciplinary force on LSPs and facilitate greater regulatory adherence.

C. *Summary of Recommendations for Restructuring*

Despite its success in other areas—namely volume and speed of cleanups completed—the LSP program exhibits several structural flaws if

288. *See id.*

289. *See* MASS. GEN. LAWS. ch. 21E, § 15. The statute authorizes "any suit by Massachusetts residents to enforce the requirements of this chapter, or to abate a hazard related to oil or hazardous materials in the environment." *See also* E-mail from Jeff Porter, Member, Mintz, Levin, Cohn, Ferris, Glovsky & Popeo PC (Nov. 7, 2005) (on file with author). Another option would be to bring a suit against the LSP Board. First, the citizen would have to request an adjudicatory hearing before the Board. *See* MASS. GEN. LAWS. ch. 21A, § 19H. If she were aggrieved by the outcome, she could seek judicial review of the decision under the state APA. *See id.* However, it is not clear that any citizen other than the LSP could be aggrieved by a hearing pertaining to a Board disciplinary decision. Even if a citizen could show she was aggrieved, the court might not have jurisdiction over the claim given specific statutory language limiting review of Board decisions. *See id.* § 19I.

290. *See* Desnoyers & Schnapf, *supra* note 45, at 12. The BCP is codified in the N.Y. Environmental Conservation Law. N.Y. ENVTL. CONSERV. LAW § 27-1401 to -1433 (McKinney 2005). *See also* New York Draft Guide, *supra* note 43.

291. In New York, the property owner must submit a "citizen participation plan" identifying concerned citizens and providing a schedule of public participation activities to address their concerns. *See* New York Draft Guide, *supra* note 43, at 14–15.

292. In New York's BCP, the public may comment at numerous stages: at the filing of an application; prior to finalizing a remedial investigation work plan; prior to agency approval of a proposed remedial investigation report; prior to agency finalization of a remedial work plan; prior to initiation of construction at the site; prior to agency approval of a final engineering report; and within ten days of issuance of a certificate of completion. *Id.* at 14.

regulatory adherence is a goal. To summarize the above discussion, future initiatives could alter the LSP program in several ways to increase interest alignment.

First, the agency should recognize and address conflicts of interest. To limit in-house bias, DEP could promulgate a rule requiring that an LSP cannot render a professional opinion on a site for which she herself drafted the plans. To restrict external conflicts of interest—pressure from clients—DEP should consider switching to a contracting out arrangement in which clients do not pay LSPs directly. If this change seems too drastic, the agency might also consider increasing its regulation of the contractual relationship between parties and LSPs, perhaps proscribing fixed-price remediation.

With respect to management, the agency should consider reinstituting its *ex ante* screening process to retain state capacity and cabin LSP discretion, and expanding its monitoring to increase knowledge of slippage and incentives for good behavior. Finally, the agency should seek to expand the disciplinary channels through which DEP, the LSP Board, and the public can address LSPs' underperformance. Among other possibilities, increasing disciplinary opportunities might involve including incentives for achieving background conditions in the licensing agreement.

CONCLUSION

The Massachusetts LSP program is a significant and potentially problematic development in state environmental governance. Audits reveal that it has contributed to pervasive departures from promulgated environmental regulations, and many of the regulatory decisions involve high stakes for public health and the environment. As more and more states consider privatizing all or part of their oversight of contaminated property cleanups and admire the expediency and flexibility of the LSP program, they must also weigh the problems the LSP program has produced.

To be sure, the panoply of concerns associated with the LSP program is not a denouncement of private involvement in hazardous waste site cleanups. To the contrary, such cleanups would be paralyzed without the competent participation of private actors at various phases. However, agencies considering privatization should contemplate the spectrum of possibilities and the broad array of public-private partnerships that might be harnessed to effectuate environmental protection. Indeed, the Massachusetts program teaches that structure matters, and regulatory slippage is not inevitable. When regulatory slippage becomes systematic, designers of privatization ought to go back to the drafting table to modify the incentives and relationships that make

their program tick. This is especially true in the context of hazardous substances: because the grave effects of noncompliance with environmental regulations may not be felt for many years, maximizing regulatory adherence in the near-term requires greater vigilance. State agencies must proactively reflect upon and react to malfunctioning regulatory regimes.

On this score, the lesson from Massachusetts seems intuitive: if you give private decisionmakers broad discretion, pit their interests against those of the government, and offer little chance of getting caught for misconduct, they are likely to deviate from regulatory standards and the public values the regulations represent. To avoid this, agencies could identify and narrow private decisionmakers' discretion through *ex ante* screening that places the most sensitive projects under public control. Agencies could then attempt to align private decisionmakers' interests with their own. Although each program will be different, agencies should strive to implement regulations that restrict internal conflicts of interest—perhaps by insisting on internal controls—and minimize external conflicts of interest, by increasing the answerability of private decision makers to agency officials through the contracting or licensing processes. To make discipline a credible threat, the agency should also attentively monitor private performance.

These interest alignment strategies may be costly. They may appear likely to jeopardize the gains of expediency, flexibility, and predictability that privatized decisionmaking offers by reconstructing aspects of hierarchical bureaucratic control. But if improving the privatized program seems impossible or too costly, states must squarely face the political decision before them by weighing the tradeoffs between compliance and factors like productivity and expediency. In some instances, states may find a return to public administration preferable; in others, they may accept the tradeoffs that privatization entails.

From an even broader perspective, the Massachusetts LSP program illustrates that the trend towards private governance involves not only classical contracting out, but also nonparadigmatic arrangements. Privatization's form is not predetermined or unchangeable. To the extent that popular debates over the appropriate extent of privatization presume sameness among privatization initiatives, they may over-generalize. The structure of relationships and authority in a governance system, not merely the public or private packaging, likely plays a significant role in the program's performance. Thus, when a privatization initiative appears to fall short of its stated goals, careful attention to program redesign may provide a viable alternative—a middle ground between complete abandonment of privatization and inaction.

