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Genevieve Bishop

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THE LOCAL BAKER/LOCAL BUREAUCRAT DILEMMA: PRIVATIZATION AND POWER IN NEW YORK CITY

I. INTRODUCTION

“Whom would you rather trust to supply your bread—your local baker or your local bureaucrat?”¹ That question, presented by Ronald S. Lauder, chairman of the New York State Senate Advisory Commission on Privatization, implies that the value of privatization should be obvious. Certainly, phrasing the question in that way invites public support for privatizing urban services. Most people cheer overwhelmingly for the local baker.² The purchase of bread, though, differs significantly from the provision of homeless housing, road repair services, and park bench maintenance.³ Because of those differences, privatization concerns cannot be reduced to “local supplier versus local bureaucrat” generalizations.⁴

In the early 1990s, New York City Mayor Rudolph Giuliani embarked on a plan for extensive privatization of City services.⁵ The City Council viewed Giuliani’s plan skeptically, much the way they might have viewed Lauder’s simplistic “local supplier versus local bureaucrat” distinction.⁶ In an attempt to get the mayor’s attention and to challenge the rapid expansion of privatization, the Council passed Local Law 35 of 1994 over

1. Ronald S. Lauder, *Executive Summary*, in *PRIVATIZATION FOR NEW YORK: COMPETING FOR A BETTER FUTURE, A REPORT OF THE NEW YORK STATE SENATE ADVISORY COMMISSION ON PRIVATIZATION* vii, ix (1992).

2. See DONALD F. KETTL, *SHARING POWER* 1 (1993) (“Americans have long had a reverence for private markets to match their dislike of public power.”).

3. See Janet C. Fisher, *Reinventing a Livelihood: How the United States Labor Laws, Labor-Management Cooperation Initiatives, and Privatization Influence Public Sector Labor Markets*, 34 *HARV. J. ON LEGIS.* 557, 559-60 (1997).

4. See *id.* at 563-65.

5. See, e.g., Karen Pallarito, *Report Questions Logic of N.Y. Plan*, *MODERN HEALTHCARE*, May 22, 1995, at 17 (reporting on Mayor Giuliani’s plan to privatize several City hospitals); John Shanahan, *Giuliani Seeks More Spending Cuts: Budget Would Also Trim Jobs*, *RECORD* (Northern N.J.), Apr. 28, 1995, at A4 (describing Mayor Giuliani’s plan to reduce the City’s work force by 4,000, partly through privatization).

6. Interview of Richard Weinberg, Director and General Counsel, and Jay Damashek, Assistant Director, Office of the General Counsel, Legal and Governmental Affairs Division, New York City Council, in New York, N.Y. (Feb. 27, 1998) [hereinafter Interview of Weinberg and Damashek].

a mayoral veto.⁷ Local Law 35 became New York City Charter ("Charter") section 312(a), amending the 1989 Charter with respect to contracts for City services.⁸

The stated intent of Local Law 35 and section 312(a) is to ensure that New York City promotes the efficient purchasing of City services.⁹ However, the complete picture of section 312(a) may not be found in this statement of legislative intent.¹⁰ This Note will explore the authority for privatization decisions in New York City, and the exercise of that authority over the last four years. It will consider the role of section 312(a) and other efforts to demand accountability for privatization decisions. Finally, this Note will discuss possible Charters which could improve accountability for privatization decisions and promote the efficient purchasing of City services.

Authority for privatization decisions is best discussed within the context of power in New York City. Therefore, Part II¹¹ of this Note reviews the historical power structure of New York City government. Part III¹² introduces privatization in New York City in the 1990s, paying particular attention to the impact of shifts in decision-making authority. Part IV¹³ considers the legal limitations on accountability for privatization decisions in New York City. Finally, Part V¹⁴ reviews implications of the foregoing discussion for future revisions of the New York City power structure.

II. PRIVATIZATION AND POWER IN NEW YORK CITY

Privatization decisions are often fleshed out in conflict.¹⁵ Public sector

7. See NEW YORK, N.Y., COMMITTEE ON GOVERNMENTAL OPERATIONS, *Reports of the Committee on Governmental Operations: Privatization of City Employees*, in NEW YORK CITY LEGISLATIVE ANNUAL, LOC. L. NO. 35 (Jun. 14, 1994) [hereinafter COMMITTEE ON GOVERNMENTAL OPERATIONS].

8. See *id.*; N.Y. CITY CHARTER ch. 13 § 312(a) (1989).

9. See COMMITTEE ON GOVERNMENTAL OPERATIONS, *supra* note 7.

10. See Interview of Weinberg and Damashek, *supra* note 6.

11. See *infra* notes 15-65 and accompanying text.

12. See *infra* notes 66-135 and accompanying text.

13. See *infra* notes 136-202 and accompanying text.

14. See *infra* notes 203-13 and accompanying text.

15. See, e.g., Nancy Buonanno Grennan, *A Legal Roadmap to Privatizing Government Services in Washington State*, 72 WASH. L. REV. 153, 154 (1997) (describing conflicting interests at stake in the privatization movement of Washington State); Mark Hazelbaker & David C. Hertel, *Privatization and the "Primarily Related" Test: A Case for Clarification*, 74 MARQ. L. REV. 451, 457-58 (1991) (discussing tensions resulting from conflicting interests in the Milwaukee School Choice Program).

employees demand job security.¹⁶ Private enterprise demands the benefits of a free market economy.¹⁷ The public demands the efficient provision of services.¹⁸ However, in New York City, the conflicts inherent in privatization decisions often remain below the surface of city life.¹⁹

Privatization results in contracts. In New York City, contract authority lies squarely with the mayor.²⁰ Despite the diverse and conflicting interests at stake, executive privatization decisions are seldom contested.²¹ Because privatization decisions generally favor private enterprise, the private sector has little reason to complain.²² Public-sector agencies and employees who may want to protest those decisions have little opportunity for more than a half-hearted squawk.²³ On the other hand, city residents who have the opportunity to respond only minimally exercise that opportunity and rarely, if ever, significantly influence privatization decisions.²⁴ The distribution of power within New York City, therefore, prevents the escalation of conflicts that could remind decision-makers that privatization decisions must balance differing interests and cannot be based on simplistic "local vendor versus bureaucrat" generalizations.²⁵

16. See Grennan, *supra* note 15, at 155-63.

17. See *Hearing on Int. No. 120-A Before the Council Committee on Governmental Operations* (New York, N.Y., Feb. 14, 1994) (statement of James P. Gifford, Executive Vice President, New York City Partnership & New York Chamber of Commerce and Industry) [hereinafter Gifford Statement].

18. See KETTL, *supra* note 2, at 1-6 (stating that the primary rationale put forth by proponents of privatization is that private enterprise promises greater efficiency).

19. Uncommon alliances develop from a sense of powerlessness and prevent tensions from rising to the surface. For example, Thomas G. Rozinski, Counsel, New York City Department of Parks & Recreation, reported that tensions typically considered inherent between City agencies and public-sector labor unions remained below the surface because the unions sensed that the alternative to cooperate with City agencies was the loss of additional jobs to participants in the Work Experience Program. See Thomas G. Rozinski, Address at New York Law School (Feb. 5, 1998) [hereinafter Rozinski Address].

20. See N.Y. CITY CHARTER ch. 13 § 372 (1989).

21. See Interview of Weinberg and Damashek, *supra* note 6.

22. See Gifford Statement, *supra* note 17.

23. See Rozinski Address, *supra* note 19.

24. See James W. Lowe, *Examination of Governmental Decentralization in New York City and a New Model for Implementation*, 27 HARV. J. ON LEGIS. 173, 179-94 (1990) (documenting the scarcity of persons participating in the democratic process of seeking change through political action).

25. See Jonas Prager & Swati Desai, *Privatizing Local Government Operations: Lessons from Federal Contracting out Methodology*, PUBLIC PRODUCTIVITY & MGMT. REV., Dec. 1996, at 185 (1996) ("[O]ne should avoid the knee-jerk reaction that claims that contracting out will *always* prove more efficient and more effective than services provided by the municipality itself.").

A. *An Overview of the History of Power in New York City*

New York City had solid practical reasons to concentrate contract authority in the hands of the executive.²⁶ Since the City's incorporation in 1897, City leaders believed that a strong mayoralty was integral to action and accountability.²⁷ Even today, some fear that any limitation on mayoral authority could paralyze the City.²⁸

In 1989, City leaders and the Charter Revision Commission had historical reasons for confirming a strong mayoralty.²⁹ Until 1821, the governor of New York State had selected the mayor of New York City.³⁰ Even after popular election of the mayor was established, the State continued to interfere in the City's affairs.³¹ The state legislature controlled administrative appointments.³² The legislature also controlled the City budget by creating the Board of Estimates and Apportionment and by authorizing the governor to appoint a majority of the Board's members.³³

The popularly elected mayor did not gain control of the Board until 1893, when the corporation counsel, a mayoral appointee, was added to the Board.³⁴ New Yorkers longed for freedom from state interference.³⁵ Thus, when the City Charter was revised in 1897, the Charter Commission viewed strong mayoral rule as a vehicle to keep the state out of City

26. See *Viewpoints*, NEWSDAY (N.Y.), Jan. 10, 1997, at A42 (asserting that any power structure for New York City which does not concentrate power in the hands of the mayor could paralyze the City government).

27. See Joseph P. Viteritti, *The Tradition of Municipal Reform: Charter Revision in Historical Context*, in RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM 16, 20 (Frank J. Mauro & Gerald Benjamin eds., 1989) ("[T]he government that came into existence in 1898 gave its [mayor] more institutional power than the mayor in any other major American city ever had and perhaps will [have]. . . . The city took the reformist model of a strong mayoralty to an extreme, the assumption being that accountability could be achieved by concentrating responsibility.").

28. See *Viewpoints*, *supra* note 26; Gene Russianoff, *Charter Revision Revs Up*, CITYLAW, (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), Jan./Feb. 1998, at 1.

29. For a more complete history of New York City government, see generally FREDERICK SHAW, HISTORY OF THE NEW YORK CITY LEGISLATURE (1954); WALLACE S. SAYRE & HERBERT KAUFMAN, GOVERNING NEW YORK CITY: POLITICS IN THE METROPOLIS (W.W. Norton & Co. 1965) (1960).

30. See Viteritti, *supra* note 27, at 17.

31. See *id.* at 18.

32. See *id.*

33. See *id.*

34. See *id.* at 19.

35. See SHAW, *supra* note 29, at 4.

affairs.³⁶ The Commission gave the mayor of New York City greater institutional power than the mayor of any other major American city.³⁷

While the seeds of a strong mayoral government were sown in colonial history, the structure of New York City government as we know it today was not established until the 1935 Charter increased the concentration of authority in the executive.³⁸ Thus a trend began which continued into the 1960s.³⁹

As the executive gained authority, the City Council lost it.⁴⁰ All actions of the City Council that reduced revenue or affected City employees were subject to approval by the Board of Estimate before submission to the mayor.⁴¹ The Board of Estimates and Apportionment, renamed simply the Board of Estimate, lost legislative status but retained the power to set salaries, approve franchises, and authorize the sale or lease of City property.⁴² New York City government settled into the structure of a weak City Council, an executive board of directors, and a very strong executive.⁴³ The authority to award contracts was in the hands of the executive.⁴⁴ No countervailing power existed to challenge those decisions.⁴⁵

B. Challenges to the City's Power Structure

Opportunity to revise the power structure in New York City arose in the 1980s.⁴⁶ Two challenges to the structure of the City's representative institutions were heard in the United States District Court. In 1981, Judge Edward R. Neaher of the Eastern District of New York determined in *Andrews v. Koch* that the practice of electing two at-large City Council members by a limited nomination and limited voting process violated the

36. See Viteritti, *supra* note 27, at 24-25.

37. The mayor controlled the budget process by appointing three of the five seats on the Board of Estimates and Apportionment. See Viteritti, *supra* note 27, at 20. The mayor's "role in the local legislative process was fully established by the fact that it took five-sixths of the vote of both houses of the legislature to override [a mayoral veto]." *Id.*

38. See *id.* at 25-26.

39. See *id.* at 26.

40. See *id.*

41. See *id.*

42. See *id.*

43. See *id.* at 19, 26; Lowe, *supra* note 24, at 175-76.

44. See N.Y. CITY CHARTER ch. 13 § 310 (1989).

45. See Interview of Weinberg and Damashek, *supra* note 6.

46. See Lowe, *supra* note 24, at 173-74.

constitutional standard of "one-person, one-vote."⁴⁷ Less than one month later, the New York Civil Liberties Union challenged the structure of the Board of Estimate under the same constitutional standard.⁴⁸

The District Court in *Morris v. Board of Estimate* concluded that the "one-person, one-vote" standard did not apply to the Board because the Board was not a legislative body.⁴⁹ The Second Circuit Court of Appeals reversed that decision and remanded the case for a determination of whether the Board was substantially malapportioned.⁵⁰ In 1984, Judge Neaher determined that the Board was indeed malapportioned, but he allowed the City additional time to present justifications for the Board's structure.⁵¹ Two years later, Neaher ordered the City to correct the unconstitutional structure "with all deliberate speed."⁵²

The *Andrews* and *Morris* decisions set the stage for restructuring the City power structure.⁵³ Two commissions were established to develop a proposed revision of the City Charter.⁵⁴ The 1989 Charter revisions, approved by popular vote in November 1989, rearranged the structure of City government significantly.⁵⁵ The Board of Estimate was abolished and the number of City Council seats increased from thirty-five to fifty-one.⁵⁶ The resulting power shift, however, only placed more concentrated control in the hands of the executive.⁵⁷

47. See *Andrews v. Koch*, 528 F. Supp. 246, 252 (E.D.N.Y. 1981), *aff'd*, 688 F.2d 815 (2d Cir. 1982), *aff'd*, 459 U.S. 810 (1982).

48. See *Morris v. Board of Estimate*, 551 F. Supp. 652, 653 (E.D.N.Y. 1982).

49. See *id.* at 657.

50. See *Morris v. Board of Estimate*, 707 F.2d 686, 691 (2d Cir. 1983).

51. See *Morris v. Board of Estimate*, 592 F. Supp. 1462, 1477 (E.D.N.Y. 1984), *aff'd*, 831 F.2d 384 (2d Cir. 1988), *aff'd*, 489 U.S. 688 (1989).

52. *Morris v. Board of Estimate*, 647 F. Supp. 1463, 1479 (E.D.N.Y. 1986); see also Joyce Purnick, *City Estimate Board Ordered to Establish One Man, One Vote*, N.Y. TIMES, Nov. 20, 1986, at A1 (providing a contemporary reaction to Judge Neaher's decision).

53. Shortly after the *Andrews* decision, Mayor Koch appointed a Charter Revision Commission chaired by Michael I. Sovern, president of Columbia University. After the *Morris* decision, Koch appointed Richard Ravitch to chair a second Commission charged with recommending appropriate changes in the structure of City government. See Gerald Benjamin & Frank J. Mauro, *The Reemergence of Municipal Reform*, in *RESTRUCTURING THE NEW YORK CITY GOVERNMENT: THE REEMERGENCE OF MUNICIPAL REFORM*, 1, 3 (Frank J. Mauro & Gerald Benjamin eds., 1989).

54. See *id.* at 3-7.

55. See Lowe, *supra* note 24, at 175.

56. See Joseph P. Viteritti, *The New Charter: Will It Make A Difference?*, in *URBAN POLITICS NEW YORK STYLE* 413, 421 (1990).

57. See Lowe, *supra* note 24, at 173.

Prior to the Charter revision, the five borough presidents had substantial input regarding the City budget.⁵⁸ After the revision, their input was reduced to the right to make recommendations regarding five percent of the expense and capital budgets.⁵⁹

The city council president's authority was also significantly reduced under the revised Charter.⁶⁰ Today, the council president's rather nebulous new role involves few substantive activities.⁶¹

The powers lost by the borough presidents and the city council president did not increase the power of the City Council.⁶² Instead, significant powers became more firmly concentrated in the hands of the executive.⁶³ The Council gained no authority over the coveted area of contracting.⁶⁴ As the executive retained full control over contracting, it also retained full control over privatization decisions.⁶⁵

III: THE PRIVATIZATION TREND AND NEW YORK CITY

A. *General Trends Toward Privatization*

By the late 1980s, cities throughout the United States were struggling to satisfy demands for increased public services within the limits of severely constrained revenues.⁶⁶ City leaders searched for innovative alternatives to publicly provided services.⁶⁷ Privatization became one solution of growing popularity.⁶⁸

58. *See id.* at 175 n.14.

59. *See id.*

60. *See id.* at 175-76.

61. The council president now fulfills only two significant roles. First, the president chairs a commission on public information. *See* N.Y. CITY CHARTER ch. 47 § 1061 (1989). Second, the president votes in the event of a tie among the council members. *See id.* ch. 2 § 24(e).

62. *See* Lowe, *supra* note 24, at 176.

63. *See id.*

64. *See id.* at 174.

65. Contracting authority is not among the enunciated powers of the Council. Other than the mayor, only the comptroller has any authority related to contracting. *See* N.Y. CITY CHARTER ch. 2 § 28; ch. 13 § 326 (1989).

66. *See* Prager & Desai, *supra* note 25, at 185; E.S. Savas, *Introduction, in* PRIVATIZATION FOR NEW YORK: COMPETING FOR A BETTER FUTURE, A REPORT OF THE NEW YORK STATE SENATE ADVISORY COMMISSION ON PRIVATIZATION 3 (1992).

67. *See* Prager & Desai, *supra* note 25, at 185.

68. *See* Savas, *supra* note 66, at 3.

Privatization passes ownership of something publicly held to the private sector.⁶⁹ The item owned may be tangible, such as a piece of property, or intangible, such as the right to provide a particular public service.⁷⁰ This approach destroys governmental monopolies and allows market competition to determine issues related to the provision of public services.⁷¹

Privatization can take many forms, including but not limited to, allowing private industry to bid competitively for contracts, awarding franchises for service provision or infrastructure management, and subsidizing services through voucher programs.⁷² Privatization can also involve the sale of government-owned assets and deregulation of particular services areas, allowing private entrepreneurs to displace public-service monopolies.⁷³

By 1994, New York City confronted a \$ 2.3 billion budget deficit⁷⁴ and a growing demand for increased efficiency in the provision of City services.⁷⁵ The political and economic situation was ripe for privatization.⁷⁶ Mayor Giuliani did not hesitate.⁷⁷ The City embarked on a series of extensive privatization initiatives.⁷⁸

69. *See id.*

70. *See* Lauder, *supra* note 1, at vii.

71. *See id.*

72. *See* Savas, *supra* note 66, at 3.

73. *See id.*

74. *See Hearing on Int. No. 120-A Before the Committee on Governmental Operations* (New York, N.Y., Feb. 14, 1994) (statement of Peter J. Powers, Deputy Mayor for Operations) [hereinafter Powers Statement].

75. *See Hearing on Int. No. 120-A Before the Committee on Governmental Operations* (New York, N.Y., Feb. 14, 1994) (statement of Dean M. Mead, Senior Research Associate, Citizens Budget Commission).

76. *See generally* Blanche Blank, *Bureaucracy: Power in Details*, in *URBAN POLITICS NEW YORK STYLE* 107, 107-41 (Jewel Bellush & Dick Netzer eds., 1990).

77. *See* Richard M. Weinberg, *An Overview of the Administration's Privatization Initiatives 3-9* (Mar. 1995) (unpublished brief on file with the Committee on Governmental Operations).

78. By early 1995, the City's privatization initiatives included: maintenance services for two park districts in the Bronx and two park districts in Queens; plumbing, painting, and electrical services at parks throughout the five boroughs; management of eleven adult shelters, two pre-natal shelters, and two family shelters; outreach services for homeless single adults; health services for homeless families and single persons; a supportive work program for substance abusers in recovery; education and enrollment services regarding Medicaid Managed Care; street resurfacing in Queens; location services for parents delinquent in child-support payments; data entry services; facility maintenance at 221 firehouses; traffic signal repair; preparation of tax bills; management and operation of jail facilities; management and operation of wastewater treatment plants; water meter reading services; mailroom services; repair and recharging of fire department masks; computer programming; publishing services; vehicle maintenance; building renovations; parking

City community leaders and governmental officials were divided over the possible effects of this increase in privatization. Mayor Giuliani believed that competition would boost government productivity while reasonably limiting expenses.⁷⁹ Union leaders worried that increased privatization would destroy public-sector job security.⁸⁰ City Council leaders claimed to fear not privatization but the concentration of authority for privatization decisions.⁸¹ In that setting, the Council took up consideration of Introductory No. 120-A, the bill which would become Local Law 35 of 1994 and would amend the City Charter in the area of procurement of contracts.⁸²

B. Local Law 35 of 1994

Local Law 35 of 1994 ("Local Law 35") applies to all technical, consulting, or personal service contracts valued above \$100,000.⁸³ Under this law, a City agency intending to solicit bids or proposals for delivery of services must first ascertain whether any City employee will be displaced by the plan to contract out the work.⁸⁴ The agency must then notify the comptroller of the result.⁸⁵ If displacement will occur, the agency must analyze the costs and benefits associated with delivery of this service using City workers.⁸⁶ This analysis must be submitted to the City Council and to the representative of the affected collective bargaining unit.⁸⁷

Once a decision to contract out the work has been made, the contracting agency follows the City's usual solicitation practices and makes

garages. *See* Weinberg, *supra* note 77, at 3-9.

79. *See* Powers Statement, *supra* note 74.

80. *See* *Hearing on Int. No. 120-A Before the Committee on Governmental Operations* (New York, N.Y., Feb. 14, 1994) (statement of Stanley Hill, Executive Director, District Council 37, AFSCME AFL-CIO) [hereinafter Hill Statement].

81. *See* Interview of Weinberg and Damashek, *supra* note 6.

82. *See* COMMITTEE ON GOVERNMENTAL OPERATIONS, *supra* note 7, at 3-9; N.Y. CITY CHARTER ch. 13 § 312(a) (1989).

83. *See* COMMITTEE ON GOVERNMENTAL OPERATIONS, *supra* note 7, at 2.

84. Displacement is defined as "any employment action that results in a reduction in the number of funded positions including but not limited to, those resulting from the layoff; demotion; bumping; involuntary transfer to a new class, title, or location; time-based reductions, or reductions in customary hours of work, wages, or benefits of any city employee." N.Y. CITY CHARTER ch. 13 § 312(a)(8) (1989, as amended 1994); NEW YORK, N.Y., COMPETITION COORDINATING COMMITTEE, CITY OF NEW YORK GUIDELINES FOR PUBLIC/PRIVATE COMPETITION 10 (1995) [hereinafter COMPETITION COORDINATING COMMITTEE].

85. *See* COMPETITION COORDINATING COMMITTEE, *supra* note 84, at 10.

86. *See id.*

87. *See id.*

its decision regarding the preferred method of service delivery in accordance with the guidelines of the Procurement Policy Board ("PPB").⁸⁸ The PPB, as established by the 1989 Charter, is a five-member panel with the authority to define regulations regarding solicitation; contract award, administration, and oversight; contract dispute resolution; and the form and content of agency contract records.⁸⁹ The PPB is largely controlled by the mayor as he appoints three of its five members; the remaining two seats are appointed by the publicly elected comptroller.⁹⁰

After deciding to award a contract, the agency head must present the reasons for that decision and all supporting documentation to the comptroller, the City Council, and collective bargaining unit representatives.⁹¹ The Council may conduct a public hearing within thirty days of the proposed contract;⁹² no contract may be awarded before the Council has had the opportunity to conduct this hearing.⁹³

C. Controversy Surrounding Local Law 35

Before its passage, Local Law 35 engendered much controversy.⁹⁴ Supporters included the Committee On Governmental Operations and District Council 37.⁹⁵ The strongest opposition came from the executive branch of City government and from representatives of private enterprise.⁹⁶

The Committee On Governmental Operations opined that the bill would allow the City to assess thoroughly the cost efficiency and quality impact of contracts.⁹⁷ The Committee believed the bill would improve resident involvement in the service-delivery process by mandating notice and opportunities for public hearings on contracts.⁹⁸

District Council 37 ("DC 37"), the largest labor union representing City employees,⁹⁹ was primarily concerned with the preservation of public

88. See N.Y. CITY CHARTER ch. 13 § 311(b) (1989).

89. See *id.*

90. See *id.* § 311(a).

91. See COMMITTEE ON GOVERNMENTAL OPERATIONS, *supra* note 7, at 10.

92. See *id.*

93. See *id.* at 10-11.

94. See Hill Statement, *supra* note 80.

95. See *id.*

96. See *id.*

97. See COMMITTEE ON GOVERNMENTAL OPERATIONS, *supra* note 7.

98. See *id.*

99. See David L. Gregory, *Br(e)aking the Exploitation of Labor?: Tensions Regarding the Welfare Workforce*, 25 FORDHAM URB. L.J. 1, 28 (1997) (referencing a statement by D.C. 37's executive director and counting the union's membership at more than 120,000 civilian members).

sector job security.¹⁰⁰ DC 37's perspective was expressed by Stanley Hill, its executive director.¹⁰¹ Hill believed that the process defined in Local Law 35 would lead to contract decisions that favored public employees.¹⁰² He hoped that the cost/benefit studies required by Local Law 35 would vindicate City employees.¹⁰³ Hill also believed that serious cost/benefit analyses would show that the City's inability to adequately supervise contractors would be revealed as the source of waste. City employees would be recognized as efficient.¹⁰⁴ As long as the cost/benefit analyses could demonstrate that economic benefits would not be achieved through privatization, DC 37 believed that public-sector job security would be preserved.¹⁰⁵

On the other side of the debate, the New York City Partnership & New York Chamber of Commerce and Industry ("Partnership") opposed Local Law 35.¹⁰⁶ Jim Gifford, executive vice president of the Partnership, professed to agree with the goal of increased privatization.¹⁰⁷ However, Gifford, speaking for the Partnership, argued that Local Law 35 was biased in favor of protecting the government monopoly.¹⁰⁸ Gifford argued that true cost/benefit analyses must be based on a system of cost accounting that the City did not have in place.¹⁰⁹ From the perspective of the Partnership, Local Law 35's definition of "displacement" was evidence of a bias in favor of protecting the government monopoly and public-sector employees.¹¹⁰ In sum, Gifford argued that the proposed legislation would increase the City's bureaucratic red tape and would require decisions based on misinformation.¹¹¹

The Giuliani administration joined the opposition.¹¹² Peter Powers, Deputy Mayor for Operations, expressed the executive's concern that Local Law 35 would unnecessarily circumscribe the administration's efforts to

100. See Hill Statement, *supra* note 80.

101. See *id.*

102. See *id.*

103. See *id.*

104. See *id.*

105. See *id.*

106. See Gifford Statement, *supra* note 17.

107. See *id.*

108. See *id.*

109. See *id.*

110. See *id.*

111. Gifford was concerned with three particular forms of misinformation: (1) the misinformation inherent in cost/benefit analyses conducted before a reliable cost accounting system was in use by the city; (2) the misinformation promoted by the overly broad definition of "displacement;" and (3) the misinformation resulting from the required use of city wage and benefit scales when calculating the private sector cost of services. See *id.*

112. See Powers Statement, *supra* note 74, at 1-2.

provide quality City services at affordable prices.¹¹³ Early in 1994, Mayor Giuliani had articulated a plan to promote competition for the right to deliver certain City services.¹¹⁴ The plan included a privatization approach referred to as "managed competition."¹¹⁵ New York City Charter section 319 allows the City to solicit a request for proposals whenever it plans to award a contract for services.¹¹⁶ Under the managed competition plan, proposals would be submitted not only by private enterprise but also by City agencies determined to compete against the private sector.¹¹⁷ Clearly, any viable proposal submitted by a City agency must be appreciably different from the current agency structure or service provision plan.¹¹⁸ Otherwise, the proposal would be nothing more than a rearticulation of a plan the City would have already considered and rejected in the cost/benefit analysis phase.¹¹⁹ Under the managed competition plan, then, any qualifying proposal submitted by a City agency will receive the same consideration as proposals submitted by private vendors.¹²⁰

The Giuliani administration also viewed Local Law 35 as generally burdensome.¹²¹ The law requires hearings that are already mandated by PPB rules under New York City Charter section 326.¹²² It requires that the cost/benefit analysis consider the cost of training displaced workers.¹²³ It also requires that the wages and benefits of City employees be calculated as the wages and benefits of private contractors when considering private-sector bids.¹²⁴

Since the Giuliani administration had clearly expressed the belief that no benefit was to be gained through Local Law 35, it was not surprising that on June 10, 1994, the mayor vetoed the bill passed by the City Council on May 12, 1994.¹²⁵ Since the City Council strongly objected to uncontested mayoral control of privatization decisions, it is also not surprising that the Council overrode his veto nine days later.¹²⁶ Thus,

113. *See id.* at 1-5

114. *See id.* at 1.

115. *See* COMPETITION COORDINATING COMMITTEE, *supra* note 84, at 2 (defining the term "managed competition").

116. *See* N.Y. CITY CHARTER ch. 13 § 319 (1989).

117. *See* COMPETITION COORDINATING COMMITTEE, *supra* note 84, at 2.

118. *See* Rozinski Address, *supra* note 19.

119. *See id.*

120. *See id.*

121. *See* Powers Statement, *supra* note 74.

122. *See* N.Y. CITY CHARTER ch. 13 § 326 (1989).

123. *See* Interview of Weinberg and Damashek, *supra* note 6.

124. *See id.*

125. *See* COMMITTEE ON GOVERNMENTAL OPERATIONS, *supra* note 7.

126. *See id.*

Intro. 120-A became Local Law 35 of 1994, later amending the New York City Charter and becoming Charter section 312 (a).¹²⁷

D. Giuliani's Guidelines For Public/Private Competition

In June 1994, New York City averaged 9,000 contracts per year, representing approximately one-fourth of the City's budget.¹²⁸ Contrary to the hopes of DC 37, the passage of section 312(a) had not restricted the City's privatization efforts.¹²⁹ Jay Damashek, assistant director of the Office of the General Counsel, estimates that the City Council receives ten notices of intent to contract each day.¹³⁰ Of these, nearly all include a "Certificate of No Effect," stating that the contract will not result in the displacement of any City employees.¹³¹ Privatization promoters, then, appear to have found a way to live with section 312(a) without becoming overly inconvenienced by its requirements.¹³²

In the intervening years, the City Council has made no effort to determine whether section 312(a) is achieving its stated purpose of "ensur[ing] sound procurement practice and the delivery of high quality services in the most cost-efficient manner."¹³³ Simultaneously, the executive branch has taken full advantage of its authority over privatization.¹³⁴ In October 1995, the Office of Operations, an office of the executive branch, published guidelines to be used by city managers faced with alternative service-delivery considerations.¹³⁵ The guidelines are a helpful tool for city managers who want to pursue privatization yet need to proceed within the formalities of section 312(a). They do not, however, help a city manager evaluate whether a particular contract serves the true interests of the city.

127. *See id.*

128. *See* Interview of Weinberg and Damashek, *supra* note 6.

129. *See id.*

130. *See id.*

131. *See* Rozinski Address, *supra* note 19; Interview of Weinberg and Damashek, *supra* note 6. Certificates of No Effect are required under N.Y. CITY CHARTER ch. 13 § 312(a) (1989).

132. *See* Rozinski Address, *supra* note 19.

133. *See* Interview of Weinberg and Damashek, *supra* note 6.

134. *See id.*

135. *See* COMPETITION COORDINATING COMMITTEE, *supra* note 84, at 10-23.

IV. REALITY CHECK: ARE THERE ANY ACTUAL RESTRAINTS ON THE EXECUTIVE POWER OVER PRIVATIZATION IN NEW YORK CITY?

Restraints on executive authority over privatization decisions mirror restraints on executive authority in general. Such restraints come in three forms: procedural restraints, power structure restraints, and political process restraints.¹³⁶ Procedural restraints prevent an executive action from going forward until particular steps have taken place.¹³⁷ Power structure restraints are checks and balances built into the structure of the government.¹³⁸ Political process restraints are found in the exercise of the right to vote in a democratic society.¹³⁹

A. Procedural Restraints

New York City Charter sections 312(a) and 326 attempt to exercise procedural restraints over privatization decisions.¹⁴⁰ However, each section results only in a formality that can be satisfied without any serious assessment of the decision to privatize.¹⁴¹

The City Council believes that the procedural requirements of section 312(a) have been satisfied in virtually all contract awards since October 1994, the date the legislation took effect.¹⁴² However, satisfaction of procedural requirements may constitute a mere formality, as exemplified by the process followed in the privatization of homeless shelters.¹⁴³

Seven homeless shelters were among the first projects the City intended to privatize after section 312(a) took effect.¹⁴⁴ The City desired to contract out the management of the shelters because it believed that not-for-profit agencies could manage them at a lower cost.¹⁴⁵ The City envisioned that part of the savings would result from a reduction in the number of "life

136. See Interview of Weinberg and Damashek, *supra* note 6. Mr. Weinberg and Mr. Damashek stated that the current New York City Charter authorizes the City Council only to design procedural restraints on the executive's contract authority. The Council is not authorized to check the mayor's authority over contracts; the Council also cannot force city residents to exercise their political process restraints on this mayoral authority. See *id.*

137. See *id.*

138. See *id.*

139. See Lowe, *supra* note 24, at 175 n.14, 175-76.

140. See Interview of Weinberg and Damashek, *supra* note 6.

141. See discussion *infra* text accompanying notes 154-70.

142. See Interview of Weinberg and Damashek, *supra* note 6.

143. See Telephone interview with Paul LoPato, New York City Independent Budget Office (Feb. 13, 1998) [hereinafter LoPato Interview].

144. See Weinberg, *supra* note 77, at 3-6.

145. See LoPato Interview, *supra* note 143.

skills trainers" employed at the shelters.¹⁴⁶ However, if the planned reduction in staff was effected at the time of contract execution, the Department of Homeless Services would have had to admit that contracting out would result in displacement of City workers.¹⁴⁷ Such an admission would have subjected the contracting out decision to detailed scrutiny.¹⁴⁸ To avoid such scrutiny, the Department of Homeless Services submitted a Certificate of No Effect with the Notice of Intent to Contract.¹⁴⁹ Thus, the department certified that contracting out would result in no displacement of City workers, even though it knew that, after privatization, the not-for-profit agencies would effect the necessary staff reductions.¹⁵⁰

While the Department of Homeless Services fulfilled the letter of the law, it sidestepped the Council's expressed concern regarding displacement of City workers.¹⁵¹ Clearly, the procedural restraints quickly became mere formalities.¹⁵² As mere formalities, they provide no realistic check on executive authority over privatization decisions.¹⁵³

B. Power Structure Restraints

Power restraints on executive authority are those that constitute a formal system of checks and balances.¹⁵⁴ The 1989 Charter included only the barest minimum of such checks and balances.¹⁵⁵ These minimal power restraints are found in the authority of the comptroller and in the oversight authority of the City Council.¹⁵⁶ Neither the powers of the comptroller nor the oversight powers of the City Council provide an effective power restraint on the executive's decision-making authority over privatization.¹⁵⁷

New York City Charter section 93 authorizes the comptroller "to audit and to investigate all matters relating to or affecting the finances of the

146. *See id.*

147. *See id.*

148. *See id.*

149. *See id.*

150. *See id.*

151. *See id.*

152. *See id.*

153. *See id.*

154. *See* Interview of Weinberg and Damashek, *supra* note 6.

155. *See* discussion *infra* note 161 and text accompanying notes 180-96.

156. The powers of the comptroller are defined in Charter section 93. *See* N.Y. CITY CHARTER ch. 2 § 93 (1989). Additional duties relating to the award of contracts are specified in Charter section 328. *See id.* ch. 13 § 328. The oversight authority of the City Council is articulated in Charter section 29. *See id.* ch. 2 § 29.

157. *See* Interview of Weinberg and Damashek, *supra* note 6.

City, including without limitation the performance of contracts."¹⁵⁸ Section 328 sets the parameters within which the comptroller can interfere with the award of a contract.¹⁵⁹ Generally, contracts cannot be implemented until the awarding agency has filed a copy with the comptroller and the comptroller has registered the contract.¹⁶⁰

In very limited circumstances,¹⁶¹ the comptroller may refuse to register a contract within thirty days of the agency filing.¹⁶² Outside of those circumstances, the comptroller can also object to the registration of the contract by writing to the mayor.¹⁶³ However, the mayor may still require that the comptroller register the contract.¹⁶⁴ At best, then, the comptroller has a maximum of forty days during which to delay the award of a contract.¹⁶⁵ Thus, the comptroller's responsibility does not restrain the executive power to award privatization contracts.¹⁶⁶

The City Council is empowered to investigate "any matters within its jurisdiction relating to the property, affairs, or government of the city."¹⁶⁷ The Council is also charged with regular and continuous review of the affairs of City agencies.¹⁶⁸ Certainly, then, the Council can investigate and oversee the award of privatization contracts.¹⁶⁹ However, noticeably absent from Council authority is the power to take concrete action to prevent, or even to delay, the award of a contract. Therefore, even if the Council, through its oversight and investigation powers, were to determine a particular contract to be problematic, it would be powerless to prevent the execution of that contract.¹⁷⁰

158. N.Y. CITY CHARTER ch. 5 § 93(b) (1989).

159. *See id.* ch. 13 § 328.

160. *See id.* § 328(a).

161. The comptroller may withhold registration if: (1) unexpended and unapplied appropriated funds are insufficient to pay for the contract; (2) the required certifications have not been made; or (3) the proposed contractor is prohibited from receipt of City contracts. *See* N.Y. CITY CHARTER ch. 13 § 328(b) (1989).

162. *See id.*

163. *See id.* § 328(c).

164. *See id.* The comptroller is required to register the contract within 10 days after a directive from the mayor. *See id.*

165. *See id.*

166. *See* Interview of Weinberg and Damashek, *supra* note 6.

167. *See* N.Y. CITY CHARTER ch. 2 § 29(a)(1) (1989).

168. *See id.* § 29(a)(2).

169. *See id.* § 29.

170. *See* Interview of Weinberg and Damashek, *supra* note 6.

C. Political Process Restraints on Executive Authority

The remaining hope for restraint on executive authority of privatization decisions is found in the political process.¹⁷¹ However, political process restraints over executive privatization decisions will only be as effective as the political process itself is at a given moment in time.¹⁷²

A belief in political process restraints underlies the concern for fair representation mirrored in the *Andrews* and *Morris* decisions.¹⁷³ Citizens can effect change through exercising their right to vote.¹⁷⁴ In an ideal world, New York City residents could effectively impact the privatization decisions of the executive simply by participating in the political process.¹⁷⁵

Democratic governance in New York City, indeed in most of the United States, is far from this ideal.¹⁷⁶ Voter participation in the United States is lower than in any other democratic country.¹⁷⁷ Decision-making authority and control over local matters has increasingly shifted to the hands of the State and away from the hands of the local people.¹⁷⁸ Vehicles commonly used by the populace to express discontent with executive decisions have found their effectiveness reduced by this power shift.¹⁷⁹

Two particular vehicles in New York City illustrate this point. First, the office of a borough president is no longer a vehicle for concrete action in response to popular concerns.¹⁸⁰ Second, public-sector labor unions are no longer vehicles that can protect against a force detrimental to City employees.¹⁸¹

Tremendous power is wielded through budget control.¹⁸² Borough presidents once had substantial input regarding the City budget.¹⁸³ However, the 1989 Charter revision relegated them to the role of "recommenders" concerning budget matters.¹⁸⁴ They have, thus, been rendered ineffective vehicles for serious change.¹⁸⁵

171. See Lowe, *supra* note 24, at 173-78.

172. See *id.*

173. See *supra* notes 47-52 and accompanying text.

174. See Lowe, *supra* note 24, at 217.

175. See *id.*

176. See *id.* at 176.

177. See *id.* at 177.

178. See *id.*

179. See *id.*

180. See *id.* at 175.

181. See Rozinski Address, *supra* note 19.

182. See Interview of Weinberg and Damashek, *supra* note 6.

183. See Lowe, *supra* note 24, at 177.

184. See *id.*

185. See *id.*

Whereas limitations on the role of borough presidents arose from local action in the Charter revision, limitations on the ability of public-sector unions to protect the rights of City employees arose from state and federal actions.¹⁸⁶ Public concern regarding the escalating public burden of welfare promoted the development of various "workfare" programs.¹⁸⁷ New York State was no exception.¹⁸⁸

New York State required that beneficiaries of the Home Relief program, the welfare program for single persons, work a maximum of twenty hours per week.¹⁸⁹ New York City incorporated this requirement into the "Work Experience Program" ("WEP").¹⁹⁰ Before long, New York City was searching for sites at which WEP participants might be employed.¹⁹¹

The WEP program raised new concerns among public sector employees.¹⁹² Employment of WEP participants could reduce the cost of City services and might jeopardize public sector job security.¹⁹³ The City's public sector unions had hoped that greater job security would result from the cost/benefit analyses required by section 312(a).¹⁹⁴ WEP brought unions face-to-face with a new source of job insecurity.¹⁹⁵ This insecurity, resulting from federal and state workfare mandates, reduced the City's unions ability to function as a vehicle for protection of public sector employment interests.¹⁹⁶

D. *Are Effective Restraints Necessary and Possible?*

Efforts to establish procedural restraints, power structure restraints, and political process restraints on executive power to award privatization contracts have proven unsuccessful.¹⁹⁷ However, New York City citizens

186. See Fisher, *supra* note 3, at 558-60.

187. See, e.g., Cerisse Anderson, *Suit Barred by Recipient of Home Relief: Workers' Compensation Is Sole Remedy for Injury*, N.Y. L.J., Apr. 17, 1990, at 1 (describing a welfare recipient who was made to work with the sanitation department in exchange for his benefits).

188. See *id.*

189. See *Brukhman v. Giuliani*, 662 N.Y.S.2d 914, 916 (Sup. Ct. N.Y. County 1997).

190. See *Rozinski Address*, *supra* note 19.

191. See *id.*

192. See *id.*

193. See *id.*

194. See *id.*

195. See *id.*

196. See *id.*

197. See discussion *supra* text accompanying notes 154-70.

do not have to concede unrestrained executive authority over privatization contracts.¹⁹⁸ Indeed, such a concession could be dangerous, as every city has learned through instances of executive corruption.¹⁹⁹

Meaningful, effective restraints that do not paralyze the City can be developed by a serious effort to revive citizen participation in local government.²⁰⁰ Both the City Council and the mayor are taking steps toward a new Charter revision.²⁰¹ This moment may provide the opportunity to devise a City governance structure that seeks accountability through increased citizen participation rather than through total concentration of authority.²⁰² Any upcoming Charter Revision Commission must be willing to promote participatory democracy as a viable means of checking executive authority without paralyzing the City.

V. CONCLUSION

The privatization movement sweeping the world is not likely to come to an abrupt halt.²⁰³ Cities will continue to struggle with both demands for increased services and budget limitations.²⁰⁴ New York City will not be an exception.²⁰⁵

Recognizing that the privatization movement is here to stay, the New York City Council expressed a valid concern regarding the purchasing of City services.²⁰⁶ New York City Charter section 312(a) is the Council's attempt to guarantee the wisdom of privatization decisions.²⁰⁷ However, Charter section 312(a) has amounted to little more than a reporting requirement.²⁰⁸ It is incapable of achieving its stated legislative purpose.²⁰⁹

As long as there are no effective procedural, power structure, or political process restraints on the executive authority to make privatization decisions, the value of privatization decisions relies solely on the integrity and wisdom of the executive.²¹⁰ Fear of paralysis is likely to preserve the

198. See discussion *supra* text accompanying notes 140-53.

199. See Ross Sandler, *Charter Revision and Crises*, CityLaw, (Center for N.Y. City Law, N.Y.L. Sch., New York, N.Y.), Jan./Feb. 1998, at 2.

200. See Lowe, *supra* note 24, at 215.

201. See Russianoff, *supra* note 28, at 3.

202. See Lowe, *supra* note 24, at 173-75.

203. See Prager & Desai, *supra* note 25.

204. See *id.*

205. See discussion *supra* notes 74-82 and accompanying text.

206. See discussion *supra* notes 74-135 and accompanying text .

207. See *id.*

208. See discussion *supra* notes 136-202 and accompanying text.

209. See *id.*

210. See *id.*

heavy concentration of authority for privatization decisions in the executive branch.²¹¹ However, that concentration of authority can co-exist with the resurrection of popular democracy.²¹² Community groups can be integrated into the City power structure; they can have input into privatization decisions, with a resulting benefit to all.²¹³

Would we rather buy bread from our local baker or our local bureaucrat? Given a real opportunity to discuss the question, the citizens of New York would likely recognize that the question is deceptively simple. Just as it is unwise to rely totally on the integrity and wisdom of one person, it is unwise to assume there is one correct direction to privatization questions. Privatization questions touch the daily lives of New Yorkers. New York City will find its wisest answers by devolving some responsibility for deciding matters that touch people's lives to the people themselves. We stand to gain both the wisdom of the masses and a revitalization of our democracy.

Genevieve Bishop

211. *See supra* notes 26-45 and accompanying text.

212. *See supra* notes 171-196 and accompanying text.

213. *See id.*