As a philosopher, I approach this topic from a rather abstract, theoretical perspective. It is my firm belief that abstract theory is critically important in justifying public policy. This has been true since the founding of this nation; nevertheless, the direction of public policy is also influenced by specific circumstances. Since I am not an intelligence insider, I am forced to look elsewhere for such detail. In what some will deem a flight of fancy, I find such concrete elements in some lines from the recent film *State of Play* (2009). In scene 11, a reporter, Cal McAffrey (played by Russell Crowe), asks an unnamed insider (played by David Harbour) at a very large corporate “contractor” called PointCorp what the company’s MO is. The insider’s reply is chilling: “They do whatever the hell they want. Their soldiers are answerable to no one. They’re loyal to nothing but a paycheck. It’s the Muslim terror gold rush.” This insider goes on to explain that a congressman, Stephen Collins (played by Ben Affleck), is threatening 30 or 40 billion dollars in corporate profits. When asked by McAffrey how this could be in light of the 3 to 4 billion dollars PointCorp receives (according to the film) for its contracts in Afghanistan and Iraq, the insider says the real money comes from the things this company does inside the United States. He cites crowd control after Hurricane Katrina and training Chicago police officers in interrogation techniques. Then he says, “Soon PointCorp will take over from the NSA on phone taps, terrorist databases, all of it. It’s a fundamental restructuring of domestic intelligence policy.”

Many are familiar with Naomi Klein’s book *NO LOGO*, in which Klein describes the “hollowing out” of major corporations by subcontracting everything but the fashioning of “logos,” which define what the corporations do. In the new introduction to the tenth-anniversary edition, Klein explains that a similar occurrence is now
happening with our government. It is being “hollowed out” through subcontracting more and more tasks.\(^2\) This is completely consistent with the message of *State of Play* and many other recent publications and films.

Finally, since I originally wrote this paper, an article has appeared that provides a dramatic real-life example of the use of contractors in the area of national security intelligence. Dexter Filkins and Mark Mazzetti’s *New York Times* article “Contractors Tied to Efforts to Track and Kill Militants” begins with the claim that “[u]nder the cover of a benign government information gathering program, a Defense Department official set up a network of private contractors in Afghanistan and Pakistan to help track and kill suspected militants.” The article goes on to report that “[t]he official, Michael D. Furlong, hired contractors from private security companies that employed former CIA and Special Forces operatives. The Contractors . . . gathered intelligence on the whereabouts of suspected militants and the location of insurgent camps.”\(^3\) I cite this article here to vindicate my reference to *State of Play*. Although the article does not speak of turning over our whole intelligence apparatus to private contractors, it clearly indicates that the “camel’s nose is under the tent.”\(^4\)

**Framing the Question**

Using private corporations to conduct intelligence activities for national security purposes has both a claimed advantage and serious disadvantages. Here, I argue that, in general, it would be unethical to use private corporations to conduct intelligence activities for national security purposes—that, ethically, the disadvantages of such a strategy greatly outweigh the claimed advantage.

In light of the millennia of controversy about what it means to be “ethical,” this framing of the question requires that I say something about how I use the term here. I understand an ethical action to be an action undertaken all things considered (including, especially, perspectives and goals). An action that is done relative to some given perspective or goal is *conditional*. It is only *required* relative to the specified perspective or goal. For example, if someone is playing chess, the “best” move may be to advance the queen five spaces straight ahead. Such a move may lead to checkmate in three moves, regardless of what one’s opponent does, and this is the goal of the game. Ethical actions, on the other hand, are *unconditional*, since they are not mediated by some specific goal or perspective. The
requirement that Jones not kill Smith just because he is mildly upset with him is not true relative to some particular goal or perspective. It is true regardless of one's perspective or goal. Immanuel Kant would have called such a moral imperative “categorical” to distinguish it from “hypothetical” imperatives, like the one in the chess example above. This is obviously not a complete ethical theory, but it constitutes a condition that I believe is at least necessary for an action to be judged ethical. Some will, nevertheless, object, claiming that all actions are “situated,” that no action can be said to reflect, for example, all perspectives. In answer to this very standard philosophical objection, I make two replies.

First, it is self-referentially inconsistent. The claim that all ethical statements are “situated” is itself an ethical statement, yet it is not “situated.” It claims to be very general; therefore, it is inconsistent with itself—or, as philosophers might say, “self-referentially inconsistent,” and, hence, not to be taken seriously.

Second, this “situatedness” objection runs afoul of a comparison with simple mathematics. There are infinitely many “natural numbers”—0, 1, 2... Referring to the cardinal number of the infinity of natural numbers, usually represented by the Hebrew letter aleph with a zero as subscript (called “aleph null”), it is not considered a mistake in virtue of the claim that “all natural numbers are situated.” True enough, each natural number is “situated” in the sequence, but that does not mean we cannot refer to the cardinal number of the whole set of natural numbers—aleph null. Referring to the cardinality of the infinity of natural numbers does not mean we can somehow examine every natural number individually; rather, it means that any particular natural number can be located in the sequence—just as any particular perspective can be described. The point of saying that ethical statements are those made “all things considered (including perspectives),” is that it is possible to describe any particular perspective we might think of—not that we can somehow examine all perspectives at once—and that any perspective that can be so described should be considered. In addition, the claim is not that all perspectives are of equal importance, just as claims about the natural numbers do not entail that all natural numbers are equal to one another. The claim is simply that any perspective that is “brought up” should be considered. Perhaps it will be dismissed, but it should be considered.
Using Private Corporations to Conduct Intelligence Activities for National Security Purposes: A Pro and Some Cons

Using private corporations to conduct intelligence activities has what appears, at first sight, to be a significant advantage over having units of the federal government perform such tasks: efficiency. U.S. "public philosophy" assumes that government functions best when it is managed as if it were a business. A government so managed, it is claimed, can more readily respond to market forces and thus achieve the greatest efficiency. This tenet of our public philosophy suggests that using private contractors instead of government agencies to protect our national security is the most efficient approach.

This "public vision" of government conflicts with another assumption that is generally recognized: Government is often needed most in cases of "market failure," circumstances where we place great value on things business does not have sufficient financial motivation to provide at "socially optimal" levels. I suggest that we would not retain our basic human rights and liberties if it were left to business to support such claims, because there is no obvious way to "make a profit" by supporting basic rights and freedoms. Rights, including negative rights, are very expensive; they require an active and well-financed government to maintain them. In spite of this, our public philosophy appears to suggest that government is most just and fair when it is operated like a business in the sense that essential functions are "contracted out" to private companies. I argue that, even if we allow that such privatization is appropriate in carrying out some intelligence activities, such acknowledgment would not justify the claim that the business model of government would maintain our basic human rights and liberties if the central tasks of U.S. intelligence were farmed out to private corporations.

I support my claim that privatizing our national security intelligence activities is a serious mistake by two main lines of argument. These approaches, while they support each other, are logically independent: That is, even if one can be successfully challenged, the other would remain.

My first attack on the business model for national security intelligence turns on the very different social functions of government and business. In this connection, I place special emphasis on the
concept of “market failure.” Undoubtedly, there are some areas where privatizing essential government functions will not produce market failure. My point is that the general strategy of privatizing such functions will lead to market failure in a number of key areas. Specifically, I contend that the area of national security intelligence is not properly classified as one in which the business model is suitable because such a construal will inevitably lead to market failure.

Second, I argue against privatizing national security intelligence by contrasting the ways in which business and government (specifically the U.S. federal government) justify their actions. Any twenty-first-century discussion of how businesses justify what they do must be consistent with how major corporations warrant their activities. This is true both because such entities are very likely to be involved in any effort to privatize national security intelligence and because major corporations account for more than half of the U.S. gross domestic product (GDP). The acts of such entities are justified to the extent that they maximize the company’s profits. This is an ambiguous statement since it does not specify any time frame. Nevertheless, I maintain that it is accurate to the extent that time frames are usually not specified beyond the most recent “quarter.” (Bear in mind that a corporation’s long run, for an economist, is usually taken to be only about seven years.)

The U.S. federal government is not limited to justifying its actions by the “bottom line.” In the real world, politics of course play a major role, but the ultimate theoretical justification of the actions of the government is whether those actions are “socially optimal” (as discussed earlier). In fact, many theorists have argued, from the time of Thomas Hobbes, that the ultimate justification of government actions is a “social contract” among the people served by that institution. I argue that the proper justification of government actions is not a “social contract,” but, rather, what I call a “social covenant,” defined along the lines of traditional religious covenants, although without presuming that the covenant is between God and human beings. I contend that even some who reject traditional social contract perspectives may find suitable warrant for government actions in a “social covenant.” I support this position in two ways. First, I link the idea of a social covenant to a position advocated by Abraham Lincoln—not a philosopher, but someone whose views carry considerable weight with many Americans. Second, I show that the proper approach to risk for a government is radically different from that usually associated with a major corporation.
National Security Intelligence and the Differing Social Functions of Business and Government

This article is not about whether there is some close similarity between business and government; rather, it is about whether there should be such a close analogy between business and that particular area of government concerned with national security intelligence. As noted earlier, many believe there should be such a close connection; indeed, they believe that national security intelligence should be entrusted to private corporations—and, hence, run according to a purely business model.

Business fails to appropriately discharge many critically important social roles. The point here is that, inherently, business is not properly structured to assume these (often linked) roles. This is manifest in four areas. First, democratic governments must provide for social decision making that potentially gives all citizens a voice. Businesses, on the other hand, typically operate in a virtually dictatorial fashion. Second, as also previously pointed out, a democratic government must provide for the rights and liberties of its citizens. The traditional goals of business do not require support of such rights and freedoms. Third, the main focus of a business is on profits and related matters, while it is the role of government to satisfy a number of societal functions—including, of course, national security intelligence, but also such areas as public health, care of the poorest among us, domestic security, and (more generally) the overall welfare of the nation. Fourth, even in cases where business is willing to provide goods and services, it may have no financial incentive to supply these things at "socially optimal" levels.

Taking these four issues in order, we first consider the role of government in social decision making. Barring a radical reorganization of U.S. business that would be contrary to the usual goals of American business endeavors, corporate decision making is not an appropriate analogue for the checks and balances of a democratic society. Business ethicist Manuel Velasquez explains the basis of the dichotomy between decision making in business and government, saying, "Full organizational democracy has not been particularly popular in the United States. . . . American ideology distinguishes sharply between the power exercised in political organizations and the power exercised within economic organizations: Power in political organizations should be democratic, whereas power in economic organizations should be left in the private hands of managers and owners."
Velasquez contrasts this sort of decision making in business with more democratic procedures supposedly characteristic of political society in a democracy:

A democratic political tradition has long held that government should be subject to the consent of the governed because individuals have a right to liberty, and this right implies that they have a right to participate in the political decisions that affect them. Within a democracy, therefore, decision making usually has two characteristics: 1) decisions that affect the group are made by a majority of its members, and 2) decisions are made after full, free, and open discussion. Either all the members of the group participate in these decision-making processes or they do so through elected representatives.13

In short, the American “public philosophy of business” endows owners and managers with decision-making power; that public philosophy does not empower the individuals who constitute the business’s workforce to make critical decisions.14 Democratic processes could be used in business, but this is not the way things are typically done in the United States. Velasquez’s two descriptions entail that, if the business model were taken as the basis for political decision making, the United States would cease to be a democracy—even in principle. If the U.S. government were, in general, to privatize such essential functions as national security intelligence, the United States would likely become a nation ruled by an elite (group of) corporation(s).15

Second, a democratic government must provide for the rights and liberties of its citizens. The preceding conclusion that this country would no longer be a democracy if essential government functions were privatized and government decisions were thus made on the business model points to the most profound deficiency in the idea that government should function like a large corporation—even to the extent that its most essential functions should be privatized: The individual rights and freedoms that are the foundation of our society would cease to exist. In their defense of taxes, The Cost of Rights, Holmes and Sunstein argue that all rights presuppose an elaborate and costly infrastructure of courts and law enforcement.16 Without such institutional support, rights and related liberties cannot be sustained. Even if the “law” recognizes them, rights and liberties cease to function if they cannot be defended, and they cannot be preserved without an infrastructure dedicated to maintaining them.

It is especially important that Holmes and Sunstein maintain that even so-called negative rights require such institutional support.
Negative rights are usually thought to be exclusionary: That is, they tell others that they must not interfere with certain actions by individuals. For example, our right to free speech entails that no one can preclude us from presenting our views—even in public. There are limits to free speech, but these have traditionally been nominal. "Positive" rights, on the other hand, require that we be given something, for example, health care, education, and so on. A major reason politicians who call themselves "conservative" are usually opposed to expanding positive rights is financial. It is well known that such rights cost money, and that money usually has to come from taxes. The importance of Holmes and Sunstein's position is that they show that even negative rights, which "conservatives" must accept unless they reject the very foundations of the U.S. government, require substantial amounts of tax money to support the institutions that are crucial to sustaining them.

The whole point of rights is to protect the individual from the awesome political power of the majority. The rights that have traditionally been called "negative" are especially important in such defense: They protect our abilities to worship as we wish, speak and assemble freely, and, in general, pursue our own idea of the good life. In short, these rights protect us from "perfectionists" who believe they know just how we should live even the most intimate aspects of our lives and are disposed to force their lifestyles on us if permitted to do so. Our traditional individual rights are the only real barrier to their doing so in the event that they are in the majority.

The bottom line is this: Without the infrastructure of a democratic state, rights (whether positive or negative) and related liberties would not be viable. A government that privatized essential functions would not sustain our civil liberties. A corporation is a "directed organization." Its ultimate goal is to make money for its stockholders. Other goals, such as increasing market share, decreasing and fine-tuning government regulation, and so on, are subsidiary to its monetary goal. That is why, as I argue elsewhere, major publicly traded corporations are not members of the "moral community." If Holmes and Sunstein are correct about the high cost of civil rights (and they surely are), there is no financial incentive for a modern corporation to spend its resources to build the infrastructure necessary to maintain these rights at all, let alone support them at a "socially optimal" level. This is a blatant case of "market failure." Since the purpose of our civil rights is to protect the minority—ultimately, the single individual—from oppression by the majority, a
corporation that promotes such rights will risk alienating its share-
holders. Ultimately, government is in a much different position than
any business enterprise, and this disparity argues strongly against
business’s support of civil liberties.

Third, government’s function in dealing with critical social needs
is unambiguous. The crisis created in the fall of 2001 by the presence
of anthrax in our mail system demonstrated the critical importance
of our having public health programs. The appropriate response was
a national strategy to cope with this bioterrorist attack. Private com-
panies supplied the drugs and vaccines to deal with the threats, but
coordinating and planning of the proper response was managed by
the federal government, together with state and local governments.
Anthrax in mail was a bioterrorist threat, but there are naturally oc-
curring public health threats, for example, the outbreak of H1N1 flu.
In the past, the decisions to vaccinate all Americans against small-
pox, polio, and other diseases have required government mandates
both to organize such efforts and insure the public was supplied with
the necessary services to address these health threats. In the case of
H1N1, the matter was left to a public education campaign.

Providing for the national defense is paramount among such
government functions. A function of our national government is
to organize and coordinate this effort. The government utilizes
the expertise of business in producing military hardware and soft-
ware, but the control, coordination, and security associated with
defending the United States—or any other democratic country—lie
outside the proper role and competence of business. It has come
to light that “contractors” have taken on an increasing share of
the fighting both in Iraq and Afghanistan. This has led to difficult
quandaries since it is unclear to whom these mercenaries answer.
Blackwater has had to change its name to avoid the barrage of
bad press associated with some of the incidents with which it has
been associated. The U.S. military, on the other hand, has a well-
established chain of command and code of military justice to gov-
ern the actions of military personnel. Especially in regions outside
the United States, the responsibilities of “contractors” are far from
clear and raise incredible difficulties.

Returning to *State of Play*, in scene 9, Senator Collins (Ben Af-
fleck) is questioning the CEO of PointCorp (Tuck Milligan). He says,

> Putting war in the hands of mercenaries and those who consider it a
> business is a contradiction in terms in any language. May I remind you,
sir, that the wars this country fought—that defined it—were fought despite what they cost, not because of it.\textsuperscript{23}

The thrust of the senator’s comment is that corporations are required by law and economics to place their bottom lines ahead of all other considerations.\textsuperscript{24} Similar considerations face any attempt to privatize our national security intelligence. The enormous responsibilities associated with spying, especially when it involves U.S. citizens, raises legal questions that should not fall into some “gray area” because the agency involved is now a private contractor. This is at the heart of maintaining our rights during trying times. Privatizing national security intelligence will inevitably lead to clashes between the financial goals of the companies charged with such work and the U.S. Constitution—with its strong emphasis on “checks and balances.” The companies will be driven by the need to maximize their bottom lines (and such related matters as expanding their market shares), whereas the role they are charged with fulfilling requires that they place the rights and safety of the American people first, even when this does not “mesh” with their corporate goals.\textsuperscript{25}

Fourth, there is another way to look at the examples previously cited and other functions that seem at odds with the usual aims of business. In some such cases, business may be capable of supplying the appropriate goods and services but not have the financial motivation to provide them at “socially optimal” levels. Government is often most indispensable in such cases. “Free rider” problems jeopardize the provision of goods and services at optimal levels, if the goods or services are even provided at all. For example, private corporations would have little financial incentive to provide a national defense: Those benefiting from the defense often could not be compelled to pay for their benefit and could enjoy protection even if the company pursuing such an effort attempted to provide a defense only for itself.\textsuperscript{26} In the case of public health, any attempt to privatize this function would face the problem of “positive externalities.”\textsuperscript{27} For example, improving the health of people too poor to pay for such services may nevertheless improve the overall health of the nation, including those who could afford health services, yet no corporation would have the financial incentive, for example, to vaccinate children whose parents could not pay for the vaccine. The question is not whether business can produce some sort of response to these social needs; the issue is whether business can deal with them appropriately—whether, that is, business can
provide for defense, public health, and so on at what economists call "socially optimal levels." The arguments presented earlier suggest that business’s goals are at odds with providing for such needs at such socially optimal levels. The goals of business and the reality that markets sometimes fail to provide goods and services at optimal levels are both implicated in business’s fundamental inability to deal with such social needs—which must therefore, become government functions. The “public view” that insists that essential government functions like national security intelligence should be privatized—and, hence, run on a business model—is a mistake that needs to be corrected in the context of our political discourse.

Unethical Markets: Answering an Objection

Someone who objects to the previous arguments about “market failure” might argue that markets only “fail” if they are not properly ordered. If, for example, property rights and transaction costs are appropriately structured, the argument might go, properly functioning markets can be created—markets that will not fail in the sense that they fail to produce “socially optimal” results.

A proponent of this argument fails to understand how “market failure” is being used in this article. In particular, such an adversary does not appreciate the force of my claim about “social optimality.” Recall that in note 8 I emphasize that I use a more general concept of “socially optimal” than is traditionally found in economics texts, which usually evaluate socially optimal conditions in utilitarian terms. As should be apparent by my emphasis on rights, my own measure is strongly influenced by deontological considerations. Deontological considerations is just a philosopher’s term for saying that I place heavy emphasis on moral rights. Our objector might counter that we can create a market in rights. Once this is done, conducting national security intelligence on a business model by contracting it out to private corporations would no longer be a problem.

One answer to this reply is to show that while it might be possible to create a market in legal rights, it is not possible to create such a venue for moral rights—which are the foundation of my argument regarding market failure. To fill out this reply is philosophically complicated, however; therefore, I suggest a “dramatization” of the issue in the form of markets that are clearly recognizable as unethical. In short, I am arguing that the claim that it is always possible to create markets if only the right structure of incentives can be put in
place runs afoul of the fact that there have been, and are, markets that function very efficiently but are clearly immoral.

Prior to the Civil War, it was legal to buy and sell "slaves" in this country. The market for slaves functioned very efficiently, but it was clearly a case of an unethical market. One of the major determinants of the Civil War was the reactions of large numbers of ordinary citizens to the spectacle of such "markets in flesh." Today there is a market in organs. It is not legal, but this "black" market seems to function very efficiently. While there is a great deal of discussion in the bioethics literature about this matter, the consensus is that such a market is immoral. Even if an ethical case could be made for someone in extreme poverty selling a kidney (and I do not think it can be made), selling a liver or heart, which would lead to immediate death, has little to recommend it from a moral perspective.

While it is possible to see the privatization of the conduct of national security intelligence, including its most essential aspects, as "market failure" because such privatization would compromise the moral rights that are the foundation of this nation, it is also possible to see such a move to a business model for such conduct as creating an unethical market for precisely the same reason. In short, to create a market for the essential conduct of national security intelligence is to produce a market that is unethical in much the same way that a market in slaves or vital organs is unethical. In the case of the market in organs, one is selling life itself; in the case of national security intelligence, one is selling off parts of the "body politic."

In effect, I confront the objector with a Hobson's choice: Either accept the arguments about "market failure" associated with conducting national security intelligence as if it were a business, or embrace the idea that the market that might be "created" for such conduct, by modifying legal and moral rights and economic incentives, will be an unethical market. (I provide further justification for this point in the next section.) As I stated earlier, it is also possible to answer the challenge to my market-failure arguments directly, but such an answer will be both philosophically and economically complex. I seek here to achieve the same result by appealing to our collective moral sense.

### Social Contracts versus Social Covenants

This article began with the thesis that, in general, it would be unethical to use private corporations to conduct intelligence activities for
national security purposes. I proposed, as a necessary condition for
an action’s being ethical, that it be “unconditional,” that is, that the
correctness of the action not be predicated on attaining a specific
goal. Conducting national security intelligence on a business model,
I argue, would lead to “market failure” because the large corpora-
tions that would be involved are directed organizations whose ac-
tions are definitely conditional. Specifically, their actions are focused
on attaining the highest levels of profits (market share and so forth)
for their shareholders (or “owners”). They would not, therefore,
produce “socially optimal results,” as already explained in detail.

There is another lens through which we might view this result:
the “conceptual universe” of large business corporations versus the
“conceptual universe” of government. When we enter the world of
business, we find ourselves using such terms as customer, employee,
shareholder, owner, and contract, among many others. Do these
terms have appropriate uses in the world of government? For ex-
ample, does it make sense to refer to the citizens of the United States
as employees, customers, or owners? If the thesis of this article is
correct, such uses are misleading, at best. They lead us to think of
the citizens of the United States as analogous to, for example, the
customers, owners, or employees of a business. While there are
clearly some similarities between, say, a business’s customers and
U.S. citizens, the similarity is not sufficient to conflate these two cat-
egories in a way consistent with the claim that the U.S. government
should be operated as if it were a business in the sense that essential
functions like national security intelligence should be farmed out to
private corporations.

Customers purchase goods and/or services from specific com-
panies. They pay for those goods and services. Citizens pay “user
fees” to do such things as operate a motor vehicle, and some of
the taxes we pay are fairly specific (for example, real estate taxes),
but the biggest “fee” most of us pay is our federal taxes. While it
is true that citizens—most of them—pay these taxes to the federal
government and receive certain “services” from the government,
the arrangement is very different from the usual relationship be-
tween a customer and a business. We do not pay taxes for specific
goods and/or services; rather, our taxes cover an array of different
things the government does. Some of these things are specifically
relevant to us but many mainly benefit others. In addition, citizens
cannot choose not to pay their taxes (without breaking the law),
but customers usually can choose not to purchase goods and/or ser-
vices from a particular company; therefore, the analogy between citizens and customers seems tenuous at best.

Similar things can be said about trying to draw an analogy between citizens and employees (not including, of course, those who actually do work for the government, at some level). Employees are paid a salary and receive certain benefits. Citizens receive certain benefits, but many of these are not specific to a particular citizen or group of citizens. Moreover, an employee can, in principle, change jobs. Denouncing your citizenship is, typically, a much more elaborate process.

Finally, the citizens of the United States do not "own" the country, even in the rather strange sense in which shareholders of a firm are said to "own" it. Such citizens do not have the ability to sell the country or trade it. They do not follow some sort of stock index to see what their "shares" in the United States are currently worth, and so on.

There is one concept, however, that seems to bridge the gap between business and government—contract. I speak not of the fact that government often enters into contracts with individuals and businesses. In that regard, government is like any other customer of a business. Rather, I speak of the tradition, going back at least to Thomas Hobbes, of basing the justification of government activities on what has variously been called "a social contract." Is the concept of a social contract the missing link in drawing an analogy between large corporations and the U.S. government—an analogy that might justify privatizing our national security intelligence and thereby conducting it using a business model?

U.S. law recognizes large corporations as legal persons that can make legal agreements we call contracts. Business transactions take place over time; the special rights and duties—or special obligations—that arise from these contracts assure the parties that agreements they have reached can be legally enforced. In addition, contractual rights and duties “that attach to specific individuals [including corporations viewed as legal individuals] . . . arise out of a specific transaction between particular individuals . . . [and] depend on a publicly accepted system of rules that define the transactions that give rise to those rights and duties.”

The rules that circumscribe contracts include such constraints as complete knowledge by all parties—no coercion, no commitment to immoral acts, and no intentional misrepresentation. The system of contracts itself provides a reasonable basis for the legal rights
involved in the law of contracts, but this system is ill equipped either to express or justify the moral rights presupposed by contracts. Nevertheless, in the political tradition of the United States, the ultimate justification for the actions of the federal government is often taken to be based on a "social contract." This contract is said to be accepted because it guarantees security and liberty that go far beyond what is available in a "state of nature."36

The detailed elaboration of such a "contract" is problematic.37 Rather than enter into this debate, however, I contend that using a social contract as justification for government authority is fundamentally flawed. We should think, instead, in terms of a "social covenant," defined along the lines of traditional religious covenants but without presuming the covenant is between God and human beings. Such a covenant would be circumscribed by a gift, an exchange of promises, and the determination of our ensuing life together by that promise.38 It determines a structure that can assure the fairness and justice of our government by defending our fundamental rights and liberties. A social covenant involves the decision to sustain a relationship, even in the face of difficult circumstances. A social contract appears more temporary, more easily "renegotiated" when problems arise.39

This brings us face-to-face with the central issue of this article: Should the national security/intelligence functions of our government be contracted to private corporations? If the justification of our government is a social covenant, the answer is definitely that they should not.

Abraham Lincoln's idea of "patriotism" was what political theorist John H. Shaar called "covenanted patriotism."40 According to this concept of "covenanted patriotism," associated with Lincoln, this nation is unique in that it is founded on the principles of political freedom found in the Constitution—principles that such philosophers as John Rawls and Ronald Dworkin think are not subject to being "weighed" against utilitarian concerns, including business calculations.41 A true patriot (in Lincoln's sense) is bound by a special covenant with the other citizens of this nation—a shared promise to defend the nation and its defining principles.42

According to this view, the concept of "the nation" is circumscribed by the principles of individual political freedom embodied in our Constitution and Declaration of Independence. If we give up these principles, we are no longer defending the United States of
America. We are defending something, but it is not the country we are covenanted to defend.

Covenanted patriots told the Bush administration that it is normal to make sacrifices to defend this country, but those sacrifices must not include changing the very basis of our patriotism—the covenant each citizen has with his or her fellow citizens to protect the country. In time of war, the United States has regularly made temporary compromises with its political liberties, but such changes must always be temporary. If the fundamental character of the nation is permanently altered in the process, the principles of the covenant will have been violated, and true (covenanted) patriotism abandoned.

The concept of covenanted patriotism highlights the disparity between maintaining our commitment to our government when it is operating on the business model, including contracting essential services to private corporations, and upholding our commitment to it in the face of grave problems. A government that is easily abandoned when problems arise is unlikely to protect our fundamental rights and freedoms in difficult circumstances. Such a government will typically not be judged as just or fair. On the other hand, our relationship with business is best represented by a contract that can be challenged when it ceases to be advantageous to support it.43

A “social contract” is, on its face, just another contract.44 Covenants, on the other hand, have traditionally been treated as the foundation of our most serious commitments. A “social covenant” makes more sense as an embodiment of our rights and liberties than any sort of contract.45 If we are bound together by a social covenant, the ethical significance of our determination to stand together in difficult times, including in the face of terrorism, is embodied in the gifts and promises we exchange.46 Some will wonder how we can speak of promises and gifts that seem to be historical events in the course of discussing something that is intended to ground the authority of our state and our most cherished rights and freedoms.47 Most modern “social contract” theorists recognize the hypothetical nature of such a contract. (The “social covenant” can also be so viewed, as I elaborate on later.) No serious philosopher believes there really was a coming together of people living in a state of nature and that these individuals contracted together to follow certain rules that would form the foundation of a state. Typically, the social contract is a sort of abstract construct that provides both a possible explanation of and a justification for the state and its actions. It is viewed as a hypothetical
agreement that anyone who satisfies certain conditions—for example, rationality—would wish to enter into to live in a less threatening, more “user-friendly” environment—a modern democratic state. A covenant, on the other hand, seems to require actual face-to-face exchanges of gifts and promises.

An excellent example of a covenant occurs near the end of Clint Eastwood’s film *The Outlaw Josey Wales* (1976). Eastwood, in his character as Josey Wales, goes to meet Comanche chief Ten Bears, whose Comanche nation is threatening Eastwood and a diverse group associated with him. Eastwood tells Ten Bears that he has come either to kill the chief or enter into an agreement with him that will preserve his (Eastwood’s) “family.” Ten Bears says the Comanche already have the gifts Eastwood presents. Eastwood tells Ten Bears that he is not offering something different. He is giving Ten Bears life, and he asks that Ten Bears give him and his “family” life. He says, “People can live together without killing one another.” This is the gift Eastwood presents and the foundation of the promise between the two. Ten Bears agrees, stating, “No paper can hold the iron [of their agreement].” In short, this is a covenant, not a contract.

I see no reason why one can view a social contract as hypothetical but cannot view a social covenant in this way. The meeting is face-to-face in *The Outlaw Josey Wales*, but entering into a covenant does not require a face-to-face meeting. If we want to live together, we must live according to certain moral principles. Among these is the belief that, should the nation be challenged, whether by natural forces or human activity, we will assist in protecting it, even at the cost of our life. That is why viewing this expectation as a “contract” that we might “renegotiate” if it becomes problematic seems out of place.

It is not my plan fully to explore the structure of a social covenant, which might be used to ground a modern democratic state. My purpose here is to paint with a broad brush the general idea of a social covenant and suggest how it differs from a traditional social contract. Our ultimate goal in this section is to suggest that a contract—even a “social contract”—is not a suitable justification for the actions of the U.S. government. Instead, I have argued that a “social covenant” is the best model for such justification.

Returning to the question that led us to explore the relation between a “social contract” and a “social covenant,” we recall that this discussion began with the question of whether the notion of
"contract" constituted a bridge between business and government that might legitimate contracting out our national security intelligence activities (and perhaps a number of other essential government functions). We have come to the conclusion that the actions of our government are best justified by a social covenant—not a social contract. What about business? What about the large corporations that would be the natural recipients of the contracts that privatization of our national security intelligence would entail?

Recall that we argued earlier that a large corporation is a "directed organization" that is focused, by law and economics, on maximizing its bottom line—and essentially ignoring all the other lines. Such an organization can be very efficient at maximizing its profits but legally and economically unable to achieve "social optimality." Yet achieving such socially optimal results is exactly what we expect of our government. It follows that large corporations are legally and economically incapable of entering into the kinds of arrangements that literally define our government. Such organizations are perfectly capable of entering into contracts, but they cannot enter into a social covenant.

This was the second line of argument to the conclusion that it is morally inappropriate to privatize our national security intelligence that I promised at the outset of this article. We now have two independent arguments to this conclusion—the argument from market failure and the argument from social covenants.

**Government versus Corporate Analysis of Risk**

Suppose it is objected that this analysis in terms of social covenants is "too philosophical" to beat back the power of the argument for privatization with which this paper began—financial efficiency. While I would disagree with such a claim because the aforementioned argument seems very sound (and because it is the second of two strong arguments), I am prepared to provide something more—something directly related both to the idea of a social covenant as justification of government action and the economics of business efficiency.

In the film *The Missing* (2004), Cate Blanchett plays a woman named Maggie whose fifteen-year-old daughter is stolen by a rogue group of Apaches who plan to sell her in Mexico. With the help of her father (Tommy Lee Jones), Maggie pursues the group. Her father goes off to look for her older daughter and returns badly beaten. He
tells Maggie that he has seen her daughter and she is alive, but he believes Maggie should take her younger daughter (age eleven) and return home, giving up on her older child. If Maggie does this, her father tells her, she can be reasonably sure of having a good life for both herself and her younger daughter. On the other hand, if they pursue the older girl, they will, with high probability, all be killed. In short, Maggie’s father presents her with a decision problem. The probability is high of being killed if they go after the older child. On the other hand, if Maggie takes her younger daughter home and leaves the older girl, the probability of a good life for both is high, although her older daughter will be sold, essentially as a sex slave, in Mexico. Using the recognized strategy of maximizing the expected value of her actions, Maggie should probably go home with her younger child, but Maggie does not accept this framing of the decision. She immediately says to her father, “I don’t know how to leave her.”53 She is saying that her relationship with her child is covenantal: It is an ethical relationship that is unconditional; hence, Maggie’s framing of her decision does not include the option of leaving her older daughter.

This is consistent with the way a nation should deal with risks to its citizens. To the extent that the actions of the U.S. government are based on a social covenant, it should not treat the lives of its citizens as things that can easily be given up if the worst happens. On the other hand, this is what a major corporation would probably do. Indeed, it is what its shareholders would demand it do if that was what maximizing the bottom line required. In short, businesses treat risk very differently than the U.S. government should treat it.

In fact, the contrast is even more striking if we include the fact that corporations typically try to externalize as many costs as possible and make their calculations based on a very limited time frame—typically just the next quarter. (But remember, even the “long run” for a major corporation is only about seven years.) One has only to look at the BP oil disaster in the Gulf of Mexico to see this point graphically illustrated. Most of the commentary has emphasized that while BP spent millions developing technology to drill deeper wells, it invested almost nothing in technology designed to deal with a disaster should the worst happen.54 In short, the “worst case” was simply not on BP’s radar. Now that the worst has happened, however, people are looking to the federal government to deal with the crisis, and the federal government seems to have accepted the responsibility
of dealing with what is arguably the worst ecological disaster in the nation's history.

In short, the contrast between the way we expect the federal government to treat the risk of bad things happening to this country and its citizens and the way a major corporation treats such risk could not be starker. Businesses are comfortable with contracts, which they can renegotiate (possibly in court) if they become burdensome; the U.S. government is bound by a social covenant to put the interests of the people first. This is not to say this always happens. We have gone a long way down the road toward privatizing our government. The BP disaster should be a wake-up call. Privatizing government functions means privatizing risk, and that is not what we should expect from our government. If we privatize our national security intelligence, we will inevitably face issues similar to the BP disaster. This time, however, the consequences for the United States and its people may be far worse.

Conclusion

U.S. public philosophy is mistaken to assume that its democratic government should, in general, function like a business—even to the extent of privatizing essential functions such as national security intelligence. While there are no doubt many areas of democratic government that would not be damaged by privatization, the essential areas of national security intelligence, broadly conceived, have their own special characteristics—which effectively preclude their being contracted out to private corporations. I have used two independent, although related, arguments to prove this. First, I show there are essential areas of U.S. government where privatization—hence, deferring to a business model—would lead to what economists call "market failures," and I have further suggested that the essential functions of national security intelligence constitute such venues. Second, while large corporations are arguably incapable of going beyond the mechanism of "contract," I suggest that our democratic government can best be justified by a "social covenant." Large corporations are, by their very nature, incapable of entering into such arrangements because they are "directed organizations" that are not members of the moral community. Although each of these two arguments is capable of standing on its own, their combined force strongly supports the claim that American democratic government should not,
in general, be privatized, and, hence, managed in accordance with a business model. In short, our public philosophy is mistaken on this point and should be changed. National security intelligence represents a profoundly important example. “Contracting out” anything but the most trivial aspects of this critical area of our government is tantamount to contracting out our national defense. My remarks on what John H. Shaar called Lincoln’s view of covenanted patriotism speak—no, shout—that doing this is tantamount to changing the very nature of our nation.

Notes

1. Kevin MacDonald, State of Play (Arlington, VA: Universal Studios, 2009). I cite this film because someone who does have very significant insider knowledge and credibility related that the claims made in the film about using contractors for national security intelligence are essentially “all true.”


4. This article is worth reading for the number of insights it provides into what is happening in the area of privatizing national security intelligence.


7. This analogy with the natural numbers is actually a simplification. A more apt comparison would be with numbers in the real plane, whose cardinality is 2 to the power of aleph null, an infinite cardinal mathematicians have proved to be “larger than” aleph null. The reason this comparison is more appropriate is that different things (including perspectives) might reasonably be represented by sets of coordinates in real space. While there is an algorithm for generating the set of all natural numbers (whose cardinality is aleph null), there is no such orderly procedure for generating all sets of coordinates in real space, just as there is no algorithm for generating the “all things (including perspectives)” referred to in my characterization of what it is to act ethically. This complication does not change the basic point of the analogy, however, and requires some knowledge of advanced logic and mathematics to fully understand.
8. In this journal article, I use a more general concept of “socially optimal” than is traditionally found in economics texts, which usually evaluate socially optimal conditions in utilitarian terms. My own measure is strongly influenced by deontological considerations, as my emphasis on rights makes clear. See also note 14 on this point.

9. I thank my friend David Zin, an economist, for this point and for the reference to the percentage of the GDP accounted for by major corporations. Also see James Roper, “How Is Business Ethics Possible?” Research in Ethical Issues in Organizations 6 (November 2005): 183–94, for a sustained argument that the acts of major corporations must be justified by their “bottom lines.”


11. See note 8.


15. I don’t mean that there would necessarily be one giant corporation that would run the country, although that is certainly possible, and the best candidate would be the largest firm dealing with the national security intelligence. It is more likely, at least in the near term, that a small number of interrelated firms would have a virtual monopoly on power. In fact, the recent U.S. Supreme Court decision (Citizens United v. Federal Elections Commission) regarding political contributions of corporations makes it very likely that this will happen if something is not done to prevent it (Kirkpatrick 2010).


18. Actually, Holmes and Sunstein’s position is even more radical: Since both “positive” and “negative” rights demand such support, these theorists argue that there really is no significant difference between the two (The Cost of Rights, 35–48).

19. I cast my argument in terms of the traditional “liberal” view of individual rights, not the recent “communitarian” notions that the rights of “groups” outweigh individual rights. I addressed the comparison between traditional liberal and communitarian approaches to social philosophy in a paper delivered at the Midwest Political Science Association meeting in Chicago in the spring of 2010. I argued that the concept of a social covenant helps bridge the gap between these positions. In any event, the notion of “public reason” that is at the heart of much communitarian
thought is suspect because it cannot deal satisfactorily with the problem of “agenda setting.”


23. MacDonald, State of Play.

24. The answer to this claim has usually been to talk about the “long run,” for example, to point out that, while it may not be in the short-run interest of a corporation to “do the right thing,” that is always what is required “in the long run” if the company is to remain viable. The problem with this argument is that the long run in business is only about seven years (recall my previous discussion). If a company acts in ways that will lead to financial losses in that period of time, such a company will likely be subjected to (1) legal action from its shareholders, (2) a hostile takeover from its competitors, and/or (3) market discipline. If the company in question is closely held, it may be able to avoid 1 and 2, but it cannot sidestep 3. Or, to the extent that it can sidestep market discipline, we enter the realm of “no bid contracts” and “crony capitalism.” This means we are no longer operating in a free market; therefore, the “efficiency” argument goes away.

25. I return to this idea of how business and government handle risk assessments later.

26. “Free rider” problems are discussed in most standard economics texts.

27. We encounter a “negative externality” when a company pollutes the air (or, perhaps, the water) in the course of manufacturing a product but fails to incorporate the cost of cleaning up such pollution into the price of its product. Consequently, goods and services associated with negative externalities are oversupplied, while a “positive externality,” exemplified by the public health case, leads to a good or service being undersupplied. A company has no financial incentive to provide a good or service at a socially optimal level in the case of externalities, whether positive or negative.

28. An advocate of running government like a business might object that the issues raised in the cases of national defense and public health are not essential to the normal functioning of government, but are produced by such government actions as regulations that limit business’s incentives to fulfill these social roles. This argument ignores the previously considered issues associated with rights, liberties, and democratic decision making, and such an argument is not supported historically. See the next section of this article for further discussion of these issues.

29. See note 8 on “socially optimal” results.

30. Utilitarianism, as used here, is more consistent with economists’ use of the term than with the usage of philosophers, but both uses are consist-
tent with the history of this concept. Generally, we might consider “socially optimal” for economists as occurring when the “marginal benefit” of the item equals its “marginal cost.” Money is frequently used to evaluate this equality (or the monetary values that people will assign given their nonmonetary concerns), but it is not inherent to the concept that money be used. For example, economists might weigh the marginal benefit of allowing individuals to express themselves freely when it is extended to the point where it equals the marginal cost. This would constitute a nonmonetary weighing for the most part and is completely consistent with economic concepts of evaluating social optimality. This is consistent with the term utilitarianism and illustrates the difference between such theories and those with a more rights, or duty-based (or deontological) emphasis. (I thank economist David Zin for help with this note.)

31. This matter may be more complicated. In my paper with David Zin, “The Ethical Foundation for the Return to Risk of Entrepreneurs,” which I delivered at the Sixteenth Annual International Conference Promoting Business Ethics on 30 October 2009, in Niagara Falls, New York, we argue that firms large enough to enjoy “pricing power” are, in effect, imposing “private taxes” on the American public. This claim is supported by detailed economic analysis comparing the deadweight loss to the economy of a tax to that of monopoly profits and showing that these losses are very similar.


34. Velasquez, Business Ethics Concepts and Cases, 95.


36. The tradition of social contract theory is rich and varied, but Jean Hampton, a leading authority, claims the justificatory and explanatory aspects of such theories hinge on imagining ourselves as conflict-prone, roughly equal, rational individuals in a “state of nature.” Such individuals would have a strong and generalizable interest in creating a certain kind of state as an alternative to living in a state of nature. By agreeing to conventions that lead to designating a leader, with certain powers, the state is created as what Hampton calls an agency relationship between the people and the “ruler,” who may be removed if powers are misused. See Jean Hampton, Hobbes and the Social Contract Tradition (Cambridge, UK: Cambridge University Press, 1986).


39. Traditional “social contract” theory sometimes speaks of such arrangements in ways more suggestive of what I call a “social covenant.”
A major point of this article is that referring to a social "contract" in the context of discussing whether government, or some essential aspect of it, should be contracted out to a major corporation represents a very serious confusion.


41. John Rawls, *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978). Note that I am assuming that Rawls and Dworkin would give such principles an ethical interpretation—that they would argue that the foundation for these principles and their political rationale is to be found in their ethical import.

42. In the conclusion of the film *Judgment at Nuremberg* (directed by Stanley Kramer and filmed in Nuremberg, Bavaria, Germany, by Roxlom Films, 1961), Chief Judge Dan Haywood (Spencer Tracy), in sentencing Dr. Ernst Janning (Burt Lancaster), says that Janning’s actions were defended as being for the good of the country (Nazi Germany). But “a country is not a rock,” Haywood intones. “It is what it stands for.” In short, if you change the fundamental principles on which a country is based, you change the country (which is not just a place).

43. This point holds whether we speak of individuals, groups, or, indeed, “stakeholders” (on any standard definition), but such issues are beyond the scope of this paper.

44. See note 51.

45. Although discussion of this matter is beyond the scope of this article, I believe the idea of a social covenant is compatible both with classical liberalism with its emphasis on individual (usually "negative") rights—stressed here—and with the communitarian ideal of group rights (often "positive") to share in “the commons” that helps sustain society (see Bollier 2004). As I emphasize here, our social covenant is the product of a hypothetical agreement among individual people. The result of this covenant is that people pledge themselves to one another to form a political community.

46. This requires an extensive discussion that cannot be undertaken here. I refer the reader to my reference to the Clint Eastwood film in the following text for some brief remarks relevant to this issue (see note 49).

47. Some will wonder how I deal with taxes, which many who want to run government like a business think of as akin to theft. In this abbreviated context, I refer such a reader to Robert Nozick’s powerful statement on this issue in *The Examined Life* (New York: Simon and Schuster, 1989), 288–89. I add, however, that many who believe government should be operated like a business also seem to believe it is appropriate to do whatever they
can to deprive the government of tax revenues. Assuming such individuals satisfy the “letter” but not the “spirit” of the law, they appear to renounce any sort of social covenant—although they might argue that because their actions are (albeit marginally) legal they are part of a social contract. Such a position, if widely practiced, deprives government of the revenues necessary to provide the range of services the “social covenant” appears to require.


50. I assume we are dealing with cases in which the goals of the nation are not regarded to be obviously immoral, as determined by democratic processes based on full disclosure and national debate. This approach is consistent with my framing this discussion in terms of American “public philosophy.”

51. In Frank Darabont’s film The Majestic (filmed in Culver City, California, by Castle Rock Entertainment, 2001), Jim Carrey’s character, Peter Appleton, explores the issue of whether the U.S. Constitution is subject to “renegotiation,” as his attorney insists it is. Carrey’s Peter Appleton concludes, in a dramatic appearance before a congressional committee that has accused him of being a “communist” (in the late 1940s), that, at least, the Constitution’s First Amendment is not subject to such renegotiation. I believe Carrey’s character clearly indicates that he regards at least this aspect of the Constitution as covenantal, rather than contractual.

52. My focus is on the nature (or form) of the agreement that warrants our common life. The covenant’s content may be similar to that of a corresponding social contract in some respects, but the covenantal form will play a major role in determining the structure of the agreement’s content. Traditional “social contract” theory sometimes speaks of such arrangements in ways more suggestive of what I call a “social covenant,” but, as I argue in this article, the issue is not just a matter of terminology. There are critical differences between a “social contract” and what I call a “social covenant.”


54. During the weeks following the BP disaster, Rachel Maddow has carefully analyzed this point and presented the evidence weeknight after weeknight on her MSNBC television show.

55. This view of large corporations is sometimes referred to as the “heterodox” view, to differentiate it from the “orthodox” view of corporations, which essentially reduces corporations to their employees. The heterodox view eschews such reduction, treating them instead as “social machines” with carefully circumscribed purposes.
Bibliography


