

# ESSAY

## WE THE SHAREHOLDERS: GOVERNMENT MARKET PARTICIPATION IN THE POSTLIBERAL U.S. POLITICAL ECONOMY

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*Twentieth-century American constitutional, administrative, and corporate law were often contests over legal liberalism. We more or less accepted the basic liberal premise of separating the public from the private—and then battled over the relative size and power of the State versus the Market. At times, the State had the upper hand, and regulatory and welfare programs proliferated. At other moments, the Market struck back, forcing the State to cede ground. The names of these contests are as familiar as Normandy, Gettysburg, and Agincourt: Progressivism, Lochnerism, the New Deal, the Great Society, and the Reagan Revolution.*

*Today, however, those conflicts seem antiquated, waged over increasingly inconsequential terrain. We've now so pervasively blended public and private identities and powers that the traditional liberal divide has all but collapsed. But with the blurring of old battle lines, new ones emerge. This Essay considers the apparent demise of legal liberalism and the corresponding rise of what seemingly comes next: public capitalism.*

*A volatile blend of neoliberalism and democratic socialism, public capitalism reflects the paradoxes, compromises, and innovations of (1) a big and potentially redistributive State that nonetheless achieves its aims through commercial rather than (just) democratic interventions, and (2) an unstintingly capitalist private sector that nonetheless flexes sovereign regulatory muscle in furtherance of public aims at times orthogonal to profits.*

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## INTRODUCTION

We've long had a mixed political economy. We exchange goods and services against the backdrop of public laws, market forces, and societal norms. The creators of these goods and services may be private actors, the State, or some combination of the two. The distribution channels may be commercial, sovereign, or, again, a hybrid. And the "price" of those goods and services may be pegged to the so-called laws of supply and demand, collectively determined through democratic processes, or, yet once more, fixed according to some hybrid formula. The choices we make, the pathways we employ, and the valuations we privilege tell us a great deal about where we are as a political, legal, economic, and moral community. And, right now, we're a community in flux.

Consider the following. With the maturation of the American welfare state in the mid-twentieth century, government asserted itself more aggressively and comprehensively in the political economy. Among other things, government expanded access to the courts, thus placing public law more at the center of traditionally private disputes. Government professionalized and regularized criminal justice, which previously had been a somewhat, if not significantly, privatized domain. Government ratcheted up industrial and financial regulation, passing laws and promulgating rules to structure and discipline myriad commercial transactions and relationships. Government assumed broader responsibility for the funding and directing of major infrastructure projects, including a national highway system. And, to pay for all of this, government imposed a greater tax burden on all of us, though generally with a progressive slant.<sup>1</sup>

By the last decades of the twentieth century, however, considerable frustration with what some characterized as government overreach led to a recalibration. The ratio of public regulation to private ordering seemed, at least to that frustrated cohort, to be out of balance. Thus, the State retreated. Government officials endorsed and encouraged private arbitration; privatized policing and prison administration; deregulated banking, telecom, and any number of other industrial sectors; sold and leased

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1. See *infra* section I.B.

highway infrastructure to for-profit companies; and reduced and flattened tax burdens.<sup>2</sup>

This rise and then retreat of state welfarism should come as no surprise. After all, one of the signature projects of legal liberalism has been in service of separating the public from the private (and vice versa)—and then finding points along the public–private spectrum that best reflected our preferences for the right mix of state and market ordering.<sup>3</sup> Hence, we oscillated, from primarily a laissez-faire regime during the *Lochner* era to a state welfarist regime that spanned the mid-1930s to the mid-1970s, and then back to a more libertarian resting point starting in the build-up to the Reagan Revolution and carrying forward into the early years of the twenty-first century.<sup>4</sup>

Though scholars, policymakers, and jurists are still processing this last and deeply consequential moment of deregulation and privatization—*private ordering's revanchism*—change is once again afoot. We're seemingly poised for yet another paradigm shift.

Indeed, today we have government reclaiming some of its recently ceded ground, albeit with a twist. Government is making civil adjudication more user-friendly, with some jurisdictions competing with private arbitrators by creating “fast-pass” public trials for those willing to pay a premium.<sup>5</sup> The tide has now turned against prison privatization—and, while government officials reassert fuller responsibility, we see some jurisdictions experimenting with VIP-style public jail facilities for nonviolent offenders

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2. See *infra* section I.B.

3. For helpful discussions along these lines, see generally Michael Walzer, *Liberalism and the Art of Separation*, 12 *Pol. Theory* 315 (1984) (describing liberalism as “a certain way of drawing the map of the social and political world,” in which “liberal theorists preached and practiced an art of separation”); Jeff Weintraub, *The Theory and Politics of the Public/Private Distinction*, in *Public and Private in Thought and Practice 1* (Jeff Weintraub & Krishan Kumar eds., 1997) (“[Liberalism] defines public/private issues as having to do with striking the balance between individuals . . . , on the one hand, and state action, on the other.”). I appreciate, of course, that for some, liberalism carries additional or different meanings. See generally Edmund Fawcett, *Liberalism: The Life of an Idea* (2014) (characterizing liberalism broadly to include framings unrelated to the public–private divide); Helena Rosenblatt, *The Lost History of Liberalism: From Ancient Rome to the Twenty-First Century* (2018) (describing the manifold understandings of liberalism, including those that differ from the Anglo-American understanding that centers on limited government and the safeguarding of individual rights). In associating what I call legal liberalism with a strong recognition of distinct and somewhat rivalrous state and private spheres, I do not mean to challenge or critique other characterizations of liberalism. My point is, rather, a much more modest one: simply to label a particularly resonant and important phenomenon that is often, but not invariably, a feature of liberalism.

4. See *infra* Part I.

5. See Anne S. Kim, Note, *Rent-a-Judges and the Cost of Selling Justice*, 44 *Duke L.J.* 166, 168–71 (1994); Eric Berkowitz, *Is Justice Served?*, *L.A. Times* (Oct. 22, 2006), <https://www.latimes.com/archives/la-xpm-2006-oct-22-tm-arbitrate43-story.html> [<https://perma.cc/6EUN-L5EU>] (describing the practice and reactions to it).

willing to pay extra for the upgrade out of gen pop.<sup>6</sup> When it comes to economic regulation, government has likewise reemerged, though most prominently by taking ownership stakes in failing financial institutions<sup>7</sup> and by taking very seriously proposals to create public (that is, government-run) banks, possibly through the United States Postal Service (USPS).<sup>8</sup> The privatization craze around highways has likewise subsided, so much so that some states are buying back privately owned and operated roads.<sup>9</sup> And, in yet another nod to the Market, public highway administrators are reclassifying left lanes as premium lanes, no longer reserved (or exclusively reserved) for green-energy cars and carpoolers but rather open to those willing and able to pay sometimes quite steep surcharges.<sup>10</sup> Lastly, given the enduring hostility to taxes, this rejuvenated and in many respects postliberal government has encouraged “patriotic philanthropy,” essentially soliciting private charitable giving to fund state programs and initiatives.<sup>11</sup>

This Essay aims to make sense of this new, and still inchoate, moment—what I call *public capitalism*. It explains how public capitalism both reflects and helps accelerate the decline of the modern liberal

6. See Kim Shayo Buchanan, It Could Happen to “You”: Pay-to-Stay Jail Upgrades, 106 Mich. L. Rev. First Impressions 60, 61–62 (2007), [https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1134&context=mlr\\_fi](https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1134&context=mlr_fi) [<https://perma.cc/L3VC-2XYY>]; Jennifer Steinhauer, For \$82 a Day, Booking a Cell in a 5-Star Jail, N.Y. Times (Apr. 29, 2007), <http://www.nytimes.com/2007/04/29/us/29jail.html> [<https://perma.cc/4D2X-6KU2>].

7. See *infra* notes 141–149 and accompanying text.

8. Jordan Weissman, Kirsten Gillibrand Unveils Her Ambitious Plan to Turn the Post Office into a Bank, Slate (Apr. 25, 2018), <https://slate.com/business/2018/04/kirsten-gillibrands-ambitious-postal-banking-bill.html> [<https://perma.cc/VA2N-DH9B>]; see also Mehrsa Baradaran, It’s Time for Postal Banking, 127 Harv. L. Rev. Forum 165, 165 (2014), [https://harvardlawreview.org/wp-content/uploads/pdfs/forvol127\\_baradaran.pdf](https://harvardlawreview.org/wp-content/uploads/pdfs/forvol127_baradaran.pdf) [<https://perma.cc/L7H4-FALD>] [hereinafter Baradaran, It’s Time] (describing a 2014 white paper from the Office of the Inspector General of the U.S. Postal Service proposing that the USPS offer financial services). See generally Mehrsa Baradaran, How the Other Half Banks 183–209 (2015) [hereinafter Baradaran, The Other Half] (explaining and endorsing postal banking).

9. See U.S. Dep’t of Transp., Report to Congress on Public–Private Partnerships 50 (2004), <https://www.fhwa.dot.gov/reports/pppdec2004/pppdec2004.pdf> [<https://perma.cc/AQ33-5MQC>] (discussing California’s purchase of State Road 91 from the private franchisee that built and initially operated it); Marlon G. Boarnet, Joseph F. DiMento & Gregg P. Macey, Cal. Pol’y Res. Ctr., Toll-Highway Finance Lessons from Orange County (2002), <https://web.archive.org/web/20081007023520/http://www.ucop.edu/cprc/documents/tollroadbrf.pdf> (on file with the *Columbia Law Review*).

10. See Peter Funt, Opinion, Highway Robbery Targets the Poor, N.Y. Times (May 17, 2017), <https://www.nytimes.com/2017/05/17/opinion/california-express-lanes.html> [<https://perma.cc/VD79-XGC7>]; Dana Hedgpeth, Toll Hits \$46.75 on I-66 Lanes Inside the Beltway, Wash. Post (Sept. 5, 2018), <https://www.washingtonpost.com/transportation/2018/09/05/toll-hits-i-lanes-inside-beltway> (on file with the *Columbia Law Review*); Robert Thomson, 95 Express Lanes Mark First Year Anniversary, Wash. Post (Dec. 29, 2015), <https://www.washingtonpost.com/news/dr-gridlock/wp/2015/12/29/95-express-lanes-mark-first-anniversary> (on file with the *Columbia Law Review*).

11. See *infra* section II.A.5.

consensus in America. And it shows how public capitalism unsettles U.S. constitutional, administrative, and corporate law.

To provide texture and clarity, let's begin with what public capitalism is not. Public capitalism is not just another shift along the public-private axis, another routine oscillation as each generation renews its membership and renegotiates its place within the western legal-liberal tradition.<sup>12</sup> So long as that dynamic perdured, we were able to focus squarely on the relative merits of state sovereign interventions versus private commercial ones. That is to say, in any given policy domain or with respect to any given controversy or concern—e.g., industrial pollution or occupational licensing—we were striking some balance between government-imposed regulations and privately arrived-at arrangements dictated by market patterns, practices, and pressures. Yet now something different is happening. Government is repositioning itself as a savvy market participant, as evidenced by the examples just discussed—using commercial rather than just sovereign levers to advance its various aims.

Nor is public capitalism just a renaming or repackaging of neoliberalism,<sup>13</sup> with my coining “public capitalism” for the sake of novelty or to shed some of the heavy baggage that has been heaped on that now-ubiquitous term. Though there is much disagreement about what neoliberalism actually means,<sup>14</sup> it is fair to say that neoliberalism involves the valorization and elevation of market practices, goals, and theories to such an extent that the State should not only promote free enterprise but also reconstitute itself along decidedly businesslike lines.<sup>15</sup>

At first blush, there appears to be good reason to view the instant moment as a neoliberal one. The State today has indeed expanded its commercial toolkit considerably, using government market participation as an alternative to traditional, sovereign command-and-control regulations and tax-and-transfer welfare programs. This enthusiasm for commercial pathways and prerogatives seemingly reflects the triumph of neoliberalism: the government routinely giving itself over to the laws and

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12. For an encapsulation of such movement within liberalism, see Brian Z. Tamanaha, *The Dark Side of the Relationship Between the Rule of Law and Liberalism*, 3 *N.Y.U. J.L. & Liberty* 516, 519–23 (2008).

13. See Wendy Brown, *Undoing the Demos: Neoliberalism's Stealth Revolution* 28–35 (2015) (“Widespread economization of heretofore noneconomic domains, activities, and subjects, but not necessarily marketization or monetization of them, then, is the distinctive signature of neoliberal rationality.”).

14. See Mike Konczal, “Neoliberalism” Isn't an Empty Epithet. It's a Real, Powerful Set of Ideas., *Vox*, <https://www.vox.com/the-big-idea/2017/7/18/15992226/neoliberalism-chait-austerity-democratic-party-sanders-clinton> [<https://perma.cc/659P-RZKW>] (last updated Dec. 20, 2017).

15. Cf. David Singh Grewal & Jedediah Purdy, Introduction: Law and Neoliberalism, 77 *J.L. & Contemp. Probs.*, no. 4, 2014, at 1, 1, 3–4, 6 (describing neoliberalism's endorsement of “market-mimicking” practices in the public sphere and recognizing that neoliberal reforms may undermine democratic values and programs).

lures of capitalism,<sup>16</sup> joining in on the fun of pricing goods and services as a for-profit firm would, while measuring success according to such metrics as efficiency and amount of revenue raised.

But that's hardly the whole picture. Government market participation need not be in service of free, let alone freer, enterprise. It can be, and is, used to achieve any number of market-*correcting*—rather than market-*enhancing* or *reinforcing*—regulatory aims, not to mention redistributive initiatives. That's certainly true of the so-called public options discussed in such spaces as health care and banking.<sup>17</sup> If anything, state commercial engagement of that sort seems more socialistic than neoliberal.

What's more, there is a correspondingly converse trend afoot. Some firms are going through a metamorphosis of their own. Mirroring the State's crossing over into the realm of commercial engagement, these businesses are making some sovereign-seeming interventions. Such apparent detours from the steady march of capitalism are most evident in the newest and biggest sectors of market growth. Today we see social-media, high-tech, and gig economy firms undertaking initiatives that are more akin to governing and regulating than they are to ordinary commercial buying, selling, or trading.<sup>18</sup>

What then can we say about public capitalism, which blends elements of neoliberalism with socialism, shareholder value maximization with, perhaps, consumer and workplace democracy? For starters, in this jumbled, postliberal world of public capitalism, public and private are less fixed, less distinct, and (as a result) less relevant statuses. What seems of greater relevance now is the *sovereign-commercial* axis, as public and private actors are each showing themselves willing and able to intervene in the political economy as either sovereign regulators or market participants.<sup>19</sup> Hence public capitalism requires us to think less about the legal status of actors (qua public or private) and more about the tools they wield, the prices they ascribe to the goods and services they provide, and the kinds of obligations they impose.

In this jumble, actors and institutions are the ultimate code switchers, toggling between identities, orientations, and goals. They are thus able to transcend their classically liberal, perhaps crabbed, all-defining roles as either *public sovereigns* or *private businesspeople*. We, in turn, the very subjects (and objects) of public capitalism, may likewise be empowered. We may

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16. See David Singh Grewal, *The Laws of Capitalism*, 128 Harv. L. Rev. 626, 652–61 (2014) (reviewing Thomas Piketty, *Capital in the Twenty-First Century* (2014)) (describing the legal framework undergirding capitalist political economies).

17. See Ganesh Sitaraman & Anne L. Alstott, *The Public Option* 169–80, 202–22 (2019).

18. See *infra* section II.B.

19. See, e.g., Jon D. Michaels, *Sovereigns, Shopkeepers, and the Separation of Powers*, 166 U. Pa. L. Rev. 861, 892–95 (2018) [hereinafter Michaels, *Sovereigns*] (characterizing the separate and distinct roles played by government regulators and private commercial actors and emphasizing how that separation is in keeping with an overarching American constitutional commitment to engendering separation between rivalrous sets of stakeholders).

be empowered to insist government be more commercially minded—and treat us as consumers. We may be empowered, too, to insist firms be more attentive to the commonweal—and thus treat us like citizens.

The downside, of course, is that such liberation may leave citizen-consumers unmoored. For generations, we've been immersed in the law and language of legal liberalism. As a result, there presently is no corresponding code-switching grammar for us to understand how government agencies and private firms construct their new identities—and no underlying philosophy that enables us to evaluate the coherence or morality of those new identities, let alone participate meaningfully in structuring them.

For the immediate moment then, public capitalism is about power—about the power to reconfigure institutional identities and transcend legal ones. It changes the nature of government, firms, and the interplay between the two (and vis-à-vis the general public as citizens and consumers). Quite possibly critical to advancing any number of long-stalled political and commercial projects, public capitalism nevertheless cannot help but leave us with a pang of philosophical and constitutional agita, as all of us (including governments and firms) struggle to find purpose once untethered from the familiar if not always comforting precepts of legal liberalism.

The challenge going forward will thus be to ascribe meaning to public capitalism, to put that undeniable but undertheorized power to good use. Perhaps it is the vehicle that can pull us out of neoliberalism's double doldrums: the worker alienation many feel in an increasingly hyper-capitalist economy and the political alienation many feel in an increasingly plutocratic polis. Just as plausibly, public capitalism may exacerbate our dual dislocations.

This Essay takes the first step in exploring public capitalism. In the Parts that follow, I provide a genealogy of public capitalism. I show how it is both an apostle and apostate of modern liberalism; describe its robustness across multiple policy domains at the federal, state, and local levels; capture its political, legal, and cultural resonance; and begin to explain its effect on firms, markets, and public and private law. By way of conclusion, I consider what the pivot from twentieth-century liberalism to twenty-first-century public capitalism suggests and portends. Because of limitations of space and scope, this Essay focuses squarely on the *government market participant* dynamic, leaving a serious and sustained study of the converse phenomenon—*firms acting as sovereigns*—for a later day.

#### I. TWENTIETH-CENTURY LIBERALISM: PUBLIC-PRIVATE SEPARATION, SPECIALIZATION, AND COMPETITION

Among the chief projects of modern legal liberalism, three stand out. First, there is the separation of state and private power, undergirded by state efforts to protect and respect private ordering in commercial, civic,



religious, familial, and personal affairs. Second, there is the specialization and compartmentalization of state and private power—such that each sector advances different agendas, follows different procedures, employs different tools, abides by different legal and moral standards, and answers to different constituencies.<sup>20</sup> And, third, there is the intensification of competition between state and private actors for (marginal) dominance over a given policy domain—an intensification brought about by, among other things, the rise of state welfarism and the corresponding pushback by firms seeking to maintain or reassert the primacy of private ordering.<sup>21</sup>

Modern legal liberalism thus fixes—and then fixates—on the public-private divide, with the relative balance of power oscillating between greater and lesser roles for the State to play in the creation and enforcement of societal and industrial rules and in the distribution (and redistribution) of goods and services.<sup>22</sup> We see this play out, roughly speaking, across two major twentieth-century governance periods—what I call the “Welfare period” and what I call the “Deregulation and Privatization period.”

#### A. *Jockeying Along the Public-Private Axis*

During these two periods, government and firms competed over marginal spaces—namely, those domains that could conceivably be subject to greater or lesser state coercive regulation (or private market ordering).<sup>23</sup> Such competition, to be clear, was not a contest between two readily interchangeable rivals. We see direct competition of that sort all the time: Two cities engage in a head-to-head contest to woo a business, such as Amazon’s much-hyped HQ2;<sup>24</sup> or two firms, such as SpaceX and Blue

20. For seminal treatments, see generally, e.g., G.W.F. Hegel, *Elements of the Philosophy of Right* (Allen W. Wood ed., H.B. Nisbet trans., 2003); Karl Marx, *On the Jewish Question*, in *The Marx-Engels Reader* 26 (Robert C. Tucker ed., 1978); Karl Polanyi, *The Great Transformation* (2d ed. 2001); Max Weber, *Politics as a Vocation*, in *The Vocation Lectures* 32 (David Owen & Tracy B. Strong eds., 2004).

21. See Jacob S. Hacker & Paul Pierson, *American Amnesia* 3–19 (2016) (characterizing jockeying between state regulators and regulated businesses throughout the twentieth century).

22. A similar story could be told about other sectors within the private sphere. Yet accountings of such things as religion and family are, for what I hope are self-evident reasons, beyond the scope of this Essay.

23. See Hacker & Pierson, *supra* note 21. See generally Kim Phillips-Fein, *Invisible Hands: The Businessmen’s Crusade Against the New Deal* (2009) (arguing that the modern conservative movement originated as an anti-regulatory backlash to the New Deal). By noting competition over marginal spaces, I mean to underscore that in any and every period there was always some public regulation, some market orderings, and some overlap between the two.

24. M.J., *How America’s Cities Are Competing for Amazon’s Headquarters*, *Economist* (Dec. 5, 2017), <https://www.economist.com/the-economist-explains/2017/12/05/how-americas-cities-are-competing-for-amazons-headquarters> [https://perma.cc/W4QW-S56B].

Origin, vie to develop next-generation space rockets.<sup>25</sup> Rather, the competition I'm highlighting is between contrasts: A policy domain can be disciplined primarily by market forces according to the laws and logic of supply and demand; or the government can swoop in and take the lead in regulating using its democratic, deliberative, and coercive instruments, according to the laws and logic of the collectively arrived-at common good. Pick your poison.

To be sure, the competition is dynamic, and there's always movement along the public-private axis. That movement isn't ever entirely unidirectional. But, extrapolating from general trends, at particular times we as a political and legal community have shown ourselves more firmly supportive of state interventions over market ones, or vice versa. Specifically, in the middle decades of the twentieth century, the government assumed a large and insurgent role, initiating or expanding various public-benefit and regulatory programs relating to transit and infrastructure, national security, finance, and socioeconomic empowerment.<sup>26</sup> This Welfare period more or less ran from the start of the Second New Deal<sup>27</sup> to the end of the Nixon presidency.<sup>28</sup>

In due time, there was a recalibration—and a turn (or, rather, *return*) to greater private ordering. Mounting disaffection with big, intrusive

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25. Dave Mosher, *Here's How Jeff Bezos' Giant New Rockets Compare to Elon Musk's*, *Bus. Insider* (Sept. 12, 2016), <https://www.businessinsider.com/blue-origin-vs-spacex-falcon-heavy-vs-new-glenn-2016-9> [<https://perma.cc/58CW-A3UU>].

26. See generally Hacker & Pierson, *supra* note 21, at 114–30 (describing the mid-twentieth-century consensus supportive of a “mixed economy” that includes a fairly robust welfare state).

27. See 2 Bruce Ackerman, *We the People: Transformations* 301–02 (1998) (marking the turn from the First to the Second New Deal, in which “Roosevelt and Congress now accepted the market as a legitimate part of the emerging economic order—so long as regulatory structures could be introduced to correct abuses and injustices”); Arthur M. Schlesinger, Jr., *The Age of Roosevelt: The Politics of Upheaval, 1935–1936*, at 211–445 (2003) (capturing the essence of the Second New Deal); see also Jefferson Cowie, *Reframing the New Deal: The Past and the Future of American Labor and the Law*, 17 *Theoretical Inquiries L.* 13, 28 (2016) (describing the limited impact of the early New Deal reforms and characterizing the second wave as having “established the most substantive parts of Roosevelt’s legacy”).

28. Nixon was many things—among them mendacious, bigoted, and hawkish. But when it came to domestic policy matters, he was, by today’s lights, quite progressive and interventionist, instrumental in advancing any number of welfare initiatives and consumer, worker, and environmental regulatory programs. See *Endangered Species Act of 1973*, Pub. L. No. 93-205, 87 Stat. 884 (codified as amended at 16 U.S.C. §§ 1531–1544 (2012)); *Consumer Products Safety Act of 1972*, Pub. L. No. 92-573, 86 Stat. 1207 (codified as amended at 15 U.S.C §§ 2051–2089) (2012)); *Clean Air Act Amendments of 1970*, Pub. L. No. 91-604, 84 Stat. 1676 (codified as amended at 42 U.S.C. §§ 7401–7671q (2012)); *Occupational Safety and Health Act of 1970*, Pub. L. No. 91-596, 84 Stat. 1590 (codified as amended at 29 U.S.C. §§ 651–678 (2012)). Nixon even championed a negative income tax, essentially a guaranteed basic minimum income. See Robert A. Moffitt, *The Negative Income Tax and the Evolution of U.S. Welfare Policy*, 17 *J. Econ. Persp.* 119, 119, 122 (2003).

government coupled with new or renewed enthusiasm for markets prompted a major shift in the direction of deregulation and privatization. These initiatives, beginning in earnest in the late 1970s and early 1980s and extending into the twenty-first century—roughly, the Deregulation and Privatization period—resulted in the State ceding (or, again, *returning*) considerable authority, discretion, and responsibility to the private sector.<sup>29</sup>

These two periods, the yin and yang of the modern American political economy, ought to be familiar enough to most readers. Some may quibble over labels; the timeline; the magnitude or intensity of the government's regulatory advances or retreats; or the various exceptions, holdouts, and spillovers (such as the commercially oriented Postal Service and Tennessee Valley Authority, and the at times sovereign-seeming AT&T<sup>30</sup>). Yet most will, I think, agree with my description of the general trends, arcs, and patterns. Likewise, most will be inclined to agree that the central and pressing debates during (and between) these two periods turned on whether the State or the Market should have been the principal steward of the political economy—and thus whether sovereign governance or commercial competition should have been the primary instrument of socioeconomic ordering.<sup>31</sup>

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29. See Hacker & Pierson, *supra* note 21, at 169–73 (detailing this “enormous shift in power toward a new corporate elite much more hostile to the mixed economy, much less constrained by moderates in government or by organized labor, and much more in tune with the new celebration of the ‘free market’”); Michael Meeropol, *Surrender: How the Clinton Administration Completed the Reagan Revolution 2* (1998) (emphasizing the bipartisan swing in the direction of greater deregulation); Jon D. Michaels, *Constitutional Coup: Privatization's Threat to the American Republic* 84–104 (2017) [hereinafter Michaels, *Coup*] (describing deregulation and privatization in the late twentieth century).

30. See generally Tim Wu, *The Master Switch: The Rise and Fall of Information Empires* (2010) [hereinafter Wu, *Master Switch*].

31. See *supra* notes 21–23 and accompanying text.

TABLE 1: SEPARATION, SPECIALIZATION, AND COMPETITION UNDER MODERN LEGAL LIBERALISM

Period	Ascending/ Insurgent Actor	Tools & Protocols	Valuation & Pricing Schemes
Welfare Period (mid-1930s– mid-1970s)	State	Sovereign <ul style="list-style-type: none"> <li>• <i>Rulemaking</i></li> <li>• <i>Legislation</i></li> <li>• <i>Adjudication</i></li> <li>• <i>Coercive Sanctions</i> (<i>taxes, fines, incarceration</i>)</li> </ul>	Public Regarding <ul style="list-style-type: none"> <li>• <i>Means-Tested</i></li> <li>• <i>Subsidized</i></li> <li>• <i>Universally Available</i></li> <li>• <i>Just deserts</i></li> </ul>
Deregulation & Privatization Period (1980s–2000s)	Firm/ Industry	Commercial <ul style="list-style-type: none"> <li>• <i>Buying, selling, investing, leasing, renting, bartering</i></li> <li>• <i>Self-regulation</i></li> </ul>	Profit Maximizing <ul style="list-style-type: none"> <li>• “<i>Laws</i>” of <i>supply and demand</i></li> </ul>

### B. Case Studies

Consider some policy domains that have been hotbeds of public–private jockeying during the modern era. What follows is more impressionistic than encyclopedic but nonetheless aims to capture some general patterns of twentieth-century State–Market contestation across a range of significant policy spaces.<sup>32</sup>

1. *Infrastructure*. — Highways aren’t the sexiest of subjects, but it is hard to deny how central the highway system has been to America’s postwar economic, social, and cultural development. Indeed, government support for an interstate highway system has, at practically every turn, been treated as a national imperative.<sup>33</sup> Federal support for interstate highways dates back to the 1800s,<sup>34</sup> but really took its modern form after World War II, with funding and planning for the Eisenhower Interstate Highway System. Throughout the 1950s and 1960s, it was virtually unquestioned that the federal government

32. Note that I start this account with the (Second) New Deal’s surge in government welfarist activism. I could have, of course, begun slightly earlier, during, say, the *Lochner* era, one characterized by greater sovereign deference to private ordering.

33. See, e.g., Maurice G. Baxter, Henry Clay and the American System 50, 206–07 (1995) (“The most important federal improvement in this period, the National Road, gradually extended westward from Maryland toward the Mississippi Valley.”); Steven Hahn, *A Nation Without Borders* 88 (2016) (describing an 1808 congressional plan to extend roadways into remote areas of the United States).

34. Theodore Sky, *The National Road and the Difficult Path to Sustainable National Investment* 15 (2011).

would appropriate the necessary funds.<sup>35</sup> Tolls would be the exception, not the rule, for the 46,876 miles of interstate thoroughfares.<sup>36</sup>

Surely the public financing of roads, funded principally through general taxes (albeit bolstered by fuel taxes), reflected a normative policy choice: Drivers and nondrivers alike benefit from a comprehensive, well-maintained national highway system that enables the easy flow of people, goods, and services and that strengthens our national defense.<sup>37</sup> What's more, even along the stretches of toll roads—where tolls had been assessed prior to the creation of the Eisenhower system and were subsequently grandfathered in—all vehicles in a single vehicular class—cars, trucks, etc.—were charged the same amount. These were, after all, commonly and largely equally shared public goods.

It was during this period of public investment in highways when dedicated high-occupancy vehicle (HOV) and bus lanes came into existence. In effect, the government committed to specially rewarding those participating in ridesharing programs, which helped not only ease congestion but also conserve fuel and minimize pollution.<sup>38</sup>

Fast forward to the latter decades of the twentieth century. This was a period of retrenchment. In the 1980s and 1990s, we saw few additions to the previously always rapidly expanding interstate highway system<sup>39</sup>—and we began to hear more and more stories of insufficiently maintained, at

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35. The costs were allocated between the feds and the states at a 9:1 ratio. Richard F. Weingroff, *The Greatest Decade 1956–1966, Highway History*, U.S. Dep't Transp. Fed. Highway Admin., <https://www.fhwa.dot.gov/infrastructure/50interstate.cfm> [<https://perma.cc/YF2P-Y7GB>] (last updated June 27, 2017).

36. See *Interstate Frequently Asked Questions, Highway History*, U.S. Dep't Transp. Fed. Highway Admin., <https://www.fhwa.dot.gov/interstate/faq.cfm> [<https://perma.cc/BN5J-G4Y4>] (last updated Dec. 18, 2018). Specifically, tolls were, at the outset, prohibited in all cases except for preexisting toll roads, such as the Pennsylvania Turnpike, which were folded into the Eisenhower System. *Ask the Rambler: Why Does the Interstate System Include Toll Facilities?*, *Highway History*, U.S. Dep't Transp. Fed. Highway Admin., <https://www.fhwa.dot.gov/infrastructure/tollroad.cfm> [<https://perma.cc/XEQ9-7LT5>] (last updated Sept. 8, 2017).

37. Richard F. Weingroff, *Original Intent: Purpose of the Interstate System 1954–1956, Highway History*, U.S. Dep't Transp. Fed. Highway Admin., <https://www.fhwa.dot.gov/infrastructure/originalintent.cfm> [<https://perma.cc/B53C-93C5>] (last updated June 27, 2017). To be sure, this does not mean that public highways are an unalloyed good, especially considering how they've contributed to sprawl and pollution.

38. See *Federal-Aid Highway Program Guidance on High Occupancy Vehicle (HOV) Lanes: Concept, Background, and History*, U.S. Dep't Transp. Fed. Highway Admin., <https://ops.fhwa.dot.gov/freewaymgmt/hovguidance/chapter2.htm> [<https://perma.cc/GS7U-FW8D>] (last updated Feb. 1, 2017); *Federal-Aid Highway Program Guidance on High Occupancy Vehicle (HOV) Lanes: Strategies to Reduce Congestion and Improve Air Quality*, U.S. Dep't Transp. Fed. Highway Admin., <https://ops.fhwa.dot.gov/freewaymgmt/hovguidance/chapter5.htm> [<https://perma.cc/ZP5Q-Z5Z9>] (last updated Feb. 1, 2017).

39. *Length of the Interstate Highway System and of the Chinese Expressway System, 1959–2017*, *Geography Transp. Sys.*, [https://transportgeography.org/?page\\_id=1869](https://transportgeography.org/?page_id=1869) [<https://perma.cc/3NNB-YMKK>] (last visited Oct. 3, 2019).

times crumbling, roads, tunnels, and bridges.<sup>40</sup> Beyond such signs of retrenchment, there were also acts of deregulation and privatization. Deregulation occurred by way of a repeal to the national maximum speed limit law,<sup>41</sup> which had been enacted in 1974 for reasons of safety and energy conservation.<sup>42</sup> And notable among this period's privatization schemes was the leasing of the Indiana Toll Road, I-80, a major highway running along the northernmost part of the Hoosier state.<sup>43</sup> Likewise, in California, the state government granted a license to a private company to build and operate a toll road, the 91 Express Lanes, through Orange County.<sup>44</sup> Over in Northern Virginia, the Dulles Greenway—completed in 1995—represented the first wholly private road built in the commonwealth since 1816. It too is a toll road.<sup>45</sup>

This push for the State to retreat, privatize, and deregulate was motivated in part by fiscal shortfalls and a corresponding recognition that there was little appetite for new taxes to maintain, let alone add, new roads. Privatization and deregulation were further advantaged by a popular and elite zest for markets, befitting the times, and a corresponding belief that private, for-profit firms would be better stewards of the highways than would government bureaucracies.<sup>46</sup> Recall that it was at this sociopolitical moment when Ronald Reagan won elections and adulation by savaging government.<sup>47</sup> One of his most memorable quips was that “the nine most terrifying words in the English language are: ‘I’m from the Government, and I’m here to help.’”<sup>48</sup>

What's perhaps most revealing about these privatization leases are their noncompete clauses. Noncompete clauses attached to leases restrict government policymaking above and beyond relinquishing control over

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40. Allan C. Ornstein, *America Is Coming Apart*, 57 *Clearing House* 9, 412 (1984).

41. National Highway System Designation Act of 1995, Pub. L. No. 104-59, 109 Stat. 568.

42. Emergency Highway Energy Conservation Act of 1974, Pub. L. No. 93-239, 87 Stat. 1046.

43. Meagan Aaron, *Public Private Partnerships* 21 (Oct. 22, 2015) (unpublished M.S. thesis, Columbia University), <https://academiccommons.columbia.edu/doi/10.7916/D8794465> (on file with the *Columbia Law Review*).

44. General Info, 91 Express Lanes, <https://www.91expresslanes.com/general-info/> [<https://perma.cc/YP45-G37R>] (last visited Oct. 7, 2019); see also Background & History, The Toll Roads of Orange County, <https://thetollroads.com/about/background> [<https://perma.cc/TWW8-XC4P>] (last visited Oct. 3, 2019).

45. About the Greenway, Dulles Greenway, <https://www.dullesgreenway.com/about> [<https://perma.cc/9F5U-KNCT>] (last visited Oct. 3, 2019).

46. Robert Poole & Peter Samuel, *The Return of Private Toll Roads*, Public Roads (Mar./Apr. 2006), <https://www.fhwa.dot.gov/publications/publicroads/06mar/06.cfm> [<https://perma.cc/MNJ5-RV9T>].

47. See Michael Weiler, *The Reagan Attack on Welfare*, in *Reagan and Public Discourse in America* 227, 237–46 (Michael Weiler & W. Barrett Pearce eds., 1992) (describing the range and breadth of Reagan's attacks on the American welfare state and its beneficiaries).

48. Ronald Reagan, *The President's News Conference* (Aug. 12, 1986), <https://www.reaganlibrary.gov/research/speeches/081286d> [<https://perma.cc/Z5A6-C6PL>].

now-privatized roads: State initiatives that conceivably “competed” with the privatized roads—for instance, construction of new alternative routes, improvements to existing alternative routes, or even greater investment in mass transit—risked lowering the value of the lease or sale. Thus, the decision to privatize entailed any number of concomitant abdications of state sovereign authority, withdrawals that left a wider power vacuum for the Market to fill.<sup>49</sup>

2. *Economic Regulation.* — Federal banking and securities regulation are among the signature features (and enduring legacies) of the New Deal. Laws such as the Glass–Steagall Act,<sup>50</sup> the Securities Act of 1933,<sup>51</sup> and the Securities Exchange Act of 1934<sup>52</sup> limited any number of potentially problematic financial practices, transactions, and representations. These laws also required financial institutions to disclose certain types of information and to maintain minimum reserves.<sup>53</sup> During the 1930s and the decades that followed, literally scores of agencies and bureaus were created to design policies, draft rules, support families and businesses otherwise unable to secure loans in the marketplace, educate the general public, monitor industry compliance, and prosecute those who ran afoul of laws and regulations.<sup>54</sup> Reinforcing these federal programs were any number of state-level undertakings, which likewise proliferated during the middle decades of the twentieth century.<sup>55</sup>

Skipping ahead to the close of the twentieth century, we arrive at a time of significant deregulation. A series of laws—notably, Riegle–Neal, Gramm–Leach–Bliley, and the Commodity Futures Modernization Act—

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49. For descriptions of the noncompete clauses included in highway privatization deals, see Ellen Dannin, *Crumbling Infrastructure, Crumbling Democracy: Infrastructure Privatization Contracts and Their Effects on State and Local Governance*, 6 *Nw. J.L. & Soc. Pol’y* 47, 60–69 (2011); Jon D. Michaels, *Privatization’s Progeny*, 101 *Geo. L.J.* 1023, 1082–84 (2013) [hereinafter Michaels, *Progeny*]; Julie A. Roin, *Privatization and the Sale of Tax Revenues*, 95 *Minn. L. Rev.* 1965, 2010–18 (2011).

50. Banking Act of 1933, Pub. L. No. 73-66, 48 Stat. 162, repealed by Gramm–Leach–Bliley Financial Modernization Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 U.S.C.).

51. Pub. L. No. 73-22, 48 Stat. 74 (codified at 15 U.S.C. §§ 77a–77aa (2012)).

52. Pub. L. No. 73-291, 48 Stat. 881 (codified at 15 U.S.C. §§ 78a–78qq (2012)).

53. See, e.g., Securities Act of 1933, 15 U.S.C. §§ 77f–77g (2012).

54. Among the agencies and bureaus are the Federal Deposit Insurance Corporation, Commodity Futures Trading Commission, National Credit Union Administration, Federal Housing Finance Agency, Financial Crimes Enforcement Network, and the Committee on Foreign Investment in the United States.

55. See, e.g., State Agency Quick Access, Conference of State Bank Supervisors, <https://www.csbs.org/state-bank-agency-contact-quick-access> [<https://perma.cc/PR4Y-Y7CW>] (last visited Oct. 3, 2019).

eliminated restrictions on interstate banking,<sup>56</sup> on firms seeking to combine commercial and investment banking,<sup>57</sup> and on certain derivative contracts (including credit default swaps),<sup>58</sup> respectively. These Clinton-era acts constituted a major retreat from the Welfare period's regulatory commitments. In the wake of the WorldCom and Enron scandals of the early 2000s, the feds reasserted themselves, most notably via the Sarbanes-Oxley Act.<sup>59</sup> But, generally speaking, the deregulatory agenda continued apace. Among other things, a 2004 Securities and Exchange Commission (SEC) rule permitted investment banks to hold considerably less capital in reserve and therefore increase their leverage.<sup>60</sup> And, further in the direction of deregulation and privatization, in 2007 the SEC authorized the Financial Industry Regulatory Authority (FINRA), a private self-regulatory organization, to oversee brokerage firms and exchange markets.<sup>61</sup>

3. *Criminal Justice.* — The criminal justice story can be told even more succinctly. In the first half of the twentieth century, we witnessed the closing of most private jails and prisons (and the cessation of the vile practice of convict leasing)<sup>62</sup>—and their replacement with federal and state carceral institutions.<sup>63</sup> We also witnessed professional, fully staffed municipal and county police forces superseding what, during much of the nineteenth century, had been substantially private law enforcement regimes.<sup>64</sup>

But this moment during which the State assumed practically all of the nation's criminal justice responsibilities was not to last. By the 1980s, efforts to privatize were afoot, with the feds and various states and localities

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56. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (codified in scattered sections of 12 U.S.C.).

57. Gramm-Leach-Bliley Act, Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified in scattered sections of 12 U.S.C.) (repealing the Glass-Steagall Act).

58. Matthew Sherman, A Short History of Financial Deregulation in the United States 2 (2009), <http://cepr.net/documents/publications/dereg-timeline-2009-07.pdf> [<https://perma.cc/F8BW-HWZL>].

59. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 15, 18, 28, and 29 U.S.C.).

60. Alternative Net Capital Requirements for Broker-Dealers That Are Part of Consolidated Supervised Entities, 17 C.F.R. pts. 200, 240 (2004).

61. The predecessor to FINRA was also private, but lacked a good deal of the power and reach of the new private organization. See Jonathan Macey & Caroline Novogrod, Enforcing Self-Regulatory Organization's Penalties and the Nature of Self-Regulation, 40 Hofstra L. Rev. 963, 968-69, 973 n.62, 980 n.98 (2012).

62. See Douglas A. Blackmon, Slavery by Another Name: The Re-Enslavement of Black Americans from the Civil War to World War II, at 377-82 (2008).

63. See Malcolm Feeley & Edward Rubin, Judicial Policymaking in the Modern State 151-71 (1998) (describing the rise of modern, professionally run and staffed prisons in twentieth-century America).

64. See Michaels, Coup, *supra* note 29, at 25-26; see also Clifford Shearing, The Relation Between Public and Private Policing, *in* Modern Policing 399, 406-08 (Michael Tonry & Norval Morris eds., 1992).



turning to private companies to build and run prisons.<sup>65</sup> Indeed, for much of the time between the early 1980s and 2016, when the Obama Administration announced the federal government would phase out its reliance on private prisons, the private prison population exceeded 120,000.<sup>66</sup>

The same was substantially true when it came to policing. Starting in the 1980s, private policing reemerged as a popular, even pervasive practice—so much so that by the mid-1990s the “private security industry already employ[ed] significantly more guards, patrol personnel, and detectives than the federal, state, and local governments combined.”<sup>67</sup>

4. *Civil Justice.* — The Welfare period marked a time when civil disputes would be more easily and readily resolved by sovereign, public adjudicators. Among other things, Congress created a slew of express private rights of action;<sup>68</sup> funded legal services organizations dedicated to the representation of poor and other underserved communities;<sup>69</sup> waived court fees for indigent plaintiffs;<sup>70</sup> and extended courts’ jurisdiction via, among other things, the Administrative Procedure Act.<sup>71</sup> Courts, for their part, eased pleading requirements,<sup>72</sup> liberalized standing,<sup>73</sup> recognized implied private rights of action,<sup>74</sup> and affirmed government agencies’ authority to adjudicate various disputes.<sup>75</sup> This increased receptivity of courts and government agencies—both to resolving heretofore private disagreements

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65. See Shane Bauer, *American Prison* 36–40 (2018); Lauren-Brooke Eisen, *Inside Private Prisons* 13–35 (2017).

66. Brett C. Burkhardt, *Private Prisons, Explained*, *Conversation* (Mar. 20, 2017), <http://theconversation.com/private-prisons-explained-73038> [<https://perma.cc/7S6V-V3NS>].

67. David A. Sklansky, *The Private Police*, 46 *UCLA L. Rev.* 1165, 1168 (1998).

68. See William H. Timbers & David A. Wirth, *Private Rights of Action and Judicial Review in Federal Environmental Law*, 70 *Cornell L. Rev.* 403, 405–06 n.8 (1985).

69. See, e.g., *About Us*, *Cal. Rural Legal Assistance*, <http://www.crla.org/about-us> [<https://perma.cc/KE4D-TSW3>] (last visited Oct. 3, 2019); *The Founding of LSC, Legal Servs. Corp.*, <https://www.lsc.gov/about-lsc/who-we-are/history> [<https://perma.cc/YPV8-FBHD>] (last visited Oct. 3, 2019).

70. Congress permitted federal district courts to do so beginning as early as 1892, though the practice really took hold in the twentieth century. See Andrew Hammond, *Pleading Poverty in Federal Court*, 128 *Yale L.J.* 1478, 1486–92 (2019).

71. See 5 U.S.C. §§ 701, 706 (2012).

72. This began in earnest in 1938. See *Fed. R. Civ. P.* 8(a)(2) (1938); *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957) (explaining that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief”); see also Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 *Colum. L. Rev.* 433, 439–40 (1986).

73. See *Ass’n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970) (expanding the range of allegedly aggrieved parties with standing to sue to include those “arguably within the zone of interests to be protected or regulated” by a given statutory or constitutional “guarantee”).

74. See, e.g., *J.I. Case Co. v. Borak*, 377 U.S. 426, 434–35 (1964) (recognizing an implied right of action under the Securities Exchange Act of 1934).

75. See, e.g., *Crowell v. Benson*, 285 U.S. 22, 51–54 (1932).

sounding in tort, contract, and property law<sup>76</sup> and to addressing previously unavailable claims against government officials—placed public judging front and center.

To be sure, all sorts of commercial self-help avenues remained open, including private arbitration. In fact, arbitration was expressly promoted via the Federal Arbitration Act of 1925.<sup>77</sup> But, lest we get ahead of ourselves, for many decades, arbitration was understood to be available only in certain, quite limited, business disputes.<sup>78</sup>

Toward the latter decades of the twentieth century, however, judges began interpreting arbitration laws far more elastically, thereby allowing many, many more disputes to be routed through private corridors. As two leading scholars describe it, “It is no exaggeration to call the Supreme Court’s arbitration decisions in the 1980s the hidden revolution of the Reagan Court.”<sup>79</sup> Indeed, once the Court gave its blessing to a far broader range of arbitration-eligible disputes, mandatory arbitration riders became ubiquitous, appearing in countless medical, educational, employment, and personal services contracts; cable, telephone, and wi-fi subscriptions; and financial agreements.<sup>80</sup> Consider, for example, nonunion, private-sector employment. In that rather large labor pool, the inclusion of mandatory arbitration clauses in employment contracts jumped from around two percent in the early 1990s to over fifty percent by the 2010s.<sup>81</sup>

Court-*approved* settlements, as opposed to judicially *resolved* adjudications, were also encouraged during this period of deregulation and privatization. Among other things, revisions to the Federal Rules of Civil Procedure in the 1980s gave judges greater power to mediate privately arrived-at settlements—and disputants greater incentive to negotiate,

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76. See, e.g., *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 419–37 (1968) (upholding a federal statute prohibiting racial discrimination in the sale of private property); *Shelley v. Kraemer*, 334 U.S. 1, 20–22 (1948) (barring courts under the Fourteenth Amendment from enforcing racially restrictive covenants); *Marsh v. Alabama*, 326 U.S. 501, 505–08 (1946) (recognizing that First Amendment protections apply in a company town).

77. Pub. L. No. 68-401, 43 Stat. 883 (codified at 9 U.S.C. §§ 1–14 (2012)).

78. Katherine V.W. Stone & Alexander J.S. Colvin, Econ. Policy Inst., *The Arbitration Epidemic* 7 (2015), <https://www.epi.org/files/2015/arbitration-epidemic.pdf> [<https://perma.cc/G67F-BNFX>].

79. *Id.*

80. Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. Times: Dealbook (Oct. 31, 2015), <https://www.nytimes.com/2015/11/01/business/dealbook/arbitration-everywhere-stacking-the-deck-of-justice.html> [<https://perma.cc/5P7U-TJNL>]; Jessica Silver-Greenberg & Michael Corkery, *In Arbitration, a ‘Privatization of the Justice System,’* N.Y. Times: Dealbook (Nov. 1, 2015), <https://www.nytimes.com/2015/11/02/business/dealbook/in-arbitration-a-privatization-of-the-justice-system.html> [<https://perma.cc/685C-Q9E7>].

81. Alexander J.S. Colvin, Econ. Policy Inst., *The Growing Use of Mandatory Arbitration* 4–5 (2018), <https://www.epi.org/files/pdf/144131.pdf> [<https://perma.cc/Q59A-GMVZ>].

bargain, and arrive at their own agreements.<sup>82</sup> This trend in favor of settlements—in effect, quasi-privatized alternatives to dispositive judicial rulings—was thus another way in which the State self-consciously retreated.<sup>83</sup>

Congress and the courts further encouraged market-based dispute resolution by restricting the ease with which controversies could be adjudicated by courts. Specifically, courts began rejecting what they previously recognized as implied rights of action,<sup>84</sup> narrowing standing,<sup>85</sup> and once again tightening pleading requirements.<sup>86</sup> Congress, for its part, (and many states, too) scaled back its funding of legal service organizations<sup>87</sup>—and in some instances prohibited those organizations from bringing class actions, representing undocumented persons, and suing the government.<sup>88</sup>

With so many legal claims routed to commercial arbitrators, settled, or altogether foreclosed, dispute resolution has been (once again) effectively privatized.<sup>89</sup> In Owen Fiss's words, this privatization has impoverished public law, as judges have been unable to “give meaning to our public values.”<sup>90</sup>

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82. See Fed. R. Civ. P. 16 (1983); Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 *Hastings L.J.* 1, 58–60 (1992); see also Fed. R. Civ. P. 23, 68 (1987).

83. See, e.g., Owen M. Fiss, *Against Settlement*, 93 *Yale L.J.* 1073, 1085–86 (1984). We see substantially similar dynamics within federal agencies. Courtney R. McVean & Justin R. Pidot, *Environmental Settlements and Administrative Law*, 39 *Harv. Envtl. L. Rev.* 191, 192–93 (2015).

84. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (refusing to recognize a private right of action under Title VI). But see *id.* at 294 (Stevens, J., dissenting) (expressing frustration given that the Court in a similar context had previously recognized a private right of action).

85. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576–78 (1992); *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–10 (1983).

86. See *Ashcroft v. Iqbal*, 556 U.S. 662, 680–83 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 560–63 (2007).

87. See, e.g., William Booth, *Attacked as Left-Leaning, Legal Services Suffers Deep Cuts*, *Wash. Post* (June 1, 1996), <https://www.washingtonpost.com/archive/politics/1996/06/01/attacked-as-left-leaning-legal-services-suffers-deep-cuts/caee36f5-114e-4068-899e-5e559ab7954a> (on file with the *Columbia Law Review*); Stuart Taylor Jr., *House Action Near in Fight over Legal Aid*, *N.Y. Times* (June 16, 1981), <https://www.nytimes.com/1981/06/16/us/house-action-near-in-fight-over-legal-aid.html> [<https://perma.cc/VA9E-UCFZ>].

88. See Robert R. Kuehn & Peter A. Joy, *An Ethics Critique of Interference in Law School Clinics*, 71 *Fordham L. Rev.* 1971, 1977–90 (2003); Booth, *supra* note 87.

89. One may see these settlements as Coasean bargains, wherein the relative costs associated with such private bargaining diminish as opportunities to pursue judicial rulings become scarcer and more expensive. See R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & Econ.* 1, 15 (1960).

90. Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 *Harv. L. Rev.* 1, 2 (1979).

5. *Revenue.* — During much of the Welfare period, the U.S. tax base was very broad, and marginal tax rates were quite high. For the highest earners, marginal rates were invariably north of seventy percent, and at times exceeded ninety percent.<sup>91</sup> By today's lights, they were astonishingly progressive—as evidenced by, among other things, the feverish responses to Congresswoman Alexandria Ocasio-Cortez's instant call to return to those midcentury tax rates.<sup>92</sup> Through these taxes, the State financed countless regulatory, infrastructure, and redistributive public-benefits programs.

Toward the latter part of the twentieth century, however, we began to see tax revolts, notable among them California's Proposition 13,<sup>93</sup> and significant federal tax cuts beginning during the Reagan presidency.<sup>94</sup> Indeed, throughout the Deregulation and Privatization period, taxes were routinely slashed—with highest earners' marginal tax rates dropping from seventy percent in 1980 to twenty-eight percent in 1990<sup>95</sup>—while efforts to raise rates or introduce new taxes were met with rage.<sup>96</sup> Influential groups such as the Club for Growth and Americans for Tax Reform have effectively forced many politicians to pledge not to raise taxes.<sup>97</sup> As evidence of these groups' Svengali-like influence over American politics, in one 2012 Republican primary debate, an overcrowded stage of presidential aspirants all promised not to raise taxes *even if* (per the moderator's hypothetical) it could be shown that every \$1 in tax increases would yield

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91. SOI Tax Stats—Historical Table 23, Internal Revenue Serv., <https://www.irs.gov/statistics/soi-tax-stats-historical-table-23> (on file with the *Columbia Law Review*) [hereinafter SOI Tax Stats] (last updated Sept. 24, 2019).

92. See Paul Krugman, Opinion, The Economics of Soaking the Rich, *N.Y. Times* (Jan. 5, 2019), <https://www.nytimes.com/2019/01/05/opinion/alexandria-ocasio-cortez-tax-policy-dance.html> [https://perma.cc/VS22-UTAR]; Matt Stoller, Democratic Attacks on AOC Expose the Party's Fear of Taking on Moneyed Interests, *Wash. Post* (Jan. 24, 2019), <https://www.washingtonpost.com/outlook/2019/01/24/democratic-attacks-aoc-expose-partys-fear-taking-moneyed-interests> (on file with the *Columbia Law Review*); Andrew Whalen, Davos Billionaires Fear Alexandria Ocasio-Cortez's Popular Tax Proposal, *Newsweek* (Jan. 22, 2019), <https://www.newsweek.com/alexandria-ocasio-cortez-aoc-tax-rate-billionaire-davos-world-economic-forum-1300779> [https://perma.cc/YSM5-D5HT].

93. See Isaac William Martin, The Permanent Tax Revolt 99–111 (2008).

94. Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085 (codified in scattered sections of 26 U.S.C.); Economic Recovery Tax Act of 1981, Pub. L. No. 97-34, 95 Stat. 172 (codified in scattered sections of 26 U.S.C.).

95. SOI Tax Stats, *supra* note 91.

96. James T. Patterson, Transformative Economic Policies, *in* The Presidency of George W. Bush 114, 117 (Julian E. Zelizer ed., 2010); Andrew Rosenthal, The 1992 Campaign: White House; Bush Says Raising Taxes Was Biggest Blunder of His Presidency, *N.Y. Times* (Mar. 4, 1992), <https://www.nytimes.com/1992/03/04/us/1992-campaign-white-house-bush-says-raising-taxes-was-biggest-blunder-his.html> [https://perma.cc/C68K-YCPF].

97. Paul Waldman, Opinion, Nearly All the GOP Candidates Bow Down to Grover Norquist, *Wash. Post: Plum Line* (Aug. 13, 2015), <https://www.washingtonpost.com/blogs/plum-line/wp/2015/08/13/nearly-all-the-gop-candidates-bow-down-to-grover-norquist> (on file with the *Columbia Law Review*) [hereinafter Waldman, Nearly All].

\$10 worth of budget cuts.<sup>98</sup> The net effect of course is that government programs are now starving for support, the national debt continues to mount, and the citizenry at large is forced to rely increasingly on self-help measures, effectively privatizing such things as teachers' school supplies and soldiers' body armor—both of which are routinely funded through family or community crowdsourcing initiatives.<sup>99</sup>

6. *Employment.* — During the Welfare period, someone had to give meaning and effect to all of these new or newly expanded government services and responsibilities. Thus the government—at all levels—had to recruit and hire phalanxes of new employees. Indeed, the federal civilian workforce jumped from around 256,000 in 1901<sup>100</sup> to approximately 830,000 in the mid-to-late 1930s<sup>101</sup> to over 2 million by the early 1950s (and then remained roughly between 1.8 and 2.3 million throughout the rest of the Welfare period).<sup>102</sup>

These new employees were salaried professionals—part of the burgeoning civil service—who secured their positions through merit-based examinations.<sup>103</sup> Their work, unlike that of their premodern antecedents, was highly accountable, constrained by statutory and constitutional procedural requirements and by substantive limitations on government officials' power and discretion.<sup>104</sup> What's more, most modern government

98. *Id.*

99. Neela Banerjee & John Kifner, *Along with Prayers, Families Send Armor*, N.Y. Times (Oct. 30, 2004), <https://www.nytimes.com/2004/10/30/world/middleeast/along-with-prayers-families-send-armor.html> [<https://perma.cc/V8EA-5342>]; Nadra Nittle, *More Teachers Are Turning to Crowdfunding Sites to Pay for Books, Supplies, and Field Trips*, Vox (Aug. 9, 2018), <https://www.vox.com/2018/8/9/17664412/teachers-expenses-crowdfunding-donors-choose-gofundme-books-school-supplies-field-trips> [<https://perma.cc/7U5H-BCMC>].

100. U.S. Dep't of Commerce, Bureau of Foreign & Domestic Commerce, *Statistical Abstract of the United States* 164 (1929).

101. U.S. Dep't of Commerce, Bureau of Foreign & Domestic Commerce, *Statistical Abstract of the United States* 154 (1937).

102. Data, Analysis & Documentation: Executive Branch Civilian Employment Since 1940, Off. Personnel Mgmt., <https://www.opm.gov/policy-data-oversight/data-analysis-documentation/federal-employment-reports/historical-tables/executive-branch-civilian-employment-since-1940/> [<https://perma.cc/BT2E-4Z8D>] (last visited Oct. 3, 2019).

103. See, e.g., Ronald N. Johnson & Gary D. Libecap, *The Federal Civil Service System and the Problem of Bureaucracy* 51, 66–68 (1994); Jon D. Michaels, *Running Government like a Business . . . Then and Now*, 128 Harv. L. Rev. 1152, 1163 (2015) [hereinafter Michaels, *Then and Now*] (reviewing Nicholas R. Parrillo, *Against the Profit Motive* (2013)).

104. See, e.g., National Environmental Policy Act, Pub. L. No. 91-190, § 102(c), 83 Stat. 852, 853 (1969) (codified at 42 U.S.C. §§ 4321–4347 (2012)) (requiring agencies to compose environmental impact statements); Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *CFTC v. Schor*, 478 U.S. 833, 850–55 (1986) (affirming the constitutionality of agency adjudication in a particular context partly because quite-serious judicial review remained available); *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 415–20 (1971) (requiring agency officials to compile a detailed record, which courts conducting judicial review could then scrutinize); *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 156–58 (1970) (extending

work was at least partly if not greatly shielded from partisan politics, with many employees enjoying (for the first time) *de facto* tenure, meaning they could be demoted or dismissed only after a showing of good cause.<sup>105</sup> Lastly, the legal and cultural conditions surrounding these twentieth-century hires established what we may call a truly and distinctively public workforce, largely removed from market pressures in ways that some label a curse and others a blessing.<sup>106</sup>

Over time, those labeling modern American bureaucracy a curse gained the upper hand. Starting in the 1980s, the government workforce became increasingly privatized and deregulated. Major responsibilities were turned over to government contractors.<sup>107</sup> Unlike members of the effectively tenured bureaucracy, these contractors were very much subject to the types of market pressures (including summary demotion and termination) found throughout the private sector.<sup>108</sup> Numbers are elusive—the feds don't volunteer a headcount, and may not have one. But some estimate that the number of government contractors now rivals the number of government employees.<sup>109</sup>

While the reasons for outsourcing government jobs are manifold,<sup>110</sup> one clear effect (which I'll have more to say about below) is that privatization essentially deregulated the "market" for government employment. Outsourcing thus represented yet another way in which the State, as we understood it, was in retreat. During much of the Welfare period, the "market" for government employment was, ironically enough, decidedly noncommercial, with the overwhelming percentage of workers subsumed within the tenured civil service.<sup>111</sup> But, by the end of the twentieth century,

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standing to allegedly aggrieved plaintiffs "arguably" within the zone of congressionally protected interests).

105. See Johnson & Libecap, *supra* note 103, at 68; Michaels, *Then and Now*, *supra* note 103, at 1164–65.

106. Michaels, *Then and Now*, *supra* note 103, at 1163–65, 1168–70.

107. See Michaels, *Coup*, *supra* note 29, at 100–02 (describing reductions in the size of the official government workforce in the 1990s and the corresponding uptick in the number of contractors).

108. See Michaels, *Progeny*, *supra* note 49, at 1031–32. They were also more likely to be partisan, not necessarily by disposition, but rather because their continued employment was dependent on remaining in the good graces of agency leaders. See Michaels, *Then and Now*, *supra* note 103, at 1172–73 (describing the partisan–political dimension of at-will government work).

109. Paul C. Light, *The True Size of Government* 3 tbl.1 (2017), [https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper\\_True%20Size%20of%20Government.pdf](https://www.volckeralliance.org/sites/default/files/attachments/Issue%20Paper_True%20Size%20of%20Government.pdf) [<https://perma.cc/5FMU-E45X>].

110. See Jon D. Michaels, *Privatization's Pretensions*, 77 *U. Chi. L. Rev.* 717, 734–57 (2010) [hereinafter Michaels, *Pretensions*]; Michaels, *Progeny*, *supra* note 49, 1030–40.

111. David E. Lewis & Jennifer L. Selin, *Admin. Conference of the U.S., Sourcebook of United States Executive Agencies* 69 fig.1 (1st ed. 2012), [https://permanent.access.gpo.gov/gpo37402/Sourcebook-2012-Final\\_12-Dec\\_Online.pdf](https://permanent.access.gpo.gov/gpo37402/Sourcebook-2012-Final_12-Dec_Online.pdf) [<https://perma.cc/2VJ3-B9WB>] (documenting that ninety percent of the federal civilian workforce was folded into the mid-twentieth-century civil service).

agency leaders could readily choose whether to continue using nonmarket bureaucrats or opt instead to use contractors selected from (and still tethered to) the private labor force.<sup>112</sup>

## II. TWENTY-FIRST-CENTURY PARADIGM: A NEW FAULT LINE

By many a reckoning, the Deregulation and Privatization period is here to stay, giving effect to our seemingly au courant neoliberal commitments and aspirations.<sup>113</sup> We often feel that way about various powerful political, philosophical, or legal movements, doubting they'll ever fade. But, sure enough, signs abound that this movement is losing steam, not to mention luster. As time goes on, evidence of deregulation and privatization's shortcomings continues to mount. Cheaper, more efficient, and smaller government sound more like hollow promises or lazy punchlines than they do accurate descriptions of what has transpired.<sup>114</sup> Complacency (and, with it, corruption) has set in, emboldening longstanding detractors and inspiring new defectors.<sup>115</sup> Plus, novel, alternative visions for governing materialize and, slowly but surely, capture the imagination of popular and elite audiences alike. It has been about forty years since the dawn of the Deregulation and Privatization period—certainly a good run and one, not coincidentally, spanning about the same length of time as the mid-twentieth-century Welfare period.

Even if we weren't due for a routine course correction, there's Donald Trump. Trump's historically unpopular<sup>116</sup> and legally and morally compromised<sup>117</sup> presidential Administration is hastening the demise of a governing

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112. E.g., John D. Donahue, *The Privatization Decision* 79–98 (1989); Steven L. Schooner, *Competitive Sourcing Policy: More Sail than Rudder?*, 33 *Pub. Cont. L.J.* 263, 265 (2004).

113. See, e.g., Robert Kuttner, *Neoliberalism: Political Success, Economic Failure*, *Am. Prospect* (June 25, 2019), <https://prospect.org/article/neoliberalism-political-success-economic-failure> [<https://perma.cc/MXN7-R98J>] (“[T]he theory and practical influence of neoliberalism marches splendidly on . . .”).

114. See Ron Nixon, *Government Pays More in Contracts, Study Finds*, *N.Y. Times* (Sept. 12, 2011), <https://www.nytimes.com/2011/09/13/us/13contractor.html> [<https://perma.cc/373U-B5T5>].

115. See, e.g., Molly Ball, *The Privatization Backlash*, *Atlantic* (Apr. 23, 2014), <https://www.theatlantic.com/politics/archive/2014/04/city-state-governments-privatization-contracting-backlash/361016/> (on file with the *Columbia Law Review*); Pat Garofalo, *Gingrich Admits Deregulation of Wall Street in the '90s Was 'Probably a Mistake,' ThinkProgress* (Nov. 8, 2011), <https://thinkprogress.org/gingrich-admits-deregulation-of-wall-street-in-the-90s-was-probably-a-mistake-4bb53f03793d/> [<https://perma.cc/Z65L-92SW>].

116. Tim Marcin, *Donald Trump's Approval Rating Shows He's a Historically Unpopular President*, *Newsweek* (Sept. 19, 2018), <https://www.newsweek.com/donald-trump-approval-rating-historically-unpopular-president-least-ever-1128666> [<https://perma.cc/Z25F-5LSN>].

117. See, e.g., 1 Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (2019), <https://www.justice.gov/storage/report.pdf> [<https://perma.cc/DB9B-SJZ8>]; 2 Robert S. Mueller, III, *Report on the Investigation into Russian Interference in the 2016 Presidential Election* (2019), <https://www.justice.gov/storage/report.pdf> [<https://perma.cc/DB9B-SJZ8>].

philosophy that disavows many core sovereign regulatory commitments<sup>118</sup> and pushes the concept of businesslike government down to the bottom of whatever slippery slope of corruption<sup>119</sup> and ineptitude<sup>120</sup> we previously thought unreachable. It hasn't helped that his Administration has become a haven and breeding ground for kleptocrats, plutocrats, and incompetents.<sup>121</sup> What's more, his brazen attacks on the so-called Deep State<sup>122</sup> have backfired, at least insofar as the attacks have spawned a newfound and seemingly urgent appreciation of civil servants,<sup>123</sup> the cohort most thoroughly marginalized by the late-twentieth-century embrace of deregulation and

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[www.justice.gov/storage/report\\_volume2.pdf](http://www.justice.gov/storage/report_volume2.pdf) [<https://perma.cc/7FPX-BFRZ>]; Document: Read the Whistle Blower Complaint, N.Y. Times, <https://www.nytimes.com/interactive/2019/09/26/us/politics/whistle-blower-complaint.html> [<https://perma.cc/44GM-DJZA>] (last updated Sept. 26, 2019); Jeffrey Goldberg, Unthinkable: 50 Moments that Define an Improbable Presidency, Atlantic, <https://www.theatlantic.com/unthinkable/> [<https://perma.cc/6P6M-544V>] (last visited Oct. 3, 2019).

118. See, e.g., 37 Ways Donald Trump Has Remade the Rules for Business, Wall St. J. (Jan. 17, 2018), <https://www.wsj.com/articles/how-donald-trump-has-remade-the-rules-for-business-1516190400> (on file with the *Columbia Law Review*).

119. See Tracking Corruption and Conflicts in the Trump Administration, Glob. Anticorruption Blog (May 2, 2017), <https://globalanticorruptionblog.com/profitting-from-the-presidency-tracking-corruption-and-conflicts-in-the-trump-administration/> [<https://perma.cc/W87C-872H>] (last updated Sept. 27, 2019).

120. See #ToddlerinChief, Twitter, <https://twitter.com/hashtag/ToddlerinChief?src=hash> [<https://perma.cc/64T5-X9ME>] (last visited Jan. 17, 2020); see also Daniel W. Drezner, The Toddler in Chief: What Donald Trump Teaches Us About the Modern Presidency (forthcoming 2020); Daniel W. Drezner (@dandrezner), Twitter (Feb. 2, 2019), <https://twitter.com/dandrezner/status/1091827048803434502> [<https://perma.cc/EZ6B-W3EZ>].

121. See, e.g., Kevin Fitzpatrick, Ryan Zinke's Scandal-Filled Past Finally Catches up to Him, Vanity Fair (Dec. 15, 2018), <https://www.vanityfair.com/news/2018/12/ryan-zinke-resigns-interior-secretary-trump> (on file with the *Columbia Law Review*); Michael Lewis, Why the Scariest Nuclear Threat May Be Coming from Inside the White House, Vanity Fair (July 26, 2017), <https://www.vanityfair.com/news/2017/07/departments-of-energy-risks-michael-lewis> (on file with the *Columbia Law Review*); Tina Nguyen, Ben Carson, Retired Brain Surgeon, Has Lobotomized HUD, Vanity Fair (Mar. 5, 2018), <https://www.vanityfair.com/news/2018/03/how-ben-carson-hobbled-hud> (on file with the *Columbia Law Review*); Jennifer Rubin, Opinion, The Trump Cabinet: Populists or Plutocrats?, Wash. Post: Right Turn (Dec. 9, 2016), <https://www.washingtonpost.com/blogs/right-turn/wp/2016/12/09/populists-or-plutocrats> (on file with the *Columbia Law Review*).

122. See Jon D. Michaels, The American Deep State, 93 Notre Dame L. Rev. 1653 (2018).

123. See Jennifer Rubin, Opinion, The Hollowing Out of the Federal Workforce, Wash. Post: Right Turn (Sept. 7, 2017), <https://www.washingtonpost.com/blogs/right-turn/wp/2017/09/07/the-hollowing-out-of-the-federal-workforce> (on file with the *Columbia Law Review*); see also, e.g., Anne Applebaum, Opinion, The Trump White House Is Destroying Our Civil Service, Wash. Post (Aug. 3, 2018), [https://www.washingtonpost.com/opinions/global-opinions/the-trump-white-house-is-destroying-our-civil-service/2018/08/03/1aad229e-969c-11e8-810c-5fa705927d54\\_story.html](https://www.washingtonpost.com/opinions/global-opinions/the-trump-white-house-is-destroying-our-civil-service/2018/08/03/1aad229e-969c-11e8-810c-5fa705927d54_story.html) (on file with the *Columbia Law Review*); Fred Hiatt, Opinion, Trump Is Destroying a National Treasure, Wash. Post (Jan. 13, 2018), [https://www.washingtonpost.com/opinions/trump-is-destroying-a-national-treasure/2018/01/12/3f42a9ca-f70b-11e7-a9e3-ab18ce41436a\\_story.html](https://www.washingtonpost.com/opinions/trump-is-destroying-a-national-treasure/2018/01/12/3f42a9ca-f70b-11e7-a9e3-ab18ce41436a_story.html) (on file with the *Columbia Law Review*).



privatization.<sup>124</sup> Indeed, elsewhere I have suggested that Trump’s cartoonishly hackish and venal version of deregulation and privatization may well be a “jump the shark” moment for the movement.<sup>125</sup>

Again, deregulation and privatization are hardly unique to Trump. But, under Trump, they’ve gained remarkable traction, taken on heightened political salience, and become more suspect given the unprofessionalism, self-dealing, and impulsiveness in and around this White House.<sup>126</sup> No doubt the excesses (and unparalleled gains) of the late stages of the Deregulation and Privatization period have also fueled the rise of a New Left, galvanized by the likes of Bernie Sanders and Elizabeth Warren and, more recently, Alexandria Ocasio-Cortez, Rashida Tlaib, and Ilhan Omar.<sup>127</sup> Those efforts, if nothing else, have broadened the public debate on the range of governance options available. Thus, if history is any guide, we may now be positioned for a simple, though sharp, recalibration in favor of greater State stewardship over the political economy.

But it is not at all clear that the traditional left–right pattern of oscillation—mapping onto different points along the public–private axis—will continue. In fact, it is more than plausible that we’re not going to veer hard to the Left. Rather, we are seemingly instead poised for what at first blush seems to be a rather modest course correction, a synthesis or mashup of the dominant, alternating impulses that have defined not only our modern political economy but also that of many other western liberal democracies. As I will discuss, such an ostensibly modest mashup is of tremendous normative and practical consequence: a realignment onto an entirely different axis.

In what follows, I first revisit the six case studies discussed in Part I and explore how government officials are beginning to renegotiate those policy domains today. Rather than determining the proper mix of public and private control (the overriding focus of twentieth-century policy-making), those officials are instead deciding whether to deploy sovereign or commercial tools to administer prisons, regulate the banking industry, and raise revenue. I then trace this realignment away from the public–

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124. Michaels, *Coup*, *supra* note 29, at 204 (characterizing the civil service as especially beleaguered).

125. Jon Michaels, *Opinion, How Trump Is Dismantling a Pillar of the American State*, *Guardian* (Nov. 7, 2017), <https://www.theguardian.com/commentisfree/2017/nov/07/donald-trump-dismantling-american-administrative-state> [<https://perma.cc/DTB9-T8J6>].

126. *Id.* See generally *Tracking Deregulation in the Trump Era*, *Brookings* (Sept. 23, 2019), <https://www.brookings.edu/interactives/tracking-deregulation-in-the-trump-era/> [<https://perma.cc/WPQ6-99BS>].

127. Lauren Gambino, ‘We’re Here to Win’: US Democratic Socialists Move to Center Stage, *Guardian* (Aug. 6, 2019), <https://www.theguardian.com/politics/2019/aug/06/democratic-socialists-us-alexandria-ocasio-cortez-bernie-sanders> [<https://perma.cc/7ZSV-FD29>]; Steve Peoples, *Democratic Socialism Surging in the Age of Trump*, *AP* (July 21, 2018), <https://www.apnews.com/a1770fd620d94bf58d0ff1035d3e0eea> [<https://perma.cc/K3GZ-8ML3>].

private axis and onto what I describe as the sovereign–commercial axis. Among other things, I note the converse phenomenon wherein firms are making substantially similar calculations. Specifically, they are sometimes eschewing their traditional commercial tools to act instead more like a conventional sovereign.

A. *Realignment, Not Recalibration*

Let's return to Part I's case studies and bring those stories into the present moment.

1. *Infrastructure*. — Having gone from a wholly public highway system during the mid-twentieth century to one, by the end of that century, transformed by various privatization and deregulation initiatives, today's nascent course correction is quite revealing. Many of the proposed privatization schemes of the 1990s and 2000s have since been scaled back, if not altogether abandoned.<sup>128</sup> For instance, in California a state agency has purchased and assumed control over one of the recently privately financed, constructed, and administered roads.<sup>129</sup> California did so in part because it deemed itself too significantly hamstrung by the private firm's noncompete clause, which prevented the state from undertaking any number of infrastructure and regulatory projects.<sup>130</sup> But the present-day story isn't just one of insourcing, which I would classify as a straightforward recalibration, a shift along the old, familiar public–private axis.

The present-day story is different and more complicated because government is now commercializing its own roads, and doing so on its own terms. Take, for example, the left lanes of major highways. Recall that under old-school, twentieth-century public administration those lanes were commonly reserved for high occupancy vehicles as well as green cars—that is, hybrid and electric cars. The rationale for according special access to some vehicles over others is fairly intuitive: A scarce good (namely, a more lightly trafficked lane) was granted to those doing their part to support three vital, public-regarding, and public-benefiting efforts—reducing carbon emissions, easing congestion, and limiting our dependence on oil, which apart from being bad for the environment also keeps the United States beholden to various unfriendly or unsavory petrostates.<sup>131</sup>

Now, however, the left lanes in quite a few jurisdictions are being repackaged as pay-to-drive (HOT) lanes. In 2011, Georgia instituted a

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128. See, e.g., Celeste Pagano, Proceed with Caution: Avoiding the Hazards in Toll Road Privatization, 83 St. John's L. Rev. 351, 377–78 (2009).

129. Public Affairs, Caltrans, <http://www.dot.ca.gov/hq/paffairs/about/toll/status.htm> [<https://perma.cc/648A-WF6W>] (last visited Oct. 3, 2019); Boarnet et al., *supra* note 9, at 2.

130. See Boarnet et al., *supra* note 9, at 2.

131. See Jason Bordoff, The Myth of U.S. Energy Independence Has Gone Up in Smoke, Foreign Policy (Sept. 18, 2019), <https://foreignpolicy.com/2019/09/18/the-myth-of-u-s-energy-independence-has-gone-up-in-smoke/> [<https://perma.cc/UK33-5M4D>].

HOT lane along a gridlocked stretch of I-85 in and around Atlanta.<sup>132</sup> Virginia recently followed suit, introducing HOT lanes along parts of I-95 and I-66 around Washington, DC.<sup>133</sup> Access to the fast lane along one ten-mile stretch of I-66 may exceed \$46 for a single one-way trip.<sup>134</sup> California, for its part, recently added HOT lanes in Orange County and Los Angeles, and along the highway linking San Jose and Sacramento.<sup>135</sup> User fees here are likewise high, with parts of I-10 near downtown Los Angeles priced around \$1.80 per mile.<sup>136</sup> The Golden State is also considering charging a congestion tax for drivers wishing to enter certain parts of Los Angeles during peak hours.<sup>137</sup> Under all of these arrangements, special access is allocated to those most able and willing to pay, just as it would be in any purely commercial context—think premium “fast passes” at amusement parks or priority boarding on commercial flights—where money (not need or desert) translates to better, faster, or more frequent service.<sup>138</sup>

2. *Economic Regulation.* — In response to the global financial crisis of 2008–2009, which many attributed in no small part to the deregulatory policies of the Clinton and Bush (43) Administrations,<sup>139</sup> the feds deemed it necessary to reassert greater influence in the realms of banking and finance. They could have done so in a manner reminiscent of mid-twentieth-century sovereign interventions: new command-and-control regulations and tax-and-transfer bailouts. While we eventually did see the passage of some quite important legislation and the concomitant promulgation of rules and

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132. Ariel Hart, First Year of I-85 HOT Lane Brings Drivers but Less Money than Expected, *Atlanta J.-Const.* (Oct. 2, 2012), <https://www.ajc.com/news/local/first-year-hot-lane-brings-drivers-but-less-money-than-expected/afjxhjoVnMYHSm0n6sm5OJ/> [<https://perma.cc/597X-L37Y>].

133. Hedgpeth, *supra* note 10; Thomson, *supra* note 10; Va. Dep’t Transp., About the Lanes, 66 ExpressLanes, [http://66expresslanes.org/about\\_the\\_lanes/default.asp](http://66expresslanes.org/about_the_lanes/default.asp) [<https://perma.cc/EV36-S3X4>] (last visited Feb. 9, 2020).

134. Hedgpeth, *supra* note 10.

135. See Funt, *supra* note 10. Far from done, California is in the process of converting and constructing hundreds of more miles of HOT lanes. See *id.*

136. *Id.*; Laura J. Nelson, L.A. County Will Consider Tighter Rules for Carpool and Toll Lanes, *L.A. Times* (Mar. 27, 2017), <https://www.latimes.com/local/lanow/la-me-ln-carpool-lanes-20170324-story.html> (on file with the *Columbia Law Review*).

137. Fredrick Kunkle, Los Angeles, a City Built Around Cars, Wants to Get Rid of Them with Tolls, *Wash. Post* (Jan. 23, 2019), <https://www.washingtonpost.com/transportation/2019/01/23/los-angeles-city-built-around-cars-wants-get-rid-them-with-tolls> (on file with the *Columbia Law Review*).

138. One must of course concede that hybrid and electric cars are expensive, and thus access to the left lane was not entirely equitable even before the emergence of HOT lanes. But an important difference remains. The privilege accorded to owners of green cars was at least tied to two other public-regarding behaviors, namely reduced carbon emissions and reduced dependence on petrostates. Those owners were thus conferring positive externalities on the rest of us.

139. See, e.g., Robert Kuttner, *The Squandering of America* 281 (2007); Lynn A. Stout, Derivatives and the Legal Origin of the 2008 Credit Crisis, 1 *Harv. Bus. L. Rev.* 1 (2011).

regulations,<sup>140</sup> the most immediate, powerful, and memorable response to the crisis was a rather atypical one: The federal government purchased ownership stakes in some of America's largest and most consequential failing businesses, including AIG, General Motors, and Citicorp, in order to prop them up.<sup>141</sup>

For starters, the government leveraged its ownership stake (taken as compensation for the cash infusion) to dictate corporate policies<sup>142</sup>—and did so without having to engage in the normal sovereign rulemaking process that would necessarily involve greater transparency, public deliberation, and judicial scrutiny.<sup>143</sup> As corporate owners rather than sovereign regulators, the feds were nevertheless playing a market-correcting role. Among other things, the government ordered a cap on the level of executive compensation; greater production of fuel-efficient cars; the withdrawal of lawsuits against other likewise-teetering financial institutions; and the cancellation of plans to move quality jobs overseas.<sup>144</sup> In these instances, the government paid dearly for the right to direct corporate behavior, employing commercial tools far nimbler than the sovereign regulatory tools traditionally at its disposal. Still, given the public-regarding (and not necessarily profit-maximizing) regulatory effects of these commercial interventions, *We the People* seemingly fared quite well.

But this story isn't entirely one of market-correcting government market participation. Government officials also promised the American public a return on its "investment."<sup>145</sup> Those officials spoke regularly in language connoting the profitability of the government's intervention. In rather short order, the promise was fulfilled, and *We the Shareholders* made out quite well, too. Though estimates vary, some reports indicate that the various corporate acquisitions "earned [the U.S. government] more than

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140. Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered titles of the U.S.C.).

141. See *infra* note 144 and accompanying text.

142. See Steven Davidoff Solomon, *Who Owns A.I.G.* (a Continuing Story), N.Y. Times: Dealbook (Oct. 7, 2010), <https://dealbook.nytimes.com/2010/10/07/who-owns-a-i-g-a-continuing-story/> [<https://perma.cc/82JR-S52W>] (describing the government's mode of intervention as unprecedented).

143. See Administrative Procedure Act, 5 U.S.C. § 553 (2012).

144. See Michaels, *Then and Now*, *supra* note 103, at 1178–79 (considering the federal government's use of corporate governance tools to regulate AIG and U.S. automakers). For in-depth treatments of the federal government's equity ownership and its use of its ownership shares to influence corporate behavior, see, for example, Andrew Ross Sorkin, *Too Big to Fail* 392–408 (2010); Benjamin A. Templin, *The Government Shareholder*, 62 *Admin. L. Rev.* 1127, 1184–86 (2010); J.W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 *Yale J. on Reg.* 283, 303–05 (2010); Louise Story & Gretchen Morgenson, *In U.S. Bailout of A.I.G., Extra Forgiveness for Big Banks*, N.Y. Times (June 29, 2010), <http://www.nytimes.com/2010/06/30/business/30aig.html> [<https://perma.cc/BM7J-VTY7>] (last updated July 1, 2010).

145. Mark Landler, *U.S. Investing \$250 Billion in Banks*, N.Y. Times (Oct. 13, 2008), <https://www.nytimes.com/2008/10/14/business/economy/14treasury.html> [<https://perma.cc/R5DP-GY4P>].

\$75 billion *in profit*.”<sup>146</sup> In achieving those dual revenue raising and regulatory aims, we’ve seemingly set ourselves up for more dealings of this sort in the future.<sup>147</sup>

Separate from the government’s acquisitions of failing companies, proposals are swirling around the concept of postal banking. The idea is simple. Many Americans don’t have ready access to run-of-the-mill commercial banks. According to a 2015 FDIC report, seven percent of American households are entirely off the banking grid (“unbanked”).<sup>148</sup> Another twenty percent are “underbanked”—that is, forced to rely on the services of predatory payday lenders or check cashers that charge exorbitant fees and interest rates.<sup>149</sup> The average underbanked family spends \$2,412 annually in financial services,<sup>150</sup> an absurdly high price for folks likely already on the periphery of the economy.

Enter the U.S. Postal Service, which under any number of new plans, would offer basic financial services, notably checking and savings accounts, and small, short-term loans. Championed by the likes of Senators Kirsten Gillibrand, Elizabeth Warren, and Bernie Sanders, postal banking would not require customers to maintain minimum balances; postal banking would, moreover, keep interest rates for small loans in line with the prevailing rate of interest for Treasury bills.<sup>151</sup> Though postal banking, like

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146. Wayne Duggan, *Financial Crisis Bailouts Have Earned Taxpayers Billions*, U.S. News (Jan. 19, 2017) (emphasis added), <https://money.usnews.com/investing/articles/2017-01-19/financial-crisis-bailouts-have-earned-taxpayers-billions> [<https://perma.cc/ZXY7-57U2>]; see also Jonathan Weisman, *U.S. Declares Bank and Auto Bailouts Over, and Profitable*, N.Y. Times (Dec. 19, 2014), <https://www.nytimes.com/2014/12/20/business/us-signals-end-of-bailouts-of-automakers-and-wall-street.html> [<https://perma.cc/47Y9-QAU8>] (reporting a more modest profit, albeit still in the billions, while also citing critics noting that, compared to other types of investments, the bailout wasn’t an especially lucrative one).

147. See, e.g., Matt Taibbi, *Secrets and Lies of the Bailout*, Rolling Stone (Jan. 4, 2013), <https://www.rollingstone.com/politics/politics-news/secrets-and-lies-of-the-bailout-113270/> [<https://perma.cc/V3UU-4AWZ>] (suggesting that the success of the investment/bailouts will ensure government remains in the investment/bailout business and that, as a result, companies will continue to operate against the backdrop of moral hazard). Legal scholars of business, finance, and banking have likewise suggested that bailouts of this particular sort may become routinized. See generally Robert C. Hockett & Saule T. Omarova, *Public Actors in Private Markets: Toward a Developmental Finance State*, 93 Wash. U. L. Rev. 103 (2015) (arguing that bailouts are inevitable due to deficiencies in the current regulatory framework); Jeffrey Manns, *Building Better Bailouts*, 63 Fla. L. Rev. 1349 (2011) (“The question is not whether bailouts will happen, but rather how, when, and to what degree government intervention will be necessary to support financial firms during a crisis.”).

148. 2015 FDIC National Survey of Unbanked and Underbanked Households 1 (2016), <https://www.fdic.gov/householdsurvey/2015/2015report.pdf> [<https://perma.cc/Z57W-UAAU>].

149. *Id.*

150. USPS Office of Inspector Gen., RARC-WP-14-007, *Providing Non-Bank Financial Services for the Underserved 2* (2014), [https://www.uspsig.gov/sites/default/files/document-library-files/2015/rarc-wp-14-007\\_0.pdf](https://www.uspsig.gov/sites/default/files/document-library-files/2015/rarc-wp-14-007_0.pdf) [<https://perma.cc/6PY7-RMFQ>].

151. See Weissman, *supra* note 8; see also Baradaran, *It’s Time*, *supra* note 8; Seth Victor, *Postal Banking and Government Profitability: When Should Governments Have to*

so many other policies, has taken on a partisan valence,<sup>152</sup> given the prominence of its current sponsors there is good reason to believe that it and possibly other market-correcting “public options” will figure prominently going forward.<sup>153</sup>

3. *Criminal Justice.* — Today in the criminal justice sphere, we are witnessing a backlash against the wholesale privatization of the 1990s and 2000s. Institutional investors are divesting from prison corporations;<sup>154</sup> businesses are being pressured not to sell products or services to said firms;<sup>155</sup> states have sought to ban even private federal detention facilities;<sup>156</sup> more and more journalists and scholars are documenting fraud and abuse perpetrated by private police<sup>157</sup> and prison officials;<sup>158</sup> and, perhaps most powerfully, the

Make Money?, Conn. Pub. Int. L.J. (forthcoming) (manuscript at 4–15) (on file with the *Columbia Law Review*). See generally Baradaran, *The Other Half*, supra note 8 (“If banks are not providing credit to the poor, the state should provide it directly. The existing post office framework represents the most promising path toward effectuating such a public option.”).

152. See Alayna Treene, Patrick McHenry to Mnuchin: Stop Democrats from Pursuing Postal Banking, *Axios* (June 27, 2018), <https://www.axios.com/patrick-henry-steven-mnuchin-postal-banking-warren-gillibrand-d34e8cf6-66f3-488d-8bad-7471b6f2dacb.html> [<https://perma.cc/5GS5-DCSL>]. But see Mark Curry, Opinion, Postal Banking Faces Challenges, but Is More Plausible than You’d Think, *Wash. Examiner* (July 16, 2018), <https://www.washingtonexaminer.com/opinion/op-eds/postal-banking-faces-challenges-but-is-more-plausible-than-you-d-think> [<https://perma.cc/F8NL-7F2W>].

153. See Paul Waldman, Why Democrats Are About to Get Stoked About Postal Banking, *Week* (Apr. 27, 2018), <https://theweek.com/articles/769888/why-democrats-are-about-stoked-about-postal-banking> [<https://perma.cc/4FNL-QK5N>]. See generally Sitaraman & Alstott, supra note 17, at 169–80.

154. Laila Kearney, Chicago Teachers Pension Fund Divesting from Private Prisons, *Reuters* (Aug. 17, 2018), <https://www.reuters.com/article/us-education-pensions-chicago/chicago-teachers-pension-fund-divesting-from-private-prisons-idUSKBN1L229H> [<https://perma.cc/N6QD-UNGX>]; Katie Rose Quandt, Corporations Divest Nearly \$60 Million from Private Prison Industry, *Mother Jones* (Apr. 28, 2014), <https://www.motherjones.com/crime-justice/2014/04/investment-corporations-divest-60-million-private-prison-cca-geo-group/> [<https://perma.cc/C3Q2-KSL8>].

155. See, e.g., Sapna Maheshwari & Emily Flitter, As Wayfair Workers Protest Migrant Detention, the Specter of a Consumer Boycott Rises, *N.Y. Times* (June 26, 2019), <https://www.nytimes.com/2019/06/26/business/wayfair-walkout.html> [<https://perma.cc/A6ES-5ZQG>] (describing worker and possible consumer boycott of a furniture supplier with contracts to outfit private immigration detention facilities).

156. See Liam Dillon, Trump Administration Sues California over Private Prison Ban, *L.A. Times* (Jan. 25, 2020), <https://www.latimes.com/california/story/2020-01-25/trump-administration-sues-california-over-private-prison-ban> [<https://perma.cc/KNT8-97TY>].

157. See, e.g., Justin Jouvenal, Private Police Carry Guns and Make Arrests, and Their Ranks Are Swelling, *Wash. Post* (Feb. 28, 2015), [https://www.washingtonpost.com/local/crime/private-police-carry-guns-and-make-arrests-and-their-ranks-are-swelling/2015/02/28/29f6e02e-8f79-11e4-a900-9960214d4cd7\\_story.html](https://www.washingtonpost.com/local/crime/private-police-carry-guns-and-make-arrests-and-their-ranks-are-swelling/2015/02/28/29f6e02e-8f79-11e4-a900-9960214d4cd7_story.html) (on file with the *Columbia Law Review*); Carimah Townes, *The Mysterious Private Police Force That’s Killing People in the Nation’s Capital*, *ThinkProgress* (Aug. 31, 2016), <https://thinkprogress.org/who-killed-alonzo-smith-5d5c128dd60/> [<https://perma.cc/SQ46-YUDL>].

158. See, e.g., Bauer, supra note 65; Timothy Williams, Inside a Private Prison: Blood, Suicide and Poorly Paid Guards, *N.Y. Times* (Apr. 3, 2018), <https://www.nytimes.com/2018/>

Obama Administration initiated a plan to wind down all the federal contracts with private prison companies.<sup>159</sup> At least eight states have similarly weaned themselves off of private prisons. In 2000, Arkansas, Kentucky, Louisiana, Maine, Michigan, North Dakota, Utah, and Wisconsin all employed private prisons. By 2017, none of those states housed inmates in private facilities.<sup>160</sup>

But this volte-face on privatization does not mean we are destined to revert to old-school public incarceration in toto. Surely that’s happening to some extent, but some other practices are surfacing (or resurfacing) as well. First, we’re seeing the emergence of VIP, pay-to-stay prison upgrades. California, for example, has found a way to raise revenue by allowing some of its wealthier convicts (who no doubt find gen-pop accommodations infelicitous) to pay extra to stay in what the *New York Times* dubbed a “5-star jail.”<sup>161</sup> Advertisements in police stations “tout municipal pay-to-stay accommodations: ‘Serve your time in our clean, safe, secure facility!’—a pitch that would be ineffective if county jails were clean, safe, and secure.”<sup>162</sup>

The creation of VIP jails is pitched as a win-win proposition. VIP jails provide an easy way for the government to make money (or lose less money) on incarceration, and they offer nonviolent offenders a quite attractive alternative to county. According to one government official, the special cells are “the best \$75 per day you’ll ever spend in your life.”<sup>163</sup> After all, the cells, which reportedly are rarely locked, come equipped with refrigerators, televisions, and telephone lines.<sup>164</sup> But, as should be obvious,

04/03/us/mississippi-private-prison-abuse.html [https://perma.cc/8QEZ-5PT7]. See generally Sharon Dolovich, *State Punishment and Private Prisons*, 55 *Duke L.J.* 437 (2005).

159. See Memorandum from Sally Q. Yates, Deputy Attorney Gen., U.S. Dep’t of Justice, to the Acting Dir., Fed. Bureau of Prisons 2 (Aug. 18, 2016), <https://www.justice.gov/opa/file/886311/download> [https://perma.cc/M5LB-GWWP]; Phasing Out Our Use of Private Prisons, U.S. Dep’t. of Justice Archives (Aug. 18, 2016), <https://www.justice.gov/archives/opa/blog/phasing-out-our-use-private-prisons> [https://perma.cc/6ABC-J9YH]. Then—Attorney General Jeff Sessions suspended the DOJ phase-out plan in 2017. Eric Beech, *U.S. Reverses Obama-Era Move to Phase Out Private Prisons*, *Reuters* (Feb. 23, 2017), <https://www.reuters.com/article/us-usa-prisons/us-reverses-obama-era-move-to-phase-out-private-prisons-idUSKBN1622NN> [https://perma.cc/7Z6J-RDYR].

160. *Private Prisons in the United States*, *The Sentencing Project* (Oct. 24, 2019), <https://www.sentencingproject.org/publications/private-prisons-united-states/> [https://perma.cc/53FD-3R6C].

161. Steinhauer, *supra* note 6.

162. Buchanan, *supra* note 6, at 62. Bear in mind that carceral conditions in California have in some instances been deemed intolerable, “[w]ith young men packed so densely that they can barely move.” *Id.* at 60. In 2011, the U.S. Supreme Court ordered the state to abide by a court-mandated population limit to remedy unconstitutional overcrowding. *Brown v. Plata*, 563 U.S. 493, 502 (2011).

163. Buchanan, *supra* note 6, at 62.

164. Mary Harris & Hetty Chang, *Pay-to-Stay Jail Programs Offer Upgraded Cells for a Price*, *NBC4 L.A.* (Apr. 30, 2015), <http://www.nbclosangeles.com/news/local/Pay-to-Stay-Jail-Programs-Offer-Upgraded-Cells-For-Price-302079671.html> [https://perma.cc/VYN3-42K9] (last updated May 1, 2015).

they are also effectively available only to those with considerable financial means, further reifying and reproducing the extant class divides instantiated by private economic forces elsewhere in and around the criminal justice system.<sup>165</sup>

Second and not entirely unrelated, we're also seeing a significant spike in law enforcement agencies' reliance on civil forfeiture power.<sup>166</sup> Critics allege that the preference for civil forfeiture (over the conventional protocol of arrest, prosecution, and incarceration) is financially motivated—what the libertarian Institute for Justice calls “Policing for Profit.”<sup>167</sup> In effect, governments secure large payments from those accused of wrongdoing—some cities and counties have become quite flush with revenue surpluses—without incurring any of the costs or uncertainty associated with criminal prosecution and detention.<sup>168</sup>

Of course, a system that encourages the pursuit of hard-to-contest civil fines over hard-to-prove criminal charges is privileging full fiscal coffers over, seemingly, justice and maybe even public safety. Such a system risks coming across as exploiting if not altogether abusing state police powers to shake down those fearful of the government's even more punitive criminal toolkit. To be sure, civil forfeiture is a sovereign, not commercial, power. But I nonetheless include it here to suggest that civil forfeiture, especially as regularly practiced these days, is more commercial, more transactional, and far less deliberative and democratic than is our old-school default protocol surrounding criminal arrest, prosecution, and incarceration.

4. *Civil Justice.* — Part of the reason (and, seemingly, the least objectionable reason) why private arbitration remains popular is because the state and federal courts are so backed up. Just about everyone complains, often with justification, about the slow wheels of justice. Getting a court date in many jurisdictions can be nothing short of a nightmare. Indeed, it is almost as if Dickens's notorious *Jarndyce v. Jarndyce* strikes readers today less like an over-the-top satire and more like a realistic estimate of what litigating parties experience. For example, in the past 25

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165. See, e.g., Michelle Alexander, *The New Jim Crow* (2010); Beth A. Colgan, Reviving the Excessive Fines Clause, 102 *Calif. L. Rev.* 277 (2014); Kaaryn Gustafson, The Criminalization of Poverty, 99 *J. Crim. L. & Criminology* 643 (2009).

166. See Dick M. Carpenter II, Lisa Knepper, Angela C. Erickson & Jennifer McDonald, *Inst. for Justice, Policing for Profit: The Abuse of Civil Asset Forfeiture* 5, 10–11 (2d ed. 2015), <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> [<https://perma.cc/X583-WSAL>]; Colgan, *supra* note 165, at 284–95; Sarah Stillman, Taken, *New Yorker* (Aug. 5, 2013), <http://www.newyorker.com/magazine/2013/08/12/taken> (on file with the *Columbia Law Review*).

167. Carpenter et al., *supra* note 166.

168. Colgan, *supra* note 165, at 285–86 & n.29; see also Stillman, *supra* note 166; George F. Will, Opinion, When Government Is the Looter, *Wash. Post* (May 18, 2012), [https://www.washingtonpost.com/opinions/when-government-is-the-looter/2012/05/18/gIQAUIKVZU\\_story.html](https://www.washingtonpost.com/opinions/when-government-is-the-looter/2012/05/18/gIQAUIKVZU_story.html) (on file with the *Columbia Law Review*).



or so years, the median time for a civil case to go from filing to trial practically doubled, from 15 to 27.2 months.<sup>169</sup>

Now the government is doing its own market hack, as it were, perhaps trying to reclaim some judicial turf long ceded to private arbitrators or perhaps simply trying to be more “customer” friendly while raising a bit of revenue in the process. Consider yet another example from California, one that’s actually been around for a couple of decades but has taken on heightened resonance as court dockets get more and more clogged—and as citizens become more attuned to thinking like customers. Californians who don’t want to wait in line for a judge to hear their case may pay extra for a fast-tracked trial, essentially paying the state to convene a special tribunal, complete with a state court judge and jury.<sup>170</sup> These makeshift, commercialized courts “are officially part of the state court system, and their judgments [unlike those of private arbitrators] have the same effect as judgments of any other state court.”<sup>171</sup> Of course, only the wealthiest of parties can afford the nicer of what former California Supreme Court Chief Justice Ronald George blasted as a “two-track system of justice.”<sup>172</sup> And these litigants get the benefit not only of speedy legal proceedings but also of greater confidentiality, as public access may be limited.<sup>173</sup> One of the judges working the VIP track characterized his Hollywood-heavy docket as “the luxury spa . . . rather than the public swimming pool.”<sup>174</sup> As with many of the other examples discussed, the fast-tracking of civil trials is still a niche practice. But as the courts continue to be backed up and as backlash to what many view as unjust and illegitimate privatized arbitration continues to intensify,<sup>175</sup> we’re apt to see more efforts of this sort.<sup>176</sup>

5. *Revenue.* — Recognizing that an entirely deregulated or privatized political economy is all but infeasible—while also appreciating that raising taxes seemingly remains a political longshot—government agencies today

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169. For data spanning the years 1992–1997, see U.S. Courts, Federal Court Management Statistics (1997), [https://www.uscourts.gov/sites/default/files/statistics\\_import\\_dir/District\\_FCMS\\_Sep\\_1997.pdf](https://www.uscourts.gov/sites/default/files/statistics_import_dir/District_FCMS_Sep_1997.pdf) [<https://perma.cc/8VVL-LTAK>]. For the most recent data, see U.S. Courts, Federal Court Management Statistics (2019), [https://www.uscourts.gov/sites/default/files/data\\_tables/fcms\\_na\\_distprofile0630.2019.pdf](https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0630.2019.pdf) [<https://perma.cc/M2AE-RSD4>].

170. See Sheila Nagaraj, Comment, The Marriage of Family Law and Private Judging in California, 116 Yale L.J. 1615, 1617–21 (2007).

171. Kim, *supra* note 5, at 166.

172. Berkowitz, *supra* note 5.

173. See Nagaraj, *supra* note 170, at 1615; see also Berkowitz, *supra* note 5 (remarking that the VIP courts tend to offer not only faster trials but also greater discretion).

174. Berkowitz, *supra* note 5.

175. See Silver-Greenberg & Gebeloff, *supra* note 80; Silver-Greenberg & Corkery, *supra* note 80. See generally Judith Resnik, Fairness in Numbers: A Comment on *AT&T v. Concepcion*, *Wal-Mart v. Dukes*, and *Turner v. Rogers*, 125 Harv. L. Rev. 78, 104–12 (2011).

176. Agencies, too, are trying to find ways to be more “customer friendly.” They have, for instance, recently endeavored to more efficiently resolve class action and other mass litigation disputes. See Michael Sant’Ambrogio & Adam S. Zimmerman, Inside the Agency Class Action, 126 Yale L.J. 1634, 1649–50 (2017).

are engaging in the type of fundraising usually associated with private charitable trusts. Termed “patriotic philanthropy,” the idea is that private, voluntary donations are solicited in lieu of or to supplement conventional, democratically determined taxes.<sup>177</sup> Agencies ranging from the National Park Service to the National Archives have “donate” links, buttons, pop-up ads, or banners on their websites.<sup>178</sup> To give some scale to the size and impact of these charitable trusts, the Center for Disease Control’s foundation reported net assets totaling just over \$100 million for 2016, while the National Park Foundation boasted \$172,254,250 in net assets for 2017.<sup>179</sup>

Today big donors are “giving” large, tax-deductible sums to various government departments. Often these sums are earmarked for special projects or initiatives close to the donors’ hearts or wallets. Recent examples include corporate funds for specific parks projects;<sup>180</sup> individual giving to restore national monuments<sup>181</sup> and revitalize failing schools;<sup>182</sup> and privately donated legal funds funneled to state attorneys general challenging, among other things, the constitutionality of the Affordable Care Act.<sup>183</sup> Recently, Delta Air wrote a check to keep Martin Luther King, Jr. National Historical Park in Atlanta open on MLK Day 2019, notwithstanding the federal shutdown that ended up shuttering most nonessential government services, including national parks and monuments.<sup>184</sup>

6. *Employment.* — With mounting disillusionment and, at times, disgust over government agencies outsourcing many of their core responsibilities to private contractors, one might expect loud and passionate calls for insourcing—that is, returning those jobs to civil servants. Were the government to

177. Margaret H. Lemos & Guy-Uriel Charles, *Patriotic Philanthropy? Financing the State with Gifts to Government*, 106 *Calif. L. Rev.* 1129 (2018) (defining and describing the phenomenon).

178. E.g., Get Involved, Nat’l Park Serv., <https://www.nps.gov/getinvolved/donate.htm> [<https://perma.cc/QA7G-NS5S>] (last visited Oct. 3, 2019); National Archives, <https://www.archives.gov/> [<https://perma.cc/R8DH-YCHP>] (last updated Feb. 7, 2019).

179. Mike Tigas, Sisi Wei, Ken Schwencke & Alec Glassford, *Nonprofit Explorer*, ProPublica, <https://projects.propublica.org/nonprofits/> [<https://perma.cc/HS9Z-74MJ>] (last updated Sept. 20, 2019).

180. Jim Hightower, *Opinion*, *Sold: National Parks Go to the Highest Corporate Bidder*, *Seattle Times* (July 31, 2015), <http://www.seattletimes.com/opinion/sold-national-parks-go-to-the-highest-corporate-bidder/> (on file with the *Columbia Law Review*).

181. Michael Pearson, *\$18.5 Million Gift to Help Refurbish Lincoln Memorial*, *CNN* (Feb. 16, 2016), <http://www.cnn.com/2016/02/16/travel/lincoln-memorial-refurbishment/> [<https://perma.cc/8BT8-FNPL>].

182. See generally Dale Russakoff, *The Prize: Who’s in Charge of America’s Schools* (2015).

183. Margaret H. Lemos, *Privatizing Public Litigation*, 104 *Geo. L.J.* 515, 534 n.103, 537 (2016) (noting, among other things, that the private funds were solicited in large part because state legislatures weren’t necessarily keen on funding anti-Obamacare suits).

184. David Oliver, *Thanks to Delta, Martin Luther King Jr. Park in Atlanta Will Open Again Despite Shutdown*, *USA Today* (Jan. 18, 2019), <https://www.usatoday.com/story/travel/news/2019/01/18/delta-air-lines-martin-luther-king-jr-park-open-government-shutdown/2613083002/> [<https://perma.cc/R7ZK-HX62>].

heed those calls, there would, of course, be a straightforward recalibration along the public–private axis. But that’s not quite what’s happening.

Though the amount of outsourced work has plateaued somewhat,<sup>185</sup> we have not witnessed corresponding stability in the civil service. Instead, longstanding civil servants are increasingly being reclassified as at-will employees. Though they are still on the government payroll, these employees are no longer very different from their private sector counterparts. They are now subject to many of the pressures of a market economy, including summary demotion or termination.<sup>186</sup> They’re less likely to receive lockstep compensation, and correspondingly more likely to be eligible for various performance-based bonuses.<sup>187</sup> New government hires, for their part, are now being brought in as at-will employees, likewise lacking tenure protections and the security of guaranteed salaries.<sup>188</sup>

When the government has effectively commercialized its own labor force, there is very little need to outsource.<sup>189</sup> Hence in this space, too, the government has reasserted its central role by way of a realignment, not a recalibration. It is, after all, shedding both traditional public servants of the sort that were ubiquitous during the Welfare period and the private contractors of the Deregulation and Privatization period—and doing so in favor of more commercialized government employees.

#### B. *Situating the Case Studies*

To be clear, the above case studies are select ones. They do not come close to covering the waterfront of the contemporary American political economy. And, even within these policy domains, there is plenty of continuity as, of course, examples of both mid-twentieth-century state welfarism and late-twentieth-century private ordering perdure.

Yet we ought not dismiss the just-discussed case studies as nothing more than odd and random quirks. Indeed, those case studies are suggestive of a larger and more transformative project of realignment—a pivot away from the old public–private axis to a new and as yet understudied one. In this new-look approach, the government is willing to act as a business would, both in terms of the tools it employs and in terms of how it values or “prices” state goods and services.

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185. See Amir Hefetz, Mildred E. Warner & Eran Vigoda-Gadot, *Privatization and Intermunicipal Contracting: The US Local Government Experience 1992–2007*, 30 *Gov’t & Pol’y* 675, 685 (2012); Michaels, Progeny, *supra* note 49, at 1040 n.86 (citing studies suggesting that outsourcing has begun to plateau).

186. Paul R. Verkuil, *Valuing Bureaucracy* 20–21 (2017); Michaels, Progeny, *supra* note 49, at 1042–50.

187. Michaels, Progeny, *supra* note 49, at 1046–49 (describing reductions in base pay and a shift toward performance-based compensation).

188. *Id.* at 1042–50.

189. Verkuil, *supra* note 186, at 20–21, 90–91; Michaels, Progeny, *supra* note 49, at 1026–27.

Note that we are starting to see this realignment from the traditionally private side, too. Though comprehensive analysis of business-side transformations will be dealt with separately,<sup>190</sup> it is nevertheless worth stating here that firms are beginning to go through their own, converse metamorphoses. Some in fact are taking on the roles and responsibilities we've long associated with sovereigns, creating or laying claim to effectively public (or at least *not altogether private*) spaces, presiding over them, and generally acting in various ways as governing stewards. We see some of this in the newest and most dynamic business sectors, including telecom, social media, and the gig/sharing economy. Cyberlaw and labor law scholars are starting to take note.<sup>191</sup> So too are journalists, as evidenced by a recent *Washington Post* headline announcing: "Facebook has declared sovereignty."<sup>192</sup> But many of us are still playing catch up.

Throughout most of the twentieth century, firms lacked such sovereign pretensions; were prohibited by law (and limited by market constraints and competition) from acting on any such pretensions; or were simply beaten to the punch by more muscular and rangy government agencies. As a result, they stayed in their proverbial lane, employing commercial tools and traversing commercial pathways in the near-singular pursuit of profit maximization. To be sure, market transactions and profits remain the defining characteristics of corporate behavior—and aren't in danger of being overrun by sovereign, public-regarding impulses. Yet firms today have undeniably crossed the Rubicon, not only by signaling it's time to deemphasize profits<sup>193</sup> but also by positioning themselves as progenitors or architects of new, purportedly better, democratic realms; by acting more political (in ways that aren't just political in service of their corporate bottom line); and by using the tools and techniques traditionally reserved to the government qua sovereign. Recent examples include Facebook's plans both to establish an independent "Supreme Court" to set standards and adjudicate disputes regarding online content<sup>194</sup> and to design and

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190. See, e.g., Jon D. Michaels, *The Private Option*, in *Debating the Public Option* (Anne Alstott & Ganesh Sitaraman eds., forthcoming 2021).

191. See, e.g., Kristen E. Eichensehr, *Digital Switzerlands*, 167 *U. Pa. L. Rev.* 665, 685–712 (2019); Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 *Harv. L. Rev.* 1598, 1630–62 (2018); Sanjukta M. Paul, *Uber as For-Profit Hiring Hall: A Price-Fixing Paradox and Its Implications*, 38 *Berkeley J. Emp. & Lab. L.* 233, 248–53 (2017).

192. Molly Roberts, *Opinion, Facebook Has Declared Sovereignty*, *Wash. Post* (Jan. 31, 2018), <https://www.washingtonpost.com/opinions/2019/01/31/facebook-has-declared-sovereignty> (on file with the *Columbia Law Review*).

193. Jena McGregor, *Group of Top CEOs Says Maximizing Shareholder Profits No Longer Can Be the Primary Goal of Corporations*, *Wash. Post* (Aug. 19, 2019), <https://www.washingtonpost.com/business/2019/08/19/lobbying-group-powerful-ceos-is-rethinking-how-it-defines-corporations-purpose/> (on file with the *Columbia Law Review*).

194. Evelyn Douek, *Facebook's New 'Supreme Court' Could Revolutionize Online Speech*, *Lawfare* (Nov. 19, 2018), <https://www.lawfareblog.com/facebooks-new-supreme-court-could-revolutionize-online-speech> [<https://perma.cc/CXW3-T6W3>].

circulate their own cryptocurrency;<sup>195</sup> Twitter essentially rendering far more consequential free speech judgments than anything decided by Congress or the courts;<sup>196</sup> and the likes of Facebook and Google creating new (physical) company towns perhaps to correct for what they see as failed government social welfare programs.<sup>197</sup> For what it's worth, we also see foreign nations treating big firms as if they were sovereigns, with some such nations going so far as to appoint ambassadors and envoys (distinct from consular officers) to Silicon Valley.<sup>198</sup>

Again, fuller treatment of this converse metamorphosis will be taken up separately. For now it suffices to say, first, that the State is not just structuring, facilitating, and regulating the Market from the sidelines as fidelity to twentieth-century legal liberalism seemingly requires. It is, instead, also participating in the Market, alongside and in competition with private businesses. And, second, firms are more willing to act as quasi-sovereigns—and correspondingly more willing both to use what we'd consider sovereign (rather than commercial) governance strategies and to adopt and embrace a normative orientation distinct from, and possibly in tension with, profit maximization. Hence these firms are *governing*, alongside and in competition with the State—and not just selling goods and services to the government, paying taxes, complying with laws and regulations, and using conventional nonsovereign tools (e.g., voting, lobbying, commenting, petitioning, and litigating) to influence government.

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195. Bill Chappell, Facebook Unveils Libra Cryptocurrency, Sets Launch for 2020, NPR (June 18, 2019), <https://www.npr.org/2019/06/18/733701971/facebook-unveils-libra-cryptocurrency-sets-launch-for-2020> [<https://perma.cc/NVC5-6ZKG>].

196. See Louise Matsakis, Twitter Releases New Policy on 'Dehumanizing Speech,' WIRED (Sept. 25, 2018), <https://www.wired.com/story/twitter-dehumanizing-speech-policy/> (on file with the *Columbia Law Review*); see also Scott Shackford, Twitter Implementing European-Style Hate Speech Bans, Reason (Sept. 25, 2018), <https://reason.com/blog/2018/09/25/twitter-implementing-broader-european-st> [<https://perma.cc/4QHU-SVCB>]; cf. Hajime Watanabe, Mondher Bouazizi & Tomoaki Ohtsuki, Hate Speech on Twitter: A Pragmatic Approach to Collect Hateful and Offensive Expressions and Perform Hate Speech Detection, 6 IEEE Access 13825, 13825 (2018), <https://ieeexplore.ieee.org/stamp/stamp.jsp?tp=&arnumber=8292838> (on file with the *Columbia Law Review*).

197. See Grant Bollmer, Will Silicon Valley's New Company Towns End Up as Failed Utopias?, Conversation (May 31, 2018), <https://theconversation.com/will-silicon-valleys-new-company-towns-end-up-as-failed-utopias-94270> [<https://perma.cc/2VB8-6DF9>] (describing Facebook's Willow Village as reflecting the firm's "desire to correct imagined social problems by reinventing social life"); George Hammond, Google and Facebook Lay Foundations for Modern-Day Company Towns, Fin. Times (July 20, 2017), <https://www.ft.com/content/124aa926-67e7-11e7-8526-7b38dcaef614> (on file with the *Columbia Law Review*) (describing Google and Facebook as having housing departments that seek to overcome or circumvent failed municipal and regional housing policy in Silicon Valley).

198. Andreas Sandre, Welcome to the Era of Tech Diplomacy, Medium (Nov. 24, 2017), <https://medium.com/digital-diplomacy/welcome-to-the-era-of-tech-diplomacy-2e174446d25> [<https://perma.cc/Y8NN-NPE9>].

TABLE 2: PUBLIC CAPITALISM'S REALIGNMENT

Period/Era	Ascending/ Insurgent Actor	Tools & Protocols	Valuation & Pricing Schemes
Welfare Period (mid-1930s– mid-1970s)	State	Sovereign <ul style="list-style-type: none"> <li>• <i>Rulemaking</i></li> <li>• <i>Legislation</i></li> <li>• <i>Adjudication</i></li> <li>• <i>Coercive Sanctions (taxes, fines, incarceration)</i></li> </ul>	Public Regarding <ul style="list-style-type: none"> <li>• <i>Means-Tested</i></li> <li>• <i>Subsidized</i></li> <li>• <i>Universally Available</i></li> <li>• <i>Just deserts</i></li> </ul>
Deregulation & Privatization Period (1980s–2000s)	Firm/Industry	Commercial <ul style="list-style-type: none"> <li>• <i>Buying, selling, investing, leasing, renting, bartering</i></li> <li>• <i>Self-regulation</i></li> </ul>	Profit Maximizing <ul style="list-style-type: none"> <li>• <i>“Laws” of supply and demand</i></li> </ul>
Public Capitalism (Public Side)	State	Sovereign or Commercial	Public Regarding or Profit Maximizing
Public Capitalism (Private Side)	Firm/Industry	Commercial or Sovereign	Public Regarding or Profit Maximizing

### III. PUBLIC CAPITALISM CONCEPTUALIZED

The political economy of the twentieth century centered on competition, coordination, and often choosing between public and private

stewardship. When choosing, the understanding was that the State would generally intervene as a democratic, deliberative, and coercive sovereign; and private firms would generally intervene as market participants. A new moment, and a new orientation, pushes that old framing to the side. Previously, we zeroed in on the action taking place along the public–private axis—and, accordingly, fixated on institutional actors’ legal status or the sectors in which they operated. Going forward, more attention needs to be paid to the commercial–sovereign axis, and thus to the tools, pathways, and normative commitments of both public and private actors intervening in the political economy.

All of that is to say that if we take the aforementioned case studies seriously—and consider additional factors that I will introduce shortly—it appears as if public and private actors are more readily interchangeable, fungible, and modular than they’ve been in a very long time. In an increasingly postliberal, post-privatized world, both public and private actors seem willing and able to influence public policy through either commercial or sovereign pathways. This new paradigm, *public capitalism*, reflects the tensions, compromises, and innovations of a big and potentially redistributive State that nonetheless achieves quite a few of its aims through commercial rather than legislative, administrative, or judicial transactions; and an unstintingly capitalist private sector that nonetheless flexes sovereign-seeming regulatory muscle in furtherance of some ostensibly democratic aims orthogonal to profits and losses. Again, this is different from neoliberalism, which is more unidirectional, lionizing the Market and attempting to colonize or cannibalize the state sector so that it, too, runs like a business (and, perhaps, for the benefit of businesses).<sup>199</sup> Instead, we have a challenging and bi-directional mishmash—and need to understand the *hows*, *whys*, and *so whats*.

In what follows, I first consider the historical, legal, economic, political, and cultural factors enabling the instant realignment to public capitalism. I then take a step back to explain how public capitalism’s apparent forerunners—that is, historic practices that bear some resemblance to today’s manifestations of public capitalism—are, in fact, highly distinguishable products of different environments and thus connoting very different meanings and effects.

#### A. *Public Capitalism: The Spirit of the Time*

Earlier I stated that the case studies presented in this Essay are impressionistic, reflective, and illustrative of changing norms, practices, and understandings. Here I identify and explore those conditions that have helped make public capitalism possible, if not inevitable.

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199. See Grewal & Purdy, *supra* note 15, at 5–7 (describing neoliberalism’s support for capitalist projects and political settlements).

1. *Hegel and The O.C.* — As we've long oscillated between a more statist and a more privatized political economy<sup>200</sup>—and now try to grasp what's coming next—we may be tempted to draw upon the paradigmatic thesis–antithesis–synthesis formulation.<sup>201</sup> But it isn't clear that public capitalism represents that perfect synthesis, the reconciliation of mid-twentieth-century welfarism and late-twentieth-century deregulation and privatization. Public capitalism is more like a mashup—less synthesis than (at least so far) undisciplined and even ad hoc blending. Indeed, with apologies to Hegel, the better comparison might be an ever-so-slightly lower brow one.

There is a memorable series of episodes of the iconic television series *The O.C.* in which an interfaith family celebrates neither Hanukkah nor Christmas, but a blended winter holiday, what they call Chrismukkah.<sup>202</sup> (Stay with me.) This is, in essence, what we see happening in the American political economy today as the seemingly oxymoronic, perhaps unworkable, and in some respects retrograde is nevertheless achieved. Overriding impulses to combine, conflate, reconfigure, and redefine state and market tools, personnel, and powers help produce any number of public- and private-regarding aims. Simply put, more may be achieved, with less effort, reflexive opposition, and, troublingly, legal or political scrutiny than if government actors pursued purely public aims using entirely sovereign channels (or, by the same logic, if private actors pursued purely private, profit-maximizing aims using entirely commercial channels).

Ultimately what marks this moment, and the practices I'm identifying as emblematic of this moment, is an apparent embrace of the interchangeability of (a) institutions—public agencies and private firms; (b) tools—coercive legislative, administrative, and adjudicative instruments of democratic regulation, and (ostensibly) voluntary commercial instruments of marketplace exchange; and (c) aims—public-regarding distributions (to everybody or to the most deserving) and profit-maximizing distributions to those most willing and able to pay. Thus public capitalism challenges, if not defies, the familiar and still legally resonant tethering of

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200. I do not think it is especially helpful to describe statist policy as necessarily central or planned, nor do I think it is especially helpful to describe private ordering as decentralized or free. Given the American constitutional system—what Justice Black called “Our Federalism”—many public, sovereign decisions are rendered or implemented in a highly decentralized manner. See *Younger v. Harris*, 401 U.S. 37, 44–45 (1971). Likewise, given the realities of today's political economy, many private commercial decisions sure look centrally planned, by the big dogs on Wall Street, in Silicon Valley, or the like.

201. Karl Marx, *The Poverty of Philosophy* 114–15 (1910) (describing the Hegelian dialectic).

202. E.g., *The O.C.: The Best Chrismukkah Ever* (Fox television broadcast Dec. 3, 2003). Rather than celebrating two separate and distinct holidays—or manufacturing a totally different anti-traditionalist holiday such as *Seinfeld's* Festivus, *The O.C.'s* Cohen family fuses and harmonizes the customs and practices of Christmas and Hanukkah. The author takes no position on the relative merits of the made-for-TV holidays or, in a show of tremendous self-restraint, on the relative merits of *Seinfeld* and *The O.C.*



state actors to sovereign tools and public-regarding aims, and private actors to commercial tools and profit-maximizing aims. It also challenges core orthodoxies of liberalism—namely, separation of the public and private sectors, specialization within each sector, and competition across the sectors. Whether this new approach reflects or heralds a discernible normative vision is something I'll consider in later sections of this Essay.

Like with Chrismukkah, the permutations of combination, recombination, and reconfiguration are staggering. Are your stockings hung by the Menorah with care? Do you leave out a plate of latkes for old Saint Nick to nosh on? Perhaps you do both. In public capitalism, we see government channeling its efforts through commercial pathways in search of “profits,” to evade ordinary constitutional restrictions, to achieve old-school redistributive goals, and to redefine and perhaps rekindle relationships with long-disaffected citizens and regulated industries. We are also seeing firms assuming sovereign-like responsibilities, more-or-less competing with the government on a regulatory footing, redefining their relationships with consumers, and even supplanting the government as a go-to regulator.

And like with Chrismukkah, the underlying societal, political, and legal conditions need to be right. Chrismukkah works well in early-twenty-first-century Newport Beach. But it most certainly would have been hard to pull off in Bialystok circa 1900 or in the Massachusetts Bay Colony of the 1690s. With that in mind, consider the particular circumstances that enable, if not drive, public capitalism today.

2. *Lumping, Conflating, and Equating the Public and Private.* — For starters, the timing is right because it is now entirely reasonable to no longer draw sharp lines between the State and Market. For years, state and private institutions have appeared intertwined, joined metaphorically—they're both big and powerful<sup>203</sup>—and literally, via the ubiquity of public-private collaborations, sweetheart deals, and the revolving door.<sup>204</sup> Indeed, from

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203. See Elizabeth Anderson, *Private Government: How Employers Rule Our Lives (and Why We Don't Talk About It)* (2017); K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 *Tex. L. Rev.* 1329, 1345 (2016). As Rahman states:

From the standpoint of domination and power, one of the central problems of today's political economy is the increasingly concentrated power of corporations. From too-big-to-fail banks to the battles over net neutrality and anxieties about private power of firms like Google in the information economy, we live in an era marked by new forms of what Brandeis famously called “the curse of bigness.”

Id. (quoting Louis D. Brandeis, *A Curse of Bigness*, *Harper's Wkly.*, Jan. 10, 1914, at 18, 18).

204. See Malcolm S. Salter, *Crony Capitalism, American Style: What Are We Talking About Here?* 11–35 (Harvard Bus. Sch., Working Paper No. 15-025, 2014), [https://www.hbs.edu/faculty/Publication%20Files/15-025\\_c6fbbb7-1519-4c94-8c02-4f971cf8a054.pdf](https://www.hbs.edu/faculty/Publication%20Files/15-025_c6fbbb7-1519-4c94-8c02-4f971cf8a054.pdf) (on file with the *Columbia Law Review*). For particularly illuminating and salient examples of longstanding close connections between specific business and the federal government, see generally Sally Denton, *The Profiteers: Bechtel and the Men Who Built the World* (2016); Wu, *Master Switch*, *supra* note 30.

private prison conglomerates<sup>205</sup> to commercial space companies<sup>206</sup> to government venture capital firms<sup>207</sup> to Silicon Valley tech giants powerful enough to (wittingly or unwittingly) destabilize political regimes,<sup>208</sup> it may be difficult to even know who is doing what and pursuant to what power.

Consider, for example, a recent challenge to the regulatory authority of Amtrak. Litigation revealed how befuddled judges on the D.C. Circuit and the Supreme Court were about a seemingly straightforward question: *whether the passenger railroad was a private or public concern*. Initially, the circuit judges scrambled to divine meaning from such peculiarities as the fact that Amtrak's web presence was signified by Amtrak.com, not Amtrak.gov.<sup>209</sup> They also seized on the more trenchant fact that Amtrak had strong incentives, if not also statutory and fiduciary duties, to regulate rail access in a self-interested fashion (thereby maximizing profits).<sup>210</sup> After some back and forth between the two courts,<sup>211</sup> the D.C. Circuit decided on remand that the public-private question ought not be dispositive, insisting instead that Amtrak's combination of sovereign regulatory powers and commercial, profit-seeking obligations was a constitutionally problematic one.<sup>212</sup> In other words, regardless whether the railroad was technically public or private, the constitutional problem of sovereign-commercial self-dealing existed.<sup>213</sup>

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205. See Eisen, *supra* note 65, at 177–210; Jill Filipovic, Opinion, America's Private Prison System Is a National Disgrace, *Guardian* (June 13, 2013), <https://www.theguardian.com/commentisfree/2013/jun/13/aclu-lawsuit-east-mississippi-correctional-facility> [<https://perma.cc/RS4A-QF84>]; Chris Kirkham, Prisoners of Profit: Private Prison Empire Rises Despite Startling Record of Juvenile Abuse, *Huffington Post* (Oct. 22, 2013), <http://projects.huffingtonpost.com/prisoners-of-profit?ncid=edlinkusaolp00000009> [<https://perma.cc/FEU6-6VAT>].

206. See, e.g., Eric Mack, On NASA's 60th Birthday, It's Reinventing Itself for the SpaceX Era, *CNET* (Oct. 1, 2018), <https://www.cnet.com/news/on-nasa-60-birthday-its-reinventing-itself-for-the-spacex-era/> (on file with the *Columbia Law Review*).

207. See, e.g., Jon D. Michaels, The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond, 97 *Va. L. Rev.* 801, 812–17 (2011) (describing the CIA's venture capital firm, called In-Q-Tel).

208. See Ewen MacAskill, US Confirms It Asked Twitter to Stay Open to Help Iran Protestors, *Guardian* (June 17, 2009), <https://www.theguardian.com/world/2009/jun/17/obama-iran-twitter> [<https://perma.cc/WX5D-M5BY>]; Rebecca J. Rosen, So, Was Facebook Responsible for the Arab Spring After All?, *Atlantic* (Sept. 3, 2011), <https://www.theatlantic.com/technology/archive/2011/09/so-was-facebook-responsible-for-the-arab-spring-after-all/244314/> (on file with the *Columbia Law Review*).

209. See *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 721 F.3d 666, 675 (D.C. Cir. 2013), vacated and remanded, 135 S. Ct. 1225 (2015).

210. See *id.* at 676.

211. For the trilogy of cases, see *id.*, vacated, 135 S. Ct. 1225 (2015), remanded to 821 F.3d 19 (D.C. Cir. 2016).

212. See *Ass'n of Am. R.Rs.*, 821 F.3d at 27–36; see also Alexander Volokh, The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges, 37 *Harv. J.L. & Pub. Pol'y* 931, 980–81 (2014) (making the substantially similar argument in advance of the D.C. Circuit's reconsideration).

213. See *Ass'n of Am. R.Rs.*, 821 F.3d at 27–36.

More broadly, some of the defining experiences, arrangements, and events of the past decade have served to underscore how easy, understandable, and perhaps prudent it is to lump, conflate, and equate state and market actors. First, the global financial crisis and subsequent bailout was perceived by many to reflect an all-too-clubby set of arrangements among Wall Street, the Federal Reserve, and the Treasury Department. A *New York Times* headline seemingly best captured this coziness: “The Guys from ‘Government Sachs.’”<sup>214</sup> Indeed, deregulation, groupthink, and the existence of a very prominent, very close-knit old boys’ network of bankers and banking regulators all lent the distinct impression that the catastrophic economic collapse was at least in part enabled by the coordinated acts and shared omissions of a set of actors, many of whom glide seamlessly between government and private employment,<sup>215</sup> and by a set of institutions that increasingly defy ready categorization on either side of the public–private divide.<sup>216</sup>

Such an impression was only strengthened when it came time to jumpstart the devastated economy.<sup>217</sup> Consider what the feds did (and didn’t do). They prioritized backroom fixes and large transfers of funds through what Steven Davidoff Solomon and David Zaring call “regulation by deal.”<sup>218</sup> They acquired controlling shares of big businesses, and thus effectively ended up steering the likes of GM and AIG until those firms regained their solvency.<sup>219</sup> And they were, by many accounts, lackadaisical in their pursuit of those financial actors widely viewed as having violated any number of civil and criminal laws. (Indeed, some attributed this prosecutorial passivity to, at best, the ways in which the entire political economy is dependent on major financial institutions “too big to jail”<sup>220</sup> and, at worst, prosecutors’ and regulators’ timidity or propinquity to bankers.<sup>221</sup>)

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214. Julie Creswell & Ben White, The Guys from ‘Government Sachs,’ *N.Y. Times* (Oct. 17, 2008), <https://www.nytimes.com/2008/10/19/business/19gold.html> [<https://perma.cc/T2CN-FHJ5>].

215. See Sorkin, *supra* note 144, at 201–04; Richard W. Painter, Bailouts: An Essay on Conflicts of Interest and Ethics when Government Pays the Tab, 41 *McGeorge L. Rev.* 131, 140–50 (2009).

216. For discussions of the complicated space occupied by the Federal Reserve, see generally Peter Conti-Brown, *The Power and Independence of the Federal Reserve* (2016); Anne Joseph O’Connell, *Bureaucracy at the Boundary*, 162 *U. Pa. L. Rev.* 841 (2014).

217. See Sorkin, *supra* note 144, at 392–408.

218. Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government’s Response to the Fiscal Crisis*, 61 *Admin. L. Rev.* 463 (2009).

219. See Barbara Black, The U.S. as “Reluctant Shareholder”: Government, Business and the Law, 5 *Entrepreneurial Bus. L.J.* 561, 578–92 (2010); Templin, *supra* note 144, at 1185–86; Verret, *supra* note 144, at 303–05.

220. Brandon L. Garrett, *Too Big to Jail: How Prosecutors Compromise with Corporations* 1–2 (2014).

221. See Jesse Eisinger, *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives* 228–43 (2017).

And perhaps the most visceral and memorable manifestation of outrage over the financial crisis and its aftermath—dubbed Occupy Wall Street—seemed very much a *pox on both your houses* protest, critical of the banks and the government alike.<sup>222</sup> Deliciously fittingly, the physical epicenter of the Occupy Wall Street movement, a little pocket of downtown Manhattan known as Zuccotti Park, is itself a puzzling blend of the public and private. Arguments swirled—and for some time confusion reigned—over whether Zuccotti Park was private property, and thus could be summarily cleared of protestors, or was municipal land far more hospitable to the occupiers.<sup>223</sup>

Second, the conflation and equation of State and Market seems understandable to those paying even passing attention to twenty-first-century U.S. defense policy—and specifically to the long, painful, and controversial occupations of Iraq and Afghanistan.<sup>224</sup> It was the U.S. government *and* KBR/Halliburton servicing the occupation, with the public and private entities often characterized as partners due only in part to then-Vice President Dick Cheney's ongoing financial ties to the powerhouse company he previously ran.<sup>225</sup> It was the U.S. government *and* Blackwater (among other private military firms) as the security bulwarks, often so intertwined that, at times, the respective chains of command were confused, blame for wrongdoing was diffused or altogether misplaced, and bizarre codependencies cropped up.<sup>226</sup> It was the U.S. government *and* Bechtel vis-à-vis nation building—that is, the work of major infrastructure projects.<sup>227</sup> And, it was the U.S. government *and* Big Oil, as critics

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222. Michael Levitin, *The Triumph of Occupy Wall Street*, Atlantic (June 10, 2015), <https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/> (on file with the *Columbia Law Review*).

223. See Nate Berg, *Occupy Wall Street Protest Poses a Public-Private Conundrum*, CityLab (Sept. 29, 2011), <https://www.citylab.com/equity/2011/09/site-wall-street-protest-public-private-conundrum/219/> [<https://perma.cc/MVT7-M8FB>]; see also Lisa W. Foderaro, *Privately Owned Park, Open to the Public, May Make Its Own Rules*, N.Y. Times (Oct. 13, 2011), <https://www.nytimes.com/2011/10/14/nyregion/zuccotti-park-is-privately-owned-but-open-to-the-public.html> [<https://perma.cc/AE7M-LP5P>].

224. See Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 Wash. U. L.Q. 1001, 1029–34 (2004) [hereinafter Michaels, *Beyond*].

225. See David E. Rosenbaum, *A Closer Look at Cheney and Halliburton*, N.Y. Times (Sept. 28, 2004), <http://www.nytimes.com/2004/09/28/us/a-closer-look-at-cheney-and-halliburton.html> [<https://perma.cc/VQ2K-DJCV>].

226. See David Isenberg, *Shadow Force: Private Security Contractors in Iraq* 124–27 (2009) (describing contractor irregularities and the tensions that arose as a result of differences between the military and contractors with respect to training, command structure, and operating protocols); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 Stan. L. & Pol'y Rev. 549, 555–57 (2005) (describing contractors' role in detention and interrogation).

227. Elizabeth Becker, *A Nation at War: Reconstruction; U.S. Gives Bechtel a Major Contract in Rebuilding Iraq*, N.Y. Times (Apr. 18, 2003), <https://www.nytimes.com/2003/>

(doubtful of Saddam Hussein's ties to al-Qaeda and angered by the absence of evidence of WMDs) queried why we went to war in Iraq, wondering, among other things, whether the close ties and seemingly overlapping interests between the Bush Administration and the oil industry played a role in that decision.<sup>228</sup>

Third, turning our gaze inward, here too we've encountered powerful, threatening, and increasingly visible state and commercial domestic counterterrorism partnerships. Specifically, thanks to a series of investigative reports and some highly publicized leaks, we now know a good deal about formal and informal arrangements between the feds and major telecom companies,<sup>229</sup> between the feds and major financial institutions,<sup>230</sup> and between the feds and major tech firms.<sup>231</sup> The sheer power of the firms, their snugness with the Intelligence Community, and—as some saw it—their concomitant disregard for (surveilled) consumers gave further justification to those already inclined to view state and market actors as one and the same.

Fourth, various recent and ongoing government “reform” projects seem in service of flattening the perceived differences between firms and government agencies. As discussed in Part II, government officials are reclassifying civil servants as at-will employees, thereby blurring in many respects what had been the most salient distinction between government and (most) private-sector work. What's more, these officials are resetting public-sector compensation, bringing it in line with what's offered in the private sector. For most government workers, particularly those below the level of senior professionals, this means fewer benefits, lower base pay, and

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04/18/world/nation-war-reconstruction-us-gives-bechtel-major-contract-rebuilding-iraq.html [https://perma.cc/7ARV-ACSN]; see also Bryan Bender, Study Finds Cronyism in Iraq, Afghanistan Contracts, *Boston Globe* (Oct. 31, 2003), [http://archive.boston.com/news/nation/articles/2003/10/31/study\\_finds\\_cronyism\\_in\\_iraq\\_afghanistan\\_contracts/](http://archive.boston.com/news/nation/articles/2003/10/31/study_finds_cronyism_in_iraq_afghanistan_contracts/) [https://perma.cc/XJ8E-PRA2].

228. See Nafeez Ahmed, Iraq Invasion Was About Oil, *Guardian* (Mar. 20, 2014), <https://www.theguardian.com/environment/earth-insight/2014/mar/20/iraq-war-oil-resources-energy-peak-scarcity-economy> [https://perma.cc/QLY4-K9X4]; Dilip Hiro, How Bush's Iraqi Oil Grab Went Awry, *Nation* (Sept. 26, 2007), <https://www.thenation.com/article/how-bushs-iraqi-oil-grab-went-awry/> [https://perma.cc/VJ4H-5Z42].

229. See Jon D. Michaels, Deputizing Homeland Security, 88 *Tex. L. Rev.* 1435, 1439–51 (2010) [hereinafter Michaels, Deputizing] (cataloging examples); Glenn Greenwald, NSA Prism Program Taps in to User Data of Apple, Google and Others, *Guardian* (June 6, 2013), <https://www.theguardian.com/world/2013/jun/06/us-tech-giants-nsa-data> [https://perma.cc/U3ZN-ZPWM]; Paul Szoldra, This Is Everything Edward Snowden Revealed in One Year of Unprecedented Top-Secret Leaks, *Bus. Insider* (Sept. 16, 2016), <https://www.businessinsider.com/snowden-leaks-timeline-2016-9> [https://perma.cc/3J97-VM2G].

230. See Michaels, Deputizing, *supra* note 229, at 1435–36, 1463 n.130.

231. See Barton Gellman & Laura Poitras, U.S., British Intelligence Mining Data from Nine U.S. Internet Companies in Broad Secret Program, *Wash. Post* (June 7, 2013), [https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497\\_story.html](https://www.washingtonpost.com/investigations/us-intelligence-mining-data-from-nine-us-internet-companies-in-broad-secret-program/2013/06/06/3a0c0da8-cebf-11e2-8845-d970ccb04497_story.html) (on file with the *Columbia Law Review*).

a vague possibility of performance-based bonuses.<sup>232</sup> Again, though these changes to the bureaucracy have been going on for the better part of two decades, they've taken on greater significance, urgency, and salience during the Trump presidency. For example, in his 2018 State of the Union Address, the President "call[ed] on the Congress to empower every Cabinet Secretary with the authority . . . to remove Federal employees who undermine the public trust or fail the American people."<sup>233</sup> To the extent the public and private workforces are brought into parity—potentially problematic for any number of reasons not germane to the instant discussion<sup>234</sup>—then that is yet another reason to think of the State and Market as less distinct from one another and thus more interchangeable.

Fifth, recall one of the most widely followed and controversial Supreme Court cases of the decade, *Citizens United v. FEC*.<sup>235</sup> In *Citizens United*, the Court held that the First Amendment protects political spending as a form of protected speech. As a result, Congress may not prohibit corporations from spending money to support or denounce individual candidates in elections.<sup>236</sup> Though the specific holding is somewhat narrow, the case has taken on a broader cultural meaning. It even prompted an awkward and highly unusual contretemps between then-President Barack Obama and Justice Samuel Alito at the 2010 State of the Union,<sup>237</sup> countless calls for a constitutional amendment,<sup>238</sup> and much disaffection and alienation among those convinced that *Citizens United* all

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232. See *supra* section II.A.6.

233. Donald J. Trump, U.S. President, State of the Union Address (Jan. 30, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-state-union-address/> [<https://perma.cc/BLW7-2ZUN>].

234. See generally Michaels, *Coup*, *supra* note 29, at 115–17 (describing both government outsourcing and the commercialization of the government workforce as threats to the legitimacy and constitutionality of the modern administrative state).

235. 558 U.S. 310 (2010).

236. *Id.* at 364–65.

237. See Adam Liptak, Supreme Court Gets a Rare Rebuke, in Front of a Nation, N.Y. Times (Jan. 28, 2010), <https://www.nytimes.com/2010/01/29/us/politics/29scotus.html> [<https://perma.cc/PB9M-PE4A>].

238. Jeff Clements, Opinion, Drain Big Money out of Politics. Overturn *Citizens United*. Pass the 28th Amendment, Newsweek (July 30, 2019), <https://www.newsweek.com/big-money-citizens-united-campaign-funding-1451687> [<https://perma.cc/MJK3-JTW8>]; Rachel Frazin, Schiff Introduces Constitutional Amendment to Overturn *Citizens United*, Hill (May 8, 2019), <https://thehill.com/homenews/house/442697-schiff-introduces-constitutional-amendment-to-overturn-citizens-united> [<https://perma.cc/6NR2-KEHP>]; Press Release, Office of Senator Kamala D. Harris, Harris, Feinstein, Senate Democrats Introduce Constitutional Amendment to Overturn *Citizens United* (July 24, 2019), <https://www.harris.senate.gov/news/press-releases/harris-feinstein-senate-democrats-introduce-constitutional-amendment-to-overturn-citizens-united> [<https://perma.cc/6ETP-DCQ9>]; LWVUS Campaign Fin. Task Force, Review of Constitutional Amendments Proposed in Response to *Citizens United*, League of Women Voters, <https://www.lwv.org/league-management/voting-rights-tools/review-constitutional-amendments-proposed-response-citizens> [<https://perma.cc/35EU-9K66>] (last visited Oct. 4, 2019).

but endorses American plutocracy and the effective fusion of corporate and political power.<sup>239</sup>

Sixth, on a mundane but still quite revealing level, consider what is perhaps best described as the Yelpification of the government—in both directions. Believe it or not, there are Yelp reviews of public prisons and jails.<sup>240</sup> The reviews may be of interest to government officials and academics. They may also serve as prime clickbait for anyone surprised to learn that people view prisons as operating in a market-like realm responsive to “customers”—and are curious as to what’s being said.<sup>241</sup> On the other end of the old public–private spectrum, we see partnerships between government health agencies and Yelp. Pursuant to one such arrangement, individuals consulting Yelp for restaurant recommendations in certain participating jurisdictions will, of course, get their fill of consumer reviews about food freshness, price, and service. But they will also be advised of the various labor, health, and safety citations issued by state and municipal officials against those restaurants.<sup>242</sup> At least some segment of the Yelp audience is likely to take seriously those government-issued citations and choose another eatery accordingly.

Last, think again of all things Donald Trump. From Ivanka’s fashion company and international IP deals<sup>243</sup> to the Donald’s nonprofit foundation, wineries, hotels and commercial properties, wedding packages, MAGA merch, and campaign-underwritten hush money,<sup>244</sup> the current President

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239. See, e.g., Richard L. Hasen, *Plutocrats United: Campaign Money, The Supreme Court, and the Distortion of American Elections* 32–35 (2016); Zephyr Teachout, *Corruption in America* 227–45 (2014).

240. Caitlin Dewey, *With Few Other Outlets for Complaints, Inmates Review Prisons on Yelp*, *Wash. Post* (Apr. 27, 2013), [https://www.washingtonpost.com/national/with-few-other-outlets-for-complaints-inmates-review-prisons-on-yelp/2013/04/27/59cc3440-9e24-11e2-a2db-efc5298a95e1\\_story.html](https://www.washingtonpost.com/national/with-few-other-outlets-for-complaints-inmates-review-prisons-on-yelp/2013/04/27/59cc3440-9e24-11e2-a2db-efc5298a95e1_story.html) (on file with the *Columbia Law Review*); Beth Schwartzapfel, *How Inmates and Loved Ones Review Jails on Yelp*, *WIRED* (Sept. 8, 2015), <https://www.wired.com/2015/09/inmates-review-jails-on-yelp/> [<https://perma.cc/ADV3-NSC5>].

241. Cf. Alexander Volokh, *Prison Vouchers*, 160 U. Pa. L. Rev. 779, 781 (2012) (proffering a “thought experiment” in which inmates are given vouchers that they may use to comparison-shop among prisons).

242. Michaels, *Coup*, *supra* note 29, at 108; Michael Arnold, *DOL Develops Use of Smartphone Apps, Soc’y for Human Res. Mgmt.*, (Aug. 2, 2013), <https://web.archive.org/web/20130821204144/http://www.shrm.org/legalissues/federalresources/pages/dol-smartphone-apps.aspx> [<https://perma.cc/6A5Y-JJCJ>]; Elaine S. Povich, *Challenge.gov Contests Liberate Labor Department Data*, *Breaking Gov* (Sept. 12, 2012), <http://breakinggov.com/2012/09/12/challenge-gov-contests-liberate-labor-department-data/> [<https://perma.cc/3ECQ-RPSJ>].

243. See Jean Eaglesham & Lisa Schwartz, *How Ivanka Trump Is a Walking Billboard for Her Namesake Fashion Business*, *Wall St. J.* (Dec. 27, 2017), <https://www.wsj.com/articles/how-ivanka-trump-is-a-walking-billboard-for-her-namesake-fashion-business-1514389465> (on file with the *Columbia Law Review*).

244. See, e.g., Philip Bump, *The Evidence that Trump Broke Campaign Finance Laws*, *Wash. Post* (Dec. 14, 2018), [www.washingtonpost.com/politics/2018/12/14/evidence-that-trump-broke-campaign-finance-laws/](http://www.washingtonpost.com/politics/2018/12/14/evidence-that-trump-broke-campaign-finance-laws/).

has powerfully and perhaps indelibly blended and entangled state and corporate identities, powers, and personalities, often making it difficult to discern where the government stops and his sundry businesses begin.

With examples like these, it is not surprising why we may today conflate and equate public and private power. It is also not surprising why we may think of them both as having political and commercial components and as being marshaled to serve sometimes compatible and sometimes conflicting public-regarding and profit-maximizing aims. Indeed, just as it is easier to combine Hanukkah and Christmas when they're already so intertwined in our psychic and lived experiences—think ecumenical “holiday” greetings, “holiday” parties, “winter” recesses from school, and latitudinarian shopping frenzies—it is easier to combine and reconfigure state and market power when government and firms are seen in roughly comparable and overlapping terms.

3. *Pragmatic Not Dogmatic.* — Perhaps because of the tremendous fluidity and transmutability of the people and institutions currently spanning the state and market sectors—and their proximate and interchangeable relations to one another—we seem to inhabit spaces in which there isn't a set orthodoxy, at least not of the sort that in many respects defined and informed twentieth-century American legal liberalism. In the 1930s, 1940s, and 1950s, a good number of Americans placed their faith primarily in the State; the nascent architecture of the New Deal; and, later, the capacity of that State to promote peace, democracy, and prosperity at home and abroad. In the 1960s, there was Camelot, the Great Society, and a belief and expectation that the government would end poverty and discrimination—and propel us to the Moon and beyond.<sup>245</sup>

That Panglossian thinking of course changed drastically in the 1970s and 1980s. After Watergate, Vietnam, stagflation, and what Jimmy Carter called our national “malaise,” Americans were primed for Ronald Reagan. The Gipper memorably ran on an anti-government platform, belittling and demonizing Washington and rejecting the moral force and competence of the State.<sup>246</sup> During this time, the Market was feted and fetishized,

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trump-broke-campaign-finance-laws (on file with the *Columbia Law Review*); David D. Kirkpatrick & Eric Lipton, Inside the Military's 5-Star Layovers at a Trump Resort in Scotland, N.Y. Times (Sept. 12, 2019), <https://www.nytimes.com/2019/09/12/us/politics/trump-turnberry-military.html> [<https://perma.cc/P4TK-SZ28>] (describing Air Force refueling stopovers at a tony Trump resort in Scotland as “the latest in a series of episodes in which the president's private businesses have intersected with his public position in ways that he can profit from”); Jonathan Stempel & Jonathan Allen, New York Sues Trump and His Charity over ‘Self-Dealing’, Reuters (June 14, 2018), <https://www.reuters.com/article/us-usa-trump-trump-foundation/new-york-sues-trump-and-his-charity-over-self-dealing-idUSKBN1JA26G> [<https://perma.cc/5X2W-EE97>].

245. See Hacker & Pierson, *supra* note 21, at 98–130 (describing the mid-twentieth-century consensus in favor of fairly activist government).

246. See Steven F. Hayward, *The Age of Reagan: The Fall of the Old Liberal Order, 1964–1980*, at 677–94 (2001); see also Hacker & Pierson, *supra* note 21, at 203; Michaels, *Coup*, *supra* note 29, at 82–95.



and Oliver Stone's Gordon Gekko gave voice to the rising sentiment that, indeed, "greed is good."<sup>247</sup> Later, Bill Clinton and Al Gore softened Reagan's flinty rhetoric and presented the avulsive break from mid-century welfarism as nothing more than a technocratic tweak. In effect, these self-styled New Democrats<sup>248</sup> repackaged Reagan's idealized Night-Watchman State as a more muscular Neoliberal State, which combined faith in the public-regarding goals of government with an abiding trust in the efficacy of markets to help advance those goals.<sup>249</sup>

Today of course, such earnest devotion, wherever placed, seems quaint, outdated, and belied by the lessons and disappointments of recent history. There surely isn't abundant faith in the State. Trust in government institutions is very low.<sup>250</sup> The Right obsesses over voter fraud, "Deep State" subversives, and encroachments on individual liberty.<sup>251</sup> The Left decries state-sanctioned voter suppression, an unjust criminal justice system, and corporate dominance over both electoral campaigns and regulatory proceedings.<sup>252</sup> Just as assuredly, confidence in the efficient clearing of markets has declined significantly, particularly as we witness rising income and wealth inequality; skepticism (again on the Left and the Right) of the

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247. *Wall Street* (20th Century Fox 1987).

248. Robert Dreyfuss, *How the DLC Does It*, *Am. Prospect* (Dec. 19, 2001), <https://prospect.org/article/how-dlc-does-it> [<https://perma.cc/XH2N-CS6T>] (describing the rise and dominance of a third-way, centrist movement within the Democratic party).

249. See Michaels, *Coup*, *supra* note 29, at 100–05 (describing the "Clinton Continuity"—a gentler but in many respects programmatically quite faithful extension of the Reagan Revolution).

250. See Domenico Montanaro, *Here's Just How Little Confidence Americans Have in Political Institutions*, *NPR* (Jan. 17, 2018), <https://www.npr.org/2018/01/17/578422668/heres-just-how-little-confidence-americans-have-in-political-institutions> [<https://perma.cc/YU4F-2G35>].

251. See, e.g., David Atkins, *Belief in Widespread Voter Fraud Is Even Worse Than QAnon or Birtherism*, *Wash. Monthly* (Oct. 20, 2018), <https://washingtonmonthly.com/2018/10/20/belief-in-widespread-voter-fraud-is-even-worse-than-qanon-or-birtherism/> [<https://perma.cc/J8QU-ADWG>]; Joan Walsh, *Opinion, The American Impulse to Equate Guns with Freedom and Masculinity with Violence Is Killing Us*, *Nation* (Oct. 2, 2017), <https://www.thenation.com/article/the-american-impulse-to-equate-guns-with-freedom-and-masculinity-with-violence-is-killing-us/> [<https://perma.cc/3DKR-8N32>]; Sean Hannity, *Opinion, The Deep State and the Greatest Abuse of Power, Corruption in American History*, *Fox News* (Feb. 15, 2019), <https://www.foxnews.com/opinion/sean-hannity-the-deep-state-and-the-greatest-abuse-of-power-corruption-in-american-history> [<https://perma.cc/JA7W-U6QU>].

252. See, e.g., Alexander, *supra* note 165, at 1–15; Jelani Cobb, *Stacey Abrams's Fight for a Fair Vote*, *New Yorker* (Aug. 12, 2019), <https://www.newyorker.com/magazine/2019/08/19/stacey-abrams-fight-for-a-fair-vote> (on file with the *Columbia Law Review*); Dylan Scott, *2020 Democrats' Campaign Finance Pledges, Explained*, *Vox* (June 25, 2019), <https://www.vox.com/policy-and-politics/2019/6/24/18656919/2020-democratic-presidential-candidates-campaign-donations-finance-pledges> [<https://perma.cc/6JQ2-QSWY>].

longstanding commitment to free trade;<sup>253</sup> and the consolidation (and corresponding coerciveness) of corporate power in the form of banks too big to fail,<sup>254</sup> defense contractors too big to debar,<sup>255</sup> and tech giants too expansive and essential for citizen-consumers to avoid.<sup>256</sup> Wary (and perhaps weary) of both the old stand-alone State and the old stand-alone Market, we are nevertheless more dependent on state and corporate institutions than ever before. Imagine navigating life without cell phones, the internet, the FDA, or the EPA! We thus still look to these institutions, albeit with a jaundiced eye.

Again, the *O.C. Chrismukkah* reference is apt<sup>257</sup>: The less orthodox one is about his or her “true” religion, the easier it is to combine and reconfigure that religion alongside someone else’s. The same goes for those who aren’t, say, fervent in their faith in markets or bureaucracy. True apostles of either Friedrich Hayek or Franklin Roosevelt would find little room for an integrative project. But there are very few purists of that sort today in American law and politics, let alone among the general public.

4. *Public Options and Corporate Social Responsibility*. — Indeed, that loss of faith (or faiths) is one reason we’re having two sets of important discussions that, I would argue, are intimately connected. The joining of these two discussions primes us for the instant public capitalism moment. The first discussion surrounds the wonky topic of public options.<sup>258</sup> Public options involve the government acting entrepreneurially, offering a good or service that the Market already provides, albeit in ways that many deem unsatisfactory.<sup>259</sup> The “Public Option” refers to a key—and by some

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253. See Alan S. Blinder, *The Free-Trade Paradox: The Bad Politics of a Good Idea*, *Foreign Aff.* (Jan./Feb. 2019), <https://www.foreignaffairs.com/articles/2018-12-11/free-trade-paradox> (on file with the *Columbia Law Review*).

254. See Sorkin, *supra* note 144, at 529–39.

255. See Drury D. Stevenson & Nicholas J. Wagoner, *FCPA Sanctions: Too Big to Debar?*, 80 *Fordham L. Rev.* 775, 809–11 (2011) (suggesting that one reason why government contractors are not only not penalized but also allowed to deliver below-quality services or charge excessive fees is because the United States has become too dependent on those contractors); see also David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 *Calif. L. Rev.* 393, 418–21, 455–56 (2008) (describing the difficulties that government agencies would likely face were they to seek to extricate themselves from long-term government contracts).

256. See Kashmir Hill, *I Cut the ‘Big Five’ Tech Giants from My Life. It Was Hell*, *Gizmodo* (Feb. 7, 2019), <https://gizmodo.com/i-cut-the-big-five-tech-giants-from-my-life-it-was-hel-1831304194> [<https://perma.cc/Q6DP-NCVN>].

257. See *supra* section III.A.1.

258. See generally Sitaraman & Alstott, *supra* note 17.

259. *Id.* at 2.

accounts quite popular<sup>260</sup>—but ultimately abandoned,<sup>261</sup> feature of the Affordable Care Act.<sup>262</sup> Pursuant to that public option provision, the federal government would have created and run a health insurance entity to compete with private health insurance companies.<sup>263</sup> Undeterred by the public option’s initial defeat, some legislators continue to back the plan<sup>264</sup>—and champion additional public options, such as the one recently floated by Senator Elizabeth Warren to create a government-run pharmaceutical plant. Warren’s proposed plant would manufacture generic drugs and sell them at cost, making those drugs far more affordable and pressuring private pharmaceutical companies to lower their prices or else lose market share.<sup>265</sup>

The second discussion centers on corporate social responsibility (CSR). An all-but-dormant topic in the United States just a decade or so ago, CSR is now hotly discussed in many, if not most, boardrooms—and touted in ads and marketing materials directed at customers, employees, and business partners alike.<sup>266</sup> Put plainly, CSR purports to broaden

260. Polling generally showed solid support for the original public option. See, e.g., Press Release, Quinnipiac Univ., U.S. Voters Back Public Insurance 2-1, But Won’t Use It, Quinnipiac University National Poll Finds (July 1, 2009), <https://poll.qu.edu/national/release-detail?releaseid=1344> [<https://perma.cc/NP78-JR77>].

261. Manu Raju, Lieberman: I’ll Block Vote on Reid Plan, Politico (Oct. 27, 2009), <https://www.politico.com/story/2009/10/lieberman-ill-block-vote-on-reid-plan-028788> [<https://perma.cc/38P9-RP7C>] (noting that then-Senator Lieberman’s promise to eliminate the public option from the Affordable Care Act “confirmed that [Senate sponsors were] short of the 60 votes needed to advance the bill”).

262. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 25, 26, 29, and 42 U.S.C.).

263. Sitaraman & Alstott, *supra* note 17, at 210–11.

264. See, e.g., Public Option Deficit Reduction Act, H.R. 261, 113th Cong. (2013); Ronald Brownstein, The Democratic Push for a ‘Public Option on Steroids’, Atlantic (Apr. 26, 2018), <https://www.theatlantic.com/politics/archive/2018/04/health-care-public-option-medicare/558965/> (on file with the *Columbia Law Review*); Peter Sullivan, Dems Introduce Public Option for ObamaCare, Hill (Oct. 17, 2017), <https://thehill.com/policy/healthcare/355840-dems-introduce-bill-for-public-option-for-obamacare> [<https://perma.cc/VYQ3-FR7R>].

265. Alex Thompson & Sarah Karlin-Smith, Warren Bill Would Get Feds into Generic Drug Manufacturing, Politico (Dec. 17, 2018), <https://www.politico.com/story/2018/12/17/elizabeth-warren-bill-drug-manufacturing-prices-1067916> [<https://perma.cc/U8UJ-HC8D>].

266. Corporate statements by American Express, ExxonMobil, and Microsoft provide some examples. See Corporate Responsibility Reports, American Express, <https://about.americanexpress.com/corporate-responsibility-reports> [<https://perma.cc/SKD4-B5XX>] (last visited Oct. 4, 2019); ExxonMobil Named Best Overall Company in Corporate Social Responsibility (CSR), ExxonMobil (Jan. 20, 2016), <https://corporate.exxonmobil.com/en/company/worldwide-operations/locations/nigeria/news-releases/exxonmobil-named-best-overall-company-in-csr> [<https://perma.cc/A7A2-C736>]; CSR, Microsoft, <https://www.microsoft.com/en-us/corporate-responsibility> [<https://perma.cc/4H9L-WJNW>] (last visited Oct. 7, 2019). Forbes lists the “Top 10” socially responsible firms. See Karsten Strauss, The 10 Companies with the Best CSR Reputations in 2017, Forbes (Sept. 13, 2017), <https://www.forbes.com/sites/karstenstrauss/2017/09/13/the-10-companies-with-the-best-csr-reputations-in-2017/> [<https://perma.cc/A3YK-S3U5>]. And consultancy firms market themselves to firms seeking to bolster CSR. See Tracey Keys, Thomas W. Malnight & Kees van der Graaf, Making the Most of Corporate Social Responsibility, McKinsey Q. (Dec. 2009),

corporate aims beyond the heretofore exclusive goal of profit maximization—prompting, obligating, and empowering managers to think more broadly about a firm’s role and responsibilities vis-à-vis employees, customers, and the general public. Indeed, in August 2019, the powerful Business Roundtable (comprised of the CEOs of the biggest American corporations and chaired by Wall Street heavyweight Jamie Dimon<sup>267</sup>) did nothing less than redefine the purpose of a corporation, deemphasizing profits and recognizing that “Americans deserve an economy that allows each person to succeed through hard work and creativity and to lead a life of meaning and dignity.”<sup>268</sup>

Though CSR is looked upon with skepticism in many corners of the American legal academy<sup>269</sup> and is dismissed by many as mere virtue-signaling, even a modest reorientation of the American business mindset may prove momentous.<sup>270</sup> If nothing else, the more firms take pains to insist that they are socially responsible, the more they may well be held to their word.<sup>271</sup>

Obviously, both public options and CSR are worthy of book-length treatments. Yet, for my purposes, a more narrow, superficial inquiry ought to suffice. To advance our understanding of public capitalism, what’s important is tying public options and corporate social responsibility together, and showing how, in a way, they’re two sides of the same coin: The State is recognizing that it needs to be more commercially oriented, and the Market is appreciating that it needs to be more public-regarding.

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<https://www.mckinsey.com/featured-insights/leadership/making-the-most-of-corporate-social-responsibility> [<https://perma.cc/M8L9-AHDN>].n

267. See Board of Directors, Bus. Roundtable, <https://www.businessroundtable.org/about-us/board-of-directors> [<https://perma.cc/LE43-EYDS>] (last visited Oct. 3, 2019).

268. Statement on the Purpose of a Corporation, Bus. Roundtable (Aug. 19, 2019), <https://opportunity.businessroundtable.org/wp-content/uploads/2019/09/BRT-Statement-on-the-Purpose-of-a-Corporation-with-Signatures-1.pdf> [<https://perma.cc/3VGP-NRDT>].

269. See, e.g., D. Gordon Smith, Response: The Dystopian Potential of Corporate Law, 57 *Emory L.J.* 985, 994–1005 (2008) (arguing that market constraints on corporate decision-makers limit the influence of “progressive corporate law” movements such as CSR).

270. See McGregor, *supra* note 193 (describing Business Roundtable’s deemphasis on profit maximization). Fortune Global 500 firms spend approximately \$20 billion per year on CSR-furthering measures. Stephan Meier & Lea Cassar, Stop Talking About How CSR Helps Your Bottom Line, *Harv. Bus. Rev.* (Jan. 31, 2018), <https://hbr.org/2018/01/stop-talking-about-how-csr-helps-your-bottom-line> [<https://perma.cc/2BL5-NV9P>]. Eighty-two percent of the S&P 500 published CSR reports in 2016, up from just twenty percent in 2011. Governance & Accountability Inst., Inc., Flash Report: 82% of the S&P 500 Companies Published Corporate Sustainability Reports in 2016, 3BL Media (May 31, 2017), <https://3blmedia.com/News/Flash-Report-82-SP-500-Companies-Published-Corporate-Sustainability-Reports-2016> [<https://perma.cc/7XNT-HPDY>].

271. Libby MacCarthy, New Report Reveals 86% of US Consumers Expect Companies to Act on Social, Environmental Issues, Sustainable Brands (May 18, 2017), <https://sustainablebrands.com/read/marketing-and-comms/new-report-reveals-86-of-us-consumers-expect-companies-to-act-on-social-environmental-issues> [<https://perma.cc/WWV9-B9AA>].

5. *Unbundling Transactional Relationships*. — Further, we're at a moment when social and technological changes are enabling us to unbundle our already highly transactional relationships.<sup>272</sup> Everything has a price, and our interactions are (or are at least perceived as) one-off arrangements. This is quite apparent in commercial settings. We're abandoning the old municipal cab companies for any old Prius with an Uber or Lyft sticker on the dash. We're jettisoning mega-Marriotts, fixtures of every city's skyline, for random Airbnb flats. And we're eschewing the big box and department stores for eBay, Etsy, and Amazon, themselves seemingly huge, monolithic marketplaces but ones that are actually comprised of thousands of no-name and readily interchangeable vendors.

The same is true in more social spaces. There has long been a decline in civic connectivity, memorably depicted in Robert Putnam's *Bowling Alone*.<sup>273</sup> But, in some respects, that decline feels less consequential these days. Today I can bowl alone and not feel especially isolated or vulnerable—especially if I share my scores, shoes, and suds via Facebook or Instagram. More broadly, instead of having to forge ties with neighbors and engaging in nonmonetary exchanges of, say, neighborly assistance, we're contacting some dude on Task Rabbit to move a couch or mount a basketball hoop. Instead of fully immersing ourselves in our physical community to build friendships, develop business relationships, and find potential mates, we're chatting up some disembodied @s on Twitter, surfing LinkedIn, and swiping through Tinder profiles. And instead of being long-term repeat players with friends and coworkers, taking turns picking up a dinner check or bar tab, now everything can be resolved immediately—*no need for a second meal!*—and to the precise penny, via services like Venmo.

In addition, any number of previously packaged goods and services are becoming unbundled, thus further underscoring the increasing granularity of our commodified existences and further facilitating our ability to engage in one-off, often D.I.Y. mixing and matching. Consider, for instance, the transformation of the television industry, with many viewers cutting the cord to the once-unshakable mainstay—cable TV—in favor of a handful of highly curated streaming services. The same is substantially true in commercial airline travel. Not too long ago there were two, then three classes of tickets—and that was all.<sup>274</sup> Now there are four or five,<sup>275</sup>

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272. Cf. Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* (2012) (describing “the role and reach of markets in our social practices, human relationships, and everyday lives”).

273. Robert D. Putnam, *Bowling Alone* (2000).

274. The History of Airline Classes and Cabins, *Travel Insider* (Sept. 29, 2016), <https://blog.thetravelinsider.info/2016/09/history-airline-classes-cabins.html> [<https://perma.cc/PW6V-J6GX>].

275. A.W., *America's Airlines Are Introducing a Class Below Economy*, *Economist* (Feb. 23, 2016), <https://www.economist.com/gulliver/2016/02/23/americas-airlines-are-introducing-a-class-below-economy> [<https://perma.cc/R6CJ-NLFX>].

plus a bewildering array of separate add-on upgrades: aisle seats, exit row seats, closer-to-the-front-of-the-plane seats, and even the highly coveted earlier boarding zones. Plus, there are separate fees for baggage, wi-fi, movies, and—of course—anything more nourishing than a tiny bag of pretzels.<sup>276</sup>

Why are these phenomena worth highlighting? They underscore and broaden three ideas: First, commodification is pervasive, unremarkable, and highly individuated. Second, unbundling is both cultural and technological, with astonishing advances in big data, smart algorithms, and whatnot lowering the transaction costs and heightening the advantages of unbundling. Third, as a result of the newfound ease of unbundling, there is less institutional or brand loyalty and thus a concomitant lowering of expectations that one has to (ever) take the bad with the good—as is the case with general taxes, boring neighbors whom you nevertheless invite to your parties because you like to borrow their power tools, or the one-size-fits-all airline ticket or CATV package that saddles you with an overpriced, bland meal or with a dozen or so home shopping channels, respectively. This individuation is, to be clear, precisely the endgame of such things as patriotic philanthropy (as a tailored alternative to general taxes). We won't want to pay—and, perhaps in time, we won't be forced to pay—for the full slate of government offerings. Instead we'll mix and match, insisting government provide us with an à la carte menu and supporting only those programs that spark joy. And, to return to the Chrismukkah leitmotif (and at the risk of sounding a choleric cry of humbug), obviously the more the winter holidays are about individuated, transactional exchanges, the easier it is to lump them together as indistinguishable gift-giving bonanzas.

6. *Toggling*. — All of the above dynamics facilitate psychic, physical, and linguistic toggling, enabling us to shift between state and market actors as we have long shifted between, say, state and federal courts (or between courts in different circuits); between state and federal regulatory agencies; and between private, for-profit firms offering substantially similar goods or services. Toggling between public and private actors throughout much of the twentieth century was a more complicated undertaking, if for no other reason than because state and market actors largely stayed in their respective lanes. That is to say, the two sets of actors were fundamentally different with respect to the tools they used, the goals they prioritized, and the processes they followed. Far from the Pepsi challenge, competition across the modern liberal public-private divide was more like choosing between a Montessori school and a military academy. Now, however, toggling between agencies and businesses is much more straightforward,

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276. Tim Wu, *Why Airlines Want to Make You Suffer*, *New Yorker* (Dec. 26, 2014), <https://www.newyorker.com/business/currency/airlines-want-you-to-suffer> (on file with the *Columbia Law Review*) (describing all the surcharges airlines impose on everything from seat assignment to food to entertainment).

as state and market actors can and do share tools, goals, and decisionmaking protocols.

Indeed, one can more readily alternate between religious traditions that are seen as alike, and that readily borrow from each other's spiritual and liturgical playbooks. The same seems to be true when alternating between the State and Market when they're seen as close substitutes for one another. Toggling is further made possible by a skeptical, pragmatic understanding of power—and the corresponding loss of faith in the purity of the State, the Market, or both. And, last, given the unbundled and granularly transactional nature of our social, political, and economic intercourse, it might be altogether unreasonable to expect us to stop short of being transactional across the old and increasingly blurred public-private divide. Rather, we can pick and choose between state and market solutions. And we can call upon government or firms to meet our particular needs, be they sovereign or commercial, in, presumably, the most efficient manner (just as a program like Waze directs us where we need to go in the fastest possible way, regardless of the various roads' attributes or characteristics).

Consider, for example, how readily we slide between our identities as citizens and consumers. We insist government be more commercial in one context and, in the very next moment, ask corporations to be more sovereign-like and public-regarding—that is, to do more to police, self-regulate, invite public input, and act transparently. Perhaps this is why President Trump seemingly struck a nerve when he attacked the Postal Service for giving what he (questionably) saw as too generous of a shipping rate to Amazon.<sup>277</sup> UPS wouldn't subsidize Amazon, so why should we?<sup>278</sup>

Likewise, we call upon Twitter (rather than the FTC, limited as it is by, among other things, the First Amendment) to do more content policing;<sup>279</sup> and Airbnb and Uber (rather than, say, clunky or politically or jurisdictionally constrained government regulators) to punish those engaging in seemingly discriminatory practices.<sup>280</sup> Airbnb does not, among other things, have to furnish its hosts with constitutional due process

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277. Steven Overly, Treasury Proposes Postal Changes After Trump Attacks on Amazon, *Politico* (Dec. 4, 2018), <https://www.politico.com/story/2018/12/04/us-postal-service-amazon-trump-1044592> [<https://perma.cc/SGZ8-KSD2>]; Nick Wingfield, Is Amazon Bad for the Postal Service? Or Its Savior?, *N.Y. Times* (Apr. 4, 2018), <https://www.nytimes.com/2018/04/04/technology/amazon-postal-service-trump.html> [<https://perma.cc/6FZS-T644>].

278. Note that not losing money off of Amazon isn't the same thing as profiting off of Amazon—and hence a recent Treasury report directs the Postal Service to “price packages ‘with profitability in mind.’” Overly, *supra* note 277.

279. See, e.g., Hamza Shaban, Twitter Bans Dehumanizing Posts About Religious Groups, *Wash. Post* (July 9, 2019), <https://www.washingtonpost.com/technology/2019/07/09/twitter-bans-dehumanizing-posts-about-religious-groups/> (on file with the *Columbia Law Review*); Shackford, *supra* note 196.

280. See Adam Chandler, Airbnb Challenges Its Hosts to Be Less Racist, *Atlantic* (Sept. 8, 2016), <https://www.theatlantic.com/business/archive/2016/09/airbnb-racism/499208/> (on file with the *Columbia Law Review*).

before meting out various punishments, such as suspension or termination. Nor is Airbnb limited to constitutionally recognized suspect classifications when crafting its nondiscrimination policies.<sup>281</sup>

Thus, in any given instance, we may want the Postal Service to be more profit-maximizing. We may want government student loan programs, which some in Congress accuse of pulling in huge “profits” at the expense of young grads struggling to make their loan repayments,<sup>282</sup> to be more public-regarding. And we may want Facebook to function like some sort of benevolent dictatorship, aggressively regulating hate speech and speech designed to interfere with the democratic process.<sup>283</sup>

Toggling of the sort just described has the potential to engender great competition between the legacy public and private sectors. We may shift, or merely threaten to shift, our loyalty from state actors to firms—with the hope that the Market can be a more dynamic or more receptive conduit of democratic will or democratic norms (and that the heretofore unresponsive State will follow suit). And we may do the same in the converse direction, from the Market to government, with a similar hope that the government might be a more socially responsible market participant (and that firms will take the hint and become more socially responsible too). As such, we may play Uber and the municipal Taxi & Livery Commission (or FedEx and the Postal Service) off one another.<sup>284</sup> And we may, as we seemingly already do, look to Apple to protect us from

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281. See *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936–37 (1982) (emphasizing that private firms aren’t typically state actors bound by the restrictions that the Constitution places on governmental officers and offices); William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 *Harv. L. Rev.* 1821, 1845 (2016) (“[T]he Constitution imposes numerous restrictions on actions by government that it does not impose on private actors . . .”).

282. See Letter from Elizabeth Warren, Tammy Baldwin, Richard Blumenthal, Sherrod Brown, Edward J. Markey & Jeffrey A. Merkley, U.S. Senators, to Arne Duncan, U.S. Sec’y of Educ. (Feb. 25, 2015), [http://www.warren.senate.gov/files/documents/2015\\_25\\_02\\_Letter\\_to\\_Secretary\\_Duncan\\_re\\_Student\\_Loan\\_Profits.pdf](http://www.warren.senate.gov/files/documents/2015_25_02_Letter_to_Secretary_Duncan_re_Student_Loan_Profits.pdf) [<https://perma.cc/28N6-3SMK>].

283. See *supra* section II.B.

284. See, e.g., Jon D. Michaels, *All the President’s Spies: Private-Public Intelligence Partnerships in the War on Terror*, 96 *Calif. L. Rev.* 901, 914–16 (2008) (describing how the Postal Service, unlike FedEx, won’t turn over parcels to law enforcement officials absent a court order); Hope Yen, *Package Wars: Postal Service Offers Next-Day Sunday Delivery*, *Seattle Times* (Nov. 1, 2017), <https://www.seattletimes.com/business/postal-service-eyes-next-day-sunday-delivery-for-holidays/> [<https://perma.cc/92DX-8X4P>]; Daniel Flatley, *Unable to Beat Them, Cabs Join Uber and Lyft in Ride Sharing*, *Bloomberg* (Nov. 7, 2017), <https://www.bloomberg.com/news/articles/2017-11-07/unable-to-beat-them-cabbies-join-uber-and-lyft-in-ride-sharing> (on file with the *Columbia Law Review*).



the peering gaze of the feds<sup>285</sup>—and to the feds to protect us from the peering gaze of Apple.<sup>286</sup>

B. *Public Capitalism's Forerunners?*

I've already acknowledged that, as a historical matter, we've witnessed earlier instances of public institutions crossing over and using commercial pathways, and private actors crossing over to take on sovereign roles and responsibilities. This section considers those historical practices and suggests how those practices were products of very different times and reflective of very different legal, political, social, and economic conditions. In short, this section helps reconcile the fact that though State and Market cross-overs are not new, public capitalism is.

1. *Premodern Practices.* — Though fascinating in their own right,<sup>287</sup> eighteenth- and nineteenth-century instances of government acting commercially and firms assuming sovereign responsibilities are not very relevant to today's story. Simply stated, this premodern era was disrupted and supplanted in the twentieth century by transformative constitutional, political, social, and economic developments that promoted separation between the State and Market, specialization within each sector, and competition across sectors.<sup>288</sup> Whatever commingling and crosswiring of sovereign and commercial functions occurred before then was of little moment. At that time, public and private identities were still quite fluid and inchoate. Today's commingling and crosswiring, by contrast, maps onto a fully developed legal and political landscape, defined in large part by State and Market separation and specialization. Thus contemporary public capitalism is of far greater consequence if for no other reason than because it defies and destabilizes central pillars of modern liberal constitutionalism.

2. *Modern-Era Practices I: Welfare Period.* — We of course cannot as readily explain away examples of sovereign–commercial commingling or crosswiring that commenced in modern times. Yet we can draw some insight from the fact that early- and mid-twentieth-century instances of government commercial intercourse and private sovereign engagement

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285. See Ellen Nakashima, *Apple Vows to Resist FBI Demand to Crack iPhone Linked to San Bernadino Attacks*, Wash. Post (Feb. 17, 2016), [https://www.washingtonpost.com/world/national-security/us-wants-apple-to-help-unlock-iphone-used-by-san-bernardino-shooter/2016/02/16/69b903ee-d4d9-11e5-9823-02b905009f99\\_story.html](https://www.washingtonpost.com/world/national-security/us-wants-apple-to-help-unlock-iphone-used-by-san-bernardino-shooter/2016/02/16/69b903ee-d4d9-11e5-9823-02b905009f99_story.html) (on file with the *Columbia Law Review*).

286. See Marrian Zhou, *Congress Presses Apple, Alphabet on Privacy Issues*, CNET (July 9, 2018), <https://www.cnet.com/news/congress-presses-apple-alphabet-on-privacy-issues/> (on file with the *Columbia Law Review*); see also *infra* note 378 and accompanying text.

287. See generally Hockett & Omarova, *supra* note 147, at 108–14 (describing public banking in the newly constituted United States).

288. I make similar arguments about the limited relevance of premodern privatization in Michaels, *Coup*, *supra* note 29, at 23–38.

were not only few and far between but also proved, for the most part, to be short-lived.

For example, many early and mid-twentieth-century government commercial practices were replaced in due time by explicitly command-and-control regulatory programs or tax-and-transfer public-benefit programs. These superseding sovereign programs were more befitting a liberal democratic welfare state (that, among other things, did not want to appear corporatist, fascist, or socialist).<sup>289</sup> They were also more respectful of the integrity of the Market, at least insofar as government market participation often entails direct and—given the State’s abundant financial and regulatory resources—unfair competition.<sup>290</sup>

Other government commercial practices from the early modern era were instead privatized, either explicitly or effectively via deregulation or judicial invalidation, and thus turned over to private actors who traversed exclusively commercial pathways. As for private sovereign engagement in this era, that too fell out of favor, again as result of the State elbowing the firms out of the way—if not expressly prohibiting private sovereign adventurism—and of the Market itself insisting that firms specialize, focusing exclusively on the pursuit of profits.<sup>291</sup>

A few select government commercial practices have, however, proven to be quite durable. Perhaps most prominent among those that have soldiered on is the Tennessee Valley Authority, which sold (and continues

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289. See James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 *Am. J. Comp. L.* 747, 764–73 (1991) (describing the corporatist orientation of early New Deal initiatives); see also Ira Katznelson, *Fear Itself: The New Deal and the Origins of Our Time* 242–60 (2013) (suggesting very different approaches to government intervention in the political economy between the First and Second New Deals).

290. This is, for instance, part of the story behind postal banking. Postal banking was first instituted during the Taft Administration and remained popular until the early 1930s—precisely a span of time when commercial banks were largely underregulated. With the safeguarding of America’s commercial banks via New Deal legislation and regulation, postal banking was pushed to the margins. See Baradaran, *The Other Half*, *supra* note 8, at 183–209; Baradaran, *It’s Time*, *supra* note 8, at 170–72; Weissman, *supra* note 8.

291. For an overview of jurisprudence that understands corporations as “public” in name only and otherwise principally, if not singularly, animated by the aim of profit maximization, see generally Henry Hansmann, *The Ownership of Enterprise* (1996); Lynn Stout, *The Shareholder Value Myth: How Putting Shareholders First Harms Investors, Corporations, and the Public* (2012). It is important to appreciate how carefully and extensively structured corporate commercial interventions became—with all sorts of laws, rules, judicial decisions, and norms defining and demarcating appropriate market participation. E.g., Marc T. Moore, *Corporate Governance in the Shadow of the State* 177–226 (2013). It is likewise important to appreciate how little there was on the books about corporations acting as quasi-sovereigns, except by way of prohibitions and restrictions that further explain why twentieth-century businesses overwhelmingly focused on profit maximization through commercial transactions. See, e.g., Joan MacLeod Heminway, *Shareholder Wealth Maximization as a Function of Statutes, Decisional Law, and Organic Documents*, 74 *Wash. & Lee L. Rev.* 939, 969–71 (2017); cf. *Marsh v. Alabama*, 326 U.S. 501, 507–08 (1946) (requiring company towns to abide by constitutional imperatives).

to sell) electrical power.<sup>292</sup> Of interest, too, are some Progressive Era state enterprises, such as the still-operational Bank of North Dakota<sup>293</sup> and the North Dakota Mill and Elevator Association,<sup>294</sup> as well as the only recently privatized South Dakota Cement Company.<sup>295</sup> Needless to add, there are thousands, if not tens of thousands, of procurement programs for government purchases of goods and services,<sup>296</sup> as well as any number of government land and resource management programs<sup>297</sup> that remain highly commercialized.

Yet, still, comparisons between those old holdouts and today's public capitalism initiatives are attenuated. Government market participation that began early in the modern era was a product of a time when sovereign regulatory and tax-and-transfer options were more limited than they are today. After all, courts well into the New Deal years were still committed to sanctifying private contracts, questioning congressional delegations to agencies, and narrowly construing the Commerce Clause.<sup>298</sup> Other, more recent forms of government market participation—like the takeover and subsequent operation of intercity passenger rail travel (Amtrak)—were

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292. The Tennessee Valley Authority: Damned If You Don't, *Economist* (Apr. 27, 2013), <https://www.economist.com/business/2013/04/27/dammed-if-you-dont> [<https://perma.cc/2298-7AC3>] (describing the TVA as a major, quasi-commercial provider of electricity).

293. See Erik Hardmeyer, Opinion, Why Public Banking Works in North Dakota, *N.Y. Times* (Oct. 1, 2013), <https://www.nytimes.com/roomfordebate/2013/10/01/should-states-operate-public-banks/why-public-banking-works-in-north-dakota> [<https://perma.cc/8T39-HBA3>].

294. See Gretchen Dykstra, Opinion, Pragmatism on the Prairie, *N.Y. Times* (Mar. 30, 2012), <https://www.nytimes.com/2012/03/31/opinion/pragmatism-on-the-prairie.html> [<https://perma.cc/8KG2-89T8>].

295. Bob Mercer, Cement Plant Sale Was to Earn Forever, *Cap. J.* (Dec. 6, 2009), [https://www.capjournal.com/opinions/columnist/cement-plant-sale-was-to-earn-forever/article\\_3c53c092-b20c-5257-ae1b-9ea0fb0902ea.html](https://www.capjournal.com/opinions/columnist/cement-plant-sale-was-to-earn-forever/article_3c53c092-b20c-5257-ae1b-9ea0fb0902ea.html) [<https://perma.cc/R7R9-WGA3>]; see also Charles Hillinger, South Dakota Turns Cement to Cash at State-Owned Plant, *L.A. Times* (Mar. 24, 1986), [http://articles.latimes.com/1986-03-24/business/fi-172\\_1-south-dakota](http://articles.latimes.com/1986-03-24/business/fi-172_1-south-dakota) [<https://perma.cc/Y9DZ-SWVU>]; Denise Ross, S.D. Cement Plant Has Operated 76 Years, *Rapid City J.* (Dec. 23, 2000), [https://rapidcityjournal.com/s-d-cement-plant-has-operated-years/article\\_0421b57b-76c9-5b88-bc90-3005ec51fe5d.html](https://rapidcityjournal.com/s-d-cement-plant-has-operated-years/article_0421b57b-76c9-5b88-bc90-3005ec51fe5d.html) [<https://perma.cc/8EMD-US83>].

296. See generally Ralph C. Nash, Jr., Karen O'Brien-DeBaakey & Steven L. Schooner, *The Government Contracts Reference Book* (4th ed. 2013).

297. For example, the Bureau of Land Management has leasing programs for oil, gas, timber, and grazing. See, e.g., General Oil and Gas Leasing Instructions, Bureau of Land Mgmt., <https://www.blm.gov/programs/energy-and-minerals/oil-and-gas/leasing/general-leasing> [<https://perma.cc/2FS6-39HT>] (last visited Oct. 4, 2019).

298. See Ackerman, *supra* note 27, at 296–98; Howard Gillman, *The Constitution Besieged: The Rise and Demise of Lochner Era Police Powers Jurisprudence* 175–193, 267 n.15 (1993). It was also a period when our constitutional commitment to liberalism wasn't fully established. See Whitman, *supra* note 289, at 752–53, 764–73 (describing some early New Dealers as drawn to corporatist projects).

hatched in moments of crisis.<sup>299</sup> That all such programs weren't subsequently reconstituted as sovereign governmental programs or altogether privatized may bespeak an explicit and carefully articulated preference for continuing to prioritize government market participation. That's certainly the case with most purchasing programs, for which no sovereign, noncommercial alternative is feasible.<sup>300</sup> But just as likely, the continuation of these programs in their vintage, commercialized forms reflects legislators' neglect or indifference, their inability to arrive at a consensus in favor of any one type of reconfiguration (that is, either to convert these programs into sovereign ones or to sell them off), or simple inertia. Surely, legislative impasses play a large role in the TVA maintaining a fair amount of its original shape and orientation. Calls for reform regularly surface, yet there is never anything close to agreement about what specifically should be done.<sup>301</sup> That's also true today with Amtrak and, to an extent, with the USPS. In their current guises, the TVA, Amtrak, and the Postal Service are routinely attacked. But so long as Congress and other stakeholders remain divided on a path forward, no change or reformation is imminent.<sup>302</sup>

Again, longstanding forms of government market participation are very different, at least by my reckoning, from an explicit decision today to (1) create a brand-new government program that eschews sovereign regulatory or welfarist protocols in favor of commercial ones or (2) commercialize an existing government program that heretofore followed a sovereign blueprint.

3. *Modern-Era Practices II: Deregulation and Privatization Period.* — Turning to the late-twentieth century, some would surely say that the broad themes and innovations of this period—privatization, businesslike government, etc.—reflected a very conscious and explicit desire to cross-wire the American political economy. There was, after all, no shortage of instances in which government and private actors seemingly fused, shared, or swapped powers and responsibilities—or otherwise engaged in legal arbitrage across the old public-private divide.<sup>303</sup> But we need to be careful to distinguish what we truly blended from what we just symbolically or

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299. In a moment of crisis, the feds rescued and consolidated twenty private passenger railroad companies all on the verge of imminent collapse. Craig Sanders, *Amtrak in the Heartland* 7–8 (2006).

300. This is one of the many reasons why Senator Elizabeth Warren's drug manufacturing proposal is so provocative. See *supra* note 265 and accompanying text.

301. See, e.g., Philip Bump, *Goodbye, New Deal: Obama Proposes Selling the TVA*, *Atlantic* (Apr. 11, 2013), <https://www.theatlantic.com/politics/archive/2013/04/goodbye-new-deal-obama-proposes-selling-tva/316380/> (on file with the *Columbia Law Review*); Toby Sells, *Senators Fire Back at Trump TVA Proposal*, *Memphis Flyer* (June 22, 2018), <https://www.memphisflyer.com/NewsBlog/archives/2018/06/22/senators-fire-back-at-tump-tva-proposal> [<https://perma.cc/K9QB-NCCQ>].

302. A simple Google search of "Amtrak reform" floods readers with countless proposals, many of which call for wholesale privatization.

303. Michaels, *Pretensions*, *supra* note 110, at 734–39 (describing privatization aimed at exploiting private-public legal-status differentials).

superficially blended. In some very important respects, privatization only accentuates the separate and distinct identities of public and private actors in a liberal constitutional order—and reinforces the separate and distinct pathways that each set of actors travels in that carefully delineated space.

For starters (though only for starters), privatization, as the term is commonly employed around the world, represents a simple transfer of power from public to private hands. When a given function is privatized in that sense, there is little, if any, merging, fusing, or crosswiring. State enterprises are altogether turned over to private actors who then operate via commercial pathways and price things as any other business would.<sup>304</sup> To the extent that the State remains involved, it does so through prototypically sovereign means—by regulating and taxing the newly privatized entity.

Most privatization in the United States is not that type of privatization. Unlike in Europe, East Asia, or Latin America, federal, state, and local governments in the United States never had many state enterprises to sell off. We never had, for instance, a national telecom service, a government-owned-and-operated airline, or national energy or agricultural companies to spin off. So privatization in the United States has been principally a matter of outsourcing *tasks*—that is, hiring private contractors to handle state regulatory and public-benefits responsibilities.<sup>305</sup> Privatization of this sort likewise entails little, if any, crosswiring of the liberal political economy.

Specifically, some private actors working on government contracts perform quintessentially commercial roles—manufacturing, say, tanks or pencils, or offering generic gardening, janitorial, catering, IT, or clerical services to government agencies. These jobs, no matter who staffs them, have always been peripheral to the sovereign work of government. This isn't to say these jobs are in any way less honorable or necessarily less important. Think of the folks who designed and built the stealth fighters. My point is much narrower: that these jobs, whether held by government employees or private contractors, support—and only support—those actually wielding state power.

Other contractors are, to be sure, assigned more central responsibilities. When that's the case, they're effectively subsumed within the state infrastructure, deputized by government officials to advance the State's various *sovereign* projects. Contractors do so by, among other things, drafting rules, conducting research in furtherance of regulatory and welfare programs, monitoring and enforcing compliance, and making

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304. See Daphne Barak-Erez, Three Questions of Privatization, *in* Comparative Administrative Law 493, 494–97 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010) (describing the various practices, including the sale of state assets, that fall under the privatization heading).

305. Michaels, Coup, *supra* note 29, at 95–98 (contrasting the wealth and diversity of British state-owned assets with the paucity of U.S.-owned assets and noting that privatization in the United States has accordingly been largely of the outsourcing variety).

enforcement decisions and public-benefits determinations.<sup>306</sup> Whether you call these contractors state actors, private adjuncts, godsends, or imposters, they are undeniably working at the behest of the State and exercising the authorities granted to them by the State. The contractors may have different incentives from career bureaucrats. They may be bound by different legal, professional, and cultural norms. And they may be perceived as different and even dangerous by the populations they serve.<sup>307</sup> But, for good and ill, they're essentially just an alternative, differentially constituted state workforce. That is to say, they are stand-ins for government workers carrying out sovereign functions. Thus we should think of their involvement—as substitutes or replacements for full-fledged civil servants—as reflecting a *de facto deregulation* of the market for government labor.<sup>308</sup> The genius, or villainy, of privatization is thus often in papering over those very real employment differences, suggesting seamlessness in ways that conceal the fact that the newly deregulated labor force isn't just (purportedly) cheaper or more industrious but also differently motivated and differently accountable.

Indeed, there really isn't any other way to think of contractors in the Deregulation and Privatization period.<sup>309</sup> When Blackwater was operating in Iraq and Afghanistan, the firm wasn't, as a matter of corporate policy, taking it upon itself to make war. And when Corrections Corporation of America ran federal and state prisons, it wasn't acting upon its own authority to incarcerate convicts. In both cases, the firms were serving clients who happened to have been sovereign entities in need of assistance with their sovereign projects. Again, however problematic these firms may be,<sup>310</sup> they're still quite different from private firms that cross over and act as semi-sovereigns over their (own) digital or physical domains.

Last, it is worth considering the Deregulation and Privatization period's embrace of businesslike government. Here too there is a clear commercial component to running the State "like a business."<sup>311</sup> But

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306. *Id.* at 111–14; Verkuil, *supra* note 186, at 18–20 (distinguishing contractors who serve as “rowers” from those who are permitted to “steer” and perform “inherent government functions”).

307. Compare Michaels, *Then and Now*, *supra* note 103, at 1171–74 (describing the different legal and cultural environments inhabited by government workers and contractors and emphasizing how those differences affect the project of public administration), with Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 *U.C. Davis L. Rev.* 133, 135–47 (2012) [hereinafter Volokh, *Privatization*] (underscoring that there are no intrinsic differences between government employees and contractors).

308. Of course, the government is acting commercially when it hires contractors. But that's similar to how the government acts commercially when it hires full-time employees. See Volokh, *Privatization*, *supra* note 307.

309. One reason we continue to be confused is because of the judiciary's reluctance to classify many contractors as state actors. Gillian E. Metzger, *Privatization as Delegation*, 103 *Colum. L. Rev.* 1367, 1419–21 (2003); see also Michaels, *Sovereigns*, *supra* note 19, at 898–99.

310. See, e.g., Dolovich, *supra* note 158; Michaels, *Beyond*, *supra* note 224.

311. Michaels, *Then and Now*, *supra* note 103, at 1152.

businesslike government has for the most part been conceived as an operational project. It has been about transforming how institutions (mainly agencies) are designed; how workers are evaluated, compensated, encouraged, hired, promoted, and fired; how decisionmaking processes are structured; and how budgets and programs are analyzed.<sup>312</sup> Simply stated, these reforms are about running government *like a business*, not running government *as a business*. Such *like-a-business* endeavors were and remain in service of leaner, more corporate-oriented approaches to sovereign governance.<sup>313</sup> And who better to assist with businesslike government than commercial contractors whose incentives to work at peak efficiency are (unlike, the argument goes, those of civil servants) more in keeping with what we'd encounter in the private sector. Thus, again, reliance on private actors is an operational (though obviously value-laden) fix, swapping out one kind of workforce for another. It isn't private actors qua private actors handling sovereign responsibilities, but rather private actors qua differently trained, regulated, and compensated state actors handling state sovereign responsibilities on behalf of the State.

#### IV. PUBLIC CAPITALISM PRACTICED: GOVERNMENT MARKET PARTICIPATION

What's at stake when we pivot from the public-private divide to the sovereign-commercial one? Does it matter whether there is a *recalibration* along the public-private spectrum in favor of greater state sovereign interventions as opposed to a *realignment* that enables greater government market participation? Sovereign and commercial tools, when wielded by the same set of actors, may produce substantially similar outcomes. For that reason, perhaps we shouldn't put too much stock in the fact that government is acting commercially, via market participation, with a frequency and an enthusiasm previously reserved solely for sovereign interventions. After all, we see fads in administrative design all the time, and maybe this pivot is no exception.

Yet as Stanley Surrey's classical work demystifying tax expenditures makes clear, seemingly interchangeable tools may nevertheless look and function quite differently—and those different looks and functions may be legally and politically quite consequential.<sup>314</sup> Surrey's work has considerable purchase here. Many of the case studies characterized in Part II (as various forms of government market participation) could conceivably be achieved using any number of other, more conventionally sovereign tools in the State's rangy toolkit. But how readily—and how forcefully? Would a policy change engineered via regulation, tax-and-transfer welfare programs, or privatization pack the same political punch or, for that matter, dampen the political fallout to a similar extent? Would there be greater or

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312. Id.; cf. Tom C.W. Lin, CEOs and Presidents, 47 U.C. Davis L. Rev. 1351, 1356–61 (2014).

313. See Michaels, Coup, *supra* note 29, at 116, 146–50 (emphasizing that businesslike government may be marshaled for either deregulatory or welfarist purposes).

314. Stanley S. Surrey, Pathways to Tax Reform: The Concept of Tax Expenditures (1973).

fewer legal encumbrances?<sup>315</sup> Indeed, we must be open to the possibility that the government's pivot to commercial tools may affect (1) whether the government intervenes at all; (2) what procedures apply—and thus how quickly, nimbly, and decisively the government may act; (3) what substantive strictures guide, limit, or direct the government's intervention; (4) the relationship among stakeholders (beneficiaries, competitors, affected third parties, etc.); and (5) the normative orientation of the intervention.<sup>315</sup> Let's consider each in turn.

A. *Whether the Government Intervenes at All*

Quite possibly, in order for the public to support (or readily support) some government interventions today, those interventions must have commercial packaging. That is to say, the government may need to appear entrepreneurial<sup>316</sup>—as a savvy market participant rather than as a meddlesome regulator or well-meaning but wasteful dispenser of welfare. By adopting this entrepreneurial posture, and employing the entrepreneur's tools, the government may either more easily justify its reentering the picture, after years of deregulation or privatization—or simply justify its continued involvement, notwithstanding lingering or newfound opposition to big, expensive, or coercive (sovereign) government.

Recall some of our case studies. In the early months of what became the global financial crisis, the American public seemingly wasn't in the mood for an old-school bailout, a straightforward cash infusion to rescue those who played fast and loose with "our money" for too long.<sup>317</sup> Under those circumstances, government market participation in the form of purchasing controlling stakes in AIG and GM may have been the dispositive factor—the only palatable intervention. We may, of course, query whether the public was being duped, that is, whether government market participation was a bait-and-switch, tricking the American public into embracing big government. But that's a different question from whether the government purchase—the *commercial transaction*—was the most politically feasible way to keep firms deemed critical to the world economy afloat.

A similar story may be told about contemporary efforts to raise government revenue. In the often-suffocating anti-tax climate we find

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315. Of course, there are parallels here to privatization, which offered easier paths forward than did conventional regulation. And there are parallels here too to administrative rulemaking, which offered easier paths forward than did congressional lawmaking. Cf. Richard A. Posner, *The Rise and Fall of Administrative Law*, 72 *Chi.-Kent L. Rev.* 953, 953 (1997) (emphasizing the efficiencies associated with the rise of administrative governance).

316. Cf. Philip J. Weiser, *Entrepreneurial Administration*, 97 *B.U. L. Rev.* 2011 (2017) (stressing the importance of entrepreneurial approaches to public and private governance).

317. See, e.g., Doyle McManus, *Americans Reluctant to Bail Out Wall Street*, *L.A. Times* (Sept. 24, 2008), <https://www.latimes.com/archives/la-xpm-2008-sep-24-na-econpoll24-story.html> (on file with the *Columbia Law Review*).



ourselves in,<sup>318</sup> government officials may have little choice but to turn more aggressively in the direction of patriotic philanthropy. This is because soliciting voluntary donations to support specific public causes may prove far more acceptable to those vehemently opposed to the coercive, sovereign imposition of general taxes.<sup>319</sup>

There even may be a case to be made that the Postal Service's hyper-commercial orientation is a politically necessary corrective—necessary, that is, to ward off calls to dismantle the state enterprise altogether.<sup>320</sup> Though the USPS has long been a government market participant, there is seemingly ever greater pressure on the Postal Service to operate as a profit-maximizer would. This pressure is evidenced by a recent Treasury report insisting that the Postal Service operate “with profitability in mind”<sup>321</sup>—and comes at a moment when the Postal Service weathers attacks from President Trump, who accuses the federal courier of not driving hard enough bargains with its customers.<sup>322</sup> It is also evidenced by Trump's decision to withdraw the Postal Service from the Universal Postal Union, an international organization whose members have long committed to subsidizing the shipping costs of letters and packages originating from addresses in the developing world.<sup>323</sup> Hence the intensification of the Postal Service's commercial engagement may be yet another example of government justifying its programming to a political community skeptical of both old-school public administration and recent forays into privatization.

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318. See Suzanne Mettler, *The Submerged State: How Invisible Government Policies Undermine American Democracy* 43–44 (2011) (describing Americans' often irrational hostility to taxes); Waldman, *Nearly All*, *supra* note 97 (characterizing the power and influence of anti-tax special interest groups in contemporary American politics).

319. Perhaps the Carlyle Group's David Rubenstein is the best example of someone prominent in both the realm of patriotic philanthropy and (anti-)tax lobbying. Though Rubenstein has given tens of millions of dollars to support the National Archives, he's also been at the forefront of lobbying campaigns to prevent the closing of a so-called billionaires' tax loophole. In fact, he explicitly connects those two worlds, admitting that his lighter tax burden enables him to be so generous. See Alec MacGillis, *The Patriot: How Philanthropist David Rubenstein Helped Save a Tax Break Billionaires Love*, *ProPublica* (Mar. 7, 2016), <https://www.propublica.org/article/how-david-rubenstein-helped-save-the-carried-interest-tax-loophole> [<https://perma.cc/GUV7-BVW4>].

320. Eric Katz, *Trump's Postal Privatization Plan Met with Bipartisan Rebuke in Congress*, *Gov't Executive* (June 26, 2018), <https://www.govexec.com/management/2018/06/trumps-postal-privatization-plan-met-bipartisan-rebuke-congress/149306/> [<https://perma.cc/K3AX-5Q83>].

321. *Trump Task Force Proposes Major Postal Service Overhaul*, *CBS News*, <https://www.cbsnews.com/news/trump-task-force-proposes-major-postal-service-overhaul/> [<https://perma.cc/X25E-TVFE>] (last updated Dec. 4, 2018).

322. See Overly, *supra* note 277 (describing the President's critique of the USPS's relationship with Amazon).

323. Jen Kirby, *Here's Why Trump Threatened to Pull Out of a 144-Year-Old Postal Treaty*, *Vox* (Oct. 19, 2018), <https://www.vox.com/2018/10/19/17996378/trump-china-universal-postal-union-treaty> [<https://perma.cc/BF28-MYZT>].

Lastly, think once more about public options. During World War II and again in the 1970s, the United States experimented with price controls.<sup>324</sup> Today, however, such measures would seem altogether anathema. But public options may have a similar effect. Public options are of course packaged differently and are likely far more palatable insofar as the government is not per se capping retail banking fees or private medical costs. Yet by entering the commercial fray and offering competing, more affordable versions of retail goods and services,<sup>325</sup> government may well force prices down.

B. *What Procedures Apply*

There may also be procedural advantages associated with the State acting commercially instead of as a sovereign. After all, the protocols surrounding government market participation are in many respects (and at least for the time being) less onerous than those surrounding the design and implementation of command-and-control regulations, tax-and-transfer welfare programs, and even privatization and outsourcing initiatives.

Consider conventional sovereign tools. Notice-and-comment rule-making involves public notice of a proposed rule or rule change; opportunities for public comment on the proposed rule or rule change; obligations on the part of the agency to develop a comprehensive record (which includes serious consideration of the public's material comments); and—almost invariably—a legal defense of the agency's statutory interpretations, its factual predicates, and its policy choices.<sup>326</sup> These extensive requirements—hallmarks of deliberative, pluralistic, accountable public administration—are often bemoaned.<sup>327</sup> Indeed, some go as far as to say that these requirements are sufficiently onerous that they deter even the most ambitious of regulators from proposing new or adjusting existing rules of general applicability. The end result, these critics claim, is ossification and regulatory paralysis.<sup>328</sup> Some urgently needed rules never

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324. See Emergency Price Control Act of 1942, Pub. L. No. 77-421, 56 Stat. 23 (codified as amended at 50 U.S.C. (2012)); Exec. Order No. 11,615, 36 Fed. Reg. 15,727 (Aug. 17, 1971).

325. This is most apparent with the public option for health insurance. The popularity of such plans is hard to gauge given how politically toxic or altogether ill-informed many discussions of the Affordable Care Act seem to be. See, e.g., Ashley Killough & Gregory Wallace, Poll: 'Obamacare' vs. 'Affordable Care Act', CNN: The Political Ticker (Sept. 27, 2013), <http://politicalticker.blogs.cnn.com/2013/09/27/poll-obamacare-vs-affordable-care-act/> [<https://perma.cc/9X3V-2M9Q>]; Ezra Klein, Obamacare's Most Popular Provisions Are Its Least Well Known, Wash. Post (Mar. 22, 2013), <https://www.washingtonpost.com/news/wonk/wp/2013/03/22/obamacares-most-popular-provisions-are-its-least-well-known> (on file with the *Columbia Law Review*).

326. See 5 U.S.C. §§ 553, 702, 706 (2012).

327. See Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345 (2019) (criticizing administrative procedure as unhelpfully onerous).

328. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59 (1995).

get off the ground, while other, already promulgated rules, in desperate need of updating, never get revised.

Other sovereign tools labor under similar, if not greater, procedural burdens. Administrative adjudication—wherein regulatory policy is shaped and refined through the resolution of individual disputes—has long been seen as slow, tedious, and inflexible, even more so than notice-and-comment rulemaking.<sup>329</sup> Today, in addition to the familiar, long-standing procedural burdens imposed by Congress and the courts, we encounter a new and powerful set of structural challenges to the constitutionality of agency adjudicators—challenges that put the entire project of administrative adjudication in some jeopardy.<sup>330</sup>

Privatization or outsourcing is generally presented and promoted as a streamlining measure—a neoliberal workaround to traditional, procedurally encumbered public administration. This is true, to an extent.<sup>331</sup> But in the process of transferring state authority to private contractors, conscientious government officials must expend considerable time drafting contracts, evaluating bids, and then monitoring the winning contractor.<sup>332</sup> Additionally, in order to secure favorable contracting prices, agencies may have to agree to lock-in certain arrangements via contract, arrangements that then may not be quickly or inexpensively revised.<sup>333</sup>

Beyond these particular claims about how contracting is not necessarily as nimble as advertised, a larger point bears mentioning: When outsourcing is touted as a streamlining measure, it is touted as such vis-à-vis the baseline default of procedurally burdensome sovereign public (bureaucratic) administration—legislation, regulation, or adjudication. So, even if outsourcing is procedurally less onerous than sovereign governing, it doesn't follow that *government by contract* is necessarily procedurally less onerous than at least some forms of government market participation.

Indeed, government market participation may on occasion operate in the procedural equivalent of a duty-free zone. This isn't true across the board. Government procurement of goods and services, surely the most heavily practiced form of government market participation, is thoroughly

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329. Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 684 (D.C. Cir. 1973) (explaining the shortcomings of case-by-case adjudication and suggesting that rulemaking is more efficient).

330. E.g., Lucia v. SEC, 138 S. Ct. 2044, 2053–55 (2018). See generally Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

331. Michaels, *Pretensions*, supra note 110, at 734–39, 745–50 (describing why outsourcing may be an expedient alternative to conventional public administration).

332. For thick descriptions of the costs associated with careful, conscientious contracting, see Donahue, supra note 112, at 108–09; Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 634–35 (2001).

333. See supra notes 49, 130 and accompanying text.

regulated,<sup>334</sup> as is postal governance.<sup>335</sup> But for many other forms of government market participation, including quite a few of our public capitalism case studies, the decision to use commercial pathways unburdens the government with respect to at least some of the “hassles” (not to mention democratic and legal safeguards) we associate with more conventional forms of sovereign public administration.

Recall the way in which the U.S. government used its controlling shares to impose corporate governance, labor, and environmental reforms on the likes of GM and AIG.<sup>336</sup> Government regulation via government market participation was largely swift and dictatorial. No doubt government officials found this preferable to regulation via rulemaking, which would have taken considerably longer and would have likely been either watered down as a result of political compromises or altogether scuttled by cagey lobbyists or lawyers. Legislation would likewise have run a high risk of being compromised if not killed by various factions, parties, and special interests holding near vetoes over the passage of new laws.<sup>337</sup> And even assuming Congress could have quickly authorized a cash bailout, such a bailout would nevertheless have left the government with far fewer opportunities to prescribe and enforce various public-regarding reforms, if for no other reason than because the companies were quite literally insolvent and thus effectively judgment-proof against claims of noncompliance.

But by using corporate power—the government’s majority ownership of AIG hovered around ninety percent<sup>338</sup>—the government could, and indeed did, effectuate change by fiat, achieving its regulatory and revenue goals without worrying much about judicial review, public input, or even public notice (except of the sort the government was proud to announce).<sup>339</sup> Broadly speaking, scholars characterized commercialized

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334. See Federal Acquisition Regulation, 48 C.F.R. §§ 1.000–1.707 (2018); Nash et al., supra note 296; see also supra notes 332–333 and accompanying text. The sheer size of these regulatory codes bespeaks how heavily regulated U.S. procurement law is.

335. See 39 C.F.R. §§ 3000–3060 (2018) (setting forth rules for the operation of the Postal Regulatory Commission).

336. See supra section II.A.2.

337. See, e.g., Terry M. Moe, *The Politics of Bureaucratic Structure*, in *Can the Government Govern?* 267, 274–75 (John E. Chubb & Paul E. Peterson eds., 1989) (describing hurdles that impede lawmaking).

338. Solomon, supra note 142 (reporting that the U.S. government owned 92.1% of AIG common stock).

339. See Templin, supra note 144, at 1185–86; Verret, supra note 144, at 303–05; see also Michaels, *Coup*, supra note 29, at 110 (remarking that the U.S. government “is *buying* rather than *legislating* compliance, eschewing the thickly constrained sovereign regulatory tools of constitutional and administrative governance for the more nimble, forceful commercial instruments that Treasury paid dearly to wield”). AIG did successfully sue the government for the latter’s heavy-handedness. But because AIG would have gone under absent the government’s equity investment, the court awarded AIG zero damages. See Aaron M. Kessler, *Ex-A.I.G. Chief Wins Bailout Suit, but Gets No Damages*, N.Y. Times: Dealbook (June 15, 2015), <https://www.nytimes.com/2015/06/16/business/dealbook/>

interventions of this kind as “regulation by deal,”<sup>340</sup> a prospect that might unnerve administrative lawyers and constitutional scholars but surely seems attractive to world-weary government officials frustrated by the various ways sovereign interventions are procedurally encumbered.

Consider, too, patriotic philanthropy, an even more concrete example involving procedural arbitrage across the sovereign–commercial divide.<sup>341</sup> Once Congress (or a state or municipal legislature) establishes foundations authorized to solicit and receive charitable contributions, government agencies, departments, commissions, and boards partner with those foundations, encourage fundraising, and ultimately use the donations to help fund any number of programs or initiatives. The procedural advantages are twofold. First, fundraising is far less procedurally onerous than is, say, passing legislation that introduces new taxes or that raises marginal tax rates. Second, legislatively appropriated money is, quite often, subject to any number of substantive and procedural requirements, including limitations as to how one goes about spending appropriated money.<sup>342</sup> By contrast, money garnered through fundraising isn’t necessarily subject to the same or similar conditions. There are, to be sure, laws regulating foundations and charitable giving, and donors may impose conditions of their own.<sup>343</sup> But, by and large, these encumbrances may be (and in some cases certainly are) less burdensome than enacting legislation, first to impose additional taxes and then to appropriate the funds raised through those additionally imposed taxes.

C. *What Substantive Strictures Guide, Limit, or Direct Government Interventions*

Substantive rules may likewise differ as they apply to sovereign and commercial interventions. The Supreme Court has, for instance, recognized government market participation exceptions. These exceptions apply in a variety of circumstances, enabling government officials to at times operate unconstrained by otherwise applicable core constitutional prohibitions. Thus restructuring a program or initiative as commercial may, for instance, allow states and localities to skirt the Dormant

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judge-sides-with-ex-aig-chief-greenberg-against-us-but-awards-no-money.html [https://perma.cc/GM8S-SKNX].

340. Davidoff & Zaring, *supra* note 218, at 468.

341. See *supra* section II.A.5.

342. See generally U.S. Gov’t Accountability Office, GAO-17-797SP, Principles of Federal Appropriations Law (2017), <https://www.gao.gov/assets/690/687162.pdf> [https://perma.cc/TS3S-FHA2] (describing the procedures and practices agencies must follow when spending congressionally appropriated funds).

343. For example, Mark Zuckerberg’s \$100 million grant to the Newark, New Jersey, school system came with all sorts of strings attached. Among other things, Zuckerberg’s foundation insisted on having input on personnel and curricular decisions. See Russakoff, *supra* note 182, at 27–29.

Commerce Clause.<sup>344</sup> Similarly, creating and spinning off special government entities—such as parks, transportation, and water districts—may allow those entities to, among other things, defy the bedrock one-person, one-vote rule when electing their leaders.<sup>345</sup> As a result of this departure from democratic representation, policy may more fully (and narrowly) reflect the priorities of those wielding disproportionate voting power—groups that are by and large landed and affluent.<sup>346</sup>

From the vantage point of government officials craving greater dexterity, there are advantages to government running a business *in-house*, as opposed to privatizing it. State-run commercial enterprises may be exempt from some regulations that apply in full to private industry, and thus also apply to whatever contractor the government may use or whatever private outfit may be assigned a previously governmental responsibility.<sup>347</sup> Further, government market participants may be exempt from certain tax burdens placed on private businesses.<sup>348</sup> And, lastly, they may be exempt from certain liabilities that attach to private actors, and that likewise attach to government agencies engaged in sovereign activities.<sup>349</sup> All of this is to say that the total cost (if that matters) of government running its own business rather than privatizing the function may be lower—and may be lower for legal reasons separate and apart from whether the government is a smarter, more creative entrepreneur.

#### D. *How the Government Interacts with Stakeholders*

Perhaps the government's choice to proceed via market participation doesn't offer much by way of procedural or substantive flexibility. It may not offer greater political palatability, either. Instead, market participation

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344. See *Reeves, Inc. v. Stake*, 447 U.S. 429, 436–37 (1980) (recognizing a government market participation exception to the Dormant Commerce Clause).

345. See *Baker v. Carr*, 369 U.S. 186, 206–08 (1962) (articulating the now canonical constitutional principle of one person, one vote).

346. See *Ball v. James*, 451 U.S. 355, 368–71 (1981) (allowing departures from one person, one vote in the case of special districts directed by officials with limited responsibilities and powers); see also Conor Clarke & Henry Hansmann, *Between Public and Private Enterprise* 6 (Jan. 30, 2019) (unpublished manuscript), [https://www.law.columbia.edu/sites/default/files/microsites/contract-economic-organization/files/60\\_-\\_spgs\\_-\\_2019-01-27\\_-\\_to\\_columbia.hansmann.pdf](https://www.law.columbia.edu/sites/default/files/microsites/contract-economic-organization/files/60_-_spgs_-_2019-01-27_-_to_columbia.hansmann.pdf) [<https://perma.cc/D7QH-JVC3>] (explaining that special districts “frequently provide such typically municipal services as drinking water, sewage, fire protection, trash collection, roads, parks, jails, libraries, and hospitals” (footnote omitted)).

347. See, e.g., *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109, 1116 (2015) (reaffirming antitrust immunity for state actors under most circumstances); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 *Harv. L. Rev.* 667, 682–96 (1991) (describing differences between how antitrust laws are applied to state actors and private actors).

348. See *United States v. City of Adair*, 539 F.2d 1185, 1190 (8th Cir. 1976) (holding that states may not tax federal corporations carrying out the “operations or means of the federal government”).

349. See, e.g., Michaels, *Sovereigns*, *supra* note 19, at 871 (noting that some federal regulations expressly exempt government corporations from having to comply).

may be prized because it enables the government to change the way it interacts with specific constituencies and stakeholders. Regulated parties often view command-and-control regulation as aggressive, adversarial, and coercive; thus sovereign rulemaking and enforcement engender a certain type of hostility among those most directly affected. State commercial competition in the Market, by contrast, may be viewed quite differently.

Again, Surrey's work is of some relevance here.<sup>350</sup> The government may be able to credibly characterize its commercial interventions as market-reinforcing rather than market-correcting—though of course any number of old-school sovereign regulations promote business interests, and quite a few government commercial programs undercut free enterprise. Still, the change from sovereign regulator to commercial participant may matter. If government casts itself in the role of commercial competitor rather than high-handed overseer, it may be able to subtly shape industry norms through its own practices. Rather than mandating change—at perhaps great political and legal cost—government may model behaviors through its own market participation. As a result of such modeling, government's private-sector competitors may feel commercial (not sovereign) pressure to emulate the State's business.

Specifically, the government as a progressive/conscientious/"woke" employer<sup>351</sup> and as a purchaser of certain inputs and raw materials (as opposed to others) may promote gentler, seemingly more organic industrial change: Customers, employers, and shareholders of private, for-profit businesses may, upon observing what government market participants are doing, insist that those businesses follow suit.

The government's relationship with public beneficiaries may change, too. When government shifts from sovereign to commercial engagement, citizens become citizen-consumers, if not outright consumers, and that alteration in public perspective or engagement may be consequential. As citizen-consumers of government goods and services, we may be less, or at least differently, demanding, as we sometimes expect more from a sovereign entity than from a commercial outfit. Of course, the converse may be true, and we become far more demanding. We may see ourselves as being especially valued (and we may object more forcefully when we feel slighted), precisely because we're engaging in commercial transactions rather than simply being taxed in a manner divorced from a one-to-one payment for goods or services. More broadly, a shift from citizens to citizen-consumers changes our voices. The newly constituted "public" may

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350. See *supra* note 314 and accompanying text.

351. Among other things, the government has used its hiring and contracting power to promote socioeconomic equality and empowerment. See, e.g., Kenneth R. Mayer, *With the Stroke of a Pen: Executive Orders and Presidential Power* 202–17 (2001); David C. Roth, *Executive Orders and the Struggle for Workplace Equality* 18 (Apr. 2015) (unpublished manuscript), [https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1050&context=louis\\_jackson](https://scholarship.kentlaw.iit.edu/cgi/viewcontent.cgi?referer=https://scholar.google.com/&httpsredir=1&article=1050&context=louis_jackson) [<https://perma.cc/S5EQ-6SE6>].

now be comprised of paying customers (as opposed to citizens or even taxpayers), and those who pay the most may, perhaps not without some justification, demand disproportionate influence.

This relationship-altering dynamic seems to play out quite clearly in all of our case studies. Donors giving money to the school board, to the National Archives, or to state attorneys general to fund suits challenging federal legislation are on very different footing from regular taxpayers. This is true with respect to actual influence, insofar as donors, unlike general taxpayers, may earmark funds or impose conditions on receipt. And it is true with respect to the appearance of such influence, insofar as donors may be perceived as wielding undue influence. Recent giving to the National Park Foundation and the trust affiliated with the Centers for Disease Control and Prevention (CDC) is illustrative.

Perhaps in part because Congress has proven a parsimonious funder of America's "best idea," it has encouraged the National Park Foundation's extensive efforts to solicit private donations in support of park programs.<sup>352</sup> Though the Park Foundation has been in the development business for decades, it has really ramped up its efforts in the last decade or so.<sup>353</sup> During this time, Coca-Cola, among others, has provided millions in tax-deductible donations.<sup>354</sup> Seemingly connected to its becoming a partner of the Park Foundation, the soda colossus received permission to use national park logos and insignias in its advertisements.<sup>355</sup> Coca-Cola, which owns the popular water brand Dasani, also reportedly influenced a decision of the Park Service—the official federal bureau, not the charitable arm—to rescind a prohibition on the sale of bottled water in the Grand Canyon.<sup>356</sup> The Service instituted the bottle ban for environmental and aesthetic reasons, after a pilot ban at Zion National Park eliminated approximately 60,000 unsightly and wasteful plastic bottles.<sup>357</sup> But soon after the ban was implemented, Park Service officials in Washington advised the Grand Canyon field supervisor that Coca-Cola was "concern[ed]"—that is, unhappy with the ban on bottled water sales.<sup>358</sup> Seemingly thanks to Coca-Cola's pressure, the ban was indeed lifted, only

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352. Lisa Rein, *Yosemite, Sponsored by Starbucks? National Parks to Start Selling Some Naming Rights*, *Wash. Post* (May 9, 2016), <https://www.washingtonpost.com/news/powerpost/wp/2016/05/09/yosemite-national-park-brought-to-you-by-starbucks/> (on file with the *Columbia Law Review*).

353. See *About the Foundation: Financial Reports*, Nat'l Park Found., <https://www.nationalparks.org/about-foundation/financial-reports> [<https://perma.cc/8HRZ-CSVD>] (last visited Oct. 3, 2019).

354. See Hightower, *supra* note 180.

355. *Id.*

356. See Felicity Barringer, *Parks Chief Blocked Plan for Grand Canyon Bottle Ban*, *N.Y. Times* (Nov. 9, 2011), <https://www.nytimes.com/2011/11/10/science/earth/parks-chief-blocked-plan-for-grand-canyon-bottle-ban.html> [<https://perma.cc/7MDS-S7FB>].

357. See *id.*

358. See *id.*; Hightower, *supra* note 180; Rein, *supra* note 352.



to be reinstated once the public caught wind of this apparent and troubling accommodation.<sup>359</sup> Hardly chastened, the Park Foundation later entered into a \$2.5 million agreement with Anheuser-Busch. Besides its tax deduction for the charitable gift, the maker of Budweiser also secured permission to use the image of the Statue of Liberty on its product labels.<sup>360</sup>

Over at the CDC, the public health department's charitable foundation takes in tens of millions of dollars annually, some of it from pharmaceutical companies.<sup>361</sup> The donated money is often earmarked for research and education relating to specific diseases, typically something important to a particular donor but not necessarily in keeping with how the CDC would otherwise spend its congressionally appropriated funds.<sup>362</sup> One concern with directed donations of this sort centers on self-dealing. According to a report in the *British Medical Journal*, the company Genentech donated hundreds of thousands of dollars to the CDC's trust to support the CDC's campaign to encourage greater testing and treatment for viral hepatitis.<sup>363</sup> Perhaps not coincidentally, Genentech just so happens to manufacture hepatitis testing kits and treatments.<sup>364</sup>

Another concern is that funding can shift an agency's priorities in a direction where the donors are—and away from where the need lies. This is, of course, already a problem given our reliance on for-profit firms to design and produce medical treatments. These firms typically cater to those with the means to pay. Hence companies scramble to develop newer and better erectile dysfunction meds, while all but ignoring treatments to combat diseases of the developing world. Allowing directed donations to the government only reinforces rather than counterbalances the unfettered market dynamics.

Turning to some of the other case studies, when individuals pay—and pay more—for such things as upgraded prison facilities, expedited civil judicial proceedings, or special highway access, these citizens morph into customers, and their demands and expectations change accordingly. Government ownership of bailed-out corporations presents yet another wrinkle. Here, two sets of relationships change. First, members of the public are

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359. Hightower, *supra* note 180. It is, I think, important to note that influence—to the extent it was exercised—may come cheap. The Park Service receives over \$2.5 billion annually from Congress. Cong. Research Serv., R42757, National Park Service Appropriations: Ten-Year Trends 2 (2019), <https://fas.org/sgp/crs/misc/R42757.pdf> [<https://perma.cc/GH96-TAKX>].

360. Hightower, *supra* note 180; see also Timothy Cama, Park Service Waives Alcohol Ban for Budweiser Promotion, Hill (Apr. 30, 2015), <http://thehill.com/policy/energy-environment/240707-park-service-waives-alcohol-ban-for-beer-giant-partnership> [<https://perma.cc/SZD4-6PF8>].

361. Jeanne Lenzer, Centers for Disease Control and Prevention: Protecting the Private Good?, *BMJ*, May 15, 2015, at 1, <https://www.bmj.com/content/bmj/350/bmj.h2362.full.pdf> (on file with the *Columbia Law Review*).

362. See *id.* at 2–3.

363. *Id.* at 1.

364. *Id.*

understood to be the beneficiaries of the government ownership—taxpayers who deserve a nice return on their “investment.” This is a very different dynamic from that spawned by a sovereign bailout, in which citizens are taxed to buoy what they may (understandably) see as big, fancy, and perhaps careless companies.

Second, the firms themselves are put in a different position. They’re no longer playing their customary role as regulated parties, a role that gives them the freedom to marshal political and legal tools to challenge sovereign regulatory interventions. Instead firm stakeholders—managers, nongovernmental directors, and employees—are recast as agents of the government-owners, essentially compelled as a matter of corporate law to follow the directives issued by those who control the board.<sup>365</sup>

E. *What Is the Preferred Normative Orientation of the Intervention*

With government market participation, the door may be more widely open to state interventions of a different policy orientation. Government can be decidedly businesslike and outwardly commercially oriented—pricing their services and products in keeping with supply and demand. And though it isn’t obvious that the government needs to be a market participant to make such pricing or valuation decisions, as a practical matter, explicit market participation changes everyone’s expectations.

Consider, for instance, the fast-tracking of civil adjudication for those willing to pay more. We need a radical reassessment of government, wherein courtroom space is effectively auctioned, before we can tolerate such deviations from traditional, sovereign practices. Indeed, it almost goes without saying that throughout the modern era most government services were allocated either equally (that is, regardless of need or ability to pay) or preferentially to those least well off. The same is true when it comes to converting left highway lanes from carpool or green car lanes to VIP fast-track lanes. Absent the reframing of government as a market actor, it might be hard, if not impossible, to make such abrupt policy shifts. The list of practices undergoing such reorientations is long, and additionally includes such things as immigration visa auctions (with buy-ins ranging from \$500,000 to more than \$1 million);<sup>366</sup> the auctioning of government-issued hunting licenses (some of which, for rare game in state parks and preserves, sell for over \$400,000);<sup>367</sup> and the establishment of various

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365. See Michaels, *Coup*, supra note 29, at 191–92 (noting the strong control government owners possessed over the failing firms they acquired); Kessler, supra note 339.

366. Ron Nixon, *Program that Lets Foreigners Write a Check, and Get a Visa, Draws Scrutiny*, N.Y. Times (Mar. 15, 2016), <https://www.nytimes.com/2016/03/16/us/politics/program-that-lets-foreigners-write-a-check-and-get-a-visa-draws-scrutiny.html> [<https://perma.cc/4JBL-EGGV>].

367. John Branch, *The Ultimate Pursuit in Hunting: Sheep*, N.Y. Times (Feb. 16, 2017), <https://www.nytimes.com/2017/02/16/sports/bighorn-sheep-hunting.html> [<https://perma.cc/84EV-8HLK>].

futures markets, allowing glorified day traders to make bets that have the incidental effect of helping federal policymakers anticipate what will happen with respect to such things as oil shocks and terrorist attacks.<sup>368</sup>

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This is a story about the political economy of early-twenty-first-century government market participation. Government market participation is, as I've said, quite possibly the most fitting of interventions given where we are as a community vis-à-vis our relationship to both the State and the Market—to bureaucracy and business as it were. Yet, to be clear, the differences between commercial and sovereign government interventions identified here are mostly contingent. We could of course imagine various ways in which these differences narrow over time, especially as more and more policymakers, jurists, regulated parties, and ordinary voters become sensitive to the ways in which savvy officials exploit the seeming promise of government market participation to gain some legal or political leverage.

#### V. PUBLIC CAPITALISM THEORIZED

Public capitalism signals a potentially massive realignment. As a result of the realignment, our attention necessarily shifts from the public–private to the sovereign–commercial. And, in so shifting, we seem to be saying farewell to some core elements of legal liberalism and hello to . . . what? What is the new ethic informing *and informed by* public capitalism? Ultimately, what we need to ask ourselves is whether public capitalism is just a tactic—a new, easier way to accomplish whatever tasks we've long done (or have always wanted to do)—or whether there is an underlying normative logic.

Though it is certainly too soon to say anything definitive, public capitalism, at least for now, presents as an anti-theory: an implicit rejection of the *-isms* of the twentieth century as well as an implicit rejection of the normatively informed and legally resonant distinctions that demarcated and structured the twentieth-century constitutional order (and political economy). Yet it also suggests the possibility for opening up new and very different democratic vistas—and new and, again, very different, checks and constraints on arbitrary and abusive expressions of both sovereign and commercial power. Consider the following.

Under public capitalism, the State may be more powerful insofar as it has more tools and greater license and leeway to strategically toggle between its sovereign and commercial guises. But the State is also newly checked. With the breakdown of the liberal political economy, the government is forced to cede monopolistic control over some sovereign tools and

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368. Robin Hanson, Decision Markets for Policy Advice, *in* Promoting the General Welfare 151, 164–69 (Alan S. Gerber & Eric M. Patashnik eds., 2006).

pathways. Firms may jump into the governance game—and compete against and potentially outperform the government in the hearts and minds of citizen-consumers.

The same is true for firms. They are now differently and more expansively empowered insofar as they can avail themselves of sovereign tools and pathways. But they are newly and differently circumscribed as government market participants enter their heretofore private, perhaps clubby commercial domains. For many struggling consumers, such disruptions to private, commercial domains are precisely what makes various “public options” so attractive.<sup>369</sup>

Government’s moral force may be diminished in some respects. Under public capitalism, government may be viewed as more transactional and more crassly commercial, and thus cannot hold itself separate from—let alone superior to—the Market. But, in other respects, government’s moral force may be greatly enhanced as the State develops new and possibly better ways to connect with politically disaffected or disenfranchised segments of the public, offering something to them qua consumers that it hasn’t been able to give them qua citizens. This is no small opportunity given perennially low voter turnout,<sup>370</sup> various forms of voter suppression and disenfranchisement,<sup>371</sup> and survey after survey signaling great distrust in (old-school) government.<sup>372</sup>

Here too we can say substantially the same things about firms, if indeed we take their sovereign, regulatory, and deliberative pretensions seriously. Their moral force may be greater if they are seen as more earnestly inclusive, more democratic, and more public-regarding. Indeed, one way to think about public capitalism’s effect on the *moral force* of governments and firms alike is through the lens of alienation. Economic alienation is a common, perhaps inescapable, feature of modern American capitalism. We might consider the democratic analog to worker alienation—call it political alienation—itself a hard to deny feature of contemporary American life. Such political alienation involves the estrangement of individuals and groups from a governance system viewed

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369. See Sitaraman & Alstott, *supra* note 17, at 38–40.

370. Asma Khalid, Don Gonyea & Leila Fadel, *On the Sidelines of Democracy: Exploring Why So Many Americans Don’t Vote*, NPR (Sept. 10, 2018), <https://www.npr.org/2018/09/10/645223716/on-the-sidelines-of-democracy-exploring-why-so-many-americans-dont-vote> [<https://perma.cc/VP9Q-EGWC>].

371. Vann R. Newkirk II, *Voter Suppression Is Warping Democracy*, Atlantic (July 17, 2018), <https://www.theatlantic.com/politics/archive/2018/07/poll-prri-voter-suppression/565355/> (on file with the *Columbia Law Review*).

372. Uri Friedman, *Trust Is Collapsing in America*, Atlantic (Jan. 21, 2018), <https://www.theatlantic.com/international/archive/2018/01/trust-trump-america-world/550964/> (on file with the *Columbia Law Review*); *Trust in Government*, Gallup, <https://news.gallup.com/poll/5392/trust-government.aspx> [<https://perma.cc/U4DA-Y5Z3>] (last visited Oct. 4, 2019).

as increasingly undemocratic and inaccessible.<sup>373</sup> Big donors and special interests play an outsized, sometimes domineering, role in American politics—a reality that leaves the rest of us feeling demoralized and dejected. What’s more, we must confront the fact that the Senate is among the least representative of all the legislative bodies in the democratic world.<sup>374</sup> California, after all, has thirty-eight million people. Another thirty-eight million Americans are scattered across the twenty-two smallest states in the union.<sup>375</sup> The first thirty-eight million are represented by two senators. The latter thirty-eight million have forty-four senators championing their interests.<sup>376</sup> And, to be sure, various internal rules, notably the filibuster, make the Senate even more undemocratic in practice.<sup>377</sup>

Treating firms as sites of democratic engagement—for consumers and workers alike—may also help alleviate some of the economic alienation attributable in modern times to the fact that practically all of a firm’s decisions are made by coterie of elites. And, likewise, it is possible that making an often-unresponsive government more “customer friendly,” more visible and approachable in the agora (than it has proven to be in the polis), may lessen present-day political alienation. Indeed, one might say that public capitalism opens a second door through which we can, to use Albert Hirschman’s terms, *enter or exit*.<sup>378</sup> Previously we had to move to a new city or state (or take our commercial business to the shop across the street). But now we may not have to physically move to put “exit” pressure on an unresponsive government unit (nor must we rely on the existence of a private-sector alternative to put similar “exit” pressure on an unresponsive business). That traditional *let’s change political jurisdictions* exit option surely remains. Yet now that traditional exit option may be complemented by a second avenue of egress: We seek sovereign-like remedies from firms and seek commercial provisions from government agencies.

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373. See generally Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (2012).

374. Michael Lind, *75 Stars*, *Mother Jones* (Jan./Feb. 1998), <https://www.motherjones.com/politics/1998/01/75-stars/> [https://perma.cc/MA75-NVZY].

375. Adam Liptak, *Smaller States Find Outsize Clout Growing in Senate*, *N.Y. Times*, <http://archive.nytimes.com/www.nytimes.com/interactive/2013/03/11/us/politics/democracy-tested.html?hp> [https://perma.cc/T658-GUJH] (last visited Oct. 20, 2019).

376. *Id.*

377. See, e.g., Sanford Levinson, *Our Undemocratic Constitution* 52–53 (2006); Frederic Bloom & Nelson Tebbe, *Countersupermajoritarianism*, 113 *Mich. L. Rev.* 809, 813, 818 (2015) (book review) (describing undemocratic aspects of the Senate, with respect to both its voting rules and the selection of its members).

378. See generally Albert Hirschman, *Exit, Voice, and Loyalty* (1970) (“Some customers stop buying the firm’s products or some members leave the organization: this is the *exit option*. As a result, revenues drop, membership declines, and management is impelled to search for ways and means to correct whatever faults have led to exit.”).

Thus the question will be whether public capitalism is expanding or contracting what Michael Walzer calls spheres of justice,<sup>379</sup> by making political and economic power more, or differently, fungible. Perhaps public capitalism will be a bridge to safely lead us out of neoliberalism's dual and devastating doldrums of political and economic alienation. Alternatively, under public capitalism, money may become even more dominant, still unrivaled in commercial corridors and now even more fully legitimized in political spaces as a result of the instant embrace of commercialized government.

Last, and still related, is the question of dynamic competition. Under twentieth-century legal liberalism, public-private competition was fierce but highly stylized and unimaginative. Like highly choreographed warfare of bygone days—think two lines of opposing troops shooting at one another across some open field—these public-private contests were battles between readily demarcated, highly differentiated, and quite stilted sets of adversaries. That's one model of competition, again defined by separation, specialization, and a rivalry between contrasting macro-level models of organization, deliberation, and execution. Public capitalism, by contrast, looks more like postmodern warfare—with boundaries, responsibilities, landscapes, and identities blurring among civilians, diplomats, relief workers, and armed combatants. We now have far less macro-level separation or specialization across a singular but great divide. Instead we have seemingly greater and more varied micro-level rivalries. Within government, within firms, and of course between government and firms, there might be heated battles over whether to intervene using sovereign or commercial tools.

Consider too comparisons to first- and second-order diversity, concepts used so effectively by Heather Gerken. Whereas first-order diversity reflects diversification within each and every organization and entity, second-order diversity entails diversification across organizations (each of which may be internally homogeneous).<sup>380</sup> I employ this analogy to suggest that legal liberalism embodies a form of second-order diversity. After all, legal liberalism comprises two internally relatively homogenous spheres—state and market—that are quite different from one another. Public capitalism, by contrast, represents first-order diversity, with firms and government entities each showing some, if not considerable, internal variation with respect to tools, orientations, and the like.

As the discussions above suggest, there are important and as yet unanswered empirical questions about how public capitalism will play out. That is, assuming my preliminary notions of new vistas and new constraints are plausible, is it the case that we will experience net gains in democratic

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379. See generally Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (1983).

380. See Heather K. Gerken, *Second-Order Diversity*, 118 *Harv. L. Rev.* 1099, 1102–03 (2005).

engagement and net gains in terms of healthy commercial competition? Or, are we likely to go down the road of the most prominent purveyors of state capitalism today, namely Russia and China, and fuse the most plutocratic and monopolistic elements of sovereign and commercial power in ways that undermine democracy, corrupt markets, and generally lessen the forms of healthy competition that keep institutions open and honest? It is, again, too early to draw conclusions. But, early or not, we need to appreciate the opportunities and risks associated with such a significant departure from past practices.

How we feel about those opportunities and risks—in principle and in practice—should influence how we approach nascent public capitalism. We may, for instance, *resist the realignment*. In effect, we could do so by preventing agencies and firms from reconstituting themselves in the novel ways discussed. This may be done through legal means, the imposition of bright-line rules that cabin government market participation and restrict corporate forays into sovereign-seeming spaces. But, of course, those bright-line rules would inhibit ostensibly desirable flexibility, run contrary to the cultural, political, and economic forces currently advancing public capitalism projects, and thus leave us in a rather problematic holding pattern—call it *lame-duck liberalism*. After all, as Part III suggests, as a conceptual matter, we have seemingly already outpaced legal liberalism’s ready compartmentalization of public and private; have begun to sense that the strict separation of sovereign government and commercial firms is artificial; and are starting to appreciate that maintaining the fiction of strict separation invites decay, complaisance, and abuse in each of the two sectors.

If altogether resisting the realignment seems too obdurate of an approach, we may consider accepting the realignment but *stringently regulating public capitalism*. Regulation may take many forms. We may, for example, consider enacting something akin to the Administrative Procedure Act for government market participation; or we may extend and beef up the Federal Acquisition Regulation to better structure government market participation, thereby limiting and narrowing opportunities for government market participants to evade democratic and constitutional protocols. And we may likewise want to expand corporate law to include rules—more prescriptive and muscular than, say, the business judgment rule<sup>381</sup>—for how and when firms venture into sovereign realms.

Another way to slice and dice public capitalism is to *confine it to certain subsets of actors or jurisdictions*. We may, for instance, encourage free and easy government market participation at the subfederal level but restrict usage at the federal level, on the theory that the federal government is singularly too powerful and too coercive to be anything other than a

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381. See, e.g., *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971) (“[A] court will not interfere with the judgment of a board of directors unless there is a showing of gross and palpable overreaching.”); *Shlensky v. Wrigley*, 237 N.E.2d 776, 779–81 (Ill. App. 1968).

commercial bully. What's more, at the federal level, perhaps unlike at the state and local levels, *exit* by fearful or victimized citizen-consumers is highly unlikely<sup>382</sup>—and thus too much depends on firms (and on firms taking on sovereign responsibilities) in order to check an overreaching federal government market participant. Additionally or alternatively, we may permit predominantly American firms to be ambitious quasi-sovereigns—regulators, governors, and stewards over their respective domains—while prohibiting predominantly foreign or truly multinational firms from doing the same. This admittedly problematic delineation could be justified in terms of concerns regarding bad-faith (or simply undemocratic or unrepresentative) sovereign interventions by non-American firms.<sup>383</sup>

We may instead tentatively *embrace public capitalism* and allow it to blossom. After all, old habits die hard and thus it is a safe bet that firms will, at least for the present moment, remain primarily commercially oriented; likewise, agencies are apt to continue prioritizing sovereign interventions, again at least in the short term. Though there is always the danger that if we wait too long, we won't be able to effectively rein in public capitalism (and that's certainly something that happened vis-à-vis privatization, when innovation in the 1990s and 2000s far outpaced regulatory tools to constrain privatization), the upside to waiting is that agencies and firms have time and space to experiment—and lawmakers and jurists have occasion to find their bearings before attempting to intervene.

Putting my cards on the table, for reasons I've discussed elsewhere,<sup>384</sup> I lament the decline of legal liberalism and, with it, the diminishing salience of the public-private divide. But the decline and corresponding breakdown of liberalism have been a long time coming.<sup>385</sup> Practically speaking, we may not be able to rediscover and reaffirm that important but again fading chapter in our history. Yet as much as the instant realignment is significant, indeed transformative, there are plenty of ways in which old, worthy battles about democratic governance can be refought, albeit on different turf with different stakes. More to the point, true adherents of a liberal constitutional political economy—who thus believe

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382. See Hirschman, *supra* note 378, at 101–05, 114–19; Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 *J. Pol. Econ.* 416, 417–18 (1956).

383. For what it is worth, we already codify such concerns in the Financial Investment and National Security Act of 2007 (FINSA). Pub. L. No. 110–49, 121 Stat. 246 (codified as amended in scattered titles of the U.S.C.). Under FINSA, direct foreign investment in U.S.-based companies is subject to heightened scrutiny and possible invalidation, on the ground that foreign control may be used to undermine American national and economic security. See Michaels, *Sovereigns*, *supra* note 19, at 888–90; Alan Rappeport, In New Slap at China, U.S. Expands Power to Block Foreign Investments, *N.Y. Times* (Oct. 10, 2018), <https://www.nytimes.com/2018/10/10/business/us-china-investment-cfius.html> [<https://perma.cc/JM7W-X29K>].

384. See generally Michaels, *Coup*, *supra* note 29; Michaels, *Then and Now*, *supra* note 103.

385. See Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 *U. Pa. L. Rev.* 1349, 1350–51 (1982).



in at least some parity between the public and private (and not total dominance of one over the other)—may find some things to like about the more variegated nature of power under public capitalism. Whereas one powerful political tide could, under twentieth-century legal liberalism, force a dramatic recalibration in favor of greater across-the-board state or market influence, similar tides under public capitalism would likely cause far less abrupt change. Under legal liberalism, everything is apt to move in lock-step, either in the direction of greater public (state sovereign) ordering or in the direction of private (market) ordering. That's the story of, first, the Welfare period and, later, the Deregulation and Privatization period. But under public capitalism, each domain may be highly idiosyncratically constructed (state-commercial versus state-sovereign versus market-commercial versus market-sovereign)—and thus, in truth, what we have is a highly reticulated set of fissures rather than one great dividing line. If so, we may have more ongoing and robust retail-level competition that conceivably invites greater democratic choice and furnishes more robust and frequently operational checks and balances.

Even with that competition, however, it is not clear that all or even most of the cherished values or aims of legal liberalism will endure. As hinted at above, will the gravitational pull of the Market—now operating within and not just in tension with the State—complete the shift from a Nanny State to a Sugar Daddy State, in which the wealthy contribute disproportionate sums and have far greater say in how those sums are spent? Indeed, the equation of citizens with customers seemingly paves the way for adopting more regressive or, at the very least, commodified forms of government responsiveness. To the extent our State is already moving in that direction,<sup>386</sup> it is a major blow to constitutional and normative principles of democratic equality.<sup>387</sup> Such a move also calls into question the purpose of a State that at least arguably isn't supposed to be a concierge to the wealthy but rather a guarantor of equality, if not a champion of progressive empowerment dedicated to countering unforgiving market forces. Again, there is certainly the chance that this retreat of progressivism along an already deeply flawed sovereignty plane will be more than offset by progressive gains in commercial realms, rendering the latter less Darwinian. But unless and until we develop an ethic of public capitalism, we simply can't be sure.

#### CONCLUSION

As we seemingly drift away from the legal liberalism of the twentieth century, we need to understand where we are going—and why. This Essay has charted this highly consequential transition to public capitalism,

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386. See Sandel, *supra* note 272.

387. See generally Joseph Fishkin & William E. Forbath, *The Anti-Oligarchy Constitution* (forthcoming); K. Sabeel Rahman, *Democracy Against Domination* (2017).

considered public capitalism's genealogy, and projected public capitalism's political, legal, and policy trajectory. There is, I readily confess, plenty left unsaid. And, indeed, future work needs to, among other things, study the converse phenomenon of firms morphing into semi-sovereigns. Still, it is this Essay's intervention which, at the very least, helps set the agenda for what may well be this generation's signature innovation in public and private law alike, on par with the bureaucratic revolution of the 1930s and 1940s and the deregulation and privatization revolution of the 1980s and 1990s.