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## ARTICLE

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### SOVEREIGNS, SHOPKEEPERS, AND THE SEPARATION OF POWERS

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*For decades, we have examined privatization with zeal and rigor. Relegated to the margins, however, have been inquiries into privatization's close cousin: direct government market participation. Given the ubiquity of government commercial transactions, the political, legal, and economic challenges such transactions engender, and the rise of CEO-style elected officials—the Trumps, Bloomborgs, and Romneys of the world—almost evangelical in their commitment to running government like a business, closer study is warranted.*

*This Article characterizes direct government market participation as a complicated, confusing, and potentially dangerous fusion of sovereign and commercial power. It describes how this fusion may undermine markets, aggrandize State power, or do both at the same time. It compares the straddling of the sovereign and commercial realms with any number of other constitutionally problematic bridging efforts, including those to combine executive and legislative; executive and judicial; federal and state; civilian and military; church and State; and, of course, private and public powers. Lastly, it situates government market participation within its own separation-of-powers paradigm—and does so to help rationalize and domesticate the vexing but often necessary practice.*

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## INTRODUCTION

Federal, state, and municipal governments are pervasive and increasingly relentless market participants. They run businesses, operate banks, own companies, license intellectual property, trade in private securities, and buy and sell goods and services for themselves and for their beneficiary communities. In addition, these governments hire and fire employees and contractors, peddle souvenirs, sell and purchase advertising, privately fundraise, and lease space in office buildings, libraries and museums, laboratories, and even aboard NASA shuttles.

Government market participation spans the exotic (e.g., government-owned venture capital firms, IT startups, and futures markets) and the mundane (e.g., postal delivery and passenger railroad services). It is at once as old as the Republic itself and as novel as the newest wave of brash CEOs arriving on the political stage and pressing to run government more and more like a business.<sup>1</sup> It entails the use of sovereign instruments, commercial tools, and potent combinations of the two. And it infuriates those railing against

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<sup>1</sup> See generally Jon D. Michaels, *Running Government Like a Business . . . Then and Now*, 128 HARV. L. REV. 1152 (2015) [hereinafter Michaels, *Running Government Like a Business*]; Jon D. Michaels, *Can Trump’s Cabinet Makeover Work?*, CNN (Dec. 17, 2016), <http://www.cnn.com/2016/12/13/opinions/cabinet-boardroom-michaels-opinion/index.html> [https://perma.cc/R7S7-AZWL].

creeping socialism while electrifying those hailing the very same initiatives as refreshingly entrepreneurial.

Government market participation has, for some time, operated in the shadow of its more prominent and more carefully scrutinized cousin: *privatization*. For years, policymakers, jurists, and scholars have focused on privatization—the outsourcing of State responsibilities to private, generally commercially oriented actors—seemingly to the neglect of government’s own direct and very public market participation.<sup>2</sup> Thus, while privatization has grabbed headlines<sup>3</sup> and become something of a cause célèbre in legal circles,<sup>4</sup> direct commercial government action has itself remained in the background, poking out only occasionally—and only then in narrow, discrete contexts.<sup>5</sup>

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<sup>2</sup> See generally GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 1 (Jody Freeman & Martha Minow eds., 2009); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 6 (2007); Gillian Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1369 (2003); Jon D. Michaels, *Privatization’s Pretensions*, 77 U. CHI. L. REV. 717, 718 (2010); Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STAN. L. & POL’Y REV. 549, 551 (2005); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CAL. L. REV. 393, 395 (2008). This Article’s equation of privatization with the outsourcing of State responsibilities is in keeping with the conventions of contemporary American legal scholarship, as evidenced by the sources just cited. This conception of privatization is, of course, hardly the only one. See generally Daphne Barak-Erez, *Three Questions of Privatization*, in COMPARATIVE ADMINISTRATIVE LAW 493, 494-97 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

<sup>3</sup> See, e.g., T. Christian Miller, *Contractors Outnumber Troops in Iraq*, L.A. TIMES, Jul. 4, 2007, at A1; James Risen & Mark Mazzetti, *Blackwater Guards Tied to Secret CIA Raids*, N.Y. TIMES, Dec. 11, 2009, at A1-2; Scott Shane & Ron Nixon, *In Washington, Contractors Take on Biggest Role Ever*, N.Y. TIMES (Feb. 4, 2007), <http://www.nytimes.com/2007/02/04/washington/04contract.html> [<https://perma.cc/32A7-UZY3>].

<sup>4</sup> See, e.g., *Filarsky v. Delia*, 132 S. Ct. 1657, 1665 (2012) (considering whether a private contractor is a state actor); *Minnecci v. Pollard*, 132 S. Ct. 617, 620 (2012) (similar); *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 63 (2001) (similar). For the importance of government outsourcing in other jurisdictions, see, e.g., HCJ 2605/05 Academic Center for Law and Business v. Minister of Finance (2009) (Isr.) [http://elyon1.court.gov.il/files\\_eng/05/050/026/n39/05026050.n39.pdf](http://elyon1.court.gov.il/files_eng/05/050/026/n39/05026050.n39.pdf) [<https://perma.cc/D7RM-VHVE>]; *Nandini Sundar v. State of Chattisgarh*, (2011) 7 SCC 547 (India).

<sup>5</sup> Most studies of government market participation have been narrowly focused in on particular institutions, particular events, or discrete legal challenges. For institutional treatments, see DAVID E. LILIENTHAL, *TVA: DEMOCRACY ON THE MARCH* 1 (1944); Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801 (2011) [hereinafter Michaels, *Fettered Executive*]. For constitutional considerations, see *Ball v. James*, 451 U.S. 355 (1981); Dan T. Coenen, *Untangling the Market-Participant Exemption to the Dormant Commerce Clause*, 88 MICH. L. REV. 395, 397 (1989); Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace*, 97 N.C. L. REV. 601, 605 (2016); Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1, 3 (2013). For event-specific inquiries, see ANDREW ROSS SORKIN, *TOO BIG TO FAIL: THE INSIDE STORY OF HOW WALL STREET AND WASHINGTON FOUGHT TO SAVE THE FINANCIAL SYSTEM—AND THEMSELVES* 392-408 (2010); Benjamin A. Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise*, 62 ADMIN. L. REV. 1127, 1185-86 (2010).

This Article zeroes in on government market participation. It addresses government market participation broadly and generally, identifying, naming, and beginning to answer one of the big questions that arises regardless whether we are considering the economics of a public postal service, the law of free speech on government passenger trains, the politics of special water districts, the ethics of government ownership of large, multinational businesses, or the architecture of a State-run venture capital firm. Simply stated, how should a government market participant juggle and harmonize its seemingly conflicting responsibilities as both a sovereign and commercial actor? Put slightly differently, how should a government entity—or a particular government official—be both regulatory and entrepreneurial at once? The rather common manifestations of commercialized sovereignty awaken us to a particularly complicated, conflicted, unpredictable, and above all powerful State.

The sovereign–commercial conflicts that I am putting under the microscope differ in degree and kind from the ordinary conflicts that government officials invariably struggle to resolve. Ordinary—let’s call them “sovereign–sovereign”—conflicts arise, for example, when government officials have to decide whether to allocate funds for a highway expansion or a new subway line. Likewise, ordinary sovereign–sovereign conflicts crop up when, in the course of establishing workplace safety standards or collective-bargaining codes, government regulators must balance the interests of industry and labor.

Sovereign–commercial conflicts are also different in degree and kind from the everyday conflicts that private actors regularly confront. Ordinary—let’s call these “commercial–commercial”—conflicts crystalize when businessmen and women must decide whether to spend more on R&D or marketing, or whether to save those funds for a rainy day.

Generally speaking, sovereign–commercial conflicts show themselves to be different in four ways. First, sovereign–commercial conflicts must be managed by balancing and commingling two distinct perspectives or orientations—namely, a public-interest orientation (broadly defined), and a business orientation (understood in terms of profit maximization). When deciding what supplier to use, ought the government choose the supplier offering the objectively best price or the one who charges more but does so in a manner that advances public aims? That is to say, should the government be willing to pay more to suppliers who operate entirely within the United States, employ only union labor, or are LEED certified?

Second, sovereign–commercial conflicts are exacerbated by the use and commingling of two distinct sets of tools: the sovereign’s coercive, lawmaking and law-enforcing tools, and the commercial actor’s market powers to buy,

sell, and trade. Does the government, for instance, use its controlling equity shares in a bailed-out automaker to maximize the return on its investment; or does the government use those shares to dictate internal corporate governance reforms, evading the “hassles” of regulating via legislation or administrative rulemaking?

Third, sovereign–commercial conflicts spread uneasily across two legal regimes—the regime that attaches to and regulates State personnel, and the regime that regulates those engaged in private commerce. This uneasy straddling prompts one to ask: should a government official abide by constitutional or corporate standards (or both) when, say, disciplining or terminating someone in her employ?

Fourth, sovereign–commercial conflicts entail the traversing of unfamiliar and at times hostile domains. Specifically, the government’s branching out into commercial domains may offend classically liberal sensibilities about the proper (that is, limited) role and reach of the State. Similarly, a business’s government-like regulatory ambitions—think Google, Facebook, or Uber—may offend democratic sensibilities about the proper (also limited) role and reach of the market,<sup>6</sup> thus making any effort to juggle or harmonize dual commercial and sovereign responsibilities that much more problematic.

Of course, resolving any number of pure public policy (sovereign–sovereign) challenges, or pure private ordering (commercial–commercial) challenges, is often terribly difficult. They involve hard choices, require considerable sacrifice, and invariably alienate those whose positions did not carry the day. Yet those conflicts are an analytical and legal cakewalk compared to many sovereign–commercial conflicts.

After all, the fusion of the sovereign and commercial creates a seeming institutional mismatch, a misalignment of institutional architecture, programmatic goals, and laws. Government regulatory agencies are ill-suited to be effective instruments of commerce; and government corporations (and other architecturally commercialized government offices) cannot be expected to be particularly democratic instruments of sovereign regulatory policy.

This fusion invites *public* self-dealing.<sup>7</sup> Commercially oriented sovereigns might misappropriate sovereign guises, tools, and resources, using the levers

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<sup>6</sup> See, e.g., Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1811 (2012) (characterizing several internet firms as having the “breadth, capital, and power to challenge governments as alternative authorities”); Alina Tugend, *Barred from Facebook, and Wondering Why*, N.Y. TIMES (Sept. 19, 2014), <http://www.nytimes.com/2014/09/20/your-money/kicked-off-facebook-and-wondering-why.html> [<https://perma.cc/KS37-TXXL>] (“[T]he large social media companies have a governmentlike ability to set social norms.”) (quoting ACLU attorney Lee Rowland).

<sup>7</sup> To be clear, I’m not suggesting anything remotely akin to graft, corruption, or any other conferral of private, personal benefits on government officials, though surely government market participation increases opportunities for such private self-dealing as well.

of regulation to pursue commercial aims (in a manner that gives the government a considerable market advantage over nongovernmental actors operating in that same commercial space).

And, conversely, this fusion endangers limited, democratic government. Public-regarding commercialized sovereigns might misappropriate commercial tools and resources, using them to regulate businesses and industries more forcefully, expansively, or expediently than could a noncommercialized sovereign entrusted with only democratic and bureaucratic tools.

The study of commercialized, entrepreneurial government is a big and weighty undertaking. This Article starts things off by contending that conflicted sovereign–commercial government should not be understood as a particularly nettlesome subset of public policy or private ordering challenges that we regularly endure, if not eagerly embrace as opportunities to test our leaders’ mettle. Rather, sovereign–commercial government should be seen as raising structural constitutional concerns in keeping with those that our multidimensional systems of separation of powers are designed to address. That is to say, our overriding constitutional and normative commitments to the “separations of powers”—not just among the three branches and between the federal and state governments but also across the public–private divide, the church–State divide, and even within agencies<sup>8</sup>—should extend to government market participation. Indeed, viewing the sovereign–commercial conflict through the lens of our separations of powers provides an analytical framework, normative urgency, and set of legal analogies and precedents for studying and policing government market participation. At the very least, insisting on some separation—by, for instance, disaggregating regulatory and commercial duties and power—can help place government market participation on firmer footing at a moment when, seemingly, the practices are becoming more and more expansive.

This Article proceeds in three parts. Part I identifies and discusses examples of government market participation. These largely stylized case studies capture the diversity of issues, institutions, and personnel involved in government market participation. Part II considers why sovereign–commercial conflicts are less like ordinary sovereign–sovereign or commercial–commercial conflicts and instead are more like those that animate our multiple and overlapping separations of powers. Part III locates the conflicted government market participant within its own separation-of-powers framework and sketches out a regulatory plan to address sovereign–commercial conflicts.

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<sup>8</sup> I explore these secondary lines of separation elsewhere. Jon D. Michaels, *Separation of Powers and Centripetal Forces: Implications for the Institutional Design and Constitutionality of Our National-Security State*, 83 U. CHI. L. REV. 199 (2016) [hereinafter Michaels, *Centripetal Forces*].

To be clear, this foray into government market participation is a conceptual one—and one that covers only so much ground. Left to the side are historical accounts relating past practices, explaining why the government finds itself in some markets (and not in others), and recounting when, how, and by what criteria some services became commercialized. Left to the side too is a normative treatment of commercialized or entrepreneurial government. Those explorations must be held over for another day.

#### I. THE THEORY AND PRACTICE OF GOVERNMENT MARKET PARTICIPATION

Government market participation appears dull—a workman-like, inescapable, and seemingly unproblematic byproduct of sovereign governing. Yet appearances can be deceiving: government market participation lies at the very core of what government does, how it operates, and how it is perceived by lawmakers and regulators, lay observers, scholars, jurists, and business executives alike.

First, over the past few decades, calls to run government like a business have become increasingly loud and unabashed. Everywhere, we encounter politicians and pundits waxing enviously at the apparent leanness, creativity, bravado, and dexterity of American businesses.<sup>9</sup> Lest one think this is principally a partisan project—associated with Republicans such as President Donald Trump and Governors Mitt Romney and Rick Scott—it was Al Gore who, as Bill Clinton's Vice President, penned a path-breaking and agenda-setting report titled *Businesslike Government: Lessons Learned from America's Best Companies*.<sup>10</sup> And it was Team Clinton–Gore which lent considerable bipartisan, technocratic credence and respectability to the initially right-wing, businesslike government movement.<sup>11</sup>

Proponents of businesslike government often take the additional step of urging legislators and regulators to seek out and capitalize on commercial

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<sup>9</sup> See RONALD KESSLER, *A MASTER OF CHARACTER: INSIDE THE WHITE HOUSE OF GEORGE W. BUSH* 277 (2004); Greg Allen, *Gov. Scott, Ex-CEO, Aims to Run Fla. Like a Business*, NPR (Jan. 6, 2011), <http://www.npr.org/2011/01/06/132684525/rick-scott-floridas-outsider-is-now-in-office> [<https://perma.cc/MRP8-6ESJ>]; Sean Illing, *Save Us from GOP Businessmen!*, SALON (June 1, 2015), [http://www.salon.com/2015/06/01/save\\_us\\_from\\_gop\\_businessmen\\_donald\\_trump\\_carly\\_fiorina\\_mitt\\_romney\\_and\\_the\\_big\\_lie\\_about\\_big\\_business/](http://www.salon.com/2015/06/01/save_us_from_gop_businessmen_donald_trump_carly_fiorina_mitt_romney_and_the_big_lie_about_big_business/) [<https://perma.cc/RA47-LYHT>].

<sup>10</sup> AL GORE, *BUSINESSLIKE GOVERNMENT: LESSONS LEARNED FROM AMERICA'S BEST COMPANIES* 3 (1997). Vice President Gore was evidently very much influenced by the writings of David Osborne and Ted Gaebler. DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1993).

<sup>11</sup> See JON D. MICHAELS, *CONSTITUTIONAL COUP: PRIVATIZATION'S THREAT TO THE AMERICAN REPUBLIC* 100-18 (2017) [hereinafter MICHAELS, *CONSTITUTIONAL COUP*] (describing how Bill Clinton and Al Gore effectively co-opted the businesslike government reform agenda, converting the starkly ideological movement into a technocratic exercise in smarter government).

opportunities, rather than simply and somewhat reluctantly engage in commerce as needs and circumstances so dictate. They further encourage dealmaking and negotiated settlements rather than command-and-control regulations.<sup>12</sup>

Second, challenging economic conditions coupled with a fervently anti-tax political culture have contributed to considerable fiscal and budgetary shortfalls at the federal, state, and local levels. As such, it appears to be a particularly opportune moment for State entrepreneurialism.<sup>13</sup>

Third, and related to the two claims immediately above, trust in government is at a nadir. We live at a time when attacks on government bureaucracy are at a fevered pitch.<sup>14</sup> With a presidential administration committed to “deconstruct[ing] the administrative state,”<sup>15</sup> with the fomenting of fears of a subversive “Deep State,”<sup>16</sup> and with calls to “drain the swamp”<sup>17</sup> reverberating from Main Street to Wall Street to K Street, more and more are viewing government as hostile to free enterprise.<sup>18</sup> Under these challenging, even hostile, conditions, it is perhaps not surprising that

<sup>12</sup> Cf. Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 536-37 (2009).

Already we have seen Donald Trump attempting to play the role of presidential dealmaker. As President-elect, Trump engaged in personal negotiations to keep the industrial giant Carrier from downsizing domestic operations and outsourcing jobs to Mexico. See Nelson D. Schwartz, *Mix of Threat and Incentive Sealed a Deal*, N.Y. TIMES, Dec. 2, 2016, at A1. And, within his first few weeks in office, the President hashed out some undisclosed deal with the aerospace titan Lockheed-Martin to lower the price of its newest F-35 fighter jets. See Christopher Drew, *Lockheed Lowers F-35 Price, After Prodding by President*, N.Y. TIMES, Feb. 4, 2017, at B5.

<sup>13</sup> See OSBORNE & GAEBLER, *supra* note 10, at 196-97.

<sup>14</sup> See Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 583-85 (2015) [hereinafter Michaels, *Enduring, Evolving*] (describing the extensive, often unsparing attacks on government bureaucracy and government workers in the 2000s and 2010s).

<sup>15</sup> Philip Rucker & Robert Costa, *Bannon Vows a Daily Fight for “Deconstruction of the Administrative State,”* WASH. POST (Feb. 23, 2017), [https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643\\_story.html](https://www.washingtonpost.com/politics/top-wh-strategist-vows-a-daily-fight-for-deconstruction-of-the-administrative-state/2017/02/23/03f6b8da-f9ea-11e6-bf01-d47f8cf9b643_story.html) [https://perma.cc/GKG7-DVVF].

<sup>16</sup> Jon D. Michaels, *Trump and the “Deep State,”* FOREIGN AFF. (Sept.–Oct. 2017), <https://www.foreignaffairs.com/articles/2017-08-15/trump-and-deep-state?cid=soc-tw-rdr> [https://perma.cc/728C-C8VM].

<sup>17</sup> James Freeman, *Could Trump Really Be Draining the Swamp?*, WALL ST. J. (Jun. 30, 2017), <https://www.wsj.com/articles/could-trump-really-be-draining-the-swamp-1498850264> [https://perma.cc/NYE7-499U]; K. Riva Levinson, *Drain the Swamp? Federal Workers Dedicate their Careers to Service*, HILL (Apr. 2, 2017), <http://thehill.com/blogs/pundits-blog/the-administration/326756-drain-the-swamp-americas-dedicated-workforce-is-not-a> [https://perma.cc/YD5G-KZH4].

<sup>18</sup> See, e.g., Jon D. Michaels & Rajesh D. Nayak, *Do It Yourself: Trump's Quiet Attack on the Regulatory State Is Another Part of His Broader Class War*, SLATE (Dec. 22, 2017), [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2017/12/trump\\_s\\_quiet\\_attack\\_on\\_the\\_regulatory\\_state\\_is\\_another\\_part\\_of\\_his\\_broader.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2017/12/trump_s_quiet_attack_on_the_regulatory_state_is_another_part_of_his_broader.html) [https://perma.cc/2GJY-STYS] (capturing the Trump Administration's efforts to frame government regulation as a threat to jobs and liberty).

governments at all levels are quick to demonstrate their commercial, entrepreneurial leanings.<sup>19</sup>

Consider, among other things, the Department of Interior's dual efforts to scale back on the size of national monuments (and thus reduce the scope of environmental and ecological safeguards) and to significantly raise the admission fees at some of the most popular national parks.<sup>20</sup> Consider too the pivot in many jurisdictions in favor of policing via civil forfeiture (a huge but highly controversial revenue raiser) and away from traditional and quite costly criminal prosecution.<sup>21</sup>

This present-day rejection of government as special and distinct from the market seemingly invites and encourages sovereign-commercial conflicts and desensitizes us to the potentially State-aggrandizing and market-destabilizing effects of such government market participation. We are desensitized both because we see commercialized forms of government as part of our "new normal" and also because we are less committed to big, welfarist, and implicitly non-commercialized forms of government.

Appreciative, therefore, of the timeliness, urgency, and perhaps changed character of government market participation in an increasingly neoliberal twenty-first century, this Part offers a few, brief illustrations and composite sketches intended to illuminate some of the central and pressing challenges that arise when a single government department or unit possesses conflicting regulatory and entrepreneurial objectives.

*Government as Self-Regulator.* Amtrak, formally known as the National Railroad Passenger Corporation, is a for-profit government corporation charged with operating the nation's intercity passenger rail system. As both a sovereign and commercial enterprise, it recently found itself in the unusual situation of having to compete in and regulate the rail transportation industry.<sup>22</sup> Should Amtrak regulate in an entirely disinterested fashion, even if such regulation results in the hamstringing of passenger transportation and thereby

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<sup>19</sup> This push indeed dates back to the Clinton-Gore years, when, again, entrepreneurial government was pitched as an antidote to Americans' frustration with the welfare state. See generally OSBORNE & GAEBLER, *supra* note 10.

<sup>20</sup> See Bartholomew D. Sullivan, *Trump's Interior Secretary Wants to End Logging, Fishing Bans on Some National Monuments*, USA TODAY (Sept. 18, 2017), <https://www.usatoday.com/story/news/politics/2017/09/18/interior-secretary-ryan-zinke-recommends-altering-several-national-monuments-allowing-commercial-use/677583001/> [https://perma.cc/5TGB-64AS]; Lauren Katz, *The National Park Service Wants to Triple the Entrance Fee at Some of its Parks*, VOX (Oct. 27, 2017), <https://www.vox.com/energy-and-environment/2017/10/26/16543124/national-park-service-entrance-fee-increases> [https://perma.cc/U5SA-NME5].

<sup>21</sup> See *infra* notes 40-41 and accompanying text.

<sup>22</sup> For details of Amtrak's competing obligations, see *Ass'n of Am. R.Rs. v. U.S. Dep't of Transp.*, 821 F.3d 19, 23 (D.C. Cir. 2016).

endangers profits? Or should the railroad regulate in a commercially self-serving fashion, at the risk of impartial, trustworthy public administration?<sup>23</sup>

*Government Equity Ownership.* As part of the federal bailouts in 2008 and 2009, the U.S. government effectively assumed control over key automotive and insurance firms.<sup>24</sup> Should the government act as a corporate fiduciary, using its equity control to prioritize shareholder profits; a public fiduciary, maximizing returns on the taxpayers' "investment;" a global regulator, seeking to stabilize markets at home and abroad; or as a domestic, partisan regulator, extracting what the Obama Administration may have seen as overdue and otherwise politically unattainable industrial regulatory reforms such as caps on executive compensation and greater firm attentiveness to environmental and labor considerations?<sup>25</sup>

*Government as Investor.* American governments at all levels and across many jurisdictions oversee countless pension funds. When investing those funds, should government managers acquire stock in firms expected to produce the highest rates of return (irrespective of the characteristics, conduct, or location of those firms)? Or should they buy stock in "socially responsible" firms or in local firms employing many constituents, even if the pension managers foresee that those politically attractive firms will be less profitable?<sup>26</sup>

*Managerial Government.* When a government supervisor seeks to discipline one of her regular employees, should she be bound by the First Amendment? Or ought we credit the claim that the supervisor is acting in a managerial or proprietary (*and not sovereign*) capacity? In other words, is the employer–employee relationship sufficiently commercial in look and feel to displace the otherwise applicable sovereign–citizen relationship so carefully regulated by the Constitution?<sup>27</sup>

<sup>23</sup> Somewhat surprisingly given the trends favoring greater government market participation, the D.C. Circuit in 2016 struck down Amtrak's dual authority, a decision seemingly in keeping with the claims this Article makes. *Id.*

<sup>24</sup> See generally Davidoff & Zaring, *supra* note 12.

<sup>25</sup> See Barbara Black, *The U.S. as "Reluctant Shareholder": Government, Business and the Law*, 5 ENTREPRENEURIAL BUS. L.J. 561, 574-75 (2010), for discussion of the "dual roles" of the Treasury Department as both shareholder and steward of the U.S. financial system. These weighty questions have, as in the Amtrak case, been the subject of recent federal litigation. See, e.g., *Starr Int'l Co., Inc. v. United States*, 121 Fed. Cl. 428, 430 (2015), *aff'd in part, vacated in part*, 856 F.3d 953 (Fed. Cir. 2017) (finding improper the federal government's 2008 acquisition of 79.9% equity ownership in AIG, but awarding zero damages).

<sup>26</sup> For discussion of these competing pressures and interests, see generally Jon Entine, *The Politicization of Public Investments*, in PENSION FUND POLITICS: THE DANGERS OF SOCIALLY RESPONSIBLE INVESTING 1 (Jon Entine ed., 2014).

<sup>27</sup> See Shinar, *supra* note 5; Kim, *supra* note 5; see also Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1010 (2005). Here too we have considerable case law. See, e.g., *Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006).

*Government Compliance with Industrial Regulations.* Many federal laws and administrative rules specifically regulate the behavior of private businesses engaged in interstate commerce.<sup>28</sup> What then happens when government agencies or government corporations participate in the market? Should those government units voluntarily abide by the laws and rules regulating private businesses? Or should they instead take advantage of the fact that they are, perhaps uniquely, under no explicit legal obligation to comply?

*Government as Proprietor.* More than a dozen states run their own retail liquor stores. Should a particular state, hostile, say, to President Trump's political agenda, be able to stop selling Trump Wine—just as Nordstrom discontinued the sale of Ivanka Trump's line of clothing? Or would such a decision constitute a form of unconstitutional viewpoint discrimination?

*Government as Wage Setter.* The U.S. Postal Service, another well-known government corporation, has historically paid its workers more than the going market rate for drivers, clerks, and couriers. Should the Postal Service continue to pay above-market wages and benefits to its employees—consistent, no doubt, with some welfarist commitment to socioeconomic empowerment of the lower-middle class?<sup>29</sup> Or should it equalize its pay to that offered by the likes of FedEx and UPS?

## II. THE SOVEREIGN–COMMERCIAL CONFLICT INHERENT IN GOVERNMENT MARKET PARTICIPATION

As the above-stylized sketches reveal, the government market participation terrain is a fraught one—a veritable minefield of constitutional and statutory law concerns, normative questions surrounding appropriate pricing and valuation, economic questions of market competition and failure, and architectural questions of corporate and bureaucratic institutional design. The sketches further reveal a simultaneously socialistic and entrepreneurial government acting opportunistically, out of some real or perceived necessity, in response to some regulatory lapse or shortcoming, or as a result of some path-dependent accident of history. Though the examples are neither especially exhaustive nor particularly nuanced, they nevertheless capture a range of practices and rationales. They also illuminate a common set of problems.

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<sup>28</sup> See, e.g., Occupational Safety and Health Act of 1970, Pub. L. 91-596 § 3(5), 84 Stat. 1590, 1591 (codified at 29 U.S.C. § 652) (exempting all governmental entities, save the Postal Service, from the definition of an “employer” under the landmark workplace safety statute).

<sup>29</sup> See Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1068-69 (2013). See generally Thomas Meehan, *Moynihan of the Moynihan Report*, N.Y. TIMES (July 31, 1966), <https://www.nytimes.com/books/98/10/04/specials/moynihan-report.html> [<https://perma.cc/N2J4-Q6G3>] (describing mid-twentieth-century postal employment as, by design, a gateway to the middle class).

In essence, the challenge of government market participation may be distilled down to this: how do government officials go about fulfilling, accommodating, or subordinating their liberal, democratic, and sovereign responsibilities in intrinsically or conceivably commercial contexts? Ought they act the part of rational economic actor—and seek the commercially best arrangement possible? Ought they be primarily interested in promoting overall public aims—*assuming those aims are readily discernible*—even if doing so comes at the expense of the commercially prized goals of high revenues or cost savings? Or should they endeavor to reconcile the two governing orientations—adopting some murky middle ground?<sup>30</sup>

One may consider the challenges of government market participation from any number of vantage points. To date, many interventions have been narrow, addressed to specific subgroups of government market participants or particular issues relevant primarily to discrete pockets of government market participation. For example, some scholars and jurists have zeroed in on government market participation as it relates to the Dormant Commerce Clause, the First Amendment, or the Equal Protection Clause. Others, in turn, have examined institutions such as the Postal Service or the Tennessee Valley Authority.<sup>31</sup>

This Article, by contrast, addresses government market participation in a transsubstantive fashion. Recognizing that sovereign–commercial conflicts exist to some degree in most instances of government market participation, I argue that such conflicts are qualitatively different from those we confront in the ordinary course of lawmaking, rulemaking, or corporate decisionmaking. I further contend that the sovereign–commercial conflicts are more like the conflicts that our constitutional system anticipates and seeks to regulate through various forms of structural separation.

This Part does the work of distinguishing the sovereign–commercial conflict from ordinary sovereign–sovereign and commercial–commercial conflicts that government and business officials regularly confront. First, I define what I mean by commercial and sovereign responsibilities. Second, I show how the sovereign–commercial conflicts do indeed differ from most routine government and corporate conflicts. Third, I identify the special challenges and problems that sovereign–commercial conflicts engender. These

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<sup>30</sup> To be clear, sometimes the choice is made for government market participants. Congress or a state legislature can and does steer government market participants, directing them to act more or less commercially. But, for reasons explained below, democratic accountability and legislative specificity do not necessarily resolve the fundamental problem of government market participants navigating sovereign and commercial waters using both sovereign and commercial tools (and toggling between sovereign and commercial legal identities). See *infra* notes 113–115 and accompanying text.

<sup>31</sup> See *supra* note 5.

conflicts render government potentially too weak, too corrupt, or too powerful and threatening. Fourth, I provide an international comparison and suggest that, ironically enough, the U.S. government is quite attuned to—and alarmed by—other nations’ sovereign–commercial conflicts.

A. *Distinguishing Sovereign from Commercial: Terms and Definition*

This Article employs the term “commercial” colloquially. *Commercial tools* are the ones we generally associate with the everyday buying, trading, selling, or leasing of goods or services. *Commercial tasks* are ones that businesses, firms, and other economic actors undertake in the regular course of events. And *commercial objectives* are the goals ascribed to said rational economic actors. This is all relatively straightforward in unambiguously commercial settings—though we of course make allowances for even the most hardheaded of businesses to, on occasion, act against economic self-interest.

I likewise use the term “sovereign” colloquially, capaciously, and in a purposely stylized manner. In doing so, I hope to strip the term of the normative and definitional baggage that notions and characterizations of sovereignty typically carry with them. *Sovereign tools* are those we associate with the State’s coercive powers to regulate, adjudicate, punish, and tax. *Sovereign responsibilities* are those viewed as necessary or important for the benefit and security of the nation and its people. We can and do disagree about how we should best promote the national welfare. And, in a similar vein, we can and do disagree about how far sovereign responsibilities extend. For present purposes, I’m indifferent as to the scope and content of those responsibilities and simply stipulate that sovereign responsibilities are those understood to advance some set of constitutionally authorized and democratically agreed upon ends.

Clearly, a pure commercial orientation may clash with sovereign interests—and vice versa. For example, U.S. government scientists develop patentable technologies with some regularity.<sup>32</sup> Should the feds license the IP rights to the highest bidder, as any purely commercial concern would? Ought they take a quasi-protectionist turn and thus limit bidding to a small group of national champions? Or ought they put those discoveries in the public domain, as a sovereign committed to disseminating information and encouraging scientific progress might (and sometimes does)?<sup>33</sup>

By that token, assuming comparable quality, should government officials procure some goods from the seller who offers the lowest price; from the

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<sup>32</sup> NASA has an entire Technology Transfer Program. See *Technology Transfer Program*, NASA, <http://technology.nasa.gov/patents> [<https://perma.cc/7KVY-FSY5>].

<sup>33</sup> See Brian Fung, *NASA Is Opening Up Hundreds of Patents to Inventors, for Free*, WASH. POST (Oct. 7, 2015), <https://www.washingtonpost.com/news/the-switch/wp/2015/10/07/nasa-is-opening-up-hundreds-of-patents-to-inventors-for-free/> [<https://perma.cc/AYP3-PRBL>].

cheapest American (or in-state) seller; or from the cheapest domestic vendor who happens to run a minority-owned small business?<sup>34</sup> Moreover, ought our answer differ if we are buying drones rather than desk lamps?

Lastly, even assuming we all agree that Amtrak is in the “business” of commercial service delivery, we may still query whether the government should subsidize passenger rail service for, say, students, seniors, and the poor—if not for everyone. And we may ponder further what services Amtrak *qua* business should offer. Assuming that there is no public-regarding case to be made for underwriting luxury train travel in Acela’s sumptuous First Class, we may nevertheless wonder whether it is proper for the government to create or reify class divides in the transportation sector, even if those willing and able to pay top dollar for Acela’s First Class help subsidize everyone else’s coach fare.<sup>35</sup>

### B. *Analogous Conflicts and Incompatibilities*

Given government’s extensive role in the modern political economy, the existence of sovereign–commercial conflicts, big and small, are practically inescapable. But that doesn’t necessarily mean we have a problem—let alone a problem distinct from the ordinary challenges of governing. Government officials are invariably forced to choose among competing priorities. They are instructed to, say, uphold public safety, regulate the market for food and drugs, guard against forest fires, alleviate highway congestion, and provide for the national defense. None of these tasks is particularly easy or even straightforward.

First, government officials recognize that resources are scarce. They cannot—and do not—expect to chase every bad guy or prevent every forest fire. Second, government officials must be sensitive to claims that they are overzealous. Were they to go after every scofflaw (including, say, jaywalkers) or stomp out every potential forest fire (including, say, a well-contained and vigilantly monitored Scout campfire), they would quickly lose public support.<sup>36</sup> Third, government officials understand that there are competing approaches and strategies for how best to accomplish their given tasks. For instance, a transportation chief instructed to ease congestion must decide whether to build an additional road, widen the existing roads, add new bus lines, or expand subway services. And even once she decides, say, to build a

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<sup>34</sup> See, e.g., U.S. SMALL BUS. ADMIN., OFF. OF GOV’T CONTRACTING & BUS. DEV., VETERAN OWNED SMALL BUSINESS CONTRACTING PROGRAMS 3-4 (June 2013); see also Jerry Mashaw, *The Fear of Discretion in Government Procurement*, 8 YALE J. REG. 511, 514 (1991).

<sup>35</sup> See MICHAEL J. SANDEL, WHAT MONEY CAN’T BUY: THE MORAL LIMITS OF MARKETS 10 (2012).

<sup>36</sup> For historical discussions of public backlash against overzealous agency enforcement and prosecution, see NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940 195–208 (2013).

new road, she still might have to choose between doing so in a way that paves over on a popular suburban park or that bisects a struggling inner-city neighborhood. A forest ranger, for her part, must decide how to allocate resources among programs that educate the public about the dangers of forest fires, that recruit more firefighters, and that preemptively irrigate the driest woodland. Lastly, the President must decide whether a peace agreement, economic sanctions, saber rattling, or war (and, if so, what kind of war) is most likely to bolster our national defense.

The balancing of competing interests and strategies is hardly exceptional. It is precisely what republican governments are designed to do. As James Madison understood, the republican form of government serves “to refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country.”<sup>37</sup> I have been characterizing such conflicts as ordinary sovereign–sovereign conflicts—ones we expect legislators and agency personnel to resolve. Some public officials are especially attentive to costs and revenue returns.<sup>38</sup> But rarely are those officials so attentive that cost savings and revenue raising become ends unto themselves—a *case of the tail wagging the dog*.

That’s why there has been, of late, outrage over a federal student loan program that reportedly results in an annual government windfall north of \$100 billion at a time when higher education is exceedingly expensive, the job market for college graduates remains uneven, and record numbers are struggling mightily to meet their loan payments.<sup>39</sup> And that’s also why there is rising opposition to law enforcement agencies’ use of their civil forfeiture power. As suggested above, critics allege that police departments’ preference for civil forfeiture—over the traditional practice of arrest, prosecution, and incarceration—is financially motivated, what some call “Policing for Profit.”<sup>40</sup> In effect, governments secure large payments from those accused of wrongdoing without incurring any of the upfront costs or uncertainty associated with criminal prosecutions, let alone the back-end costs of incarcerating those successfully prosecuted.<sup>41</sup>

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37 THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961).

38 See OSBORNE & GAEBLER, *supra* note 10, at 195–218.

39 See Letter from Senators to Sec’y Duncan, Dep’t 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/6MB3-5MV7>] (objecting to the Department of Education’s seeming preference for generating revenue from student loans over alleviating the burdens placed on unemployed and underemployed recent graduates).

40 DICK M. CARPENTER II ET AL., POLICING FOR PROFIT: THE ABUSE OF CIVIL ASSET FORFEITURE, INSTITUTE FOR JUSTICE (2d ed. 2015), <http://ij.org/wp-content/uploads/2015/11/policing-for-profit-2nd-edition.pdf> [<https://perma.cc/AS6U-Z3VX>].

41 See Sarah Stillman, *Taken*, NEW YORKER, (Aug. 12–19 2013), <http://www.newyorker.com/magazine/2013/08/12/taken> [<https://perma.cc/SUB2-VKW9>]; see also George F. Will, *When*

This is what makes government market participation different. Government officials may prioritize—or be compelled to prioritize—one of two often irreconcilable objectives. The dog may wag the tail or, as just mentioned, the tail may wag the dog.

Of similar consequence, government market participants enjoy a bigger toolkit. Ordinary government officials possess sovereign (that is, legal and coercive) tools. Businesses, for their part, possess only commercial (that is, financial and transactional) tools, even when confronting the most vexing of commercial–commercial conflicts.

Given this expanded toolkit, there is no close analogy between a government market participant and a federal, state, or municipal transportation secretary tasked with easing congestion within budgetary limits. Nor is there a close analogy between a government market participant and a corporate executive deciding whether to relocate plants overseas. Instead, the nearer comparison is to an owner–operator of an old-time company town. This proprietor both runs a business and effectively governs the surrounding community.<sup>42</sup>

Possessing the dual toolkit of a sovereign *and* a business changes everything. Consider Congress’s plan for Amtrak to act as government regulator and for-profit corporation. By giving Amtrak these dual powers, Congress enabled the government railroad to summon the coercive force of its federal rulemaking power to tilt the commercial landscape in its favor. By contrast, entirely commercial firms competing with Amtrak had to make do with market levers (and only market levers) in their quest to increase, or even maintain, profitability and market share. To be sure, those private firms enjoy additional means of influence. Among other things, they could lobby government decisionmakers. But license to lobby, to petition Congress, and to support candidates are not sovereign powers. They are, instead, decidedly private powers entrusted to all of us—and done so for the purpose of empowering civil society and corporate interests to influence and possibly check the exercise of sovereign authority. And, for better or worse, those private powers are commercially inflected insofar as financial clout correlates strongly with political influence.

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*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) [https://perma.cc/W58K-FSML] (criticizing “law enforcement agencies [for] padding their budgets and financing boondoggles” through civil forfeiture).

<sup>42</sup> See, e.g., *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (describing a company-owned town and assessing its governance responsibilities). Firms such as Facebook and Google that regulate sizable virtual communities and effectively make policy while running for-profit businesses may be viewed by some as latter-day manifestations of the old company towns. See Chander, *supra* note 6, at 1808; cf. Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 105, 111-12 (2010).

We see the converse resolution of the sovereign–commercial conflict when we turn to the federal government and the bailouts of 2008 and 2009. Specifically, the Treasury Department employed its commercial powers as principal owner of bailed-out companies such as General Motors (GM) to advance several sovereign aims, including cleaner air, greater energy conservation, and lower unemployment.<sup>43</sup> This particular set of commercialized sovereign interventions shows how government market participants are specially—and powerfully—situated: If Treasury desires to regulate GM above and beyond the terms of the bailout itself, its position as an owner allows for the circumvention of the difficult and democratically contested legislative and rulemaking processes. Absent commercial powers, Treasury—like any other government unit that lacks a complementary arsenal of commercial tools—would be forced to go to Congress or, alternatively, issue a notice of proposed rulemaking (and begin that involved process).

Thus here too we see an actor straddling two worlds. Above, I just compared government market participants with proprietors of company towns. Yet one strains to find especially close public sector comparisons. A government market participant who straddles the two worlds does so, perhaps, like a prosecutor who also has the power to preside over criminal trials, or like a Secretary of State who serves concurrently as a United States Senator.

Those comparisons are, I think, apt because just like the government market participant, neither of those hypothetical government officials can readily reconcile her dual status or dual institutional responsibilities. An official who acts both as prosecutor and judge brings charges and then tries defendants brought up on those very charges. And an official who serves as both Secretary of State and U.S. Senator negotiates and signs treaties and then, soon after, votes to ratify those very agreements. In both instances, institutional roles—as prosecutor, diplomat, judge, or legislator—are at least partially compromised, if not altogether subverted. We understand these two-hat-wearing officials as *prima facie* problematic and presumptively abusive. Thus, we need not consider the objective merits of the prosecutor’s case or the soundness of the diplomat’s treaty before crying foul.

Again, the ordinary sovereign–sovereign conflicts discussed above are the very bread and butter of republican government. But dual-role conflicts of the sort just posited seem entirely unfamiliar—and unacceptable. One reason they seem so is because these dual roles are constitutionally prohibited. One person’s service as both prosecutor and judge is inconsistent with our conception of due process.<sup>44</sup> And, even more straightforward, the

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<sup>43</sup> See Black, *supra* note 25, at 589-90.

<sup>44</sup> Cf. *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971) (finding no constitutional support for the issuance of a warrant by a “state official who was [also] the chief investigator and prosecutor

Constitution's Incompatibility Clause plainly prohibits members of Congress from moonlighting in the President's Cabinet.<sup>45</sup> It is telling that government market participants share much in common with these hypothetical dual officeholders: all of them are in a position to leverage two discrete sets of tools and toggle between two sets of identities.

Surely, one may argue that I'm drawing unfair comparisons—associating heretofore legally unobjectionable government market participation with practices long understood to be constitutionally verboten. But that argument may prove too much. After all, the concerns we so quickly and effortlessly identify with dual prosecutors/judges and dual Cabinet Secretaries/Senators reflect our—that is, the United States's—broad constitutional commitments to the separations of powers, including, often, the separation of institutions, instruments, and personnel. To be clear, the assignment of dual, conflicting responsibilities in government personnel is not invariably improper. After all, we encounter any number of inquisitorial systems of government where the existence of a dual prosecutor–adjudicator is far less troublesome. And many perfectly reputable parliamentary systems provide for sitting legislators to lead important government ministries. Our discomfort with these dual roles is therefore very much a function of the United States's especially strident embrace of separating and checking State power. And just as we separate federal–state and executive–legislative–judicial roles—not to mention civilian–military, church–State, and public–private roles—there is a constitutional case to be made (again, at least in the United States) for likewise separating the sovereign and the commercial.

### C. *The Architecture of the Sovereign–Commercial Conflict*

We can push these analogies further still: the concerns surrounding the fusion of sovereign and commercial responsibilities track those that justify the various other lines of separation central to our constitutional system. Indeed, we regularly think of the separations of powers as advancing three primary aims: to align government departments' institutional features with their organizational missions and orientations; to avoid the appearance and prevent the reality of public self-dealing; and, of course, to safeguard individual liberty. As it happens, separating the sovereign from the commercial seemingly advances those very same aims.

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in the case"). The Supreme Court has also prohibited executive officials (otherwise unrelated to the arrest or prosecution) serving in judicial capacities, at least insofar as any fines assessed in criminal judicial proceedings can be drawn upon by said executive in furtherance of carrying out their executive duties. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972).

<sup>45</sup> See U.S. CONST. art. I, § 6, cl. 2.

### 1. Separation and Institutional Mismatch

Government market participation tends to be funneled through one of two sets of institutions. There are the familiar public administrative agencies, permitted, directed, or obligated to engage in some form of commerce. Any such commercial engagement reinforces, is added to, is conjoined with, or comes at the expense of their regular sovereign duties. And any such commercial engagement broadens, deepens, or complicates those agencies' governing perspective or orientation.

There are, also, government corporations of a bewildering number of stripes and complexions. These entities often have an internal architecture—and institutional orientation—more in keeping with what we find in business settings than in the agencies ringing the National Mall. These government corporations may in turn be encouraged or obligated to consider sovereign aims or commitments, as add-ons to or in conjunction with their sundry commercial responsibilities.<sup>46</sup>

As an institutional matter, neither government agencies nor government corporations are likely to be particularly adept at advancing both sovereign and commercial aims. By and large, agencies are constructed to carry out the State's sovereign, democratic interests. And government corporations, in turn, are generally designed to further the State's commercial interests. Indeed, often government corporations are intended to be anti-agencies of a sort, with Congress viewing agencies as poor instruments of State commerce and enterprise.

Let me explain. Government agencies, such as the Department of Labor or the Department of Transportation, are pluralistic, internally divided, and internally rivalrous. The intra-agency divisions and rivalries constitute what I elsewhere call the *administrative separation of powers*.<sup>47</sup> They give meaning and effect to important, if not always appreciated, tensions among the agency leaders (appointed by the President); the politically insulated, career civil servants; and the public writ large, authorized to participate broadly and meaningfully in many facets of administrative governance.

This tripartite fragmentation of agency power serves as a constitutional salve, helping to redeem the Framers' constitutional commitment to the separation of powers in an era of modern administrative governance. (Recall that this constitutional commitment was profoundly tested by the decision of twentieth-century lawmakers to delegate previously disaggregated legislative,

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<sup>46</sup> Cf. Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 857-61 (2014); DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONF. OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 60-64 (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/TM6V-H5LP>].

<sup>47</sup> See Michaels, *Enduring, Evolving*, *supra* note 14, at 530.

executive, and judicial powers to initially unitary administrative agencies.<sup>48</sup>) Again, I present these arguments in more robust forms elsewhere.<sup>49</sup> For our immediate purposes, it is enough to recognize that a collaborative, contentious, and pluralistic framework for intra-agency rivalry and separation exists; that these rivalries ensure that administrative action is the product of extensive input (and ultimately buy-in); and that agencies, precisely because of this administrative separation of powers, are suitable and legitimate shapers, enforcers, and arbiters of sovereign interests in our constitutional republic.<sup>50</sup>

Yet when it comes to government market participation, this intentionally fragmented organizational structure (so necessary for constitutionally sound democratic decisionmaking) seems clunky. Leading accounts of American corporate governance understand homogeneous organizational control to be the institutional arrangement best suited to advance the singular commercial objective of profit maximization.<sup>51</sup> Specifically, homogeneous control allows entities to be fast and decisive, and the corresponding absence of internal fragmentation and rivalries narrows the space for dissent and obstruction of the kind that may disadvantage government agencies vis-à-vis their commercial competitors.<sup>52</sup>

Government corporations, to some extent modeled on private corporations, tend to be viewed as having an advantageous design choice precisely because they are not internally fragmented like agencies.<sup>53</sup> Among other things, government corporations generally lack an independent, politically insulated civil service; they may instead be free to employ at-will workers, as do most private commercial concerns.<sup>54</sup> Government corporations

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<sup>48</sup> See *id.* at 526.

<sup>49</sup> See *id.*; see also MICHAELS, CONSTITUTIONAL COUP, *supra* note 11, at 57-70.

<sup>50</sup> See Jon D. Michaels, *Of Constitutional Custodians and Regulatory Rivals: An Account of the Old and New Separation of Powers*, 91 N.Y.U. L. REV. 227, 265 (2016).

<sup>51</sup> See generally HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 39-44 (1996); Michael C. Jensen, *Value Maximization, Stakeholder Theory and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235, 249 (2002); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440-41 (2001).

<sup>52</sup> Cf. Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 412-13 (1996) (recognizing that commercial outfits focus on questions of management, whereas public instrumentalities are concerned with governance strategies).

<sup>53</sup> See KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30365, FEDERAL GOVERNMENT CORPORATIONS: AN OVERVIEW 10 (June 8, 2011). For discussions of the difference between agencies and corporations when it comes to matters of public input, rivalrous decisionmaking, and other process and design questions, see MICHAELS, CONSTITUTIONAL COUP, *supra* note 11, at 163-66.

<sup>54</sup> See generally Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine*, 36 INDUS. L.J. 84 (2007).

also tend to be less transparent and less open to public participation of the sort we have come to expect from agencies.<sup>55</sup>

We are, or at least we should be, comfortable with fragmented, contentious government decisionmaking—notwithstanding that such fragmented contentiousness is so time- and resource-intensive—precisely because we have an enduring constitutional commitment to a pluralistic, rivalrous model of sovereign government. Fragmented, rivalrous government is, in short, a feature, not a bug, of a liberal republic founded upon the separating and checking of State power. (This is, in essence, what the businesslike government crowd fails to appreciate. Of course, we can aggressively streamline administrative rulemaking and other sovereign tasks—but at what cost to our constitutional commitments?<sup>56</sup>)

And we are, and are told that we should be, comfortable with homogeneous organization control over businesses, at least so long as we expect—and indeed demand—businesses to be unflinchingly profit-seeking. Note that this division between sovereign and commercial entities, works—and works well—only if everyone recognizes that the State needs the authority and resources to support and protect capitalism’s casualties.<sup>57</sup>

By these reckonings, vesting both sovereign and commercial responsibilities in *either* administrative agencies or government corporations invites misalignment—a mismatch between organizational architecture and programmatic orientation. Agencies cannot be expected to handle commercial duties particularly well. And, when it comes to government corporations and sovereign powers, we run the risk of decisions being made without the requisite democratic input, rivalrous engagement, and overall procedural rigor. Indeed, we routinely snicker at how agencies fumble about as they try to purchase new staplers,<sup>58</sup> and we may shudder at how government

<sup>55</sup> See A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 560 (1995) (describing lax regulation and oversight of government corporations compared to administrative agencies); KOSAR, *supra* note 53, at 8 (noting that Congress gives government corporations “marginal attention” and that these bodies “come under comparatively little congressional scrutiny”).

<sup>56</sup> MICHAELS, CONSTITUTIONAL COUP, *supra* note 11, at 165-66.

<sup>57</sup> See, e.g., JACOB S. HACKER & PAUL PIERSON, *AMERICAN AMNESIA: HOW THE WAR ON GOVERNMENT LED US TO FORGET WHAT MADE AMERICA PROSPER* (2016) (describing the broad mid-twentieth-century consensus in favor of a welfare state complete with a strong and expansive social safety net). If and when that recognition falters, we might have reason to challenge the governing corporate orthodoxy and make different and broader demands of businesses. Indeed, perhaps the State’s failure to provide for capitalism’s casualties is in part what animates those who challenge the primacy of shareholder value theory in corporate governance.

<sup>58</sup> Cf. James Taranto, *The Ashtray of History: Remember “Reinventing Government?” No, and with Good Reason*, WALL ST. J. (Dec. 6, 2011), <http://www.wsj.com/articles/SB10001424052970204903804577082550219655404> [<https://perma.cc/99XB-SG5D>] (describing some of the more showy ways in which Al Gore highlighted government procurement waste and cost overruns).

corporations make welfarist determinations expediently and unilaterally, without meaningful public involvement.

Note that the mismatch concerns may seem relatively small bore. But make no mistake: it is of great relevance if for no other reason than because we evaluate government commercial engagement in terms of efficiency and productivity.<sup>59</sup> Moreover, we assess government sovereign engagement based in considerable part on how robust, inclusive, and deliberative the administrative process was.<sup>60</sup> The mismatch concerns are still more relevant because questions of efficient institutional alignment are, as I describe later, themselves constitutionally salient.

## 2. Separation and Public Self-Dealing

Worse than simply engendering institutional mismatches wherein the architecture of government entities does not jibe with the sovereign or commercial orientation of those entities, sovereign–commercial conflicts might lead to the abdication, subordination, or outright denial of sovereign duties and obligations. A government unit that, by choice or directive, gives primacy to commercial considerations may end up diminishing the State and undermining its moral authority.

Consider a pair of the case studies introduced in Part I. First, there is government as employer. Senior government officials may contend that they are acting in a commercial, proprietary capacity when they make personnel decisions—that is, hiring, firing, promotions, and demotions—managing a workforce just as a private entity would. This classification (as commercial)

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<sup>59</sup> Congress, the President, and the media often make considerable hay out of the profitability, or lack thereof, of government enterprises such as Amtrak and the Postal Service. See, e.g., Ron Nixon, *Amtrak Losing Millions Each Year on Food Sales, Audit Finds*, N.Y. TIMES (Aug. 2, 2012), <http://www.nytimes.com/2012/08/03/us/politics/amtrak-lost-834-million-on-food-in-last-decade-audit-finds.html> [https://perma.cc/QDB9-BCPH]; Robert J. Samuelson, *The Expensive Amtrak Fantasy*, WASH. POST (Mar. 5, 2013), [https://www.washingtonpost.com/opinions/robert-samuels-on-the-expensive-amtrak-fantasy/2013/03/05/4224bfe6-85de-11e2-9d71-fofeafdd1394\\_story.html](https://www.washingtonpost.com/opinions/robert-samuels-on-the-expensive-amtrak-fantasy/2013/03/05/4224bfe6-85de-11e2-9d71-fofeafdd1394_story.html) [https://perma.cc/R93H-AU4B]; U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-475T, U.S. POSTAL SERVICE: ESCALATING FINANCIAL PROBLEMS REQUIRE MAJOR COST REDUCTIONS TO LIMIT LOSSES (2009); see also Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 29, 2017, 5:04 AM), <https://twitter.com/realDonaldTrump/status/946728546633953285> [https://perma.cc/QL5A-MDYA] (calling into question the delivery prices set by the U.S. Postal Service, “which is losing many billions of dollars a year”).

<sup>60</sup> See Mashaw, *supra* note 52, at 406, 412-13; Michaels, *Of Constitutional Custodians*, *supra* note 50, at 273 (“Courts can increase or decrease the deference accorded to agency actions or interpretations depending on the degree to which those actions or interpretations were arrived at through a truly rivalrous, heterogeneous, and inclusive administrative process.”); see also Ronald J. Krotoszynski, Jr., “History Belongs to the Winners”: *The Bazelton–Leventhal Debate and the Continuing Relevance of the Process/Substance Dichotomy in Judicial Review of Agency Action*, 58 ADMIN. L. REV. 995, 999-1002 (2006) (describing a pivotal judicial battle over whether to scrutinize agency outcomes or agency processes).

matters because senior officials may wish, when sanctioning employees, to act outside the scope of the First Amendment, and thus fire or demote employees for, among other things, otherwise protected speech acts.<sup>61</sup> Disavowing their sovereign status—and thus shedding any corresponding constitutional duties—may well make government more adroit and flexible, not to mention commercially competitive. But the price of such dexterity is dear indeed. For example, license to avoid certain constitutional responsibilities that otherwise attach to sovereign–citizen relations may well undermine the case for granting the government coercive powers in the first place. We do so, after all, fully expecting that the government will subject itself to any number of constitutional restrictions including those articulated in the First, Fourth, Fifth, and Fourteenth Amendments.<sup>62</sup> And we do so, I would add, expecting that the government remains internally rivalrous and pluralistic. Allowing high-ranking officials to fire or demote subordinates for unpopular or critical speech may subvert the administrative separation of powers—specifically by weakening the nonpartisan bureaucracy’s ability to challenge and oppose presidentially appointed agency leaders.

Second, consider Amtrak. Congress designated Amtrak as a for-profit government entity,<sup>63</sup> and the D.C. Circuit suggested that, as a result of that designation, Amtrak’s corporate officers might have fiduciary duties to maximize profits.<sup>64</sup> Amtrak officials certainly face political pressure to operate in the black. Congress is, after all, a regular and fierce critic of Amtrak’s fiscal management.<sup>65</sup>

Along with its commercial obligations, Amtrak recently possessed regulatory responsibilities. Specifically, Congress gave Amtrak a leading role in devising rules affecting the railroad industry. Rules favoring Amtrak’s particular interests would no doubt help the passenger rail keep its costs down and its customer satisfaction high. And this is precisely the problem. Recent suits challenged Amtrak’s dual—and conflicting—status as a federal rulemaker and commercial profit-seeker, underscoring the tension between regulating in

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<sup>61</sup> See Kim, *supra* note 5; Shinar, *supra* note 5.

<sup>62</sup> Cf. *Bd. of Regents v. Roth*, 408 U.S. 564, 588-89 (1972) (Marshall, J., dissenting) (emphasizing the government’s heightened duty of reasonableness and fairness in practically all of its transactions and interventions); Michaels, *Running Government Like a Business*, *supra* note 1, at 1159 (stressing the correspondence between the State’s vast powers and its responsibility “to exercise [those] powers . . . fairly, democratically, and constitutionally”).

<sup>63</sup> *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 721 F.3d 666, 674-75 (D.C. Cir. 2013), *rev’d on other grounds sub nom.* 135 S. Ct. 1225 (2015).

<sup>64</sup> 721 F.3d at 676.

<sup>65</sup> One recent full committee hearing concentrated on the “mismanagement of the issues relating to food services and beverages at Amtrak.” *A Review of Amtrak Operations, Part I: Mismanagement of Food & Beverage Services: Hearing Before the Comm. on Transportation and Infrastructure*, 112th Cong. 1 (2012) (statement of Congressman John L. Mica).

a self-serving fashion and doing what is in the public interest. The D.C. Circuit found Amtrak's dual status to be unconstitutional, specifically because of the high risk of self-dealing.<sup>66</sup> At bottom, the court's stated concerns are consonant with those expressed in this Article: Amtrak may well choose or feel compelled to misuse its sovereign, coercive tools to boost its commercial standing.

To be sure, even the appearance of impropriety—that is, the possibility that the government's commercial objectives influence regulatory outcomes—has serious ramifications. Government entities perceived as using their sovereign powers to boost their commercial output are likely to engender distrust and intensify existing doubts. Again, we need look no further than the rather forceful opposition amassing against municipalities for their ready reliance on civil forfeitures—as an alternative to criminal justice—to gauge public distrust of government agencies that raise money through seemingly self-serving regulation.<sup>67</sup>

Note this is not only a concern with businesslike government. We might have a similar reaction were government officials to take on—or refuse to shed—ecclesiastical duties and harness their State powers and State platforms in furtherance of their religious commitments. Consider, for example, a scenario in which the Archbishop of New York was elected Governor of New York (and retained his leadership position in the Catholic Church). As a Cardinal–Governor he would invariably find himself between a proverbial rock and hard place, torn between the dictates of canon and constitutional law. Nevertheless, he would be bound by the strong anti-Erastian commitment reflected in the Establishment Clause. As Sam Rascoff recounts, the Framers “were deeply concerned with attempts by the state to harness the power of religion to achieve ‘secular’ political goals.”<sup>68</sup> Particularly sensitive to the power-accreting effects of fusing State and church powers, Rascoff reminds us further that the Framers “conceived of the Establishment Clause as a bulwark against precisely this sort of aggrandizement of the state.”<sup>69</sup>

This hypothetical is, I hasten to add, different from actual scenarios involving officials such as Kentucky's Kim Davis. Davis, a county clerk of fleeting notoriety—her fifteen minutes came in 2015—insisted her personal

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<sup>66</sup> *Ass'n of Am. R.Rs.*, 821 F.3d at 23; 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 (2014) (framing the Amtrak case as a due process case, an approach that the D.C. Circuit later adopted).

<sup>67</sup> See, e.g., MICHELLE ALEXANDER, *THE NEW JIM CROW* 79–83 (2010) (characterizing civil forfeiture as a “shakedown” with minimal due process protections); *supra* notes 40–41 and accompanying text.

<sup>68</sup> Samuel J. Rascoff, *Establishing Official Islam? The Law and Strategy of Counter-Radicalization*, 64 STAN. L. REV. 125, 133 (2012).

<sup>69</sup> *Id.*

religious convictions prevented her from carrying out her public duties.<sup>70</sup> Specifically, she refused to issue marriage licenses to same-sex couples, in contravention of the Supreme Court's *Obergefell v. Hodges* decision.<sup>71</sup> That real-world example, however, is more akin to cases of private corruption: Davis was accruing personal, albeit spiritual, benefits rather than satisfying alternative and incommensurate professional obligations. Thus Davis, a government clerk who held no other office, is not like the Senator–diplomat or prosecutor–judge (or Cardinal–Governor). Instead, she is like the crooked public official who subverts her public charge for some private, though not necessarily pecuniary, gain.

These sovereign–commercial situations are not likely to arise regularly, hence the rather farfetched hypothetical involving a Cardinal–Governor. What's more, it may well be the case that trust in government, already woefully low, will not (and perhaps cannot) plummet further simply because some government entity appears to disavow its sovereign obligations or misuse its sovereign powers. To be sure, we can just as easily downplay the concerns associated with prosecutor–judges and Senator–diplomats. Dual-role assignments were unlikely to arise with any regularity. Even so, it was speculative at best that dual-role officials would do any measurable harm.<sup>72</sup> And, assuming the worst, it still isn't clear that conflicted dual-role officials would trouble voters, let alone shatter faith in government. Yet the separation of those responsibilities is nonetheless vigilantly enforced, in part because even the occasional fusion of otherwise disaggregated sovereign duties is unacceptable, particularly in our system predicated on comprehensively rivalrous government; and in part because government distrust runs deep in our political and legal culture (such that we cannot afford to risk squandering what little political and cultural capital government retains).

### 3. Separation and Abusive Government

I just described the possibility of government officials resolving sovereign–commercial conflicts in favor of commercial interests. Needless to say, the resolution of sovereign–commercial conflicts might run in the opposite direction, leading to the subordination, abdication, or redirection of a government agency's commercial responsibilities. For those who champion an activist welfare state and are generally wary of government market participation, this outcome may appear to be a happy one. But even that

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<sup>70</sup> Alan Blinder & Richard Fausset, *Kentucky Clerk Who Said "No" to Gay Couples Won't Be Alone in Court*, N.Y. TIMES, Sept. 3, 2015, at A18.

<sup>71</sup> 135 S. Ct. 2584 (2015).

<sup>72</sup> This is a point the Court concedes in *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), albeit when considering the possibility of de minimis private self-dealing.

contingent ought to appreciate that the fusion of sovereign and commercial tools and legal authorities emboldens the State in problematic ways. The fusion enables the government to advance sovereign interests without necessarily having to follow the ordinary and onerous processes associated with congressional lawmaking or administrative rulemaking. This fusion further enables government officials, at times, to act without regard for the substantive constraints otherwise imposed on the government *qua* sovereign. Such an ability to bypass procedurally rigorous legislative and regulatory pathways and to evade substantive restrictions placed on government officials invites abuse and overreach, in ways that should be alarming for libertarians and big government types alike. Moreover, just as the subordination of sovereign responsibilities to commercial ones may undermine faith in the State, the subordination of commercial responsibilities to sovereign ones (and the corresponding misappropriation of commercial tools and legal prerogatives) may diminish faith in the market.

Consider another pair of examples from Part I. Recall first the U.S. government's ownership stake in all-but-collapsing automotive and insurance firms. Leveraging its position as "owner," the government induced the auto companies to boost its output of environmentally friendly cars.<sup>73</sup> Corporate managers were also instructed to scale back their plans to move jobs overseas.<sup>74</sup> In a similar move, the government compelled AIG's managers to withdraw lawsuits against other, equally distraught financial firms.<sup>75</sup> In both of these instances, the government used its commercial power to recast corporate policies. The new policies seemed to advance sovereign, welfarist aims over any number of commercial and perhaps fiduciary ones to maximize shareholder wealth.<sup>76</sup> Of particular importance, the government engineered these policy changes using commercial instruments far less democratic, procedurally robust, and judicially reviewable than are the mainstays of a sovereign subject to the strictures of bicameralism and presentment, and the requirements of the Administrative Procedure Act.<sup>77</sup>

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<sup>73</sup> Templin, *supra* note 5, at 1185-86.

<sup>74</sup> Black, *supra* note 25, at 589-90.

<sup>75</sup> Louise Story & Gretchen Morgenson, *Inside the U.S. Bailout of A.I.G.: Extra Forgiveness for Big Banks*, N.Y. TIMES (June 30, 2010), <http://query.nytimes.com/gst/fullpage.html?res=9A04E2D6143CF933A05755CoA9669D8B63&pagewanted=all> [https://perma.cc/8VUF-NNPG].

<sup>76</sup> See generally J.W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 YALE J. ON REG. 283 (2010). For discussion of the litigation surrounding government ownership, see *supra* note 25; see also Gretchen Morgenson, *Court Casts a New Light on a Bailout*, N.Y. TIMES (Sept. 27, 2014), <http://www.nytimes.com/2014/09/28/business/court-casts-a-new-light-on-a-bailout.html> [http://perma.cc/FRP8-T9WC]; Aaron M. Kessler, *AIG Boss Wins Suit but Loses the War*, N.Y. TIMES, Jun. 16, 2015, at B1.

<sup>77</sup> See Davidoff & Zaring, *supra* note 12, at 519-20.

Again, the misappropriation here, unlike in the Amtrak case study, is from the commercial side of the ledger. The government seemingly cast to the side its apparent commercial objectives and obligations (both to the American taxpayers, to whom a return was promised, and to the rest of the shareholders, to whom the United States *qua* controlling shareholder may well have owed some commercial duties), trading on its commercial status and influence to advance sovereign, public-regarding interests.

It may go without saying but the government would likely have been slower, more tentative, and in some ways less successful had it sought to effect the same industry reforms using only the lawmaking and law-enforcing tools typically entrusted to the sovereign. Sovereign tools are less handy than commercial ones, and that's by design: lawmaking and law-enforcing are heavily regulated activities subject to far greater and more contentious forms of democratic and bureaucratic input.

Recall as a second example government investment decisions. Here too investments may be chosen to promote welfarist objectives, to the apparent detriment of the government's rate of return. Among other things, government pension managers might invest in solar energy companies (and divest from fossil fuel firms); they might prioritize local firms with the hope that government investments lead to local job growth, an expanded tax base, and a happier electorate, and they might divest from firms that sell harmful products or do business with rogue nation-states.<sup>78</sup>

Making policy through investments rather than legislation or regulation can no doubt save time and political capital. Pension investment decisions may be directed and constrained by statutes and regulations. But the decisions themselves are not generally subject to the substantive and procedural requirements of lawmaking. Yet such an investing-as-regulating approach to governing expands State powers in potentially troubling ways: the government employs its commercial tools and resources to reach further and act more expediently than it could were only sovereign, coercive tools at its disposal.

Government market participation serving as a workaround, a way to bypass the substantive and procedural laws constraining government market regulation (via lawmaking, rulemaking, and adjudication), should raise red flags. Indeed, the commingling of sovereign regulatory and commercial transactional powers poses similar threats to limited government as does the fusion of executive and legislative power, executive and judicial power, and public and private power. In all these cases, the combination and consolidation of powers limits opportunities for dissent and pushback of the sort that deters and constrains abusive or simply imprudent government

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<sup>78</sup> See Entine, *supra* note 26.

interventions.<sup>79</sup> Thus, even if we think there are too many constraints placed on government regulators, the solution may well be to reform our regulatory processes—through legislation and, perhaps, litigation—not to seek a workaround.<sup>80</sup>

D. *Washington's Perception of Other Nations' Sovereign-Commercial Conflicts*

Note too that our rather undertheorized, and heretofore largely unproblematic fusion of regulatory and commercial powers mirrors a type of expanded, conflicted State power that the United States is quick to deem disconcerting in international relations. For instance, the U.S. government heavily scrutinizes foreign, State-owned firms seeking to acquire controlling interests in American businesses.<sup>81</sup> Motivating such scrutiny are concerns that foreign, State-owned firms may not be simply (and innocently enough) looking to diversify their holdings, seizing upon what they see as good business opportunities, as nongovernmental investors would. Instead, we worry that State-owned firms are using their purchasing power to advance sovereign rather than commercial interests. They may, for instance, be less concerned with maximizing profits than with destabilizing U.S. national or economic security,<sup>82</sup> dictating regulatory policy from abroad (via corporate control, as in the bailout examples discussed above), or extracting trade secrets, classified information, or intellectual property from American firms.<sup>83</sup>

This intensive scrutiny—greater than what the United States applies to nongovernmental (and thus more assuredly singularly profit-seeking) foreign and multinational businesses interested in acquiring American assets<sup>84</sup>—reflects Congress's recognition that other nations may possess

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<sup>79</sup> See Michaels, *Enduring, Evolving*, *supra* note 14, at 522.

<sup>80</sup> See Michaels, *Privatization's Pretensions*, *supra* note 2, at 719 (describing government officials as engineering workarounds to circumvent laws and rules they find particularly onerous).

<sup>81</sup> See, e.g., *infra* note 83 and accompanying text.

<sup>82</sup> See, e.g., JOHN F. FRITELLI, CONG. RESEARCH SERV., RL31733, PORT AND MARITIME SECURITY: BACKGROUND AND ISSUES FOR CONGRESS 6-7 (2005) (characterizing some public officials' concerns over foreign, State-owned businesses overseeing U.S. port operations); Eric Lipton, *Chinese Withdraw Offer for Nevada Gold Concern*, N.Y. TIMES, Dec. 22, 2009, at B3 (reporting U.S. government opposition to a proposal by a firm "controlled by the Chinese government" to acquire a Nevada mining operation).

<sup>83</sup> See JAMES K. JACKSON, CONG. RESEARCH SERV., RS22863, FOREIGN INVESTMENT, CFIUS, AND HOMELAND SECURITY: AN OVERVIEW 2-3 (2008); Michaels, *Fettered Executive*, *supra* note 5, at 807. For what it is worth, other nation-states review direct foreign investments and transactions too. See DAVID M. MARCHICK & MATTHEW J. SLAUGHTER, CORRECTING A PROTECTIONIST DRIFT: GLOBAL FDI POLICY, COUNCIL ON FOREIGN RELATIONS 7-12 (2008) (describing the review processes undertaken by the governments of Canada, China, Russia, Germany, Japan, Australia, France, and Hungary, among others).

<sup>84</sup> See 50 U.S.C. § 2170(b)(2)(B)(i)(II) (2012) (directing CFIUS to rigorously review proposed direct foreign investments by companies owned or effectively controlled by foreign governments).

sovereign–commercial conflicts in spades. And those nations may resolve their sovereign–commercial conflicts in ways that either distort markets or extend their policymaking reach.<sup>85</sup>

Sensitive to these possibilities, the U.S. government working group charged with reviewing foreign acquisitions has focused intensely on Chinese firms owned by or effectively controlled by Beijing. Such firms regularly seek to acquire controlling interests in American companies. Surely, most acquisitions are pure business decisions. But there is always the possibility that the investment is pretextual—and the acquisitions are, in fact, strategic components of Chinese foreign policy.

In recent years, the U.S. working group (called the Committee on Foreign Investment in the United States, or CFIUS for short) helped scuttle Chinese firms' plans to acquire an Oregon wind farm<sup>86</sup> and various mines in places such as Nevada.<sup>87</sup> Though seemingly harmless enough, both the farm and mines were reportedly too close to U.S. military installations, and thus opportune sites from which the Chinese government could—through its corporate proxies—conduct surveillance and other intelligence operations antithetical to American national security.

CFIUS has also closely monitored attempts by State-owned or State-controlled Chinese firms to buy sizable stakes in U.S.-based telecommunications and technology companies. Leading Chinese outfits, such as Huawei, have had special difficulty breaking into the American telecom and tech markets.<sup>88</sup> Though CFIUS deliberations are secret, it is fairly apparent that CFIUS considers Huawei a cybersecurity threat inclined to create or exploit network vulnerabilities.<sup>89</sup> And even in cases where CFIUS has allowed foreign acquisitions to proceed, the working group has imposed restrictions and conditions on the role that foreign owners may play. For instance, when Lenovo, partially owned by the Chinese government, acquired IBM's personal computing business line, CFIUS insisted that Lenovo

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<sup>85</sup> See JACKSON, *supra* note 83 (describing the U.S. government's sensitivity to foreign governments using direct foreign investment as a tool of economic and national-security statecraft).

<sup>86</sup> Rachelle Younglai, *Obama Blocks Chinese Wind Farms in Oregon over Security*, REUTERS (Sept. 29, 2012), <http://www.reuters.com/article/us-usa-china-turbines-idUSBRE88R19220120929> [<https://perma.cc/7JCP-MPP9>].

<sup>87</sup> Lipton, *supra* note 82.

<sup>88</sup> See Shayndi Raice & Andrew Dowell, *Huawei Drops U.S. Deal Amid Opposition*, WALL ST. J. (Feb. 22, 2011), <https://www.wsj.com/articles/SB10001424052748703407304576154121951088478> [<https://perma.cc/C8CB-3CJ6>].

<sup>89</sup> See Steven R. Weisman, *Sale of 3Com to Huawei Is Derailed by U.S. Security Concerns*, N.Y. TIMES (Feb. 21, 2008), <http://www.nytimes.com/2008/02/21/business/worldbusiness/21iht-3com.1.10258216.html> [<https://perma.cc/MSG9-X496>].

officials wall themselves off from all computer sales to federal agencies.<sup>90</sup> Lenovo executives were also required to steer clear of two legacy IBM buildings, presumably where classified projects for the American government were already underway.<sup>91</sup>

Lastly and lest one think that China alone has been singled out, CFIUS also insisted on similar stipulations before the French company Alcatel (itself closely connected to the French government) could acquire Lucent. Lucent ran Bell Labs, which has long performed significant, often classified, work for the U.S. government. As a condition of sale, Alcatel's personnel were restricted from any direct involvement in Bell's operations.<sup>92</sup>

(Lest one think these conflicts are inescapable, a nation-state with large fiscal reserves could set up a blind investment trust, a preemptive measure both to prevent its own officials from politicizing investment policy and to signal to the rest of the world that there is no ongoing sovereign–commercial conflict. In such situations, the sovereign would bow out gracefully, substantially eliminating the conflict.)

In all, the development of a regulatory regime that scrutinizes, restricts, or altogether rejects acquisitions by State-owned or State-controlled firms reflects Congress's canny recognition that other nations' sovereign–commercial conflicts might compromise U.S. market operations, threaten U.S. sovereign interests, or expand the influence and power of overseas governments.<sup>93</sup> Again, it is curious and, perhaps, unsettling that, like many a pot, we have failed to realize we too are covered in soot. To be sure, the purely domestic effects of *our* sovereign–commercial conflicts play out very differently from those exploited on a grander geopolitical stage. Nevertheless, the effects of our domestic sovereign–commercial conflicts are problematic for many of the same reasons just discussed—and thus seemingly demand similar regulatory attention.

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<sup>90</sup> Anthony Michael Sabino, *Transactions That Imperil National Security: A Look at the Government's Power to Say "No"*, N.Y. ST. B. ASS'N J., Nov.–Dec. 2005, at 20, 22, 24.

<sup>91</sup> *Id.*

<sup>92</sup> See Michaels, *Willingly Fettered*, *supra* note 5, at 826.

<sup>93</sup> See *supra* notes 82–92. Another domain in which Congress recognizes the distinction between sovereign and commercial roles played by foreign sovereigns is that of foreign sovereign immunity. Under the Foreign Sovereign Immunities Act, a major exception to the conferral of foreign sovereign immunity is referred to as the commercial activity exception. 28 U.S.C. § 1605(a)(2) (2012). Simply stated, foreign governments or heads of state engaged in commercial activities may well forgo the privileges of immunity otherwise befitting a recognized sovereign. While the scope of the exception presents complicated questions, see, for example, *OBB Personenverkehr AG v. Sachs*, 136 S. Ct. 390, 395 (2015), the key point for our purposes is straightforward: Congress appreciates the distinction between a foreign sovereign *qua* sovereign and a foreign sovereign *qua* market actor.

### III. STRUCTURAL SEPARATION, REGULATION, AND LEGITIMATION

Sovereign–commercial conflicts are only exacerbated by federal, state, and local governments’ seemingly nonchalant, opaque, inconsistent, and spotty approach to their own market participation. Some important domains, including government procurement and pension programs, are already extensively regulated in ways that suggest a clear appreciation of the problems identified in Section II.C. The same is true when it comes to some specific government institutions, such as the Tennessee Valley Authority and the U.S. Postal Service. But many other analytically or at least substantively similar forms of potentially conflicted government market participation barely register in legislative, administrative, or judicial deliberations and proceedings. Thus we’re left with unevenly and sometimes arbitrarily regulated forms of government market participation. This state of affairs frustrates systematic study and bedevils would-be reformers; nevertheless, if not precisely because of the current splotchiness, a transsubstantive set of regulatory protocols ought to be carefully considered.

Regulation could proscribe, or at least drastically scale back, government’s participation in the market. Such a strong intervention would eliminate many of the concerns this Article raises. Nonetheless, a widescale ban or broad restriction on government market participation would be extreme and disproportionate for any number of reasons, including the difficult logistics associated with abrupt government disengagement from the market, the fact that some forms of government market participation are necessary or highly practical, and the undesirability of ready alternatives to government market participation (including but not limited to the outsourcing of many government services<sup>94</sup>).

This leaves us in a place not altogether different from the one administrative lawyers found themselves in during the 1940s. Those lawyers recognized that federal public administration was a necessary but unruly realm, particularly insofar as agency practices were, at that time, varied, opaque, and often ad hoc. Ultimately, they succeeded in enacting the Administrative Procedure Act (APA).<sup>95</sup> The APA brought order and structure to the myriad administrative practices that were then being employed by federal agencies, cabined some of the more troublesome forms of administrative governance, and helped cement the administrative state’s constitutional footing.

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<sup>94</sup> See MICHAELS, *CONSTITUTIONAL COUP*, *supra* note 11 (describing the constitutional dangers posed by privatization); *supra* note 2 (detailing how privatization undermines, among other things, accountability).

<sup>95</sup> Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

The APA is hardly perfect. But, as the Supreme Court noted, it did yeoman's work by introducing "greater uniformity of procedure and standardization of administrative practice among the diverse agencies whose customs had departed widely from each other."<sup>96</sup> Perhaps the signature achievement of the APA is its articulation and delineation of two principal means of administrative intervention: rulemaking and adjudication,<sup>97</sup> and the corresponding separation of personnel, tools, and orientation. Such separation distanced formal adjudicators and the proceedings over which they presided from the rest of the agency charged with making and enforcing rules.<sup>98</sup> Such separation also helped wall adjudicators off from those agency officials who could put to use the spoils of adjudication—namely, the proceeds of any fines that transgressors paid and the agency was allowed to keep.<sup>99</sup>

Today, given the importance of government market participation, it might be time to formally recognize that pervasive practice as a third principal category of administrative intervention. Doing so may put us in better position to develop (similarly) strong defaults premised on the separation of sovereign and commercial functions and personnel; to guide government market participation; to make commercialized government more transsubstantively uniform; and, quite possibly, to preempt the types of structural, constitutional, and normative concerns and challenges with government market participation that this Article raises.<sup>100</sup>

#### A. *Separation as a Foundational Constitutional Commitment*

Our constitutional and administrative architecture is defined, and legitimated, in large part by important lines of separation. We separate power and functions along many dimensions—interbranch, federal–state, public–private, civilian–military, church–State, and intra-agency. Combinations or fusions of executive–legislative, executive–judicial, federal–state, public–private, civilian–military, church–State, or agency head–civil servant power certainly have their selling points. Most significantly, such combinations

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<sup>96</sup> *Wong Yang Sung v. McGrath*, 339 U.S. 33, 41 (1950).

<sup>97</sup> See *NLRB v. Wyman-Gordon*, 394 U.S. 759, 763–64, 771–72 (1969) (plurality opinion); *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672 (D.C. Cir. 1973).

<sup>98</sup> See 5 U.S.C. § 554(d) (2012).

<sup>99</sup> See *Marshall v. Jerrico Inc.*, 446 U.S. 238, 248 (1980). In *Jerrico*, the Court rejected a challenge to a statutory scheme allowing agencies to keep the proceeds of fines levied. Though the claimant argued that such a scheme encouraged the assessment of excessive fines, the Court found no due process violation, in part because the agency adjudicators who actually imposed the fines were organizationally separate from the rest of the agency and thus had no interest in or control over the revenue raised by such fines.

<sup>100</sup> One of the closest approximations to what I am proposing is the Federal Acquisition Regulation (FAR), a comprehensive blueprint regulating and directing government procurement of goods and services. 48 C.F.R. pts. 1–53 (2012).

enable more potent, better coordinated, and more streamlined exercises of government power.<sup>101</sup> Yet it is precisely for these reasons that such combinations are understood and treated as constitutionally problematic. Lines of demarcation and separation limit the power and reach of the government. They also more efficiently allocate authority in ways that align specific types of power with specific types of institutions.<sup>102</sup> And the corresponding checking and balancing across those lines of division make the government decisionmaking process more inclusive, contentious, and rigorous.

Not all of these lines of separation have the same constitutional currency. Tripartitism and federalism are the most textually, structurally, and historically resonant. But we cannot ignore the others, which provide additional, different, and reinforcing lines of protection against institutional mismatch, corrupt dealings, and overreaching State power. For instance, the Constitution makes clear that the lines separating the public from the private and the church from the State are important too. These lines of separation preserve spheres of private autonomy, limit the power and reach of the State, and ensure that civil society is sufficiently independent of the State to press and challenge government officials.<sup>103</sup> In some ways, these particular lines of separation are more basic and more fundamental to Western liberal democracy. Indeed, many Western liberal democracies lack both a federal structure and the formal separation of executive and legislative power. But none of them fails to recognize the limited reach of the State; nor does any deny the existence of private property—or fail to provide space for the private ordering of personal, spiritual, social, and economic affairs.<sup>104</sup>

Additionally, separation *within* agencies, though not deeply ingrained in our constitutional culture, ensures that administrative power is disaggregated and divided not just between adjudicators and policymakers but also among politically appointed agency heads, career, politically insulated civil servants, and the public writ large authorized to participate in administrative matters. This administrative separation of powers regime carries the Framers' attentiveness to checks and balances into the twentieth and twenty-first centuries—a necessary extension once one appreciates that so much of modern governing takes place not at the intersection between Congress and the President but rather within agencies. In an era when vast troves of legislative and judicial power are freely and liberally delegated to

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<sup>101</sup> See Michaels, *Centripetal Forces*, *supra* note 8, at 203.

<sup>102</sup> *Id.*

<sup>103</sup> See *id.* at 201.

<sup>104</sup> See generally PAUL STARR, *FREEDOM'S POWER: THE TRUE FORCE OF LIBERALISM* 53-58 (2007).

agencies, separation and disaggregation within those entities limit the potential for government abuse or overreaching and, again, reaffirm the constitutional commitment to checking and balancing even as agencies combine previously siloed legislative, executive, and judicial power all under one roof.<sup>105</sup>

I cannot do adequate justice in this Article to nuanced and complicated claims about separation. For these purposes, it is enough to stipulate that these many lines of separation are in keeping with our *separations of power*.<sup>106</sup> And given the frequency with which the sovereign–commercial border is traversed, the exercise of sovereign and commercial powers ought to be likewise separated as a regulatory, if not a constitutional, matter. After all, the structural challenges associated with the sovereign–commercial conflict resemble those that motivate the already recognized dimensions of separation.

First, in Subsection II.C.1, I mentioned that the combination of sovereign and commercial responsibilities produces some institutional or organizational mismatches, notably with agencies not ideally constituted to carry out straightforward commercial responsibilities, and government corporations ill-designed to take on multifaceted sovereign tasks. Separation to ensure an efficient allocation of responsibilities is an important component of the constitutional separation of powers. A legislature that not only declares but also makes war would be just fine with respect to the former responsibility, but terrible when it comes time for 535 members of Congress to collectively act the part of Commander in Chief and issue command directives in real time. Likewise, a judiciary that not only interprets but also makes laws would be problematic if for no other reasons than because unelected judges, purposely kept at some distance from everyday political scrums, do not necessarily have a good feel for what kinds of government services and interventions the public desires; and because there is no way for the public to replace out-of-step, but tenured-for-life, judicial “lawmakers.” Obviously, there are other concerns with these combinations—some of which I’ll return to in short order—but here I’m focusing only on the specific claim that the fusing of discrete powers and responsibilities interferes with an otherwise more orderly, disaggregated allocation of authority that aligns particular responsibilities with particular institutional structures.

Second, in Subsection II.C.2, I framed the combination of sovereign and commercial responsibilities as a form of debasement of public office. This debasement can occur, I posited, when the government market participant promotes the commercial at the expense of the sovereign. Again, there are analogies to the constitutional separation of powers. The Incompatibility

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<sup>105</sup> See Michaels, *Enduring, Evolving*, *supra* note 14, at 526.

<sup>106</sup> See *supra* note 8 and accompanying text. For a comprehensive defense of this proposition, see MICHAELS, *CONSTITUTIONAL COUP*, *supra* note 11, at 153–57.

Clause—which prohibits individuals from simultaneously serving in Congress and the Executive Branch—is in part motivated by a fear of government self-dealing and doubts as to whether any one official can faithfully promote both legislative and executive institutional responsibilities. Either the legislative or the executive role is likely to be compromised.

Third, in subsection II.C.3, I characterized the combination of sovereign and commercial responsibilities as a threat to limited, democratic government. Consolidated power's threat to liberty is probably the most well-known, well-rehearsed, and likely to be mentioned justification for the separation of powers and thus needs little elaboration here. Simply stated, the fusion of sovereign and commercial power—like the fusion of executive and legislative, executive and judicial, federal and state, or public and private power—enables particularly potent (and possibly abusive) expressions of State power.

Thus, precisely because the sovereign–commercial dynamic raises substantially similar concerns and threats—*and simply does so along a different, often overlooked power axis*—there may well be reason to extend the traditional lines of separation to include the sovereign–commercial one, and to police that line accordingly.

#### B. *The Institutional Design of Sovereign–Commercial Separation*

Engendering greater sovereign–commercial separation can be achieved by disentangling commercial activities and personnel from sovereign ones. We might, for example, obligate or direct government offices to (i) identify themselves as either commercial or sovereign; (ii) limit themselves to using only commercial or sovereign tools (in accordance with their ascribed or chosen commercial or sovereign identity); and (iii) segregate those personnel from colleagues within the organization, department, or agency who are advancing the *other* objectives.

A government department or unit would, for instance, signal that a particular initiative or program is primarily commercial in nature. It would then proceed to use only commercial tools, invoke only commercial legal protections, and separate its commercial employees from those who are promoting sovereign interests. Simply put, government pensions would either be tools of Keynesian fiscal policy (at the expense of maximizing returns on the investment); or they would be tools of pure investment, divorced and expressly insulated from the political and moral imperatives of the incumbent government. Government (or NASA intellectual property or National Park) policy would either be an extension of government social welfare policy—and treated and evaluated as such—or it would be a commercial endeavor and, likewise, treated and evaluated as such.

This on-the-ground strategy of separation is something that administrative law can certainly handle. After all, Congress and the courts allow most agencies to make rules and adjudicate controversies, and grant the agencies considerable discretion to choose between the two.<sup>107</sup> But, beyond that choice, Congress and the courts insist that the agencies segregate formal adjudicators and formal adjudicatory instruments from the rest of the agency. This disaggregation means that government units cannot readily misappropriate the tools and resources associated with one responsibility for use in the other. Nor can they readily combine the two sets of tools and toggle between two distinct legal identities to exercise greater State power than we otherwise understand agency officials to possess.<sup>108</sup> Perhaps the best example of an agency trying to fuse its rulemaking and adjudicatory powers involves the National Labor Relations Board (NLRB). In *NLRB v. Wyman-Gordon*, the Board attempted to issue a forward-looking, generally applicable rule via a formal adjudicatory order.<sup>109</sup> Though no reasoning commanded a majority of the Court, six justices insisted that the NLRB could not, in effect, take the best of both worlds. Specifically, the Board could not claim rulemaking's broad substantive powers to craft forward-looking, generally applicable rules without first going through the inclusive, deliberative rulemaking process as prescribed in the APA.<sup>110</sup>

Note that this focus on on-the-ground separation may signal a certain degree of indifference between the government's choice to act in a sovereign or a commercial manner. That is, the separation I'm suggesting seeks to eliminate the problems associated with commingling, toggling between, and possibly misappropriating sovereign and commercial tools and identities. But it doesn't tell us whether a given instance of government market participation *ought to be* in furtherance of regulatory or entrepreneurial aims.

There are, of course, good normative and institutional-design reasons why we should not be agnostic as to the government's choice. Yet thoughts on how and where to prioritize the sovereign over the commercial (and vice versa) must be taken up at a later date. For present purposes, separation—regardless which

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<sup>107</sup> See *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 201 (1947) (*Chenery II*) (leaving the choice between proceeding via rulemaking or adjudication largely to the discretion of the agencies).

<sup>108</sup> This gets particularly tricky in agencies where top officials are expected to set programmatic and enforcement policies and are also called upon to review administrative law judges' decisions implicating those policies.

<sup>109</sup> 394 U.S. 759 (1969) (plurality opinion).

<sup>110</sup> Insistence that agencies abide by either the procedures specified for conducting adjudications or the procedures specified for promulgating rules commanded the assent of the four-justice plurality plus the two dissenting justices. See *id.* at 775, 779 (Douglas, J., dissenting); *id.* at 780-81 (Harlan, J., dissenting).

side of the sovereign–commercial divide is preferred—does enough work on its own to mitigate the “conflict” harms on which this Article concentrates.

C. *The Logistical and Doctrinal Consequences of Sovereign–Commercial Separation*

As much as I insist upon giving meaning and effect to the separation of the sovereign and the commercial, I recognize that such separation poses considerable challenges. In what follows, I briefly address three such challenges.

First, disentangling the commercial from the sovereign is easier said than done. Postal inspectors seem very much engaged in a sovereign enterprise, whereas letter carriers and post office clerks seem to be quite naturally commercially oriented, more like their counterparts at FedEx or UPS than like those coworkers who conduct criminal and civil investigations. Likewise, government officials supervising the equity ownership aspects of the 2008–2009 bailouts were arguably more like private, corporate directors and managers than they were like their own Treasury colleagues who focused on trade policy or international money laundering. To make matters more difficult, some Treasury officials wore two hats. They had, for instance, responsibilities with respect to both the bailout and trade policy.<sup>111</sup> Additionally, there are further challenges surrounding government supervisors who think of themselves as ordinary employers when it comes to hiring and firing subordinates, but as agents of the State when it comes to invoking qualified immunity in response to suits brought by regulated parties.

This blurring is a problem, perhaps a big one. But it isn't a unique one. Administrative law judges tasked with formal adjudicatory responsibilities are kept separate from agency inspectors, rulemakers, and prosecutors.<sup>112</sup> And government lawyers are subject to one set of responsibilities, duties, and liabilities when they prosecute suspected criminals but substantially different ones when they are engaging in agency policymaking. All of this is to say that I recognize the many connections that bind and blend commercial and sovereign activity—and that thus make disaggregation difficult. But I also recognize that similar entanglements exist elsewhere, and we nevertheless endeavor to disaggregate in those contexts too.

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<sup>111</sup> For example, Neel Kashkari, a Treasury Department official, served both as Assistant Secretary of the Treasury for International Economics and Development and as the Department's point person for the Troubled Asset Relief Program (TARP). See Press Release, U.S. Treasury Department, Kashkari Appointed Interim Assistant Secretary for Financial Stability (Oct. 6, 2008), <https://www.treasury.gov/press-center/press-releases/Pages/hp1184.aspx> [<https://perma.cc/U342-98KU>].

<sup>112</sup> See Michael Asimow, *When the Curtain Falls: Separation of Functions in the Federal Administrative Agencies*, 81 COLUM. L. REV. 759 (1981).

Second, one might query whether the sovereign–commercial conflict is simply a byproduct of the nondelegation doctrine.<sup>113</sup> That is, perhaps the real problem is that Congress gives government market participants too much discretion and autonomy. Greater congressional guidance may increase the democratic legitimacy of government market participation<sup>114</sup> and decrease the severity of the sovereign–commercial conflict by directing government market participants to pursue regulatory *or* entrepreneurial goals. But even if Congress specifies that a government unit should operate like a for-profit business, it doesn't follow under the existing nondelegation doctrine that Congress would also be required to expressly restrict that government unit's access to sovereign legal tools and prerogatives. Thus the designated unit could very much be singularly focused on profit maximization pursuant to a clear congressional directive and yet still employ its sovereign tools, invoke its sovereign legal prerogatives, or dangerously combine its commercial and sovereign tools and legal identities. In other words, in order for the nondelegation doctrine to do all the work that is required in this complicated space, that doctrine would have to be interpreted quite thickly—with Congress having to do far more than simply specify a proverbial “intelligible principle.”<sup>115</sup>

Third, one of the more unsettling questions that follows from this disaggregation of sovereign and commercial tools, legal authorities, and personnel is whether such forced separation means that fully and exclusively commercially oriented government market participants ought not be treated as state actors for constitutional purposes.<sup>116</sup> The mere suggestion that *any* government actor could legally evade constitutional restrictions placed on the State might be alarming to some, possibly most, observers. But perhaps we ought to consider state action less in terms of public versus private (the current framing) and more in terms of sovereign versus commercial. After all, fully commercialized government market participants segregated (as I propose) from those wielding sovereign tools cannot readily act with the force of law nor easily claim any of the privileges of a sovereign agent. Instead, those fully commercialized actors might have no greater claim to act coercively than do their counterparts employed by private firms. Moreover, fully commercialized government market participants are apt to be kept in check by any number of private law duties and doctrines that sound in corporate and securities law, agency law, tax law, and contracts, property, and

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113 See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

114 See THEODORE J. LOWI, *THE END OF LIBERALISM* 146, 154-55, 297-99 (2d ed. 1979).

115 *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001).

116 See generally Charles L. Black, Jr., *The Supreme Court, 1966 Term—Foreword: “State Action,” Equal Protection, and California’s Proposition 13*, 81 HARV. L. REV. 69, 70 (1967).

torts—and possibly by whatever disciplining influence the market itself plays in regulating individual firms.<sup>117</sup> As such, fully commercially oriented government market participants may be technically governmental but are not acting in the powerful, coercive ways (*under the color of state law*) that prompt us to separate and more stringently regulate government actors in the first place.

It is also important to appreciate that though this reframing of the state action doctrine limits its reach along one dimension (namely, commercially oriented government action), it extends state action along another. Specifically, this reframing places private contractors and other private deputies carrying out sovereign responsibilities or exercising sovereign-like powers<sup>118</sup> much more firmly in the state action camp. Under my reformulation, state actor designation would now turn on an actor's tools, responsibilities, and outlook rather than on what uniform she wears or whether she happens to be closely supervised by a government official.<sup>119</sup> Thus injured parties may seek redress against any unconstitutional acts contractors, private deputies, or private quasi-regulators might perpetrate in conjunction with designing, administering, or carrying out sovereign or sovereign-like duties. That's a big win and reflects, quite possibly, a truer application of state action doctrine in a world in which not only the public and private but also the sovereign and commercial are blurred.

#### CONCLUSION

Government market participation's time has come. If anything, we are late in recognizing the need for transsubstantive regulatory interventions. Long thought of as uninteresting, as an unfortunate necessity, and, perhaps, as the most murky and uninviting of bureaucratic backwaters, government market participation is a commercial and regulatory dynamo.

While more work needs to be done to assess the normative implications of prioritizing the sovereign over the commercial (or the commercial over the sovereign) in any number of regulatory settings, this Article lays the groundwork for such inquiries. It does so by situating government market participation within a deep and varied philosophical and jurisprudential

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<sup>117</sup> I recognize that a commercially oriented government market participant will never be truly disciplined by the market. Congress is always hovering in the background and is apt to appropriate funds if it looks as if a government market participant is in danger of failing. Perhaps more importantly, I recognize that neither the market nor, say, the common law is necessarily as protective of individual rights as is the U.S. Constitution. See Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 505-06 (1985) (underscoring the challenges to state action doctrine "at a time when the public/private distinction is increasingly blurred").

<sup>118</sup> See *supra* note 42 and accompanying text.

<sup>119</sup> For a strong critique of the current doctrine and its problematic application in contexts involving private contractors, see Metzger, *supra* note 2.

phylum of compound acts seemingly in need of structural disaggregation and separation. The compounding of sovereign and commercial tools and powers is, I insist, substantially similar to the compounding of any number of other tools and powers that the Constitution and subsequent generations of legislators, jurists, and regulators have seen fit to split apart into their atomic elements.

The urgency of such an exploration and, ultimately, the need for corresponding remedial interventions only grows in this era of ours increasingly defined by CEO-style politics, aggressive regulation by dealmaking, and a seeming bipartisan commitment to running government like a business.