BOOK REVIEW

RUNNING GOVERNMENT LIKE A BUSINESS . . . THEN AND NOW

AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940. By Nicholas R. Parrillo. New Haven, Conn.: Yale University Press. 2013. Pp. xi, 584. $55.00.

Reviewed by Jon D. Michaels[*]

INTRODUCTION

The American administrative state is on the ropes. It is being challenged as inefficient, expensive, bloated, moribund, out of control, and even morally bankrupt. Modest calls during the 1990s and early 2000s to "reinvent government"[1] have given way to more insistent cries to run government like a business — to harness the principles, practices, and infrastructure of the market economy to save money, increase efficiency, overhaul the bureaucracy, and reduce so-called red tape.[2]

During the past few decades, ostensible defenders of the administrative state have been more Chamberlain than Churchill. First, they declared the era of big government over.[3] Then they smashed ashtrays on national TV in a symbolic protest over bureaucratic wastefulness.[4] And now they're stumbling over each other to privatize,[5]

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[1] AL GORE, FROM RED TAPE TO RESULTS: CREATING A GOVERNMENT THAT WORKS BETTER & COSTS LESS 6 (1993); DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT 19 (1992) (internal quotation marks omitted).

[2] *See* Richard C. Box, *Running Government Like a Business: Implications for Public Administration Theory and Practice*, 29 AM. REV. PUB. ADMIN. 19, 21 (1999); Thomas Frank, *The 'Populists' Are Right About Wall Street*, WALL ST. J., Mar. 25, 2009, at A11; *see also* Carmen Cox, *Run the Government Like a Business, Most Say*, ABC NEWS RADIO (July 23, 2014, 5:17 AM), http://abcnewsradioonline.com/politics-news/run-the-government-like-a-business-most-say.html [http://perma.cc/N8VP-32JV] (citing recent Gallup poll in which more than eighty percent of Americans prefer business-like government).

[3] *See* William J. Clinton, Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 79, 79 (Jan. 23, 1996).

[4] James Taranto, *The Ashtray of History*, WALL ST. J. (Dec. 6, 2011), http://online.wsj.com/news/articles/SB10001424052970204903804577082550219655404 [http://perma.cc/7CYE-M6A7] (describing Vice President Al Gore's appearance on David Letterman's late-night show).

[5] *See, e.g.*, GOVERNMENT BY CONTRACT (Jody Freeman & Martha Minow eds., 2009); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY (2007).

marketize,[6] corporatize,[7] or commercialize[8] whatever's not nailed down. Indeed, with defenders like these seemingly dead-set on appeasing and accommodating critics, it should not be surprising that American public administration is today being recast in the image of the market — increasingly business-like and unabashedly anti-administrative.

Curiously, at the very moment when scholars and policymakers are confronting these existential challenges to the traditionally conceived modern administrative state, there is a flurry of historical work illuminating poorly understood and little-appreciated aspects of that state's infancy.[9] Among these works is Professor Nicholas Parrillo's powerful and provocative *Against the Profit Motive*. Parrillo takes us back to a time when this now-vast but beleaguered administrative state was just beginning to find its footing. The administrative state did so, Parrillo tells us, in large part by terminating what in essence was America's *last* sustained romance with business-like government — a romance that united government service with the pursuit of profits.[10]

Against the Profit Motive is about the souring of that romance with business-like governance and the subsequent adoption of a salarization regime that paid government employees fixed, regular wages (p. 8). Salarization explicitly divorced public governance from private, "pecuniary self-interest" (p. 9) and suggested, at least implicitly, that government is (and perhaps needs to be) different and special — distinct

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[6] *See, e.g.*, Jon D. Michaels, *Privatization's Progeny*, 101 GEO. L.J. 1023, 1026 (2013) (describing liberal and conservative elected officials both working to infuse market principles and practices into government bureaucracies).

[7] *See, e.g.*, KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS 18–19 (2011) (describing fundraising by a private trust created to support the National Park Service); Ron Nixon, *In Switch, Development Agency Welcomes Business and Technology to Poverty Fight*, N.Y. TIMES, Apr. 8, 2014, at A8 (describing USAID partnerships with major corporations).

[8] *See, e.g.*, Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 801–17 (2011) (describing the creation of a private venture capital firm to invest in technologies useful to the intelligence community); William Harwood, *Obama Ends Moon Program, Endorses Private Spaceflight*, CNET (Feb. 1, 2010, 3:31 PM) http://www.cnet.com/news/obama-ends-moon-program-endorses-private-spaceflight [http://perma.cc/HTA3-39QA].

[9] *See, e.g.*, DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE (2014); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION (2012).

[10] There were of course periods of considerable flirtation in the interim years. *See, e.g.*, Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 ADMIN. L. REV. 859 (2000); James Q. Whitman, *Of Corporatism, Fascism, and the First New Deal*, 39 AM. J. COMP. L. 747, 748 (1991).

from entities and organizations in the private sector, which are free to pursue profits.[11]

Parrillo contends that this decision to embrace salarization was understood to be a necessary one (pp. 17–18). It was necessary in order to legitimate and render far more trustworthy an expanding administrative state. This administrative state was newly, or simply more insistently, expected to take on many additional responsibilities, to better represent the interests of a more fully enfranchised (and mobilized) public, and to reach deeper and more coercively into the American political economy.[12]

Against the Profit Motive deftly guides us through the salarization reforms that culminated in the late nineteenth and early twentieth centuries. It is a work of history, but this history has immense contemporary relevance. Indeed, readers encountering Parrillo's book might well view his project as leaving off at the beginning of a new, hopeful era. It was an era in which the then still-nascent modern administrative state was showing signs of coming into its own, seemingly understanding its distinctly public obligations and corresponding responsibilities, laying a foundation for subsequent bureaucratic innovations (that further marked the government as different and special), and establishing the normative and constitutional bona fides of modern American public administration.

We now find ourselves at the tail end of that once-hopeful era that spanned much of the twentieth century. Of late, the specialness of the administrative state is increasingly challenged, discredited, and undermined amid calls to, once again, run government like a business.[13] In light of contemporary American government's wholesale reliance on private, for-profit contractors to carry out public responsibilities,[14] its reorientation of the public workforce to more fully respond to market

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[11] In this important respect, the turn to salarization can be seen as a reaffirmation of what Parrillo calls "[t]he civic republican dream of the revolutionary era," namely, "to divorce governmental power from individual self-interest, including pecuniary self-interest" (p. 9). *See also* William J. Novak, *Public-Private Governance: A Historical Introduction*, in GOVERNMENT BY CONTRACT, *supra* note 5, at 23, 33–34 (characterizing American constitutional law as particularly attentive to public corruption concerns).

[12] As Parrillo emphasizes, "[o]fficial selflessness was necessary to vest the state's novel and alien [regulatory] demands with legitimacy" (p. 184).

[13] To be clear, these challenges haven't made much of a dent in the overall size or scope of governmental responsibilities. *See* City of Arlington v. FCC, 133 S. Ct. 1863, 1877–79 (2013) (Roberts, C.J., dissenting). But they have rendered such responsibilities far less administrative and far less public than they had been for much of the twentieth century. *See generally* VERKUIL, *supra* note 5; Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. (forthcoming 2015) (describing public responsibilities as increasingly being funneled into less well-regulated private domains).

[14] *See infra* notes 84–87 and accompanying text.

pressures and incentives,[15] and its effective ownership of automotive,[16] insurance,[17] and even venture capital firms,[18] we have seemingly come full circle. In this rush to re-embrace business-like government, we're either forgetting or affirmatively repudiating the principles and practices that legitimized American public administration as a distinct normative and legal enterprise.

This Review explains what happened after *Against the Profit Motive* leaves off, first as additional governance reforms carried forward the American administrative revolution that salarization begot, and later as critics, opponents, and revanchists started mounting a counterrevolution.

Part I outlines *Against the Profit Motive*'s key ideas and themes regarding salarization and recounts how salarization helped legitimate the then-burgeoning administrative state. Part II links Parrillo's salarization story to later bureaucratic reforms — specifically, civil service tenure and the granting of broad public participatory rights in administrative governance — that, I argue, further legitimated the still constitutionally and democratically suspect administrative state. Part III considers the subsequent backlash against this distinctly *public* approach to public administration. This backlash began as a series of intellectual critiques of, in essence, the very ways in which American public administration had marked itself (through salarization, a tenured civil service, and extensive public participation in the administrative process) as different and special. In time, as I discuss in Part IV, those intellectual critiques found an especially favorable and accommodating vehicle — privatization — that operationalized the increasingly politically salient imperative to run government more like a business. Part V seeks to understand the present-day failure to defend, let alone celebrate, the "government-as-special" model of American public administration. This last Part also provides some thoughts on how to reclaim that once-proud mantle of government as special, and explains why there are good and pressing reasons for doing so.

I. RUNNING GOVERNMENT LIKE A BUSINESS . . . *THEN*

In *Against the Profit Motive*, Parrillo transports us to the largely forgotten world of nineteenth-century American government as bazaar. This was a world in which one could readily mistake citizens for consumers — and bureaucrats for businessmen.

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[15] *See* Michaels, *supra* note 6, at 1042–50.

[16] *See infra* notes 122–25 and accompanying text.

[17] *See infra* notes 119–21 and accompanying text.

[18] *See* Michaels, *supra* note 8, at 812–17.

Such confusion is understandable given the highly commercial nature of government transactions at that time. Parrillo groups these transactions into two distinct categories: facilitative payments and bounties. First, government agents charged with administering benefits programs would receive direct "facilitative payments" (p. 2) (some legislatively sanctioned and some under the table) from those seeking assistance (pp. 51–79). And second, government agents tasked with ensuring public compliance with laws and regulations would receive monetary "bounties" (p. 2). Such bounties included a percentage of the fines levied against regulatory transgressors (pp. 191, 221), proceeds from maritime seizures (p. 307), and bonuses paid for successful criminal prosecutions (pp. 255–57).

As mainstays of this public bazaar, government agents could personally *profit* by being more diligent and accommodating to those seeking benefits and by being more dogged and unflinching in prosecuting regulatory and criminal scofflaws. Parrillo's sweeping and vivid account is thus replete with insufferable tax ferrets hunting far and wide for violations (pp. 191–95); audacious naval privateers on quests for bounty (pp. 320–21); enterprising immigration clerks offering bulk-rate discounts in an effort to draw "business" away from other clerks (pp. 132, 137, 140); and government-licensed physicians similarly competing with one another to attract paying "customers" — namely, veterans seeking friendly docs willing to designate them as disabled (and thus eligible for government pensions) (p. 150).

For an emerging but still fledgling nation-state, public compensation regimes organized around facilitative payments and bounties were eminently practical. They were, after all, relatively inexpensive to finance. Legislatures did not have to contribute the lion's share of government agents' pay. Instead, government agents earned much of their keep through the fees paid by benefits seekers and from the revenue they themselves brought in through the levying of fines.

These compensation schemes were also relatively easy to manage. The prospects of earning more money through facilitative payments and bounties motivated government agents to work hard. Cultivating a highly motivated workforce was especially important in nineteenth-century America. At that time, the government's footprint was quite small. In many parts of the country there simply weren't the resources, institutional infrastructure, or public feedback loops available to otherwise closely monitor agents in the field.

In these respects, government was very much organized around the timeless business principles of profit, risk, and entrepreneurialism. Nevertheless — or, more likely, precisely because facilitative payments and bounties reflected a business-like approach to public administration — over time both forms of compensation became increasingly unpopular and unpalatable.

Government workers receiving facilitative payments were, not surprisingly, overly indulgent to the beneficiary populations. These workers knew all too well where their bread was buttered. This highly clientist orientation didn't constitute a major political problem, Parrillo tells us, until the rise of mass politics toward the latter part of the nineteenth century and early part of the twentieth century. Only then did the overwhelmingly large but diffuse groups of nonbeneficiaries become sufficiently well organized and politically empowered to oppose the cozy relationship between benefit-seeking individuals and payment-seeking government agents (pp. 125–26, 140–44, 155–58). Bearing the costs of a system that encouraged the excessively generous granting of benefits to discrete groups, the broader public had ample reason to object (p. 127).[19]

At roughly the same time, communities began resisting the overaggressive enforcement of laws by bounty-seeking government agents. Parrillo astutely recognizes that because many of the laws being enforced were *malum prohibitum* regulatory ones (and hence these violations rarely offended moral sensibilities), communities were generally more tolerant of the transgressing parties than were the government bounty seekers who had financial incentive to prosecute fully and stringently.

The solution to each of these problems was salarization, a comprehensive regime of standardized, fixed, and regular wages for government agents that divorced public employment from the private pursuit of profits.

There is much one could say about salarization, but it is important here to underscore, as Parrillo does, that there was more to the revolutionary shift away from facilitative payments and bounties than simply a surge in political opposition. The political backlash seemed to coincide with an emerging, principled recognition that it is inappropriate to commingle profit seeking and government service. It is inappropriate not just because government officials' pursuit of private gain might backfire in any particular instance, as seems to be the case given the overly indulgent granting of benefits and the overly punitive enforcement of regulatory laws. It is also inappropriate because there is a fundamental normative incompatibility between the principles and practices that make sense in the marketplace and those that make sense in the realm of public administration.

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[19] This was true for less explicitly monetary reasons, too. Nativists opposed facilitative payments in the immigration realm on the ground that such a compensation scheme encouraged government agents to champion the interests of those applying for citizenship (pp. 129–32). Conservationists, for their part, objected to facilitative payments associated with land-grant applications. They argued that such payments created incentives for government agents to be unduly attentive to private developers (pp. 127, 173–74).

Parrillo tells us that the facilitative payments and bounty schemes came to be seen as illegitimate to observers. It looked unseemly for government agents to operate in such a wheeling-and-dealing fashion (pp. 116–20). Government wasn't an oasis of trust and impartiality. Too often, it was a sketchy trading post (pp. 132, 137, 140, 150) or shark tank of bounty seekers ready to pounce.[20]

These concerns about illegitimacy, unseemliness, and lack of trust are of undoubted importance. But they are also abstract. One can readily comprehend, and even quantify, the added public costs associated with having to pay the salaries of government agents out of the general revenues and having to conduct greater oversight to deter slacking among government agents now paid a fixed wage. One can also readily comprehend, and likely quantify, the foregone revenue associated with a less aggressive enforcement regime now that regular, fixed salaries have supplanted bounty payments (pp. 195–96).[21]

One cannot, however, easily make tangible (let alone quantify), the anticipated gain in what Parrillo characterizes as "trust" (p. 35) — a trust engendered or deepened by rendering government agents less unseemly and more neutral — neither too cozy with benefits seekers nor too adversarial to regulated parties (pp. 35–37). Thus, to say no to facilitative payments and bounties and incur the expenses and hassles of initiating a salarization regime likely meant that the salarization reformers were motivated at least in part by something larger and more principled.[22]

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Understanding this at least partially principled turn toward salarization reveals something important about the American administrative state at this juncture — about its nascent identity, its growing aspirations, and its sense of its relationship to other entities and organizations (both public and private).[23]

It wasn't that this maturing administrative state was necessarily *more pure* than businesses, for which the profit motive remained a central and guiding principle. Rather, this maturing administrative state

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[20] Of course, some businesses likewise shy away from bonuses and commissions — attempting, in many cases, to signal to their customers that their salespeople are honest brokers when it comes to recommending products or services.

[21] Parrillo explains that self-interested government agents charged with enforcement responsibilities often did the government's "dirty work" and contributed considerably to the public fisc (p. 196).

[22] In addition to the lower operational expenses and higher revenue associated with facilitative payments and bounties, it would be costly, as a budgetary matter, to redesign the government's compensation schemes and costly, as a political matter, to confront and displace the vested interest groups that supported and benefited from the status quo arrangements.

[23] *See supra* note 11.

simply had powers, prerogatives, and obligations that were (and remain) unlike almost anything found in the private sector.[24] Officials recognizing government's special authority and the increasing demands placed on the state to regulate broadly and coercively thus had to take seriously their corresponding responsibilities to exercise such powers and prerogatives fairly, democratically, and constitutionally.

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Indeed, one of Parrillo's many contributions is to mark this early point of divergence between state and market and connect it to the rising ambitions and self-awareness of an American political community on the cusp of a great democratic, regulatory, and legal awakening. Understood in this light, the salarization reforms that Parrillo documents were just the start of an even larger revolution in running the government, in essence, *like a government*. The American administrative revolution continued — and I'd argue needed to continue — to play out across much of the twentieth century as additional, defining features further marked public administration as different and special and further legitimated the exercise of uniquely coercive powers by a government committed both to democratic accountability and the rule of law.

II. RUNNING GOVERNMENT LIKE A GOVERNMENT . . . *THE ADMINISTRATIVE REVOLUTION*

Salarization was both momentous, in signaling a decisive shift toward marking the public sector as special (and making it so), and modest because it addressed only one of several then-extant administrative shortcomings.

First, to be sure, salarization helped eliminate perverse and unseemly monetary incentives. It curbed a type of corruption and, as Parrillo tells us, engendered greater public trust in a workforce now operating (at least financially) at arm's length from the public. But salarization could not, on its own, assure good public administration or public confidence in the then rapidly expanding administrative state.[25] Indeed, an argument could be — and today often is — made that lethargic administration or poor or arbitrary decisionmaking is even more likely to occur in the absence of properly aligned monetary incentives that would otherwise serve to direct and discipline a workforce.[26]

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[24] *But see infra* note 128 and accompanying text.

[25] Parrillo recognizes this as well: "In the worst cases, salarization replaced crude indulgence of recipients with an equally crude indifference to their needs" (p. 126).

[26] *See infra* notes 70, 89–91 and accompanying text.

Second, salarization was not, on its own, an antidote to the spoils system and the strains patronage placed on American public administration. Parrillo emphasizes that the availability of facilitative payments and bounties attracted what came to be seen as the wrong kind of public servant (p. 123). So did patronage. The spoils system resulted in the staffing of many government posts with party hacks.[27] The system also generated high rates of turnover; one's position in the workforce was, after all, only as secure as the electoral success of his benefactor. The combination of an underqualified and relatively transitory workforce surely limited the effectiveness and trustworthiness of even a salaried public administration.[28]

For these reasons, among others, the project to mark government as different and special in ways that reflected the modern American administrative state's powers, responsibilities, and obligations required additional reforms — reforms that reinforced and expanded the bedrock foundation that salarization laid. To be legitimate, the government would have to act not only impartially, in ways Parrillo describes. It would also have to act rationally, democratically, and constitutionally. Such imperatives took on heightened significance beginning in the late nineteenth century and continuing well into the twentieth. This was a time, after all, when unprecedented demands were placed on public officials to more fully regulate the modern political economy, to more fully represent broad, public interests, and to more fully operate according to rule-of-law principles.[29] In short, as administrative agencies did more of the work of governing — and as the public sphere became more truly public (in terms of both greater democratic and legal accountability) — it was only natural for public administration to continue to diverge from what was commonly practiced in a private sector unburdened by the powers and responsibilities entrusted to the state.

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[27] *See generally* ARI ARTHUR HOOGENBOOM, OUTLAWING THE SPOILS: A HISTORY OF THE CIVIL SERVICE REFORM MOVEMENT, 1865–1883 (1968); Carl Joachim Friedrich, *The Rise and Decline of the Spoils Tradition*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1937, at 10.

[28] *See, e.g.*, STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 49–54 (1982). As Parrillo captures in his discussion of immigration, patronage staffing by pro-immigration political machines ensured that government employees remained favorably disposed to those seeking to be naturalized even after those employees' compensation shifted from facilitative payments to fixed salaries (p. 133). Similarly, in his account of veterans' disability benefits, Parrillo notes that even the officials in "the Pension Bureau's all-salaried headquarters in Washington . . . appear[ed] to have been particularly indulgent toward applicants in electorally important areas, seeking to garner votes for the incumbent party" (pp. 146–49).

[29] This was especially true during the New Deal years, which witnessed an unprecedented surge in both the size and reach of administrative governance, *see* LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 170 (2002), and a corresponding spike in skepticism over the constitutionality of this expansive administrative state, *see* cases cited *infra* note 31.

Of the ways in which American public administration continued to mark itself as different and special, two stand out. First, federal officials crafted a professional, politically insulated civil service. Second, officials significantly broadened procedural and public participatory rights in administrative governance. Both of these initiatives,[30] like the turn to salarization, involved displacing (and thus disappointing) entrenched interests that had benefited from the then-extant practices. And both of these initiatives likewise involved incurring increased operating costs. Nevertheless, both were absolutely critical — helping to mold essential features of the then-expanding but still constitutionally and democratically suspect administrative state.[31]

Elsewhere I have discussed how this pair of post-salarization initiatives helped engender what I call administrative separation of powers.[32] Administrative separation of powers divides administrative authority among three sets of institutional rivals: the politically appointed agency leaders, the tenured, politically insulated civil servants staffing the agencies, and the public writ large empowered to participate meaningfully in most facets of administrative governance.[33]

Administrative separation of powers serves to legitimize administrative governance. By disaggregating and triangulating administrative power, it reaffirms the constitutional commitment to limited, pluralistic government through rivalrous checks and balances. Such a commitment to separating and checking government power — so central to the Framers' design — was, of course, believed to be seriously endangered by the advent of administrative agencies that combined lawmaking, enforcement, and adjudicatory responsibilities all under one roof.[34]

Administrative separation of powers also makes administrative governance more democratic (via broad and meaningful public participation) and more rational and rule-bound (via the work undertaken

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[30] It bears underscoring that both of these initiatives were multigenerational, sometimes haphazard, undertakings. *See* Michaels, *supra* note 13 (manuscript at 11) ("The architects of the modern administrative state left it to future generations to cobble together clusters of constraints that, only over time and somewhat serendipitously, began to function [in ways that helped check, enrich, and legitimate American administrative governance]." (footnote omitted)).

[31] For cases challenging and questioning important elements of administrative power, see, for example, Morgan v. United States, 298 U.S. 468 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935); and Crowell v. Benson, 285 U.S. 22 (1932).

[32] *See* Michaels, *supra* note 13 (manuscript at 3).

[33] *See id.* (manuscript at 9–35).

[34] *See, e.g.*, FTC v. Ruberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting) (asserting that the still-burgeoning administrative state "has deranged our three-branch legal theories"); Jacob E. Gersen, *Unbundled Powers*, 96 VA. L. REV. 301, 305 (2010) (claiming that the advent of administrative agencies that combine legislative, executive, and judicial power "has long been an embarrassment for constitutional law").

by politically insulated, expert civil servants). In short, what we commonly understand to be core, albeit sometimes conflicting,[35] administrative values — neutrality, expertise, nonarbitrariness, political accountability, and civic republicanism[36] — are all baked into the very reforms that rendered American administrative law and practice fundamentally different from what we associate with (and expect from) the market.

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Note that in connecting salarization to civil-service tenure and public participation, I am linking three analytically distinct developments. In *Against the Profit Motive*, Parrillo explicitly decouples salarization from bureaucratization (and thus from, among other things, the rise of the civil service) (pp. 6–8). He also appears to reject the "lump[ing] together [of] American government's nonprofit status with a variety of other . . . institutional features that actually have no ironclad connection with it, logical or historical" (p. 361). Parrillo argues, persuasively, that salarization follows its own logic and timeline (p. 5).[37] Bureaucratization is clearly a different undertaking. So too is the democratization of administrative procedure (through thick participatory rights), a movement that itself stands in some tension with bureaucratization.

Parrillo helpfully separates out — *and more importantly elevates* — salarization as a landmark achievement in its own right. But once he does so — and once we acknowledge this valuable insight — there is still much to gain by seeing how salarization, bureaucracy, and public participation jointly contribute to a perhaps distinctly American brand of public administration. Such a brand privileges and quite possibly requires checking and balancing by a combination of democratic[38] and countermajoritarian forces[39] and the elimination of financial self-

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[35] Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1292 (1984).

[36] *See generally, e.g.*, Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461 (2003) (nonarbitrariness); Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81 (1985) (political accountability); Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 HARV. L. REV. 1511, 1563–64 (1992) (civic republicanism); Jodi L. Short, *The Political Turn in American Administrative Law: Power, Rationality, and Reasons*, 61 DUKE L.J. 1811, 1820–23 (2012) (administrative rationality).

[37] Or, more accurately, a pair of logics, one responding to facilitative payments and the other responding to bounties (p. 5).

[38] *See infra* note 65 and accompanying text.

[39] I consider the tenured civil service to be countermajoritarian insofar as its members, like federal judges, are insulated from political pressures, derive their legitimacy (and authority) from the persuasiveness of their reasoning rather than any electoral mandate, and are generally committed to promoting the rule of law (or adhering to their professional codes as scientists, engineers, accountants, and the like) even if that means opposing the incumbent administration. *See*

dealing from the exercise of coercive, sovereign power. This Part, and the Parts that follow, bring Parrillo's salarization story forward.

A. Civil Service Reforms: The Specialness of Tenure

Even shorn of its facilitative-payment and bounty schemes, the expanding, modernizing administrative state remained problematic. It was, after all, the product of a constitutional sleight of hand. Administrative governance effectively collapsed the Framers' tripartite scheme of separation of powers — and again did so by consolidating legislative, executive, and judicial power in agencies often dominated by the President and his appointed deputies.[40]

One critical advancement for administrative legitimacy was therefore the creation of a professional, tenured civil service. Such a civil service was likely to possess true expertise and, of equal importance, was empowered to resist partisan overreaching by agency leaders.

In this section, I briefly describe the rise of the civil service and explain the significant role civil servants play in marking the administrative state as special and legitimate — in ways we neither need nor require the market to be.

The development of a professional, depoliticized civil service began, quite modestly, with the passage of the landmark Pendleton Act of 1883.[41] Over time, Congress and, occasionally, the President continued to strengthen and expand the nascent civil service.[42] It took the better part of several decades, but by the 1950s over ninety percent of the federal civilian workforce was hired through a merit exam system.[43] These civil servants were legally insulated against politically motivated adverse employment actions.[44] And they were express-

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Michaels, *supra* note 13 (manuscript at 27); *see also* DAVID E. LEWIS, THE POLITICS OF PRESIDENTIAL APPOINTMENTS 30 (2008) (noting that civil servants "often feel bound by legal, moral, or professional norms to certain courses of action and these courses of action may be at variance with the president's agenda").

40 *See supra* p. 1161.

41 Ch. 27, 22 Stat. 403 (1883) (amended 1978); *see* Jerry L. Mashaw, *Federal Administration and Administrative Law in the Gilded Age*, 119 YALE L.J. 1362, 1390–92 (2010).

42 *See* RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 37–41, 51, 68 (1994); SKOWRONEK, *supra* note 28, at 47–84; *see also* Sean M. Theriault, *Patronage, the Pendleton Act, and the Power of the People*, 65 J. POLITICS 50, 60–65 (2003).

43 Address at the 70th Anniversary Meeting of the National Civil Service League, 1952 PUB. PAPERS 310, 311 (May 2, 1952).

44 DAVID E. LEWIS & JENNIFER L. SELIN, ADMIN. CONFERENCE OF THE U.S., SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES, 67, 69 (2012), http://www.acus.gov/sites/default/files/documents/Sourcebook-2012-Final_12-Dec_Online.pdf [http://perma.cc/QP5A-QVY9].

ly prohibited from engaging in political activities on behalf of their bosses.[45]

These reforms represented obvious and important points of departure both from prevailing practices in the private sector — where at-will employment was and remains the norm[46] — and from earlier practices within the public sector, where government workers were at-will employees (and, given the ubiquity of the spoils system, highly politicized ones at that).[47]

Government workers selected through a merit system were likely to be of higher quality. And because they were effectively tenured (and thus now more likely to serve out their careers in government), these more talented workers had the opportunity and incentive to invest in deepening and broadening their expertise as well as their commitment to the institutions and communities they served.[48] One might go so far as to suggest that whereas salarization helped eliminate problematic financial incentives to work diligently, the civil service spawned salutary, nonmonetary alternatives. Professional civil servants — the best of whom could earn far more in the private sector[49] — often seek recognition from their colleagues, who laud (and sometimes reward) them for "the quality of their work and their conformity to the ethical norms that prevail in the professional bureaucracy."[50]

Moreover, the newly tenured rank-and-file federal workforce served to constrain an otherwise relatively unchecked presidential administration granted vast powers to regulate the modern political economy through its hand-chosen agency leaders. Because civil servants could not be fired for political or policy disagreements with the appointed agency leaders, they were well positioned to speak truth to power, as it were, resisting hyperpartisan or simply poorly conceived initiatives and exercising autonomy and discretion in the design and

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[45] *See* Hatch Act, Pub. L. No. 76-252, § 9(a), 53 Stat. 1147, 1148 (1939) (codified as amended at 5 U.S.C. § 7324 (2012)); *see also* Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, 413 U.S. 548, 566 (1973) (characterizing the Hatch Act as helping guarantee that "employment and advancement in the Government service [does] not depend on political performance" and eliminating pressure to "perform political chores in order to curry favor with [one's] superiors").

[46] *See, e.g.*, Katherine V.W. Stone, *Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace*, 36 INDUS. L.J. 84, 84 (2007) ("In the United States, the dominant form of the [private] employment contract is at-will.").

[47] *See supra* notes 27–28 and accompanying text.

[48] *See* CHARLES T. GOODSELL, THE CASE FOR BUREAUCRACY 91 (1983); James L. Perry, *Bringing Society In: Toward a Theory of Public Service Motivation*, 10 J. PUB. ADMIN. RES. & THEORY 471, 481 (2000).

[49] This is especially true for the likes of lawyers, engineers, scientists, and accountants. *See generally* CONG. BUDGET OFFICE, COMPARING THE COMPENSATION OF FEDERAL AND PRIVATE-SECTOR EMPLOYEES (2012), http://www.cbo.gov/sites/default/files/cbofiles/attachments/01-30-FedPay.pdf [http://perma.cc/KQT6-7TZV].

[50] PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY 170 (2009); *see also* LEWIS & SELIN, *supra* note 44, at 30.

implementation of administrative programs.[51] Hence, if salarization created one important arm's-length relationship — namely, between government agents and the general public — the tenuring of the civil service created another: between the short-term, presidentially appointed, and politically accountable leaders directing the agency and the career civil servants responsible for carrying out much of the day-to-day activities.[52]

Such a rivalrous design might well be anathema in business settings that generally do not grant, let alone guarantee, rank-and-file workers the authority to challenge, confront, and even frustrate the will of the leadership. One need not necessarily criticize firms for lacking such internal rivalries. Firms need not, as a legal or normative matter, be internally divided and rivalrous in part because they don't presume to represent the broadly constituted public interests — and thus don't need to embrace a decisionmaking process that is pluralistic and intentionally contentious. Nor do firms presume to exercise coercive power over vast segments of the American public such that checking and balancing would be necessary to limit acts of abuse or tyranny.[53]

B. Procedural Reforms: The Specialness of Public Participation

The second major post-salarization administrative reforms were procedural ones that established a strong set of transsubstantive administrative default practices (guiding such agency actions as rulemaking and adjudication) and authorized broad public participation in administrative governance.[54] Congress codified many of the procedures and participatory rights in the Administrative Procedure Act.[55] Over the years, the legislature and the courts continued to flesh out

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[51] *See* Michaels, *supra* note 13 (manuscript at 16–20); *see also* Elizabeth Magill & Adrian Vermeule, *Allocating Power Within Agencies*, 120 YALE L.J. 1032, 1037–38 (2011) ("[C]onflicts between political appointees and the 'bureaucracy' — usually taken to refer to the well-insulated-from-termination members of the professional civil service — are legion." *Id.* at 1038.).

[52] Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 586 (1984) (noting that a small political vanguard are "at the apex of an enormous bureaucracy whose members enjoy tenure in their jobs, are subject to the constraints of statutes whose history and provisions they know in detail, and often have strong views of the public good in the field in which they work"); Magill & Vermeule, *supra* note 51, at 1037–38 (highlighting the "significant" role career government workers play in agency rulemaking and adjudications, *id.* at 1037).

[53] *See, e.g.*, Novak, *supra* note 11, at 34–35 (explaining the traditional view that private coercion is generally not a concern in the United States because private power is "smaller in scale, comparatively unorganized, fragmented, and widely distributed," *id.* at 34, and is, moreover, kept in check by government regulations). Were private firms to act coercively, it might make sense to require them to act in a more government-like fashion. *Cf. infra* note 128 and accompanying text.

[54] *See* Michaels, *supra* note 13 (manuscript at 21).

[55] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

and expand both the obligations imposed on administrative actors and the rights given to the public at large.[56]

Members of the public enjoyed the right to petition for rules,[57] to receive notice of proposed rules,[58] to provide comments on said proposed rules,[59] to request any and all nonconfidential agency documents,[60] and to bring legal challenges alleging that agencies abused their discretion or otherwise acted in an arbitrary or capricious manner.[61]

Allowances for extensive public participation, especially at a time during which the federal administrative state continued to grow considerably,[62] added another chapter to the government-as-special story. Specifically, these allowances made administrative governance (and thus American government) far more open, more rule-bound, more pluralistic, and — again — more rivalrous and potentially contentious.

Just as the civil service engendered one important rivalry (and created another arm's-length relationship) within the administrative realm, broad opportunities for public participation in the design and implementation of American public policy created yet another.[63] Now both the civil servants and the political leaders would have to reckon, regularly and thoughtfully, with a vast universe of civil society participants: aggrieved citizens, gadflies, well-heeled special interests, regulated industries, and the like.[64]

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56 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667 (1975).

57 5 U.S.C. § 553(e) (2012).

58 *Id.* § 553(b).

59 *Id.* § 553(c). Agencies that fail to consider material comments run the risk that courts will invalidate the finalized rule. *See, e.g.*, United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252–53 (2d Cir. 1977); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 393–94 (D.C. Cir. 1973).

60 *See* 5 U.S.C. § 552.

61 *Id.* § 702; Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

62 Participatory rights expanded during the 1940s and, again later, during the 1960s and 1970s. *See* Administrative Procedure Act, Pub. L. No. 79-404, §§ 4, 10(e), 60 Stat. 237, 238, 243–44 (1946) (expanding participatory rights in the federal rulemaking process); Bressman, *supra* note 36, at 554 ("In the 1970s, we opened the administrative process to all affected parties with the aim of creating an idealized legislative process."); Reuel E. Schiller, *Enlarging the Administrative Polity: American Law and the Changing Definition of Pluralism, 1945–1970*, 53 VAND. L. REV. 1389, 1417 (2000) (emphasizing that in the 1960s and 1970s, "[t]he judiciary would become the guardian of participatory administration, democratizing the administrative process[] [and] ensuring that it served the public good"); Stewart, *supra* note 56, at 1670 ("[In the 1970s, participatory rights expanded] to ensure the fair representation of a wide range of affected interests in the process of administrative decision."). These periods were also ones during which the federal administrative state grew considerably. *See* Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1247–53, 1272–95 (1986) (describing the expansion of federal administrative power during the New Deal and Great Society periods).

63 *See* Michaels, *supra* note 13 (manuscript at 20–23).

64 SHANE, *supra* note 50, at 159–60; Gillian E. Metzger, Essay, *Ordinary Administrative Law as Constitutional Common Law*, 110 COLUM. L. REV. 479, 509–10 (2010) (indicating that the expansion of opportunities for public participation in administrative governance has been motivated

This added participatory dimension further disciplined and democratized the governance space, and did so differently from the ways secured through facilitative payments or presidential elections.[65] It also did so differently from the way shareholders participate in and influence corporate governance decisions. Whereas corporate shareholders are understood to be singularly focused,[66] members of the public writ large have a near-infinite variety of interests, agendas, and viewpoints — all of which may be brought to bear on administrative action.[67]

As with the creation of a tenured civil service, there is reason to locate the proliferation of participatory rights within the broader project of legitimizing an expansive administrative state — an administrative state mindful of its growing democratic obligations and increasingly coercive regulatory powers (which require checking and balancing as well as salarization to safeguard against arbitrary or abusive public administration).

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in part by "[c]onstitutional concerns with unchecked agency power," *id.* at 509); Richard Murphy, Essay, *Enhancing the Role of Public Interest Organizations in Rulemaking via Pre-Notice Transparency*, 47 WAKE FOREST L. REV. 681, 682–83 (2012) (calling empowered public participants "hammers with which to pound agencies," *id.* at 683). This is not to say that all members of the public are necessarily "equals" in terms of their relative influence on administrative proceedings. Those with greater resources and connections might wield disproportionate influence, just as they do in the context of elections (and notwithstanding the universality of the franchise).

[65] Presidential elections are winner-take-all affairs. The elected administration has select interests and constituencies it naturally identifies with and champions. By contrast, anyone may participate meaningfully in administrative rulemaking. This is true regardless whether she counts herself among those whose favored candidate lost the most recent presidential election. For these reasons, civil society and agency leaders reflect potentially very different sets of democratic interests. The same is true, to be sure, with respect to Congress and the President. Both are democratically elected and accountable, but they often represent different interests, viewpoints, and constituencies.

[66] Despite important differences among shareholders, generally speaking they are understood to share a common interest in maximizing the value of their shares. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 443, 451–53 (2001); Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235 (2002).

[67] A closer, but still incomplete analogy might be to a European-style workplace-democracy business model. *See, e.g.*, Walther Müller-Jentsch, *Germany: From Collective Voice to Comanagement*, *in* WORKS COUNCILS: CONSULTATION, REPRESENTATION, AND COOPERATION IN INDUSTRIAL RELATIONS 53 (Joel Rogers & Wolfgang Streeck eds., 1995). But even compared to a workplace-democracy business model, the American administrative model is still far more inclusive and internally rivalrous. After all, under American federal administrative law, anyone may petition for a rule, comment on a proposed rule, or request agency materials (regardless how far removed she is from the immediate focus of the agency concern).

III. RUNNING GOVERNMENT TOO MUCH LIKE A GOVERNMENT . . . *THE POST-WAR BACKLASH*

Quite possibly, defenders of the twentieth-century administrative state have overlooked the connections between and among salarization, bureaucratization, and public participation — and thus have not fully appreciated how integral they all are to the project of legitimizing administrative governance. One might go further and suggest that the failure of the architects and latter-day champions of these reforms to mark and celebrate government as different and special has haunted us — and these underlying initiatives — ever since.

Indeed, the adoption of a salarization regime, the spawning of a civil service, and the broadening of participatory rights did not go uncontested for long. In the latter half of the twentieth century, critics challenged the size, scope, and composition of modern administrative governance. Explicitly, these challenges were framed in terms of agency capture, bureaucratic drift, and waste — and were often understood within the broader context of Cold War politics and the specter of collectivism, socialism, and communism. Implicitly, these challenges were to the very infrastructure of administrative specialness.[68]

A full accounting of such challenges would fill volumes. For these purposes, a quick, highly stylized march through the decades will have to suffice. In the 1950s and 1960s, critics of the administrative state zeroed in on agency capture. They worried that agency officials were too readily influenced by regulated parties and other special interests.[69] They feared that bureaucracies were too susceptible to the pressure brought to bear by regulated interests. The connection between these concerns and the ways government has marked itself as special is plain, albeit not regularly articulated. First, regarding salarization, were government officials motivated by (properly calibrated) monetary incentives, they would strive to maximize their pay — and thus be far less susceptible to special interests' pressures and enticements.[70] Second, regarding tenure, were government officials to serve at the pleasure of the President, they would be more fearful of losing their jobs —

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[68] Box, *supra* note 2, at 26–27 (indicating that post–World War II critics of the administrative state expressed frustration with a government too divorced from market-like concepts and practices); William J. Novak, *A Revisionist History of Regulatory Capture*, *in* PREVENTING REGULATORY CAPTURE 25, 29 (Daniel Carpenter & David A. Moss eds., 2014) (linking specific academic critiques of the modern administrative state to "the more general resurgence of interest in competition and private enterprise").

[69] *See generally* MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION (1955); Samuel P. Huntington, *The Marasmus of the ICC: The Commission, the Railroads, and the Public Interest*, 61 YALE L.J. 467 (1952).

[70] Of course, the facilitative payments Parrillo describes (pp. 125–79) were calibrated in such a way to make government officials especially beholden to special interests — namely, the benefits seekers.

and thus, again, be less likely to cozy up with most special interests.[71] And third, regarding public participation, were there fewer opportunities for public involvement, special interests might not be as well positioned to unduly influence agency officials in the first place.[72]

In the 1960s and 1970s, critics turned their attention to so-called bureaucratic empire building.[73] Here too, the challenges amounted to an implicit attack on the government-as-special model of public administration. In the absence of opportunities to maximize pay, salaried careerists would, so critics feared, use their discretion to aggrandize their own administrative fiefdoms.[74] Such discretion to engage in empire building was only enhanced by government workers' tenure — which insulated them from perhaps more budget-conscious political leaders — and by the empowerment of public constituencies, some of which would provide encouragement and possibly cover for officials looking to enlarge programs and departments.[75]

Catapulting forward, the 1980s and 1990s witnessed an even broader range of complaints leveled against the American administrative state. Among other things, critics lamented the expense and reach of the federal bureaucracy, the magnitude of government waste, and the burdens both agencies and businesses faced in complying with administrative procedures,[76] including those permitting robust public

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[71] Capture theorists were principally focused on independent agencies, the leaders of which — and not just the rank-and-file workers — were insulated from presidential removal. These theorists often endorsed greater political control over the relevant agency officials as a means of counteracting capture. *See, e.g.*, Novak, *supra* note 68, at 29–30.

[72] One could argue that the administrative project was, at this juncture, far from complete — and that the still-limited degree to which the broader public was authorized to participate in administrative governance facilitated capture by well-heeled interested parties who did not have to rely on statutory authorizations to make their positions known.

[73] *See, e.g.*, WILLIAM A. NISKANEN, JR., BUREAUCRACY & REPRESENTATIVE GOVERNMENT (1971).

[74] I do not consider whether this concern, or any of the others discussed in this section, stands up to scrutiny. *Cf., e.g.*, Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005) (contending that the empire-building model does not accord with actual bureaucratic behavior).

[75] *See, e.g.*, David Freeman Engstrom, *Drawing Lines Between* Chevron *and* Pennhurst*: A Functional Analysis of the Spending Power, Federalism, and the Administrative State*, 82 TEX. L. REV. 1197, 1243–44 (2004) (describing savvy interest groups lobbying to protect favored federal programs); Roderick M. Hills, Jr., *Dissecting the State: The Use of Federal Law to Free State and Local Officials from State Legislatures' Control*, 97 MICH. L. REV. 1201, 1240–41 (1999) (characterizing state and local officials' lobbying efforts in support of increased funding for federal programs).

[76] GORE, *supra* note 1; OSBORNE & GAEBLER, *supra* note 1; Box, *supra* note 2, at 30 (describing widespread "questioning [of] the size and scope of government" in the 1980s and 1990s); James Q. Wilson, *Reinventing Public Administration*, 27 PS: POL. SCI. & POL. 667, 672 (1994); *see also* President Ronald Reagan, First Inaugural Address (Jan. 20, 1981), http://www.heritage.org/initiatives/first-principles/primary-sources/reagans-first-inaugural-government-is-not-the-solutIon-to-our-problem-government-is-the-problem [http://perma.cc/DM3U-C8EV] ("[G]overnment is not the solution to our problem; government is the problem.").

participation.[77] Some viewed the politically insulated bureaucracy as too liberal, and apt to overregulate.[78] Others railed against those civil servants less interested in accelerating the regulatory agenda than in slacking off, a laziness attributed to the lack of monetary incentives to excel and to the job security tenure affords.[79] Furthermore, critics insisted that extensive public participation, coupled with opportunities to sue agencies, imposed untold costs and delays on the administrative process.[80] In short, the principal ways in which government had marked itself as special — fixed salaries, tenure, and public participation — were once again implicitly attacked by those who thought government was wasteful, unresponsive, and inefficient.

IV. RUNNING GOVERNMENT LIKE A BUSINESS . . . *NOW*

These often oblique critiques of salarization, tenure, and public participation presented themselves as serious, if again only implicit, challenges to the government-as-special edifice. More recently, however, these challenges have become more direct and politically salient. As a result, opportunities to profit have started to creep back into public administration.[81] So have initiatives reclassifying civil servants as at-will employees[82] and practices that result in the curtailing of public participation.[83]

But whatever concessions have been made within the administrative state to make government run more like a business, they pale in comparison to the external accommodations made. Many of these external accommodations involve the outsourcing of government responsibilities to the private sector.

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[77] *See, e.g.*, Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1410–26 (1992).

[78] *See, e.g.*, Gregory B. Christainsen & Robert H. Haveman, *The Reagan Administration's Regulatory Relief Effort: A Mid-Term Assessment*, *in* THE REAGAN REGULATORY STRATEGY 49, 67–68 (George C. Eads & Michael Fix eds., 1984) (describing President Reagan's Task Force on Regulatory Relief); Bob Woodward & David S. Broder, *Quayle's Quest: Curb Rules, Leave 'No Fingerprints,'* WASH. POST, Jan. 9, 1992, at A1. *See generally* STUART M. BUTLER, MICHAEL SANERA & W. BRUCE WEINROD, MANDATE FOR LEADERSHIP II: CONTINUING THE CONSERVATIVE REVOLUTION (1984).

[79] Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2263 (2001) (alleging that "bureaucracy also has inherent vices (even pathologies), foremost among which are inertia and torpor").

[80] *See, e.g.*, McGarity, *supra* note 77.

[81] *See* Michaels, *supra* note 6, at 1048–49 (describing increased enthusiasm for performance-based public compensation schemes).

[82] *See id.* at 1048–50, 1059–60 (describing recent uptick in government agencies' use of monetary bonuses, performance-based incentives, and prizes).

[83] *See* John D. Graham & James W. Broughel, *Stealth Regulation: Addressing Agency Evasion of OIRA and the Administrative Procedure Act*, 1 HARV. J.L. & PUB. POL'Y: FEDERALIST 30, 38–49 (2014); Connor Raso, *Agency Avoidance of Rulemaking Procedures*, ADMIN. L. REV. (forthcoming), http://ssrn.com/abstract=2293455 [http://perma.cc/32HW-J9PW].

This privatization[84] of public responsibilities satisfies today's fervent calls to run government like a business and also serves as a bit of a cheat. Rather than actually transform the way government itself works, privatization provides alternative platforms. If government itself cannot be substantially overhauled to run like a business (because of, say, the stickiness of salarization, civil-service tenure, and public participatory rights), it can shift playing fields — and run its operations *through* businesses.

In that respect, outsourcing might seem to be only a glancing blow to the government-as-special model of public administration. Salarization, civil-service tenure, and participatory rights are, in principle, unsullied by privatization.[85] Yet it is hard to ignore the reality that privatization, given its magnitude,[86] marginalizes these three administrative achievements and calls into question their continuing relevance. After all, the locus of many important state responsibilities has already shifted to a private sector that embraces profits, at-will employment, and limited (if any) public participation in governance decisions.[87]

A. Rejecting Salarization

Contemporary privatization is in part a neoliberal reversion to the pre-salarization era. Today, and in truth for some years now, government agencies are regularly preferring for-profit private actors to their own, salaried employees.[88]

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[84] In other contexts, privatization refers to different practices, including the sale of state assets. *See, e.g.*, Daphne Barak-Erez, *Three Questions of Privatization*, *in* COMPARATIVE ADMINISTRATIVE LAW 493, 495–97 (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010); Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449 (1988). But the outsourcing of service responsibilities is the dominant meaning of privatization in the American context, and it is the meaning on which I rely in this Review.

[85] *See* Michaels, *supra* note 6, at 1061 ("By allowing the market to annex discrete responsibilities, the outsourcing government is able to ensure its internal, public norms remain unrivaled.").

[86] As just one rough marker, the U.S. government now "employs" more federal contractors than it does federal civilian employees. CURTIS W. COPELAND, CONG. RESEARCH SERV., RL34685, THE FEDERAL WORKFORCE: CHARACTERISTICS AND TRENDS i, 3–4 (2011); *see also* Paul C. Light, *A Government Ill Executed: The Depletion of the Federal Service*, 68 PUB. ADMIN. REV. 413, 417–18 (2008).

[87] *See, e.g.*, 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES § 8.9, at 619 & n.139 (1992); VERKUIL, *supra* note 5; Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437 (2005); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 WASH. U. L.Q. 1001 (2004); Jon Michaels, *Deforming Welfare: How the Dominant Narratives of Devolution and Privatization Subverted Federal Welfare Reform*, 34 SETON HALL L. REV. 573, 640–41 (2004); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1183–87 (1999); David A. Super, *Privatization, Policy Paralysis, and the Poor*, 96 CALIF. L. REV. 393 (2008).

[88] Many contractors, like other private-sector workers, are salaried employees. But the firms for which they work are driven by profits, and presumably they freely use financial incentives such as bonuses to improve principal-agent interest alignment.

Privatization advocates insist that private actors have the financial incentives to outperform salaried government workers. Salaried workers receive the same pay regardless whether they are diligent or simply skating by — and thus there is the fear that they will not work hard.[89] Where there is instead the possibility of profits (or bounties or bonuses) — as there is, once again, when agencies entrust state responsibilities to firms — there are built-in, and quite explicit, incentives to strive.[90] This renewed blending of public service and private profit-seeking is viewed as especially attractive today given the desire to overcome what critics see as bureaucratic torpor.[91] But despite its apparent appeal, this renewed blending endangers all that salarization achieved with respect to boosting administrative regularity and impartiality and enhancing the overall legitimacy of the administrative state.

B. Rejecting Tenure

Business-like government today is also about reorganizing administrative agencies to make them more hierarchical, as is (not coincidentally) the norm in the corporate realm. As stated above, the political insulation — and thus independence — of the civil service invites conflict between agency leaders and the rank-and-file workforce. Such conflict helps promote good governance and limit hyperpartisan or simply arbitrary public policy. Such conflict is, at the same time, expensive, time-consuming, and quite often frustrating. Critics contend that the political leaders running administrative agencies need greater (if not complete) control over those charged with the day-to-day management of agency programs. These political leaders, just like corporate CEOs, need such control in order to run their organizations in a responsible, efficient, and effective fashion.[92]

The same privatization practices that circumvent government salarization (by using for-profit firms and their workers instead of civil servants) can simultaneously short-circuit bureaucratic independence. Agency heads employing private actors are often able to achieve greater hierarchical control over those folks than over their own civil servants.[93] This is because the private actors who replace civil servants differ not only in terms of how they are compensated, but also in terms of their job security (or lack thereof). Contractors and other private

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[89] *See, e.g.*, MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW 340–42 (2009).

[90] Susan Rose-Ackerman, *Reforming Public Bureaucracy Through Economic Incentives?*, 2 J.L. ECON. & ORG. 131, 132 (1986) (discussing "direct financial incentives to induce good performance").

[91] *See supra* note 79 and accompanying text.

[92] There are, of course, important constitutional considerations surrounding presidential control over the administrative state. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH (2008).

[93] *See* Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 748–50 (2010).

actors deputized by the government generally aren't protected against at-will termination. They and their firms also need to have their work assignments periodically renewed. Thus they have quite strong incentives to play nicely, as it were, with agency heads, in ways civil servants simply do not.[94] In short, private actors are vulnerable actors, much more likely to carry out overly partisan or unsound directives without complaint than are career civil servants empowered and acculturated to challenge such directives.[95] For these reasons, employing private actors undermines the important enriching and checking functions performed by the independent civil service. Insofar as this weakening of administrative separation of powers enables political leaders to consolidate and aggrandize administrative power (in a manner that invites hyperpoliticized, arbitrary, or abusive government interventions), it presents a serious challenge to the continuing legitimacy of the administrative state.

C. Rejecting Public Participation

Third, business-like government is often invoked as a rallying cry to eliminate or work around bureaucratic "red tape." What constitutes red tape is, of course, subject to debate. Where some see red tape, others see essential guarantees of accountability. Rights to participate meaningfully in the development of administrative policy, to demand information held by agencies, and to challenge arbitrary or unlawful exercises of state power impose serious burdens on the administrative state. They also help improve agency decisionmaking, deter administrative wrongdoing, and provide avenues for remediation when deterrence fails.

When private actors are tasked with carrying out state responsibilities, they are often not obligated to follow the same procedures that apply in full to government personnel. For example, private actors ordinarily do not have to comply with, among other things, freedom of information requests[96] or privacy laws.[97] When they take the lead in

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[94] Many privatization scholars emphasize, with good reason, the accountability problems associated with potentially poorly supervised, runaway contractors. *See, e.g.*, Jody Freeman & Martha Minow, *Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT, *supra* note 5, at 1, 3. But as I have discussed elsewhere, an even more disconcerting problem might well be the converse one. Contractors and other private agents are often highly motivated to be quite loyal to the agency leaders who decide whether to cancel, renew, or expand work assignments. Such loyalty gives agency leaders far greater control in directing administrative action than if those leaders had to work with less-compliant civil servants. *See* Michaels, *supra* note 13; Michaels, *supra* note 93, at 748–49.

[95] *See supra* notes 48–52 and accompanying text.

[96] *See* Jack M. Beermann, *Privatization and Political Accountability*, 28 FORDHAM URB. L.J. 1507, 1554 (2001); Guttman, *supra* note 10, at 895.

[97] *See* Michaels, *supra* note 93, at 738–39.

developing policy, they usually do so outside of the notice-and-comment rulemaking framework.[98] And they generally are not required to respond to petitions requesting the initiation, change, or cessation of ostensibly public programs.[99]

The channeling of public responsibilities to the less open, less participatory, less regulated private sector enables a far more streamlined approach to governing. Without the customary opportunities for criticism, contestation, or outright sabotage, decisions can be made and programs can be implemented much more quickly. This practice of finding and then operating on a more favorable regulatory landscape is, of course (and, again, not coincidentally), a staple of modern businesses, which are accustomed to changing form[100] and location[101] in order to reduce their tax liabilities and legal responsibilities. But it is a practice that, when employed by the government, weakens civil society, further collapses administrative separation of powers, and brings into question the legitimacy of a less constrained, less democratically inclusive administrative state.[102]

V. Reclaiming Government-Like Government

Parrillo's treatment of the salarization reforms offers an opportunity to consider the evolution of American public administration as a distinctively normative undertaking. Specifically, *Against the Profit Motive* illuminates a rudimentary, inchoate, and now seemingly fleeting vision of government officials recognizing that their domain is special — and taking steps to mark it as such. Analogies between business and government administration have been around for a very long time. By the end of the nineteenth century, these analogies no longer made sense, at least with respect to compensation (p. 362). And they make even less sense now. The responsibilities, powers, and aspira-

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98 *See* Beermann, *supra* note 96, at 1554.

99 *See id.*; Guttman, *supra* note 10, at 895; Michaels, *supra* note 13 (manuscript at 41–43); Michaels, *supra* note 93, at 735–39. Additionally, courts do not consistently treat private actors carrying out public responsibilities as state actors for constitutional purposes. *See* Michaels, *supra* note 93, at 735–38.

100 *See, e.g.*, John C. Heenan, *Graceful Maneuvering: Corporate Avoidance of Liability Through Bankruptcy and Corporate Law*, 65 MONT. L. REV. 99, 115–23 (2004) (describing corporate restructuring decisions that enable firms to limit their liability).

101 *See, e.g.*, John D. McKinnon & Scott Thurm, *U.S. Firms Move Abroad To Cut Taxes*, WALL ST. J. (Aug. 28, 2012, 9:38 PM), http://online.wsj.com/news/articles/SB10000872396390444230504577615232602107536; M.S., *Boeing's Labour Problems: Moving Factories to Flee Unions*, THE ECONOMIST (Apr. 25, 2011, 2:16 PM), http://www.economist.com/blogs/democracyinamerica/2011/04/boeings_labour_problems [http://perma.cc/CK6B-4EPQ] (describing Boeing's relocation of some of its operations to "right-to-work" states that are less protective of organized labor).

102 *Cf.* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 397 (1995) (noting concerns that government could "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form").

tions of the twenty-first-century American state are strikingly different from those of private firms — and appropriately so.

Today, amid the frequent and often uncontested calls to run government like a business, supporters of salarization, the civil service, and broad participatory rights ought to recall and reclaim those initiatives' rich histories and their enduring contributions. These supporters ought to be forthright in explaining at least three things: what government does — and doesn't do; how governmental efforts should be measured; and how the American administrative state's divergence from the market has helped ensure that the government's coercive powers remain rationally arrived at, democratically informed, and impartially exercised.

But until that is done, until the government's intrinsic, if idiosyncratic, worth is recognized on its own terms, American public administration will continue to look ill and rudderless, very much in need of rescuing by, quite literally, corporate raiders promising to run government as if it were a failing business.[103] The truth of the matter, however, is that in many respects — including the ones that perhaps matter most — the administrative state remains sound, and is far more legitimate, rule-bound, and politically and legally accountable than it was in the early days of salarization. (Of course, there is always room for improvement, for innovation, and for learning from other sectors. But improvement and innovation aren't necessarily the same as making government more business-like — and proposed reforms must be measured against principles broader and more constitutionally resonant than economic efficiency.[104])

This intrinsic worth is, again, evidenced and expressed through the major government-as-special reforms undertaken: salarization, civil service tenure, and the granting of broad public participatory rights. As such, supporters of this approach to public governance need to own up to the fact that, yes, American public administration is generally

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[103] Presidential candidates H. Ross Perot, George W. Bush, and Mitt Romney each emphasized his experience as a successful corporate executive and proposed, in effect, to improve government by running it more like a business. Even though Bush was the only one of these three candidates elected, each profoundly influenced national debates and the broader public discourse. *See* JON R. BOND & KEVIN B. SMITH, ANALYZING AMERICAN DEMOCRACY: POLITICS AND POLITICAL SCIENCE 565 (2013) (characterizing Mitt Romney, among others, as a proponent of running government more like a business); James P. Pfiffner, *The First MBA President: George W. Bush as Public Administrator*, 67 PUB. ADMIN. REV. 6 (2007) (describing Bush's business-oriented approach to public governance); Ronald Brownstein, *Business Executive as Populist*, L.A. TIMES, June 13, 1992, http://articles.latimes.com/1992-06-13/news/mn-142_1_business-executives [http://perma.cc/FK2C-BC8Y] (describing a growing class of business-oriented politicians, including Perot, who championed running government like a business).

[104] *See* INS v. Chadha, 462 U.S. 919, 944 (1983) ("Convenience and efficiency are not the primary objectives — or hallmarks — of democratic government . . . ."); *id.* at 958–59 ("[I]t is crystal clear . . . that the Framers ranked other values higher than efficiency.").

less efficient than some businesses — namely, those select few that, it bears underscoring, actually thrive;[105] and, yes, government is indeed more internally rivalrous and messily pluralistic than are private firms in ways that stymie managerial control and otherwise bog down the administrative process.

In owning up to these facts, these supporters need to explain that such "inefficiencies" are not bugs in the American public law system. Rather, what businesses would likely see as bugs are, in fact, necessary features of the constitutional and administrative design.[106] It is a design that reflects attentiveness to the fact that, as Parrillo notes, the government alone exercises sovereign, coercive powers and does so, I would add, within the confines of a legal framework that prizes (and quite possibly requires) checks and balances among rivalrous sets of democratic and countermajoritarian stakeholders.[107]

This is no easy position to defend, particularly given how fully the business-like government crowd dominates contemporary discourse; given the very real fiscal, managerial, and political problems that regularly beset the administrative state; and given the difficulties politicians face — today as much as in the nineteenth century[108] — to get beyond what's expedient.

Defending the government-as-special model of public administration requires, first, resisting the temptation to use profits to better motivate government's sometimes listless workforce. Such resistance helps to preserve administrative neutrality. It requires, second, resist-

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[105] Often supporters of business-like government neglect to acknowledge the high (and generally acceptably high) incidence of firm failure. Factoring in the frequency and likelihood of private firms going under, one could offer a very powerful inversion of the typical market-responsiveness story that these supporters of business-like government are apt to tell. On their telling, businesses, unlike governments, are highly accountable. Private firms are understood to be highly accountable because they depend on profits to stay in business. Failure to perform at a high level could very likely result in their being put out of business.

In truth, the accountability story is far more complicated. Businesses are really accountable in particular moments. They are really accountable until they're suddenly not in the least bit so — that is, once they go (or are about to go) under. The officers and employees can, and do, generally walk away. Shareholders can likewise tolerate the associated losses. Most shareholders are (or at least can be) financially diversified in ways that few American citizens can be politically diversified — hedging their bets, as it were, by acquiring and retaining the right to reside and to vote in multiple nation-states. (Indeed, this possibility, perhaps likelihood, of firm failure helps explain why the government *subsidizes* critical firms and industries — often those involved in national defense — precisely so they don't go under when the state needs their products and services the most.) By contrast, the purportedly unaccountable government must stay the course; it cannot close up shop and post a "sorry" sign in the front window. Simply stated, going out of business is not an option for the government.

[106] *See* Michaels, *supra* note 13 (manuscript at 9–35); *cf.* Josh Chafetz, *Congress's Constitution*, 160 U. PA. L. REV. 715, 769 (2012) (describing conflict among the constitutional branches as "features rather than bugs").

[107] *See* Michaels, *supra* note 13.

[108] *See supra* p. 1157.

ing the temptation to impose greater hierarchical control by marginalizing or defanging the sometimes obstinate civil service. Such resistance helps preserve rivalrous engagement between the politically accountable agency leaders and the politically insulated experts within the bureaucracy. And third, it requires resisting the temptation to circumvent undoubtedly nettlesome administrative procedures. Such resistance helps preserve opportunities for broad public participation as yet another, this time popular, check on how state power is designed and wielded.

Resistance along these three lines will surely be viewed by some, perhaps many, as government stubbornness, callousness, or arrogance. In truth, such resistance is nothing more than an act of modesty. It is a modesty unnecessary in the private sector, where, again, firms in the United States are not burdened by the obligations that attach to exercises of sovereign, coercive power[109] carried out in the name (and with the consent) of the people.[110] And it is a modesty unwitnessed in autocratic states insensitive to the demands of republicanism or the rule of law. Nevertheless, it is a modesty that legitimates and moderates American public administration and that, quite likely, provides the stability and security that enables businesses *to run like businesses*.[111]

* * *

So far, my focus has been on the public harms associated with running government like a business. For the reasons discussed above, business-like government undermines the administrative state's legal and moral legitimacy. But the private sector is likewise challenged and quite possibly threatened when government acts too much like a business or operates too readily through businesses.

After all, a government that discards or circumvents tenure is apt to provide a far less stable regulatory framework. Career civil servants check the partisan and ideological excesses of elected administrations. Without that steadying hand, administrative and regulatory practices are apt to swing somewhat wildly, reversing course each time the White House alternates between pro-business and pro-consumer (or labor or environment) administrations.

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[109] Corporations generally do not (and cannot) act coercively, at least not with respect to those who have not voluntarily opted into such a relationship. Moreover, customers, unlike citizens of the federal government, are generally much freer to shop around — that is, to choose which (if any) coercive relationship to enter into. *Cf.* Box, *supra* note 2, at 35–36. *But see infra* note 128 and accompanying text.

[110] By and large, businesses are free to focus principally on profits and to attend to a singular, relatively homogeneous constituency of shareholders. *See, e.g.*, HENRY HANSMANN, THE OWNERSHIP OF ENTERPRISE 53–65 (1996).

[111] Jon D. Michaels, *Government Is Special*, BALKINIZATION (June 6, 2014, 2:49 PM), http://balkin.blogspot.com/2014/06/jon-d.html [http://perma.cc/K9B3-ZD7K].

And a government that curtails or circumvents public participation might well leave businesses and other private interests systematically shut out of the administrative decisionmaking process. Without the guarantee of access to administrative proceedings, such interests might find themselves subject to the whims of a whimsical government.

Lastly, a government that entangles itself with profit-seeking enterprises runs the risk of either ignoring or skewing its public responsibilities — a risk that private-sector actors must bear.[112] Consider, for example, the case of Amtrak, one of many congressionally designated government corporations.[113] As a for-profit commercial enterprise[114] as well as a regulator,[115] Amtrak possesses seemingly conflicting responsibilities. Indeed, the D.C. Circuit recently recognized this conflict. In 2013, it struck down some of Amtrak's rulemaking authority precisely because Amtrak had a financial interest in how those rules (regarding priority usage of shared railroad tracks) would be shaped.[116] Of particular note, and in keeping with the lessons of Parrillo's book, the court found it troubling that Congress could create entities that enjoyed the coercive rulemaking power of a government instrumentality but lacked the public-regarding financial disinterest to exercise that authority in a neutral, trustworthy manner.[117] No doubt the private parties that brought this suit challenging Amtrak's regulatory impartiality shared the court's concern.

Consider, too, instances in which the federal government functions simultaneously as the controlling shareholder in major corporations and the sovereign regulator over said corporations and their industry rivals. The government possessed these seemingly conflicting responsibilities after taking equity ownership stakes in AIG and the American automotive companies in the wake of the 2008 global financial crisis. As part-owner, part-regulator, the government ostensibly sought both to maximize shareholder value (thereby securing a return on the public's "investment") and to stabilize the then-reeling economy.[118] At

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[112] *Cf. supra* note 19 (describing concerns that facilitative payments distorted immigration and land-grant policies).

[113] *See* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 856 (2014).

[114] Amtrak must be "operated and managed as a for-profit corporation," 49 U.S.C. § 24301(a)(2) (2012), and its managers have a "fiduciary duty to maximize company profits," Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 676 (D.C. Cir. 2013).

[115] *See Ass'n of Am. R.Rs.*, 721 F.3d at 668 (describing statute authorizing Amtrak and the Federal Railroad Administration to jointly develop standards regarding the usage of shared railroad tracks).

[116] *Id.* at 676–77.

[117] *Id.* at 675.

[118] *See* Barbara Black, *The U.S. as "Reluctant Shareholder": Government, Business and the Law*, 5 ENTREPRENEURIAL BUS. L.J. 561, 574–75 (2010) (suggesting conflicts inherent in the Treasury Department's "dual roles as shareholder and 'steward of the U.S. economic and financial

the same time, the government further took advantage of its unusual position as controlling shareholder to dictate some regulatory policies through corporate board decisions — instead of through the normal, but far more cumbersome, rulemaking process sure to elicit challenges from both civil servants and members of the public.

Thus, acting through the avenues available to it as an owner of AIG (rather than as a sovereign authorized to promulgate rules),[119] the federal government directed the teetering insurance giant to forgo potentially valuable legal claims against Wall Street banks.[120] In that respect, AIG's core financial interests (and the federal government's investment in that company) took a back seat to the broader governmental commitment to strengthening America's financial sector.[121]

Similarly, the government, acting again as a corporate director rather than as a neutral and highly constrained regulator, instructed the car manufacturers to "produce a [sizeable] portion of their vehicles in the United States."[122] The government qua corporate director further insisted that the automakers "pursue a business strategy based on the policy goal of building fuel-efficient cars."[123] These policy decisions were not principally about maximizing the return on the taxpayers' investment.[124] Instead these decisions appeared to be motivated by more diverse, perhaps partisan, policy considerations such as preserving U.S. jobs, protecting the environment, and promoting energy conservation.[125]

Though the D.C. Circuit objected to Amtrak's dual role,[126] entanglements of this sort are generally tolerated. They are tolerated not-

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systems'" (quoting *Duties & Functions of the U.S. Department of Treasury*, U.S. DEPARTMENT OF THE TREASURY, http://www.ustreas.gov/education/duties (last updated May 25, 2010))).

119 *See* J.W. Verret, *Treasury Inc.: How the Bailout Reshapes Corporate Theory and Practice*, 27 YALE J. ON REG. 283, 285 (2010) (noting that though the U.S. government acted as a corporate director, it nevertheless retained not only the powers of a sovereign but also the immunity accorded to a sovereign under federal securities and state corporate law); Michael Rosemeyer, Note, *Is the Government's Takeover of AIG Constitutionally Permissible?*, 4 ENTREPRENEURIAL BUS. L.J. 243, 253–54 (2009).

120 *See* Louise Story & Gretchen Morgenson, *Inside the U.S. Bailout of A.I.G.: Extra Forgiveness for Big Banks*, N.Y. TIMES, June 30, 2010, at A1. It also demanded internal governance reforms. *See* Rosemeyer, *supra* note 119, at 254.

121 *See* Gretchen Morgenson, *Court Casts a New Light on the Bailout*, N.Y. TIMES, Sept. 27, 2014, http://www.nytimes.com/2014/09/28/business/court-casts-a-new-light-on-a-bailout.html (describing a lawsuit brought by AIG shareholders alleging that the federal government acted punitively and coercively in the course of the bailing out the failing insurance company).

122 Black, *supra* note 118, at 589–90.

123 Benjamin A. Templin, *The Government Shareholder: Regulating Public Ownership of Private Enterprise*, 62 ADMIN. L. REV. 1127, 1186 (2010).

124 Verret, *supra* note 119, at 305.

125 *See* Black, *supra* note 118, at 589–90; Templin, *supra* note 123, at 1185–86.

126 That decision might yet be reversed by the Supreme Court. *See* Dep't of Transp. v. Ass'n of Am. R.Rs., 134 S. Ct. 2865 (2014), *granting cert. to* 721 F.3d 666 (D.C. Cir. 2013).

withstanding the fact that they enable the hijacking of commercial instruments to advance seemingly public aims (as was the case with AIG and the automakers) and, conversely, the hijacking of public instruments to advance seemingly commercial aims (as was the case with Amtrak regulating on matters that affect its profitability).[127] Thus the problem with these entanglements — for our generation as much as for those operating in the pre-salarization era that Parrillo describes — is one of trust, reliability, and assurances of neutrality in the exercise of sovereign, coercive powers on behalf of a democratic polity. It is a problem not only for a government that craves legitimacy but also for a private sector that would prefer its regulator to operate impartially and transparently.

It bears mentioning that private firms occasionally find themselves similarly entangled, particularly when they exercise quasi-sovereign powers. Certain firms that dominate the financial, telecommunications, and new media industries essentially control resources, networks, and services that are of vital importance to large segments of the American public. The public interacts with those firms almost out of necessity (rather than choice), and those firms enjoy broad discretion in formulating, among other things, policies regarding user eligibility and access, consumer protection, and dispute resolution.[128] In

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[127] Relatedly, the Supreme Court has drawn a distinction between state regulation of the market and state participation in the market. The dormant commerce clause applies when states *regulate* in a discriminatory fashion, but it does not restrict state *participation* in the market, even when a state's practices as a market participant are discriminatory in favor of in-state interests. *See* Reeves, Inc. v. Stake, 447 U.S. 429, 436–37 (1980); Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 808–10 (1976).

[128] *See* Anupam Chander, *Facebookistan*, 90 N.C. L. REV. 1807, 1808, 1809 (2012) (explaining that "Facebook has become so powerful and omnipresent that some have begun to employ the language of nationhood to describe it," *id.* at 1808, that many, many individuals "trust[] their lifetime of intimate communications with friends and family to [Facebook]," *id.* at 1809, and that Facebook "increasingly records our lives, mediates our interactions, and serves as a platform for businesses, media, organizations, and even governments to engage the world," *id.*); *id.* at 1811 (indicating that "Google, Yahoo, and Microsoft are among the companies with the breadth, capital, and power to challenge governments as alternative authorities"); Frank Pasquale, *Beyond Innovation and Competition: The Need for Qualified Transparency in Internet Intermediaries*, 104 NW. U. L. REV. 105, 111, 112, 119–20 (2010) (noting that, among other things, new media giants "organize and control access" to vital telecommunications and information portals, *id.* at 111, that Google is "a de facto lawmaker for many aspects of life on the Internet," *id.* at 112, and that, because "most consumers have only one or two options," large telecom carriers "can easily use their services to subtly advance their own political or cultural agendas without much fear of losing customers," *id.* at 120); Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009, 1014–15 (2013) (describing powers exercised by market-dominating Internet and social-media outfits); Judith Resnik, *The Supreme Court, 2010 Term — Comment: Fairness in Numbers: A Comment on* AT&T v. Concepcion*,* Wal-Mart v. Dukes*, and* Turner v. Rogers, 125 HARV. L. REV. 78, 122 (2011) (discussing binding arbitration procedures imposed on telecommunications customers that limit procedural rights and circumscribe the types and forms of claims that can be presented); *see also* 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

instances where private firms exercise such de facto public control, there might well be reason to insist that they accept corresponding *public* responsibilities. In short, we might want them to act more like a government.

CONCLUSION

Present-day disillusionment with government is in part, and perhaps counterintuitively, a function of government leaders' embrace of business-like practices, their often-voiced promises to be more business-like, and their failure to justify the administrative state's existence normatively, constitutionally, or prudentially as different and special. Government's force and, ultimately, its favor stems from its insistence on being separate, removed, and perhaps *above* private actors and private activity. This separation gives government its legal and moral legitimacy to compel rather than simply to advertise or entice, and to do so without engendering the type of mistrust that, as Parrillo notes, profits and other market metrics invite.

Ironically, Parrillo's insightful claim that, in order to expand, late-nineteenth-century American government had to become less like the market has, today, been turned on its head. Now, almost the polar opposite seems true: in order even to maintain its current size and scope, government must run like a business.

Reading *Against the Profit Motive* through this contemporary lens suggests the need to reclaim the virtue in what others have persuaded us is a vice. The continual failure of elected leaders (and, in fairness, scholars) to explain why the government must operate differently clouds public perception of what government should be, and what it is failing to do. To command the public's attention, especially on matters that seem abstract and hostile to the rhetoric and reality of business-like government, is a big challenge. As long as the public thinks bureaucracy is failing (rather than functioning in the way American bureaucracy is supposed to function — namely, in a costly, clunky, confrontational fashion); and as long as we don't know what to make of entities like the Postal Service (which Congress calls a corporation but does not *really* allow to run like a business[129]), government will con-

-why.html ("'The average person's soapbox is now digital, and we're now in a world where the large social media companies have a governmentlike ability to set social norms' . . . ." (quoting Lee Rowland, Staff Lawyer, American Civil Liberties Union)).

[129] For instance, Congress requires the United States Postal Service (USPS) to pre-fund its pension benefits for seventy-five years through annual payments of more than $5 billion. *See* 5 U.S.C. § 8909a(d)(3)(A) (2012). "No other government agency or private business is required to make such over-payments." *Postal Service Defaults on $5.6B Retiree Pre-Payment*, USA TODAY (Oct. 1, 2012, 5:13 PM), http://www.usatoday.com/story/ondeadline/2012/10/01/postal-service-default-retiree-health-benefits/1606815/ [http://perma.cc/V9JD-5PHL]. "Without the pension

stantly be questioned and ridiculed as a second-best alternative to the market. Leaders who accept this claim that government isn't distinctive — and instead is simply a poor substitute for the market — will respond by submitting even more fully to the gravitational pull of the private sector. That pull is, as I already suggested, helpful to neither side.

We should instead celebrate (or at least tolerate) government's clunkiness as appropriate given the special obligations under which it operates. Such clunkiness is, again, a feature of our intentionally rivalrous, rule-bound public administration, which not only prizes but needs pluralism, which accepts responsibilities and encumbrances in direct proportion to its coerciveness, and which understands that its responsibilities are best satisfied by preserving rather than eliminating checks and balances and by deemphasizing personal financial gain within the context of public employment. We should celebrate (or, again, at least tolerate) this clunkiness — just as we can celebrate the leanness and hyper-efficiency of business (and tolerate the concomitant economic inequality and dislocations associated with market competition) as appropriate given the market's purposes and responsibilities, and just as we can celebrate (or again tolerate) the unique practices of other particular, important, and in many respects equally idiosyncratic realms, such as the family.

If some analogy to business is inevitable, perhaps a more appropriate one would be to call government business's designated driver. It is surely tempting to partake in the revelry, but government must refrain, for its own good and integrity — and for the good of the private sector, whose creativity, risk-taking, and experimentation are enabled by government's abstemiousness.

[pre]payment, USPS would have a $1.5 billion surplus instead of a $20 billion shortfall." Ben Sherman, *Postal Service Set to Default on Pension Payment for First Time, but Congress Could Easily Fix the Problem*, THINKPROGRESS (July 19, 2012, 10:35 AM) http://thinkprogress.org/economy/2012/07/19/546851/postal-service-default-congres/ [http://perma.cc/93NV-9M7R]. Moreover, though the Postal Service has expressed a preference to eliminate Saturday deliveries (for cost-saving reasons), the Service must secure congressional authorization to do so — something Congress has been unwilling to grant. *See* Ron Nixon, *Post Office Rebuffed Again on 5-Day Service*, N.Y. TIMES, Mar. 21, 2013, http://www.nytimes.com/2013/03/22/us/politics/gao-rejects-post-offices-5-day-delivery-service.html.