INTRODUCTION

The institutional developments known in common parlance as globalization are conventionally understood as involving broadly transnational processes of market-oriented governance, as well as what are widely presumed to be their homogenizing effects. Without gainsaying the importance of the international and transnational aspects of globalization, limiting discussion to the extraterritorial in this way tends to obviate a clear understanding of the domestic processes through which globalization was and continues to be institutionalized. Imagining globalization only in terms of international affairs tends to focus attention on the power of the executive branch, given the executive’s

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1 For an extended discussion of how globalization has been construed and understood in market oriented terms, see Alfred C. Aman, Jr., The Democracy Deficit: Taming Globalization Through Law Reform, 1-14, 87-129 (NYU Press, 2004).
constitutional responsibilities in foreign affairs. Improving an understanding of globalization’s domestic front means broadening that focus to include not only the regulatory functions of the executive branch, but the other branches and levels of government – especially the legislative branch. It is in those legislative and regulatory arenas that the politicization (and polemicization) of a particular construction of globalization -- as a foreign economic threat coupled to a golden opportunity for global capitalism – is most evident, as well as its popularization and entrenchment in neoliberal terms. Those terms, however, are inadequate either to account for the current diversity of public-private arrangements, or to convey the range of current debate in relation to privatization and the public interest. Globalization blurs the distinction between public and private, particularly when the state seeks to increase its competitiveness by contracting out some of its domestic responsibilities to private actors. Taking account of the domestic “face” of globalization is thus important as both a corrective to a flawed analysis of its causes and effects, as well as a necessary (if insufficient) step in addressing the democracy deficit inherent in globalization as it has developed in practice.²

Globalization is often understood largely in neoliberal, economic terms, as if it were a force of nature. For some, globalization is all about competition—a competition for markets and investments that is global in scale and more intense than ever before. For individual corporations to succeed, for example, they must become more efficient, taking full advantage of new technologies and moving various components of their operations around the world, so as to lower costs and expand their markets. States are expected to follow suit by deregulating their markets, privatizing governmental services, lowering taxes and, in the process, becoming more effective in attracting new businesses and, of course, jobs to their geographic region. The viewpoint of globalization that forms this paper, however, begins not in the inevitability of global markets, but in the role of domestic law and politics in producing

² See ALFRED C. AMAN, JR., SUPRA NOTE 1.
certain market conditions (global or otherwise). In discussion, globalization is usually presented in a way that assumes a top down phenomenon, emphasizing scale and homogeneity. By contrast, the perspective I take is from the bottom up, taking into account the areas where domestic law and local communities are caught up, and too often caught out, by globalization.

To illustrate what a bottom up approach to globalization entails, it is necessary, first, to correct some prevailing myths about globalization particularly those grounded in neoliberal discourse. The purpose of Part I is, in effect, to shift our perspective on the nature of globalization. Part II then deals with the domestic side of globalization, especially privatization, for reasons I will explain. In Part III, I offer some ideas for reform in which administrative law is the centerpiece. This brings us full circle to the issue of how different understandings of globalization have implications for our understanding of state power, particularly when it enlists the private sector to carry out significant public responsibilities.

PART I

GLOBALIZATION, NEOLIBERALISM AND THE DEMOCRACY DEFICIT

Globalization as we know it today is inseparable from its domestic politicization as neoliberal reform and its promotion of world markets—by which I mean the so-called
Reagan-Thatcher revolution of the early 1980’s, its global export, the broad political consensus around its key terms (especially “privatization” and “deregulation”) and the claim as to some inherent value in “disembedding” the market from the encumbrances of state and society (e.g., entitlements). I argue that the usual understanding of

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3 The presidency of Ronald Reagan stands as the shift point in national power dynamics from the then-entrenched Democratic Party. The “Reagan Revolution” involved not only this shift in political fortunes, but a deliberate and sustained focus on economic reforms that included “deregulation, privatization, free market philosophy and a reduced role of government.” Joe Martin, The Next Ten Years – A White Knuckle Decade with Nowhere to Hide; A Prospective on Management Trends, BUSINESS QUARTERLY (Mar. 22, 1989), at 51. A concerted attempt to move toward increased privatization of government was always central to the Revolution’s ideological goals; however, movement toward privatization proved more difficult, and met with more resistance than advocates had anticipated. Privatization efforts by the Reagan administration met with consistent opposition, and prompted the Republican Party and other privatization advocates to move toward less confrontational tactics and to adopt less explicit language in an attempt to embed a privatization ideal in the political psyche. See Margaret E. Kriz, Slow Spin-Off, THE NATIONAL JOURNAL (May 7, 1988), at 1184 (describing privatization advocates as seeking to put forward ideas that would “continue to germinate” in future administrations, even if they were not Republican controlled). For a current perspective on the long-term effects on outcomes of the Reagan Revolution on the modern political, social, and economic landscape see Dick Meyer, Reagan’s Revolution Plus 25, CBSNEWS.COM, Dec. 1, 2005, http://www.cbsnews.com/stories/2005/12/01/opinion/meyer/printable1088888.shtml.

4 David Harvey has noted that for modern privatization advocates the meaning of the word “privatization” carries with it references to the political ideals of individual dignity and individual freedom that were deliberately incorporated into the founding of the modern neoliberal movement. See DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 5–6 (2005). “Contracting out” refers to the practice of government contracting with a private employer for the delivery of some good or service, where the ultimate responsibility for the success of the service or good delivery technically remains with the contracting
globalization (at least in the U. S.) is unduly restricted – the legacy of the way globalization was produced out of a particular political moment. As an approach to governing, neoliberalism favors markets over law almost across the board, and in the generation since the Reagan-Thatcher era, many new supra-national and global institutions have been developed for the advancement of global markets.

But globalization is far more than these institutional arrangements. It is also a way of thinking and representing the relationships between the market, state and society – i.e., it is also a discourse, and this discourse also has effects in that it makes some positions seem more obvious or easier to defend than others. In neoliberal discourse, markets and law tend to be treated as either/or options, law being treated as if it were a human intrusion in an otherwise natural system of economic forces. It also treats globalization as if it were “out there” in the world at large – while law is imagined as parochial or domestic. This is another way that law is imagined to encumber markets. These claims result in a mythical view of globalization that is to a large degree shared by pro- and anti-globalization advocates – who are alike in ultimately seeing the global economy as a
government body. See, Geoffrey Segal, Testimony to the Utah Law Enforcement and Criminal Justice Interim Committee, Contracting Out Force Prisons to Focus on Results, Performance, REASON FOUNDATION (Sept. 21, 2005), http://www.reason.org/commentaries/segal_20050921.shtml.

“Competitive sourcing” calls for the identification of government activities that are “commercial” and therefore able to be done by the private sector, and the institution of a competitive bidding process to assign such activities to their most “efficient and effective” source. Geoffrey F. Segal, Competitive Sourcing: Driving Federal Government Results, REASON FOUNDATION, http://www.reason.org/commentaries/segal_compsourcing.pdf (last visited Jan. 24, 200).
universal norm in relation to which local government is largely irrelevant. This may seem to be an overstatement, but the fact remains that the discourse of neoliberalism so dominates our understandings that it is difficult to recognize it as something other than common sense, let alone conceptualize alternative accounts of globalization.

Privatization, for example, is viewed as a perfectly natural, common sense regulatory reform. Yet the history of the privatization movement’s key terms is recent, and their promulgation well choreographed. Robert Poole, co-founder of the Reason Foundation (the leading think tank of the privatization movement in the U. S.) claims to have been the architect of the popularization of the term “privatization” in the 1960’s.

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5 See id. at 87–128.

6 On the taken-for-granted validity of “laissez-faire ideology,” see Margaret Jane Radin & R. Polk Wagner, Symposium on the Internet and Legal Theory: The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace, 73 Chi-Kent L. Rev. 1295, 1295; see also Berman, infra note 7, at 1278.

7 See footnote 1 and accompanying text. In addition, the Republican Party’s economic agenda contained within the 1994 Contract With America, authored by Newt Gingrich, can be seen as an extension of this push, started in the Reagan years, to reconceptualize and reinforce a binary public/private divide. See Republican National Committee, Contract With America (2005). While the language used to promote the economic aims of the Contract With America appears to have contentiously avoided specific references to privatization, Newt Gingrich’s more recent writings have been much more explicit. In a recent book Gingrich promotes what he calls the “principles of entrepreneurial public management” and unequivocally states that the government should “[p]rivatize more government functions. Many agencies or government services could be turned over to private companies that can deliver services more efficiently and at lower costs.” Newt Gingrich, Winning the Future: A 21st Century Contract With America 170–73 (2005).

“Competitive sourcing” was subsequently crafted as a more neutral proxy term, after privatization became laden with partisan political associations. The George W. Bush administration seems to prefer the even more neutral term “management” – as in the President’s Management Agenda (PMA). The neutralization of these terms is one way

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9 For example, Mitch Daniels, governor of Indiana and former director of the OMB has said, “Personally, I never use the word ‘privatization,’ because it connotes an orthodoxy of its own.” Mitch Daniels, Reason Foundation: Annual Privatization Report 2006: Reforming Government Through Competition (Apr. 2006), http://www.reason.org/apr2006/apr2006_daniels.shtml. Proponents of privatization also hailed the early efforts of the George W. Bush administration to expand the use of “competitive contracting” in order to “open more federal positions involving commercial activities to competition from the private sector.” Ronald D. Utt, Improving Government Performance Through Competitive Contracting, THE HERITAGE FOUNDATION (June 25, 2001), http://www.heritage.org/Research/GovernmentReform/BG1452.cfm. The aggressive competitive sourcing strategies were pitched as a way to save $10 to $14 billion dollars a year in program costs while at the same time improving basic public services. Id.

10 See Executive Office of the President, Office of Management and Budget, President’s Management Agenda: Competitive Sourcing: Conducting public-private competition in a reasoned and responsible manner, WHITEHOUSE.GOV (July 24, 2003), http://www.whitehouse.gov/cc/competitive-sourcing20030724.pdf. Scholars generally follow the early history of the movement in adopting privatization and using “the private sector” as the antonym for government action glossed as the public. I do the same, but fundamentally, imagining public and private as complements in a single field errs in making them alternatives, as if they were fungible through the commercial sector; however, as I shall argue, important elements of the public interest resist incorporation into the private commercial sector.
in which neoliberalism—originally a partisan platform—came to be naturalized within a broad political consensus. There would in fact seem to be no neutral term.\footnote{11 It is precisely the services to these populations that were among the earliest government functions to be out-sourced to private contractors. See, e.g., Harding, \textit{infra} note 83, at 3 (documenting the rise of private prisons in the last two decades); Matthew Diller, \textit{The Revolution in Welfare Administration: Rules, Discretion and Entrepreneurial Government}, 75 N.Y.U. L. REV. 1121 (2000).}

This is one reason why critics of neoliberal globalization should not imagine that a swing of the political pendulum away from Reaganite terms, or a change of ruling party, will return us to an older liberalism. The effects of globalization on the relationship between states and markets and the technologies that drive it are by now too fundamental to be reversible with a change of administration – probably anywhere, but certainly in the United States. This, plus the fact that the discourse of neoliberalism represents the market as inherently democratic tends to accelerate globalization, paradoxically widening the democracy deficit.

What is the democracy deficit and how does it arise?\footnote{12 This discussion relies on my analysis of democracy deficits set forth in Alfred C. Aman, Jr, \textit{The Democracy Deficit}, supra note 1, at 3-6.} Democracy deficits can take many forms, depending on the institutional location and the substantive and procedural decisions involved; their vertical or horizontal nature; and the procedures to which they are compared. Democracy deficits may arise from decisions that have significant adverse affects on individuals but are inaccessible to affected citizens because they are made by jurisdictions or private entities beyond the reach of the domestic or international political structures of those affected. Such democracy deficits often are the result of negative spillovers from one jurisdiction to another, such as acid rain, or they
can arise from private decisions to move capital from one part of the world to another. Representation or direct participation in the decisions that lead to these spillovers usually is not possible in jurisdictions in which affected citizens do not live and in whose political processes they cannot directly participate; nor is it even theoretically possible to participate at the international level, if there is no treaty or relevant international organization with jurisdiction over the issues involved or if the decisions causing the adverse effects are made by private entities.

Democracy deficits can result from more directly vertical relationships in which decisions are made from above; for example, by supranational organizations like the European Union. In the European Union context, democracy deficit concerns often arise from the fact that some decisions in the chain of command are thought to be simply too far removed from affected citizens in a particular state.\textsuperscript{13} Though one might argue that the power to make these decisions was, in effect, delegated by the states to the European Union, opposition to the unforeseen outcomes of these broad delegations of power is often expressed as a form of democracy deficit and in tension with principles of subsidiarity that argue for decision-making processes as close to the affected citizens as possible.\textsuperscript{14} Of course, issues of domestic federalism are similar, when decisions are made at the national rather than state or local levels of government.


Still another kind of democracy deficit derives from the fact that the democratic processes used to conform domestic law to an international ruling are substantially less than those used to create these rules or laws in the first place. For example, pursuant to treaties negotiated within or judicial decisions rendered by the World Trade Organization (WTO), domestic law must often change to harmonize with these outcomes. The processes used appear to be democratic, but the outcome of these processes, given the prior commitments made in the treaties involved, means the outcomes, usually are a foregone conclusion. The same processes used to promulgate a rule or pass a statute are employed to rescind the rule or amend the law, but the fait accompli nature of the processes used means, in reality, that the same is less. They have a rubber stamp quality to them.\textsuperscript{15}

Fast track legislative processes (i.e. processes that do not allow for amendments on the floor of the House or Senate) may also contribute to a sense of a democracy deficit; they also represent a kind of fait accompli lawmaking, since amendments are not allowed, but this kind of deficit derives from there being fewer, rather than the same, legislative processes involved. In this sense, the growing power of the executive branch in various global contexts in which, for example, issues previously thought of as domestic now appear to be within the broad foreign policy powers of the executive branch, also creates

\textsuperscript{15} See Sidney A. Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 Admin. L. Rev. 435 (2002). Many nations are not even involved in the original decisions at the WTO. Steve Charnovitz, *The Emergence of Democratic Participation in Global Governance (Paris, 1919)*, 10 IND. J. GLOBAL LEGAL STUD. 45, 49 (2003). (describing the WTO practice of “officials leading a negotiation will invite selected governments into a room to hammer out a deal that is later presented to the entire membership as a fait accompli.”).
democracy deficit concerns, whether they result from the increased use of executive
treaties or broad based executive orders, such as those involved with establishing military
tribunals.16

The de-territorializing effects of globalization make democracy deficits increasingly common, both at home and abroad. For example, some decisions that have substantial impact on citizens of a country are made by organizations, either domestic or multi-national organizations, that are essentially private, beyond direct democratic control or influence. Transnational actors of all kinds have a need for rules for their operations to run smoothly. The transnational aspects of their operations place them beyond the control of any one jurisdiction and the rules and dispute resolution mechanisms that they develop are voluntary and, essentially, private in nature. Yet, these rules can and often do have transnational effects on various publics. Corporate codes of conduct governing labor conditions, voluntarily adopted, may or may not be the result of input by citizens in various countries who are concerned with child labor, low wages or the right of freedom of association.17 It may seem that there is no democracy deficit in such contexts, since one might not expect the decision making processes of private actors to be democratic, beyond their own shareholders. But this assumes that our concept of public and private remains the same, even in the face of denationalizing global forces. The horizontal nature of governance creates new issues of legitimacy and democracy that

16 See, e.g., Tara L. Branum, President or King? The Use and Abuse of Executive Orders in Modern-Day America, 28 J. LEGIS. 1 (2002).

17 See, e.g., Adelle Blacket, tba
go beyond individual states. We must, therefore, also go beyond state centric approaches and habits of mind when thinking about democracy in contexts such as these.

As a matter of interpretation, democracy deficits, of course, also turn on how one conceptualizes democracy. Democracy may require more than the involvement of a legislative or executive body or the participation of a member state. It also involves concepts of legitimacy, which include opportunities for participation in decision making processes by stakeholders whose interests may not adequately be represented by a member state. Decisions made by judicial panels at the WTO, utilizing decision making processes that are not particularly transparent and limit participation only to member states, are not likely to be seen as legitimate by those whose interests are not fully (or even partially) represented by formal state representation. The inevitable trade-offs that arise when free trade conflicts with environmental protection are likely to produce widespread participation demands from a range of nongovernmental organizations (NGO’s) whose interests are more varied and diverse than any single state representative can be.18 From their point of view, there is a democracy deficit if they are excluded from the relevant decision making processes. From a broader public point of view, the quality of the decisions may suffer if the perspectives of diverse interests and parties are not considered. One might argue that such democracy deficits may exist only in the eyes of the beholders. If so, that would only underscore the point that the scope of democracy should be decided by democratic means.

Globalization processes thus complicate both the form and content of democracy. As they rearrange the lines between public and private entities, they also rearrange the public’s role. The traditional statutory line between public and private, or markets and government, reinforces this displacement. For example, the statutes that spell out procedural and informational requirements restrict them primarily to state actors only. When public functions are carried out by private actors, the requirement of transparency and public participation – the keystones of administrative democracy – is often reduced or set aside. That is the essence of the democracy deficit and this is precisely the kind of democracy deficit that flows from the privatization of public functions. But even if this were not the case, and the state action doctrine were able to reach certain private entities, the relevant public law remedies may not always be appropriate. The new mixtures of public and private power require new conceptions of administrative procedure, conceptions unlikely to emerge in the context of a judicial proceeding focused on the rights of an individual.

As we shall argue more fully in Part III, there is a need for the legislature to extend aspects of the Administrative Procedure Act (APA) or other administrative reforms to the private sector. There is room for a wider role for law in sustaining the contact between global institutions and local democracy. This is not to suggest, however, that neoliberalism and market reforms are inherently objectionable, or that administrative law and neoliberalism are somehow inherently opposed. Neither is the case. Quite the contrary, I turn to administrative law because its principles clarify the potential relationship between government and global markets, and yield a more nuanced sense of democratic possibility. Administrative Law focuses on administrative values –
administrative justice -- rather than on such a priori distinctions as public and private, or
domestic and international, so important to neoliberal discourse—and so misleading as to how
contemporary governance in a global era actually works. 19 The idea of “administrative values” and the
importance of restoring the democratic values of administrative law to globalization is the primary point I wish to make in this chapter.

Quite apart from its impact on democracy, there is another reason to reconsider the neoliberal discourse of globalization-- it does not account for the facts on the ground. Even where neoliberal reform has been most actively embraced, considerable regulation is still in place, whether in the form of so-called “managed competition” or other forms of intervention designed to “help” the market take hold.20 This is often the case in industries

19 By “public” and “private” I am referring to the colloquial (often zero-sum) distinction between
government and the commercial sector in relation to privatization (among other terms), not the public-
private divide theorized by legal scholars concerned with the relationship of the state to private ordering.

See Berman, Paul Schiff 2000 Symposium Overview, Part IV: How (if at all) to regulate the internet:
Cyberspace and the state action debate: the cultural value of applying constitutional norms to regulation.
71 U. Colo. L. Rev. 1263, 1279-1281.

20 In his writings about the telecommunications industry, for example, Professor Hudson Janisch provides
an example of this distinction. Writing about the telecom downturn of the late 1990s and early 2000s in
Telecommunications in Turmoil, 37 University of British Columbia Law Review 1 (2004), Professor
Janisch posits that the regulatory environment actually worked to create a state of artificial competition
that, while it provided artificially low prices to consumers, ultimately worked against consumer interests
as it created an unhealthy dependence by telecom companies on government regulatory support. Another
frequent commentator on the telecommunications industry, the economist Alfred E. Kahn, is also a
passionate advocate for competitive market approaches, but has also voiced similar concerns about the
unintended consequences of regulatory attempts to create competition. See, e. g., Alfred Kahn, The
Regulatory Tar Baby, 21 Journal of Regulatory Economics 35 (2002). This critique of the application of
such as telecommunications, where advances in technology now make real competition within the industry possible, rendering the industry’s previously existing natural monopoly characteristics essentially obsolete as a basis for state intervention. Where we tend to see neoliberal reform applied in a much purer fashion is in the area of social services, specifically services for vulnerable populations -- the poor, the ill, the elderly, children or prisoners, groups that are almost by definition excluded from participation in the market and political life. Historically, the privatization movement took hold first at these margins. I concentrate on vulnerable populations not only because they inherently warrant our concern, but also because they represent the fullest display of the contradictions between the discourse of neoliberalism and its effects in practice. In other words, their situation offers a prime example of the democracy deficit of globalization, and a compelling portrait of globalization’s “domestic face.” I will come back to the resources of administrative law in relation to the democracy deficit in Part III, but let us turn to some other myths about globalization—to lay the groundwork for that discussion.

PART II

administrative law, however, does not necessarily lead to the conclusion that administrative law cannot serve as a positive force within competition-based environments. Indeed, Professor Janisch has observed that “freer markets” may in fact require more regulation—albeit regulation of a different sort and sophistication—than in a traditional regulated industry.
RETHINKING GLOBALIZATION

The conventional picture of globalization is of a global structure to which domestic legal regimes must inevitably adapt. But globalization is not a structure – it is a process in time. Taking the domestic face of globalization into account brings out its process aspects. Viewed in real time, we can see that globalization is produced by domestic political institutions, both public and private. This means that it can be shaped, influenced and changed by them as well – unless a democracy deficit makes this impossible.

States function in relation to globalization in two principal ways. First, they are agents of globalization, “globalizing states”, furthering it with policies designed to attract and retain investment, usually in the form of low taxes and minimal regulation. They are also products of globalization, continually transformed by the very process of managing their own interests. This means that states, too, like the transnational enterprises they deal with, are reshaped by the diffusion of their powers in relation to other states and nonstate actors (e.g., multinational corporations). These emergent combinations of public and private power mean that some redefinition is in order as to what is public and what is private – with implications as to what citizenship means in this new context.

Perhaps most importantly, and perhaps paradoxically as well, the globalizing state is not one that rules the world, but one that cannot avoid responding to the world. Its responses transform it. When states rely on the private sector to carry out what were once public responsibilities, the outcome is not just economic (greater efficiency, perhaps) but
also a different kind of state. Globalization is therefore not something “out there”--
foreign and distant; it is embedded in domestic institutions, both public and private, and
the distinction between public and private does not always matter. Globalization, then,
does not begin in the inevitability of global markets, but in the role of domestic law and
politics that makes the market and the state mutually interdependent – even if they are
theoretically independent. The interdependency that I am calling the domestic face of
globalization is clearest in delegations of state power to administrative agencies and then
to the private sector. The next sections examine the vertical and horizontal dimensions of
degagements of state power.

A. DELEGATING STATE POWER VERTICALLY

Imagine a vertical axis – first looking up (to global institutions), then down (to
national and local institutions of government). Sometimes national states delegate power
up to what commentators have called “the international branch of government”
(international organizations such as the WTO or the IMF or the World Bank, or regional
bodies such as the EU or NAFTA). The functioning of these bodies raises very directly
issues involving what Richard Stewart and others call global administrative law. Stewart
defines Global Administrative Law as “the mechanisms, principles, and practices that
promote or otherwise affect the accountability of diverse global administrative bodies, in
particular by ensuring that they meet adequate standards of transparency, participation,
reasoned decision, and legality, and by providing effective review of the rules and
decisions made.”21

These are important issues but for our purposes the more relevant delegations are
more localized – the province of domestic administrative agencies. There is, of course, a
connection between the procedures these international organizations use and the ability of
domestic bodies to have meaningful input into their policies, especially harmonization
processes or other forms of incorporation at the national level. The processes of
harmonization utilized by the WTO, for example, have great relevance to domestic law
and procedure. At worst, they can turn domestic processes into mere rubber stamps for
rules adopted at a higher level and now incorporated without much opportunity for real
citizen participation or change at the national level.22

One interesting example of this can be found in the area of food safety. Standards
for food safety that are adopted by the WTO are generally derived from private-sector
organizations that are not open to the type of administrative openness or procedural
process that we have come to expect from domestic administrative bodies.23 One such

Law and Politics 695, 696 (2005). See also, Dan Esty, Good Governance at the Supranational Scale:
Globalizing Administrative Law, 115 Yale L. J. 1490 (2006). (These administrative law principles
would apply, for example, to the WTO and other global institutions, but these issues are beyond the
scope of this paper.)

22 See Alfred C. Aman, Jr. The Democracy Deficit, 161-166 (NYU Press, 2004).

23 Public Citizen, Global Trade Watch, The WTO’s Coming to Dinner and Food Safety is Not on the Menu,
http://www.citizen.org/trade/wto/articles.cfm?ID=10445(excerpted from Lori Wallach & Patrick
Woodall, WHOS TRADE ORGANIZATION?).
organization is the Codex Alimentarius Commission (the “Codex”), based in Rome. The Codex prides itself on developing its standards in a “science-based” manner that uses “experts and specialists in a wide range of disciplines.”24 The standards developed by the Codex are adopted by the WTO and are used to determine whether domestic food safety standards, which generally have been subject to public notice and comment, represent trade barriers that the violating WTO country will be required to change. In many instances, the WTO obliges its member countries to treat foreign country food inspection and safety systems “equivalent” to their own. Domestic food safety regulations that provide more stringent standards than the standards developed by groups like the Commission and adopted by the WTO are presumed to be a WTO violation, even if the domestic law submits domestic and foreign food products to exactly the same standards.25

It is interesting to note that the Codex Alimentarius Commission has a U.S. office (“U.S. Codex”), which is located in the Food Safety and Inspection Service (“FSIS”) of the United States Department of Agriculture (“USDA”). The U.S. Codex office is stated to be the “U.S. Contact Point for the Codex Alimentarius Commission and its activities,” which the web page states is the “major international mechanism for encouraging fair international trade in food while promoting the health and economic interest of consumers.”26 The U.S. Codex office can be accessed via a web page hosted on the USDA web site and contains a link to information about the Codex and provides a


25 See Wallach & Woodall, supra note 17.

26 http://www.fsis.usda.gov/regulations_&_policies/Codex_Alimentarius/index.asp
schedule of public meetings for U.S. Codex office, which it states are to allow the U.S. Codex delegates to “inform the public about the meeting agenda and proposed U.S. positions on the issues.” This gives the appearance of public feedback to the Codex standards, but it is feedback at least twice removed from the actual point of where the standards get set, and it is unclear that such public meetings have any impact on the standards setting process employed by the Codex, or the adoption of those standards by the WTO. Yet once those standards have been adopted, the U.S. administrative agencies in charge of food safety will be in charge of administering and enforcing them.

Similarly, decisions rendered by NAFTA tribunals can greatly affect domestic law, often without much opportunity for widespread participation. In the United States, we have seen several instances where NAFTA decisions have conflicted with U.S. regulatory standards. One recent high profile example, of course, is the NAFTA-driven laws which lowered or relaxed transportation safety standards in order to open U.S. highways to Mexican trucking companies. In 2001, we also saw the attempt by a Canadian fuel additive company to use the NAFTA tribunal dispute system to win compensation for damages that the company claimed it suffered from a California decision to ban the use of certain fuel additives that the state had determined were having an unhealthy effect on water supplies.

Indeed, increasingly, the vertical axis also involves the devolution of federal power down to states or sub regions below the federal government. Globalization exerts a

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downward push when it comes to the exercise of federal and state power, providing incentives for more state autonomy as well as more local authority within states.\textsuperscript{30} The federal/state is particularly in play today in the U. S. as a debate is on-going as to whether federal rules---usually market based---can preempt state laws and regulations.\textsuperscript{31}

B. DELEGATING STATE POWER HORIZONTALLY

The conventional picture of globalization more or less aligns with the vertical axis. But that is only one of its dimensions. The domestic face of globalization is primarily along a horizontal axis. There, we are dealing with delegations to administrative agencies which then seek to take advantage of the market either by deregulating or by outsourcing the agency’s responsibilities by contract. Along this imaginary horizontal axis, privatization and deregulation are local policy responses to globalization. It is the horizontal axis that is especially important, at least from the point of view of U.S. law, and it is usually overlooked -- or set apart from the topic of globalization.

Some delegations to the market are de facto in nature. For example, various “de facto delegations” to the market result from inadequate funding of the regulatory regime in place; given the impossibility of carrying out certain regulatory mandates, it is as if there is, in effect, no regulation in place or if there is, little or no enforcement. Market

\textsuperscript{30} See Alfred C. Aman, The Democracy Deficit, supra note 1, Chapter Two for an extended treatment of a global perspective on federalism.

forces are then likely to take over the abandoned area. There also are de facto delegations to private transnational entities, where regulation would most likely require a multi-lateral treaty approach. Without that, voluntary private regulatory arrangements prevail.

In addition to de facto delegations and of greater importance for our purposes, two other types of delegation are key to the horizontal dynamics of globalization—specifically, deregulation and privatization. Both take many forms. Some forms of deregulation, such as those brought about by legislation, result in the outright repeal of regulatory structures and agency enabling acts. Others, however, instituted by administrative agencies themselves, result in the repeal of some of their own rules and/or their replacement with rules that use markets and market approaches as regulatory tools, thereby replacing command-control regulatory approaches with incentive based regulation. It is important to remember the often neglected point that such uses of the market and market-based approaches are in this sense a means to ends, not ends in themselves. In the United States, for example, such forms of deregulation are usually subject to the Administrative Procedures Act (APA).\textsuperscript{32} Under the APA, an agency’s repeal or change of an existing rule,\textsuperscript{33} for example, is treated the same, procedurally speaking, as the promulgation of a new rule. In effect, for purposes of the APA, deregulation is a form of regulation. Since the New Deal, substitution of market approaches for more direct regulation has usually been upheld by reviewing courts, particularly when economic regulation has been involved.\textsuperscript{34}

\textsuperscript{34} See Chapter One, note 146.
Privatization can also take many forms, each representing a different “degree of separation” between the public body delegating its responsibilities and the private actors to whom that delegation is addressed. As Professor Lester Salamon has noted, privatization in the United States has meant the development of new forms of governance. He uses the term “the new governance” for the variety of tools that government at all levels now use in carrying out their public functions, including contract grants, tax expenditures, vouchers, direct loans, government corporations, and franchises.

Like deregulation, some forms of privatization result from legislative action -- aimed at replacing a regulatory regime with a market. A legislature may, for example, sell off a governmentally owned entity to private parties, as was common in Europe in the 1980s. Like the deregulation that results from the wholesale statutory repeal of a

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37 For an interesting discussion of the differences between privatization and deregulation in the U.S. and Europe, see Giandomenico Majone, Paradoxes of Privatization and Deregulation, J. EUR. PUB. POL’Y 4 (1994).
regulatory regime, the market in these instances is intended to replace the government completely when government owned assets are sold to private buyers. Government supervision ends with this kind of privatization.

The most common form of privatization in the U.S. (and certainly the earliest form of privatization there) is the use of the private sector to deliver what once were governmentally-provided social services. The primary governance tool in these cases is the contract. The management of prisons, for example, has been increasingly outsourced to the private sector at both the federal and state levels. Garbage and snow removal also are now commonly handled by private providers, and various aspects of welfare

38 Id.
39 See Shymeka L. Hunter, More Than Just a Private Affair: Is The Practice of Incarcerating Alaska Prisoners in Private Out-Of-State Prisons Unconstitutional? 17 ALASKA L. REV. 319, 327-328 (2000). (“Given the way the federal government and states like Alaska have supported the private sector’s prison ventures and the booming market, it is perhaps not surprising that by 1996 there were more than one hundred private jails and prisons located across twenty-seven states. As of 1997, the private prison industry was grossing 550 million dollars annually; Alaska is among the twenty-five states that make use of private prisons. Thirty-one states, the Federal system, and Washington, D.C., reported a housing total of 71,208 prisoners in private facilities in 1999. Specifically, Alaska housed thirty-five percent of its prison population in private facilities during 1999, making it second only to New Mexico’s thirty-nine percent.”)
40 Lewis D. Solomon, Reflections on the Future of Business Organizations, 20 CARDOZO L. REV. 1213, 1216 (1999). (“Virtually any asset or service that a local government owns or provides has been privatized somewhere in the United States in some manner, including fire protection, police protection, waste water treatment, street lighting, tree trimming, snow removal, parking structures, railroads, hospitals, jails, and even cemeteries.”)
administration,\textsuperscript{41} such as eligibility determinations, are carried out by private entities. Contracting out, for such purposes, is akin to agency deregulation, in that government agencies remain responsible for the outcomes, but they are no longer involved in the day to day regulation or management of the enterprise. Private actors are now the dominant players by virtue of their contract with the state. And unlike public agencies they are unlikely to be subject to statutes such as the APA or FOIA. More important, the contracting process itself is usually some form of a least bid contract procedure, one that tends to focus on cost above all else.

Elsewhere, I have examined by way of a case study the contracting process used by the city of New York to outsource the health care of New York city prisoners to a for-profit firm. Some generalizations from that study are relevant here\textsuperscript{42}. The use of contracts as the legal mechanism to carry out the state’s responsibility to provide essential human services to prisoners can unduly insulate some key considerations from public view and debate before deficiencies inherent in some of these contracts see the light of day. Implicit in outsourcing decisions of this type, however, is the idea that entering into a contract involves a relatively private negotiation between a buyer and a seller, one that cannot be wholly public without seriously undermining the negotiation process. Such process that does exist at this stage is focused less on achieving the substantive goals of the contract, or on determining what those goals should be, and more on its costs in monetary terms. Sealed bids and variants of this approach seek to ensure that a low cost,


if not the least cost, provider is chosen and chosen in a way that is not susceptible to corruption.

Also, implicit in the process is the assumption that there are likely to be many providers of the service sought, willing and able to contract with the government. In this sense, there is seldom any distinction made between a contract with a vendor of a product or a service an agency needs to do its job and a service that might be at the heart of the agencies duties or a responsibility so fundamental that they cannot outsource it without taking into account political issues beyond cost. Indeed, the process is often based on the assumption that we are replacing a government monopoly with an open market. This, in turn, suggests that the competition for the contract will yield the most highly efficient and skilled provider—and that these are not competing goals.

This, however, is often not the case—at least with regard to prison health care. Evidence suggests that there are, in fact, very few competitors for such contracts.\(^{43}\) In

\(^{43}\)The 2000 contract competition to provide inmate health care to the New York City prison system involved only three bidders, two of which were local to the New York municipal area: Capital Health Management, based in Queens; St. Vincents Hospital and Medical Center, based in Manhattan; and the Tennessee based Prison Health Services, which was awarded the contract. Eric Lipton, *Company Selected for Rikers Health Care*, N.Y. TIMES, Sept. 19, 2000, at B1. Consolidation of private providers may also be having a negative effect on competition. Government prison systems may drop a provider due to dissatisfaction with the medical care provided, only to find itself being stuck with the same provider again after a merger or acquisition of the new provider by the previously dropped company. For example, in 1999 Prison Health Services purchased EMSA Government Services, a large competitor which had replaced PHS as the provider in Polk County, Florida prior to the acquisition. The purchase had the effect of returning inmate medical care back to Prison Health Services, much to the displeasure.
New York City’s largest such contract, there was only one bidder. But even if a real competition had ensued, the primary basis of the competition tends not to be in terms of imaginative solutions to difficult problems. It is almost wholly in terms of cost and compliance. Cost, of course, is a factor in any governmental decision to hire a contractor or to perform the service itself. No one wants to waste tax dollars. At the same time, when legal frameworks such as those governing public contracts focus only on costs in economic terms, the human needs and the human consequences of resource decisions fade from public view. Put another way, those wishing to win a contract will have a strong incentive to make promises that they cannot keep. Quality checks in prison health stop at the agency level—or with the muckraking press. City and state review deal primarily with after-the-fact compliance issues.

Government contracts and their emphasis on least cost approaches tend to privilege a least cost economic discourse, keeping other kinds of values out of the conversation. They also further an assumption that private providers are superior to public providers in this regard, given the profit motive as a great motivator. In short, the shift to contract as the primary means of legislat ing in these areas tends to realign the public’s ideas of its own responsibilities with regard to the means and ends of carrying out fundamental public responsibilities. Unless we recognize the new role that such contract processes play in governance overall, such contracts are effectively separated from the social compact. The current political preference for the private sector and market ordering is too often insensitive to that possibility, resulting in the neglect of basic

human needs. Effectively hidden from public view, prisoner health is commoditized in a manner tantamount to roads, bridges and other natural things. How we label services and service providers as public or private has implications for substance, process and participation—issues far more important than the abstract categories represented by the labels themselves.

PART III

TAMING GLOBALIZATION THROUGH ADMINISTRATIVE LAW

Privatization today should be understood as a principle effect of globalization. In this sense, it is not merely one means among others for making government more efficient or for expanding the private sector. Nor is it just a reflection of current political trends and a swing of the regulatory pendulum from liberal to conservative. Rather, the increasing reliance on “the new governance” is indicative of a changing relationship between the market and the state, one characterized by a fusion of public and private values, rhetoric and approaches— a fusion that is itself integral to the fusion of global and local economies. Privatization is the result of these fusions. It, in effect, increases the exposure of the state to external economic and political pressures that tend to accelerate globalization, in large part, because private actors fully exposed to the global economy
now carry out the delegated tasks. The global political economy places great pressures on all entities--public and private--to be cost effective if they wish to be competitive.\footnote{44 For a discussion of the various ways that competition in a global economy can affect state entities, politics and the law they apply see Alfred C. Aman, Jr., The Globalizing State, supra note 4, at 780-791.} This encourages such delegations on the part of the state and it raises concerns over whether the cost savings that result from such public delegations to private entities occur at the expense of democratic processes, legitimacy and individual justice. Given the role that the public/private distinction plays in the U.S. Administrative law, privatization, in this global context, tends to reduce the democratic public sphere in favor of other arrangements that are likely to be less transparent and accountable to the public, and less exposed to competing value regimes.

The democracy deficit that results from privatization is primarily the result of the application of a traditional conception of the public/private distinction that is likely to lessen considerably the public sector’s responsibilities for transparency and accountability when private actors perform certain tasks. Justifications often provided for such an approach begin with the assumption that policymaking and administration can, in fact, be separated -- an assumption that most commentators reject.\footnote{45 Jody Freeman has described the actual cumulative process of policymaking and subsequent implementation and enforcement as \textit{fluid}.\@ She explains that administrative law scholars tend to take "snapshots" of specific moments in the decision-making process (such as the moment of rule promulgation) and analyze them in isolation. Rules develop meaning, however, only through the fluid processes of design, implementation, enforcement, and negotiation.\@ Jody Freeman, \textit{The Private Role in Public Governance}, 75 N.Y.U.L. REV. 543, 572 (2000). See also Michael Aronson, \textit{A Public Lawyer-=s
contexts, private actors inevitably make policy when they carry out their delegated tasks and interpret the contracts under which they operate. A new kind of administrative law can and should be created to respond to the “democracy deficit” associated with privatization. It need not rely solely on traditional procedural approaches, arguably designed for governmental agencies carrying out regulatory functions. At the same time, it is important to emphasize that what is at stake are the values of public law -- transparency, participation, and fairness. Various procedural approaches may be necessary to ensure the realization of these values. The values of the APA, though not necessarily the precise procedural devices it currently employs, need to be extended to various hybrid, public/private arrangements, if we are to ensure the legitimacy of those partnerships.

Responses to Privatization and Outsourcing, in The Province of Administrative Law, supra note ___, at 40, 50-58.

46 For purposes of this article, references to the APA are intended to suggest the use of procedures for hybrid decision-making that may or may not be the same as the procedures found in the APA. In many instances, if the APA is to apply it must be amended to fit the needs of hybrid arrangements involved, such as the provisions dealing with contracting out agency duties, see text at notes ___, infra; in others, it is important to determine which types of private entities should be affected by APA extensions. For a discussion of the scope and coverage of the Freedom of Information Act, as it relates to the private sector, see, e.g., Alfred C. Aman, Jr., Information, Privacy, and Technology: Citizens, Clients or Consumers? pp. 333-336 in Freedom of Expression and Freedom of Information (Jack Beatson and Yvonne Cripps, eds.) (Oxford Univ. Press, 2001).
The globalizing state fuses in approach and in rhetoric the cost-consciousness language of the market with the public interest goals of the state, eliminating any bright line distinctions that once might have existed between “the state” and “the market”. The fusion between public and private that results is similar to the fusion that occurs between the global and the local, as the local and the global become modalities of a single dynamic system. The combination of these fusions—public and private, global and local—creates democracy deficit issues specific to privatization. Indeed, the democracy problem in globalization arises from the disjunction between global socio-economic and political processes on the one hand, and local processes of democratic participation, on the other. The resolution of this disjuncture is usually left to the market, but when public responsibilities are delegated or outsourced to the private sector, the public is involved very differently in the decision making processes. And when it comes to vulnerable populations such as prisoners they are not likely to be involved at all.

The new administrative law can need not rely solely on traditional procedural approaches, arguably designed for governmental agencies carrying out regulatory functions. I want to emphasize that what is at stake are the democratic values of public law—transparency, participation, fairness, and accountability. Various procedural approaches may be necessary to ensure the realization of these values. For example, in the United States, the democratic values of the APA should be extended to various hybrid, public/private arrangements, if the legitimacy of those partnerships is to be assured. The pragmatics of globalization make privatization important as a terrain where a new administrative law might emerge, assuring public forums for input and debate and a flow of information that can help create a meaningful politics around private actors doing the
public’s business. The democracy problem is and should be one of the primary concerns of a new administrative law.

It is with the actual contract and contracting process that the most important reforms are most urgently needed. Once an agency decides to contract out its primary functions, the proposed contract should be noticed to the public on the agency web site as if it were a rule promulgated for public comment. The public should have a chance to comment on the goals of the contract, its mode of enforcement, the monitoring of its implementation (including what shall constitute monitoring), and all other issues deemed relevant. As with a rule in a regulatory proceeding, the agency need not adopt all or any of the suggestions made, but it should provide its own reasons for accepting the ultimate contract.

An important role for administrative procedure is to accommodate most if not all of these interests with a process that allows them to speak to one another as well as the ultimate decision maker. Once a contract is entered into, it is also important that these discussions occur with some frequency. The nature of the enterprise requires ongoing monitoring of the contract terms, as well as opportunities to comment on its administration, and provision for amendments regarding the duties of the private actor. Procedurally speaking, the privatizing agency should be willing to:

- treat the proposed contract more like a rule than a contract negotiated between two parties. It can be put up on the prison authority’s web site, calling for public comments, suggestions, alternative language and ways to achieve its substantive reform goals from whoever wishes to comment.
In our extended example, this would include prisoners and their representatives as well.

• provide extensive information on the track records of firms competing for the contract.

• ensure fair competition among the bidders. All of them should agree that if they are chosen, they will be subject to regular reporting requirements and a modified Freedom of Information Act allowing interested members of the public to make relevant inquiries about their operation while the contract is in place. That contract should be no more than three years subject to renewal but only after another round of competitive bidding occurs.

The simplicity of notice and comment procedures when it comes to such public service contracts makes such transparency reasonably efficient, and transparency need not impose undue impediments to the bargaining process. A presumption in favor of the bargains struck in such contracts can be written into the governing statutes. Courts need not be involved unless there is corruption or an unconstitutional exercise of discretion. Indeed, the purpose of these citizen oriented procedures is to ensure that the many views and voices involved in such public regarding private arrangements are heard. It is not just that there is a public dimension involved; it is that there are genuine public values at stake that necessitate debate and contest. The various positions are different formulations of democracy – as inherent in the operations of the market, or external to the market as a larger framework of critique and reform.
CONCLUSION

My main goal in this paper has been to shift our perspective on globalization away from a top down, neoliberal conception of markets to one that sees the market and market forces generally, as regulatory tools, available to political controls. This, in turn, points to new uses of administrative law to improve globalization as a democratic endeavor. The first step was to re-think two prevailing myths about globalization. One myth is that globalization is always or only a transnational or international phenomenon. The other is that the public-private divide is or should be a bright line distinction. The second step was to respond to these myths – correcting the first with an account of the domestic face of globalization, and the second with a fuller acknowledgment of how the private sectors does the public’s work. The third step, accordingly, was to argue for both an application and reform of administrative law to extend it to the creation and monitoring of private contracts when private contractors are engaged in the public’s business. Administrative law has great promise in terms of bringing democratic values into the relationship between the state, the market and individuals. But that promise is inaccessible unless the domestic face of globalization is more widely recognized.

Imagining “the global” as something apart from the local fails to capture the extent to which privatization was (and is) driven by domestic politics. This is not to dismiss it as partisan, but to point to its embeddedness in localized arenas. While it might seem intuitively indisputable that “the commercial environment is now global but legal
sovereignties are still territorial.47 Such formulations divert attention from the actual
locals where “the global” is produced through particular understandings of commerce and
markets, and the ways these are put into practice through domestic law.

Historically, the administrative law process was an alternative to private law
dispute resolution, increasing the expertise brought to bear on certain issues as well as,
over time, tending to widen the variety of interests and actors involved in decision
making contexts.48 Today, privatization and outsourcing offer creative alternatives to
some aspects of the administrative process itself. Privatized and deregulated contexts
introduce additional bargaining currencies beyond traditional adjudicatory or legislative
policy making procedures. When private providers carry out government responsibilities,
though, or when market incentives are introduced to achieve particular regulatory
outcomes, these approaches are not substitutes for regulation, but the very means of
regulation -- part of the regulatory process itself. Private actors, private incentive
structures and markets in general are not separate and apart from regulation in the public
interest, they are central to it. Addressing the democracy deficit means improving the
engagement of the private sector with stakeholders and interested citizens. This would be
a significant step towards reviving a politics around the public interest in terms broader
than the prevailing neoliberal discourse. It would greatly alleviate some of the democracy
problems caused by a neoliberal form of globalization that has not only come home, but

47 See Radin & Wagner, supra note 7, at 1296.
48 See Richard B. Stewart, The Reformation of American Administrative Law, 88 HARV. L. REV. 1667,
1669-1670 (1975).
has done so with a vengeance. These are the main advantages of widening our understanding of globalization, particularly its domestic face.