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INTRODUCTION

TWO THERE ARE THAT RULE THE WORLD: PRIVATE POWER AND POLITICAL AUTHORITY

DR. CHARLES J. REID, JR.*

I. INTRODUCTION

In Brian Tierney’s felicitous translation, Pope Gelasius I is recorded as saying “Two there are . . . by which this world is chiefly ruled.”¹ When the Pope thus addressed Emperor Anastasius at the end of the fifth century, he was stating his belief that the world was governed respectively by “the sacred authority . . . of the priesthood and the royal power.” Pope Gelasius’ world vanished long ago. But it is fair to say that the governance of today’s world remains divided between two great sources of power and authority: the private power of vast sums of wealth; and the political authority of governments. Indeed, it is increasingly the case that in many circumstances it is private power that exerts control over governmental authority.

An early example of this phenomenon was seen in the Asian Financial Crisis of 1997, which began with a run on the Thai Baht – the currency of Thailand – triggered by its abrupt devaluation. The crisis led to the near-bankruptcy of the Thai State, and it quickly became the received wisdom that “[t]he lesson to be drawn from the crisis is that financial markets will eventually punish economic activity that violates or ignores liberal economic principles.”² Thailand’s economy was left in shambles and the nation was forced to respond by changing its governmental policies, which included a “balance[d] . . . budget,” an “end [to] subsidies to state companies and utilities,” and the adoption of other “stringent conditions.”³

Which was more powerful? The trappings of sovereign statehood? Sovereign power once included control over one’s monetary and fiscal re-

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1. BRIAN TIERNEY, *THE CRISIS OF CHURCH AND STATE, 1050–1300*, at 13 (Prentice-Hall, 1964) (Letter of Pope Gelasius I to Emperor Anastasius, 494 CE).

2. Robert O’Brien & Marc Williams, *Global Political Economy* 5 (6th ed. 2020).

3. *Thais Agree to Raise Taxes and Shake Up Finance*, N.Y. TIMES (Aug. 6, 1997), <https://www.nytimes.com/1997/08/06/business/thais-agree-to-raise-taxes-and-shake-up-finance.html>.

gimes. Thus “money,” it was once taken as common wisdom, “is a creature of the state.”⁴ The “power over coinage and currency,” another writer declared, “is an attribute of sovereignty.”⁵ What became of these maxims where Thailand was concerned? Was it really the case that the demands of a powerful, private, transnational investment class exercised an important aspect of sovereign power – determination of the worth of the national currency? And that this investor class could effectively wreck a nation’s domestic economy if its dictates were ignored or scorned?

Some writers answered these questions affirmatively, and even said that this sort of discipline was a good thing.⁶ Most of the nations of the world had assented to a system of free cross-border exchange – in goods, services, even in currencies – and the Asian Financial Crisis was the messy, unfortunate, but effective way that system was supposed to work.⁷ Others took an opposing view. One of the commentators who viewed these developments with alarm was Susan Strange, a British scholar well-respected in the field of international economics.⁸ She criticized the system that had come into being, writing that the world economy had become a “casino,” and that the biggest private players were now those effectively in charge of the system.⁹

In the quarter-century since this event – which has come to be known as the Asian Financial Crisis, because the contagion that started in Thailand quickly spread to neighboring economies – we have seen private power acquire ever greater means by which to assert its will. What follows is an examination of the scope and extent of private power’s reach. Thus this essay will touch on some areas of common experience in which private power has come to play a dominant role.

4. Abba P. Lerner, *Money as a Creature of the State*, 37 AM. ECON. REV. 312, 313 (1947).

5. Angus D. MacLean, *Outline of the Gold Clause Cases*, 15 N.C. L. REV. 249, 252 (1937). Angus MacLean was “the Assistant Solicitor General who prepared the Gold Clause cases for the government.” Christopher P. Guzelian, *The Dollar’s Deadly Laws That Cause Poverty and Destroy the Environment*, 98 NEB. L. REV. 56, 68 (2019) (providing MacLean’s background).

6. See, e.g., ROBERT Z. ALIBER & CHARLES P. KINDLEBERGER, *MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES* 126 (Palgrave Macmillan, 7th ed. 2015); Peter Passell, *The Precocious Thai Economy Receives Its Comeuppance*, N.Y. TIMES (Aug. 14, 1997), <https://www.nytimes.com/1997/08/14/business/the-precocious-thai-economy-receives-its-comeuppance.html>.

7. See Pasuk Phongpaichit & Chris Baker, *Thailand’s Crisis: Neo-Liberal Agenda and Local Reaction*, in *FINANCIAL LIBERALIZATION AND THE ASIAN CRISIS* 82 (Ha-Joon Chang, Gabriel Palma & D. Hugh Whittaker eds., 2001); Kevin Hewison, *Neo-Liberalism and Domestic Capital: The Political Outcomes of the Economic Crisis in Thailand*, 41 J. DEV. STUD. 310 (2005).

8. *Obituary: Susan Strange*, INDEP. (Dec. 9, 1998), <https://www.independent.co.uk/arts-entertainment/obituary-professor-susan-strange-1190179.html>. On the blog of the London School of Economics, we find that “Susan Strange (1923–1998) was arguably Britain’s most influential scholar of world politics in the last quarter of the twentieth century.” Alison Carter, *Professor Susan Strange 1923–1998: A Tribute*, LONDON SCH. ECON. & POL. SCI. BLOG (Oct. 17, 2017), <https://blogs.lse.ac.uk/internationalrelations/2017/10/17/professor-susan-strange-1923-1998-a-tribute/>.

9. SUSAN STRANGE, *MAD MONEY: WHEN MARKETS OUTGROW GOVERNMENTS* 1–21 (1998).

First is the matter of private prisons. Although criminal justice has been traditionally – and with good reason – regarded as a core public function, the actual imposition of criminal penalties has, in many places, been entrusted to private, for-profit corporations whose interests would seem quite often to conflict with goals such as prisoner rehabilitation.

Second, the Article investigates the rise of a private space program, which in the United States has been taking on an ever more central role in driving not only technological development, but the conception and implementation of policy.

Many other examples might be given. Thus one might consider the effective privatization of the public forum that the major social media corporations have accomplished over the last two decades. Speech, even speech that occurs in a classic public forum – a demonstration on city streets, for instance, or a gathering in a public park – necessarily relies on private fora to broadcast the event. Or one might consider the weaponization of philanthropy. Increasingly, large donors are bringing their weight to bear on the internal decision-making of the institutions that have been the object of their largesse. The case of Nikole Hannah-Jones, the principal creator of the 1619 Project for the *New York Times* – who was apparently denied tenure at the University of North Carolina because of pressure from a donor – is merely a single prominent example of an increasingly prevalent phenomenon.¹⁰

But this is an introductory essay, not a full-scale exploration of the scope and reach of private power. The latter project might fill more than one book. So in the interest of space and time, after our examination of the place of private power in the corrections industry and the exploration and exploitation of outer space, we shall turn our attention to the contributions of our symposium participants.

II. PRIVATE POWER IN AMERICA

A. *The Private Prison-Industrial Complex*

What is crime? The United States Supreme Court has defined it as “a wound on the community.”¹¹ The community might be a municipality, or a state, or even the entire United States of America.¹² But however large or small the community might be, crime itself remains as an offense against it.

10. See Scott Jaschik, *Hannah-Jones Turns Down UNC Offer*, INSIDE HIGHER ED (July 7, 2021), <https://www.insidehighered.com/news/2021/07/07/nikole-hannah-jones-rejects-tenure-of-fer-unc-job-howard-u>; Julia Craven, *The Newspaper Baron Who Lobbied Against Nikole Hannah-Jones: And What He Teaches Us About Journalism, Impartiality, and Credibility*, SLATE (June 4, 2021), <https://slate.com/news-and-politics/2021/06/the-newspaper-baron-who-lobbied-against-nikole-hannah-jones.html>.

11. *Flanagan v. United States*, 465 U.S. 259, 265 (1984).

12. See *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 444 n.28 (1987) (the Court refers to “the United States” as a “community”).

And if crime is an attack on the community, then criminal law is about the vindication by the community of its values through the enforcement of its law.¹³ In this context, it is clear that the community consists of the people acting in their political capacity.¹⁴ We might put this in a set of logical steps. There is a community; it enjoys the right of self-defense; it exercises this right legislatively, through the enactment of statutes and ordinances, and judicially, by providing venues for the law's enforcement. The community is a political unit and its actions therefore constitute an essentially public concern.¹⁵

But after sentence is passed, who is in charge of ensuring that the punishment is carried out? In many jurisdictions, it is this last part of the equation – the question of who carries out the punishment – that proves to be problematic since in many places it is not the community but private parties who implement the penalties. Thus the people are excluded, and the political community is involved only indirectly, if at all. Criminal punishment in the United States of America has, to an alarming degree, become a privatized, for-profit venture.

This is a system, furthermore, that lends itself to class injustice. One might thus begin with Matt Taibbi's important investigation into this subject.¹⁶ Taibbi is among the most perceptive and incisive of American commentators on economic and social injustice – and among the least tolerant of hypocrisy.¹⁷ In his book, *The Divide*, he examines the yawning gap between the ways in which the criminal justice system turns a blind eye to the crimes of the well-to-do,¹⁸ while punishing even the most minor transgressions of the relatively disadvantaged.¹⁹

A chapter in his book addresses, in particular, the system of private prisons that have flourished on the American landscape over the last three decades or so.²⁰ He focuses in on CCA—the Corrections Corporation of America (which has recently changed its name to CoreCivic).²¹ Writing in

13. See *Glossip v. Gross*, 576 U.S. 863, 932 (2015) (Breyer, J., dissenting).

14. See generally *Sugarman v. Dougall*, 413 U.S. 634, 642–43 (1973); *Cabell v. Chavez-Salido*, 454 U.S. 432, 439–41 (1982); *Oyster Bay Assocs. L.P. v. Town of Oyster Bay*, No. 13-16015, 2013 WL 7176872 (N.Y. App. Div. Oct. 9, 2013).

15. See generally *Dillingham v. United States*, 423 U.S. 64, 65 (1975); *Gannett Co. v. DePasquale*, 443 U.S. 368, 394 (1979) (Burger, C.J., concurring); *Levine v. United States*, 362 U.S. 610, 625 (1960) (Brennan, J., dissenting).

16. See MATT TAIBBI, *THE DIVIDE: AMERICAN INJUSTICE IN THE AGE OF THE WEALTH GAP* (Spiegel & Grau, 2014).

17. See *id.* at xvii–xviii.

18. See *id.* at 24–30.

19. See *id.* at 3–13.

20. See *id.* at 53–82.

21. Devlin Barrett, *Private-Prison Firm CCA to Rename Itself CoreCivic*, WALL ST. J. (Oct. 28, 2016), <https://www.wsj.com/articles/private-prison-firm-cca-to-rename-itself-corecivic-1477666800>.

2014, Taibbi tells a story of price-gouging, monopolistic practices, and a sharp attention to the bottom line.²²

In fact, Taibbi moved perhaps too briskly over the problems posed by private prisons. The industry began small. In 1985, the second year of the Corrections Corporation of America's existence, it operated only "a county jail and a juvenile detention center in Tennessee," and a "facility in Houston, a motel hastily remodeled to hold immigration detainees."²³ By the 1990s, CCA had greatly expanded, aided by the vast increase in incarceration.²⁴ Indeed, CCA was even joined by competitors, as the Wackenhut Corporation²⁵ (now known as the GEO Group) entered the field,²⁶ as did others.²⁷

22. TAIBBI, *supra* note 16, at 218.

23. Madison Pauly, *A Brief History of America's Private Prison Industry*, MOTHER JONES (July–Aug. 2016), <https://www.motherjones.com/politics/2016/06/history-of-americas-private-prison-industry-timeline/>.

24. Writing in the year 2000, Jenni Gainsborough and Marc Mauer noted that "the scale of incarceration has expanded from about 330,000 Americans in prison and jail in 1972 to nearly two million today." Jenni Gainsborough & Marc Mauer, *Diminishing Returns: Crime and Incarceration in the 1990s*, SENT'G PROJECT 3 (2000), <https://www.prisonpolicy.org/scans/sp/DimRet.pdf>. It is estimated, as of 2020, that over 2.3 million Americans are in some form of penal confinement. Put another way, 20% of the world's prisoners are confined in the American penal system. See Peter Wagner & Wanda Bertram, *What Percent of the US Is Incarcerated? (And Other Ways to Measure Mass Incarceration)*, PRISON POL'Y INITIATIVE (Jan. 16, 2020), <https://www.prisonpolicy.org/blog/2020/01/16/percent-incarcerated/>.

25. Founded in 1954 by a former FBI agent, George R. Wackenhut, the corporation was in the business for many years of providing security details and private investigative services. See Beryl Lipton, *From FBI Reject to Private Warlord: The Rise of George Wackenhut*, MUCKROCK (Jan. 10, 2017), <https://www.muckrock.com/news/archives/2017/jan/10/george-wackenhut-fbi/>; Matt Schudel, *George Wackenhut Dies: Security Pioneer*, WASH. POST (Jan. 7, 2005), <https://www.washingtonpost.com/archive/local/2005/01/07/george-wackenhut-dies/49ba2b1f-ee06-4426-9717-7fb3cd75b1a0/>; Jennifer Bayot, *George Wackenhut, 85, Dies: Founded Elite Security Firm*, N.Y. TIMES (Jan. 8, 2005), <https://www.nytimes.com/2005/01/08/business/george-wackenhut-85-dies-founded-elite-security-firm.html#:~:text=Wackenhut%2C%20a%20former%20F.B.I.%20agent,his%20daughter%2C%20Janis%20Wackenhut%20Ward>.

26. The Wackenhut Corporation first entered the corrections field in 1984. Scott D. Camp, *Private Prisons in a New Environment*, in THE OXFORD HANDBOOK OF PRISONS AND IMPRISONMENT 651, 654 (John Wooldredge & Paula Smith eds., 2018). In 1994, the Corporation spun off its prison business (now known as the GEO Group), which, at the time, "develop[ed] and manag[ed] prisons and jails in the United States, Britain, and Australia." *Company News: Wackenhut Plans a Public Offering for Its Prisons Unit*, N.Y. TIMES (May 25, 1994), <https://www.nytimes.com/1994/05/25/business/company-news-wackenhut-plans-a-public-offering-for-its-prisons-unit.html>.

27. A third major prison company is Management and Training Corporation, which also operates a number of prisons both within the United States (see, e.g., Nicole Maxwell, *New Mexico Legislators Visit MTC Facilities in Chaparral*, ALAMOGORDO DAILY NEWS (Jan. 6, 2022), <https://www.alamogordonews.com/story/community/2022/01/06/new-mexico-legislators-visit-mtc-facilities-chaparral/9116409002/>; Alex Driggs, *Jailhouse Blues: Garza County Officials Announce Change to Dalby Facility as Feds Pull Out*, LUBBOCK AVALANCHE-J. (May 9, 2022), <https://www.lubbockonline.com/story/news/2022/05/09/garza-county-officials-announce-change-dalby-facility-feds-pull-out/9708540002/>), and internationally (see, e.g., Ben Doherty & Christopher Knaus, *Construct Loses Lucrative Nauru Offshore Processing Contract to US Prisons Operator with Controversial Record*, GUARDIAN (Aug. 16, 2022), <https://www.theguardian.com/australia-news/2022/aug/16/construct-loses-lucrative-nauru-offshore-processing-contract-to-us->

Private prisons have earned a reputation for being violent places.²⁸ In May 2012, at a Corrections Corporation of America facility in Mississippi, a “gang fight” escalated into a riot that left a guard dead “and at least twenty other people . . . injured.”²⁹ In September 2015, a fight between rival gangs left four inmates dead at the Cimarron Correctional Facility, also run by the Corrections Corporation of America, in Oklahoma.³⁰

Then there is the violence that has occurred at GEO Group-operated prisons. Writing in 2010, Peter Gorman stated that “GEO . . . has one of the world’s worst track records in inmate care.”³¹ In mid-December 2008, an “uprising”³² that included the taking of hostages occurred at the Reeves County, Texas, Detention Complex operated by the GEO Group.³³ A few days later, an inmate died under suspicious circumstances at the same facility.³⁴ Matters worsened at the Reeves County prison in 2009. Two guards

prisons-operator-with-controversial-record; Denham Sadler, *Private Prisons Are a Very Australian Problem*, VICE (June 14, 2022), <https://www.vice.com/en/article/akezwp/private-prisons-are-a-very-australian-problem>).

28. See Jamie Grierson & Pamela Duncan, *Private Jails More Violent Than Public Ones, Data Analysis Shows*, GUARDIAN (May 13, 2019), <https://www.theguardian.com/society/2019/may/13/private-jails-more-violent-than-public-prisons-england-wales-data-analysis>.

29. *Guard Killed, 20 People Injured in Mississippi*, HOUS. CHRON. (May 22, 2012), <https://www.houstonchronicle.com/news/houston-texas/article/Guard-killed-20-people-injured-in-riot-at-3575196.php>; see also Holbrook Mohr, *Rioting Erupts at Private Prison for Illegal Immigrants; Guard Killed*, ST. LOUIS POST DISPATCH (May 22, 2012), https://www.stltoday.com/news/article_d7355e78-cc4e-5f60-a016-4375eb20067d.html (“[m]ore than two dozen officers were held hostage at some point during the hours-long spate of violence”); Emily Lane, *Prison Riot Leaves One Dead, Others Injured*, NATCHEZ DEMOCRAT (May 21, 2012, 1:20 AM), <https://www.natchezdemocrat.com/2012/05/21/prison-riot-leaves-one-dead-others-injured/> (“White smoke, flames and pepper spray grenades rose above the razor wire fence”).

30. Liam Stack, *4th Inmate Dies After Prison Brawl*, N.Y. TIMES (Sept. 13, 2015), <https://www.nytimes.com/2015/09/14/us/4th-inmate-dies-after-oklahoma-prison-brawl.html>; Andrew Knittle & Graham Lee Brewer, *Inmate Deaths in Cushing May Be from Oklahoma’s Deadliest Prison Melee*, OKLAHOMAN (Sept. 14, 2015), <https://www.oklahoman.com/story/news/crime/2015/09/14/inmate-deaths-in-cushing-may-be-from-oklahomas-deadliest-prison-melee/60723203007/>; *Four Left Dead After Attack at Cimarron Correctional Facility*, STILLWATER NEWSPRESS (Sept. 13, 2015), https://www.stwnewspress.com/news/four-left-dead-after-attack-at-cimarron-correctional-facility/article_797c1db8-5a61-11e5-997f-173038d4d931.html; *Autopsies Show All Four Inmates Died from Stab Wounds*, TULSA WORLD (Sept. 15, 2015), https://tulsaworld.com/news/state-and-regional/autopsies-show-all-four-inmates-in-cushing-prison-fight-died-from-stab-wounds/article_24a77896-672d-55c4-92a8-3494e0135235.html; *Officials Lift Lockdown at State Prisons, Confirm Gang Involvement in Fatal Cimarron Correctional Facility Fight*, TULSA WORLD (Sept. 22, 2015), https://tulsaworld.com/news/state-and-regional/officials-lift-lockdown-at-state-prisons-confirm-gang-involvement-in-fatal-cimarron-correctional-facility-fight/article_47f9a76e-ebec-517d-a6b298570dd26ac6.html.

31. Peter Gorman, *Private Prisons, Public Pain*, FORT WORTH WKLY. (Mar. 10, 2010), <https://www.fwweekly.com/2010/03/10/private-prisons-public-pain/>.

32. *Texas Prison Uprising Ends; 2 Hostages Are Freed*, DESERET NEWS (Dec. 14, 2008), <https://www.deseret.com/2008/12/14/20291283/texas-prison-uprising-ends-2-hostages-are-freed>.

33. *Hostage Being Held at Reeves County Prison*, ODESSA AM., Dec. 13, 2008, at A1.

34. Fernando Del Valle, *Official: Guerra “No Business in Pecos”*, VALLEY MORNING STAR (Harlingen, TX), Dec. 18, 2008.

were arrested and convicted on bribery charges.³⁵ Two inmates committed suicide.³⁶ At the end of January, an inmate denied access to epilepsy medication died in custody.³⁷ This final death led to a major disturbance “prompted by poor treatment, including medical services.”³⁸

In November, 2014, the journalist Shane Bauer took a job at a CCA prison where he worked essentially undercover for a period of four months and documented a chain of failures and transgressions that amounted to a dismal, continuous record of inhumanity.³⁹ At best, inmates lead lives of boring, unremitting drudgery. “The work program was dropped. . . .”⁴⁰ “Many vocational programs . . . have been axed.”⁴¹ “The big recreation yard sits empty most of the time.”⁴² The reason is the skeletal staffing policy, which is driven by the desire to maximize profits.⁴³ Then there is inmate health, which is often allowed to deteriorate for the same reason.⁴⁴ One inmate Bauer encountered lost his legs and fingers to untreated gangrene.⁴⁵ Finally, there is the violence. During Bauer’s tenure, he witnessed a steady escalation in stabbings and assaults that led to “the prison go[ing] on indefinite lockdown.”⁴⁶ Bauer learned from visiting inspectors that the

35. *Four Former Reeves County Detention Employees Sentenced in Smuggling Cases*, ODESSA AM., Sept. 4, 2009, at B4.

36. Forrest Wilder, *The Pecos Insurrection*, TEX. OBSERVER (Oct. 8, 2009), <https://www.texasobserver.org/the-pecos-insurrection/> (“[A]ccording to public records, five men died in Reeves between August 2008 and March 2009, including two suicides”).

37. Bob Campbell, *Pecos Prison Accused of Neglect: Lawyer Says an Inmate Died After Not Receiving His Epilepsy Medication*, HOUS. CHRON., June 21, 2009, at 6.

38. *Cleanup Begins, Adjusters Sent in Following Texas Prison Riot*, CLAIMS J. (Feb. 11, 2009), <https://www.claimsjournal.com/news/southcentral/2009/02/11/97828.htm>; Alicia A. Caldwell & Betsy Blaney, *New Fires at West Texas Prison Break Out*, HOUS. CHRON. (Feb. 5, 2009), <https://www.chron.com/news/houston-texas/article/New-fires-at-West-Texas-prison-break-out-1728161.php>. Forrest Wilder added that the prison uprising was caused by “widespread dissatisfaction with almost every aspect of the prison: inedible food, a dearth of legal resources, the use of solitary confinement to punish people who complained about their medical treatment, overcrowding, and, above all, poor health care.” Wilder, *supra* note 36.

39. Shane Bauer, *My Four Months as a Private Prison Guard*, MOTHER JONES (July–Aug. 2016), <https://www.motherjones.com/politics/2016/06/cca-private-prisons-corrections-corporation-inmates-investigation-bauer/>.

40. *Id.*

41. *Id.*

42. *Id.*

43. During new-employee orientation, Bauer was informed by a more senior corrections officer, “‘On any given day, they can take this facility. . . . At chow time, there are 800 inmates and just two [corrections officers].’” *Id.*

44. *Id.* (“If [an inmate] were sent to the hospital, CCA would be contractually obligated to pay for his stay. For a for-profit company, this presents a dilemma. Even a short hospital stay is a major expense for an inmate who brings the company about \$34 per day”).

45. Bauer, *supra* note 39.

46. Bauer, *supra* note 39. In 2016, the year Bauer published his article, it was reported “that private prisons had a 28 percent higher rate of inmate-on-inmate assaults and more than twice as many inmate-on-staff assaults compared with federally run or operated prisons.” Hauwa Ahmed, *How Private Prisons Are Profiting Under the Trump Administration*, CAP REP. (Aug. 30, 2019), <https://www.americanprogress.org/article/private-prisons-profiting-trump-administration/>.

prison in which he was stationed was improperly run – too little staffing, too little training, and a consequent absence of order and discipline.⁴⁷

The private prison system, despite its failures, has, however, enjoyed political success by utilizing two main vehicles – campaign contributions and lobbying. The last three election cycles witnessed ever-increasing donations by the private-prison industry to political campaigns, principally – but not invariably – Republicans. Thus it was reported that the industry donated \$1.7 million in the 2016 election cycle,⁴⁸ and followed that by donating \$1.9 million during the 2018 midterm campaign.⁴⁹ It seems that even larger sums of cash were donated in 2020.⁵⁰

Then there is the lobbying. Writing in 2015, the *Washington Post*'s Michael Cohen expressed his disgust at the practice: “With the growing influence of the prison lobby, the nation is, in effect, commoditizing human bodies for an industry in militant pursuit of profit.”⁵¹ Lobbyists for the industry make their presence felt not only in the nation’s capital, but also in the states: “In 2015, CCA hired 121 lobbyists in 25 states and GEO Group hired 79 lobbyists in 15 states.”⁵² Representatives of both CCA and GEO participated in drafting proposed legislation, much of which found its way into law.⁵³ The industry has also created a public-relations arm “to change the negative perception of private prisons.”⁵⁴ The lobbying, the public relations, and the campaign donations, furthermore, opened doors. A special report prepared jointly by *The Arizona Republic* and public radio station

47. Bauer, *supra* note 39.

48. Monsy Alvarado et al., *‘These People Are Profitable’: Under Trump, Private Prisons Are Cashing in on ICE Detainees*, USA TODAY (Dec. 19, 2019), <https://www.usatoday.com/in-depth/news/nation/2019/12/19/ice-detention-private-prisons-expands-under-trump-administration/439336600/>.

49. *Id.* See also Madison Pauly, *Private Prison Companies Poured Record Cash into the 2018 Elections*, MOTHER JONES (Nov. 12, 2018), <https://www.motherjones.com/politics/2018/11/private-prison-companies-poured-record-cash-into-the-2018-elections/> (noting that in addition to required disclosures, it is probable that the private-prison industry contributed significant sums to “dark-money groups that don’t have to reveal their donors”).

50. See Derek Gilna, *Private Prison Industry Ramped Up Campaign Contributions, Favoring Republicans*, PRISON LEGAL NEWS (Nov. 1, 2020), <https://www.prisonlegalnews.org/news/2020/nov/1/private-prison-industry-ramped-campaign-contributions-favoring-republicans/>.

51. Michael Cohen, *How For-Profit Prisons Have Become the Biggest Lobby No One Is Talking About*, WASH. POST (Apr. 28, 2015), <https://www.washingtonpost.com/posteverything/wp/2015/04/28/how-for-profit-prisons-have-become-the-biggest-lobby-no-one-is-talking-about/>.

52. At the federal level, “CCA and GEO Group spent a combined \$1.6 million to hire a total of 20 lobbyists.” *Buying Influence: How Private Prison Companies Expand Their Control of America’s Criminal Justice System*, PUB. INT. (Oct. 12, 2016), <https://inthepublicinterest.org/buying-influence-how-private-prison-companies-expand-their-control-of-americas-criminal-justice-system/>.

53. See Alyssa Ray, *The Business of Immigration: Tracking Prison Privatization’s Influence on Immigration Policy*, 33 GEO. IMMIGR. L.J. 115, 126–29 (2018).

54. Jonathan Barrera, *AB 32 Is a Ban: California Takes the Right Approach but Must Still Take Further Action Against For-Profit Corporations in Our Prison System*, 55 LOY. L.A. L. REV. 145, 164 (2022).

KJZZ showed close connections between campaign contributions, lobbying, and policy shifts favorable to the prison industry.⁵⁵

Indeed, it has now been documented that the private-prison complex receives many tangible benefits in return for their political engagement. Occasionally, the pay-off takes the form of crude and blatant corruption, as in the case of two Pennsylvania juvenile-court judges who accepted kickbacks from the prison industry in return for aggressively sentencing defendants to extreme and excessive terms of confinement.⁵⁶ More often, the pay-off comes in the form of expanded criminalization of everyday activities,⁵⁷ the adoption of stiffer sentencing guidelines and policies,⁵⁸ and the actual imposition of longer sentences on those convicted of crimes.⁵⁹

Recently, steps have been taken to limit the reach of the private prison industry and even to return the management of incarcerated populations to

55. See Jimmy Jenkins, Joseph Darius Jaafari & Justin Price, *Arizona Lawmakers Invest More in Private Prisons After Record-High Campaign Contributions*, KJZZ (July 30, 2021), <https://kjzz.org/content/1703791/arizona-lawmakers-invest-more-private-prisons-after-record-high-campaign>; see also Jason L. Morin, Rachel Torres & Loren Collingwood, *Cosponsoring and Cashing In: US House Members' Support for Punitive Immigration Policy and Financial Payoffs from the Private Prison Industry*, 23 BUS. & POL. 23, 492–509 (2021) (documenting in particular donations to Democrats who are willing to assume political risks by co-sponsoring legislation favorable to the private-prison industry).

56. See 'Kids For Cash' Captures a Juvenile Justice Scandal from Two Sides, NPR (Mar. 8, 2014, 6:26 PM), [https://www.npr.org/2014/03/08/287286626/kids-for-cash-captures-a-juvenile-justice-scandal-from-two-sides#:~:text=Press,'Kids%20For%20Cash'%20Captures%20A%20Juvenile%20Justice%20Scandal%20From%20Two,kids%20and%20the%20judges%20involved.](https://www.npr.org/2014/03/08/287286626/kids-for-cash-captures-a-juvenile-justice-scandal-from-two-sides#:~:text=Press,'Kids%20For%20Cash'%20Captures%20A%20Juvenile%20Justice%20Scandal%20From%20Two,kids%20and%20the%20judges%20involved.;); *Former Judges Who Sent Kids to Jail for Kickbacks Must Pay More than \$200 Million*, NPR (Aug. 18, 2022, 7:48 AM), <https://www.npr.org/2022/08/18/1118108084/michael-conahan-mark-ciavarella-kids-for-cash>.

57. See andré douglas pond cummings & Adam Lamparello, *Private Prisons and the New Marketplace for Crime*, 6 WAKE FOREST J. L. & POL'Y 407, 421–22 (2016); VALERIA VEGH WEIS, MARXISM AND CRIMINOLOGY: A HISTORY OF CRIMINAL SELECTIVITY 277 (2017); SUE BINDER, BODIES IN BEDS: WHY BUSINESS SHOULD STAY OUT OF PRISONS 63–64 (2017); *Private Prison Companies Want You Locked Up*, JUST. POL'Y INST. (June 22, 2011), <https://justicepolicy.org/press/private-prison-companies-want-you-locked-up/>; see also Amy Pratt, *Private Prison Companies and Sentencing 9* (The Ohio State Univ. Moritz Coll. of L., Student Paper Series No. 39, 2022) (“networking alone is . . . a distinct goal of private prison companies. They want to build relationships with the various government officials . . .”).

58. See Matthew Clarke, *Study Shows Private Prison Companies Use Influence to Increase Incarceration*, PRISON LEGAL NEWS (Aug. 22, 2016), <https://www.prisonlegalnews.org/news/2016/aug/22/study-shows-private-prison-companies-use-influence-increase-incarceration/>.

59. A major research paper published by the National Bureau of Economic Research documents that an expansion in “private-prison capacities” leads to a “robust” impact on sentencing. See Christian Dippel & Michael Poyker, *Do Private Prisons Affect Criminal Sentencing? 2* (NAT'L BUREAU OF ECON. RSCH., Working Paper No. 25717, 2019). The authors suggest that three factors likely contribute to this phenomenon: the role of private-prison operators play in the political ecosystems of particular states, *id.*; “judicial capture,” in which judges are influenced “through campaign contributions or revolving door promises,” *id.* at 2–3; and “fiscal constraints,” meaning circumstances in which “private prisons are required by law to be a fixed percentage cheaper than state facilities,” *id.* at 3.

the government.⁶⁰ To that effect, President Joe Biden signed an Executive Order on January 26, 2021, to “reduce profit-based incentives to incarcerate,” specifically by steadily phasing out private contractors from the management of federal prisons.⁶¹

But if the American government has begun to take some half-measures to rein in private prison operators, on a global stage they have begun to merge seamlessly with private security firms and defense contractors into what has been described as the big business of “corporate mercenaries.”⁶² These “private security and military companies are increasingly taking over functions that were once carried out by states.”⁶³ Thus the monopoly of force that classic jurisprudence ascribes to the state is being threatened in real ways on the ground.⁶⁴ And so the integrity of states is thereby threatened – by both internal and external private actors. And when the sources speak of “states,” they mean both the states that comprise the United States of America, and the many nation-states that comprise the international community.

B. *Private Space Programs*

This article is not about proposing solutions to the plight of private prisons, or other discrete forms of crisis. It is concerned rather with the ways in which private power has grown in strength and has consequently displaced or diminished the political and the democratic spheres of American life. Private prisons, intrinsically motivated as they are by a profit incentive that stands in conflict with traditional objectives of penal confinement – rehabilitation, preparation for release back into society, finally even good health – represent one example of private power that has come to play an over-enlarged role in determining public policy. Another example of private power exerting itself in an area that once belonged predominantly to the public sphere is the development of a privately-financed, privately-managed space program.

60. See *The First Step to Stop Corporations from Profiting from Incarceration in the United States*, TRANSNAT’L INST. (Mar. 30, 2021), <https://www.tni.org/en/article/the-first-step-to-stop-corporations-from-profiting-from-incarceration-in-the-united-states>.

61. Reforming Our Incarceration System to Eliminate the Use of Privately Operated Criminal Detention Facilities, Exec. Order No. 14006, 86 Fed. Reg. 14006 (Jan. 26, 2021).

62. Tea Cimini, *The Invisible Army: Explaining Private Military and Security Companies*, E-INT’L. RELS. (Aug. 2, 2018), <https://www.e-ir.info/2018/08/02/the-invisible-army-explaining-private-military-and-security-companies/>; Clarissa Rodio, *Modern Warfare: Corporate Mercenaries and Wars for Profit*, CIRSD (Nov. 30, 2021), <https://www.cirsd.org/en/expert-analysis/modern-warfare-corporate-mercenaries-and-wars-for-profit>.

63. Felip Daza & Nora Miralles, *The Disturbing Rise of the Corporate Mercenaries*, OPENDEMOCRACY (Aug. 6, 2021), <https://www.opendemocracy.net/en/disturbing-rise-corporate-mercenaries/>.

64. See Karl Dusza, *Max Weber’s Conception of the State*, INT’L J. POL., CULTURE & SOC’Y 3, 71–75 (1989).

To understand the emergence of private space ventures, we might begin with the end of the 1950s and the 1960s. “[I]n 1958, about three-quarters of Americans trusted the federal government to do the right thing almost always or most of the time.”⁶⁵ This statistic is unsurprising, given the overall effectiveness of government in that era.⁶⁶ By the middle 1960s, the interstate highway system, then under construction, was binding the disparate corners of the United States into a closer union.⁶⁷ The United States Congress had enacted far-reaching civil-rights laws.⁶⁸ Medicare was adopted into law and had begun to confer its benefits.⁶⁹ Then there was the space program. President John F. Kennedy pledged in May 1961, that the United States would send a manned spacecraft successfully to the moon and back.⁷⁰ And on July 20, 1969, that promise was fulfilled when first Neil Armstrong and then Edwin Aldrin stepped onto the lunar surface.⁷¹

Alas, much of what followed in the 1970s and 1980s can be seen as a kind of anti-climax for the American space program, especially manned space flight. In the middle 1970s, the United States launched “Skylab,” a modest space station that was nevertheless home to some significant scientific experiments.⁷² The decade also witnessed the “Apollo-Soyuz” mission

65. *Public Trust in Government, 1958–2022*, PEW RSCH. CTR. (June 6, 2022), <https://www.pewresearch.org/politics/2022/06/06/public-trust-in-government-1958-2022/>.

66. See Charles J. Reid, Jr., *Government Works*, HUFFINGTON POST (Oct. 23, 2012), https://www.huffpost.com/entry/government-works_b_2002148.

67. See Joe Weber, ‘America’s New Design for Living:’ *The Interstate Highway System and the Spatial Transformation of the U.S.*, in *ENGINEERING EARTH: THE IMPACT OF MEGAENGINEERING PROJECTS* 553, 554–55 (Stanley D. Brunn ed., 2011); Teal Arcadi, *Partisanship and Permanence: How Congress Contested the Origins of the Interstate Highway System and the Future of American Infrastructure*, 5 *MOD. AM. HIST.* 53, 56–62 (2022).

68. Two major pieces of legislation were the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, which “prohibi[ted] discrimination on the basis of race, color, religion, sex, or national origin”; and the Voting Rights of 1965, Pub. L. No. 89-110, 79 Stat. 437, which recognized the systemic voter suppression that characterized the electoral process in many states and that therefore took important steps to ensure a democratically fair electoral process.

69. Medicare was created by the Social Security Amendments of 1965, Health Insurance for the Aged and Medical Assistance, Pub. L. No. 89-97, 79 Stat. 286, which constituted the adoption of a limited national health insurance. Medicaid was also created at this time. See Edward Berkowitz, *Medicare and Medicaid: The Past as Prologue*, 27 *HEALTH CARE FIN. REV.* 11, 11–23 (Winter 2005–2006) (reviewing the history of the creation of both programs).

70. John F. Kennedy, Address to Joint Session of Congress, John F. Kennedy Presidential Library and Museum (May 25, 1961); President Kennedy reiterated his pledge in September 1962, at a speech at Rice University, in Houston Texas. John F. Kennedy, Address at Rice University on the Nation’s Space Effort, John F. Kennedy Presidential Library and Museum (Sept. 12, 1962).

71. See Ariella Marsden, *On This Day: One Giant Leap for Mankind in 1969 Moon Landing*, JERUSALEM POST (July 20, 2022), <https://www.jpost.com/international/article-712589>.

72. Skylab conducted observations of the sun, a series of ultra-violet studies “to provide a better look into the Solar System and Universe,” and an “X-Ray Mapping Experiment.” Emily Carney, *Space in the Seventies: Skylab’s Other Astronomy Experiments*, NAT’L SPACE SOC’Y (Oct. 4, 2021), <https://space.nss.org/space-in-the-seventies-skylabs-other-astronomy-experiments/>.

– the creation, in 1975, of a temporary, jointly-staffed space station of Soviet cosmonauts and American astronauts.⁷³

In the 1980s, the United States relied on the space shuttle to conduct an extended series of orbital missions. Two enormous tragedies marred the space shuttle program. In 1986, the shuttle *Challenger* exploded shortly after takeoff, killing its crew of seven.⁷⁴ Seventeen years later, in 2003, the space shuttle *Columbia* disintegrated during reentry, again killing all seven crew members.⁷⁵ The early and mid-2000s witnessed reduced reliance on the space shuttle, and the vehicle itself was retired from service in 2011.⁷⁶ The American space program then depended, for the next decade, on Russian spacecraft to reach the International Space Station.⁷⁷

At the conclusion of the last shuttle mission, in July 2011, Ralph Vartabedian and W.J. Hennigan, national security correspondents for the *Los Angeles Times*, expressed the feelings of many when they wrote that the future of American space exploration seemed “poorly defined, jeopardized

73. Eric Betz, *Apollo-Soyuz: When the Space Race Ended*, DISCOVER (July 22, 2020), <https://www.discovermagazine.com/the-sciences/apollo-soyuz-mission-when-the-space-race-ended>.

74. *The Shuttle Explosion: What Preceded the Instant in Which the Challenger Was Lost*, N.Y. TIMES (Jan. 29, 1986), <https://www.nytimes.com/1986/01/29/us/the-shuttle-explosion-what-preceded-the-instant-in-which-the-challenger-was-lost.html>; William J. Broad, *The Shuttle Explodes: 6 Crew and High-School Teacher Are Killed 74 Seconds After Liftoff*, N.Y. TIMES (Jan. 29, 1986), <https://www.nytimes.com/1986/01/29/us/shuttle-explodes-6-crew-high-school-teacher-are-killed-74-seconds-after-liftoff.html>; John Noble Wilford, *The Shuttle Explosion: Faith in Technology Is Shaken, But There Is No Going Back*, N.Y. TIMES (Jan. 29, 1986), <https://www.nytimes.com/1986/01/29/us/the-shuttle-explosion-faith-in-technology-is-jolted-but-there-is-no-going-back.html>.

75. Michael Grunwald, *Columbia Is Lost: Shuttle Disintegrates on Reentry, Killing Seven Onboard*, WASH. POST (Feb. 2, 2003), <https://www.washingtonpost.com/archive/politics/2003/02/02/columbia-is-lost/69169dda-cfa9-4a48-ad2a-ed3410ee527d/>; *The Columbia Catastrophe*, WASH. POST (Feb. 2, 2003), <https://www.washingtonpost.com/archive/opinions/2003/02/02/the-columbia-catastrophe/1a59d55f-433f-469b-8a1e-2490eb4cf709/>; Tom Shales, *Networks Struggle to Convey Another Day of National Anguish*, WASH. POST (Feb. 2, 2003); *Our Entire Nation Grieves*, WASH. POST (Feb. 2, 2003), <https://www.washingtonpost.com/archive/politics/2003/02/02/our-entire-nation-grieves/1c408a23-8fe5-4075-9e6e-16dc16b4cc85/>; Guy Gugliotta, *In Reentry, Shuttle Was Insulated Ball of Fire: Breakup Occurred at Point of Highest Stress, Scientists Say*, WASH. POST (Feb. 2, 2003), <https://www.washingtonpost.com/archive/politics/2003/02/02/in-reentry-shuttle-was-insulated-ball-of-fire/c30f581d-7532-426b-a0d4-b24e748194be/>.

76. Kenneth Chang, *Atlantis Lifts Off for Last Space Shuttle Mission*, N.Y. TIMES (July 8, 2011), <https://www.nytimes.com/2011/07/09/science/space/09shuttle.html>; *After the Space Shuttle: The Arguments for Bold, and Inspiring, Missions Still Hold*, N.Y. TIMES (July 22, 2011), <https://www.nytimes.com/2011/07/22/opinion/22fri1.html>; Scott Powers, *Atlantis Puts a Flawless Finish on the Shuttle Era*, L.A. TIMES, July 22, 2011, at A12.

77. Melissa Hogenboom, *America and Russia: Uneasy Partners in Space*, BBC NEWS (Feb. 21, 2012), <https://www.bbc.com/news/science-environment-17074388>; Joseph Stromberg, *How NASA Became Utterly Dependent on Russia for Space Travel*, VOX (May 5, 2014), <https://www.vox.com/2014/5/5/5674744/how-nasa-became-utterly-dependent-on-russia-for-space-travel>; *The U.S. Hitches Its Final Ride to Space from Russia – For Now*, WIRED (Apr. 8, 2020), <https://www.wired.com/story/the-us-hitches-its-final-ride-to-space-from-russia-for-now/>.

by a bleak budget outlook and a weak political consensus.”⁷⁸ Two private companies, however, had been launched in the early 2000s, perhaps anticipating that they would fill this void. In the year 2000, Jeff Bezos, who worked first as an investment banker and then founded the Amazon Corporation, established a company known as “Blue Origin,”⁷⁹ whose mission was to develop space technology, for its own use and for resale to clients.⁸⁰ Two years later, in 2002, Elon Musk joined this privately-funded space race. A native South African whose family had grown wealthy thanks to mining interests,⁸¹ he had founded or co-founded several technology companies in Palo Alto in the middle and latter 1990s, the most prominent of which was PayPal.⁸² He now created his own company – SpaceX – for the purpose of exploring space.⁸³

The personalities of the two men shown through in the way they described the objectives of their respective ventures. Bezos was perhaps low-key in stating his expectations for extra-terrestrial travel, but hardly modest. He sought initially to facilitate space travel by private persons, but he hoped in the longer term to exploit outer space for commercial and industrial pur-

78. Ralph Vartabedian & W.J. Hennigan, *Space Agency Struggles to Set New Course: With Plans for the Next Exploration Mission Still Vague, Many Are Growing Frustrated with NASA*, L.A. TIMES, July 19, 2011, at A1.

79. HOWARD E. MCCURDY, FINANCING THE NEW SPACE INDUSTRY: BREAKING FREE OF GRAVITY AND GOVERNMENT SUPPORT 35 (2019).

80. The Blue Origin name refers to the Blue Earth as the origin of his, and our, space ventures, and Blue Origin’s motto, ‘*Gradatim Ferociter*,’ Latin for ‘Gradually (or step by step) Ferociously,’ is featured on the company’s crest” SCOTT MADRY, DISRUPTIVE SPACE TECHNOLOGIES AND INNOVATIONS: THE NEXT CHAPTER 92 (2020).

81. Marilynn Mitchell, *Behind the Billions: Inside Errol Musk’s Emerald Mine, Net Worth, and Scandals*, S. AFR. (Dec. 9, 2021), <https://www.thesouthafrican.com/lifestyle/elon-musk-net-worth-errol-musk-emerald-mine-scandal-tesla-space-x/>; Phillip de Wet, *Elon Musk’s Family Once Owned an Emerald Mine in Zambia – Here’s the Fascinating Story of How They Came to Own It*, BUS. INSIDER: S. AFR. (Feb. 28, 2018), <https://www.businessinsider.co.za/how-elon-musks-family-came-to-own-an-emerald-mine-2018-2/>; Phillip de Wet, *A Teenage Elon Musk Once Casually Sold His Father’s Emeralds to Tiffany and Company While His Dad Was Sleeping*, BUS. INSIDER (Feb. 22, 2018), <https://www.businessinsider.co.za/elon-musk-sells-the-family-emeralds-in-new-york-2018-2/>.

82. PayPal was originally founded as “X.com,” but evolved, by the year 2000, into the electronic payment business under the name PayPal. Megan J. Ptacek, *X.Com Scraps Bank Strategy to Focus on PayPal System*, AM. BANKER (Oct. 11, 2000), <https://www.americanbanker.com/news/xcom-scraps-bank-strategy-to-focus-on-paypal-system>. The move was greeted by skepticism in some circles. See Tom McGrath, *X.Com’s Exit from Internet Banking a Good Start*, AM. BANKER (Dec. 6, 2000), <https://www.americanbanker.com/news/comment-xcoms-exit-from-internet-banking-a-good-start>. PayPal, however, soon enjoyed success. See, e.g., *X.Com Turns Your Mobile Phone into a Wallet*, PR NEWswire (June 13, 2000), <https://www.paypalobjects.com/html/pr-061200.html>; *Electronic Commerce: Web Auction Lovers Find Friend in PayPal*, INVS.’ BUS. DAILY, July 24, 2000, at A8.

83. See Michael Sheetz, *The Rise of SpaceX and the Future of Elon Musk’s Mars Dream*, CNBC (Mar. 20, 2019), <https://www.cnn.com/2019/03/20/spacex-rise-elon-musk-mars-dream.html>.

poses.⁸⁴ Musk, for his part, was simultaneously simple and grandiose in his ambitions – he wanted to send persons to Mars.⁸⁵

By 2005, Bezos' initial plans were coming into view. He purchased “a huge tract of land” in rural Texas with the purpose of establishing a spaceport.⁸⁶ A story that appeared originally on Space.com and that was reposted to CNN described Bezos' future plans.⁸⁷ “The company aims to create ‘an enduring human presence in space,’ explains the Blue Origin internet site.”⁸⁸ To that end, the Company hoped to develop reusable rockets capable of vertical liftoff and landing.⁸⁹ What conferred originality on the website's declarations – indeed, what made them revolutionary – was that Bezos was not acting as a government contractor might. Such contractors had been involved with NASA from the early days of the space program.⁹⁰ Bezos' business plan, however, was not dependent upon securing government contracts, though he certainly obtained lucrative contracts once his venture proved successful. First, however, he made clear that Blue Origin was independent of NASA. When he pledged to host “passenger flight service,” it was as a private company operating independently of any national space agency.⁹¹

A decade later, in 2015, Bezos launched and landed an unmanned sub-orbital test flight of Blue Origin's *New Shepard* spacecraft.⁹² It was at this

84. See Jamie Carter, *In Photos: Jeff Bezos' Blue Origin Reveals the 'Orbital Reef' Private Space Station to Help Build a Business Ecosystem in Low Earth Orbit*, FORBES (Oct. 26, 2021), <https://www.forbes.com/sites/jamiecartereurope/2021/10/26/in-photos-jeff-bezos-blue-origin-reveals-the-orbital-reef-private-space-station-to-help-build-a-business-ecosystem-in-low-earth-orbit/?sh=26e1f9f866e2>; Olafimihan Oshin, *Bezos: Trip to Space 'Reinforces My Commitment to Climate Change'*, HILL (July 20, 2021), <https://thehill.com/policy/transportation/nasa/563886-bezos-trip-to-space-reinforces-my-commitment-to-climate-change-to/> (“‘we need to take all heavy industry, all polluting industry and move it into space’”).

85. See PETER WARD, *THE CONSEQUENTIAL FRONTIER: CHALLENGING THE PRIVATIZATION OF SPACE* 45 (2019).

86. See Paul Harris, *Billionaire Picks One-Horse Town to Start Space Empire*, GUARDIAN (Apr. 10, 2005), <https://www.theguardian.com/science/2005/apr/10/spaceexploration.usnews1>; Michael Graczyk, *Space Dreams Boost Tiny Texas Town*, NBC NEWS (Mar. 13, 2005), <https://www.nbcnews.com/id/wbna7151863>.

87. Leonard David, *Blue Origin Rocket Plans Detailed*, CNN (June 13, 2005), <http://www.cnn.com/2005/TECH/space/06/13/blue.origin/index.html>.

88. *Id.*

89. *Id.*

90. See John A. Johnson, General Counsel of NASA, Prepared Statement (1960); PATENT POLICIES OF DEPARTMENTS AND AGENCIES OF THE FEDERAL GOVERNMENT – 1959, at 273–79 (prepared for the use of the Select Committee on Small Business, Dec. 8–10, 1959).

91. David, *supra* note 87.

92. The first test flight occurred in April 2015, but it was deemed a failure because Blue Origin failed “to recover the propulsion module,” and the goal had been to both launch and land the rocket. Brian Wang, *Blue Origin New Shepard Reusable Rocket Has First Development Test Flight*, NEXT BIG FUTURE (Apr. 30, 2015), <https://www.nextbigfuture.com/2015/04/blue-origin-new-shepard-reusable-rocket.html>. In November of that year, Bezos succeeded in having his rocket land, thus making it reusable. See William Harwood, *Blue Origin Successfully Launches – and Lands – Rocket*, CBS NEWS (Nov. 24, 2015), <https://www.cbsnews.com/news/blue-origin-successfully-flies-and-lands-new-shepard/>; *Blue Origin Makes Historic Rocket Landing – Flies*

time, around 2014 and 2015, that Blue Origin began to bid and receive government contract work.⁹³ Thus he agreed to supply rocket engines to the United States government for its new Vulcan rocket.⁹⁴ In fact, by this time, Bezos' spacecraft designs had grown increasingly sophisticated. What the government wanted was access to Blue Origin's "BE-4 monster engines," designed to "generate 1.1 million pounds of thrust, capable of transporting up to 50,000 pounds of payload into high orbits around the earth."⁹⁵ Nor was this the only government contract Bezos has undertaken.⁹⁶

Bezos' program for passenger space flight, however, has developed very much independent of NASA or, indeed, of the American government. The "centerpiece" of this project is the *New Shepard* spacecraft, "named after Alan Shepard, the first American to reach space in 1961 and one of the

and Lands World's First Fully Reusable Rocket, BUS. WIRE (Nov. 24, 2015), <https://www.businesswire.com/news/home/20151124005399/en/Blue-Origin-Makes-Historic-Rocket-Landing>.

93. Todd Bishop, *Blast-Off for Bezos: Blue Origin Wins Deal to Develop New U.S. Rocket Engine for Boeing Joint Venture*, GEEKWIRE (Sept. 17, 2014), <https://www.geekwire.com/2014/bezos-blue-origin-wins-deal-develop-u-s-rocket-engine/>. Bezos subsequently entered into another major government contract, to supply specialized equipment for a future prospective moon landing. See Michael Sheetz, *NASA Awards Contracts to Jeff Bezos and Elon Musk to Land Astronauts on the Moon*, CNBC (Apr. 30, 2020), <https://www.cnbc.com/2020/04/30/nasa-selects-hls-lunar-lander-teams-blue-origin-spacex-dynetics.html>. Finally, Bezos has also contracted with DARPA – the Defense Advanced Research Projects Agency – to develop nuclear-powered spacecraft. See Sandra Erwin, *DARPA Selects Blue Origin, Lockheed Martin to Develop Spacecraft for Nuclear Propulsion Demo*, SPACE NEWS (Apr. 12, 2021), <https://spacenews.com/darpa-selects-blue-origin-lockheed-martin-to-develop-spacecraft-for-nuclear-propulsion-demo/>.

94. Bishop, *supra* note 93; Sheetz, *supra* note 93.

95. Jessica Orweg, *Jeff Bezos' Private Spaceflight Company Is Building a Monster Engine That'll Launch the Business to New Heights*, BUS. INSIDER (Dec. 7, 2015), <https://www.businessinsider.in/jeff-bezos-private-spaceflight-company-is-building-a-monster-engine-thatll-launch-the-business-to-new-heights/articleshow/50083574.cms>. See also Robert Z. Pearlman, *'Behold Vulcan: Next-Generation Rocket Unveiled by United Launch Alliance*, YAHOO! NEWS (Apr. 14, 2015), <https://www.yahoo.com/news/ behold-vulcan-next-generation-rocket-unveiled-united-launch-131734918.html> (reviewing the adoption of Bezos' BE-4 engines for the Vulcan program). Manufacturing and design delays, however, have kept the rockets grounded until now. See Eric Berger, *With Further Delays to BE-4 Rocket Engine, Vulcan May Not Make 2022 Debut*, ARS TECHNICA (Dec. 13, 2021), <https://arstechnica.com/science/2021/12/ula-disappointed-in-be-4-delay-but-still-aiming-for-2022-vulcan-launch/>. A December 2022 launch, however, remains a possibility. Sandra Erwin, *Space Force Acquisition Chief to Meet with ULA and Blue Origin, Expects Vulcan to Launch in December*, SPACE NEWS (June 28, 2022), <https://spacenews.com/space-force-acquisition-chief-to-meet-with-ula-and-blue-origin-expects-vulcan-to-launch-in-december/>.

96. See, e.g., Kate Duffy, *NASA Green Lights Jeff Bezos' Space Company Blue Origin for Future Missions, Including Planetary Expeditions and Satellite Launches*, BUS. INSIDER (Dec. 17, 2020), <https://www.businessinsider.in/tech/news/nasa-green-lights-jeff-bezos-space-company-blue-origin-for-future-missions-including-planetary-expeditions-and-satellite-launches/article-show/79781398.cms>; Sheetz, *supra* note 93. But see also Michael Sheetz, *Bezos' Blue Origin Takes NASA to Federal Court over Award of Lunar Lander Contract to SpaceX*, CNBC (Aug. 16, 2021), <https://www.cnbc.com/2021/08/16/jeff-bezos-blue-origin-takes-nasa-to-federal-court-over-hls-contract.html>; Loren Grush, *Blue Origin Loses Lawsuit Against Federal Government over NASA's Human Lunar Lander Contracts*, VERGE (Nov. 4, 2021), <https://www.theverge.com/2021/11/4/22763384/blue-origin-lawsuit-nasa-spacex-lost-human-lunar-lander-artemis>.

astronauts who walked on the moon.”⁹⁷ *New Shepard* has thus far undertaken only sub-orbital flights. After several unmanned flights that carried out brief research projects for NASA,⁹⁸ Blue Origin launched its first manned flight on July 20, 2021 – the 52d anniversary of the first moon landing – with a crew of four, including Jeff Bezos and his brother Mark.⁹⁹ Subsequent prominent passengers have included William Shatner, famously known as Captain Kirk from the television series *Star Trek*,¹⁰⁰ and Laura Shepard Churchley, the daughter of astronaut Alan Shepard.¹⁰¹ These flights, furthermore, like the many other manned spaceflights that *New Shepard* has carried out,¹⁰² utilized the Texas spaceport, and did not make use of NASA facilities in either Florida or California.¹⁰³

Now we should examine the operations of Elon Musk’s space exploration corporation, SpaceX. Musk’s road to becoming a space entrepreneur

97. Joey Roulette, *What Is New Shepard and Where Will It Fly?*, N.Y. TIMES (Oct. 13, 2021), <https://www.nytimes.com/2021/10/13/science/new-shepard-flight.html>.

98. See, e.g., Loren Grush, *Blue Origin Successfully Launches and Lands First New Shepard Rocket of 2019*, VERGE (Jan. 23, 2019), <https://www.theverge.com/2019/12/10/21003756/blue-origin-new-shepard-rocket-test-launch-science-research-watch-live>; Michael Sheetz, *Blue Origin Launches and Lands Record Mission of the Rocket Bezos Wants for Flying Space Tourists*, CNBC (May 2, 2019), <https://www.cnbc.com/2019/05/02/watch-blue-origin-launch-and-land-new-shepard-with-nasa-payloads.html>; William Harwood, *Bezos’ Blue Origin Launches New Shepard Spacecraft on Sub-Orbital Test Flight*, CBS NEWS (Dec. 11, 2019), <https://www.cbsnews.com/news/blue-origin-test-flight-of-new-shepard-spacecraft-today-watch-live-stream-2019-12-11/>.

99. Michael Sheetz, *Jeff Bezos Reaches Space on Blue Origin’s First Crewed Launch*, CNBC (July 20, 2021), <https://www.cnbc.com/2021/07/20/jeff-bezos-reaches-space-on-blue-origins-first-crewed-launch.html>; Christian Davenport & Dalvin Brown, *Jeff Bezos, Mark Bezos, Wally Funk, and Oliver Daemen Reach Space, Return Safely on Blue Origin’s New Shepard Rocket*, WASH. POST (July 20, 2021), <https://www.washingtonpost.com/technology/2021/07/20/bezos-space-flight-live-updates-video/>.

100. Jackie Wattles et al., *William Shatner Goes to Space on Blue Origin Mission*, CNN (Oct. 13, 2021, 4:11 PM), <https://www.cnn.com/business/live-news/william-shatner-blue-origin-space-flight>; William Harwood, *William Shatner Sets Record in Space With Blue Origin Spaceflight*, CBS NEWS (Oct. 13, 2021, 5:14 PM), <https://www.cbsnews.com/live-updates/william-shatner-blue-origin-space-flight/>.

101. *Daughter of U.S. Astronaut Rockets Into Space Aboard Blue Origin Spacecraft*, GUARDIAN (Dec. 11, 2021, 10:58 AM), <https://www.theguardian.com/science/2021/dec/11/blue-origin-rocket-laura-shepard-churchley-michael-strahan>; Nate Chute, *How Laura Shepard Churchley Will Honor Her Father’s Space Legacy Aboard Blue Origin Flight*, EL PASO TIMES (Dec. 10, 2021, 1:08 PM), <https://www.elpasotimes.com/story/news/2021/12/10/laura-shepard-churchley-blue-origin-launch-alan-shepard-astronaut-space-flight/6447231001/>.

102. See, e.g., Michael Sheetz, *Jeff Bezos’ Blue Origin Launches and Returns First Six Passenger Spaceflight*, CNBC (Dec. 11, 2021, 8:16 AM), <https://www.cnbc.com/2021/12/11/watch-jeff-bezos-blue-origin-ns-19-live-first-six-passenger-crew.html>; Mike Wall, *Jeff Bezos’ Blue Origin Launches 6 People to Space in Fourth Crewed Flight*, SPACE.COM (Mar. 21, 2022), <https://www.space.com/blue-origin-space-tourism-launch-ns-20>; William Harwood, *Blue Origin Launches Six Passengers on Supersonic Flight to the Edge of Space*, CBS NEWS (Aug. 4, 2022, 12:23 PM), <https://www.cbsnews.com/news/blue-origin-launches-six-passengers-on-supersonic-flight-to-the-edge-of-space/>.

103. See, e.g., Xavier Walton, *Is Van Horn the New Space City? Residents Say They’re Competing With Houston For the Rights to the Title*, KHOU-11 (Oct. 12, 2021, 7:58 PM), <https://www.khou.com/article/tech/science/space/van-horn-new-space-city/285-10e632e1-7fe3-44cf-8636-307091ddc3c1>.

was, how to put it? less conventional, more exotic, even more eccentric than the course Bezos had charted. By the year 2000 Musk had become fascinated with travel to Mars. In a speech that year to a convention of the Mars Society, held at Stanford University, Musk proposed an audacious agenda: “‘creating a human civilization on Mars and helping humans to go from being a one planet species to multiplanet species.’”¹⁰⁴ At first, Musk thought he could purchase the necessary equipment from Russia, but those plans failed to materialize because of a mix of hazy business practices and geopolitics.¹⁰⁵

Not to be deterred, Musk resolved that if he could not buy rockets on the international market, he would manufacture his own.¹⁰⁶ Thus was “formed Space Exploration Technologies, or SpaceX.”¹⁰⁷ By May, 2005, Musk had constructed and tested his first rocket, Falcon-1.¹⁰⁸ The first launch occurred in March, 2006, at the Kwajalein Atoll, in the Marshall Islands, where the American government maintains a naval base and launch facilities.¹⁰⁹ Unfortunately, the rocket “was lost moments [after liftoff], apparently due to a fuel leak,”¹¹⁰ a conclusion later revised to mechanical failure.¹¹¹ One year later, Falcon-1 enjoyed a somewhat qualified success when it “became the first privately funded spacecraft to achieve orbital height, reaching an altitude of 190 miles . . . before a control problem sent the vehicle hurtling back to Earth.”¹¹² Another rocket, this one carrying satellites, was lost in August, 2008.¹¹³ Finally, in September, 2008, SpaceX

104. Keith Cowing, *Millionaires and Billionaires: The Secret To Sending Humans to Mars?*, SPACEREF. (Aug. 30, 2001), <https://spaceref.com/uncategorized/millionaires-and-billionaires-the-secret-to-sending-humans-to-mars/>.

105. Mark Kaufman, *When SpaceX Tried to Buy Missiles From Russia: Vodka and a Run-Around*, INVERSE (Aug. 2, 2017), <https://www.inverse.com/article/34976-spacex-ceo-elon-musk-tried-to-buy-icbm-rockets-from-russia>.

106. Andrew Chaikin, *Is SpaceX Changing the Rocket Equation?*, SMITHSONIAN: AIR & SPACE MAG. (Jan. 2012), <https://www.smithsonianmag.com/air-space-magazine/is-spacex-changing-the-rocket-equation-132285884/>.

107. *Id.*

108. Kevin Maney, *Private Sector Enticing Public Into Final Frontier*, USA TODAY (June 17, 2005, 2:55 AM), https://usatoday30.usatoday.com/money/industries/technology/2005-06-16-space-ventures-usat_x.html.

109. Leslie Wayne, *A Bold Plan to Go Where Men Have Gone Before*, N.Y. TIMES (Feb. 5, 2006), <https://www.nytimes.com/2006/02/05/business/yourmoney/a-bold-plan-to-go-where-men-have-gone-before.html>.

110. Alan Boyle, *SpaceX Rocket Lost, Was Fuel Leak to Blame?*, NBC NEWS (Mar. 24, 2006, 4:31 PM), <https://www.nbcnews.com/id/wbna11997932>.

111. Brian Berger, *Falcon 1 Failure Traced to a Busted Nut*, SPACE.COM (July 19, 2006), <https://www.space.com/2643-falcon-1-failure-traced-busted-nut.html>.

112. John Johnson, Jr., *Private Rocket Hits New Heights*, L.A. TIMES (Mar. 21, 2007, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2007-mar-21-sci-launch21-story.html>.

113. John Schwartz, *Launch of Private Rocket Fails; Three Satellites Were Onboard*, N.Y. TIMES (Aug. 3, 2008), <https://www.nytimes.com/2008/08/03/science/spacex/03launchweb.html>.

successfully achieved Earth orbit, launching from the Kwajalein Atoll, in the Pacific Ocean.¹¹⁴

By the time Falcon-1 had attained Earth orbit, Elon Musk was already dreaming of larger things. His company, SpaceX, had commenced development on two larger rockets – “Falcon-9” and “Falcon Heavy.” While SpaceX had struggled in putting Falcon-1 into space, success came much more quickly to Falcon-9. In June, 2010, it achieved orbit on its first try “in what appeared to be a nearly flawless trip.”¹¹⁵ This was both economically and politically beneficial to Elon Musk. President Barack Obama had made clear before the flight that he “want[ed] commercial providers . . . to ship cargo and even crew up to the International Space Station in years to come,” and he hoped that Musk’s SpaceX would be among those corporations leading the way.¹¹⁶

By the early 2010s, Musk’s company had begun work on yet a more powerful rocket – the Falcon Heavy. The plan was to construct a rocket with enough thrust to leave earth’s gravitational field altogether and so to enter inter-planetary space.¹¹⁷ In December 2017, Musk announced that preparations were nearly complete and that Falcon Heavy would soon liftoff from a launch-pad at the Kennedy Space Center in Florida.¹¹⁸ The destination was an orbit around the sun that would eventually intersect with the Martian orbit.¹¹⁹ The payload consisted of Elon Musk’s personal Tesla automobile.¹²⁰ The launch occurred in February, 2018 and was deemed a

114. Tariq Malik, *SpaceX Successfully Launches Falcon 1 Rocket Into Orbit*, SPACE.COM (Dec. 13, 2019), <https://www.space.com/5905-spacex-successfully-launches-falcon-1-rocket-orbit.html>; Alan Boyle, *Low-Cost Rocket Finally Gets To Orbit*, NBC NEWS (Sept. 28, 2008, 7:01 PM), <https://www.nbcnews.com/id/wbna26932813>; John Schwartz, *Private Company Launches Its Rocket Into Orbit*, N.Y. TIMES (Sept. 28, 2008), <https://www.nytimes.com/2008/09/29/science/space/29launch.html>.

115. Kenneth Chang, *Private Rocket’s First Flight Is a Success*, N.Y. TIMES, June 5, 2010, at A11.

116. Peter Grier, *Obama’s Space Plans Ride on Falcon 9 Rocket Launch*, CHRISTIAN SCI. MONITOR (June 3, 2010), <https://www.csmonitor.com/Science/2010/0603/Obama-s-space-plans-ride-on-Falcon-9-rocket-launch>; *SpaceX Falcon 9 Rocket Enjoys Successful Maiden Flight*, BBC NEWS (June 4, 2010), <https://www.bbc.com/news/10209704>.

117. Jay Bennett, *Falcon Heavy For the Outer Solar System*, POPULAR MECHS. (Mar. 2, 2018), <https://www.popularmechanics.com/space/rockets/a18666202/falcon-heavy-for-the-outer-solar-system/>.

118. William Harwood, *SpaceX Shows Off Powerful Falcon Heavy Rocket Ahead of First Launch*, CBS NEWS (Dec. 22, 2017, 3:00 PM), <https://www.cbsnews.com/news/spacex-shows-off-powerful-falcon-heavy-rocket/>; Emre Kelly, *SpaceX’s Three-Core Falcon Heavy Rolls Out to KSC Launch Pad*, FLA. TODAY (Dec. 29, 2017, 2:02 PM), <https://www.floridatoday.com/story/tech/science/space/2017/12/28/spacex-falcon-heavy-rocket-rollout-nasa-ksc-pad-39-elon-musk/987277001/>.

119. Brad Jones, *The Falcon Heavy Just Launched Successfully. Next Stop, Mars.*, FUTURISM (Feb. 6, 2018), <https://futurism.com/falcon-heavy-launched-next-stop-mars>.

120. Darrell Etherington, *Elon Musk Shows Off Falcon Heavy’s Roadster-Loving Artificial Astronaut*, TECHCRUNCH (Feb. 5, 2018, 1:45 AM), <https://techcrunch.com/2018/02/04/elon-musk-shows-off-falcon-heavy-s-roadster-loving-artificial-astronaut/>; Mohammed Hadi, *Here’s Why It Says ‘DON’T PANIC!’ on the Dashboard of the Car Elon Musk Just Shot Toward Mars*, BUS.

success, although the orbit that was actually achieved has caused the spacecraft to narrowly miss Mars.¹²¹ Falcon Heavy has subsequently launched satellites into Earth's orbit,¹²² and has achieved the title of the world's most powerful rocket.¹²³

Falcon-9 has been used by the Department of Defense to launch military and spy satellites into earth orbit.¹²⁴ Indeed, the United States armed forces have considered the "use [of] Elon Musk's reusable SpaceX rockets and vehicles for short-notice cases," such as situations calling for the immediate deployment of troops.¹²⁵ The militaries of other nations have also made use of SpaceX rocketry. Thus the nation of Germany has used the Falcon-9 rocket to launch payloads into space.¹²⁶ In the summer of 2022, SpaceX was given clearance to use the Falcon Heavy "to launch top secret spy satellites."¹²⁷

INSIDER (Feb. 6, 2018, 5:06 PM), <https://www.businessinsider.com/falcon-heavy-launch-falcon-heavy-roadster-says-dont-panic-on-the-dashboard-2018-2>.

121. Loren Grush, *Elon Musk's Tesla Overshot Mars' Orbit, but It Won't Reach the Asteroid Belt as Claimed*, VERGE (Feb. 8, 2018, 4:21 AM), <https://www.theverge.com/2018/2/6/16983744/spacex-tesla-falcon-heavy-roadster-orbit-asteroid-belt-elon-musk-mars>; Rafi Letzter, 'Starman' Just Zipped Past Mars In His Rapidly-Decaying Tesla Roadster, LIVE SCI. (Oct. 21, 2020), <https://www.livescience.com/starman-tesla-mars-approach.html>; Jackie Wattles, *Elon Musk Launched His Own Tesla Roadster to Space Four Years Ago. Where Is It Now?*, CNN BUS. (Feb. 8, 2022, 2:46 PM), <https://www.cnn.com/2022/02/08/tech/spacex-tesla-roadster-falcon-heavy-anniversary-scn/index.html>.

122. Jackie Wattles, *SpaceX's Falcon Heavy Rocket Launches First Paid Mission and Lands All Three Boosters*, CNN BUS. (Apr. 12, 2019, 7:26 AM), <https://www.cnn.com/2019/04/11/tech/spacex-falcon-heavy-arabsat-launch/>; Elizabeth Howell, *SpaceX Falcon Heavy to Launch Cutting-Edge NASA Space Tech*, SPACE.COM (Apr. 14, 2019), <https://www.space.com/next-falcon-heavy-rocket-carries-nasa-payloads.html>; Shannon Stirone, *SpaceX's Falcon Heavy Deploys Dozens of Satellites to Orbit*, N.Y. TIMES (June 25, 2019), <https://www.nytimes.com/2019/06/25/science/falcon-heavy-spacex-launch.html>; Meghan Bartels, *SpaceX Falcon Heavy Rocket Lofts 24 Satellites in 1st Night Launch*, SPACE.COM (June 25, 2019), <https://www.space.com/spacex-falcon-heavy-stp2-launch-success.html>.

123. Rachel Thomas, *Super Heavy-Lift Launch Vehicles: How Does Falcon Heavy Stack Up?*, FLA. TODAY (Apr. 9, 2019, 5:58 PM), <https://www.floridatoday.com/story/tech/science/spacex/2019/04/09/worlds-most-powerful-rockets-saturn-delta-falcon-heavy-sls-new-glenn/3411587002/>; Jackson Ryan, *Meet the SpaceX Falcon Heavy, the World's Most Powerful Rocket*, CNET.COM (Apr. 15, 2019, 7:15 PM), <https://www.cnet.com/pictures/meet-the-spacex-falcon-heavy-the-worlds-most-powerful-rocket/>.

124. Amy Thompson, *SpaceX Launches Advanced GPS Satellite For US Space Force, Sticks Rocket Landing at Sea*, SPACE.COM (June 17, 2021), <https://www.space.com/spacex-military-gps-iii-sv05-satellite-launch-rocket-landing>; Mike Wall, *SpaceX Launches Classified Spy Satellite for US Military, Lands Rocket*, SPACE.COM (Feb. 2, 2022), <https://www.space.com/spacex-launches-nrol-87-spy-satellite-lands-rocket>.

125. Michelle Codiva, *U.S. Military and Elon Musk Collaborate to Use SpaceX Rockets for Fast Delivery of Hardware and Supply Worldwide*, SCI. TIMES (July 11, 2022, 10:32 PM), <https://www.sciencetimes.com/articles/38699/20220711/military-spacex-collaborates-launch-high-speed-vehicles.html>.

126. Stephen Clark, *SpaceX Launches German Military Radar Satellite From California*, SPACEFLIGHT NOW (June 18, 2022), <https://spaceflightnow.com/2022/06/18/spacex-launches-german-military-radar-satellite-from-california/>.

127. Kate Duffy, *SpaceX Will Launch Top Secret US Spy Satellites With the Reuse of Falcon Heavy Rocket Now That It's Received Space Force Approval, Report Says*, BUS. INSIDER (Aug.

Nor was Elon Musk content with launching others' satellites into orbit. Beginning in 2015, he commenced the development of "Starlink"—a satellite network that he wished to place into orbit to facilitate world-wide internet connectivity,¹²⁸ and thereby advance his business interests. After a lengthy period of regulatory review, SpaceX began to place satellites into earth orbit in 2019.¹²⁹ He now has some 3,000 or more operational satellites in orbit.¹³⁰ In February 2022, he used his network to assist the nation of Ukraine to regain internet connections following the Russian invasion of that country,¹³¹ and in May 2022, the Starlink system was used for targeting and positioning artillery fire.¹³²

Should space be as heavily privatized as it has become? That is the question that journalist Peter Ward explores in his important book, *The Consequential Frontier: Challenging the Privatization of Space*.¹³³ NASA, he argues, has fundamentally changed its role. No longer is it the contractor, commissioning smaller corporations to perform particular and discrete functions associated with spaceflight.¹³⁴ On the contrary, it has now become the client of these large aeronautical corporations.¹³⁵

There are, Ward asserts, serious problems associated with this transitioning of roles.¹³⁶ Space, especially near-earth orbit, has become a danger-

12, 2022, 5:35 PM), <https://www.businessinsider.in/science/space/news/spacex-will-launch-top-secret-us-spy-satellites-with-the-reusable-falcon-heavy-rocket-now-that-its-received-space-force-approval-report-says/articleshow/93523506.cms>.

128. Peter B. de Selding, *SpaceX To Build 4,000 Broadband Satellites in Seattle*, SPACE.COM (Jan. 20, 2015), <https://www.space.com/28305-spacex-satellite-internet-seattle.html>; Cecilia King & Christian Davenport, *Internet From Space Not So Far-Fetched, Musk Thinks*, WASH. POST, June 10, 2015, at A1.

129. Joey Roulette, *First Satellites for Musk's Starlink Internet Venture Launched Into Orbit*, REUTERS (May 23, 2019, 9:45 PM), <https://www.reuters.com/article/us-space-exploration-spacex/first-satellites-for-musks-starlink-internet-venture-launched-into-orbit-idUSKCN1SU07Y>; Cecilia Smith-Schoenwalder, *SpaceX Successfully Launches Satellites Aimed at Fast Internet*, US NEWS (May 24, 2019, 1:39 PM), <https://www.usnews.com/news/national-news/articles/2019-05-24/elon-musks-spacex-successfully-launches-starlink-satellites-aimed-at-fast-internet>.

130. Joey Roulette, *SpaceX Whizzes Past Annual Launch Record With Starlink Mission*, REUTERS (July 22, 2022, 10:05 PM), <https://www.reuters.com/lifestyle/science/spacex-whizzes-past-annual-launch-record-with-starlink-mission-2022-07-22/>; Ry Crist, *Starlink Explained: Everything to Know About Elon Musk's Satellite Internet Venture*, CNET (Aug. 11, 2022, 1:15 PM), <https://www.cnet.com/home/internet/starlink-satellite-internet-explained/>.

131. Michael Sheetz, *Elon Musk's SpaceX Sent Thousands of Starlink Satellite Internet Dishes to Ukraine, Company's President Says*, CNBC (Mar. 22, 2022, 6:05 PM), <https://www.cbc.com/2022/03/22/elon-musk-spacex-thousands-of-starlink-satellite-dishes-sent-to-ukraine.html>; Elizabeth Howell, *How SpaceX Got Starlink Up and Running in Ukraine: Report*, SPACE.COM (Mar. 9, 2022), <https://www.space.com/how-spacex-got-starlink-running-ukraine>.

132. Christopher Miller, Mark Scott & Bryan Bender, *UkraineX: How Elon Musk's Space Satellites Changed the War on the Ground*, POLITICO (June 9, 2022, 4:30 AM), <https://www.politico.com/news/2022/06/09/elon-musk-spacex-starlink-ukraine-00038039>.

133. See PETER WARD, *THE CONSEQUENTIAL FRONTIER: CHALLENGING THE PRIVATIZATION OF SPACE* (2019).

134. *Id.* at 51–63.

135. *Id.*

136. *Id.*

ous and cluttered place, with an ever-increasing risk of an over-abundance of satellites and other objects colliding, shattering, and finally rendering any number of the most efficient orbital pathways unusable.¹³⁷ There are also privacy concerns, as privatized spacecraft gradually establish a system of total surveillance without any guideposts or rules.¹³⁸

Large sums of money, furthermore, are being spent by space corporations to influence the shape of public policy.¹³⁹ Full-time lobbyists now have easy access to the political class,¹⁴⁰ while public-relations firms seek to damage the competition.¹⁴¹

Space tourism, furthermore, is only drawing attention to the yawning inequality of wealth and privilege that exists in the United States, and, indeed, might even contribute to its worsening, as an enlightened class of “celebrities” and “billionaires” grow more detached from those less advantaged.¹⁴² Space must become democratized, Ward is convinced of this, but he is at a loss for good ideas.¹⁴³ Without a steady hand of regulatory oversight, Ward fears that capitalism could run amok, as it did during the age of colonialism, in the eighteenth and nineteenth centuries.¹⁴⁴

One can add two further concerns to Ward’s list. First, there is the international law of outer space. The founding document of this body of law is the so-called Outer Space Treaty of 1967. The United States, the Soviet Union (now Russia), and China are among the signatories. It is a Treaty that envisions that state actors will be the ones exploring outer space and establishes principles and rules for right conduct. Most fundamentally, outer space is defined as the common interest of all humanity: “The exploration and use of outer space, the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of mankind.”¹⁴⁵ Private exploitation of a public resource would seem to be greatly at odds with this Treaty commitment.

A second concern is the possibility of a private space firm becoming a belligerent in a conflict. Elon Musk’s Starlink network has been attacked by

137. *Id.* at 97–100, 109 (“The rush to make money has created a situation in which an unstoppable storm of debris will already be hurtling around the planet by the time anyone imposes meaningful restrictions”).

138. *Id.* at 101 (“imagine a network of cameras taking photos of every inch of the planet’s land on a daily basis”).

139. *Id.* at 77–79.

140. *Id.*

141. *Id.* at 77.

142. *Id.* at 92–93.

143. *Id.*

144. *Id.* at 4, 182–83.

145. Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies art. 1, Dec. 19, 1966, 610 U.N.T.S. 205.

Russian hackers,¹⁴⁶ as well as threatened with destruction.¹⁴⁷ News reports suggest that Musk is in all likelihood coordinating with the United States, or at least has the blessing of the United States in its involvement in the war and this may be the reason it has been targeted.¹⁴⁸ But acknowledgment of this fact also raises uncomfortable questions: What if Starlink were proceeding on its own? Acting as a free agent, perhaps, seeking the ultimate marketing opportunity – battle-testing a satellite system that is war-ready? There would be buyers for such a system. Or what if Starlink either deliberately or inadvertently prompted hostilities between nations that might already harbor intense animosities against each other? Even if Starlink is not taking these measures – and there is no evidence that it is – these questions are rightly concerning. One can look to the example of Britain’s East India Company to know that gigantic corporations are capable of hostile actions against other nations that inevitably implicate its host nation.¹⁴⁹

III. THE SYMPOSIUM

A. *The Keynote Speakers*

Held on November 19, 2021, the Symposium on private power featured not one but two keynote speakers. Michael Every, Global Strategist at Rabobank, addressed an early morning audience.¹⁵⁰ In a long series of market dailies and more specialized, in-depth studies, Mr. Every has demonstrated a prescient and far-reaching view of geopolitical and economic conditions.¹⁵¹ His view of the present order is bleak. In 2018, he expressed

146. Kate Duffy, *A Top Pentagon Official Said SpaceX Starlink Rapidly Fought Off a Russian Jamming Attack in Ukraine*, BUS. INSIDER (Apr. 22, 2022, 5:05 AM), <https://www.businessinsider.com/spacex-starlink-pentagon-russian-jamming-attack-elon-musk-dave-tremper-2022-4>; Jason Rainbow, *As U.S. Blames Russia for KA-SAT Hack, Starlink Sees Growing Threat*, SPACENEWS (May 11, 2022), <https://spacenews.com/as-us-blames-russia-for-ka-sat-hack-starlink-sees-growing-threat/>.

147. Jennifer Leman, *Uh, Looks Like Russia’s Space Chief Threatened Elon Musk on Twitter*, POPULAR MECHS. (May 10, 2022), <https://www.popularmechanics.com/space/rockets/a39956239/russias-space-chief-threatened-elon-musk-on-twitter/>; Ben Turner, *Chinese Scientists Call for Plan to Destroy Elon Musk’s Starlink Satellites*, LIVE SCI. (May 22, 2022), <https://www.livescience.com/china-plans-ways-destroy-starlink>.

148. See, e.g., Cristiano Lima & Aaron Schaffer, *U.S. Quietly Paying Millions to Send Starlink Terminals to Ukraine, Contrary to SpaceX Claims*, WASH. POST (Apr. 9, 2022), <https://www.washingtonpost.com/politics/2022/04/08/us-quietly-paying-millions-send-starlink-terminals-ukraine-contrary-spacexs-claims/>; Grace Kay, *U.S. General Says Elon Musk’s Starlink Has “Totally Destroyed Putin’s Information Campaign,”* BUS. INSIDER (June 9, 2022, 4:00 PM), <https://www.businessinsider.com/us-general-elon-musk-spacex-starlink-destroyed-putin-information-campaign-2022-6>.

149. See, e.g., William Dalrymple, *The East India Company: The Original Corporate Raiders*, GUARDIAN (Mar. 4, 2015, 12:59 AM), <https://www.theguardian.com/world/2015/mar/04/east-india-company-original-corporate-raiders>.

150. Michael Every, RaboResearch Head of Financial Markets Research, Asia-Pacific, Keynote Address at the University of St. Thomas Law Journal Fall Symposium - Two There Are that Rule the World: Private Power and Political Authority (Nov. 19, 2021).

151. *Id.*

deep concern at “The Rise and Fall and Rise of the Great Powers,” fearing the possibility, indeed, the probability of great-power war.¹⁵² In 2017, he pondered, with an open mind, both the strengths and the weaknesses of free trade.¹⁵³ In 2022, he has reflected on the death of the American dream,¹⁵⁴ global economic weakness,¹⁵⁵ and the prospect of future food shortages and even famine.¹⁵⁶

Mr. Every’s brilliant and iconoclastic address was in keeping with this worldview. Entitled “The Power of the Powerful,”¹⁵⁷ its name was a deliberate pun on Vaclav Havel’s famous 1978 essay, “The Power of the Powerless.”¹⁵⁸ Have we moved, Every asked, from Westphalia (referencing the Peace of Westphalia and the system of nation-states to which it gave rise) to “West-failia,” a system tottering on the brink of something else, perhaps chaos, perhaps a new ordering?¹⁵⁹ With the emergence of great concentrations of private wealth and private power, he mused that the emerging techno-feudalism, whose rise Yanis Varoufakis so greatly fears and has warned us about, might become a real possibility.¹⁶⁰ Regrettably, because of contractual obligations, Mr. Every was unable to publish his paper with the Law Journal, even as he set the tone for much that followed.

152. Michael Every, *The Rise and Fall and Rise of the Great Powers . . . and the Great Currencies*, RABOBANK: RABORESEARCH (Nov. 16, 2018), research.rabobank.com/markets/en/documents/275848_173830_rise-and-fall-and-rise-final-version.pdf. (“In short, might Great Power conflict be the norm, and post-WW2 global peace and stability the outlier?”).

153. Michael Every, *The Great Game of Global Trade: But Which Game Is It, Exactly?*, RABOBANK (Jan. 30, 2017), research.rabobank.co/markets/en/documents/271476_1013651_great-game-3.pdf. (“[Free trade’s] long-run track record is poor Even where it has been tried fully, it has usually ended in some form of political breakdown”).

154. See Michael Every, *The American Dream Is Dead: For the First Time, Less Than Half of Americans Believe They’ll Ever Own a Home*, ZERO HEDGE (Apr. 20, 2022, 11:20AM), zerohedge.com/economics/american-dream-dead-first-time-less-half-americans-believe-theyll-ever-own-home.

155. See Michael Every, *Rabobank: Michael Burry Warns That the Economy Looks Like a House of Cards . . . And He Is Right*, ZERO HEDGE (May 25, 2022, 9:08 AM), <https://www.zerohedge.com/markets/rabobank-michael-burry-warns-economy-looks-house-cards-and-he-right>; and See Michael Every, *Rabobank: It’s Lenin’s Ideas That Sadly Explain Where We Are All Drifting Today*, ZERO HEDGE (June 30, 2022, 9:05 AM), [zerohedge.com/markets/rabobank-its-lenins-ideas-sadly-match-where-we-are-all-sadly-drifting-today](https://www.zerohedge.com/markets/rabobank-its-lenins-ideas-sadly-match-where-we-are-all-sadly-drifting-today).

156. See Michael Every, *Rabobank: We Are In an Undeclared Global Economic War, and Worldwide Famine Is Coming*, ZERO HEDGE (May 20, 2022, 2:00 PM), <https://www.zerohedge.com/markets/rabobank-we-are-undeclared-global-economic-war-and-worldwide-famine-coming>.

157. Michael Every, *supra* note 150.

158. Vaclav Havel, *The Power of the Powerless*, (Oct. 1978), <https://www.nonviolent-conflict.org/wp-content/uploads/1979/01/the-power-of-the-powerless.pdf>.

159. Michael Every, *supra* note 150.

160. Michael Every, *supra* note 150; see generally, Yanis Varoufakis, *Techno-Feudalism Is Taking Over*, PROJECT SYNDICATE (June 28, 2021), project-syndicate.org/commentary/techno-feudalism-replacing-market-capitalism-by-yanis-varoufakis-2021-06.

The lunch hour was graced with a second keynote address, this one delivered by Zephyr Teachout.¹⁶¹ Teachout not only teaches at Fordham University, where she holds the rank of Professor of Law, but has been politically active at high levels. In September 2014, she received a third of the vote in a Democratic Party primary challenge to Governor Andrew Cuomo of New York.¹⁶² In January 2022, Teachout was appointed “special advisor and senior counsel for economic justice” in the New York Attorney General’s office.¹⁶³

Teachout, furthermore, is that rare political figure who is also a gifted scholar. In 2014, the same year she sought the Governor’s office, Teachout published *Corruption In America* with the Harvard University Press.¹⁶⁴ She fears, quite properly, that corruption has become endemic to the American political order, even as polite discourse avoids the use of that word.¹⁶⁵ In *Break ‘Em Up*, published in 2020, Teachout called for a popular, grassroots movement demanding the use of antitrust laws to break-up the great monopolies of our age.¹⁶⁶

In her contribution to the Private Power symposium, Professor Teachout is particularly concerned with surveillance capitalism and its impact on the workplace.¹⁶⁷ Employers have gained technological advantages that can effectively break worker solidarity and pit employees against each other.¹⁶⁸ As remedies, she proposes recourse to the National Labor Relations Act; to the adoption of progressive reforms at the state level; and finally, to the expansion and widespread use of contract doctrines such as the law of unconscionability to deter and defeat one-sided labor contracts.¹⁶⁹

B. David Schultz

David Schultz is Distinguished University Professor of Political Science and Legal Studies at Hamline University and an adjunct Professor of

161. Zephyr Teachout, Professor of Law, Fordham University, Keynote Address at the University of St. Thomas Law Journal Fall Symposium - Two There Are that Rule the World: Private Power and Political Authority (Nov. 19, 2021).

162. Thomas Kaplan, *Cuomo Defeats Teachout, Liberal Rival, in the Primary*, N.Y. TIMES (Sept. 9, 2014), <https://www.nytimes.com/2014/09/10/nyregion/cuomo-and-hochul-win-new-york-primary.html>; Ginia Bellafonte, *For Teachout, The Thrill of Defeat*, N.Y. TIMES, (Sept. 12, 2014) <https://www.nytimes.com/2014/09/14/nyregion/for-teachout-the-thrill-of-defeat.html>.

163. Nick Reisman, *Zephyr Teachout Joins New York AG James’ Office*, SPECTRUMNEWS1 (Jan. 24, 2022, 2:29 PM), [spectrumlocalnews-com/nys/ny-state-of-politics.2022/01/24/zephyr-teachout-joins-ag-james-office](https://www.spectrumlocalnews.com/nys/ny-state-of-politics.2022/01/24/zephyr-teachout-joins-ag-james-office).

164. See generally, ZEPHYR TEACHOUT, *CORRUPTION IN AMERICA: FROM BENJAMIN FRANKLIN’S SNUFF BOX TO CITIZENS’ UNITED* (2014).

165. *Id.* at 291–305.

166. See generally, ZEPHYR TEACHOUT, *BREAK ‘EM UP: RECOVERING OUR FREEDOM FROM BIG AG, BIG TECH, AND BIG MONEY* (2020).

167. Zephyr Teachout, *Surveillance Wages: Private Governing Power and the Future of Work*, 19 U. ST. THOMAS L.J. 165 (2023).

168. *Id.* at 167–70.

169. *Id.* at 171–73.

Law at the University of St. Thomas. His book *Election Law and Democratic Theory* stands as a landmark in the synthesis of political theory and the nuts-and-bolts of elections.¹⁷⁰ Writing in 2014, Schultz described a body of election law that was inconsistent if not incoherent. “[P]artisan gerrymandering is justiciable but one is left with no definition of what it is and how to remedy it. Race is a factor that may be considered in drawing district lines, but only up to a point. Money disbursed for political purposes implicates First Amendment concerns, yet money is and is not speech.”¹⁷¹ And the theory that stands behind this concatenation of constitutional dissonance is no better: “Decisions in election law seem less principled, more case specific, and simply jumbled.”¹⁷²

In his contribution to this Symposium, Professor Schultz reexamines some of the premises of this earlier work and finds in American constitutional law what can only be called—tragically, lamentably—a preferential option for corporate well-being if not primacy.¹⁷³ Despite being artificial entities, created and empowered by state law, corporations have been accorded ever-increasing numbers of constitutional rights.¹⁷⁴ A legal fiction, corporate personality, has, in the literalness of the age, been imbued with personhood.¹⁷⁵ And this judicial deference to corporate power and autonomy, Schultz persuasively argues, is increasingly at odds with an American democratic order that must, if it is to be meaningful, be effectively participatory and inclusive, and dedicated to equality as a substantive principle of justice.¹⁷⁶

C. Erik Loomis

Erik Loomis is a Professor of Labor History and Director of Graduate Studies at the University of Rhode Island. He is the author of several important studies on labor history and the abuse of corporate power. His book *Out of Sight: The Long and Disturbing Story of Corporations Outsourcing Catastrophe* is a chilling account of the mobility of money and the on-the-ground grief it causes to communities and countries.¹⁷⁷ Condemning the system that two generations of political and business leaders have built, Loomis writes: “The current system of economic and environmental exploitation abroad and the decline of the middle class at home is the result of

170. See generally DAVID SCHULTZ, *ELECTION LAW AND DEMOCRATIC THEORY* (2014).

171. *Id.* at 269.

172. *Id.* at 270.

173. David Schultz, *Justice Brandeis’ Dilemma Revisited: The Privileged Position of Corporate Power in American Democracy*, 19 U. ST. THOMAS L.J. 134 (2023).

174. *Id.* at 146.

175. *Id.* at 146–49.

176. *Id.* at 149–53.

177. See generally ERIK LOOMIS, *OUT OF SIGHT: THE LONG AND DISTURBING STORY OF CORPORATIONS OUTSOURCING CATASTROPHE* (2015).

a choice made by corporate leaders to profit at the expense of working people around the world.”¹⁷⁸

Loomis’s book *A History of America In Ten Strikes* is similarly important.¹⁷⁹ Regarding this book, a reviewer has written:

The title says it all, if one reads it carefully. This is not really a book about strikes but instead a history of the United States centered on political economy and class struggle. In ten chapters, Erik Loomis moves generation by generation from the 1820s to the present, anchoring each in the story of a famous strike.¹⁸⁰

Loomis’s contribution to the Private Power symposium promises to be as significant as these book-length projects. Indeed, he builds upon these earlier works to propose the creation of an international regulatory state protective of the rights of labor and the panoply of human rights.¹⁸¹ He clearly perceives the destruction caused by the international “hyper-mobility” of capital and he blames the ruination thereby caused on the bipartisan neoliberal trade policies of the last four decades.¹⁸² Bill Clinton, George W. Bush, and Barack Obama all come in for criticism in his paper for promoting an international trade regime that led to deindustrialization, not only in the United States, but in other nation-states that attempted to lift workers out of poverty, such as Mexico.¹⁸³

Loomis confronts this failed paradigm with a bold legislative agenda.¹⁸⁴ He draws from the vision that animated the many legislative successes of the 1930s to the 1970s – from the New Deal to the Environmental Protection Agency and the Occupational Health and Safety Administration.¹⁸⁵ This was a vision that aimed at wide-scale material prosperity and a safe and healthy environment.¹⁸⁶ His paper is fairly effervescent with fresh thinking. What about reviving the old United Auto Workers’ idea that employees had a “property interest” in their work?¹⁸⁷ What about enacting a Corporate Accountability Act that could be used to set standards not only domestically, but internationally, through control of supply chains? And

178. *Id.* at 19. Loomis adds: “Capitalism is made up of individuals. That means there are alternative choices corporate leaders can make. . . . The free market is not a natural force. It is not gravity. . . . We can reconcile capitalism and dignified employment, profit and environmental stability. But this can happen only when we unpeel the layers of myths around corporate behavior . . .” *Id.*

179. ERIK LOOMIS, *A HISTORY OF AMERICA IN TEN STRIKES* (2018).

180. James N. Gregory, Book Note, 17 *Lab. Stud. Working-Class Hist.* 144, 144 (2020) (reviewing Erik Loomis, *A History of American In Ten Strikes* (2018)).

181. Erik Loomis, *Recreating the Regulatory State—Internationally*, 19 *U. ST. THOMAS L.J.* 101 (2023).

182. *Id.* at 103.

183. *Id.* at 111–18.

184. *Id.* at 118.

185. *Id.* at 121–28.

186. *Id.*

187. *Id.* at 127.

what about transposing these insights to the entire world?¹⁸⁸ The great danger, Loomis acknowledges, “is that corporations have largely superseded the nation-state.”¹⁸⁹ It is the task of political authority to reassert democratic control over such enterprises.¹⁹⁰

D. *Eric J. Boos*

Eric Boos has been most recently a visiting law professor at the University of Idaho. He is the author of an important study that compares and contrasts the legal philosophies of the contemporary legal positivist H.L.A. Hart (1907-1992) and the thirteenth-century scholastic theologian Thomas Aquinas.¹⁹¹ In the *Tulane Journal of International and Comparative Law*, Boos presciently criticized free-trade policies for their harmful effects on sub-Saharan Africa.¹⁹² He has carefully explored the problematic relationship of informed consent and personal autonomy, especially in the medical context.¹⁹³ And his study of the intersection of women’s suffrage, prohibition, the age of consent, and the brewing industry in early twentieth-century Wisconsin remains a masterpiece of careful, synthetic social and legal history.¹⁹⁴

Boos’ contribution to the Private Power Symposium is premised on a clear-sighted view of the crisis pervading American life.¹⁹⁵ This is the growing national emergency of economic inequality and precariousness of existence.¹⁹⁶ Boos looks to Alan Greenspan’s writings as support for his proposition.¹⁹⁷ And to be sure, Greenspan has identified economic inequality as a crisis, though he seems little concerned about it.¹⁹⁸

In fact, the situation is far worse than Greenspan imagines it to be. Consider, for example, American life expectancy. It began to decline in the

188. *Id.* at 128–33.

189. *Id.* at 119.

190. *Id.* at 133.

191. Eric J. Boos, *Perspectives in Jurisprudence: An Analysis of H.L.A. Hart’s Legal Theory* (May 1996) (Ph.D. dissertation, Marquette University) (ProQuest).

192. Eric J. Boos, *Between Scylla and Charybdis: The Changing Nature of U.S. and EU Development Policy and Its Effects on the Least Developed Countries of Sub-Saharan Africa*, 11 *TUL. J. INT’L & COMPAR. L.* 181 (2003).

193. Karene M. Boos & Eric J. Boos, *At the Intersection of Law and Morality: A Descriptive Sociology of the Effectiveness of Informed Consent Law*, 5 *J. L. & SOC’Y* 457 (2004).

194. Eric J. Boos, *Strange Brew: The Wisconsin Brewing Industry’s Opposition to Prohibition, Women’s Suffrage and the Age of Consent Laws*, 12 *S. CAL. REV. L. & WOMEN’S STUD.* 3 (2002).

195. Eric J. Boos, *Moral Imperative—Legal Requirement: Why Law Schools Should Require Poverty Law and International Human Rights*, 19 *U. ST. THOMAS L.J.* 63 (2023).

196. *Id.* at 64.

197. See ALAN GREENSPAN, *THE AGE OF TURBULENCE: ADVENTURES IN A NEW WORLD* (2007).

198. KURT ANDERSEN, *EVIL GENIUSES: THE UNMAKING OF AMERICA: A RECENT HISTORY* 280–81 (2020).

2010s,¹⁹⁹ and it continues to decline today.²⁰⁰ Hunger is a real and growing problem in the United States,²⁰¹ as is homelessness.²⁰² The racial wealth gap has widened.²⁰³ America is no friend to the vulnerable and increasingly turns its back on those in need.

This encompassing crisis cries out for solutions. Boos proposes the need to educate America's legal professionals to the dimensions of this encompassing social tragedy.²⁰⁴ All students, Boos argues, ought to take a mandatory course on poverty law: "There can be no denying that poverty invokes a consideration of justice, and justice is a primary purpose of our entire legal establishment."²⁰⁵ Such a course should be given academic rigor and made part of an effort "to integrate . . . [the] notion of justice

199. Lenny Bernstein, *U.S. Life Expectancy Declines for the First Time Since 1993*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/national/health-science/us-life-expectancy-declines-for-the-first-time-since-1993/2016/12/07/7dcdc7b4-bc93-11e6-91ee-1addffe36cbe_story.html; Ben Tinker, *US Life Expectancy Drops for Second Year in a Row*, CNN (Dec. 21, 2017, 8:57 PM), <https://www.cnn.com/2017/12/21/health/us-life-expectancy-study>; Lenny Bernstein, *U.S. Life Expectancy Declines Again, a Dismal Trend Not Seen Since World War I*, WASH. POST (Nov. 29, 2018, 12:01 AM), https://www.washingtonpost.com/national/health-science/us-life-expectancy-declines-again-a-dismal-trend-not-seen-since-world-war-i/2018/11/28/ae58bc8c-f28c-11e8-bc7968604ed88993_story.html; Wash. Post Ed. Bd., *America Is Losing Ground to Death and Despair*, WASH. POST (Nov. 30, 2018, 7:05 PM), https://www.washingtonpost.com/opinions/america-is-losing-ground-to-death-and-despair/2018/11/30/77c6b38e-f45a-11e8-bc7968604ed88993_story.html ("[Falling life expectancy represents] a sustained decline in expected life span at birth not seen in the United States since the years of World War I and the 1918 flu pandemic."); ANDERSEN, *supra* note 198.

200. Atheendar S. Venkataramani, Rourke O'Brien & Alexander C. Tsai, *Declining Life Expectancy in the United States: The Need for Social Policy as Health Policy*, 325 JAMA 621 (2021); Claire Klobucista, *U.S. Life Expectancy Is in Decline. Why Aren't Other Countries Suffering the Same Problem?*, COUNCIL ON FOREIGN RELS. (Sept. 8, 2022, 1:40 PM), <https://www.cfr.org/in-brief/us-life-expectancy-decline-why-arent-other-countries-suffering-same-problem> ("[L]imited access to health care and increases in poverty amid the pandemic have only compounded the problem [of declining life expectancy], especially for marginalized groups."); ANDERSEN, *supra* note 198.

201. Nina Lakhani, *One in Four Faced Food Insecurity in America's Year of Hunger, Investigation Shows*, GUARDIAN (May 3, 2021, 2:32 PM), <https://www.theguardian.com/environment/2021/apr/14/americas-year-of-hunger-how-children-and-people-of-color-suffered-most>; Patty Housman, *The Growing Hunger Crisis in America*, AM. U. (Oct. 8, 2020), <https://www.american.edu/cas/news/the-growing-hunger-crisis-in-america.cfm>; Adam Minter, *America's Hunger Pandemic Is Getting Worse*, BLOOMBERG (Jan. 2, 2022, 7:00 AM), <https://www.bloomberg.com/opinion/articles/2022-01-02/america-s-hunger-pandemic-is-still-getting-worse>.

202. German Lopez, *Homeless in America*, N.Y. TIMES (July 15, 2022), <https://www.nytimes.com/2022/07/15/briefing/homelessness-america-housing-crisis.html>; Isabel McDevitt, *The Typical Homeless Person in America Might Surprise You*, HILL (Oct. 11, 2022, 7:30 AM), <https://thehill.com/opinion/civil-rights/3680209-the-typical-homeless-person-in-america-might-surprise-you/>.

203. Benjamin Harris & Sydney Schreiner Wertz, *Racial Differences in Economic Security: The Racial Wealth Gap*, U.S. DEP'T TREASURY (Sept. 15, 2022), <https://home.treasury.gov/news/featured-stories/racial-differences-economic-security-racial-wealth-gap>.

204. Boos, *supra* note 195, at 84.

205. Boos, *supra* note 195, at 87.

across the curriculum.”²⁰⁶ The law school curriculum, Boos continues, should be reformed in a second way also, and that is by adding a required course on human rights.²⁰⁷ The work of the lawyer, after all, should be directed at the common good of society, and human rights should be placed at the center of that common good.²⁰⁸

E. Courtney Hostetler

Our final contributor is Courtney Hostetler, who is Senior Counsel for Free Speech For People. Free Speech For People is an advocacy group that means to challenge the primary role of money in American political life. One can gain a fair sense of the organization’s work from the blog that it maintains. In October 2022, it endorsed the campaign to ban Super PACs [Political Action Committees] under Massachusetts law.²⁰⁹ In July 2022, the organization joined a lawsuit challenging restrictive voting laws in Arizona.²¹⁰ Also in July 2022, the chairperson of Free Speech For People, Ben Clements, published a law-review article urgently calling for the legislative adoption of a “Big Tech Accountability Act” to subject these large corporations to democratic oversight and regulation.²¹¹ In the spring of 2022, Free Speech For People filed suit to stop voter intimidation tactics in Colorado.²¹²

Ms. Hostetler’s contribution focuses on the ways in which corporate political action corrupts American democratic processes.²¹³ While Ms. Hostetler notes that “[i]t is still constitutional to prohibit corporations from directly contributing to candidate campaigns and political parties,”²¹⁴ it is now also the case that corporations and wealthy individuals can engage in

206. Boos, *supra* note 195, at 88.

207. Boos, *supra* note 195, at 89.

208. Boos, *supra* note 195, at 90.

209. *Legal Advocates File Two Challenges in Support of Proposed Ballot Measure to Ban Super PACs in Massachusetts*, FREE SPEECH FOR PEOPLE (Oct. 24, 2022), <https://freespeechforpeople.org/legal-advocates-file-two-challenges-in-support-of-proposed-ballot-measure-to-ban-super-pacs-in-massachusetts/>.

210. *FSFP Joins Campaign Legal Center in Federal Lawsuit Challenging New Voter Suppression Laws in Arizona*, FREE SPEECH FOR PEOPLE (July 27, 2022), <https://freespeechforpeople.org/fsfp-joins-campaign-legal-center-in-federal-lawsuit-challenging-new-voter-suppression-laws-in-arizona/>.

211. Ben Clements, *The Big Tech Accountability Act: Reforming How the Biggest Corporations Control and Exploit Online Communications*, 44 W. NEW ENG. L. REV. 5 (2022).

212. Peter Stone, *Groups Perpetuating Trump’s 2020 Election Lie Face Scrutiny and Lawsuits*, GUARDIAN (May 9, 2022, 5:00 AM), <https://www.theguardian.com/us-news/2022/may/09/conservative-groups-trump-election-lie-lawsuits-scrutiny>; *The Guardian Publishes New Article on Our Federal Lawsuit to Stop Illegal Voter Intimidation in Colorado*, FREE SPEECH FOR PEOPLE (May 9, 2022), <https://freespeechforpeople.org/the-guardian-publishes-new-article-on-our-federal-lawsuit-to-stop-illegal-voter-intimidation-in-colorado/> (providing links to the litigation).

213. Courtney Hostetler, *Corporations, Foreign Investments, and U.S. Elections*, 19 U. ST. THOMAS L.J. 155 (2023).

214. *Id.* at 158.

“independent expenditures” with the goal of influencing public policy.²¹⁵ She notes an even more ominous trend – the rise of “foreign-influenced” corporations that spend lavishly to defeat ballot measures aiming to protect workers or advance other socially beneficial causes.²¹⁶

She gives many examples, but one might single out Uber, which “is a US corporation” even though “the sovereign wealth fund of Saudi Arabia actually own[ed] about five to ten percent of its corporate stock and has a seat on its board of directors.”²¹⁷ It was Uber, along with other “app-based delivery companies” like Lyft and DoorDash, that financed a successful California ballot initiative “to treat their drivers as independent contractors instead of employees.”²¹⁸ Thus great wealth was utilized to control and manipulate public opinion and the outcome of elections.²¹⁹

F. Conclusion: Private Power and Democratic Accountability

It might be old-fashioned, simplistic even, to expect that the people should govern in a nation that proclaims itself to be democratic. Yet, as this symposium makes clear, large national responsibilities have been metaphorically if not literally “out-sourced” to private entities. Indeed, it is quite literally the case with some aspects of criminal punishment in at least some American states. The U.S. space program, too, has taken on some of the more disturbing trappings of privatization.

Less literally, but no less real, it is also true of many of the topics that the Symposium contributors have explored. Surveillance capitalism dominates the workplace in ways unimaginable a generation or two ago. Corporate bigness has led to the adoption of public policy that favors the haves over the have-nots. Workers are exploited by a hyper-mobile capitalism that has led to the deindustrialization of large parts of the American mid-section.²²⁰ The results of elections are distorted by deluges of corporate campaign cash. But despair should not be the order of the day. The Symposium’s contributors have not only diagnosed the pathologies that plague America, they have proposed solutions. It is hoped that these proposals are taken seriously in the public-policy debates that are sure to follow.

215. *Id.* at 158–59.

216. *Id.* at 156.

217. *Id.* at 161.

218. *Id.* at 160.

219. *Id.* at 160–62.

220. See Justin H. Vassallo, *Liberals Are Finally Realizing That Deindustrialization Was a Disaster for the Working Class*, JACOBIN (Nov. 8, 2022), <https://jacobin.com/2022/11/rana-foroohar-homecoming-review-regional-development-deindustrialization>.