Globalization(s), privatization(s), constitutionalization, and statization: Icons and experiences of sovereignty in the 21st century

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What can democratic constitutional states offer that multinational corporations and global governance cannot? One answer, coming from recent decisions by courts in Israel and India, is policing and incarcerating, held to be activities that could not be constitutionally outsourced to third-party providers.

The articulation of an anti-privatization right is novel, but the activities it recognizes as belonging to the state have a long track record of distributing benefits across class lines to both public and private sectors. Police and prisons—along with courts as the conduit—are not often listed as “social rights” but ought to be, for they are government-provided services aiming to make both the citizenry and the state secure. The history of these services is a roadmap to statization, constitutionalization, privatization, and globalization, for the interactions among citizens, government, and third parties gave content to the roles of police, judge, and prison official. These actors in turn came to personify the state. During the twentieth century, constitutions and international conventions imposed new constraints on police, judges, and prisons when those subject to their authority gained recognition as rights holders.

Yet if institutions of surveillance, confinement, and control are the only obligatory relationships that governments have, democratic constitutional states distinguish themselves from corporate and transnational organizations solely through their unique capacity to legitimate the imposition of violence. For constitutional sovereignty to join privatization and globalization as sustaining twenty-first century metanarratives entails offering more than prohibition and punishment. To do so requires translating the great ambitions of the twentieth century—equality and dignity—into legitimate institutions with the gravitas associated with police, courts, and prisons. Other infrastructure functions need to be elaborated as state-based activities in which citizen and state partake and through which collective norms develop. Exemplary are postal networks, inscribed in some forty constitutions that allocate government responsibilities for or protect the confidentiality of the post. Yet, postal services are now also at risk of losing their identity as state-supported public platforms offering universal services within and across borders.

1. “Ization”

Globalization and privatization encode two grand metanarratives marking a new understanding of the status quo, even as the terms denote processes of change operating across diverse contexts. Because these words are proffered for essays honoring ten years of I-CON, the question turns to the relationship of globalization and privatization to the state—a locus of authority constituted by laws and institutions, by economic and cultural practices, by a territory delineating the parameters of by its power, and by its own imagined community. The development of constitutionalism adds yet another layer, simultaneously authorizing state action while imposing constraints on how the state may govern.

“Ization” has become affixed to so many English words that it has lost the connotations it once had to mobilizing efforts aimed at producing state identity in the wake of colonization. In the twentieth century, “Indianization” was used to describe the British policy of “increasing the number of native Indians elected to the legislature in India” so as to achieve a “transfer of authority to native citizens.” In the 1950s, the usage was reiterated in “Egyptianization” and “Nigerianization,” followed by “Vietnamization” as the United States tried to enlist Vietnamese to continue anti-Communist efforts in Indochina.

“Ization” likewise operates on the “private” and the “global” to capture the directionality of movements of power—acting on the “public” and the “national” to shift sets of activities and capacities away from the state (be it a constitutional government or not) to other venues. Private firms, crossing national borders, undertake some services (such as running prisons, policing, arbitrating, administering ports, supplying combatants, educating, providing housing or health services) that have been identified

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1. Id.
2. Id.
3. Id.
4. Id.

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3. Id.

4. Id.
questions of transnational constitutionalism, exemplified by the founding of I-CON, launched in 2003 "to fill a need created by the recent trend toward globalization of constitutional norms," and reiterated in 2010 when I-CON’s editorial "baton" was passed.

In contrast, privatization has not been much the topic of constitutional exchanges, and occasional efforts to seek judicial review to limit privatization have generally been rebuffed. As one comparativist (enlisted to oppose a constitutional challenge to a private prison in Israel) commented, functions that were "essential components of governance were matters of political, economic and social preference...properly, in a democracy, left to the choice of the electorate." Further, he opined, given the history of activities moving between government and the private sector, any essentialist quest into core governmental functions was ill-advised.

A few decisions break the constitutional silence on privatization. One case, whose name (Academic Center of Law and Business v. Minister of Finance) gives no hint that its subject matter is prisons, was issued in 2009 by Israel’s Supreme Court. The Israeli Parliament had, in 2004, licenced a single "private" prison with 800 beds, managed


Jowell, supra note 14. ¶ 29–30. He did note that certain activities, "police and defence" plus "Royal Perogatives" of common law Crown powers, such as treaty making, prosecution, and dissolving Parliament, might well be core government powers. Id. ¶ 31.


A few other courts have dealt with challenges to privatization of services. For example, the German Constitutional Court required judicial oversight of the effects of privatization on workers who had been employees of the state. See Bundesverfassungsgericht [BVerfG] 1 BvL 174/09, Jan. 25, 2011, http://www.bverfg.de/entschieden/ezs/20110125_bvL17409.htm. Other courts have rejected judicial review of privatization related to economic development. See, e.g., Delhi Science Forum v. Union of India and Another, AIR 1996 S.C. 3356 (rebutting a challenge to a telecommunication policy permitting private sector entrants)
by a for-profit corporation that was required to report to and comply with government regulations. The litigation entailed a global constitutional exchange among private and state parties comparing the degree of the Israeli privatization to English, French, and American models. The corporation that had won the bid for the contract included investors from various countries, and the opposing parties proffered statements from legal experts about the laws of France, South Africa, the United Kingdom, the United States, and the European Court of Human Rights.

The Israeli Supreme Court, in turn, undertook its own "comparative analysis" to address "the phenomenon of prison privatization around the world." After surveying diverse case law and political theories, the justices concluded that privatization was constitutionally noxious as a domestic matter, because the legislation chartering the prison violated prisoners' human dignity and liberty, expressly protected by one of Israel's Basic Laws. The "novelty" of a constitutional "right against privatization" has already sparked commentary in the pages of I-CON.

What makes the decision worth re-engaging is not only what was banned (private entrepreneurs undertaking an activity that the court defined to be intrinsically violative of detainees' human rights[23]), but what the decision suggests can be privatized—which is so much else the state does. The court styled its ruling as predicated on inmates' personal rights rather than on a structural analysis of what constituted the "hard core" of sovereign powers that could not be delegated "to private" litigants who have standing to pursue such claims.

A "private" entity—the Academic Center of Law and Business, "acting as a public petitioner" (joined by a former member of the Israeli Prison Service and later by a prisoner) brought the facial challenge to a 2004 legislative enactment authorizing one private prison. Academic Center, supra note 14, ¶ 1 (Beinisch). This "private" law school is itself innovative, in that before the founding in 1994 of another such entity (the Interdisciplinary Center), legal education was only available through universities partially funded by the state, which capped tuitions. The litigation's configuration also reflects Israel's welcoming of "private" litigants who have standing to pursue such claims.

A.L.A. Management and Operations, an Israeli corporation with non-Israeli investors, "was incorporated for the specific purpose of bidding." That corporation built a new facility near Beer-Sheva for 800 prisoners: after the decision, the building was sold to the Israel Prison Service. See Richard Harding, State Monopoly of "Permitted Violation of Human Rights": The Decision of the Supreme Court of Israel Prohibiting the Private Operation and Management of Prisons, 14 POSSENDER & Soc'y 131, 134, 144 n.6 (2012).

Jeffrey Jowell, asked by Israel's Minister of Finance, provided a "comparative perspective" on the "researched jurisdictions" of the United Kingdom, South Africa, the European Union, and the European Convention on Human Rights. See Jowell, supra note 14. He concluded that privatization of prisons did not, under the laws of those countries, confer a "core executive function on a non-state actor" or constitute an "affront to the human dignity and personal liberty of the prisoners." Id. ¶¶ 7, 11.

Academic Center, supra note 14, ¶ 57, 61 (Beinisch).

Barak Medina, Constitutional Limits to Privatization: The Israeli Supreme Court Decision to Invalidate Prison Privatization, 8 Iso's. J. Crim. L. (ICON) 690, 691, 696 (2010). Medina called the decision the first in Israeli history to strike an "entire body of legislation" rather than declaring a subset invalid.

"[Un]employment powers . . . involved] a continuous violation of human rights." Academic Center, supra note 14, at Introduction, ¶ 18, 21-22 (Beinisch). The Chief Justice also noted, that while the issues raised by other forms of privatization were not before the court, various functions, such as the appointment of a private person to prosecute, to enforce court judgments, and to staff facilities for the mentally ill, were "not so closely related to the manifestly sovereign functions of the state . . . [as] that involved in the management and operation of a prison." Id. ¶ 32.

23. Academic Center, supra note 14, ¶ 63 (Beinisch).

24. Sundar v. Chattisgarh, (2011) 7 S.C.C. 441 ¶ 73 (hereinafter "Sundar"). The case was filed by "private" parties—a sociologist and historian as well as a former government minister. At issue were the appointments pursuant to Chattisgarh's 2007 law addressing Special Police Officers (SPOs), which the court contrasted with the 1861 Indian Police Act that also authorized supplementing state-based police forces through specially-appointed forces.


26. Id. ¶ 41.

27. Id. ¶ 99, 12-14.

28. Id. ¶¶ 53, 4-20.

29. Id. ¶ 41.

30. Id. ¶ 73. The court limited the 2007 Chattisgarh Police Act by constraining the role of SPOs. The court also ordered that India stop providing support funds for improper use of SPOs, that the state retrieves the arms issued, and that the state directly provide adequate security. Id. ¶ 75.

A distinct question are the requirements the government can impose on those whom it employs. For example, the United States Supreme Court has struck a state law banning non-citizens from becoming members of its bar while upholding a state law requiring public school teachers to be citizens rather than permanent resident aliens. Compare In Re Griffiths, 413 U.S. 717 (1973), with Ambach v. Norwick, 441 U.S. 66 (1979).
When god and monarchy no longer sufficed, the provision of "peace and security" became a pillar of sovereignty, manifested through the development of administrative capacities to police, adjudicate, and punish. Democratic regimes offered another basis, popular sovereignty, in which the relationship between citizen and state licensed governments to impose violence on their own populations. Constitutions—democratic and not—codified both that authority and its limits.

Twentieth-century egalitarian movements, shifting the focus from nationalism to democratic self-governance, embedded another layer by reading obligations into old constitutions and writing new ones to include all persons, regardless of race, ethnicity, and gender, within the circle of rights-holders. Aspirations for states expanded, as constitutions elaborated a range of rights beyond security. India’s Constitution, for example, protects rights to education and access to legal aid; several of the constitutions in Central and South America elaborate environmental rights. But challenges of implementation and radical inequalities persist, posing renewed puzzles about how to legitimate collective action and expand opportunities across class lines.

Many tasks that have historically been associated with sovereignty—war-making, imposing taxes, and legislating—can be remote from wide segments of the population, either because the activities occur offshore, involve a small set of participants, are episodic, or are concentrated at a single site such as the one city in which a legislature sits. In contrast, the institutions on which sovereigns have relied to monitor and control—police, courts, and prisons—turn the abstraction of government into a material presence, personifying the state and demonstrating its capacity to provide goods and services—peace and security—that have utilities for the private as well as the public sector. Hence, a portion of this commentary is devoted to mapping how these activities helped to make the state, became artifacts of the state, and provided springboards for the development of norms about the state.

Through millions of exchanges, on street corners and inside courts and prisons, rules have been shaped expressing values about the relationship of governed and government. Practices in these institutions produce norms and ideologies that make words like "the police," "the judge," and the "prison warden" intelligible and laden with behavioral expectations. In many eras, those rules authorized autocratic power; hierarchies of status rendered some individuals abused on the streets, marginalized in courts, and mistreated in prisons, as the personages of police, judge, and custodian embodied inhospitable and often oppressive control.

More recently, democratic constitutions have added attributes modeling these state actors as accountable and constrained. Constitutional injunctions now frame the exchanges and require trained officials to treat individuals (suspects, detainees, litigants, witnesses) with dignity. Further, at the subconstitutional level, dense regulations (such as codes of criminal and civil procedure and police manuals) formalize and structure these interactions—even as the content of obligations remains the subject of intense disagreement and failures in practice are commonplace. New modes are also developing, captured by phrases such as “community policing,” “therapeutic justice,” and “residential correctional centers.”

The relationship between policing and state formation that turned the police officer into "the most visible representative of the state" has been charted, as have contemporary trends to privatize and to globalize policing. Here, building on other work and sketching the contributions made by both courts and prisons to state development, I seek to anchor an appreciation both for the longevity of these institutions as sources of experiences of sovereignty and for the novelty of their current constitutional obligations. I then turn to efforts to privatize these services and to the implications of insights that policing, adjudicating, and incarcerating are not constitutionally wholly delegable to the private and not wholly transferable to the global.

The insistence by the Supreme Courts of India and of Israel that private police and prisons violated each country’s constitution locates state identity in the discharge of obligations to staff particular institutions. Although not often characterized as "social rights," police, courts, and prisons are government-provided services to be added to a list usually referencing rights to education, health, and work. These older social rights are embedded in the broader effort to generate a secure environment in which political and economic institutions can function and prosper. Police, courts, and prisons have come to seem so natural to government as to go unnoticed as requiring significant state commitments supporting daily services. The infrastructures that legislatures have funded to sustain these functions (with occasional interventions by judiciaries and oversight through executive officials) illuminate the ways in which content could be given to more recently crafted social rights. And these exemplars


32 This work thus joins others in thickening histories of state finding beyond the fiscal-military paradigm. See, e.g., Steve Pincus & James Robinson, The Rise of the Interventionist State (paper on file with the author, 2012); TERRI HENDERSON, STATE AND SOCIAL CHANGE IN EARLY MODERN ENGLAND 1560–1640 (2002).

33 A comparative overview, permitting a glimpse of the wealth of activity, attention, and regulation of courts, is the essay ORDINARY PROCEEDINGS IN FIRST INSTANCE by Ben Kaplan, Kevin M. Clermont, Alphonse Kohlb, Hans Schirm, Hans Hoyer, Edmund Wengerke, Per Olof Helld, Enrique Vescovi, Mauro Cappelletti, and Bryant Garth, in CIVIL PROCEEDINGS, XVI INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 250 (1984).

34 STANLEY H. PALMER, POLICE AND PROTEST IN ENGLAND AND IRELAND 1780–1850 at 6 (1988). Palmer attributed the rise of policing to fear of social unrest; his account identifies the development of policing as a political effort to provide crowd, as contrasted with crime, control. Id. at 7–11; see also J.M. BLUMENTHAL, POLICE AND PUNISHMENT IN LONDON 1660–1750 (2001).


36 See, e.g., HIBS, supra note 32.

37 The distinction between global norms of human rights and their instantiation at national and local levels has been well mapped. The "global" may spawn its own police, courts, and prisons, but the scale and reality of material existence locate individuals in time and place and hence states (albeit not necessarily the ones now configured) are likely to endure to provide these functions and (as I argue in this essay) many others. See generally SEYLA BENHABBI, DIGNITY IN ADVERSITY: HUMAN RIGHTS IN TROUBLED TIMES (2011).

38 See generally EXPLORING SOCIAL ROSIEZ: BETWEEN THEORY AND PRACTICE (Daphne Barak-Erez & Aeyal M. Gross eds., 2007).
prompt inquiry into what other infrastructure rights ought to be integrated into the political-social welfare activities of democratic states.

My argument is that these forms ofIdentification interactions become state functions by placing them outside the purview of total third-party provisioning, even when, as the Israeli and Indian Supreme Courts exemplify, the decision to outsource may be the product of democratic decision-making. Other such rights need to be constructed—not essentialized but made—to enable individuals to experience democratic states as vital resources facilitating collective debate about the import of state identity and producing inter-generational benefits across class and racialized lines. The building of state and citizen relationships through experiences beyond Michel Foucault’s surveillance (even when disciplined by constitutional norms) gives states an identity predicated on more than control and offers individuals roles other than customers.

The challenges are many, including whether one can locate normative criteria to identity services that states must provide. By insisting it was basing its ruling on the personal rights of detainees, the Supreme Court of Israel sought to avoid the difficulties—with its polity, let alone on a global scale—of articulating such criteria. Other constitutional jurists have likewise puzzled about whether to name a function as an “essential attribute” of government. So many activities have been and are in a mélange of public and private action that deciding when to apply the label “state action” spawns reams of doctrine. Even as we today speak of the “Dutch” and the “English” as colonial authorities, much of the exercise of that form of “sovereignty”—including policing, jailing, and courts—was undertaken by “private” state-supported corporations, the Dutch and the English East India Companies.

My focus is therefore not an empirical quest for the timeless “essence” of the state but on the normative question about what it is that we—in democratic constitutional polities—want to make in this century to be a function of the state, both transnationally and within a particular government. “Why a constitutional state?”—might well be the retort and is certainly the challenge posed by globalization and privatization. An abbreviated response is that states continue to offer opportunities for self-governance; that, in the last century, democratic constitutional states have produced new rights to equality and dignity for sets of persons that were long excluded, and that constitutional states aspire to fair distributions of opportunity while also continuing commitments to personal liberty and security. This packet of concerns is not one on which globalization can deliver and in which privatization has any interest.

But this set of aspirations is relatively new and potentially fragile. Because the vitality of globalization and of privatization is now assumed, the burden of justifications has shifted toward the state, in need of explaining itself as a desirable organizational form. The issue is whether the “constitutionalization” to which I-CON is devoted can offer a sufficiently robust competing or complementary ideology. To do so (and thereby to join privatization and globalization as twenty-first-century metamorphoses) requires more than insisting that the uniqueness of the constitutional state resides in prohibition and punishment.

What else is there? Constitutions, transnational conventions, and social practices are the resources to mine for richer accounts. Constitutions specify a host of aspirations and make legal commitments to which a state can be held, even as the content varies over time and implementation comes through “progressive realisation” (to borrow the formulation from the South African Constitution41). Thus, responses to the questions—what do/must constitutional states offer that multinational corporations and global governance cannot—come in part through the methods used by the Israeli and the Indian courts, intent on interpreting their respective constitutive laws in the context of transnational precepts and admonitions.

These rare cases on constitutional anti-privatization rights are radically ambitious and yet too sparse. These judgments insist on state provisioning, and hence on judicial implementation of this form of a social right. Because, in many social orders, the affirmative obligation to maintain peace and security through policing and prisons goes unfulfilled and leaves individuals and communities in jeopardy, judicial review (in the context of privatization and otherwise) is admirably innovative. But if policing and prisons, along with courts as the conduit, are the only venues in which state identity is expressed, then constitutional states distinguish themselves from corporate forms solely through their unique capacities to legitimate violence. Policing, courts, and incarceration ought not to stand as the sole examples of functions so entwined with state identity and so personally experienced by individuals that they alone must be undertaken predominantly or exclusively by the state instead of by private intermediaries. Constitutional states need more collective problems to solve


42 The aspirations for global citizenship and the distinction between constitutional subjects and subjectivities are explored by Selya Benhabib in her review of Michel Rosenfeld’s The Identity of the Constitutional Subject: Selfhood, Citizenship, Culture, and Community (2010), in 33 Cardozo L. Rev. 1889 (2012). My argument is that the institutional activities are fixed, as is exemplified by debates about the relationship between member states and Europe, including the decision on the Economic Stability Plan. See, e.g., Bundesverfassungsgericht [BVerfG] 2 BvR 170, June 30, 2009 ¶ 251-252, http://www.bverfg.de/entscheidungen/en/2009/06/30_2bvr17000en.html.


44 See, e.g., Jackson, supra note 43, § 27(2) (healthcare, food, water, and social security).
than regulating violence, and more institutional structures than police, courts, and prisons in which to express commitments to their values and to develop reciprocal relationships with their populations. My interest is in identifying other structural facets of governance that can be understood—either within a given nation state or transnationally—as entitlements to be appreciated for their collective utilities in producing identity for and affiliation to the constitutional state.

I seek to unencumber the now-conventional social rights of education, health, and housing from the status of outlier and from debates about whether they are subject to judicial enforcement or reliant on other means of implementation.45 I do so in part by sketching that state provision of services beyond self-defense is not a novel artifact of twentieth-century constitutions but longstanding. Police, courts, and prisons predate the nomenclature of “social rights” but all are in service of the right to security that contributed to and came to be embedded in state identity. Judicial involvement in these institutions (limited and not always efficacious) has also become commonplace.

A scan of other facets of constitutions locates examples of services such as transportation, public lands, and environmental protection that are also infrastructure activities through which individuals could experience themselves as part of a state, facilitating the growth of both individual and collective capacities. I close with a brief discussion of one, an obligation encoded in some constitutions and not often referenced under the rubric of rights (social or otherwise), to provide universal postal services and other forms of communication. Such services, found in old as well as new constitutions, exemplify state provisioning supportive of private and national agendas and expressive of government obligations to accord equal and respectful assistance.

Above, I added “-ization” to the word constitutional—and thus joined others using the term to capture how constitutional precepts have become endemic within and beyond the state. The term marks the dynamic role of constitutions in identifying and protecting citizen-state relationships.46 I deploy “statization” as both a reminder of the recent lineage and of the continuing evolution of nation states. These words (awkward until naturalized, tucked into Google searches, and accepted by Microsoft’s spellcheck) acknowledge the degree to which the state and its constitutional project have become emblematic so that monitoring and controlling populations will not be the only signatures of the state.

2. Statization: the development of domestic sovereign authority to adjudicate and punish

State coercion—violence—is at the core of the implementation of all judgments. Whether a remedial order puts a person in detention or requires contracts to be performed, money to be paid, assets transferred, families supported, or relationships severed, state-backed authority disrupts lives and businesses.48 Mapping the institutional expansion of state capacities to judge and to punish is one way to chart the development of the state, just as tracking the constraints imposed on courts and prisons through both national and transnational legal regimes illuminates the path of constitutionalization around the globe.

Adjudication and punishment are ancient artifacts of polities long replaced by new configurations. Rulers in Mesopotamia, Egypt, Palestine, Greece, and Rome all relied on public performance of their adjudicatory powers to generate capacity to impose order.49 The apparatus of adjudication was the daily counterpart of the more dramatic moments of sovereign creation through acquiring territory by compact or conquest.50 Early adjudication was not free-form but located in terms of process and place, with roles assigned to disputants, witnesses, and jurists. The acts, performed before an audience, were recorded in clay, stone, and papyrus. These structured, public, interpersonal exchanges embedded fledgling sovereign powers. These interdependent communal activities were a form of what Joseph Manning described as “connective justice,” referencing the aim in Egypt to bridge “divine and human worlds.”51 The term can be generalized to reflect dispute resolution functions in anchoring affiliations among individuals and their rulers.

Parallel practices took place in medieval Europe, and some historians identify courts as the “first municipal governments,” brought into being to protect markets and territories by deciding disputes and thereafter acquiring additional administrative

47 See THE INVENTION OF THIRTY-ONE (Eric Hobsbawm & Terence Ranger eds., 1983).
48 The privatization debate about “outsourcing violence” has focused on the privatisation of policing, criminal sanctions, and the military. See, e.g., Alon Harel, Outsourcing Violence?, 5 Law & Ethics of Hum. Rights 395 (2011); Laura DeCinque, Outsourcing War and Peace: Persisting Public Values in a World of Privatized Foreign Armies (2010); Sharon Dolovich, State Punishment and Private Prisons, 55 Duke L.J. 437 (2005); Sklansky, Private Police, supra note 35. That “violence” ought to comprehend broader mechanisms by which the state imposes its authority.
51 Manning, supra note 49, at 114 (relying on Jan Assmann, The Mind in Ancient Egypt (2002)).
functions. Material spaces—efforts to schematize those localities—followed, and sovereign adjudication moved indoors. By the end of the twelfth century, European town leaders had constructed civic structures to augment the open-market squares, churches, and private residences used for communal business. A city's existence was marked through this "civic self-fashioning" by a town hall (or a town house, Rathaus, or civic palace) "clearly designed to dominate" its environs. Of course, state-based dispute resolution was never the only form; then (as now) private resolutions—through families, religions, and commercial alliances—were commonplace, albeit also dependent for enforcement (aside from self-help) on recognition from sovereigns gaining control over the legitimacy of violence.

Punishment was equally central to sovereigns' developing identities. Historians of medieval England describe "some kind of prison" as a "natural part of the equipment of every town," with such facilities "tucked away in the cellar or attic of every fifteenth century guildhall." But noxious smells, coupled with aspirations that town halls avoid associations with detention (and its metaphysical contamination), resulted in isolating incarceration in discrete structures—jails, built as short-term accommodations to house a variety of marginal people such as criminal defendants and debtors.

Nomenclature mirrors the diversification of sovereign services. Words such as "court-house," "palais de justice," and "prison" were not then in the vocabulary, just as commerce, religion, adjudication, and government were not segregated activities. "Town halls," a term of art, sheltered both rooms for holding court and the set of weights that provided official standards for merchants. Separate, purpose-built structures designed for judges (lay or professional) to decide cases (court-houses) and for detainees to be housed for long terms (prisons) entered the landscape and dictionaries in the centuries thereafter.

Form follows not only function but also funds, and economic prosperity created opportunities for governments to do more. When communities could finance the building of monumental town halls, multiple-cell prisons, and pay for staff, wooden structures gave way (literally in some cases) to brick, stone, and metal. In the sixteenth century, the English Parliament, which relied more on incarceration than did some of its European counterparts, required houses of correction for every shire. Across the Atlantic and centuries later, the Congress of the United States began, after the Civil War, to fund buildings named "United States Court House" (often also "and Post Office"), and, in 1896, Congress chartered the construction of the first specifically federal prison.

During the eighteenth and nineteenth centuries, the courthouse grew from a single-room building into the grand structures, now taken for granted as signatures of national governments. These buildings represented not only new forms of sovereignty but also the political clout of professionalizing specialists—architects, lawyers, judges, and municipal managers. The rules within courts and prisons reflected ideas about officials' roles and state–citizen relations. Courtrooms elevated the judge to a starring role on a bench, marked the growing authority of lawyers and administrators by situating them in front of a bar, welcomed jurors in jurisdictions authorizing their participation, and relegated the audience to areas in the back.

During the nineteenth century, the term "penitentiary" came into use. In France, Claude Nicolas Ledoux is credited with the "original idea" of building a prison "totally independent of the courthouse." John Howard and Jeremy Bentham pressed England to give convicted criminals solitude and to require hard labor to secure rehabilitation. Bentham proposed a method of implementation—the "Panopticon" (a circular structure with a control module in the middle), designed (but never built)

61 LOUSSURY, supra note 58, at 238–256.

62 TITTLER, supra note 53, at 126–128. Litigation played a vital role in providing opportunities for individuals to participate in the state and for interaction between local and central authorities. HENSEL, supra note 32, at 66–145.


64 Glimpsing back two hundred years underscores the changes. In the United States in 1850, no building owned by the federal government had the name "courthouse" on its front door. While local and state governments had by then funded such purpose-built structures, the fewer than forty federal judges dispersed around the country needed no building of their own. In contrast, by 2010, more than 850 federal judges were to meet in hundreds of federal courthouses, so-named, that joined the thousands of state and local courthouses around the country. See Judith Resnik, Building the Federal Judiciary (Legally and Literally): The Monuments of Chief Justices Taft, Warren, and Rehnquist, 87 I.C.T. 821 (2012). On the political import of national, regional, and international courthouse building, see generally JUDITH RENNER & DENISE CAIN, REPRESENTING JUSTICE INVENTION, CONTEMPORARY AND RULERS IN CITY-STATES AND DEMOCRATIC COURTHOUSES 193–281 (2011).


so that inmates could be observed, night and day, from the center. The Foucauldian nightmare was that inmates could never know whether or when they were seen—justified by Bentham as promoting self-discipline. (“The more strictly we are watched, the better we behave.”66) Bentham was also a proponent of prisons run by private parties (“I would do the whole by contract”68), whether for profit or not.

But Bentham’s form of privatization was also emphatically public, predicated on what he termed “publicity” that, in the context of prisons (and “of all public institutions”) meant unlimited access to information about the institutions and open account books to enable the “great open committee of the tribunal of the world”69 to assess what transpired. Moreover, Bentham advocated surveillance not only of those subjected to state detention but also of legislators and judges. (“Without publicity all other checks are insufficient: in comparison with publicity, all other checks are of small account.”70) Bentham therefore provides the bridge to popular sovereignty movements that reformed the practices of policing, courts, and prisons and that prompted the creation of other domestic and international institutions.

3. The constitutionalization of policing, detention, and courts

Just as courthouses are government structures now taken for granted, the attributes of modern adjudication are presumed to be intrinsic, as if courts have always been obliged to be open to the public, to be staffed by independent judges empowered to appraise the fairness of the rules under which they operate, and to offer equal access to all persons. Likewise, today, the idea that police must respect suspects’ rights and that prisoners in public or private facilities must be afforded certain minimal conditions as a matter of human dignity seems ordinary, even if not regularly achieved in practice.

These strictures are, however, not natural but made—produced through political and social movements of the past three centuries. Thus, the sketch provided above of the development of statization through construction of the state apparatus of police stations, courts, and prisons needs to be complemented by a sketch of the global exchanges that transformed the interactions within each institution—inventing constitutionally-constrained embodiments of state power.

During the Renaissance, the public was invited to watch spectacles of judgment and punishment. Yet, while witnessing power, the public was not presumed to possess the authority to contradict it. Over time, however, new theories of sovereignty altered the practices of adjudication and punishment. “Rites” turned into “rights,” as aspects of adjudication became obligatory public; judges became independent actors; and—in the last few decades—all persons became eligible participants and detainees gained the status of rights-holders.

The 1676 Charter of the English Colony of West New Jersey provided that “in all publick courts of justice for tryals of causes, civil or criminal, any person or persons . . . may freely come into, and attend.”71 A century later, the new states in North America took this precept to heart, as the words “all courts shall be open,”72 coupled with clauses promising remedies for harms to property and person, were reiterated in many of their constitutions. Those documents regulated how judges were to be selected, their terms of office, and their procedures, and the publication of opinions. States were required to make the service of dispute resolution readily available in local communities. The utilities were interactive, as courts embedded state identity by welcoming private parties seeking enforcement of agreements and protection of property.

The public’s new access rights and authority to sit in judgment of judges and, inferentially, of the government, worked a radical transformation. As spectators became active participants (or “auditors” as Bentham described his goal that when presiding at trial, a judge was “under trial”)73), courts became one of many venues contributing to what twentieth-century theorists termed the “public sphere”—disseminating information that shaped popular opinion of governments’ output.74 Courts were not only contributors to the public sphere but also became attractive venues when judges, who had been positioned as loyal servants, gained the status of independent actors, authorized to stand in judgment of the very power that endowed them with jurisdiction.

Litigation has long exemplified a substantial popular demand for state services. But it was only in the twentieth century that all persons gained rights to be in all the roles in courts—litigants, witnesses, jurors, lawyers, and (yet more recently) judges. Constitutional principles of equal treatment were read to entitle a host of claimants to be heard and treated with dignity, whatever their race, class, ethnicity, and gender. The public performance of citizen–state interactions served as a platform for conflicts about what rights governments ought to provide and how institutions had to treat individuals. In response, a mix of constitutional and statutory lawmaking

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70 See Judith Resnik, Fairness in Numbers: A Comment on AT&T v. Concepcion, 125 Harv. L. Rev. 78, 80–81, 104–105 (2011) [hereinafter Resnik, Fairness in Numbers].
71 See Bentham, Rationale of Judicial Evidence, supra note 69, at 355–356.
restructured family life, responded to household violence, reshaped employee and consumer protections, and recognized indigenous and civil rights.

Constitutional norms, iterated in national documents and going global through transnational conventions, also changed ideas about what courts had to provide. The phrase "a fair hearing" appeared in the twentieth century and became the touchstone for assessments of whether a particular criminal, civil, and administrative process met the demands of justice. The transnational codification of the 1966 United Nations Covenant on Civil and Political Rights summarized the newly egalitarian, and in that sense democratic, aspirations of adjudication: "everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."73

Data on usage rates provide a glimpse of the myriad of exchanges in which people encountered government employees responsive (or impervious) to their needs. Numbers from the United States make the point. In the twenty-first century, state courts deal with some forty million civil and criminal cases (traffic, juvenile, and domestic relations cases aside) annually.74 Figures from Europe likewise show expanded use, tracking not only filings but also the growing investment of public and private resources in legal systems.75 High filing rates—often read as problematic—ought to be celebrated as markers of the degree to which governments, individuals, and corporate entities sought to enlist state help and believed they would be heard. Courts also have become channels to social services encompassing more than dispute resolution. The names—"mental health courts," "family courts," "veterans' courts," "drug courts"—capture efforts that build in social workers and mental health professionals so that courts can provide remedies broader than transfers of dollars or persons.

Expanded state capacities are likewise on display in the work of the criminal law—from policing to prosecutions to incarceration. The United States again provides one example.76 Between the 1930s and 1980, prison populations were relatively stable; by 1983, 440,000 people were incarcerated.77 But by 1997, the prison population had grown to 1.6 million,78 and within the decade, included more than 2.3 million people, with another 5 million under supervision.79 In fiscal terms, federal and state governments devoted more than $65 billion per year to the jails and prisons; for states, the amounts were about seven percent of their general fund revenues.80 California, whose prisons were found in 2011 to be unconstitutionally overcrowded, gave more resources to prisons—about a tenth of its operating budget—than to higher education.81

Although the United States has outstripped most countries in incarceration rates, other countries are also expanding their capacity to imprison.82 The construction business for prisons is "booming," as professional designers of "justice facilities" transverse national boundaries. The "prison-industrial complex" includes communities relying on correctional facilities for employment, unions of correctional staff seeking to protect jobs, manufacturers looking to market their wares, and entrepreneurs confident that investments in housing inmates can yield profits. But these activities are circumscribed because the police and prisons, like courts, have been reinvented through the imposition of constitutional norms that, in recognition of human dignity, limit the state's authority to inflict certain forms of punishment. As the Indian Supreme Court explained in its Sunder ruling that banned state-designated private police, "modern constitutionalism posits that no wielder of power should be allowed to claim the right to perpetuate state's violence . . . unchecked by law, and notions of innate human dignity of every individual."83 As that court detailed, these transnational commitments on detention took shape after World War II. The International Covenant on Civil and Political Rights imposed obligations that "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."84 The United Nations then elaborated Basic Principles for the Treatment of Prisoners, including rights to health care.85 South Africa's late twentieth-century constitution imposes specific obligations: "Everyone who is detained, including every sentenced prisoner, has the right . . . to

77 See also Sankeu L. Embree, CRISIS AND CHANGE IN THE UNITED STATES: THE PRISON SURVEY (1999).
79 See Kenneth Krase, PRISONS IN THE USA: COST, QUALITY AND COMMUNITY IN CORRECTIONAL DESIGN, IN PRISON ARCHITECTURE: POLICY, DESIGN, AND EXPERIENCE (Kela/Palme/SE, 2000) [hereinafter PRISON ARCHITECTURE].
81 See Donald Kranz, PRISONS IN THE USA: COST, QUALITY AND COMMUNITY IN CORRECTIONAL DESIGN, IN PRISON ARCHITECTURE: POLICY, DESIGN, AND EXPERIENCE (Kela/Palme/SE, 2000) [hereinafter PRISON ARCHITECTURE].
83 ICCPR, supra note 75, art. 10.
conditions of detention . . . consistent with human dignity, including at least exercise and the provision, at the state's expense, of adequate accommodations, nutrition, reading material and medical treatment. 99

In the United States, constitutional boundaries on incarceration evolved through reinterpretation of older texts. Before the 1960s, courts had held that prison authorities had unlimited discretion. But horrific descriptions of prisoners who were fed flour and water, lashed, and left without medical care prompted judges, pressed by prisoners' rights advocates, to conclude that "prisoners do not shed all constitutional rights at the prison gates." 100 Judges read constitutional requirements of "due process" and prohibitions on "cruel and unusual punishment" to address conditions of confinement, to preclude certain levels of violence, unsanitary conditions, and "deliberate indifference to known medical needs." 101 Judges issued structural injunctions aiming to require a modicum of safety and sanitation. Likewise, the courts revisited protections against unreasonable searches and seizures and rights against self-incrimination, and placed constraints on how police could deal with suspects. The 1966 decision of Miranda v. Arizona gained global recognition as the shorthand for insulation from coercive policing. 92

Yet a progressive constitutional story elaborating criteria for the legitimacy of state action is too simple a narrative, as the erosion of Miranda and the "debate" about torture in the wake of 9/11 make plain. Prisons provide another example. At the same time that constitutional injunctions were structuring interactions within prisons to curb certain forms of degradation, the United States pioneered a new kind of facility, "supermax," explained as minimizing risks of escape and violence and designed to impose extreme and prolonged isolation. 93 The United States Supreme Court has not ruled out such confinement, although it has required a modicum of process before such placements. 94 An unanimous United States Supreme Court explained that conditions in Ohio's supermax put inmates into cells that were "7 by 14 feet, for 23 hours per day," 95 and that the "solid metal doors" ensured the deprivation of "almost any environmental or sensory stimuli and of almost all human contact." 96 Given these "atypical" conditions producing a "significant hardship," the Constitution required officials to provide an informal hearing that did not include rights to confront or obtain witnesses. 97

4. The muddle of privatization(s), the impact of globalization, and the market in incarceration

Having sketched statization and constitutionalization, I turn now to globalization and privatization. While extensive public regulation of police, courts, and prisons is new, private forms of these services are not. In the eighteenth century, fee-for-service custodians supplied detention facilities on an as-needed basis; states leased convicts and transported criminals to provide colonial labor; and the British and the Dutch East and West India Companies run police, jails, and courts. 98 Today, states permit a host of private police services, sometimes hiring "special" private forces as well as retaining private firms to build and run prisons.

These various activities prompt my suggestion of a plural form so as to disentangle the analytic mélange within privatization(s) that run from limiting public access to conditions of detention, consistent with human dignity, including at least exercise and the provision, at the state's expense, of adequate accommodations, nutrition, reading material and medical treatment. 99

[92] S. Am. Crest., 1996 § 35(2). These rights are non-derogable. Id. § 37(5)(c).
96 Id. at 198. See, e.g., Wilkinson v. Austin, 545 U.S. 209 (2005).
97 Id. at 214.
98 Id. at 224. This form of confinement has raised concerns transactionally, with questions about whether it constitutes torture or inhumane or degrading treatment under Art. 3 of the European Convention on Human Rights. See, e.g., A. R. v. Russia, 1439/09 B.C. H.R. (2010), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-100964 (holding that three year term of solitary confinement for prisoner violated Art. 3); Ammad v. U.K., 24037/07 11949/08 36742/08 36591/09 B.C. H.R. (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-110267 (concluding that extradition to the United States was not precluded because of the isolation imposed at federal prisons).
Margaret Thatcher famously pressed for a privatization of (the aptly named) British Petroleum Company through a "public" offering of five percent of the company stock to private investors, and total divestment followed thereafter.101

British Petroleum is an ironic exemplar of privatization for it makes plain how intermingled "private" markets and "public" Sovereignties are, as "-ization"—nationalization and privatization—go back and forth. Public investments have been essential to British Petroleum's success, as Britain and that corporation ventured across the globe. During the first quarter of the century, the British Government negotiated for the company to obtain exclusive rights to oil in what was then Persia.102 The result, called the Anglo-Iranian Oil Company, joined in a colonizationizing competition (and occasionally in alliance) with Royal Dutch-Shell and with Standard Oil, based in the United States.103 Iran's nationalization of its oil industry in the early 1950s ended that structure, replaced by the entity called the British Petroleum Company, which Thatcher privatized and which now goes under the name BP. The company reciprocated by pouring resources into United Kingdom programs, such as helping to finance both a major expansion of a venerable English museum by augmenting "The Tate" with "Tate Modern." The name of the inaugural show, RePresenting Britain 1500–2000,104 could be read as referencing the mutual entrenchment of the public and the private in Britain's persona.

Thatcher became the "poster" prime minister for government withdrawal from enterprises it had owned—a experience replicated in other European countries. Given that the United States had not have commercial enterprises to divest, its version of privatization entails shifting activities (such as incarceration, courts, education, the maintenance of roads, social benefit programs, and pensions) that during the nineteenth or twentieth century had become duties of local, state, or federal governments to private providers, paid in whole or part from public funds,105 while maintaining (or not) various degrees of control over policy and implementation.106

As the BP example illustrates, the interaction between the public and private can be nuanced, as is the relationship between privatization and the state. An alternative verbiage, "re-privatization," recognizes that some activities, once private, can become

101 See Gerem Baj, The Confl ict of "Privatization" and Germany's National Socialist Party, 20 J. Econ. Persp. 187, 188 (2006). Retraced the term to policies of the Nazi government, which privatized some of what had been government-run activities to obtain support from the business sector. Id. at 189.


104 The company renamed itself BP, and in 2010 became identified with Louisiana as oil rig ruptures disfigured the United States Gulf coast. See generally, Our History, BP, http://www.bp.com/content/dam/en/global/corporate/history/articleId=90393378&contentId=7036819.


public and then return to the private sector.107 "Denationalization" is another term, and one Thatcher reportedly thought had unappealing connotations.108 Yet privatization can entail denationalization when enterprises are turned over to foreign investors or overseers. Israel's private prison had foreign investors. Similarly, the investment arm of Kuwait tried to buy British Petroleum but was blocked, and a proposal to privatize port services in the United States was derailed when the purchasers were revealed to come from Dubai.109

The ability of private entrepreneurs to affect public agendas is a related concern. For example, private providers of prisons have successfully expanded their market, diversified the forms of supervision offered, and lobbied for more detention. England, a "global leader,"110 initially contracted to have a private provider build one prison; thereafter England turned to the private market for management and ownership of existing prisons and for services before and after sentencing.111 In the United States, the 1980s marked the emergence of the Corrections Corporation of America (CCA) and the Wackenhut Corrections Corporation, a division of a global security firm that, in 2003, became the GEO Group. Within the decade, the two controlled 75 percent of the private prison market in the United States.112 In terms of numbers, as of 2011, private prisons detained a small but growing fraction of the population—about 8 percent (more than 125,000 people) of those incarcerated prisons in the country.113

By then, the GEO Group described itself as the "world's leading diversified provider in privatized correctional, detention, and treatment services," offering prisons, detention of juveniles and immigrants, private probation, residential treatment, psychiatric facilities, and electronic monitoring under a "Continuum of Care model" for its "customers worldwide."114 GEO illustrates how privatization and globalization are emmeshed: the result of its transnational business in 2011 was an income exceeding $1.6 billion, a "27 percent" increase over the prior year's earnings.115

Yet that growth "unfortunately...fell short" of the company's goals; a letter to shareholders explains that an "unprecedented political and legal realignment in California of low security offenders from the state down to the counties...[had] resulted in the...
deactivation of several GEO facilities contracted with the State of California, which we are now actively marketing to county and federal agencies [which] we believe had a significant need for detention and correctional beds.116 Similarly, CCA reported in 2005, that “[t]he demand for our facilities . . . could be adversely affected by . . . leniency in conviction and sentencing practices or through the decriminalization of certain activities that are currently proscribed by our criminal laws.”117

Private prison providers thus join with some public officials and prison staff unions in supporting detention policies including confining immigrants.118 The 2011 shareholder report from GEO’s Chair found solace in the “strong fundamental trends and increasing demand for bed space . . . At the federal level, initiatives related to border enforcement . . . have continued to create demand for larger-scale, cost efficient facilities.”119 Further, as a significant contributor to certain Florida lawmakers, GEO came close to obtaining a legislative mandate from that state to require private prisons in various areas.120

As this example illustrates, privatization often turns to for-profit (as compared with non-profit) entrepreneurs, whereas governments (along with associations such as religions and universities) are animated by other goals. But governments do have budgets, aspire for surpluses, and make or save money.121 Thus, as illustrated by the Israeli prison litigation, privatization can be less a critique of government than a back-handed compliment, reflecting that the demand for a particular government service outstrips what the public owned or could use as its property, such as roads, parks, railroads, and canals.122

116 Id. at 2.
119 GEO 2011 ANNUAL REPORT, supra note 114, at 2.
121 A prominent United States example was the New London, Connecticut’s interest in a “distressed municipality” (according to the State of Connecticut) in economic development; the city condemned some land proximate to where Pfizer Inc., a major pharmaceutical corporation, was building a research facility. The goal was to create areas for walking along the waterfront and for restaurants and shopping to revitalize the city. Landowners objected to the condemnation as not for a “public use,” as the United States Constitution requires. In 2005, in a five to four decision, the Supreme Court disagreed, ruling that the proposed use was sufficiently for the “general public” for purposes of the federal constitution. Kelo v. City of New London, 545 U.S. 469 (2005). This holding rested in part on deference to state and local assessments of what was a public use. Justice Thomas, in dissent, proposed a narrower definition that relied on what the public owned or could use as its property, such as roads, parks, railroads, and canals. Id. at 505, 512 (Thomas, J., dissenting).

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private actors. Further, privatizing activities could lift budget burdens to enable state provision of more or different services. Moreover, in various eras, governments have permitted employees to make profits by funding their work through direct charges to recipients/customers rather than by salaries, and sometimes that direct economic relationship prompted providers to be solicitous of the customer-citizenry.122

Another set of debates centers on whether a company whose raison d’etre is profit seeking alters the nature of or the demand for the services provided and whether pricing options for recipients creates distributive injustices—all of which economists might style negative externalities. The Israeli Supreme Court decision objected to the existence of a market in prisons. Commodification, the justices (with one directly invoking Kant123) reasoned, engendered an “attitude of disrespect”124 that reduced prisoners’ personhood. Detention could not possibly be “motivated by economic considerations of profit and loss”125 because authorizing a private corporation to “keep human beings behind bars while making a financial profit from their imprisonment” was an affront to inmates’ dignity.126

Enabling some recipients to get better services by permitting shopping is a discrete egalitarian concern. Privatizations can function as a neo-liberal attack on collective action by ceding power to entities that, through differential pricing and access, diminish the wellfarterist and redistributive aspects of state-provided services.127 Michel Sandel opened his book What Money Can’t Buy with an example of a California prison offering nonviolent offenders a “prison cell upgrade: $82 per night” to have a quiet cell.128 The Sundar decision offered parallel distribution arguments against private policing as undercutting the state obligation to ensure that all of its population be equally protected.129

Courts offer another template in which to explore the various forms that privatizations take, their impact on policy agendas, and their effect on the images of and expectations about government actors. “Private” disputes are the largest component of many jurisdictions’ dockets, as millions of people in conflict come to court for “public” dispute resolution.130 Litigants with resources invest vast sums in lawyers who argue to judges about law’s meaning.131 In some jurisdictions, constitutional obligations of
open courts and norms of equality have endowed less-resourced litigants with state subsidies (such as "public defenders" for indigent criminal defendants, waivers of filing or transcript fees, and civil legal aid) and produced a sprawling multi-century debate about how to allocate and ration legal and judicial services. As with prisons, efforts are also underway to convert certain court functions into a service-for-hire and to cut back on state subsidies. During earlier eras, courts "jealously" guarded their "monopoly" on dispute resolution and ruled that the divesture of jurisdiction was against "public policy." Illustrative was the common law doctrine making unenforceable contracts that pre-committed parties to using arbitration if disputes arose. Moreover, encouraging private conciliation was outside the charter of publicly-commissioned jurists.

Today, in contrast, jurisdictions such as the United States enforce obligations to arbitrate, even over protests that they are borne of unfair advantages imposing unbargained-for terms. Statutes authorize paid, private decision makers ("rent-a-judge") to enter binding, enforceable judgments. Many countries embrace "alternative dispute resolution" (ADR), as illustrated by Europe’s 2008 directive insisting that its member states develop mediation programs for cross-border disputes—arguably undermining rights to a fair hearing protected by the European Convention on Human Rights.

Various and diverse arguments are made on behalf of the uncoupling of adjudication from the state. One account is that ADR is a second-best response to systemic overload, produced because governments cannot support all those who seek to use their courts. Another analysis stresses both the immediate dollar costs of the public processes and the effects, said to chill productive economic and social exchanges. The claims are that alternative forms of resolution are more accurate, less expensive, more generative, and more congenial. Advocacy for privatization is sometimes linked to movements around restorative justice and community empowerment that are critical of the adversarialism produced by complex procedures, lawyer dependency, and public conflicts. Other support comes from "repeat player" defendants (both private and public) who found the glare of open courts disruptive to business practices and to governance policies and successfully reshaped rules to constrain access.

In both the United States and the United Kingdom, privatization has reformatted activities inside courthouses by diminishing occasions for public observation of and involvement in adjudication. Many judges work in conference rooms outside public view and function as managers of disputes. The idea of what a judge does has changed. Mediation and cancellation, which were once normatively "extra judicial," have been reassigned to judges, instructed to settle disputes, oftentimes without public access either to process or result. By 2011, the government of the United Kingdom (which had been a global leader in facilitating "paths to justice" through legal aid and administrative tribunals) declared too much "unnecessary litigation," pressed disputants to mediate and settle, dramatically cut legal assistance, and adopted a policy aiming for civil litigants to internalize the costs of litigation (aside from the courthouse infrastructure expenses) under a fee-for-service model. Rates of trials have declined on both sides of the Atlantic. By 2010, in the federal courts in the United States, trials began in only two of a hundred civil cases filed—described by the monk of the "vanishing trial." In short, from policing, prosecution, and punishment to civil litigation, ideas about what various government officials do have been built, reformatted, and are now under revision again. Whether it was ever "credible to talk as though the state monopolizes" the functions of maintaining order, enforcing criminal law, and imposing civil liabilities, it is not so today. Privatization of what during the twentieth century became a "public" function of dispute resolution—both criminal and civil—is hence a global phenomenon that limits structured, public interactions between citizen and state, even as the aegis of state power (pace Foucault) can expand.

In addition to affecting the nature of the work that public officials do and their agendas, privatizations can be, but are not intrinsically, a means of eluding public regulation. The degree of oversight is contingent, as terms such as "outsourcing," "devolving," and "delegating" suggest. While the "private" sometimes marks an arena beyond the reach of the state, some privatizations are partial—such as outsourcing infrastructure but maintaining operational control, or operating the infrastructure and delegating service management. At times, privatization can enhance the capacity and authority of government.

133 See Ramsik, Fairness in Numbers, supra note 72, at 112–118.
137 This concern was forecast in Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc’y Rev. 95 (1974).

139 Bryant Garth, From Civil Litigation to Private Justice: Legal Practice at War With the Profession and its Values, 59 B.C. L. REV. 951 (1993); see also Salem Advocate Bar Association v. Union of India (UOI), AIR 2003 SC 189.
144 See Sklansky, Private Policing and Human Rights, supra note 129, at 116–120. Further, private military companies (or "PMCs"), like private policing are part of industries that are "increasingly multinational." Sklansky, Private Police, supra note 35, at 1182.
Thatcher’s privatization included the creation of new regulatory agencies. The European Union’s reliance on private bodies to set standards is cited as a mechanism to generate cohesion by overcoming member state differences. Health care debates in the United States suggest a variety of models—the government is a bill payer for citizens receiving health care from private providers, a shopper on behalf of consumers and thereby altering market options, or a direct provider of services. In private prisons, owners and staff of such facilities are private contractors, while the prisoners, detained at the behest of the state, are generally supported by the public fisc, supplemented in some jurisdictions by fines and other charges levied directly against inmates.

Israel’s 2003 prison legislation, struck down by its Supreme Court, offered another option. The statute “improved” on the “English model” by requiring that private employees and owners use the same procedures to search and discipline inmates and be subjected to the same legal standards as the government. The state maintained the power to appoint staff, to control allocation of prisoners, to monitor the site, and to revoke the contract. And, in addition to ex post regulation, legal systems could impose ex ante constraints (a “public law of privatization”) to require that governments contemplating privatizing functions give detailed disclosures of the options and costs and grant rights of participation in decision making to citizens.

Thus, the degree of public oversight depends on how a transfer is structured, how much discretion inheres in the services, and on what accountability mechanisms are put into place. As one expert told the Israeli Supreme Court, under the Human Rights Act (HRA) adopted in the United Kingdom, “any person . . . whose functions are functions of a public nature” must act consistent with HRA; moreover, the HRA determined that prisons were public functions, whoever ran them. He further opined that the European Court of Human Rights had “established that the fundamental rights protected in the Convention” were “enforceable against ostensibly private bodies” when the “state has retained a high level of responsibility for their regulation.”

Moreover, “public” activity ought not be assumed to ensure obligatory transparency, disclosure, and regulation, as the example of judge-based dispute settlement illustrates. At a more general level, many constitutional polities impose variable levels of constraints on executive and legislative branch action, and sovereign immunity may shield governments from forms of liability to which private actors can be subjected. A particular legal system can—as the Israeli legislation at issue in the private prison case exemplifies—impose the same liability on private actors as public actors. Conversely, as the Supreme Court of the United States concluded in the context of private prisons, private officials and employers need not be liable for violations of rights that federal government actors might be.

I turn now from the variegated landscape of privatizations to more about the justifications. Enthusiasts generally make claims about utilities. The state is faulted as a failed manager that is too bureaucratic, inflexible, and insufficiently expert to ensure quality across a range of domains. Competition is the antidote, generating efficiencies through creating more options and different formats for the provision of services. A managerial literature further argues the structural advantages of private markets because of a presumed enhanced capacity to monitor agents’ loyalty in pursuing the object of their principals.

As for privatizations’ successes, empirical claims are proffered about services, oversight, resource production, and profit. For example, improving efficiencies depends in part on the ability of new providers to access particular markets and thereby generate accountability through competition. But some markets may be difficult to enter; prisons, for example, require large capital investments, and that market has not, thus

144 Starr, supra note 100, at 18.
145 Donnelly, supra note 106, at 71.
146 The legislation also directed the private provider to ensure “the welfare and health of the inmates and taking steps during the imprisonment that will aid their rehabilitation after their release for imprisonment, including employment training and education.” Prisons Ordinance Amendment Law (no. 28), 5764-2004, § 128.12.
147 Academic Center, supra note 14, ¶ 6 (Beinisch); Prisons Ordinance Amendment Law (no. 28), 5764-2004, § 128.13(1).
148 Id. ¶ 5 (Beinisch) (discussing Prisons Ordinance Amendment Law (no. 28), 5764-2004, §§ 128.32–128.35).
150 Jowell, supra note 14, ¶¶ 52–54 (citing Human Rights Act of 1998, § 6(3)(b) (Eng.). He described the South African system as similar (and likewise not posing any “constitutional difficulties”) because the “legal accountability” for private actors was the same as public actors for this “public function,” as provided by the South African Constitution that deemed anyone carrying out a public function to be an organ of the state. Id. ¶ 73 (citing S. Afr. Const., 1996, § 239).
153 Federal prisoners detained in private prisons cannot bring suits predicated directly on the United States Constitution against either the companies owning the institutions or individual correction officers but can only seek relief based on claims available under state law. See Minneci v. Pollard, 132 S. Ct. 617 (2012); Correctional Services Corp. v. Maleksos, 534 U.S. 61 (2001). In this respect, privatization can enhance the authority of the state—holding the initial power of judgment about incarceration—while diffusing the state’s accountability. See White, supra note 98, at 138.
156 Donnelly, supra note 105, at 4, 22.
far, been populated by an array of providers. Further, the debate about the impact of privatization of prisons illustrates the challenges of assessing competing claims about comparative efficiencies. Some argue that private facilities are equal to or better than state facilities in terms of conditions and costs. Others believe that few dollar reductions per prisoner exist and worry that the savings, if any, derive from compromises on safety and programs. Also raised is a different kind of cost—that delegation to the private sector undermines the legitimacy of state sanctions. Debates about private courts entail another metric—about whether requiring disputants to use arbitration and other forms of ADR is less expensive and more generative of successful resolutions.

5. The constitutionalization of privatization(s)

Courts have received few direct challenges to privatizations, and the Israeli Supreme Court “assumed that there is no constitutional impediment to privatization of the vast majority of services provided by the state.” As for private prisons, the small number of judicial discussions aside from Israel have generally upheld the practice. As one United States appellate judge opined, a prisoner had only a “legally protected interest in the conduct of his keeper, and [not] in the keeper’s identity.” Thus, if measured against a transnational constitutional norm on either the meta-claim of privatization or the particular instantiation of private incarceration, Israel’s legislation creating a private prison would have been upheld.

After its worldwide sweep, however, the Israeli court read its own Basic Law on Human Dignity and Liberty to license judicial review and to invalidate the statute. To do so, the justices analyzed the state’s guarantee of fundamental human rights that permitted violations if “betting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required”—a test that invited a proportionality analysis.

The ruling did not turn on an empirical inquiry into whether public prisons were functioning well or—as expert commentators have argued—whether private prisons were better than the baseline provided by the public sector. Indeed, a concurring justice assumed that even if private prisons improved the experience of confinement over that in the public sector, privatization was illegal because private providers inherently harmed inmates’ human rights more than public providers did. Further, the lone dissenting justice described prison conditions as “chilling”: overcrowding had produced a lack of space, sanitation, ventilation, medical care, and programs that resulted in violations of “basic rights of persons” as a “matter of course.”

The Israeli court’s decision rested instead on another kind of empirical insight—that the state’s decision to punish is not complete at sentencing but continues when staff make decisions about whom to search, how to classify, and whether to impose administrative segregation. Thus, distinct from the scholarly claim that

117 Richard Harding, who was the “autonomous Inspector of Custodial Services In Western Australia from 2000 to 2008,” argued that private prisons would have improved Israel’s “in house (non-accountability) structure,” as had happened, in his view, in the United Kingdom. See Harding, supra note 18, at 141, 143 n.1.


119 Dolevich, supra note 48, at 462-471.

120 Academic Center, supra note 14, ¶ 65 (Beinisch).

121 Jeffrey Jowell opined that the “long history of privatization of industries and contracting out of governmental functions” in the United Kingdom had not been significantly challenged, and given that prisons had “a minimum of degree of political and legal accountability,” any such challenge “would be likely to fail.” Jowell, supra note 14, ¶ 7. Moreover, in practice, “no criticism” had emerged that a private prison was “any less effective than a state run prison.” Id. Similarly, South Africa had also permitted various activities, including prisons, and the case law to date suggested that contracting out is not “in any way unconstitutional.” Id. ¶ 8.

122 James Blumstein, from the United States, likewise averred that in “one context or another, the United States Courts of Appeals for the Fifth, Sixth, Seventh, Ninth, and Tenth Circuits have rejected claims that privately-operated prisons violate the United States constitution.” Opinion, James Blumstein, 163 2605/05 Academic Center of Law and Business v Minister of Finance (Isr. Aug. 23, 2006) [hereinafter Blumstein, Opinion]. In addition, as noted, the Israeli Supreme Court referenced a decision from Costa Rica upholding a form of privatization of prisons. Academic Center, supra note 14, ¶ 22 (Nair).

123 Pischke v. Lütcher, 178 R 34 497, 500 (7th CIR. 1999) (Poumer, J. for the court). That appellate court described the challenge to private prisons to be “thoroughly frivolous,” and noted that it could not “think of any... provision of the Constitution that might be violated by the decision of a state to confine a convicted prisoner in a prison owned by a private firm rather than by a government.” Id.

124 Academic Center, supra note 14, ¶¶ 35–36 (Beinisch).

125 See Blumstein, Cohen & Seth, supra note 158, at 466 (citing average savings for a state introducing private prisons to be $33 to $15 million); Blumstein, Opinion, supra note 161, at 24 (noting cost savings and other economic benefits of private prisons). But see Tinnor, supra note 158, at 82–88 (finding little evidence substantiating the benefits or harms of private prisons).

126 Academic Center, supra note 14, ¶ 18 (Procaccia). In her view, because “private enterprise” could not have “internalized the doctrine of balances in the exercise of sovereign power,” entrusting “sovereign coercive authority to a private concessionaire” would cause more harm to inmates’ human dignity. Id. ¶ 49.

127 Academic Center, supra note 14, ¶ 3 (Lerry). He noted that private providers could perhaps do better. Id. ¶ 46; see also Harding, supra note 18, at 142. In his view, Israel’s prisons were in “profound and continuous breach of every international standard, of every domestic Israeli standard and of every expectation of decency.” In 2012, the German Constitutional Court considered a challenge to a Hessen law that placed involuntarily confined mentally ill criminals in institutions that, while state owned, were corporate entities with private staff. The court upheld the provision in part because it had the potential to improve the “quality of internment.” See Bundesverfassungsgericht [BVerfG] 2 BvR1335/10, Jan. 18, 2012, http://www.bundesverfassungsgericht.de/entscheidungen/20121318_2bvr133510.htm.

128 Academic Center, supra note 14, ¶¶ 2, 12, 26, 37, 67 (Beinisch); ¶¶ 2, 8 (Procaccia). The violation of right to liberty is “inflicted by the party that manages and operates the prison where the inmate is held in custody, and by the employees of that party, whose main purpose is to ensure that the inmate duly serves the term of imprisonment to which he has been sentenced.” Id. ¶ 25 (Beinisch). Examples included “the power to order an inmate ... held in administrative isolation for a maximum of 48 hours,” to “approve reasonable force to carry out” a body search, and to prohibit an inmate from meeting with a particular lawyer.” Id. ¶ 26.
privatization undermines the social legitimacy of punishment, the court’s focus was on the lawfulness of private actors continually making punishment decisions at the state’s behest.

Some might therefore have concluded that the uncontrollability of those many discretionary judgments rendered the agency/principal relationship inevitably incomplete. The court did not, however, embark on an analysis of agency failure but insisted (with citations to Rousseau and Locke) that creating the agency relationship itself breached the social contract. Giving private enterprise state activities limiting personal liberty resulted in a “violation of the constitutional right to personal liberty beyond the violation that arises from the imprisonment itself.” Because custodial detention “necessarily involve[s] a serious violation of human rights,” only state agents could do so.

What kind of constitutional right did the Israeli Supreme Court establish? Given that the decision’s predicate was the irrelevancy of quality differences in conditions at public and private prisons, the right does not sound in the equality and distributive decision on private police. Further, given that the concerns that laced India’s Sanaur decision on private police. Moreover, by tying its holding to the personal entitlements of detainees, the court did not elaborate a collective commitment to liberty that required parsimony by a polity in its punishment through avoiding creating incentives for private enterprises to profit by seeking increasing numbers of detention beds. Instead, the court reasoned that detainees had the right to have the state itself furnish directly the unique service of depriving people of their liberty and dignity. To borrow an Arendtian formulation, the right to have rights became a right to have only the state take away those rights.

The dissent disagreed with what he described as the insistence that the “social right” of protecting the dignity of the incarcerated could only be accomplished by the public sector. He argued that the majority was misguided because, while the state had a “central role” in realizing that protection, private as well as public providers could supply “the right to proper prison conditions,” and the private sector might well do so better than the public sector. His understanding that providing adequate conditions to prisoners has “aspects of a social right” reflects the welfarist aspects of prisons (run by public or private actors), which house and support those involuntarily confined.

State-funded dispute resolution—courtscan also be classified as a social right (as well as a political and a civil right, if choosing to use T.H. Marshall’s terms) because courts distribute conflict resolution opportunities and today, must do so in a manner respectful of the dignity and equality of the participants. Further, as discussed above, states have come to subsidize both the infrastructures and some of the users, not only to respond to their needs but also to legitimate courts by enhancing their capacity to enforce laws and provide for the security of economic and interpersonal relationships. Moreover, both national regulations and international conventions now organize these functions through imposing requirements such as dignified treatment for detainees, and public hearings before independent and impartial judges for disputants. The Indian Supreme Court’s 2011 decision—that citizens had rights to “appropriately trained . . . and properly equipped” state-provided police—adds policing to the list of activities governments have come to supply as a matter of course.

Naming the provisioning by states of police, courts, and prisons as social rights opens up that characterization beyond the strictures of the International Covenant on Economic, Social and Cultural Rights (ICESCR), focused on state obligations to respect, protect, and ensure that their populations have housing, education, a means of a livelihood, social security, and health. Once the rights to security and dispute resolution, implemented through police, courts, and prisons, are put into this mix, even constitutions (such as the United States’s) said to be devoid of welfarist obligations can be understood to have distributive obligations, albeit ones that neither prisoners nor defendants (criminal or civil) volunteer to use.

Therefore, in addition to placing the Israeli Court ruling under the rubric of personal entitlements, it belongs within the category of the structural. The Israeli Supreme Court did what it had claimed to have avoided; it identified a facet of the “hard core” of sovereign powers” that can neither be transferred nor delegated. The Indian Supreme Court expressly acknowledged that it had done so, concluding

169 Mary Sigler, Private Prisons, Public Functions, and the Meaning of Punishment, 38 P.A. St. U. L. Rev. 149 (2010). Michael Walter has also argued that the “democratic defense of the right to punishment” depends upon the state ensuring that state actors, functioning in their representative capacity, treat citizens-detainees in the same, equal-handed manner. Michael Walter, At McPrison and Surly King It’s . . . Hold the Justice, Nov. 1998, at 10–12.
170 Academic Center, supra note 16, ¶ 23 (Beinisch); ¶ 2 (Arbel); ¶ 1 (Rivlin); ¶ 4, 12 (Proccacia); ¶ 1, 2 (Harpaz); ¶ 39 (Nevo); ¶ 12, 13 (Levy).
171 Id. ¶ 33 (Beinisch).
172 Id. ¶ 10 (Beinisch).
173 Dolovich, supra note 48, at 515–518.
174 Under Israel’s Basic Law: Dignity is not absolute: infringements are permissible under a proportionality analysis. See Basic Law 1 (8). This conception contrasts with the German view, in which dignity is understood as an absolute. See Susanne Baer, Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism, 59 U. Takanro Lj. 417 (2009).
175 Academic Center, supra note 14, ¶ 2 (Levy).
that policing could not be "divested or discharged through the creation of temporary cadres with varying degrees of state control."183 Both court-based anti-privatization rights therefore fit within what I called "statization"—the need for polities to create themselves through institutional services entailing relationships between citizen and state that produce identity for both.

Further, these two holdings make actions obligatory not only for the state but also for its citizens, who must reciprocate. The Israeli Supreme Court focused on the unique authority of the state to violate liberty and dignity rights, but it could have also explained that detainees and prisoners are obliged particularly to the state rather than to corporate entities to obey police commands and to take the punishment meted out. The interaction (even under conditions such as supermax, isolating prisoners from others) requires the state to internalize the punitive tasks and individuals to serve (in the literal sense) the state directly so as to make amends for transgressing collective norms.

These various exchanges could be characterized as a form of "connective justice," the term referenced at the outset for ancient Egyptian adjudication—here redeployed to describe mandates (shared by citizens and state) of compliance with behavioral norms. "Connection" today has a psychological valence that feeds into political theories imagining states in communitarian, democratic, and feminist terms. Applying it to detention makes plain that connections can be complex and harsh. I use the phrase to evoke a dense set of interactions (in these contexts, among police, disputants, judges, government officials, and detainees) in the immediate instance and, when done in public or made transparent, enabling debates about governing norms.184 On this account, anti-privatization rights become collective entitlements to state and citizen identity (as distinct from the legitimacy or nature of sanctions) forged through the running of institutions such as the police, courts, and prisons. Privatizations therefore not only undermine individuals' personal rights but also dilute opportunities to build affiliations within and to the state.

Scholars puzzle about the intelligibility of sovereignty in the twenty-first century. In the United States, political movements aim to delegitimize state capacities and disable its welfarist capacities, whereas in Europe, the risk of the failure of its ambitions haunts contemporary exchanges. My view is not that the state sovereignty will rapidly disappear; indeed, forms of nationalism, some of them virulent, are resurging. More positively, constitutional democratic states have been bases for elaboration of new forms of rights that, only in the last decades, embrace all persons. Thus, the energy devoted to exploring the phenomenology of privatization and globalization needs to be coupled with efforts to build the content of constitutional sovereignty so as to limit its xenophobia and to render it both legible and generative.

The history and practices of policing, courts, and prisons, set forth above, offers insights into some of the attributes that make state-based services recognizable, entrenched, and durable. All three serve the state, while being useful to individuals and to enterprises, made more secure in their persons and transactions through state control. All three create opportunities for encounters that forge identities, both collective and individual (e.g., suspect or victim, litigant, detainee, judge, warden, cop). In closing, I explore a few aspects of constitutional regimes that oblige citizen–state engagements other than police stops, and serving prison sentences. Some are specific to a given polity and others are found in many constitutions, enabling transnational exchanges about their content.

Obvious examples come from constitutions imposing duties by specifying state provision of what have become standard-bearers in social rights discourse—such as education, health care, and social security—that are given institutional form through public schools, hospitals, health care services, and administrative offices and that turn individuals into students, patients, and recipients. In some jurisdictions, these services have become fixtures of the state ("The National Health" is the shorthand in England) that enable the state to perform its own competence (or lack thereof). Today, these institutions are the subject of privatization efforts that put at risk opportunities to experience the state as providing sustenance.185

Another space of infrastructure rights are the calls in many constitutions for the provision of a "healthy environment."186 On occasion, those commitments are coupled with obligations to work transnationally for protection of the "global" or the "international" environment.187 Moving from national to global prescriptions, the ICESCR is the prominent exemplar, but other international conventions also call on states to facilitate the flourishing of their populations. One illustration is the mandate in the Convention on the Elimination of Discrimination Against Women (CEDAW) that state parties enable women and men to be full participants in all facets of "political, social, economic, and cultural" life and to undertake, when necessary, 

185 An oft-cited exemplar is South Africa, which forged its new identity on obligations to "respect, protect, promote and fulfill the rights to the Bill of Rights" (see South Africa v. Grootboom 2001 (1) SA 46 (CC) at 72, ¶ 49, quoting the Housing Act) and to enable individual flourishing by recognizing rights such as to shelter. S. Afr. Const., 1996, ch. 1, § 7(2). These obligations are subject to judicial review that is appreciable of limited resources and reliant on application of the constitutional test of "progressive realization," South Africa v. Grootboom 2001 (1) SA 46 (CC) at 57, ¶ 13.

Mechanisms for generating identity and relationships can also come through duties imposed by government on citizens. Compulsory voting offers one template.\footnote{Note, The Case for Compulsory Voting in the United States, 121 Harv. L. Rev. 591, 592 (2007).} Australia, along with some twenty other countries, mandates that its citizens come to the polls and register to vote.\footnote{Rusche v. Electoral Commissioner [2007] HCA 43 (Austl.).} The Australian rule is statutory, complemented by a constitutional overlay that the franchise, as a matter of structure ("we, the people"), is both a universal entitlement and a duty.\footnote{See Treaty Concerning the Formation of a General Postal Union, Oct. 9, 1874, 19 Stat. 577, as amended by the Universal Postal Union, Mar. 21, 1885, 25 Stat. 1339; http://www.upu.int; see also Harrop Freeman, International Administrative Law: A Functional Approach to Peace, 57 Yale L.J. 976, 978 (1947). Freeman described the Universal Postal Union as "the first international body whose permanent bureau had more than the power to gather information. It was assigned executive functions in clearing accounts, and was charged with offering opinions on disputes between members."} If public employees (rather than private companies) greet citizens who are required to vote regularly, the activity produces another opportunity to "see" the state and participate in it. Another obligation engendering relationships is service on a jury, requiring citizens to function as ad hoc judges and work together in efforts to render consensus-based judgments.\footnote{In 2009, the Brazilian Supreme Tribunal responded to a declaratory action seeking to hold invalid a law that had been enacted before the constitution of 1988 and that provided a state monopoly over certain forms of mail. A majority, discussing the role of the post as a public service and not only an economic activity, upheld the statute, with Justice Barbosa highlighting that a subsidized postal service in producing national identity. See S.T.F. ADPF 46/DF, Relator: Min. Eros Grau, 8.5.2009, http://redir.stf.jus.br/paginador/pub/paginaador.jsp?docT=AC&docID=608304. The opinion, issued in August of 2009, was published February 26, 2010.} Taxation could also be reimagined as a practice of reciprocal interactions, built through examples such as governments that post signs announcing that new construction or certain services represent "tax dollars" at work.

The more common (and complex) example is the military; the 1949 German Constitution obliged its citizens perform national service,\footnote{14 PAPIIRS, Public Opinion, National Gazette, Dec. 19, 1791, reprinted in 14 Pamphlets of James Madison (Robert Rutland & Thomas Mason eds., 1983).} and many countries have statutory counterparts, although sometimes addressed to a subset (such as the US requirement that men, but not women, register for the draft). Service to one's country is reciprocal, in that the state supplies those who do so with education, health care, and training. National service can thus be an inter-class, inter-ethnic opportunity for forming affiliations among citizens and with the state.

State-subsidized communication networks offer a different kind of opportunity that, instead of the concentrated periods of national or jury service, permit a wide array of individuals to have regular but brief contact—often in public—with government officials helping them to get private and public business done. The eighteenth-century version was the post, an early conduit for globalization that became the subject of parody; and business correspondence of the people," rendered through "postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people," rendered through "postal services to all communities."\footnote{189 Convention on the Elimination of All Forms of Discrimination Against Women Arts 3, 4, Sept. 3, 1981, 1978 U.N.T.S. 1. See also id. Arts. 10, 11, 13; Alice Kessler-Harris, In Pursuit of Economic Citizenship, 10 Soc. Pol. 157 (2003).}

For some two hundred years, the federal government funded post office buildings that served as meeting places in hamlets across the country, created employment opportunities for postmasters (and eventually postmistresses) and clerical staff, invented home delivery services, and subsidized the exchange of information through special rates for certain forms of publication. After the Civil War, the federal government paid for major construction projects outside Washington, DC. These "United States Post Office worldwide."\footnote{193 See Treaty Concerning the Formation of a General Postal Union, Oct. 9, 1874, 19 Stat. 577, as amended by the Universal Postal Union, Mar. 21, 1885, 25 Stat. 1339; http://www.upu.int; see also Harrop Freeman, International Administrative Law: A Functional Approach to Peace, 57 Yale L.J. 976, 978 (1947). Freeman described the Universal Postal Union as "the first international body whose permanent bureau had more than the power to gather information. It was assigned executive functions in clearing accounts, and was charged with offering opinions on disputes between members."}

But the founders of many countries saw communication networks as central. Illustrative is the Constitution of the United States, which authorized the national Congress to "establish Post Offices and post Roads."\footnote{Amendment Act (2011), which eliminated compulsory military service.} Through the Post Office Act of 1792 and many statutes thereafter, Congress expanded the system that Benjamin Franklin had headed prior to the Constitution. The nation-building function was plain: James Madison extolled the post as a vehicle for uncensored and subsidized newspaper circulation that would (he hoped) promote "public opinion."\footnote{The 1958 Postal Policy Act explained that its subsidy was "to unite more closely the American people, to promote the general welfare, and to advance the national economy." The mandate in the 1970 Postal Reorganization Act called for the provision of "postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people," rendered through "postal services to all communities."}

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and Court House” combinations generated a “federal presence” in cities across the country. Serving as the “nation’s oldest and largest public business,” the post was sustained through legislation awarding it a monopoly on government mailing and, in recent decades, expressly obliging it to provide “universal service in all parts of the country.” Almost everyone “in every corner of the country” is able to send “at reasonable cost and with reasonable effort” letters and documents that will be delivered “within a reasonable period of time and almost complete security.” As of 2008, more than 200 billion items moved annually in the federal postal system.

The universal service obligation is an ambition and a burden. Further, the United States Postal System operated under limits on the kinds of auxiliary services it can provide, and it has expensive obligations to current and past workforce members. The current economic challenges put the longevity of the United States Postal System into question. As of this writing, post office defaults on pension benefits owed loomed. Thus, the role of government as the conduit for uncensored and subsidized exchanges is lessening. In 2009, 13,000 fewer post offices existed than had in 1951, with more cutbacks underway. Even as the Postal Service was held by the Supreme Court to be inseparable from the United States for purposes of antitrust laws, some commentators described it as in a “death spiral,” explained as caused by a mix of technology and private providers.

The collapse of government postal services undercut the distributive and communitarian impact provided by the public sector. Those who argue for cutting national subsidies for the Post Office do not couple those proposals with demands for government support to make the Internet accessible to every person. Further, even as protests from rural communities and postal employees’ unions stemmed some cutbacks, the face of the government through its post offices is fading. The United States relocated “post offices” by opening up stalls selling stamps inside malls and other commercial enterprises. And to the extent the encounter is virtual, users now Google “USPS.com,” rather than “USPS.gov.”

Connectivity is definitional of globalization, and pillars of the private sector—Facebook, Google, and FedEx, inter alia—have become famous for providing networks generating identities and profits for those institutions. Many people do not need the state to communicate with each other. But some people need the subsidy. And the state needs people to turn to it—gov—as a source and as a resource that, under constitutions insistent on equality and dignity, is a redistributive universal provider of some services.

The post is a mix of public and private joint ventures that, like civil and criminal justice services, force interactions that can redound to the benefit of state and individual. The beneficiaries are not one generation nor focused on a single identifiable group. Moreover, in centuries past, implementation of constitutional guarantees for an unobstructed post created new institutions—post offices in every hamlet stood alongside police, courts, and prisons as embodiments of daily state-provided services in which diverse people shared space, practices, and role-occupations. And many of those transactions took place (per Bentham’s injunctions) in venues open to the public.

These institutions require state resources but are not independent of the form (capitalist, socialist, and communist) that a country’s economic system takes. All offer opportunities for the state to work with its citizenry. If not completely outsourced, all enable the state to be understood, seen, experienced, engaged, criticized, and reformed. These institutions are the product of constitutional imagination, shaping icons of sovereignty when monarchies fell. And the public identities of police, courts, prisons, and of the gentler postal services, are all tottering.

The vulnerabilities of the public post system, like the shift to private policing, the declining public nature of courts, and profit-seeking prisons, undercut a progressive narrative from statization to constitutionalization installing durable criteria of government legitimacy and insisting on accountability and egalitarian treatment that is insistently redistributive. When celebrating a decade of I-CON, the forward-looking constitutional questions are what institutions (old and new) will, in the decades to come, mark the utilities, commitments, and generativity of democratic states.

202 Id. at 741 (citing 39 U.S.C. §§ 101, 403).
204 Accenture, Postal Universal Service Obligation (USO) International Comparison: International Postal Liberalization—Comparative Study of US and Key Countries 13 (2008). Government goals of universal service are commonplace: many countries and the European Union have similar mandates to ensure affordable exchanges. Id.
206 Flamingo Industries, Ltd., 540 U.S. at 746.
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