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Quasipublic Executives

ABSTRACT. In this Essay, we first observe the rise of what we call “quasipublic executives”: both “nominally private executives,” that is, private executives in charge of public functions such as corrections, education, and national defense; and “nominally public executives,” that is, public executives who have assumed private characteristics such as insulation from electoral control mechanisms. We proceed to argue that control mechanisms for quasipublic executives should be drawn from both constitutional law and corporate law, broadly interpreted. Constitutional law and corporate law both face the problem of controlling executives but use radically different control mechanisms to do so. This difference, we argue, can be justified only by differences in the institutional settings of the executives governed by each body of law or in the functions with which they are charged. But because quasipublic executives, whether nominally public or nominally private, operate in private institutional settings and perform public functions, this justification for the use of different control mechanisms cannot apply to them. Further, we argue that the law’s failure to draw control mechanisms from both fields is symptomatic of a larger doctrinal distortion. Under this distortion, the solutions that the law offers to social problems are often driven more by the doctrinal field to which those problems are assigned than by functional considerations.

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INTRODUCTION

This is an Essay about how to design control mechanisms for executives who have private characteristics such as insulation from electoral control, but who are charged with public functions such as corrections, education, and national defense. We call these figures “quasipublic executives.” Quasipublic executives are created both when public executives assume private characteristics, becoming what we call “nominally public executives,” and when private executives assume or are assigned public functions, becoming what we call “nominally private executives.” The regulation of quasipublic executives is important and interesting for two reasons. First, quasipublic executives have become increasingly common in the United States and abroad,¹ and the demographic and technological changes behind this trend are unlikely to reverse themselves. Second, our effort in this Essay to design effective control mechanisms for quasipublic executives reveals a connection between constitutional law and corporate law that has growing consequences for both fields. Unfortunately, this connection has been overlooked for the most part by academics and practitioners alike. This inattention is symptomatic of a broader distortion in the law and legal education caused by the assignment of social problems to doctrinal areas on the basis of formal legal concepts rather than functional considerations. We shall discuss such distortions later in the Essay.

Part I begins by arguing that constitutional law and corporate law address a common problem of controlling executives but that they use very different control mechanisms to do so. It continues by suggesting that this difference can be described using the incentives-and-insulation framework that one of us has developed elsewhere.² In particular, we observe that constitutional law relies principally on political and social control mechanisms, while corporate law relies principally on market control mechanisms. Part I then argues that any justification for this difference in reliance must rest on differences between the functions with which we charge the executives governed by constitutional law and corporate law or on differences between the institutional structures in which these executives operate. But no such justification can support the systematic differences between the control mechanisms applied to nominally public executives and those applied to nominally private executives because both of these types of executives are charged with public functions and operate

1. See, e.g., Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 829-35 (2000); Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551-56 (2000) [hereinafter Freeman, *Private Role*].

2. See K.A.D. Camara, *Classifying Institutional Investors*, 30 J. CORP. L. 219 (2005).

in institutions with substantial private characteristics. In the absence of a justification for the divergence between corporate law's and constitutional law's control mechanisms, it is natural to look to corporate law to shore up the control mechanisms governing nominally public executives and to constitutional law to shore up the control mechanisms governing nominally private executives.³

Part II sketches the application of this theory to the reform of control mechanisms for quasipublic executives, using school executives as a running example. In light of space constraints, however, we leave for future work rigorous application of our theory to particular institutions. We conclude by returning to the Essay's second motivation—namely, the light that our analysis sheds on the convergence of constitutional law and corporate law and, more generally, on the ways in which doctrinal divisions in the legal academy distort the law's approach to social problems.

I. CONTROLLING EXECUTIVES

A. Incentives and Insulation

The problem of controlling executives is a special case of the problem of controlling people—a problem central to the law, seen as a system of social engineering. The law controls people by controlling their exposure to and insulation from three types of incentive forces: political, market, and social.⁴

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3. We say that any justification, if it exists, must be function-dependent in this way, but we leave open the question whether any such justification in fact exists. If no justification exists, then our argument calls for the wholesale reform of both constitutional law and corporate law—for example, the abandonment of the shareholder-wealth-maximization principle in corporate law. Strategically, however, it is wise to begin by applying the argument to quasipublic executives; in their case, the challenge to existing doctrine and dogma can be framed as a narrowly drawn, functionally grounded exception rather than as a proposal for radical change. Once reformers are successful in this limited domain, they can seek to expand the category of quasipublic executives, applying their reforms more broadly. Cf. K.A.D. Camara, *Costs of Sovereignty*, 107 W. VA. L. REV. 385, 393 n.30 (2005) (describing a similar strategy in civil rights and international law contexts).
 4. This incentives-and-insulation framework is useful both for understanding what people are likely to do, see, e.g., Camara, *supra* note 2, at 225-42 (2005), and also for understanding what options the law has for controlling what people are likely to do. One of us is working on an article-length discussion of this framework, which includes a comparison and evaluation of the frameworks that others have offered. See, e.g., Donald Black, *Social Control as a Dependent Variable*, in 1 TOWARD A GENERAL THEORY OF SOCIAL CONTROL 1 (Donald Black ed., 1984); Steven Shavell, *Law Versus Morality as Regulators of Conduct*, 4 AM. L. & ECON. REV. 227 (2002). We omit that discussion here. But we note that the incentives-and-

Political incentive forces change behavior by conditioning a person's getting what he wants on his having the consent of others. Market incentive forces are a special case of political incentive forces in which, in the paradigm case, the reward is financial and the consenters are market participants operating under the baseline rules of private law.⁵ Social incentive forces change behavior by changing what people want.⁶ It is helpful to think of social incentive forces as internal, that is, as the contribution of an agent's own preferences to what he does, and to think of political and market forces as external, that is, as the contribution of obstacles to the satisfaction of an agent's preferences to what he does. But this rule of thumb must be taken with the caveat that social incentive forces can be shaped and so have external origins, even though, once in place, they function internally.

With the term "insulation," we capture the idea that people differ in their susceptibility to incentive forces. Someone who is perfectly insulated from an incentive force does not change his behavior in response to it. Authority, in the sense of a social practice of obedience to the one with authority, insulates the one possessing authority from political incentive forces because, if the

insulation framework applies not only to the law's means of social control, but also to social controllers such as firms, mass media, religion, and science, each of which simultaneously imposes control mechanisms and is subject to the control mechanisms of other social controllers. For this latter point we are indebted to Charles Nesson.

5. It is useful to distinguish market incentive forces from political incentive forces because (1) there is a well-developed and largely separate literature on market incentive forces; (2) it is often advantageous to define political incentive forces as usually involving non-financial rewards because financial rewards often reduce the effectiveness of non-financial ones so that it is helpful to treat them separately, *see* Camara, *supra* note 2, at 237 n.60; and (3) the distinction between market incentive forces and political incentive forces often, though not always, tracks that between ex post rewards and ex ante consent requirements. But the distinction is one we will treat loosely—in particular, we will often refer to control mechanisms that simulate competitive markets as market control mechanisms.
6. This, of course, is a rough functionalist notion of what it might mean to change a desire. Some types of social control mechanisms, such as moral norms, might be seen as introducing a countervailing desire in the form of, for example, moral revulsion at an otherwise desirable act. The philosophical, psychological, and neurological aspects of desire, including necessarily what it might mean to change a desire, are currently in a state of theoretical flux. *See* TIMOTHY SCHROEDER, *THREE FACES OF DESIRE* 3-38 (2004) (providing a summary of the debates, which we note but do not engage). What we describe as a social control mechanism does not completely overlap with the Ellicksonian notion of social norms. *See* ROBERT ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991). Ellicksonian social norms, depending as they do on the sanction of others, could more accurately be described as a mixed social and political control mechanism. Our social control mechanisms, however, include items such as the socially shaped individual moral conscience of an actor, which does not necessarily depend on the existence of any sanctioning outsider.

consenter habitually obeys, the authority need not take his preferences into account. Wealth, or not wanting what can be bought, insulates a person from market incentive forces. Perfect competitive pressure and old-fashioned physical force both insulate a person from social incentive forces, for when someone has no choice, what he wants does not matter.⁷

A set of incentive forces, together with degrees of insulation from them, describes a system of control mechanisms.⁸ Because control mechanisms are often developed on an ad hoc basis or shaped from a legal-doctrinal perspective heavily influenced by history, these systems often contain patterns and holes with no immediately apparent functional justification. Thinking about the law's means of social control in the abstract way we advocate is helpful because it makes these patterns and holes more apparent. Moreover, once we see them, we can decide whether they are desirable by consulting general arguments about the situations in which different types of incentive forces and insulation are useful. And if they are not desirable, we can determine how to fix them.

B. Constitutional Law and Corporate Law

Constitutional law and corporate law share the problem of controlling executives. By “executives,” we mean high-level decision-makers who are substantially independent of the internal hierarchies of their institution. Thus, the President of the United States, the Mayor of Boston, and the Principal of Mountain View High School are executives, as are the chief executive officers of the large corporations that dominate the American economy. By using the term “executive,” we do not mean to restrict ourselves to those at the top of an institutional hierarchy or to those who constitute its public face. What is essential is the independence that we emphasize in our definition, for it follows from this independence that the law must provide, or permit others to provide,⁹ whatever control mechanisms will apply. It is also evident from our

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7. The library of the Stanford Economics Department's second-floor lounge contains a copy of SERGE-CHRISTOPHE KOLM, *LE BONHEUR-LIBERTÉ: BOUDDHISME PROFOND ET MODERNITÉ* (1982), on which is inscribed: “For Kenneth Arrow, this work about taking one's own preferences as choice variables.” This freedom of preference would also be a kind of insulation from social incentive forces—think of Meursault in ALBERT CAMUS, *L'ÉTRANGER* (1942).
 8. An incentive force's effect depends on the other forces to which an individual is exposed. For example, the effect of a political incentive force that conditions an individual's acquisition of a walrus on his obtaining the consent of a government agency depends critically on whether the individual wants a walrus, which is itself the result of social incentive forces.
 9. The idea that legal baselines such as the baseline rules of private law can be justified only as the result of important and non-obvious decisions about how best to order society has been

definition of “executive” that by “constitutional law” we mean not only constitutional law as traditionally understood, but the whole of the law governing public executives, including much of administrative law. And by “corporate law” we mean the law governing the executives of large, publicly traded firms, which both excludes the law of close corporations and includes parts of, for example, antitrust and labor law.

Constitutional law and corporate law control executives in very different ways: constitutional law, principally through political and social control mechanisms; and corporate law, principally through market control mechanisms. Constitutional law relies on electoral mechanisms (elections, appointments, recalls, and impeachments); on separation of powers (both horizontally among government branches and vertically among international, federal, state, and local governments and between governments and individuals); on norms of public service; and on institutional structures such as sunshine laws, notice-and-comment periods, freedom of speech, and public education that make the other control mechanisms more effective. Corporate law relies on a variety of control mechanisms, but principally on competitive products markets and performance-based executive compensation, including, as an extreme form, the market for corporate control. There are certainly exceptions to this characterization in the literature and in practice—for example, some scholars describe market control mechanisms in constitutional law¹⁰ and others identify political and social control mechanisms in corporate law¹¹—but the exceptions are few enough not to undermine the characterization in general.

Our central claim is that the systematic difference between the control mechanisms that constitutional law employs and those that corporate law employs leads to suboptimal control of quasipublic executives. Any justification for the difference must rest on supposed systematic differences

among the most lasting contributions of the academic line stretching from Wesley Hohfeld through Morris Cohen to Duncan Kennedy and Frank Michelman. See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

10. See, e.g., Saul Levmore, *Citizen Warranties and Majorities*, 31 FLA. ST. U. L. REV. 409 (2004) (suggesting that governments warrant the quality of services, such as education, and pay up on these warranties when quality falls short); Saul Levmore & Kyle D. Logue, *Insuring Against Terrorism—And Crime*, 102 MICH. L. REV. 268, 310-11, 318-19 (2003) (suggesting a type of incentive compensation to combat crime and terrorism).
11. See, e.g., Melvin Aron Eisenberg, *The Divergence of Standards of Conduct and Standards of Review in Corporate Law*, 62 FORDHAM L. REV. 437, 439-61 (1993).

between the situations in which each type of control mechanism is most effective. For example, one traditional justification for corporate law's focus on market control mechanisms is that profit-maximizing executives operating in markets with suitable price interventions do what is socially best. This justification, however, does not apply to the class of quasipublic executives whom we have called "nominally private executives" because they are charged with public functions—and it is generally agreed that public functions are not well policed by markets, even with suitable price interventions. To take another example, one traditional justification for constitutional law's focus on political control mechanisms is that these mechanisms allow citizens to participate actively in government and thereby to express their autonomy and develop the political virtues. But this justification does not apply to nominally public executives who operate in institutional settings, such as deep within complex bureaucracies, in which they enjoy such insulation from political control mechanisms that these mechanisms are no longer an effective training ground for citizens.

In general, the justifications for systematic differences between the control mechanisms applied to public executives and those applied to private executives fail when private executives are charged with traditional public functions, such as corrections, education, policing, and national defense, and so become only nominally private. They fail, too, when public executives become insulated from the ordinary control mechanisms applied to the public sphere, and so become only nominally public. Consequently, we should consider subjecting both sorts of quasipublic executives—nominally private and nominally public—to control mechanisms drawn from both constitutional law and corporate law. Constitutional law can teach us how to tailor control mechanisms to the performance of public functions, while corporate law can teach us how to tailor control mechanisms to private institutional settings.

II. CONTROLLING QUASIPUBLIC EXECUTIVES

A. The Status Quo

We are concerned with nominally public executives whose private characteristics have made traditional constitutional-law control mechanisms ineffective. Such executives have arisen both through express creation and through demographic and technological changes that have undermined traditional constitutional-law control mechanisms. Much of the intentional creation of nominally public executives is attributable to the progressive

movements at the turn of the last century, which aimed at isolating civil servants from political control mechanisms.¹² Those reforms were largely successful—for example, Robert Lineberry and Edmund Fowler have found that cities with reform-movement structures are less responsive to socioeconomic differences within their populations than are cities with traditional structures.¹³

As for the unintentional creation of nominally public executives, this can be traced in part to problems about which Senator Calhoun warned us a century and a half ago in his *Discourse* and *Disquisition*.¹⁴ The rise of costly, nationally focused mass media; the great increase in the constitutional power of the federal executive and legislature to deal with local problems, itself a consequence of growing economic interdependence among the states; and the move to direct election of United States Senators have combined to convert national democracy into an elaborate marketing competition and to sap energy from state and local politics.¹⁵ And as the government faces problems of increasing technical sophistication due to advances in economics, medicine, and engineering, the attractiveness of executives who have stronger ties to extra-governmental, professional communities than to their governmental superiors grows. The internationalization of mid-level bureaucracy has had a similar effect.¹⁶

We are also concerned with nominally private executives whose public functions are not well policed by traditional corporate-law control

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12. See generally Robert L. Lineberry & Edmund P. Fowler, *Reformism and Public Policies in American Cities*, 61 AM. POL. SCI. REV. 701 (1967) (reporting empirical results relating to the effects of reform government structures).
 13. *Id.* at 709-10. Interestingly, Lineberry and Fowler also found that “reform” cities tended to follow policies more significantly associated with middle-class interests than traditionally structured cities, even though these cities did not have a markedly higher proportion of middle-class citizens. To the extent that these cities drew their civil servants from the middle class, Lineberry and Fowler’s observation suggests that civil-service reforms function as an insulating device; that is, these reforms confer more relative decision-making power on the executives that staff the civil service, notwithstanding the purportedly rationalistic ends of the reforms. Further support for this supposition can be found in M. Craig Brown & Barbara D. Warner, *Immigrants, Urban Politics, and Policing in 1900*, 57 AM. SOC. REV. 293 (1992), which demonstrates that the dominance of middle-class reformers was correlated with increased immigrant arrests over the traditional “machine politics” system.
 14. JOHN C. CALHOUN, DISCOURSE ON THE GOVERNMENT OF THE UNITED STATES (1851); JOHN C. CALHOUN, DISQUISITION ON GOVERNMENT (1851); see also 1 BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 243-51 (1991).
 15. See Marc J. Hetherington, *The Political Relevance of Political Trust*, 92 AM. POL. SCI. REV. 791 (1998).
 16. See, e.g., Anne-Marie Slaughter, *The Real New World Order*, 76 FOREIGN AFF. 183 (1997).

mechanisms. Nominally private executives have been created both by express delegation of government functions to private institutions and indirectly by private executives' successful competition against the government in the market for public services. School-voucher and utility-privatization proposals are current examples of privatization by public officials. The private law-enforcement officers that patrol gated communities and shopping malls,¹⁷ the planned-community covenants that implicitly zone land, and the schools run by the Catholic Church and for-profit entrepreneurs are all examples of privatization as a result of private initiative and market competition.

The rise of quasipublic executives in areas ranging from corrections to defense to education to policing has been well documented elsewhere.¹⁸ At the municipal level, for example, appointed city managers and police chiefs are steadily replacing elected mayors and sheriffs,¹⁹ just as private schools and parochial schools compete with public schools and private prisons compete with their public counterparts.²⁰ Our communities are increasingly becoming privately owned, gated complexes guarded by private police.²¹ United States

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17. One might argue that private security forces are merely a supplement purchased by private property owners when the security provided by the state is insufficient for their high-security needs. This would be an overly simplistic view of the situation. For one, the use of private security forces creates incentives for all players that make the situation look more like a supplanting than a supplementing. For example, the police have less incentive to patrol aggressively a shopping mall already patrolled by private security forces. Similarly, a property owner who uses private security has little incentive to support the police (receiving fewer per-dollar services than the mean of the population) and can therefore be expected to oppose police taxes. Thus, in the aggregate, it is accurate to describe this as competition because more private security means less public support for police and less police presence.
 18. A useful overall survey of this trend appears in Freeman, *Private Role*, *supra* note 1.
 19. The difference between city managers and mayors illustrates the fact that the "line" (such as there is) between a quasipublic executive and a public or private executive is contextual and comparative. Compared to a manager of a corporate town, such as the one at issue in *Marsh v. Alabama*, 326 U.S. 501 (1946), a city manager is very public indeed. However, compared to a mayor, a city manager (who is clearly more insulated from the political control of the electoral process) is relatively quasipublic. Local citizens cannot expect to have the same level of control over a city manager as they have over an elected mayor.
 20. See Richard F. Culp, *The Rise and Stall of Prison Privatization: An Integration of Policy Analysis Perspectives*, 16 CRIM. JUST. POL'Y REV. 412 (2005). A worthwhile analysis of prison privatization in the context of globalization is Alfred C. Aman, Jr., *Privatization, Prisons, Democracy, and Human Rights: The Need To Extend the Province of Administrative Law*, 12 IND. J. GLOBAL LEGAL STUD. 511 (2005). Aman advocates an importation of constitutional control mechanisms into the management of prisons.
 21. See David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761 (1995); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

monetary and lending policies are set by an independent federal agency commanded by statute to draw its membership from the banking community.²² And the United States is outsourcing to private firms not only defense research and production, but also actual wartime operations.²³

Quasipublic executives have no doubt been beneficial in some respects. The reformist project reduced corruption in public administration and increased the competence of public administrators.²⁴ At the same time, the instances of poor performance by quasipublic executives are legion and often occur along dimensions that suggest the absence of the types of control mechanisms that we contend are missing. Privatized prisons provide a convenient example. Toward the end of the 1990s, a string of prisoner lawsuits, management corruption scandals, deaths, escapes, brutality, and other problems came to light. Legislatures quickly reacted by imposing regulatory constraints and reducing private prisons, in the words of one commentator, to “mirror images of public prisons.”²⁵ This result was predictable, as it is difficult to impose contractual requirements on amorphous qualities like appropriate confinement. Legislatures could have predicted that private-prison operators would, in the absence of regulatory oversight or an alternative along the lines we propose, cut costs by externalizing various risks (escape, brutality, etc.) onto prisoners or society at large.²⁶ Similarly, management scandals have plagued the executives

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22. This is the Federal Reserve Board, of course. See 12 U.S.C. §§ 241-248 (2000) (organizing the Board of Governors of the Federal Reserve System); 12 C.F.R. pt. 226 (2006) (containing the Federal Reserve Board regulation implementing the Truth in Lending Act). On the independence of such institutions generally, see Susanne Lohmann, *Optimal Commitment in Monetary Policy: Credibility Versus Flexibility*, 82 AM. ECON. REV. 273 (1992); and David Stasavage, *Transparency, Democratic Accountability, and the Economic Consequences of Monetary Institutions*, 47 AM. J. POL. SCI. 389 (2003).
 23. This last example seems especially surprising, and yet see, for example, *High Pay—and High Risks—for Contractors in Iraq*, CNN.COM, Apr. 2, 2004, <http://www.cnn.com/2004/WORLD/meast/04/01/iraq.contractor> (noting numerous quasi-military uses of private contractors in Iraq, including as security for the U.S. civil administrator and embassy officials).
 24. For example, a convincing case can be made that civil-service reforms lead to increased long-term economic growth because of the ability of insulated bureaucrats to make infrastructure investments that have no immediate payoff. See James E. Rauch, *Bureaucracy, Infrastructure, and Economic Growth: Evidence from U.S. Cities During the Progressive Era*, 85 AM. ECON. REV. 968 (1995). See generally Andrei Shleifer, *State Versus Private Ownership*, 12 J. ECON. PERSP. 133 (1998). We do not endorse Shleifer's claims about school privatization, which rely, among other things, on the fanciful notion that the state can effectively make and enforce contracts barring the teaching of religion in private schools.
 25. Culp, *supra* note 20, at 426-31.
 26. This point is partially made in Oliver Hart et al., *The Proper Scope of Government: Theory and an Application to Prisons*, 112 Q.J. ECON. 1127 (1997).

in charge of government-sponsored lenders Fanny Mae and Freddie Mac,²⁷ and private contractors were implicated in the torture at Abu Ghraib.²⁸ Privatization can lead to political distortion by creating vested interests in pro-business policies.²⁹ The phenomenon of agency capture, at its height in the case of nominally public executives, is usually seen as the result of affiliation between regulators and the regulated, or as the result of repeat business.³⁰ But agency capture can also be seen as the consequence of unintended insulation from the necessary incentive forces—in other words, as a consequence of poorly designed control mechanisms.

We will use school executives as a concrete example for the remainder of our discussion, but we should emphasize again that our goal is to present a general theoretical framework, not to apply that framework in any detail to a particular institutional setting. The example of schools is a device for the exposition of the framework and not a contribution to the literature on education policy. Schools provide a nice example because we can see in them the rise of both nominally private executives—for instance, private-school headmasters who occasionally receive public funds and contracts—and nominally public executives—for instance, public-university presidents and school-district superintendents who are becoming increasingly entangled with private firms. Further, education is both a socially important function and the locus of a current scholarly and popular battle over the balance between public and private provision of a good that has both public and private value.

Education is a public function in the sense that there are public benefits derived from it. And, though education has historically been privately provided, there also has been a longstanding American commitment to government-supplied public education. Charles Fried identifies as one of three drivers of opposition to school-voucher programs (the others being union self-interest and suburban parents) “a principled conviction . . . that government[.] . . . schools are necessary to forge a nation of immigrants into one coherent

27. See, e.g., David S. Hilzenrath, *Report Slams Fannie Mae*, WASH. POST, Sept. 23, 2004, at A1 (reporting on findings of accounting irregularities at Fannie Mae and Freddie Mac).

28. See Report of Major Gen. Antonio M. Taguba, *reprinted in* MARK DANNER, TORTURE AND TRUTH 279, 302, 323-24 (2004) (noting that civilian contractors were permitted to “wander[] about with too much unsupervised free access” to prisoners and implicating two named private-contractor employees in direct involvement in, or cover-ups for, torture).

29. This hypothesis is fleshed out in Bruno Biais & Enrico Perotti, *Machiavellian Privatization*, 92 AM. ECON. REV. 240 (2002).

30. See, e.g., DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991).

nation.”³¹ Nominally private executives—those who run parochial and private schools—have always played a major role in education and are now playing an even larger role because of government efforts through voucher and charter-school programs to give public schools competitive incentives.³² And many public executives have become only nominally public as their insulation from market control mechanisms has been reduced. For example, since the passage, in 1980, of the Bayh-Doyle Act,³³ public universities have begun to obtain private patents at a vastly accelerated rate, even on publicly funded research.³⁴ At the same time, corporate-funding-in-exchange-for-intellectual-property deals have ballooned in public universities.³⁵ The net effect of all this is to separate the results of public research from public control.

The rise of quasipublic executives in education has had significant effects. For example, nominally private executives need not abide by the traditional legal constraints on public executives to permit political dissent or to refrain from content-based censorship—constraints that may have great value in inculcating American civic values.³⁶ In higher education, corporate

31. Charles Fried, Comment, *Five to Four: Reflections on the School Voucher Case*, 116 HARV. L. REV. 163, 167 (2002).

32. Unlike ordinary privatization, which simply sells off a public function or pays a private entity to carry it out, a school-voucher system directly attempts to impose market control mechanisms on public schools by subjecting them to the competitive marketplace. However, the voucher system does so by permitting its funding to be used to channel students toward private schools, which are insulated from political control mechanisms. It thus exerts more control over public-school executives at the price of exerting less control over the executives who will be permitted to handle an increased segment of the students who are to be educated. On the public end of the continuum, some charter schools are publicly funded and regulated but privately run; such schools seem designed to create competitive pressures on fully public schools without eliminating state control over education.

33. Pub. L. No. 96-517, 94 Stat. 3015 (1980) (codified at 35 U.S.C. §§ 200-211 (2000)) (permitting private patents of technology developed in federally funded research).

34. See Risa L. Lieberwitz, *Confronting the Privatization and Commercialization of Academic Research: An Analysis of Social Implications at the Local, National, and Global Levels*, 12 IND. J. GLOBAL LEGAL STUD. 109, 123 (2005).

35. Lieberwitz notes, by way of example, both “the 1982 Washington University-Monsanto agreement for \$23.5 million of corporate funds over five years in exchange for exclusive licensing rights to patents resulting from biomedical research” and “the 1998 University of California at Berkeley-Novartis agreement for corporate funding of \$25 million over five years in exchange for exclusive licensing rights to about a third of the Plant and Microbial Biology department’s discoveries.” *Id.* at 123-24 (citation omitted).

36. See generally *Bd. of Educ. v. Pico*, 457 U.S. 853, 863 (1982); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969); *Epperson v. Arkansas*, 393 U.S. 97, 109 (1968); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Each of these cases expresses a notion of the civic value of public education, as evidenced, for example, in First Amendment

entanglement with research raises the potential for unwarranted commercialization of previously public knowledge and consequent injury to the norms and results of academic inquiry.³⁷ There is some evidence suggesting that the infiltration of private economic interests into the public primary-school classroom has been socially harmful.³⁸ Commentators have noted misconduct by loosely controlled charter-school officials,³⁹ and there has been controversy over the mixing of academic research and private funding, including concerns about conflicts of interest leading to dubious scientific results – another example of market incentives placing public values at risk.⁴⁰

B. Control Mechanisms for Quasipublic Executives

In light of the rise, likely persistence, and poor performance of quasipublic executives, it is important to ask what we can do to improve the control mechanisms under which they operate. An alternative approach is to resist the rise of quasipublic executives altogether, that is, to restrict our allocation of social functions to traditional public executives and traditional private executives. The problem with this alternative is that it neglects the benefits that quasipublic executives can provide. In light of the demographic and technological changes that drove the rise of quasipublic executives in the first

protections. This is an idea that reaches back to the ancient Greeks. See, e.g., PLATO, *THE REPUBLIC* 209-34 (Richard W. Sterling & William C. Scott trans., 1985).

37. See generally Lieberwitz, *supra* note 34 (noting this trend); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, 90-92 (1999) (same).
38. Consider, for example, Channel One, a privately produced educational and commercial television series frequently used in public schools. Christine M. Bachen, *Channel One and the Education of American Youths*, ANNALS, May 1998, at 132, 143, cites mixed evidence of Channel One's effect on childhood marketing susceptibility. However, even her own study of this phenomenon, which found little negative effect, nonetheless found a markedly higher effect of Channel One advertising on low-achieving and immigrant populations. She also found that Channel One is used more frequently in the lower-income school districts that serve such students and that students in those groups tended to learn less from the programming. There seems to be little that can be said for an "educational tool" that may not teach anything, aside from consumption, to the students at whom it is directed.
39. See, e.g., Goodwin Liu & William L. Taylor, *School Choice To Achieve Desegregation*, 74 FORDHAM L. REV. 791, 794 (2005) (noting a handful of large frauds perpetrated by charter-school executives, as well as concerns that these institutions might become "refuges for white flight").
40. See Lieberwitz, *supra* note 34, at 135-36 ("Studies have reported that corporately financed researchers are significantly more likely than researchers who are not funded by the corporation to reach favorable results concerning a corporation's product, including pharmaceutical products.").

place, it may be that even though poorly controlled quasipublic executives underperform relative to traditional public and private executives, properly controlled quasipublic executives would outperform their traditional counterparts. Moreover, that alternative brings to a head the conflict over which functions should be treated as public and which as private. This conflict is difficult to resolve under many different moral and political views, and, in light of the diversity of such views, any resolution of it is unlikely to garner sufficient support to be implemented.

We now turn to the task of devising a system of control mechanisms well-suited to quasipublic executives. In doing so, we take no position on the precise goals that control mechanisms for specific quasipublic executives should be designed to advance. We do not say, for example, that control mechanisms for principals should foster education in civic values over education in the hard sciences or that control mechanisms for private-prison wardens should foster deterrence over rehabilitation. Our goal is rather to sketch how one might select a set of control mechanisms for a quasipublic executive given the ends that the executive is to serve. We should note at the outset, however, that constitutional-law control mechanisms may have substantial value that is independent of the context in which they are used. Matthew Baum and David Lake have argued that democratically responsive institutions are positively correlated with increased life expectancy, education, and, as a consequence, economic growth.⁴¹ And there are many deontological arguments for public control centered on personal autonomy and community self-definition.⁴²

1. *Nominally Public Executives*

With respect to nominally public executives, our goal is to replace traditional constitutional-law control mechanisms, where they have failed or been abandoned, with more effective alternatives. The foregoing discussion was meant to convince the reader that corporate law is a natural place to look for these alternatives because it solves the same executive-control problem but uses very different control mechanisms to do so. Corporate law, as we discussed above, controls executives primarily through market control

41. Matthew A. Baum & David A. Lake, *The Political Economy of Growth: Democracy and Human Capital*, 47 AM. J. POL. SCI. 333 (2003). As Baum and Lake indicate, however, the relationship between democracy and growth is hotly contested.

42. See, e.g., JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 82-131 (1996) (defending a conception of democratic theory grounded in the interplay between public and private autonomy); cf. JOHN RAWLS, POLITICAL LIBERALISM 72-81 (1993) (describing central aspects of autonomy in his theory of liberalism).

mechanisms. To apply corporate law's control mechanisms to nominally public executives, we must harness market mechanisms to the public ends that we want these executives to pursue. It is not enough just to apply corporate-law control mechanisms as they currently exist; that would only convert nominally public executives into nominally private ones.

The essence of a market control mechanism is that it is ordinarily tied to the executive's performance in the eyes of a competitive market. By "competitive market," we usually mean markets operating more or less within the baseline rules of property and contract. But government intervention in the price system does not convert a market incentive force into a political one. It is not essential that a market subject to the baseline rules of property and contract be directly involved. Other institutions could be used to impose monetary constraints on executives. There would be a market incentive if, for example, executive compensation were tied directly to the financial reports prepared by a corporation's outside accountants rather than to its share price—and this might be a useful market incentive to impose on corporations operating in temporarily inefficient capital markets.

Using this definition of market incentive forces, it is easy to think of analogues to performance-based executive compensation for quasipublic executives. We would need a third-party performance metric on which to condition the amount of compensation and some currency in which to pay it—a currency about which the quasipublic executive cared. Consider first the question of what metric to use. In some fields, we already have acceptable metrics. In education, for example, performance on standardized tests, admission to elite universities, and truancy rates are all third-party metrics to which we could tie rewards for the quasipublic executives who run our schools.

Usually, these metrics will be imperfect because there are attributes of good performance that they do not capture. For example, using budget reduction as a performance metric for a social services agency will capture the virtue of efficiency but not necessarily the virtue of assistance to the needy. Tying executive compensation to an imperfect metric may cause the executive to perform better on that metric but even worse on other important dimensions of performance. This is a cost that must be weighed case by case. Moreover, metrics can often be improved. In corporate law, for example, outside auditors and mandatory disclosure are often thought to make the market more informed and hence to make share prices a better third-party metric of firm value.

The metric issue is particularly relevant to the case of public schools. The No Child Left Behind Act⁴³ has institutionalized a metric of school performance—namely, test scores—that may cause school executives to pursue only some, and not all, of the goals of public education. Civic-mindedness, for example, is a virtue to be instilled partly through education, but one that turns up only indirectly, if at all, in standardized-test performance.

Now consider the question of what currency to use for performance-based compensation. The simplest example is money given directly to the nominally public executive. This works well if the public executive cares about money. On the other hand, financial rewards may interact negatively with other important control mechanisms and may not be effective motivators in the case of quasipublic executives who have already turned down more lucrative opportunities in the private sector. Another example is money given to the nominally public executive's institution—for instance, an increased budget or funding for special projects. An executive might respond to institutional financial incentives such as these because, for example, he enjoys commanding larger institutions or because the enhanced resources will allow him to pursue a favorite policy. A third example is a change in the institution's jurisdiction. Perhaps the executive prefers a larger, smaller, or otherwise different jurisdiction, and would respond to proposed changes in it. Any currency that is important to the executive will suffice, but the nature of the currency used to pay the reward may have side effects to which the social planner should pay attention.

An analogue to the market for corporate control for nominally public executives would consist of a similar opportunity for a private agent to buy the nominally public executive's job and profit from doing so, either by carrying out the job himself or by selling it later to another private agent.⁴⁴ For example, we could couple the executive-compensation control mechanisms, described above, with a market in quasipublic-executive positions. In such a market, an outsider who believed he could perform a quasipublic executive's job better

43. Pub. L. No. 107-110, 115 Stat. 1425 (2002) (codified at 20 U.S.C. §§ 6301-6578 (Supp. III 2003)).

44. Of course, this is an extreme hypothetical possibility. The risk of severe wealth effects and deep public dissatisfaction with a system in which one could purchase public office would probably prove insurmountable. *See, e.g.*, WILLIAM DOYLE, *THE OXFORD HISTORY OF THE FRENCH REVOLUTION* 23-37 (1989) (discussing the practice of purchasing public offices as a contributing factor to public dissatisfaction in pre-revolutionary France). However, in light of the high cost of participating in a major election, one might be forgiven for wondering whether the purchase of offices on the open market would be equivalent to the current system, but without the transaction costs generated by creating the appearance of political liberalism.

than its current holder could and would purchase the position from the sitting executive in order to obtain the available compensation. The easiest way to induce such purchases would be to award a fixed sum of public money to particular functions carried out by quasipublic executives. The result would be that the position would go to the person who could do it most cheaply. There would be a choice involved between specifying performance in the nature of the function to be carried out, as just described, and paying for performance according to third-party metrics, as described above. An analogue to the corporate-control market could work with either system. Of course, there could be significant moral and practical problems with so directly commodifying the market for nominally public executive control, but we will not consider these in depth here.

We could achieve an approximation of the effects of a market in quasipublic executive jobs by more general electoral reforms, particularly those designed to increase the relative impact of individual votes⁴⁵ or to increase competition for electoral positions. We also could simply raise the salaries of nominally public officials to closer-to-market rates in order to expand the pool of candidates for those positions. Although there is something to be said for the virtue of selecting executives on the basis of their willingness to make personal sacrifices for public service or their ability to ignore corrupting temptations,⁴⁶ there seem to be equally persuasive arguments in favor of increasing the pool of potential candidates to include those who might not be able to make such sacrifices.

Another way to impose market constraints on nominally public executives would be to simulate the basic market constraint of limited resources by making it structurally difficult for executives to overspend. This could be accomplished by, for example, reducing the discretionary budgets of executives, unbundling budget-setting functions from operations functions, requiring consent across many institutions for spending increases, or requiring agencies with revenue models to be wholly self-supporting.

One virtue of recent school-voucher proposals, flawed though they may be, is their attempt to implement the flip side of the market for corporate control, namely, the right of a shareholder to opt out of the company of an

45. Such reforms could include, for example, decentralizing governmental functions (geographically or by unbundling those functions and distributing them among more officeholders), which would reduce the dilution of an individual voter's impact and permit more fine-grained electoral judgments.

46. Of course the choice of poorly paid government service over well-paid private employment might represent a preference for power over money as well as a preference for public service over money.

underperforming executive. To the extent that certain executives are already quasipublic, it might be worth considering some creative options for granting a similar means of exit to citizens served by institutions operated by nominally public executives. One particularly interesting possibility is the notion of competition between municipalities. For example, neighboring cities might compete for the privilege of supplying school service to groups of citizens, perhaps organized into councils, on their common border.⁴⁷

2. *Nominally Private Executives*

The trouble with nominally private executives is that corporate-law control mechanisms cause them to pursue ends that do not coincide well with the public good. Our object is to adapt the very different control mechanisms of constitutional law to reorient nominally private executives to the public good while sacrificing as little as possible of the efficiency that corporate-law control mechanisms produce. One approach would be to take corporate-law control mechanisms that are currently tied to share prices, such as executive compensation, and tie them instead to metrics of public performance, such as those that we discussed above in the context of nominally public executives. Under this approach, performance-based compensation would be retained, but a public-oriented metric for performance would be substituted for the share price. This might be achieved by contract for those quasipublic executives whose public role comes through traditional government privatization. For example, states using voucher programs to contract with privately run schools could include financial incentives for improved test scores, graduation rates, college entrance rates, and the like.⁴⁸ Likewise, prison-management contracts could provide for bonuses or penalties based on the number and outcome of prisoner-abuse lawsuits, the rate of disciplinary violations, or even the relative recidivism rates of its inmates versus inmates in state-run prisons. In each case, however, the measuring problem remains. If the metrics are inadequate, performance-based compensation will provide imperfect incentives to work toward the public goals to be achieved.

47. Indeed, one might even permit organized groups of citizens to exercise the option of seceding from one municipality to be annexed by another.

48. In theory, the point of voucher proposals is that the marketplace would perform this function as parents and students choose the best-performing schools. However, the perennial controversies about college and post-college rankings demonstrate how easy it is for an institution to massage data and manipulate public perceptions. The state, by contrast, can build audit mechanisms into its voucher system and take advantage of its privileged access to this information.

A second route suggested by the incentives-and-insulation analysis of constitutional law is to use political control mechanisms to add weight in nominally private executives' decision-making calculus to interests that are not well represented by existing corporate-law control mechanisms—for example, the interests of students, parents, or labor. At one extreme, we could subject nominally private executives' decisions affecting students, parents, or teachers to the consent of a government agency or private association charged with representing those interests. Weaker control mechanisms are also possible. We could give board representation to the teachers' union or to the parent-teacher association; we could give the general public, or representatives of designated interests, the power to remove nominally private executives through referendum or impeachment; or we could rotate possession of the executive's office among representatives of the different groups, thereby encouraging intertemporal horse trading while also giving each group the opportunity to participate by deciding.⁴⁹

Many variations on such political control mechanisms are possible. What is best will depend on the particular institutional context. In the context of education, one possible political control mechanism is mandatory representation. As noted above, the state could provide parents or teachers with mandatory representation on the governing boards of state-subsidized private schools, or could require school officials to make themselves available to meet with parents and others interested in the workings of the school system. The interest to be protected, of course, need not be a parental interest. Scientists might demand representation to ensure that evolutionary theory is taught; the

49. Depending on the amount of electoral muscle such advocates can muster, this proposal could be structured either as a political control (perhaps by providing the teachers union advocates with some form of veto over the actions of the executive), or as a simple social control (perhaps by forcing the executive to confront the union advocates and their moral claims). At the most basic level, all of this depends on the political process for its normative validation. If the teachers are unable to stir up political support for their aims, they will and should be unable to prevail on the legislature to impose their will on quasipublic executives. Even so, the legislature might be sufficiently concerned to impose the teachers' *presence* on the same executives, in other words, to require that the executives meet with, and listen to, the teachers' representatives. This sort of representation would be less coercive, since it would require only that the executives have a meeting, not that the executives actually act to protect the union's interests. Consequently, such a proposal could be justified based on less political support. We might draw a lesson from advocates of proportional representation and require executives to meet with interest groups whose members comprise a fixed, significant minority of the population. At an extreme, this would amount to the creation of deliberative public-input mechanisms based on stratified samples similar to those suggested by ETHAN J. LEIB, *DELIBERATIVE DEMOCRACY IN AMERICA: A PROPOSAL FOR A POPULAR BRANCH OF GOVERNMENT* (2004), albeit in a primarily advisory role and focused on the executive rather than the legislature.

local moralist might demand representation to ensure that promiscuous sex is not taught. Such democratic methods of representation would have a stronger claim to legitimacy than market-based methods, which might give only shareholders and large donors a board-level voice in school operation.

A second, closely related possibility is to impose some of the internal constraints often featured in electoral control mechanisms on nominally private executives. Thus, if a nominally private executive of a privatized business were subject to a contractual or statutory term limitation coinciding with the political processes in the underlying jurisdiction (e.g., elections to the school board that approved his school's charter renewals), then the executive would have an incentive to give due regard to the public interest, because the voters would have an opportunity to express their dissatisfaction with his continued service before the time came to renew his contract. Similarly, a quasipublic executive's contract could permit electorally accountable public officials, or the public itself by initiative, to terminate his contract through a referendum or a recall mechanism.⁵⁰ This translates directly to the charter or voucher school systems.

A third possibility is to reduce nominally private executives' insulation from social incentive forces. One effect of the large corporation—and one that was a source of controversy when large corporations first took the American stage—is to separate its managers through cultural, geographic, and social distance (for example, through layers of subordinates) from many of those whom they affect.⁵¹ Managers see shareholders, but not laborers; they see bankers, but not environmental interests. One way to pierce this insulation would be to grant these constituencies representation on boards of directors, but we can imagine other ways. For example, nominally private executives might be required to spend time in communities affected by their decisions. This is not as bizarre a suggestion as it might appear. Many a scandal has been created by, for example, shifting corporate headquarters from their traditional locations.⁵² Part of the globalization controversy can be understood as a reaction to the problem of executives becoming disconnected from and, hence,

50. Of course, private executives can be expected to charge a premium for these provisions, but this would be beneficial in itself, since it would provide the public with information about the market value of the flexibility it ordinarily obtains for free from its government officials, thereby permitting more efficient decision-making.

51. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005).

52. A popular account of one of these scandals appears in BRYAN BURROUGH & JOHN HELYAR, *BARBARIANS AT THE GATE: THE FALL OF RJR NABISCO* 81-85 (1990) (describing public opposition to the relocation of RJR Nabisco's corporate headquarters).

unconcerned with, the localities that house their employees and consumers; there are vigorous political movements centered on encouraging local ownership of businesses.⁵³

Many commentators have acknowledged the importance, in structuring a society along liberal-democratic lines, of face-to-face communication.⁵⁴ This, too, has an application to the educational marketplace, albeit on the research end. Consider the problem of cultural appropriation, whether of artistic or biological resources.⁵⁵ University administrators (or other executives) making patent decisions implicating indigenous cultural practices⁵⁶ may do well to acquire some firsthand exposure to the cultures at issue.

Another technique for reducing the insulation of nominally private executives from social incentive forces would be to increase the explicit normative feedback the executives receive. This feedback could come from within the institution if we ensure that the institution has representatives from diverse interest groups and ethical perspectives. Our society might also make an effort to reinstate the traditional role of the lawyer as broad-minded counselor, for example, by relaxing the zealous-advocacy rule.⁵⁷ The feedback could also come from outside the institution, with the aid of structural changes to encourage transparency and openness. For example, public-records laws could be expanded to cover the records of those corporations holding

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53. The quintessential example of “outside” quasipublic executives taking over control of public resources without any local representation, and the consequent backlash, is Bechtel’s purchase of the Cochabamba, Bolivia, water utility. After Bechtel raised rates in disregard of the needs of the local community, the people rose in rebellion and laid siege to the city. For a chronology of the events, not objective but firsthand, see Jim Shultz, *Bolivia’s War over Water*, http://www.democracyctr.org/bechtel/the_water_war.htm (last visited Aug. 5, 2006). Whatever one may think of the merits of water-system privatization (and the Bolivian government was not composed of angels), it seems uncontroversial to suggest that a local influence on Bechtel’s executive decision-makers would have stood at least some chance of averting the violence, litigation, mass arrests, and martial law that resulted from this ill-advised (not to say immoral) behavior.
54. See LEIB, *supra* note 49, at 101 n.20.
55. With respect to the latter, see generally JAMES BOYLE, SHAMANS, SOFTWARE, AND SPLEENS: LAW AND THE CONSTRUCTION OF THE INFORMATION SOCIETY 119-43 (1996).
56. The problem of “biopiracy”—the outside patenting of indigenous folk remedies—is well known, as is the similar problem of cultural appropriation of indigenous art. See generally POOR PEOPLE’S KNOWLEDGE: PROMOTING INTELLECTUAL PROPERTY IN DEVELOPING COUNTRIES 159-206 (J. Michael Finger & Philip Schuler eds., 2004), available at http://www.worldbank.org/research/Poor_Peoples_Knowledge.pdf (discussing issues of cultural appropriation and biopiracy).
57. See generally James R. Elkins, *The Moral Labyrinth of Zealous Advocacy*, 21 CAP. U. L. REV. 735 (1992) (criticizing the zealous-advocacy rule).

government contracts (obviously including charter schools and schools funded by vouchers), whether those corporations are publicly traded or not.⁵⁸

The more difficult case is the nominally private executive who has attained quasipublic status by virtue of ordinary market operations rather than a government contract—the operator of a wholly private school in a non-voucher state, for example, or a condominium developer. The sort of structural changes that might be imposed easily by contract in the case of a privatized public service will not be so directly available if the executive has no contract with the state. Nonetheless, there are several possible routes for structural modification. For one, we could modify the baseline property and contract regimes to shift the balance of power within such organizations. For example, the employment-at-will doctrine could be relaxed with regard to private-school teachers, so as to partially insulate them from the control of private-school owners, and thus set them up as consenters with regard to owners' curricular goals.⁵⁹ Likewise, society might impose term limitations and periodic ratification requirements on restrictive covenants in land, thereby permitting condominium owners to serve as consenters with respect to developers. We could expand public-records laws to cover defined categories of nominally private institutions filling government functions. And we could enact legal reforms similar to the National Labor Relations Act⁶⁰ to facilitate the self-organization of clients (homeowners, for example, or parents) and interested citizens in forms conducive to exerting social pressure on these executives. A National Parent-Teacher Association Act, for example, could provide for guaranteed access to facilities, non-retaliation for organizing, and some kind of analogue to collective bargaining in the private-school context. Finally, society might make more aggressive use of the levers of control provided by the power to condition state support upon compliant behavior. For example, tax-exempt status is a government subsidy for nonprofit private schools—a subsidy that could be withheld if those schools were to cross a public-regarding line. Similarly, condominium developers must turn to the courts to enforce their covenants,

58. Imposing this as a contractual term required to do business with the government would probably avoid the Fourth Amendment and other constitutional concerns. *See, e.g.*, 31 U.S.C. §§ 7501-7507 (2000) (providing for audits of companies with federal contracts).

59. Of course, the doctrine need not be relaxed in all respects (as that would distort the ordinary economic relationship between schools and their employees). Teachers could be somewhat protected from termination for their curricular choices (within a range) with non-retaliation provisions similar to those that exist in the Title VII context without otherwise giving them a general immunity from termination. This would amount to nothing more than a legal establishment of the principle of academic freedom in pre- and post-secondary private schools.

60. 29 U.S.C. §§ 151-169 (2000).

and the courts could become more aggressive in overlaying the bounds of public policy on private contracts.

CONCLUSION

We have argued that constitutional law and corporate law use very different control mechanisms to address their common problem of controlling executives. Constitutional law relies on political and social forces and insulation from market forces, while corporate law relies on market forces and insulation from political and social forces. This difference is justified, if at all, by differences between the functions with which the institutions traditionally governed by constitutional law and those traditionally governed by corporate law are charged. But no such justification can apply to quasipublic executives, who are a large and growing part of our executive technology, because those executives, whether nominally private or nominally public, share private institutional characteristics and are charged with public functions. It is therefore natural to look to corporate law to shore up nominally public executives' control mechanisms and to constitutional law to shore up nominally private executives' control mechanisms. We have sketched some of the adapted control mechanisms that such an inquiry could yield in Part II. Our argument has consequences for the regulation of quasipublic executives in practice and for the research agendas of those concerned with regulating quasipublic executives. It also has consequences of broader interest, and it is to these consequences that we now, by way of conclusion, turn.

Constitutional law and corporate law are similar fields. Both are concerned with how best to allocate power within a dynamic system in order to achieve a contested goal. Their solutions to this problem are very different, however, which suggests that each has something to learn from the other. We think that the differences between constitutional law and corporate law are today driven more by the sociology of the legal academy than by any difference between the types of institutions to which they apply. One reason for the rift is the dominance of law-and-economics scholars in the generation of corporate law academics that followed Victor Brudney and Melvin Eisenberg. Another is the separation of the constitutional law and corporate law courses in the law school curriculum—and, to a lesser extent, the separation of the students who are most invested in each of them.

The consequence of this separation—between constitutional law and corporate law, but also between other fields—in legal academia has been a

doctrinal distortion in the law.⁶¹ By this, we mean that the approaches to, the discourse surrounding, and the solutions of the social problems that the law yields are heavily influenced by the doctrinal field to which those problems are assigned. Our argument in this Essay addresses one such doctrinal distortion: the focus, with respect to nominally public executives, on failed constitutional-law control mechanisms to the exclusion of corporate-law control mechanisms, and vice versa for nominally private executives. Other examples abound. For example, the analysis of the manner in which a superior rulemaking body ought to coordinate inferior rulemaking bodies depends very much on whether the specific situation being considered is routed to constitutional law (federalism), corporate law (parent versus subsidiaries), or private international law (interstate conflicts of law). The boundaries between doctrinal fields are reinforced by matching partitions in casebooks, conferences, and courses, as well as the capture of particular doctrinal fields by competing methodologies, the most prominent of which is, no doubt, law and economics.

Interdoctrinal and generalist interdisciplinary scholarship may help to combat the doctrinal distortion, but these approaches are indirect. What is really needed is a more integrated approach to teaching the law—an approach that presents the law as a single comprehensive system of social regulation to be partitioned for study along functional or conceptual lines rather than historic, doctrinal ones.⁶² In addition to easing students and future judges and legislators into a broader understanding of the law's structure of social regulation, such an education might do much to solve problems of incomplete governance such as the one we discuss in this Essay.

61. See K.A.D. Camara, *Cases and Materials on American Law*, at iii, iv (2003) (unpublished manuscript, on file with author).

62. We are aware of a few efforts along these lines. At Harvard Law School, for example, there existed, for a time, the Bridge Program, which attempted to unite the first-year classes in something like the way that we suggest. That program seems to have gone away, however, and neither of us could see much impact from it in the structure of the first-year curriculum in 1997 or 2001. At the University of Chicago Law School, we are told, there is an Elements of the Law course that attempts to explore the law's conceptual underpinnings—but our very small, unscientifically taken sample of Chicago graduates (a former co-clerk and several former colleagues) tells us that the course is not very successful. We would be delighted to be corrected.