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ALFRED C. AMAN, JR.

Law, Markets and Democracy: A Role for Law in the Neo-Liberal State

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Once upon a time, and not too long ago, law consciousness was at a high point in the United States.¹ There seemed to be a good deal of confidence among policy makers and citizens in the ability of law to solve or improve a host of societal problems. *Brown v. Board of Education*² and its progeny brought an end to *de jure* discrimination in the South and triggered a newfound confidence in the efficacy of law to solve what we might call the problems of the post-New Deal era. During the 1960s and into the early 1970s, the federal courts successfully dismantled some of the worst aspects of apartheid in the South.³ The activism of the federal courts was matched by the President and Congress. President Johnson declared war on poverty, proposed plans for a Great Society, and advocated voting rights reforms, all of which Congress wrote into law.⁴

Law consciousness was expansive. The environment became a priority, as did the health and safety of workers and citizens in general. It was President Nixon — a conservative Republican — who not only imposed controls on the price of oil and gas at the wellhead,⁵ but also proposed some of the initial, innovative environmental legislation.⁶ Congress created a host of new administrative agencies in the late 1960s and early 1970s to regulate in these areas, and regulate they did.⁷ Indeed, the early forms of some environmental laws, such as those dealing with water, were absolutist in nature.⁸ The law decreed that water shall be clean by a date certain.⁹ The administrative state grew substan-

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1. Marc Galanter has written extensively on the concept of the decline of law in the U.S. economic and political system, and has also spoken on the topic in recent presentations at the New York Law School. For an overview of Professor Galanter's views and arguments in this area, see Marc Galanter, *The Turn Against Law: The Recoil Against Expanding Accountability*, 81 TEX. L. REV. 285 (2002).
 2. 347 U.S. 483 (1954).
 3. See, e.g., *Armstrong v. Bd. of Educ.*, 333 F.2d 47 (5th Cir. 1964); *Meredith v. Fair*, 306 F.2d 374 (5th Cir. 1962).
 4. See, e.g., Head Start Act, Pub. L. No. 97-35, §§ 635–657, 95 Stat. 499, 499–508 (codified at 42 U.S.C. §§ 9801, 9831–9852 (1981)) (prior to 1982 amendment); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (prior to 1970 amendment); Economic Opportunity Act of 1964, Pub. L. No. 88-452, 78 Stat. 508 (1964) (prior to 1975 amendment).
 5. Emergency Petroleum Allocation Act of 1973 (“EPAA”), Pub. L. No. 93-159, 87 Stat. 627 (codified at 15 U.S.C. §§ 751–756 (1973) (repealed 1975)).
 6. See, e.g., National Environmental Policy Act of 1969 (“NEPA”), Pub. L. No. 91-190, 83 Stat. 852 (codified at 42 U.S.C. §§ 4321–4347 (1970)).
 7. For example, in 1974 Congress created the Federal Energy Administration (“FEA”), Federal Energy Administration of 1974, Pub. L. No. 93-275, 88 Stat. 96 (codified at 15 U.S.C. §§ 761–786 (1974)), and in 1977, the Department of Energy was founded, Pub. L. No. 95-91, 91 Stat. 565 (codified primarily at 42 U.S.C. §§ 7101–7352 (1977)).
 8. See, e.g., Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-240, 86 Stat. 816 (codified at 33 U.S.C. §§ 1151, 1281–1301, 1311–1330, 1341–1346, 1361–1377 & 1381–1387 (1972)).
 9. See I WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: AIR AND WATER 19 (1986) (“Among the more salient examples of absolutism in environmental law are the goals in the Clean Water Act calling for fishable/swimmable water everywhere by July 1, 1983 and no discharges anywhere by January 1, 1985.”).

tially during this time, dwarfing the previous administrative law explosion triggered by the New Deal in the 1930s and 1940s.¹⁰

A common response to societal problems in the late 1960s and early 1970s, or so it seemed, was to say, there “ought to be a law.” There was a sense that law and the affirmation of citizens’ rights could at least begin to reign in some of the worst aspects of problems as wide ranging as poverty, air pollution, and highway safety. But there were also critics of this prevailing state of affairs. Some commentators, such as Milton Friedman and Frederick Hayek, opposed governmental intervention, especially federal intervention, on philosophical grounds.¹¹ They argued that state intervention into economic affairs would undermine fundamental freedoms and economic liberties.¹² Moreover, for them, the use of law as a solution to social problems would likely only make such problems worse. Such views were given little credence by lawmakers in those days, perhaps because the basic model of New Deal liberalism had by then become deeply embedded in our political and legal culture.

But quite apart from these philosophical critics, others had problems on policy grounds. Law had its limits, they argued. Although they were not philosophically opposed to the regulatory enterprise, even at the federal level, they reasoned that regulation was not always an effective solution, especially because administrative agencies could easily become colonized by the very interests whose activities the regulation sought to control.¹³ These critics began to question what the law could realistically accomplish in various contexts and whether the purported benefits were worth the costs. They used the refrain “there ought to be a law” ironically to suggest that laws, in some contexts, could be counterproductive, a tool in the hands of the regulated providing little societal benefit. To them, there could be too much law, but if so, it was at least too much of a relatively “good thing.”

A healthy debate on the efficacy of legal remedies and regulatory approaches to solving societal problems is both normal and necessary. Regulation involves law and politics and there is always disagreement over the means and ends of law in such contexts. Moreover, critique is part of the political process and, usually, there is an expectation that the political pendulum will, over time, swing back and forth, from liberal to conservative, and then back again. It is the “then back again” that I wish to address in this essay. Especially after 1980, our belief in and our use of law to solve societal problems seemed to decline precipitously, well beyond the ebb and flow of political trends and tastes. Beginning in earnest

10. See ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* 83 (1992).

11. See, e.g., MILTON FRIEDMAN & ROSE FRIEDMAN, *FREE TO CHOOSE: A PERSONAL STATEMENT* (1980); FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* (1944).

12. See FRIEDMAN & FRIEDMAN, *supra* note 11, at 38–69.

13. See, e.g., Ralph Nader & Mark Green, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 *YALE L.J.* 871 (1973).

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in the 1980s, law and markets came to be seen in binary terms. You could have one or the other, but not both. More law meant less markets and vice versa. When it came to choosing between law or markets, the tide clearly had shifted. “There ought to be a law” was now replaced with a new refrain: “There ought to be a market.”¹⁴

In this essay, I will address the question of why this turn to markets has occurred. As I argue below, we are not simply dealing with a swing of the political pendulum that will ultimately be reversed by a change of the political party in power. The reasons run deeper than electoral politics and go to the fundamental changes that have occurred in the ways that states and markets now interact. In Part I, I argue that this is, in fact, a major byproduct of a highly politicized, neo-liberal view of globalization in the United States, one that ultimately sees the global economy as a set of relentless, hegemonic forces that almost always require that policy makers favor markets over law.¹⁵ Part I outlines some ways that law might play a more active role in this global era.

It is important to state at the outset that my goal is *not* to argue or suggest that somehow we need to return to the past. Rather, I want to suggest ways we can invoke law in the world in which we now live to create the democratic means, flows of information, and political processes necessary for an active, effective, and creative citizenship. Part II will examine two structural openings for modest but important legal reform that can further such goals.

I. THE NEO-LIBERAL STATE

We now live in an increasingly neo-liberal state, one in which economic approaches to issues often trump more traditional, political, law-oriented approaches.¹⁶ As David Harvey has noted:

Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices. The state has to guarantee, for example, the quality and integrity of money. It must also set up those military, defence, police, and legal

14. I discuss this shift from law to markets and the ways that various judicial review doctrines facilitated it in ALFRED C. AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 15–50 (2004).

15. *See id.* at 87–128. *See generally* DAVID HARVEY, *A BRIEF HISTORY OF NEOLIBERALISM* 64–86 (2005).

16. *See* HARVEY, *supra* note 15, at 3 (noting that market exchange has come to be valued as “an ethic in itself, capable of acting as a guide to all human action, and substituting for all previously held ethical beliefs”) (quoting Matthew Arnold as cited in RAYMOND WILLIAMS, *CULTURE AND SOCIETY, 1780–1950*, at 118 (1958)).

structures and functions required to secure private property rights and to guarantee, by force if need be, the proper functioning of markets. Furthermore, if markets do not exist (in areas such as land, water, education, health care, social security, or environmental pollution) then they must be created, by state action if necessary. But beyond these tasks the state should not venture. State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (prices) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit.¹⁷

Perhaps law premised on neo-liberal assumptions might not be so bad, if it produces policy outcomes that are politically acceptable. This may often be the case and there are certainly many winners in the global economy. Yet, there are persistent problems that are now more severe than ever before. Disparities in wealth have increased enormously in many countries, including our own, and though wealth may have increased in some developing countries, its distribution has often been very concentrated in relatively small elite.¹⁸

Moreover, a neo-liberal approach to some policy issues creates serious problems with democratic accountability.¹⁹ Globalization based on neo-liberal tenets complicates democracy both in theory and in practice. It complicates democracy in theory because the prevailing models and metaphors of globalization derive largely from a vision of capitalism that equates markets with democracy, imagining markets as an expandable lateral system in which individuals are free to participate according to their own interests and abilities. But participation in markets as consumers is more limited than participation in political processes as citizens. Consumers might be able to effect change in some circumstances through, for example, product boycotts or forms of market power. However, choosing to buy or not buy a product is not the same as engaging in a more extensive political process that includes the give-and-take of political dialogue, the ability to propose and choose among a range of possible solutions before those decisions are made, and the possibility of having a say in who those decision-makers are. The processes that engage us as citizens are multidimensional in nature and they can transcend the simple “either/or” remedial choices available to consumers in the market.

Globalization complicates democracy in practice for a host of reasons. In the United States, the fundamental reason is that models and metaphors of law are based on a vision of state power that imagines it as a vertical hierarchy: the

17. HARVEY, *supra* note 15, at 2.

18. See JENS MARTENS, A COMPENDIUM OF INEQUALITY: THE HUMAN DEVELOPMENT REPORT 3-4 (2005), available at <http://www.globalpolicy.org/soecon/inequal/2005/10compendium.pdf>.

19. See AMAN, *supra* note 14, at 137-49.

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federal government *over or above* the states; the states *over or above* local communities; and looking outward from the United States, international organizations *over* national and regional organizations. A hierarchical approach to law and politics cannot account effectively for the importance of transnational players and transnational problems, given the very distinct political and legal limitations of territorially based states and the multidimensional demands made on global governance approaches to transnational issues.²⁰

A. Utopias: Law and the Market

We might expect some resistance or political outcry over some of the policy outcomes of the neo-liberal state, especially those exacerbating poverty issues and other externalities of globalization. But there is, at least in the United States, a noticeable decline in meaningful participation in politics,²¹ and in the sense of our collective ability to affect change that has the promise of making most of us better off than before.²² This was not the case in earlier times when we regularly turned to law. Perhaps we were utopian in our legal aspirations; law's utopia may have underestimated costs and over estimated benefits, as critics have claimed, but law's utopia in the 1960s and 1970s sought to be inclusive in terms of whom it tried to benefit.²³ Poverty and its societal effects were very much on the radar screen of policymakers and lawmakers.²⁴ This is in stark contrast with the market-driven utopias of today.

Market utopias more easily accept outcomes in which many people simply fall off the demand curve for a better life. Markets are all about allocating scarce goods in ways that impersonally, and seemingly without politics, sort out the winners and losers in the global economy. As Henry Giroux wrote, most market-driven utopias

have implored us to turn away from the public realm as a terrain for improvement and change, to cut our losses there and limit our involvements, and to instead encourage individual responsibility, personal initiative, and the centrality of people's private activities. Our social order . . . may not be perfect but it is good enough.²⁵

20. See generally Karl-Heinz Ladeur, *Globalization and Public Governance — A Contradiction?*, in PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION 5–20 (Karl-Heinz Ladeur ed., 2004).

21. See, e.g., Avi Salzman, *It's Time to Vote, But Will We?*, N.Y. TIMES, Oct. 31, 2004, § 14CN, at 1.

22. See generally AMAN, *supra* note 14, at 59–60.

23. See, e.g., *Goldberg v. Kelly*, 397 U.S. 254 (1970).

24. See *supra* notes 3–10 and accompanying text.

25. HENRY A. GIROUX, PUBLIC SPACES, PRIVATE LIVES: DEMOCRACY BEYOND 9/11, at 113 (2003). Giroux is quoting Ronald Aronson, *Hope After Hope*, 66 SOC. RES. 480 (1999), in support of his own argument that “free-market rationality . . . represents both a thinly veiled attack on democratic values and a relentless attempt to undermine and eliminate the public realm as a terrain of deliberation, education, engagement, and social change.” GIROUX, *supra*, at 113.

As a result, such models of utopia, “no longer preclude the evils of misery, oppression, and dependency . . . [P]roblems can be contained but never eliminated, cleaned up but never purged from the social order.”²⁶ In effect, the market’s utopia “cannot be realized without dystopia, without reproducing it; hence utopia never promises to eliminate dystopia, merely to be allowed to recruit from its meritocratic [sic] escapees.”²⁷ Law’s utopia usually makes calculations more complex and more costly than the market’s. Values other than efficiency are involved and, at its best, law’s utopia has assumed that the least well off are as important as the most well off. What is law’s utopia for the neo-liberal state? Does it extend beyond establishing property rights and protecting markets? To get at these questions, we must understand what happened to law in the process of neo-liberal reform and its main consequence, the phenomenon we refer to as globalization.

B. *Globalization and its Myths*

Let me begin by dispelling some myths about globalization. The first is that globalization refers only to what occurs worldwide. Some phenomena that we call “global” do have these characteristics, such as the global capacities of the Internet. But as I and others use this term, global effects are the local consequences of ideas, institutions, and other forces that transcend territorial or jurisdictional lines.²⁸ States may regulate the flow of these forces and in this sense, globalization is a series of local effects of wider conditions.

A second myth about globalization is that it is the product of international forces and is, in effect, imposed from the outside — as if it were a top-down affair. This is not the case. Globalization is not another “level,” “above” national states. Nor is globalization international, in the sense that it is primarily driven by states. The essence of globalization is its denationalizing forces and trends.²⁹ Indeed, non-state actors and multinational corporations play key roles in global processes precisely because they are not necessarily bound to any one jurisdiction. True, globalization does include global institutions such as the World Trade Organization and the North American Free Trade Agreement, but globalization is also, as far as everyday lives are concerned, a domestic phenomenon, driven by

26. GIROUX, *supra* note 25, at 114 (summarizing the argument of Sheldon S. Wolin, *Political Theory: From Vocation to Innovation*, in VOCATIONS OF POLITICAL THEORY 18 (Jason A. Frank & John Tambornino eds., 2000)).

27. GIROUX, *supra* note 25, at 114 (quoting Wolin, *supra* note 26, at 18).

28. Jan Aart Scholte, *What is ‘Global’ about Globalization?*, in THE GLOBAL TRANSFORMATIONAL READER: AN INTRODUCTION TO THE GLOBALIZATION DEBATE 84 (David Held & Anthony McGrew eds., 2d ed. 2003).

29. See Jost Delbrück, *Globalization of Law, Politics, and Markets — Implications for Domestic Law — A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9 (1993); Saskia Sassen, *The Participation of States and Citizens in Global Governance*, 10 IND. J. GLOBAL LEGAL STUD. 5 (2003).

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private actors. It is embedded in our local, domestic institutions — public and private — rhetorically, socially, economically, politically, and legally.

Many institutions now seek to take advantage of the deterritorialization characteristics that epitomize globalization, as markets have become capable of expanding exponentially and technologies such as the Internet radically affect our sense of connection to the world. The competition this encourages in the private and public sectors can be fierce. Public as well as private bodies now constantly seek low-cost means of fulfilling their obligations, whether it is creating and selling a product or providing a government service. “Privatization,” “deregulation,” and “non-governmental organizations” are the new coins of the global, neo-liberal realm. Legal as well as economic relationships are increasingly horizontal as well as vertical; networks are replacing hierarchies as decision-making centers; governance is replacing government as we have known it.

The myths of globalization contribute significantly to the perception that law as we have known it cannot possibly be effective when we are dealing with world-wide phenomena that are imposed from the outside and represent forces and processes that are, more or less, like the weather — something to be harnessed, perhaps, but beyond shaping in any fundamental way. Markets, in contrast, are now usually assumed to be the answer to global problems, as if markets and law were always in a binary opposition. This is particularly evident in the deregulation and privatization reforms that have become so common in U.S. regulatory approaches to issues ranging from the environment to social services.³⁰

As I have argued elsewhere, the market metaphors are primarily lateral, or horizontal; the power metaphors are primarily hierarchical, or vertical.³¹ The telltale signs that these imagined models are in play turn up in usages of the word “global” as if it meant “worldwide.” When “global” is used to suggest homogeneity in the fields of production and consumption, this is the market metaphor at work, depicting the world as ultimately one unified market. When it is used to suggest a form of dominance, this is the power metaphor at work, conjuring up world government by law. Either way, these models are highly misleading. Markets are neither self-regulating nor necessarily democratic, and if law is to matter again in a way that is not linked in a binary fashion with markets, it must be flexible enough to accommodate a three-dimensional view of regulation. It must take into account the vertical and horizontal relationships among the public and private sectors, as well as the merging of these sectors. Lastly, it is important that we think more locally and regionally, rather than globally in the world-wide sense described above.³²

30. See AMAN, *supra* note 14, at 91–101.

31. *Id.* at 3.

32. For a more in-depth discussion of this argument see *id.*

II. LAW'S REFORMS

To develop the kind of law-reform agenda I have in mind requires that we focus on domestic law. By turning the lens to globalization's domestic side, we can both advance understanding of the contemporary world and, at least within the United States, begin to develop reforms that would expand and strengthen democracy in the various governmental and non-governmental settings where policy is made and applied today. By this, I mean not just formal representation in the legislative and executive branches of government, but also at ground level, in contexts created by deregulation and privatization. These are the new terrains created by neo-liberalism and it is here our attention to law reform should be focused.

These highly varied deregulatory and privatized contexts often combine elements of the public and private sector as public functions are delegated to the private sector by the application of market values to an increasingly wide range of governmental functions and services. The very recourse to markets and the private sector would appear to diminish the importance of law, or even render it superfluous. One of the primary reasons to opt for the market and the private sector generally is to increase efficiency; however, the embedded nature of globalization within American institutions of government renders this kind of either/or thinking obsolete. Markets and law are not separate worlds. Markets often function as a form of regulation. The public and the private sectors often merge, necessitating new approaches to law, to maintain the values of, and opportunities for, public debate over public matters now delegated to the private sector.³³

In many of these privatized settings today — e.g., prisons, health care, welfare, and housing for the poor — products and services may be provided privately, but the responsibility for their success or failure remains public. Thus, what kinds of markets are appropriate in specific private contexts and whether markets are even appropriate at all are questions in which the public should be involved, as they should participate in questions over the compatibility of profitability and public service. Understanding globalization from the domestic side means sorting through such rationales from the standpoint of how markets actually function in specific contexts, and when making private providers of public services more subject to accountability, public input is appropriate.

A. Two Examples: Privatization and Deregulation

I will, very briefly, give two examples of the kind of law reform I have in mind for some of the public/private and deregulatory issues that face us today. The first deals with privatization; the second deals with what I previously have called administrative equity — that is, exceptions to rules that when applied to certain individuals or entities result in hardship or other unreasonable outcomes.

33. See, e.g., *id.* at 93–101.

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I will discuss the need for a new form of administrative equity, one that is applicable in deregulatory contexts or in primarily market-oriented regulatory regimes. Both privatization and deregulation suggest the need for, and the direction of, some of the legal reforms we should pursue.

1. *Privatization*

Privatization should be understood as a principle dynamic (i.e., both cause and effect) of globalization.³⁴ It is not merely one means among others for making government more efficient or for expanding the private sector. Nor is it just a reflection of current political trends and a swing of the regulatory pendulum from liberal to conservative. Rather, the increasing reliance on “the new governance” is indicative of a changing relationship between the market and the state. It is characterized by a fusion of public and private values, rhetoric, and approaches — a fusion that is itself integral to the fusion of global and local economies. Privatization is the result of these fusions. In effect, it increases the exposure of the state to external economic and political pressures that tend to accelerate globalization, in large part because private actors fully exposed to the global economy now carry out the delegated tasks. The global political economy places great pressures on all entities — public and private — to be cost-effective if they wish to be competitive. This pressure encourages such delegations from the state to private entities and it raises concerns over whether the cost savings that result from such delegations occur at the expense of democratic processes, legitimacy, and individual justice. Given the role that the public/private distinction plays in the U.S. administrative law, privatization, in this global context, tends to reduce the democratic public sphere in favor of other arrangements. These arrangements are likely to be less transparent and accountable to the public, and less exposed to competing value regimes. This is the essence of the democracy deficit.

The democracy deficit is primarily the result of the traditional application of the public/private distinction that is likely to lessen considerably the public sector’s responsibilities for transparency and accountability when private actors perform certain tasks. Justifications often provided for such an approach begin with the assumption that policymaking and administration can, in fact, be separated — an assumption that commentators reject.³⁵ Even in privatized contexts, private actors inevitably make policy when they carry out their delegated tasks and interpret the contracts under which they operate. A new kind of administrative law can and should be created to respond to the democracy deficit associated with privatization. It need not rely solely on traditional procedural approaches, ar-

34. The comments in this section draw heavily on the ideas and arguments set forth in my earlier work. *See id.* at 87–128.

35. *See, e.g.,* Michael Aronson, *A Public Lawyer’s Responses to Privatization and Outsourcing*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 40, 50–58 (Michael Taggart ed., 1997).

guably designed for governmental agencies carrying out regulatory functions. In fact, the role I envision for administrative law is not connected to regulation per se but to democracy. It is important to emphasize that what is at stake are the values of public law: transparency, participation, fairness, and accountability, as well as the kind of democracy that can flow from all of these things. Various procedural approaches may be necessary to ensure the realization of these values. If we are to ensure the legitimacy of the partnerships between the public and private spheres, the democracy-creating values of the Administrative Procedure Act (“APA”), though not necessarily the precise procedural devices it currently employs, need to be extended to these hybrid public/private arrangements.³⁶

The pragmatics of globalization make privatization a critical terrain on which a new administrative law might respond by assuring public forums for input and debate and a flow of information that can help create a meaningful politics around the decisions of private actors. The democracy problem is, and should be, one of the primary concerns of a new administrative law.

2. *Exceptions to Rules: Rethinking Administrative Equity in Deregulatory Contexts*

Writing about administrative equity some years ago, I focused on exceptions from traditional command-and-control regulation (i.e., regulatory attempts to cure market failures, or attempts to mitigate the harshness of some market outcomes).³⁷ Many of these exceptions were based, at least in part, on market rationales to justify the exceptions sought, introducing market concepts into the regulatory process. In rethinking administrative equity for the present, however, I believe we now need to take into account that we live in a neo-liberal era, increasingly dominated by deregulation, privatization, and an almost instinctive reliance on markets for process and outcomes. My goal is to examine regulatory schemes based primarily on market-based rules in order to explore exceptions from the standpoint of their providing more regulation, not less, as a shelter from market forces.

If exceptions can be granted to command-control rules, should there also be an exceptions process when the rules consist of market-based regulation? One might argue that the validity and effectiveness of market-oriented rules will not depend on legal exceptions processes since the market is presumably capable of making its own adjustments. However, the application of market-oriented rules to particular situations will not always advance a program’s basic goals and in some cases may undercut it. Certain individuals or entities may experience hardship or, more likely, fail to realize fully the intended benefits of a regulatory scheme. A similar need to conform the general to the particular arises, though

36. For some specific reform proposals, see AMAN, *supra* note 14, at 149–51.

37. Alfred C. Aman, Jr., *Administrative Equity: An Analysis of Exceptions To Administrative Rules*, 1982 DUKE L.J. 277 (1982).

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such relief may take various forms, in addition to traditional exceptions or waiver processes.

Some of these forms will involve statutes that seek to mitigate the harshness of market outcomes. At the state and municipal levels of government, legislation has been sought that attempts to shield certain vulnerable sectors of the population from absolute market rule through “living wage” ordinances.³⁸ For example, Maryland’s legislature passed a state living wage bill in 2004 that mandated that companies contracting with the state pay their workers a minimum of \$10.50 per hour, but the state’s governor vetoed the law.³⁹ Similar legislation has passed at the municipal level, but has faced severe opposition.⁴⁰

Such laws might be termed “community-based” legislative exceptions because they seek to mitigate the perceived negative effects of the market on the local communities that they affect through statutory relief. Another example of such community-based legislative exceptions can be found in the rising opposition towards large chain store retailers — specifically, Wal-Mart and other so-called “big box” stores — which are perceived by their opponents as bringing with them a host of problems that outweigh any potential price benefits that such stores might offer their customers.⁴¹ Communities have sought to restrict or exclude the activities of big box stores through zoning⁴² and wage ordinances.⁴³

A closer parallel to administrative equity-based exceptions that is individually based can be found in statutes governing market-oriented regimes. In *Sugar Cane Growers Cooperative of Florida v. Veneman*,⁴⁴ for example, the court dealt with the Food Security Act, which gives the Department of Agriculture the authority to implement a payment-in-kind program for sugar growers. Pursuant to this Act, “[t]he Department supports sugar production through a program

38. For a succinct overview of living wage laws, and the arguments for and against, see AMAN, *supra* note 14, at 160–61.

39. See Meredith Cohn & Stanley Hirsh, *Living-wage Bill: ‘Disastrous’ or ‘Great Benefit’?; \$10.50-an-hour Measure Legislators OK’d Faces Veto*, BALT. SUN, Apr. 14, 2004, at 1D.

40. See Angela Yvonne Jones, *Bittersweet Victory: Non-Enforcement of Detroit’s Living Wage Ordinance Plagues the Community’s Living Wage Standard*, 5 J.L. SOC’Y 617 (2004); Rachel I. Rosen, Note, *The Rise and Potential Fall of Living Wage Laws: Missouri Hotel and Motel Association v. City of St. Louis*, 21 J.L. & COM. 131 (2001).

41. See Richard C. Schragger, *The Anti-Chain Store Movement, Localist Ideology, and the Remnants of the Progressive Constitution, 1920–1940*, 90 IOWA L. REV. 1011, 1016 (2005) (noting that “present day anti-chain advocates arguing that Wal-Mart’s quest for low prices has resulted in wage stagnation, labor abuses, bankrupt suppliers and competitors, destroyed downtown businesses, and urban sprawl”).

42. George Lefcoe, *The Regulation of Superstores: The Legality of Zoning Ordinances Emerging from the Skirmishes Between Wal-Mart and the United Food and Commercial Workers*, 58 ARK. L. REV. 833 (2006).

43. See, e.g., Erik Eckholm, *Chicago Orders ‘Big Box’ Stores to Raise Wage*, N.Y. TIMES, July 27, 2006, at A1; see also Jon Gertner, *What is a Living Wage?*, N.Y. TIMES, Jan. 15, 2006, § 6 (Magazine), at 38.

44. 289 F.3d 89 (D.C. Cir. 2002).

of non-recourse loans; if the market price of sugar drops below the forfeiture price, producers may forfeit their crops to the Department in satisfaction of their loans rather than try to repay in cash.”⁴⁵ This “effectively guarantees a minimum price for harvested and processed sugar.”⁴⁶ It also provides sugar producers with a built-in statutory exceptions process, which allows them to avoid repayment of their loans under certain circumstances and it allows the government to ensure that there are proper incentives for maintaining stability in the sugar market.⁴⁷

Aside from statutory attempts to create regulatory exceptions that account for special circumstances when commodities are involved, is it possible to take into account special circumstances for human beings, as in new market-oriented welfare programs? In *Mason v. Nebraska*,⁴⁸ the Supreme Court of Nebraska dealt with an appeal involving that state’s Welfare Reform Act. That Act was designed to reform the welfare system by removing disincentives to work, promoting economic self-sufficiency, and providing individuals and families the support needed to move from public assistance to economic self-sufficiency. As part of its program, the Act

generally requires that while receiving cash assistance benefits, recipient families in which at least one adult has the capacity to work must participate in a “self-sufficiency contract,” which sets forth certain approved work-related activities in which recipients must engage. When no adult in the family has the capacity to work, however, no self-sufficiency contract is required.⁴⁹

The Act also contains a “family cap” provision that works to prevent any increases to a recipient family’s cash assistance when a child is born more than ten months after the family accepts cash assistance.⁵⁰

The plaintiffs in this case were children from families that are headed by single mothers and have received cash assistance payments.⁵¹ The plaintiffs were each born more than ten months after their mothers began receiving cash benefits.⁵² Each family was informed by the Nebraska Department of Health and Human Services that, due to the family cap, the family’s cash assistance would

45. *Id.* at 91.

46. *Id.*

47. Such a program provides, in effect, a subsidy to sugar growers that may or may not be wise policy. However, it also represents an example of a mechanism for providing exceptions to market-oriented regulatory regimes that might have applicability in other areas as well.

48. 672 N.W.2d 28 (Neb. 2003).

49. *Id.* at 30 (citation omitted).

50. *Id.*

51. *Id.* at 31.

52. *Id.*

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not be increased because of the additional child.⁵³ However, none of the families participated in a self-sufficiency contract and the Department did not dispute the fact that the mothers were disabled and had no capacity to work within the meaning of the Act.⁵⁴ The lower court enjoined the Department from enforcing the family cap under these circumstances and the Supreme Court of Nebraska affirmed.⁵⁵

Though no explicit exceptions process existed, the court interpreted the governing statute in a way that implied such exceptions. The court noted that “[t]o the extent that the family cap serves to promote a transition from public assistance to economic self-sufficiency, there is little to be gained in applying the family cap to families who receive non-time-limited assistance . . . [for whom] full self sufficiency is unrealistic”⁵⁶ because of “physical, mental, or intellectual limitations.”⁵⁷ This would not in the court’s view be in accord with the purposes of the statute involved, as reflected in the text and its legislative history.⁵⁸ In effect, the court read the statute as rationally granting an exception to a class of recipients who had no hope of achieving full self-sufficiency.

These are just a few examples of how the excesses of the market, when used as a regulatory tool, might be mitigated by law and legal processes. Whatever end of the regulatory spectrum on which we begin — the market or a complete rejection of the market — administrative equitable principles suggest that there can be an on-going interplay of various market and regulatory values that can temper the dominant tendencies of whatever regulatory or market-based program is in effect. A regulatory regime based on market principles need not and should not be a static one, restricted only by efficiency values.

C. Law and Democracy

To return to an earlier question raised in this paper, what is a role that law can play in the neo-liberal state, beyond the creation and protection of property rights? Law can, I believe, be used as a vehicle for democracy. Indeed, I am optimistic about the future of democracy if we can vest our democratic hopes in something other than unchecked markets, and especially if we can acknowledge that the markets neither supplant legal regulation nor substitute for democracy. Markets are a form of regulation and should be treated as such. More important, while markets might provide metaphors for democracy and political debate, they are not inherently democratic. The role I see for law in a neo-liberal state thus

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* at 33.

57. *Id.*

58. *Id.*

goes beyond the creation and protection of property rights. The role of law is to maintain and, when necessary, to create the infrastructures required for citizens to participate in decisions as citizens, not just as consumers of services, or according to rules they had no part in making.

The demands of democracy are not satisfied in one-time legislative initiatives or executive decisions in favor of markets over law. If democracy actually exists, it is in the day-to-day operations of both public and private institutions. To reach this point, the first step is to recognize that the private sector is not the antithesis of the public sector, but today often functions as a privatized public sector. Acknowledging the public interest in the privatized public sector opens up a new space for citizen participation and public accountability — in effect, a new dialogue dedicated to democratic responsibility. Some law reform will be necessary to realize that exciting potential, but important resources are at hand and administrative law can play a crucial role.