

# The Siren Is Calling: Economic and Ideological Trends Toward Privatization of Public Police Forces

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*The landmark Supreme Court ruling in Citizens United has opened the floodgates to allow unlimited corporate campaign donations, and Supreme Court doctrine is shifting back to the Lochner-era’s focus on economic rights. At the same time, there are efforts underway across the United States to privatize public services in order to alleviate what proponents claim is a shortfall in revenue due to the recession. Within those privatization efforts, public policing has become a new front, with outsourcing and wholesale privatization of the police underway. This Article adds to the existing scholarship a political analysis of privatization efforts, including how lobbying and campaign financing are making wholesale privatization in the area of policing a very real possibility.*

*This Article looks at the example of Camden, New Jersey, where the city’s entire police force was fired and replaced with a county-wide force in order to shed pension and wage obligations, as an incubator for future wholesale privatization of the police. Considering the trend of corporate lobbying through groups like the American Legislative Exchange Council that write model legislation and deliver it to lawmakers, as well as unlimited campaign donations, this Article traces the current trend toward police privatization. It argues that without more transparency and some limitations on such expenditures, the public cannot fully and fairly participate in decisions about whether to relinquish force-protection to private corporations. Understanding the potential consequences for both public safety and democratic principles requires systemic, legislative and electoral transparency that currently remains deficient.*

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The first truth is that the liberty of a democracy is not safe if the people tolerate the growth of private power to a point where it becomes stronger than their democratic state itself. That, in its essence, is Fascism—ownership of Government by an individual, by a group, or by any other controlling private power.<sup>1</sup>

INTRODUCTION

The current perception of economic distress in cities across the United States has fueled an increase in calls to privatize public services<sup>2</sup> and to expand privatization of the criminal justice arena.<sup>3</sup> For example,

1. Franklin D. Roosevelt, Recommendations to the Congress to Curb Monopolies and the Concentration of Economic Power (Apr. 29, 1938), in 1938 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: FRANKLIN D. ROOSEVELT 305 (Samuel I. Rosenman, ed.).

2. See Kathryn Edwards & Kai Filion, *Issue Brief No. 250: Outsourcing Poverty: Federal Contracting Pushes down Wages and Benefits*, ECON. POL’Y INST. (Feb. 11, 2009), available at <http://s1.epi.org/files/page/-/pdf/ib250.pdf>; Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. DAVIS L. REV. 133 (2012); Jody Freeman & Martha Minow, *Introduction to GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY* 1 (Jody Freeman & Martha Minow eds., 2009).

3. See Roger A. Fairfax, Jr., *Outsourcing Criminal Prosecution?: The Limits of Criminal Justice Privatization*, 2010 U. CHI. LEGAL F. 265.

privatization is already ubiquitous in the prison industry.<sup>4</sup> Although most people consider their local police force to be a natural extension of government, many state and local police departments partner with private firms in a hybrid of public and private service.<sup>5</sup> Some municipalities are now taking the next step of outsourcing their public police forces entirely. This Article focuses on this new stage of police privatization and examines the intersection of economic distress, political influence, and the law that has led municipalities to embark on a path toward wholesale privatization of public police forces.

Rising pension obligations and declining revenue are the primary justifications given by governments that are rethinking how they provide public services.<sup>6</sup> For example, Camden, New Jersey, fired its entire police force, only to create a county department with only one city in the county participating in this new department: Camden.<sup>7</sup> With minimal public outcry, the plan allowed the local government to start over, shredding the contract it had negotiated with the police union and hiring new officers at lower wages without pension obligations. Foley, Minnesota, represents the other example this Article analyzes: wholesale privatization. Having already outsourced to the county sheriff, the local government sought to save further by hiring a private security company to take over policing.<sup>8</sup> The public became so concerned about the plan that it was abandoned and the town restored its local public police department. Other cities have explored hybrid systems of public and private patrols: for example, Chicago attempted to replace public police with private security in a large downtown district but scrapped the plan after the local police union fought and defeated it.<sup>9</sup> In New York City, the police

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4. See Sharon Dolovich, *How Privatization Works: The Case of Prisons*, in GOVERNMENT BY CONTRACT, *supra* note 2 (providing a comprehensive discussion of privatization including of the private prison industry, a subject this Article acknowledges as pertinent to its analysis, but beyond its focus).

5. The wave of partial privatization of police forces has generated scholarship on the State Action Doctrine and the efficacy of partial privatization. See, e.g., Christian Turner, *State Action Problems*, 65 FLA. L. REV. 281, 303–08 (2013); Elizabeth E. Joh, *The Paradox of Private Policing*, 95 J. CRIM. L. & CRIMINOLOGY 49, 115–16 (2004) [hereinafter Joh, *The Paradox of Private Policing*]; Sean James Beaton, *Counterparts in Modern Policing: The Influence of Corporate Investigators on the Public Police and a Call for the Broadening of the State Action Doctrine*, 26 TOURO L. REV. 593, 598–99 (2010).

6. See Michael A. Pagano et al., *City Fiscal Conditions in 2012*, NATIONAL LEAGUE OF CITIES: RESEARCH BRIEF ON AMERICA'S CITIES (Sept. 2012), available at <http://www.nlc.org/Documents/Find%20City%20Solutions/Research%20Innovation/Finance/city-fiscal-conditions-research-brief-rpt-sep12.pdf>; NAT'L GOVERNORS ASS'N & NAT'L ASS'N OF STATE BUDGET OFFICERS, THE FISCAL SURVEY OF STATES, at vii (2012), available at <http://www.nga.org/files/live/sites/NGA/files/pdf/FSS1206.PDF> [hereinafter NAT'L GOVERNORS ASS'N].

7. See *infra* Part I.C.2.a.

8. See *infra* Part I.C.2.b.

9. Mick Dumke, *Faced with a Cop Shortage, Some Officials Look to Private Policing*,

department manages the “Paid Detail Unit,” which essentially leases city police officers to private companies to patrol private property in uniform.<sup>10</sup> In order to illuminate the circumstances under which these plans have emerged, this Article explores how politics, ideology, and the law have created an atmosphere in which outsourcing and privatization are “on the table” and offers an analysis of the nuances that make these plans seemingly appealing to local governments but ultimately dangerous to the public trust.

Without demonizing the very notion of police privatization, this Article will consider the pros and cons of such plans, but it will also consider another layer to this debate that has not yet been fully articulated by legal scholars since the Supreme Court changed campaign finance law with its landmark ruling in *Citizens United*.<sup>11</sup> There is now an unprecedented infusion of corporate money that is devoted to political candidates and lobbying, with the aim of fueling privatization efforts. These efforts are buttressed by evolving jurisprudence that is likely to be strengthened and expanded in the foreseeable future. Taken in conjunction with the current economic situation that most states and municipalities face, this financial force, with full-throated legal backing, has opened the door to new opportunities for private interests to influence public actors in order to gain more access than ever before. The secrecy that pervades the political process and how money is used to influence legislative activity makes a fully developed debate about police privatization difficult.

Tracing the evolution of the applicable law and history related to both policing and economic liberty rights—because both are germane to a better understanding of how police privatization may advance—this Article analyzes two existing paths toward that end: 1) outsourcing police services to larger government entities that can take over the operations, mitigating wage and benefit obligations; and 2) negotiating contracts with private companies that will take over the duties entirely, relieving local government of the burdens associated with long-term benefit and wage obligations. The positions that favor and oppose police

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CHICAGO READER (Aug. 25, 2011, 3:00 PM), <http://www.chicagoreader.com/Bleader/archives/2011/08/25/faced-with-a-cop-shortage-some-officials-look-to-private-policing>.

10. See Joanne Wasserman, *Call 'Em NYPD Green: Private Firms Paying Uniformed Cops for OT Shifts*, *Daily News*, N.Y. CITY PATROLMEN'S BENEVOLENT ASS'N (Aug. 10, 2003), <http://www.nycpba.org/archive/nydn/03/nydn-030810-ot.html> (noting the program began in 1998 and was expanded after Sept. 11, 2001); Naomi Wolf, *NYPD for Hire: How Uniformed New York Cops Moonlight for Banks*, *THE GUARDIAN* (Dec. 17, 2012, 12:57 PM), <http://www.guardian.co.uk/commentisfree/2012/dec/17/nypd-for-hire-cops-moonlighting-banks>.

11. *Citizens United v. FEC*, 558 U.S. 310 (2010).

privatization are then laid out and a fuller context that examines the political influences at work is considered.

Part I will provide a brief historical context focusing on shifts relating to policing and to constitutional doctrine. With respect to policing, Part I will describe the shift from private to public policing, which was an innovation of the mid-nineteenth century, as well as more recent shifts back from public to private. This section outlines the history in order to gain a more fully developed perspective of what a future system of privatized police might look like.<sup>12</sup> Interwoven in this history is the history of relevant constitutional doctrine, culminating in the current Supreme Court's shift back to an economic-rights focus comparable to the reasoning it used during the *Lochner* era.<sup>13</sup> The trajectory of the law, with campaign finance limitations heavily curtailed and collective bargaining increasingly challenged,<sup>14</sup> has left open a space for police outsourcing and privatization.

Part II explores the advantages and disadvantages of police privatization. Proponents of privatization suggest that accountability and monopolization can be addressed through contracting and state regulation. Opponents contend that abrogation of democratic principles and wage depression are likely consequences of privatization. While important to the debate, a full accounting of these advantages and disadvantages is impossible because of the largely hidden means by which political influences are advancing police privatization efforts, a phenomenon that Part III explores.

Part III focuses on the political influences that are advancing police privatization efforts. In particular, Camden, New Jersey, offers insight into outsourcing police and how such a plan can be seen as an incubator for future privatization plans. While Camden did not hire a private corporation to take over its police force, it did create an entirely new model that eliminated its current force with the strong political and financial backing of one unelected player whose interests benefited greatly from it. This Part will look at the example that outsourcing in Camden provides as a forerunner to the possibility of wholesale police privatization. This Part will also look to the private prison industry for insight into

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12. Legal scholars have written extensively on the history of policing and public-private partnerships. See Joh, *The Paradox of Private Policing*, *supra* note 5; Elizabeth E. Joh, *The Forgotten Threat: Private Policing and the State*, 13 IND. J. GLOBAL LEGAL STUD. 357 (2006) [hereinafter Joh, *The Forgotten Threat*]; Elizabeth E. Joh, *Conceptualizing the Private Police*, 2005 UTAH L. REV. 573; David Alan Sklansky, *Private Police and Democracy*, 43 AM. CRIM. L. REV. 89 (2006); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165 (1999).

13. See *infra* Part I.A.2; *Lochner v. New York*, 198 U.S. 45 (1905).

14. See, e.g., Steven Greenhouse, *Judge Voids Wisconsin Law Curbing Unions*, N.Y. TIMES, May 27, 2011, at A11; Steven Greenhouse, *In Michigan, a Setback for Unions*, N.Y. TIMES, NOV. 9, 2012, at B1.

how financing elected officials has opened the door to privatizing criminal justice services. This Part will analyze how that political financing translates into business opportunities and consider the consequences for police forces and the public in impoverished municipalities.

## I. HISTORY REPEATS

### A. *Origins of Public Policing and Economic Liberty Rights*

In order to contextualize trends toward police privatization, this Section provides a historical picture of how policing came to be a public service. In conjunction with that history, this Part traces the Supreme Court's interpretation of substantive due process and its focus on economic liberty, the effect of which permitted abuses by private forces that were only reined in after the New Deal. This shifting jurisprudence highlights the ways in which force-protection by private actors is closely tied to legal interpretation and economic power.

#### 1. FROM PRIVATE PATROLS TO PROFESSIONAL POLICE

Should privatization models be adopted, understanding some of the issues that cities encountered before the police became a public professional force is essential to predicting the potential pitfalls that lie ahead. Between the mid-seventeenth and eighteenth centuries, law enforcement was carried out by constables and night watchmen in northern cities like New York, Boston, and Philadelphia.<sup>15</sup> Men who were unpaid patrolled the streets, keeping order and serving warrants.<sup>16</sup> Constables, who oversaw the night watchmen, were established by the local government and answerable to local courts.<sup>17</sup> They patrolled the streets in the day, protecting the public and private businesses, while watchmen patrolled at night.<sup>18</sup> Constables were generally tradesmen, expected to take on their police duties as a civic obligation.<sup>19</sup> Those who could afford it generally hired substitutes to handle their duties for them.<sup>20</sup> Businesses also hired private guards as additional protection.<sup>21</sup> The system was only minimally effective at combating crime, and corruption became commonplace.<sup>22</sup> Typically, constables would employ anyone who was willing to

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15. THE ROLE OF POLICE IN AMERICAN SOCIETY: A DOCUMENTARY HISTORY 3 (Bryan Vila & Cynthia Morris eds., 1999).

16. *Id.* at 4.

17. ERIC H. MONKKONEN, POLICE IN URBAN AMERICA 1860–1920, at 34, 47 (Robert Fogel & Stephan Thernstrom eds., 1981).

18. THE ROLE OF POLICE IN AMERICAN SOCIETY, *supra* note 15, at 4.

19. *See id.*

20. *See* Sklansky, *The Private Police*, *supra* note 12, at 1206.

21. *See id.* at 1206 n.226.

22. *See id.* at 1206.

do the dangerous work of patrolling the street at night, and those night watchmen often worked hand-in-hand with criminals to earn extra money in exchange for their quiet cooperation.<sup>23</sup> Further complicating this disparate organizational structure was the fact that investigating crime was not a public matter at all; constables would make their extra money by privately investigating and pursuing alleged criminals for profit.<sup>24</sup> This mechanism of policing operated without coordination between public and private entities—and the public was generally at the mercy of both, yet not satisfied with either.<sup>25</sup> During the same period, while the North faced growing populations in its cities, the southern states employed a different kind of organized policing scheme: slave patrols.<sup>26</sup> These patrols operated primarily in the rural South and while regulated by the state, were comprised solely of voluntary, unpaid white males using their own weapons.<sup>27</sup>

Starting in the 1840s, several large American cities implemented the first state-controlled professional police forces.<sup>28</sup> However, private investigative services still flourished that blurred the lines between public and private police,<sup>29</sup> particularly because the police wore no uniforms to set them apart.<sup>30</sup> By 1853, New York City had a uniformed public police force, and by the end of the century, virtually every major city had a similar professional force.<sup>31</sup> With constables and night watchmen no longer available for private businesses to utilize, private security became a formal option when Allan Pinkerton opened his Protective Police Patrol in Chicago in 1858.<sup>32</sup> His company quickly expanded east to New York and Philadelphia and primarily serviced banks and private businesses as guards and investigators.<sup>33</sup> Pinkerton's National Detective Agency ("Pinkerton") quickly became the armed force of many private companies to both spy on employees and brutally suppress union dis-

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23. *Id.*

24. *Id.*

25. See THE ROLE OF POLICE IN AMERICAN SOCIETY, *supra* note 15, at 13 (noting Benjamin Franklin's commentary about corruption, which described watchmen as "ragamuffins" who would work for "a little drink" while constables who paid them kept the remainder of money collected from taxes meant to be used for proper watchmen wages). R

26. *Id.* at 14–15.

27. See *id.* at 15–16.

28. See MONKKONEN, *supra* note 17, at 42–46; THE ROLE OF POLICE IN AMERICAN SOCIETY, *supra* note 15, at 25–29; Sklansky, *The Private Police*, *supra* note 12, at 1207–08. R

29. See Sklansky, *The Private Police*, *supra* note 12, at 1212. R

30. See *id.* at 1207.

31. *Id.* at 1208.

32. See THE ROLE OF POLICE IN AMERICAN SOCIETY, *supra* note 15 at 40; Sklansky, *The Private Police*, *supra* note 12, at 1211–12 (discussing the Pinkerton expansion into the northwest and eastern United States). R

33. See THE ROLE OF POLICE IN AMERICAN SOCIETY, *supra* note 15, at 40. R

sent.<sup>34</sup> By the late 1800s, Pinkerton and its competitors supplied replacement workers to companies with striking employees, infiltrating unions, and clashing violently with workers.<sup>35</sup> The public began to consider whether these private forces should be reined in and force-protection regulated by the state when Congress began an investigation into their activities in 1893.<sup>36</sup> While Congress implemented no laws governing the states' use of private police forces, the debate had begun about public trust and the role of the police in the public sphere.<sup>37</sup>

## 2. ECONOMIC LIBERTY RIGHTS AND CORPORATE POWER AT THE TURN OF THE TWENTIETH CENTURY

While the public began to question the power of private corporate security, the courts and Congress still failed to recognize the need for regulatory oversight and continued to draw a bright line between private and government action. The only legislative result of the congressional investigation in 1893 was the implementation of a law prohibiting the federal government from hiring private security to carry out police operations, known as the "Anti-Pinkerton Act";<sup>38</sup> the Act did nothing to formally prevent state and local governments from using such companies.<sup>39</sup> Congress blamed the states for failing to protect private property rights adequately and left that duty to the states.<sup>40</sup> Certainly, private businesses continued to employ private security, but the hearings raised public awareness about the distinct roles of public and private force-protection.<sup>41</sup> Pinkerton and other private agencies continued to offer their services to companies to quell labor disputes and spy on labor unions.<sup>42</sup> In fact, the hearings did nothing to stem the violence associated with labor

34. Sklansky, *The Private Police*, *supra* note 12, at 1213–14.

35. *Id.* at 1214–15 (discussing the Homestead, Pennsylvania, clash between Pinkerton guards and striking union workers at the Carnegie Steel Mill, which left three workers and twelve guards dead).

36. *Id.* at 1215–16 (noting that although Congress passed the Anti-Pinkerton Act, which prohibited federal employment of Pinkerton detectives, Congress refused to address the broader concerns of private police action, concluding that the matter was best left to the states to address).

37. *Id.* ("The most important results of the Homestead investigations, however, were broader public knowledge of the extent of private policing in late-nineteenth-century America, and deeper discontent with that phenomenon . . .").

38. Act of Mar. 3, 1983, ch. 208, 27 Stat. 572, 591 (codified as amended at 5 U.S.C. § 3108 (2012)); *see Joh, The Forgotten Threat, supra* note 12, at 367; Sklansky, *The Private Police, supra* note 12, at 1215 & n.297.

39. *See FRANK MORN, "THE EYE THAT NEVER SLEEPS": A HISTORY OF THE PINKERTON NATIONAL DETECTIVE AGENCY* 26 (1982). Although the congressional hearings did spark a "flurry" of companion laws in states that had not already tried to limit the use of private police, "such laws probably had little practical effect on private policing." *Id.* at 107.

40. *See Joh, The Forgotten Threat, supra* note 12, at 366.

41. *See Sklansky, The Private Police, supra* note 12, at 1214–16.

42. *See id.* at 1216.



disputes and the participation of private security firms—which only became better armed and more violent—continued into the 1930s.<sup>43</sup> In order to contextualize how these forces operated unhindered in the years around the turn of the twentieth century, it is important to identify how the courts viewed labor and economic liberty rights under the law.

Tracing the laws that protected corporate interests and property rights in that period is an essential part of understanding the jurisprudential shift that this Article argues is taking place now, leading to outsourcing and privatization of force-protection around the country. Scholars locate the emergence of substantive due process rights primarily in the *Lochner*-era Supreme Court cases, which recognized economic liberty rights, usually at the expense of the working class.<sup>44</sup> Although there were cases prior to *Lochner* that used the same theory to protect property rights under the Fourteenth Amendment, the term “substantive due process” was not yet created.<sup>45</sup> In 1873, the *Slaughterhouse Cases* recognized certain fundamental rights—albeit in the dissent—with regard to the “liberty to contract,” including the first rumblings of a substantive due process right.<sup>46</sup> Then in 1897, the Court revisited this new reading of the Fourteenth Amendment and found a substantive right to due process granting citizens, including corporate citizens, the “liberty to contract.”<sup>47</sup> Corporate constitutional rights had already been acknowledged

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43. See Joh, *The Forgotten Threat*, *supra* note 12, at 367–69 (discussing the next congressional hearing in response to violent labor disputes, citing news articles on the La Follette Committee).

44. See DAVID E. BERNSTEIN, *REHABILITATING LOCHNER: DEFENDING INDIVIDUAL RIGHTS AGAINST PROGRESSIVE REFORM* 117–18 & nn.59–61 (2011) (arguing that *Lochner* has been singled out to represent the entire line of economic liberty rights cases (citing LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978))).

45. See Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 *YALE L.J.* 408, 493–94 (2010) (discussing the first interpretation of the Fourteenth Amendment to include an understanding that people had “vested rights” in property rights by Justice Thomas McIntyre Cooley in 1868 (citations omitted)).

46. 83 U.S. 36, 114–18 (1872) (Bradley, J., dissenting). In the *Slaughterhouse Cases*, the plaintiffs were butchers who were required to pay a fee to work in the only slaughterhouses approved by the state government, which they contended represented a monopoly and abridged their Fourteenth Amendment rights under the privileges and immunities clause and the equal protection clause. *Id.* at 57, 66 (majority opinion). The Supreme Court ruled against the butchers, finding that the Fourteenth Amendment’s Privileges and Immunities Clause did not apply because it only protected citizens of the United States and not citizens of a state. *Id.* at 74.

47. *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (“The ‘liberty’ mentioned in that amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation; and for that purpose to enter into all contracts which may be proper, necessary, and essential to his carrying out to a successful conclusion the purposes above mentioned.”). However, the Court only found that right with regard to the Amendment’s application to the states. *Id.* at 591. Only later did the Court tie the Due Process Clauses of the Fourteenth and Fifth Amendments together, finding

in 1886 when the Supreme Court ruled that corporations should be treated like individual persons for purposes of taxation under the Fourteenth Amendment,<sup>48</sup> and now those corporate citizens were vested with economic liberty rights.<sup>49</sup>

Along with cases that defined economic liberty rights in ways that effectively prioritized employers over their workers, the Supreme Court also defined “state action” in a way that barred regulation by state authorities of private activities. In the first case to address “state action” authority, the Court ruled that the federal government could not impose restrictions on a private militia that was attacking black voters.<sup>50</sup> Following that decision, the Court decided the *Civil Rights Cases*, a consolidation of five similar cases.<sup>51</sup> The Court ruled in one decision that the Civil Rights Act of 1875 was unconstitutional in that it violated the Privileges and Immunities Clause of the Fourteenth Amendment when it gave the government the authority to regulate private business activities.<sup>52</sup> Because private companies employed private security forces, they could not be considered state actors and therefore were not required to adhere to constitutional protections with respect to their privately funded and supervised activities.<sup>53</sup> Justice Joseph Bradley carved out a private-action-versus-state-action definition of the Fourteenth Amendment that was used to restrict government regulation of a wide range of business activities.<sup>54</sup>

Favoring business interests in the realm of force-protection and labor contracting, the *Lochner* Court prioritized private enterprise over government regulation, a doctrine this Article argues is recurring under the current Supreme Court. While there is some disagreement about whether the *Lochner*-era Court embraced what has come to be known as

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that substantive due process also applied to federal regulations. In *Adair v. United States*, 208 U.S. 161, 173 (1908), the Court had already decided the landmark case of *Lochner v. New York*, 198 U.S. 53 (1905), but now the era was well underway, finding the right to contract firmly rooted in both the Fifth and Fourteenth Amendments and limiting the ability of both states and the federal government to interfere.

48. *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

49. *See Allgeyer*, 165 U.S. at 589.

50. *See United States v. Cruikshank*, 92 U.S. 542, 554 (1875) (finding that Fourteenth Amendment did not apply to individuals but only to activities by state actors).

51. *See* 109 U.S. 3, 4 (1883).

52. *Id.* at 13.

53. *See id.* at 11–13.

54. The holding concluded that the Fourteenth Amendment “[d]oes not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation, or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers, executive or judicial, when these are subversive of the fundamental rights specified in the amendment.” *Id.* at 11. *See also infra* note 56.

“laissez-faire constitutionalism,”<sup>55</sup> the fact remains that the effects of *Lochner* and its progeny favored the interests of the powerful and wealthy over workers who had less bargaining power in the realm of contracting, especially with respect to employment and labor laws.<sup>56</sup> During that era, the Court restricted state and federal government authority to exercise power over private economic relationships, tending to find parties free to enter into contracts at will and therefore outside the scope of government intervention.<sup>57</sup> This view of contracting rights remained essentially unchanged with respect to labor relations and workers’ rights until 1937.<sup>58</sup> The jurisprudence marking this period is squarely in line with a view of limited governmental authority to protect workers and expanded individual economic liberty rights; for workers, even the small gains through legislation and regulation were limited by the Court through decisions that protected the employer and private interests.<sup>59</sup> In 1936, Congress attempted to act once again through a sub-

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55. See BERNSTEIN, *supra* note 44, at 23 (arguing that the bakers in *Lochner* were backed by large-scale bakeries that would benefit from a law limiting the amount of hours the bakers could work because the small bakeries had fewer employees and needed them to work longer); Matthew J. Lindsay, *In Search of “Laissez-Faire Constitutionalism”*, 123 HARV. L. REV. FORUM 55, 55–57 (2010), [http://harvardlawreview.org/media/pdf/vol123\\_forum\\_lindsay.pdf](http://harvardlawreview.org/media/pdf/vol123_forum_lindsay.pdf); David E. Bernstein, *Lochner Era Revisionism, Revised: Lochner and the Origins of Fundamental Rights Constitutionalism*, 92 GEO. L.J. 1, 58–60 (2003); David N. Mayer, *The Myth of “Laissez-Faire Constitutionalism”: Liberty of Contract During the Lochner Era*, 36 HASTINGS CONST. L.Q. 217, 217–19 (2009); Bernard H. Siegan, *Rehabilitating Lochner*, 22 SAN DIEGO L. REV. 453, 453–54 (1985).

56. See *Lochner v. New York*, 198 U.S. 45, 64 (1905) (taking a narrow view of the Fourteenth Amendment by strictly limiting interference in questions of contracting between parties, whatever their respective positions or the effects those contracts might have on the larger economic landscape); *Adair v. United States*, 208 U.S. 161, 180 (1908); *Adkins v. Children’s Hosp.*, 261 U.S. 525, 561–62 (1923) (striking down a federal minimum wage law for women); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (striking state law forbidding contracts that banned union membership).

57. See *Lochner*, 198 U.S. 45; *Adair*, 208 U.S. 161; *Adkins*, 261 U.S. 525; *Coppage*, 236 U.S. 1.

58. See, e.g., Lindsay, *supra* note 55, at 55 & n.2 (noting that *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), is often considered the end of the *Lochner* era); Mayer, *supra* note 55, at 217 & n.3. Before this time, the Court viewed the Commerce Clause as a limited power of the federal government to regulate those activities that had a direct relationship to interstate commerce. The Court did permit some regulations that appeared to be only tangentially related to commerce, if at all, but the Court applied a distinctly moralistic standard in those decisions and generally found regulations of the economic variety off-limits. The Great Depression, a result of the stock market crash of 1929, found millions of Americans unemployed or working grueling hours for little pay. Congress attempted to regulate some of the harshest working conditions but the Court saw no reason to re-imagine its narrow view of the Constitution and continued to strike down legislation that attempted to level what many saw as an unfair playing field between workers and employers. President Roosevelt’s “court-packing” scheme legendarily caused the jurisprudential about-face. See *infra* note 68.

59. See *Hammer v. Dagenhart*, 247 U.S. 251, 276–77 (1918) (striking down the Keating-Owen Act of 1916, better known as the Child Labor Act, finding that Congress did not have the

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committee that investigated labor unrest and the role of private security companies in it.<sup>60</sup> The subcommittee released scathing reports on these companies' union busting activities, including spying from within as well as violently disrupting union activities.<sup>61</sup> The findings were damning and tarnished the public's view of private security companies but produced little in the way of regulation.<sup>62</sup>

It is within this landscape that companies gained the upper hand in matters of contract and defense of property, keeping collective bargaining at bay, as well as using private forces against workers. Private security forces had plenty of work in spite of the Anti-Pinkerton Act, as the law had no authority beyond the federal government.<sup>63</sup> Although some jurisdictions did attempt to limit their number,<sup>64</sup> private forces operated without much scrutiny and profited from the gaps left by the public police force.<sup>65</sup> Even the state police chiefs recognized the necessity for private security because no public force was capable of handling all property protection.<sup>66</sup> The public and Congress increasingly recognized the need for some delineation between public and private force-protection, and with the New Deal, the Court began to acknowledge the same.<sup>67</sup>

Substantive due process doctrine began to shift away from its ideologically entrenched focus on economic liberty and embrace a more nuanced approach that included workers' rights. With the onset of the New Deal, the Court began to change course on unregulated economic liberty rights.<sup>68</sup> In *West Coast Hotel*, Chief Justice Hughes wrote the

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power to ban the sale of goods across state lines just because those goods were produced in a factory that employed children).

60. See MORN, *supra* note 39, at 186–87 (discussing the La Follette Committee reports between 1936–1941); Joh, *The Forgotten Threat*, *supra* note 12, at 369.

61. See MORN, *supra* note 39, at 186–87.

62. See *id.* at 188.

63. See Joh, *The Forgotten Threat*, *supra* note 12, at 367, 373.

64. *Id.* at 367 & n.58 (citing cases where judges refused private security licenses on the grounds that there were too many in the jurisdiction).

65. *Id.* at 368 (noting that some stores created cooperatives in which members shared security services as well as the names of “repeat offenders”).

66. *Id.* at 372.

67. *Id.* at 371 & n.83 (citing *District of Columbia v. Clawans*, 300 U.S. 617 (1937), and lower court cases in which courts noted inherent bias of private security witnesses in criminal cases).

68. Legal scholars are well acquainted with the “shift in time that saved nine.” The well-known proverbial twist refers to the abrupt and halting course reversal of Justice Owen Roberts in both *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), and *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937). Both cases were decided only months after FDR proposed his “court-packing” legislation—federal legislation that would permit the President to appoint a new Supreme Court justice for each sitting justice over the age of seventy-and-a-half. It did not pass. See S. 1392, 75th Cong. (1937); Jamie L. Carson & Benjamin A. Kleinerman, *A Switch in Time Saves Nine: Institutions, Strategic Actors, and FDR's Court-Packing Plan*, 113 PUB. CHOICE 301, 304–05 (2002).

majority opinion and addressed the Court's departure from prior rulings, finding that economic conditions had changed for working people since 1923<sup>69</sup> and surprisingly, that "[t]he Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law."<sup>70</sup> This represented a dramatic change in the Court's reasoning, finally subjecting contracting and labor rights to some scrutiny and recognizing government power to limit some of the practices companies used to maintain an upper hand.

### 3. POST WORLD WAR II POLICING AND THE STATE ACTION DOCTRINE

While this Article is not focused on the State Action Doctrine, it is important to acknowledge its role in the debate about private police and outsourcing of police services because it is germane to accountability and the potential pitfalls associated with monopolization. Understanding the State Action Doctrine frames the debate historically in order to trace the laws governing force-protection and the public trust, or what people should expect from their local police force and its relationship to constitutional protections. A municipality must be cognizant of its liabilities and the citizenry clear about its rights.

After World War II, public police forces evolved and became more bureaucratic, centralized, and professional.<sup>71</sup> Collective bargaining and unions gained recognition from the public, politicians, and courts, and companies were less able to deploy private armies to quash union organizing.<sup>72</sup> Companies like Pinkerton moved out of the public eye and into the more mundane world of securing private property and conducting private investigations without the focus on infiltration and spying.<sup>73</sup> Although widely used, private security activities were less

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69. See *West Coast Hotel v. Parrish*, 300 U.S. 379, 390 (1937).

70. *Id.* at 391.

71. See Joh, *The Forgotten Threat*, *supra* note 12, at 373–74.

72. See *id.*; Sklansky, *The Private Police*, *supra* note 12, at 1218–19. It is important to note that private sector unions gained collective bargaining power and protection first with the passage of the Wagner Act in 1935, while public sector unions were not recognized until later. *E.g.*, Kenneth Casebeer, *Drafting Wagner's Act: Leon Keyserling and the Precommittee Drafts of the Labor Disputes Act and the National Relations Act*, 11 *INDUS. RELATIONS L.J.* 73, 73–75 (1989); Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 *HARV. L. REV.* 389, 491 (1950). In 1958, New York City mayor Robert Wagner signed the "little Wagner Act" giving city employees collective bargaining rights. Anthony C. Russo, *Management's View of the New York City Experience*, 30 *PROCEEDINGS ACAD. SCI.* 81, 82 (1970). Then in 1959, Wisconsin became the first state to legalize public sector collective bargaining rights. *E.g.*, Morris Slaveny & George R. Fleischli, *A Comparison of the Wisconsin and Federal Labor Relations Acts*, 2 *COMPARATIVE LABOR L.* 1, 8 (1977).

73. See Sklansky, *The Private Police*, *supra* note 12, at 1220.

scrutinized by the public.<sup>74</sup> However, courts began to better define the role of private security as separate from public police.<sup>75</sup>

The doctrinal separation between private and public force-protection that was promulgated after World War II remains principally unchanged and continues to define how private security can be held liable for constitutional rights violations under certain circumstances.<sup>76</sup> The State Action Doctrine was applied to a private police force for the first time in 1946 when, in *Marsh v. Alabama*, the Supreme Court held that a town entirely run by a private company was a state actor when it performed the duties normally performed by a government municipality.<sup>77</sup> The case considered whether a “company town” that functioned like a municipality, providing public services including security, could prohibit someone who did not live there from distributing religious literature.<sup>78</sup> The Court held that because the town was open to the public, the company could not prohibit constitutionally protected speech within its borders.<sup>79</sup> Under *Marsh*, where a public police force has been turned over to a private entity with government oversight of those duties, that force would certainly be a state actor. The case illustrates the Supreme Court’s willingness to hold a private company to a public standard if it provides services the same way a public town would.<sup>80</sup> After *Marsh*, the Court addressed private police in two fairly narrow decisions, concluding that if they are deputized by a municipality, then they must adhere to the same constitutional requirements public police follow.<sup>81</sup> Once shopping malls with private security gained in popularity and number, the Court again faced the task of distinguishing what role private security must play in respecting constitutional protections. In the 1960s, the Court found that malls were similar to municipalities because they were

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74. *See id.*

75. *See id.* at 1229–47.

76. *See id.* at 1279–80.

77. 326 U.S. 501, 505, 509–10 (1946).

78. *Id.* at 502.

79. *Id.* at 509–10.

80. *See id.* It is worth noting that *Marsh* did not overturn the Supreme Court’s ruling in the *Civil Rights Cases*; it simply found that taking on the role of providing public services subjects private entities to constitutional oversight. *Id.* In a contemporaneous case, the Supreme Court also ruled that private homeowner’s associations could not enforce racial covenants because to do so would require courts to uphold them in challenges, making the state complicit in violations of Fourteenth Amendment protections, so homeowners can only ask for voluntary complicity in such circumstances. *See Shelly v. Kraemer*, 334 U.S. 1, 18–19 (1948).

81. *See Williams v. United States*, 341 U.S. 97, 98–100 (1951) (finding private guard hired by lumber company who beat confession out of alleged thief a state actor because deputized “special” policeman showed suspect a badge and local detective present); *Griffin v. Maryland*, 378 U.S. 130, 135–37 (1964) (finding that deputized amusement park guard was a state actor who violated the Fourteenth Amendment by enforcing park’s segregation rule when he arrested African-American guests for trespass); *Beaton*, *supra* note 5, at 603, 608, 615.

open to the public—essentially small “company towns” like the one at issue in *Marsh*.<sup>82</sup> But by 1976, the Court reversed course and decided that malls were more like small businesses in a cooperative, and therefore, private guards were not state actors.<sup>83</sup> By the 1970s the lines between public police and private security companies were once again beginning to blur with partnerships becoming more common.<sup>84</sup> Additionally, public police began to rely on private security to obtain evidence that effectively circumvented constitutional requirements under the Fourth, Fifth, and Sixth Amendments.<sup>85</sup> This practice is currently within legal bounds, so long as a court can find that there was a “legitimate private purpose behind the search.”<sup>86</sup>

B. *Hybrid Policing: Public/Private Partnerships and the Upsurge of Business Interests in Politics*

As the law began to recognize the need to regulate policing, the substantive due process pendulum swung from economic to individual rights under the Warren Court. As it subsequently began to shift back toward a focus on economic liberty rights, political campaign financing regulations were one of the targets of the Court. This Section traces the growth of public-private police partnerships within that landscape in order to frame the current trajectory toward privatizing police.

1. THE RISE OF THE HYBRID SYSTEM

By the end of the 1960s, there were more public police in the United States than private security personnel.<sup>87</sup> By the 1970s, the trend was slowing, with a ratio of 1.4 public police officers for every private security officer.<sup>88</sup> Estimates put the ratio of private to public police at 3:1 in the year 2000.<sup>89</sup> The trend has only increased since that time, with partnerships between public and private police soaring since September

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82. *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 317–18 (1968), *overruled by* *Lloyd Corp. v. Tanner*, 407 U.S. 551, 570 (1972) (Marshall, J., dissenting) & *Hudgens v. NLRB*, 424 U.S. 507, 520–21 (1976).

83. *Hudgens*, 424 U.S. at 520–21 (1976); *Lloyd Corp.*, 407 U.S. at 570 (Marshall, J., dissenting).

84. See Sklansky, *The Private Police*, *supra* note 12, at 1221.

85. See Joh, *The Paradox of Private Policing*, *supra* note 5, at 114–17. Joh discusses the “silver platter doctrine,” whereby private police arrest and obtain evidence without regard for constitutional considerations and hand it over to public police for use in prosecutions. See *id.* Joh outlines its history and consequences in current practice. *Id.* The practice is within the law and courts have consistently held that evidence obtained by private actors is admissible by the state to prosecute defendants, even when it would be held inadmissible if obtained by state actors. *Id.*

86. *Id.* at 116–17 (quoting WAYNE LEFAVE ET AL., 1 CRIMINAL PROCEDURE § 1.7(f) (2004)).

87. Sklansky, *Private Police and Democracy*, *supra* note 12, at 89 (citation omitted).

88. Joh, *The Paradox of Private Policing*, *supra* note 5, at 54–55 (citations omitted).

89. *Id.* at 55 (citation omitted).

11, 2001.<sup>90</sup> There are two ways that public police forces partner with private security companies: 1) by sharing information to enhance overall crime prevention and investigation and 2) by outsourcing support services.<sup>91</sup> In either of these two models, the State Action Doctrine would generally apply as long as the public police entity “authorizes, encourages, or facilitates” the private activity.<sup>92</sup>

As of 2006, there were approximately 450 partnerships between public law enforcement and private security entities.<sup>93</sup> Those partnerships include sharing information between public and private police, but also providing additional patrols for special events and policing quasi-private property.<sup>94</sup> For example, a private security firm patrols 100 public housing buildings in Boston; the firm includes 165 private guards, 43 of which are designated as “special police officers” with limited arrest powers.<sup>95</sup> These systems of cooperation have been encouraged, and in many instances, funded by the federal government.<sup>96</sup> These partnerships have also been embraced by the highest levels of state and local law enforcement management.<sup>97</sup>

Many police departments also utilize the services of private companies to carry out duties that were once entirely the purview of the public department. Such contracts have been in use since at least the 1950s but have become much more common in the last twenty years as departments seek to save resources.<sup>98</sup> Those services include emergency response or 911 dispatching,<sup>99</sup> towing impounded vehicles,<sup>100</sup> data entry,

90. See THE LAW ENFORCEMENT-PRIVATE SECURITY CONSORTIUM, U.S. DEP’T OF JUSTICE, OPERATION PARTNERSHIP: TRENDS AND PRACTICES IN LAW ENFORCEMENT AND PRIVATE SECURITY COLLABORATIONS 8, 46–48 (2009).

91. See *id.* at 6.

92. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 539 (4th ed. 2011).

93. THE LAW ENFORCEMENT-PRIVATE SECURITY CONSORTIUM, *supra* note 90, at 40.

94. See *id.* at 44 (explaining how private companies assist with events like NASCAR races, security in Business Improvement Districts, and disaster relief efforts, including Hurricane Katrina); see also Griff Witte, *Private Security Contractors Head to Gulf*, WASH. POST, Sept. 8, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/07/AR2005090702214.html>.

95. THE LAW ENFORCEMENT-PRIVATE SECURITY CONSORTIUM, *supra* note 90, at 44.

96. See *id.* at 47.

97. See *id.* at 40.

98. See Joh, *Conceptualizing the Private Police*, *supra* note 12, at 614 & n.227.

99. See, e.g., Michael Ratcliffe, *Council Approves Privatization of Police/911 Dispatching*, LAWRENCEVILLE PATCH (Jan. 22, 2013, 4:27 AM), <http://lawrenceville.patch.com/articles/council-approves-privatization-of-police-911-dispatching> (noting New Jersey township’s decision to outsource 911 services to Georgia-based private company iXP with union and public outcry against plan); OLIVER W. PORTER, CREATING THE NEW CITY OF SANDY SPRINGS: THE 21ST CENTURY PARADIGM: PRIVATE INDUSTRY 111–12 (2006) (discussing contracting provisions for all police, fire, and dispatch services with Fulton County, Georgia).

100. Joh, *Conceptualizing the Private Police*, *supra* note 12, at 613.

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and crime lab analysis.<sup>101</sup> Aside from 911 dispatching, such contracted services do not tend to garner much opposition because these are not force-protection activities, but rather support services.<sup>102</sup>

## 2. POLITICS AND MONEY: THE SHIFTING LANDSCAPE AFTER THE WARREN COURT

While policing became more heavily regulated after World War II, substantive due process interpretation began to shift from economic to individual liberty rights under the Warren Court.<sup>103</sup> Unlike the *Lochner* Court, the Warren Court granted the federal government wide latitude to pass laws banning discrimination, which was in line with the cultural shifts in society.<sup>104</sup> While both Courts interpreted the Fourteenth Amendment to include substantive due process rights, the Warren Court applied them wholly differently by finding that they existed primarily to protect fundamental personal rights of citizens, albeit using very similar logic to apply them. It should not come as a surprise that very few judges or scholars since the end of the Great Depression have outwardly embraced the *Lochner* Court's vision,<sup>105</sup> but in resting on its foundations, the "liberal" Warren Court rehabilitated the same jurisprudence while avoiding the haunting label *Lochner* conveys.

Currently, the Supreme Court has begun to shift back toward an economic liberty interpretation of substantive due process rights, with a priority placed on curbing government regulation; it is here that privatization is gaining momentum. While *Citizens United* marks a historical change in campaign finance laws, corporate personhood did not begin with the Supreme Court's ruling in that case.<sup>106</sup> The question of corpo-

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101. Fairfax, *supra* note 3, at 275.

102. *See id.* at 273–75.

103. Earl Warren served as Chief Justice from 1953–1969. As the Women's Rights and Civil Rights movements came into fruition, the Court, under the supervision of Chief Justice Earl Warren, began to hear challenges based on alleged violations of fundamental and substantive due process rights. In *Brown v. Board of Education*, 347 U.S. 483, 494–95 (1954), the Court applied the Equal Protection Clause in finding segregation a direct violation of the Fourteenth Amendment, holding that separate but equal educational facilities did not cure the harm caused by segregated schools. The Court began to use reasoning first encountered in the *Lochner* era during this period, and applied its broad interpretation of substantive due process rights in cases involving personal rather than economic rights. In *Loving v. Virginia*, 388 U.S. 1, 11–12 (1967), the Court struck down the state's Racial Integrity Act of 1924 on both equal protection and due process grounds, holding marriage to be a fundamental right, as well as determining that the law was primarily intended to perpetuate white supremacy. *See also* *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (holding that married couples have a fundamental right to possess and use contraception); *Eisenstadt v. Baird*, 405 U.S. 438, 454–55 (1972) (extending the right to possess and use contraception to unmarried people).

104. *See, e.g., supra* note 103.

105. *See generally, e.g.,* BERNSTEIN, *supra* note 44.

106. *See* *Citizens United v. FEC*, 558 U.S. 310, at 315.

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rate constitutional rights started in 1886 when the Court recognized Fourteenth Amendment protections on behalf of a corporation.<sup>107</sup> This recognition was not part of the Court's decision in the case—it was simply inserted into the syllabus—but it became accepted as law.<sup>108</sup> The cases decided during the *Lochner* era continued to grant corporations Fourteenth Amendment protections in matters pertaining to contracts and employment, so whether corporations should enjoy constitutional rights that living and breathing citizens possess has not been in question for the last 100 years.<sup>109</sup> Even in matters related to political speech, the Court has previously recognized a corporation's right to participate in political discussion by granting it First Amendment rights.<sup>110</sup> Laws that entirely ban the use of corporate funds to affect or influence political activity are a presumptive violation of the First Amendment absent a showing of compelling government interest.<sup>111</sup>

Various efforts have been made to limit spending that might influence elections by groups or corporations in order to preserve faith in the democratic process.<sup>112</sup> Some limitations have been permitted and others overruled. In 1971, Congress passed legislation attempting to codify the disparate laws and streamline their applications.<sup>113</sup> However, some provisions of that legislation were struck down by the Court, which held that they violated the First Amendment rights of corporations and individual groups, while other provisions remained unaffected.<sup>114</sup> Since 1947, however, the method by which most unions, corporations and individual groups have spent money to influence the electorate has been through Political Action Committees (“PACs”).<sup>115</sup> Campaign finance

107. *Santa Clara Cnty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

108. *Id.*; John A. Powell & Stephen Menendian, *Beyond Public/Private: Understanding Excessive Corporate Prerogative*, 100 KY. L.J. 43, 99 (2011).

109. See Powell & Menendian, *supra* note 108, at 112–14.

110. *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 784, 788 n.26 (1978) (protecting commercial speech regarding ballot initiative but acknowledging dangers of direct financing to candidates).

111. *Id.* at 786 (citing *Bates v. Little Rock*, 361 U.S. 516, 524 (1960)).

112. See Tillman Act of 1907, 2 U.S.C. § 441b(a) (2012); Federal Corrupt Practices Act, 2 U.S.C. §§ 241–248 (1925), *repealed by* Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–442 (2012); 1947 Taft-Hartley Act, 29 U.S.C. §§ 401–531 (2012). The Federal Election Campaign Act created the Federal Election Commission. 2 U.S.C. § 437c.

113. See Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431–442.

114. *Buckley v. Valeo*, 424 U.S. 1, 58–59 (1976) (upholding limits on direct campaign contributions and disclosure requirements but striking provisions that curbed spending by campaigns, by individuals using personal money to run for office, and by independent groups on issues related to elections).

115. See Adam Winkler, “Other People’s Money”: Corporations, Agency Costs, and Campaign Finance Law, 92 GEO L.J. 871, 935 (2004) (citation omitted); see also Jeremy G. Mallory, *Still Other People’s Money: Reconciling Citizens United with Abood and Beck*, 47 CAL. W. L. REV. 1, 25–28 (2010).

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laws prior to 2002 banned direct contributions by corporations and labor unions to influence federal elections, except through segregated voluntarily contributed funds to the general treasury, which could be spent on federal races.<sup>116</sup>

Unlimited “soft money,” or individual contributions not coordinated with candidates in state and local elections, created an atmosphere wherein PACs were spending millions of dollars on issue-related advertising that avoided direct endorsements but created political pressure to change campaign finance laws in order to curb the limitless flow of cash that had at least the appearance of buying the candidates.<sup>117</sup> Congress attempted to address the problem of “soft money,” passing legislation commonly referred to as McCain-Feingold in 2002.<sup>118</sup> That law subjected political parties to federal spending limits and banned corporations and non-profit groups from financing what it defined as “electioneering communications,” which was issue-related advertising that named a candidate within thirty days of a primary and sixty days of a general federal election.<sup>119</sup> Challenged in 2003, the law was upheld<sup>120</sup> and remained unchanged until 2007, when the Supreme Court ruled that the thirty- and sixty-day bans were unreasonable infringements on First Amendment rights, unless the advertising in question included an outright endorsement of a candidate.<sup>121</sup> In 2008, the Court further limited the law by striking the “millionaire’s amendment,” a provision intended to level the playing field between wealthy candidates and those who could not afford to bankroll their own campaigns.<sup>122</sup> The Court was clearly signaling that its majority in those decisions had serious reservations about campaign spending limitations as they related to the First Amendment.

### C. Continuing Trends in the Law and Privatization Schemes

As the Supreme Court began dismantling government regulation of

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116. See 2 U.S.C. § 441b; *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 660 (1990) (prohibited corporations from directly spending money to influence campaigns but permitted “independent political expenditures [made] through separate segregated funds”), *overruled by Citizens United v. FEC*, 558 U.S. 310, 365 (2010); see also Winkler, *supra* note 115, at 935.

117. See Winkler, *supra* note 115, at 935–36.

118. Bipartisan Campaign Reform (McCain-Feingold) Act of 2002 § 101, Pub. L. No. 107–155, 116 Stat. 81, 82–86 (2002).

119. See *id.* § 201(3)(A), 116 Stat. at 89.

120. *McConnell v. FEC*, 540 U.S. 93, 114, 246 (2003), *overruled by Citizens United*, 558 U.S. at 365.

121. *FEC v. Wisc. Right To Life, Inc.*, 551 U.S. 449, 457–58, 481 (2007).

122. *Davis v. FEC*, 554 U.S. 724, 729, 740 (2008) (striking provision that limited amount of personal funds a candidate could use in his or her campaign).

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campaign donations, private entities began to look for more ways to influence political actors. This Section analyzes the return to an economic liberty rights focus within the law that allows business interests to play a larger role in politics. Additionally, it explores the types of police privatization proposals currently being considered and how presumed economic distress plays a role in shaping them.

### 1. RETURN TO ECONOMIC LIBERTY RIGHTS AND POLITICAL INFLUENCE

In laying the groundwork to limit government power over large business interests, the current Supreme Court, with Chief Justice Roberts at its helm, has carved out a space in which corporations are granted the same constitutional rights as citizens and the federal government is limited in its ability to regulate the activities of those corporations. The focus of this Section is this space and how it came to exist in the context of the Fourteenth Amendment's Due Process Clause. How corporations participate in democracy reveals the extent to which that influence can potentially usurp the will of the individual voter. The financial influence is not partisan; it is also not always certain to garner a victory for a preferred candidate, but it is powerful. To ignore the speech that money amplifies is to analyze privatization in a convenient vacuum of democratic and economic altruism—conditions which increasingly cease to exist in any pure form in the context of electoral politics.

In 2010, the Court came down with its highly controversial decision in *Citizens United*, holding that Congress could not limit independent spending by corporations or unions on “electioneering communications,” gutting McCain-Feingold once and for all.<sup>123</sup> The Court found no compelling government interest in limiting corporate spending during elections, holding that corporations had as much right under the First Amendment to influence elections as any other citizen.<sup>124</sup> The Court went further, stating that “[t]he appearance of influence or access, furthermore, will not cause the electorate to lose faith in our democracy. By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”<sup>125</sup> As long as there is no actual *quid pro quo* between a candidate and the corporation, the Court declared that there would be no appearance of corruption.<sup>126</sup> The dissent wasted no time accusing the majority of

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123. See *Citizens United*, 558 U.S. at 365–68 (overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), and *McConnell*, 540 U.S. 93 (2003), and reinstating *Buckley v. Valeo*, 424 U.S. 1 (1976), and *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765 (1978)).

124. *Id.* at 340–41.

125. *Id.* at 360 (citing *Buckley*, 424 U.S. at 46).

126. See *id.* at 359.

returning to the kind of reasoning most often associated with the *Lochner* Court.<sup>127</sup>

While *Citizens United* dealt with campaign *spending* regulations, the Court has now overturned limits on direct campaign *contributions*, overturning the aggregate limitations upheld in *Buckley*.<sup>128</sup> In *Citizens United*, the Court defined independent expenditures as speech delivered directly to the electorate, and held that no appearance of corruption could be assumed since that message was not coordinated with any particular candidate.<sup>129</sup> Now the Court has found that even large direct contributions to candidates do not risk corrupting the process, a more significant step toward deregulating campaign financing.<sup>130</sup> In *McCutcheon v. FEC*, the Court struck down aggregate donation limits—the total amount any one donor may give in a two-year election cycle to federal candidates and non-candidate party committees.<sup>131</sup> It left in place “base limits” for candidates, parties and their PACs, but removed restrictions on individual donors who may now contribute the maximum allowable to each.<sup>132</sup> Narrowly defining corruption as an explicit *quid pro quo*, the Court held that any limitations beyond the base limits represent a violation of the First Amendment.<sup>133</sup> Acknowledging that large money donors procure influence with politicians, the Court still found that such influence is not a danger to the democratic process and does not rise to the level of corruption.

The direction the Court took in overturning McCain-Feingold and the portion of *Buckley* permitting aggregate limits, as well as in striking

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127. *Id.* at 479 (Stevens, J., dissenting) (“In a democratic society, the longstanding consensus on the need to limit corporate campaign spending should outweigh the wooden application of judge-made rules. The majority’s rejection of this principle ‘elevate[s] corporations to a level of deference which has not been seen at least since the days when substantive due process was regularly used to invalidate regulatory legislation thought to unfairly impinge upon established economic interests.’” (quoting *First Nat’l Bank of Bos.*, 435 U.S. at 817 n.13. (1978) (White, J., dissenting))).

128. *McCutcheon v. FEC*, No. 12-536 (Apr. 2, 2014) (striking two-year aggregate limits but upholding base limits).

129. See *supra* note 125 and accompanying text.

130. See *McCutcheon*, slip op. at 19 (“Spending large sums of money in connection with elections, but not in connection with an effort to control the exercise of an officeholder’s official duties, does not give rise to . . . *quid pro quo* corruption.”).

131. See *generally id.*

132. See 2 U.S.C. § 441a (2012). Base limits represent the total amount each candidate and committee may accept from an individual donor during each election cycle. These limits were left in place while the aggregate limits, which capped the total amount a donor could contribute in each two-year election cycle, were overturned. See *McCutcheon*, slip op. at 13, 19.

133. See *McCutcheon*, slip op. at 20 (“The line between *quid pro quo* corruption and general influence may seem vague at times, but the distinction must be respected in order to safeguard basic First Amendment rights.”).

down a Supreme Court case decided as recently as 2003,<sup>134</sup> indicates a willingness to ignore recent precedent and shift its thinking where government regulation is concerned. The reasoning the majority used to overturn these regulations looks very similar to the Court's thinking during the *Lochner* era. While a large majority of individuals and small business owners oppose the ruling in *Citizens United*,<sup>135</sup> the Court has doubled down on its unpopular decision, reversing a Montana Supreme Court decision that upheld a 1912 voter-approved ban on corporate political campaign expenditure.<sup>136</sup> The current Supreme Court has clearly indicated that corporations have certain constitutional rights, specifically with respect to the First and Fourteenth Amendments. It is the Court's holding—that corporate “liberty” is just as important as individual human “liberty”—that makes this Court look so much like the *Lochner* Court. The *Lochner* Court appeared to many people as unconcerned with the difficulties suffered by workers at the hands of employers and unable to recognize a need for the government to step in to protect certain classes of citizens whose bargaining power was so much weaker than the large companies who extracted their labor. Presently, a similar cognitive dissonance exists that harkens back to that age and makes *Citizens United* look like a harbinger of things to come. It is against this backdrop that privatization of heretofore public force-protection has begun to find momentum.

## 2. POCKETS OF RESISTANCE: PROPOSALS ON THE TABLE

There are two primary efforts underway to change the existing model of public police services.<sup>137</sup> The first involves outsourcing the entire force to another jurisdiction that remains within the public domain but allowing a municipality to annul existing contracts and start anew.<sup>138</sup> These types of proposals have met with mixed success, with some

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134. *Citizens United v. FEC*, 558 U.S. 310, 365–68 (2010).

135. *E.g.*, *Small Businesses Reject Role of Money in Politics; View Citizens United Decision as Bad for Business*, AM. SUSTAINABLE BUS. COUNCIL (Jan. 18, 2012), [http://asbcouncil.org/sites/default/files/files/poll\\_results\\_money\\_in\\_politics.pdf](http://asbcouncil.org/sites/default/files/files/poll_results_money_in_politics.pdf); *In Supreme Court Ruling on Campaign Finance, the Public Dissents*, ABC NEWS (Feb. 17, 2010, 7:00 AM), <http://abcnews.go.com/blogs/politics/2010/02/in-supreme-court-ruling-on-campaign-finance-the-public-dissents>.

136. *Am. Tradition P'ship v. Bullock*, 132 S. Ct. 2490, 2491 (2012) (per curiam).

137. *See* Joh, *Conceptualizing the Private Police*, *supra* note 12, at 614 & n.230 (discussing attempts in the 1990s to privatize several public forces).

138. *See, e.g.*, Adam Elmahrek, *City Council Members Allege Widespread Police Union Bullying*, VOICE OF OC (Aug. 28, 2012, 5:01 PM), [http://www.voiceofoc.org/oc\\_coast/article\\_a5185e5c-f16c-11e1-a44f-0019bb2963f4.html](http://www.voiceofoc.org/oc_coast/article_a5185e5c-f16c-11e1-a44f-0019bb2963f4.html) (discussing allegation outsourcing plan failed because of intimidation and union bullying of Fullerton, California, city council members); Josh Marshall, *Saginaw Police Union Files Grievances Against the City*, MINBCNEWS.COM, (Feb. 18, 2013, 7:09 PM), <http://www.minbcnews.com/news/story.aspx?id=862316#.UxSjtNyuCG8> (noting plan moving forward and police fired in outsourcing to county force plan).

schemes already in their implementation phase and others struggling to survive.<sup>139</sup> Still other plans have been defeated, usually by a mix of public concern and police union pressure.<sup>140</sup> The second type of model that has not yet found its mark is the privatization of a force—selling it to a private company entirely.<sup>141</sup> Such plans have been offered and thus far defeated but keep resurfacing with increasing frequency.<sup>142</sup> This Subpart examines both models.

a. *Outsourcing to Larger Municipalities*

In 2012, the city of Camden, New Jersey, decided to dissolve its contract with the Camden Police Department and launch a new county-wide division called the Camden Police Metro Division.<sup>143</sup> The county freeholders voted for the measure, and while there was some outcry, primarily from local unions, there was less consternation than other outsourcing plans have faced.<sup>144</sup> The new county department could theoretically cover all municipalities within Camden county that wish to join it—thirty-seven in total—but as of the spring of 2014, the new county-wide department covers only one of them: the city of Camden.<sup>145</sup> Camden is one of the poorest cities in the state—and has the state’s highest murder rate—so when the county decided to scrap the existing union contracts and propose something new, few showed up to protest.<sup>146</sup> The national news minimally covered the story, but given the desperate conditions of poverty and crime, coupled with what many viewed as overly generous wage and pension obligations, this plan was met with little resistance beyond a vocal local minority.<sup>147</sup> In addition, the Camden police have had such a contentious relationship with the public—including numerous charges of police misconduct—that they found few cham-

139. See, e.g., Jason Laday, *Camden City, County Will Continue Regional Police Plan Without Union*, S. JERSEY TIMES, Mar. 18, 2013, [http://www.nj.com/camden/index.ssf/2013/01/camden\\_city\\_county\\_officials\\_p.html](http://www.nj.com/camden/index.ssf/2013/01/camden_city_county_officials_p.html).

140. See, e.g., Dumke, *supra* note 9.

141. See, e.g., Wolf, *supra* note 10.

142. See *infra* note 156 and accompanying text.

143. Darran Simon & Claudia Vargas, *Financial Details Outlined for Camden Regional Police Force*, PHILA. INQUIRER, Aug. 30, 2012, [http://articles.philly.com/2012-08-30/news/33500354\\_1\\_regional-police-force-county-force-police-budget](http://articles.philly.com/2012-08-30/news/33500354_1_regional-police-force-county-force-police-budget).

144. Compare *id.* with Ratcliffe, *supra* note 99 (discussing an hour-long public comment period generally opposing the privatization of emergency responses in Lawrence, New Jersey).

145. Kate Zernike, *To Fight Crime, a Poor City Will Trade in Its Police*, N.Y. TIMES, Sept. 29, 2012, at A1.

146. *Id.*

147. *Id.* (Before being disbanded, the salary range for the department was \$47,000–\$81,000, including 3–11% bonuses for staying on the job beyond five years and shift bonuses that included an extra 4% for the day and 10% for a night shift. With a generous sick-time allowance, the average absentee rate was 30% per shift.)

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pions among those they were sworn to protect.<sup>148</sup>

The plan called for an increase in police officers—from 273 to 400—which the county hopes will stem the tide of crime.<sup>149</sup> Having just been implemented in May 2013, the success of the transition is yet unknown, although overall crime rates have declined.<sup>150</sup> The old police force was given an opportunity to join the Metro Division—albeit with major wage and benefits concessions; originally told only 49% of existing officers would be hired for the new force, the union sued to stop the plan.<sup>151</sup> The county then offered to transfer any officers that wanted to move to the new force along with a more generous set of conditions, including the right to retain collective bargaining rights and keep their existing pension and medical benefits.<sup>152</sup> However, they would also be required to drop the lawsuit, forfeit their existing contract, and give up any earned status for their years on the force.<sup>153</sup> The union voted overwhelmingly against the offer and decided to pin their hopes on the lawsuit.<sup>154</sup> The union vote did nothing to prevent officers from applying to the new force and organizing as a new union; however, since they voted

148. See, e.g., ACLU OF N.J., THE CRISIS CONTINUES INSIDE POLICE INTERNAL AFFAIRS 3 (2013), available at [http://www.aclu-nj.org/files/3413/6059/3876/ACLU\\_NJ\\_Internal\\_Affairs.pdf](http://www.aclu-nj.org/files/3413/6059/3876/ACLU_NJ_Internal_Affairs.pdf) (noting in follow-up to 2009 report showing inadequate response to civilian complaints, that in 2012, “[o]nce again a majority of local departments provided inaccurate information in response to the most basic questions regarding individuals’ rights to file . . . complaints.”); *Camden Agrees to Pay \$3.5 Million to Victims of Police Corruption*, ACLU OF N.J. (Jan. 10, 2013), <https://www.aclu.org/criminal-law-reform/camden-agrees-pay-35m-victims-police-corruption> (noting that one officer was convicted and three officers pled guilty to corruption for planting evidence, falsifying reports and perjury leading to settlement with 88 citizens); Matt Katz, *Camden Police Scandal Has Widespread Consequences*, PHILA. INQUIRER, Feb. 21, 2010, [http://www.philly.com/philly/news/year-in-review/20100221\\_Camden\\_police\\_scandal\\_has\\_widespread\\_consequences.html](http://www.philly.com/philly/news/year-in-review/20100221_Camden_police_scandal_has_widespread_consequences.html).

149. See Zernike, *supra* note 145; see also Matt Skoufalos, *Camden FOP Votes down County Offer, Braces for Legal Fight*, COLLINGSWOOD PATCH (Feb. 4, 2013, 3:42 AM), <http://collingswood.patch.com/articles/camden-f-o-p-votes-down-county-offer-braces-for-legal-fight> (“In 2007, we were the number five most dangerous city. For the last five years we have ranked [number one] or [number two]. In 2008, we had over 350 officers. In 2010, we had 393 officers.” (quoting Camden City Fraternal Order of Police President John Williamson about whether more police would result in less criminal activity)).

150. See Heather Haddon & Ricardo Kaulessar, *Crime Dips in Camden as New County Police Force Replaces City Officers*, WALL ST. J., Aug. 5, 2013, <http://online.wsj.com/article/SB10001424127887323968704578650171849946106.html>; Joe Green, *For Camden Officials, 2013 Drop in Crime and Homicides a Step in Right Direction*, S. JERSEY TIMES, Jan. 3, 2014, [http://www.nj.com/camden/index.ssf/2014/01/for\\_camden\\_officials\\_2013\\_drop\\_in\\_crime\\_homicides\\_is\\_a\\_just\\_a\\_step\\_in\\_right\\_direction.html](http://www.nj.com/camden/index.ssf/2014/01/for_camden_officials_2013_drop_in_crime_homicides_is_a_just_a_step_in_right_direction.html) (noting force not at full capacity but 15% drop in homicides from 2012 to 2013).

151. See Zernike, *supra* note 145; Laday, *supra* note 139 (noting union lawsuit against city continuing after union voted against plan).

152. Jason Laday, *Camden FOP Leaders Reviewing Offer from Freeholders on Regional Police Department*, S. JERSEY TIMES, Jan. 15, 2013, [http://www.nj.com/gloucester-county/index.ssf/2013/01/camden\\_fop\\_leaders\\_reviewing\\_o.html](http://www.nj.com/gloucester-county/index.ssf/2013/01/camden_fop_leaders_reviewing_o.html).

153. *Id.*

154. See Laday, *supra* note 139.

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against the offer, the county said it could only hire 49% of the existing officers.<sup>155</sup>

The Camden regionalization idea is not a new one: other municipalities have proposed similar plans to outsource their services to larger, nearby forces.<sup>156</sup> Those municipalities have been much smaller, however, and even they faced enormous resistance from their local communities.<sup>157</sup> Moreover, their plans involve folding in their services with already-existing departments that can extend services to them; in no other case has a municipality created a broader regional force to fold itself into that did not already exist and included no other municipalities. The Camden plan is significant because it uses a beleaguered city as a test case for other large municipalities to shed contracts and start anew—without the burden of long-term obligations—by creating a new police department with a new name.<sup>158</sup> But perhaps more importantly, as will be discussed below,<sup>159</sup> this innovative plan allows for some analysis of the convergence of political influence and dwindling revenue streams that provides opportunities to upend public services without much resistance.

#### b. *Privatization of the Public Police*

There are numerous examples of cities using private security to bolster existing forces, usually financed by neighborhood associations, known as Business Improvement Districts<sup>160</sup>—but in those partnerships

155. *See id.*

156. *See* Charles B. Stockdale, *Cities That Have Fired Their Police Forces*, 24/7 WALL ST. (Dec. 13, 2011), <http://247wallst.com/2011/12/13/cities-that-have-fired-their-police-forces/> (cities include Pewaukee, Wisconsin, in 2009; Maywood, California, San Carlos, California, and Pontiac, Michigan, in 2010; Millbrae, California, and Youngstown, Arizona, in 2011; noting that all have populations under 30,000 except Pontiac, which was under control of an emergency city manager); Gideon Rubin, *Pacifica City Manager Mum on Move to Kibosh Police Outsourcing Plan*, PACIFICA PATCH (Aug. 21, 2012, 1:53 AM), <http://pacificapatch.com/articles/pacificapatch-city-manager-mum-on-move-to-kibosh-police-outsourcing-plan> (discussing closed session meetings on proposal to outsource local police service to the sheriff's department and decision to stop pursuing that plan); Brett Dickie, *Saginaw Residents Show Support for Police Department*, MINBCNEWS.COM (Feb. 19, 2013, 9:46 PM), <http://www.minbcnews.com/news/story.aspx?id=862862#UyHhMIFdWUA> (discussing the layoff of police officers to close budget gap amid ongoing consideration of outsourcing plan to county sheriff department); Richard Winton, *Fullerton City Council Rejects Move to Consider Disbanding Police*, L.A. TIMES, Aug. 9, 2012, <http://articles.latimes.com/2012/aug/09/local/la-me-fullerton-20120809> (noting that city council voted against outsourcing Fullerton, California, police service to Orange County Sheriff Department 3 to 2, despite ongoing criticism of the department).

157. *See supra* note 156.

158. *See* Simon & Vargas, *supra* note 143.

159. *See infra* Part III.A.

160. *See* THE LAW ENFORCEMENT-PRIVATE SECURITY CONSORTIUM, *supra* note 90 at 40, 119–20 (listing several formal law enforcement and private security partnerships in such places such as Chicago, Boston, and Dallas).

the local police still operate as the *de facto* public police force with the private officers permitted only limited powers.<sup>161</sup> Attempts to sell the wholesale delivery of force-protection to private companies have not yet succeeded, but the idea has been considered, and given current trends, plans to sell off entire departments are likely not far from realization.<sup>162</sup> Moreover, other cities have been slowly blurring the public and private lines. One such example is the use of public funding to hire private forces while concurrently shrinking the public force.<sup>163</sup> The reverse of that is essentially a system of leasing public police to private companies that pay the department in return for the benefits of having an officer with public police powers, including taxpayer indemnification of the company in case of litigation.<sup>164</sup>

One such effort to privatize the entire force was attempted in Foley, Minnesota, in 2011.<sup>165</sup> There, the city council voted to hire a private contractor to take over all policing duties and dismiss its entire force.<sup>166</sup> It would have saved the town of 2,600 residents \$53,000 per year.<sup>167</sup> Foley had already outsourced its patrol services to a nearby sheriff unit in 2003, but further budget cuts pushed the small municipality to find ways to save more on public safety.<sup>168</sup> The deal did not go through when the private company declined to sign the contract, in large part because of the difficulty in determining how state action issues and tort liability

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161. See Joh, *The Forgotten Threat*, *supra* note 12, at 379–84 (discussing the different types of partnerships and division of accountability); Beth Slovic, *Debate About Security in Downtown Portland Parks Continues: Portland City Hall Roundup*, THE OREGONIAN (Dec. 13, 2011, 10:26 AM), [http://blog.oregonlive.com/portlandcityhall/2011/12/debate\\_about\\_security\\_in\\_downt.html](http://blog.oregonlive.com/portlandcityhall/2011/12/debate_about_security_in_downt.html) (discussing ongoing debates about private security patrols in downtown Portland).

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162. E.g., Nancy Bean Foster, *Weare Mulled Replacing Police Department with Private Security Company*, THE BEDFORD BULLETIN (Oct. 4, 2013, 11:42 PM), <http://www.newhampshire.com/apps/pbcs.dll/article?AID=/20131005/NEWS07/131009579/-1/newhampshire14&template=newhampshire1408> (“According to Robert Tanenholt of Greystone International, the company has never run a police department in the United States, but said that privatized police departments are on the horizon. ‘It’s something that’s starting to raise its head in towns and cities,’ said Tenenholt. Budgets, unions, and other issues are behind the interest in privatizing departments, Tanenholt said, but ‘we’ve never done this before.’”).

163. See Brendan McCarthy, *N.O. Residents Increasingly Turning to Private Police Patrols*, WWLTV (Nov. 1, 2012, 5:17 PM), <http://www.wwltv.com/news/eyewitness/brendanmccarthy/brendan-maps-176820771.html>.

164. See Wolf, *supra* note 10.

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165. Kari Petrie & Kirsti Marohn, *Minn. Town to Replace Police with Private Security Force*, USATODAY (Nov. 14, 2011, 10:01 AM), <http://usatoday30.usatoday.com/news/nation/story/2011-11-14/police-private-security-foley/51194090/1>.

166. *Id.*

167. Andrew Strickler, *The Force Is Not with You: Cash-Strapped Minnesota Town Hires Private Guards for Policing Duties*, THE DAILY (Jan. 2, 2012), [http://www.andrewstrickler.com/uploads/A.Strickler\\_No\\_Cop\\_Town\\_1.2.12.pdf](http://www.andrewstrickler.com/uploads/A.Strickler_No_Cop_Town_1.2.12.pdf).

168. *Id.*

would apply.<sup>169</sup> There was not a great deal of support for the idea, even within the town council, and Foley decided to rebuild its local police without the assistance of even the county sheriff.<sup>170</sup>

While the plans to outsource or privatize police have been met with mixed reaction among the public, there are serious questions that must be addressed because these various plans continue to find their way into the halls of government on an ever-increasing basis. There may be plans that make fiscal sense but are not worth the risks for public safety; at the same time, there are many different ways that outsourcing and privatization play a role for local governments in contexts outside of policing. Therefore, the next Part considers the costs and benefits of systems that seek to shed public police services.

## II. PROS AND CONS OF PRIVATIZATION AND OUTSOURCING OF THE POLICE

### A. *Could Privatizing the Police Be Beneficial?*

#### 1. ECONOMIC UNCERTAINTY REQUIRES A SOLUTION

State budgets have been operating with large shortfalls since 2008, and many still suffer the consequences of a sluggish housing market, high unemployment, and accompanying debt associated with the recession.<sup>171</sup> Despite projections that revenue will increase by 4.1% in 2013, states still report an average increase in spending of only 2.2% in 2013.<sup>172</sup> Whether because of mistrust in the economic recovery or ideologically driven motives, the move to shrink budgets will continue unabated for the foreseeable future.<sup>173</sup> In surveys that reflect city finances, the outlook is often bleak, in part because of declining support from federal and state governmental disbursements,<sup>174</sup> but also because of underfunded pensions and health care obligations.<sup>175</sup> So the fiscal problems are real where they truly exist, if also currently overstated.

With depressed revenues, municipalities could see real savings in

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169. See Conrad Wilson, *Foley Private Security Deal on Hold*, MINN. PUB. RADIO (Jan. 5, 2012, 5:58 PM), [http://blogs.mprnews.org/statewide/2012/01/foley\\_private\\_security\\_deal\\_on\\_hold/](http://blogs.mprnews.org/statewide/2012/01/foley_private_security_deal_on_hold/).

170. Conrad Wilson, *Foley to Re-Start Police Department*, MINN. PUB. RADIO (Feb. 22, 2012), <http://minnesota.publicradio.org/display/web/2012/02/22/foley-police-department>.

171. See NAT'L GOVERNORS ASS'N, *supra* note 6, at vii (noting the trend of state budget revenues and shortfalls since 2008 and projecting slow growth in 2013). R

172. *Id.*

173. *See id.*

174. Pagano et al., *supra* note 6, at 5 ("Leading factors that city finance officers report to have decreased are levels of federal aid (51%), state aid (50%), the local tax base (47%) and the health of the local economy (42%).") R

175. *Id.* at 9.

reforming police services. According to some estimates, private security officers make an average of 47% less than their public counterparts.<sup>176</sup> In a privately run system willing to bifurcate police services, some tasks could be performed by trained sworn officers, while others could be handled by a second-tier force at a much lower cost to the municipality.<sup>177</sup> The wage structure, handled by a company, affords the greatest opportunity to keep costs down. Unlike a union model, where wages are based on seniority or rank, a private company can set the terms and institute a performance-based structure.<sup>178</sup> In an outsourced situation like Camden, the savings are immediate because the entire force is released from its contract and a new, lower wage structure is put into place.<sup>179</sup> Moreover, the very threat of outsourcing or privatization may be sufficient to compel union officers to renegotiate salary and benefits in a more favorable direction for the municipality.<sup>180</sup>

Beyond wages, the benefits obligations for municipalities are cited as a major impediment to balancing budgets.<sup>181</sup> Committing to long-term pensions and health insurance is expensive and carries unforeseeable market fluctuations.<sup>182</sup> When municipalities look for approaches to cutting spending, those benefits can become a lucrative target.<sup>183</sup> Given the nature of private contracts, such obligations can be shed entirely by municipalities that can simply draw a fiscal line in the sand and allow private companies to handle such issues. In addition to cost savings, there is the added benefit of control and predictability.

Competition is another possible benefit of outsourcing and privatization that may affect not only cost but also efficiency, as it has arguably done in other contexts.<sup>184</sup> Private security companies already exist in the market, so competition is already built into the framework. If the

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176. See Erwin A. Blackstone & Simon Hakim, *Private Policing: Experiences, Evaluation and Future Direction*, in HANDBOOK ON THE ECONOMICS OF CRIME 359, 362 (Bruce L. Benson & Paul R. Zimmerman eds., 2010).

177. Erwin A. Blackstone & Simon Hakim, *Privatizing the Police*, THE MILKEN INST. REV. 54, 57 (2010) ("Private armed officers guard the transit systems of Miami and St. Louis. Private armed guards earning \$34,000 a year are being substituted in Hernando County, Fla., for sheriff's deputies earning about twice as much. The Southfield, Mich., Police Department cut the cost of processing newly arrested prisoners in half by hiring the Wackenhut Corporation to do the job.").

178. See *id.* at 58.

179. See Zernike, *supra* note 145.

180. See Blackstone & Hakim, *supra* note 176, at 375.

181. See Pagano et al., *supra* note 6, at 6, 9.

182. Daniel J. Kaspar, *Defined Benefits, Undefined Costs: Moving Toward a More Transparent Accounting of State Public Employee Pension Plans*, 3 WM. & MARY POL'Y REV. 129, 143 (2011) (discussing lack of uniform accounting foundation to predict market fluctuations leading to pensions being underfunded).

183. See Paul M. Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 263 & n.3 (2011).

184. See Paul Guppy, *Policy Brief: Private Prisons and the Public Interest: Improving Quality*

public is concerned that profit motives will result in negative consequences for the public, the threat of competition may compel acceptable behavior, born of self-interest.<sup>185</sup>

## 2. LACK OF PUBLIC TRUST IN EXISTING MODEL

Police corruption, brutality, racial profiling, and general disrespect—mostly for the poor—are problems in cities big and small.<sup>186</sup> That the general public may have concerns about a private force is understandable in a visceral sense, but given minimal public outcry in Camden, distrust of privatization may not play a large role in cities that already have a history of police malfeasance.<sup>187</sup> Given that history, one of the most vital concerns to address is accountability.<sup>188</sup> If robust accountability can be assured, then public trust can be established. Privatization could open the door to new opportunities to create regulations and establish protocols that do not currently exist.<sup>189</sup> For example, the “blue wall of silence”<sup>190</sup> could be addressed by contracting that reflects stiff penalties for noncompliance with vigorous government oversight.

Additionally, competition and other incentives might address concerns that profits will be the top priority for private enterprise.<sup>191</sup> With whistleblower protection offered to individual officers, it is possible that the public could build trust in a private force more than one represented by a union without a robust regulatory system of redress. Further, any fear that private companies would be reluctant to report levels of criminal activity in a bid to demonstrate success may be unfounded because

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*and Reducing Cost Through Competition*, WASH. POL’Y CTR. 3 (Feb. 2003), available at <http://www.washingtonpolicy.org/sites/default/files/PrisonPublicInterestPB.pdf>.

185. See Volokh, *supra* note 2, at 150 (discussing accountability and competition in the private prison context). R

186. See Julian Darwall & Martin Guggenheim, *Funding the People’s Right*, 15 N.Y.U. J. LEGIS. & PUB. POL’Y 619, 639–41 (2012) (citing a lack of oversight in criminal justice system as cause for disrespect and police corruption); Megan Cottrell, *Chicago Spent over \$63 Million Defending Police Misconduct: Study*, CHI. REP. (May 21, 2012, 3:55 PM), <http://www.chicagonow.com/chicago-muckrakers/2012/05/chicago-spent-over-63-million-defending-police-misconduct-study/> (discussing the costs of police misconduct).

187. See Martin Guggenheim, *The People’s Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 464 (2012) (citing numerous instances of evidence tampering and police corruption across the United States).

188. See generally Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229 (2003).

189. See Volokh, *supra* note 2, at 149. R

190. Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233, 237 (1998) (“Police officers also sometimes lie under oath because of the ‘blue wall of silence,’ an unwritten code in many departments which prohibits disclosing perjury or other misconduct by fellow officers, or even testifying truthfully if the facts would implicate the conduct of a fellow officer.” (citations omitted)).

191. See generally Volokh, *supra* note 2. R

rigorous reporting can be monitored by independent public agencies and citizens.<sup>192</sup> It is notable that problems exist currently with the use of the public police monitored system called CompStat,<sup>193</sup> which some argue has been very successful in tracking statistical data and crime patterns but has had the collateral effect of incentivizing police to underreport crime to keep those statistics down.<sup>194</sup> At the very least, these provisions have the potential to offer a model that is no worse than what many citizens currently experience.

In Camden, some complained that the new officers would be unfamiliar with the neighborhoods and thus less able to understand the heart-beat of the city, know its residents, and exhibit the care expected by the populace.<sup>195</sup> But again, many had already lost trust.<sup>196</sup> In places where that concern is more applicable, the proper training, orientation, and interaction with the people who live there can address these issues.<sup>197</sup> A new force would not simply arrive in town on a particular day and begin patrolling, but could craft a transitional and permanent police system with members of the community and government. Such obstacles are possible to overcome with proper coordination. It is also instructive that hybrid systems currently in operation have produced no marked discord because of familiarity issues;<sup>198</sup> the public is accustomed to partial privatization schemes and may be amenable to a broader effort.

### 3. EFFICIENCY AND HOW TO MAINTAIN IT

As mentioned above, competition is one way to compel private companies to perform efficiently and to prioritize the needs of the community rather than simply prioritizing profits.<sup>199</sup> Contracts can incentivize companies to meet certain performance benchmarks or lose

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192. See, e.g., N.Y.C. COMM'N TO COMBAT POLICE CORRUPTION, <http://www.nyc.gov/html/ccpc/html/home/home.shtml> (last visited March 3, 2014) (established in 1995 as permanent oversight committee with members appointed by mayor).

193. See Andrew Guthrie Ferguson, *Crime Mapping and the Fourth Amendment: Redrawing "High-Crime Areas"*, 63 HASTINGS L.J. 179, 192–95 (2011) (explaining CompStat origins and uses as crime mapping and data management).

194. See generally John A. Eterno & Eli B. Silverman, *The NYPD's Compstat: Compare Statistics or Compose Statistics?*, 3 INT'L J. POLICE SCI. & MGMT 426 (2010).

195. See njopengovernment, *Camden County Freeholders Meeting*, YOUTUBE (Sept. 24, 2012), <https://www.youtube.com/watch?v=vo680sBIRVI>.

196. See ACLU OF N.J., *supra* note 148, at 3.

197. See Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARV. L. REV. 1285, 1313 (2003) (discussing generally the benefit of including diverse members of community in implementing social services and efficacy of partnership with private entities to increase innovation in newly privatized public services).

198. See Joh, *The Forgotten Threat*, *supra* note 12, at 378–79.

199. See Guppy, *supra* note 184, at 3; Volokh, *supra* note 2, at 152 n.76.

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business; bonuses for exceeding them can also be negotiated.<sup>200</sup> For cities that prefer to fold their policing into a larger county-wide department, these incentives can also be addressed through contracts. There may be other nearby police departments that can compete for the business, and the threat of full privatization also serves as an impetus to perform to the standards set by the local government.<sup>201</sup>

Critics suggest that public services should remain within the control of the government because private monopolies can gain too much power and be difficult to eliminate, thereby becoming unanswerable to lack of efficiency issues.<sup>202</sup> However, police already operate as a monopoly with a great amount of power to support local politicians who are willing to meet contract demands in exchange for union support.<sup>203</sup> With a private entity, collective bargaining is much less likely. For states that have implemented right-to-work laws, workers are even less likely to organize unions where dues are voluntary because so many workers can opt out of carrying the cost of bargaining.<sup>204</sup> Even within the outsourcing model, monopolization is no greater an issue than currently exists, even if a new force organizes as a union.

One of the great benefits of private forces operating today is an ability to fill gaps for public forces.<sup>205</sup> When a security patrol handles private property, public police can be deployed into high crime areas, and their numbers can be increased.<sup>206</sup> Private patrols already handle low-level activities that do not require sworn police officers, like issuing summonses, towing cars, and acting as an “eyes and ears” presence on the street to deter crime.<sup>207</sup> In an outsourcing model, a municipality can

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200. See Freeman, *supra* note 197, at 1326.

201. See Blackstone & Hakim, *supra* note 177, at 59.

202. See Freeman, *supra* note 197, at 1336.

203. See Blackstone & Hakim, *supra* note 176, at 359, 373.

204. See Richard B. Freeman, *What Can We Learn from the NLRA to Create Labor Law for the Twenty-First Century?*, 26 ABA J. LAB. & EMP. L. 327, 328 & n.8 (2011) (discussing Taft-Hartley amendment allowing states to ban security clauses which would require union dues or fees for the cost of collective bargaining activities, effectively weakening union organizing in those right-to-work states (citing David T. Ellwood & Glenn Fine, *The Impact of Right-to-Work Laws on Union Organizing*, 95 J. POL. ECON. 250, 268 (1987); William J. Moore, *The Determinants and Effects of Right-to-Work Laws: A Review of the Recent Literature*, 19 J. LAB. RES. 445, 463 (1998))).

205. See Blackstone & Hakim, *supra* note 176, at 365.

206. See, e.g., *id.* at 369; THE LAW ENFORCEMENT-PRIVATE SECURITY CONSORTIUM, *supra* note 90, at 8; see generally Philip J. Cook & John MacDonald, *Public Safety Through Private Action: An Economic Assessment of BIDS, Locks, and Citizen Cooperation* (Nat'l. Bureau of Econ. Research, Working Paper No. 15877, 2010), available at <http://www.labidconsortium.org/pdf/EconJournalMay2011.pdf> (discussing statistical analysis of private security effects on crime in Los Angeles).

207. See Sklansky, *Private Police and Democracy*, *supra* note 12, at 97; see also *supra* notes 99–100 and accompanying text.

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fire its current force, shed the associated contracts, and supplement the county force with private security to handle non-essential police duties. That type of system could provide enormous cost savings while crafting the most efficient division of officers and remain flexible rather than beholden to union requirements consistent with hiring and firing officers.

#### 4. ACCOUNTABILITY AND TRANSPARENCY

Accountability and transparency are two areas of concern that must and can be addressed with proper contracting and oversight.<sup>208</sup> The voice of the police must remain a government voice in order to ensure public trust, but there are ways to accomplish that goal in a privatization context. As with private prisons, a company can be tasked with performing certain duties while the government remains the ultimate arbiter of the scope and regulation of the activity. Ultimately, the government remains responsible to the public for the actions of the contractor.

In the specific context of policing, the State Action Doctrine covers police services overseen and regulated by the state.<sup>209</sup> While courts have interpreted the doctrine's application to private actors in various and—some would argue—muddled ways,<sup>210</sup> there should be no lack of clarity in any of the schemes this Article considers because the government is directly contracting with and authorizing the actions of the private entity on behalf of the public interest.

##### B. *What Are the Potential Pitfalls in Privatizing and/or Outsourcing the Police?*

As the above Section outlines, in arguing for cost-saving measures, proponents of police privatization contend that issues of accountability, transparency, and ultimately public trust can be addressed through proper implementation of laws and contracts.<sup>211</sup> However, there are counterarguments that critics argue just as forcefully, and because constitutional issues and the rule of law are implicated, those too must be analyzed as the push for privatization continues into the area of

208. See Volokh, *supra* note 2, at 149–50 (discussing the possibility of enacting stronger legislation to expand the State Action Doctrine to apply to private actors in the context of policing). R

209. See *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 621–22 (1991) (finding state action requires consideration of “[1] the extent to which the actor relies on governmental assistance and benefits . . . [2] whether the actor is performing a traditional governmental function, . . . and [3] whether the injury caused is aggravated in a unique way by the incidents of governmental authority” (citations omitted)).

210. See generally Turner, *supra* note 5 (discussing the disparate approaches within the Supreme Court and lower courts applying differing factors and weighting them unevenly). R

211. See generally Volokh, *supra* note 2. R



policing.<sup>212</sup>

### 1. FINANCIAL BENEFITS AND PUBLIC COSTS

Dissolving contracts, breaking up unions, and hiring personnel at lower wages with attenuated benefits is one way to save money,<sup>213</sup> but the question municipalities must ask is whether possible savings outweigh the potential consequences to public trust and safety. But even if expense is the sole concern, or at least the top priority, there is some question about whether privatizing criminal justice projects is always cheaper. For example, studies have shown that private prisons are not always less expensive than public prisons.<sup>214</sup> Even when some savings can be achieved, one report on private prisons concluded that quality was not better than in public counterparts.<sup>215</sup> For police services, the public may want to consider whether the savings are worth the potential loss in quality in a privately managed system. Unlike prisons, which are beyond the experience of the majority, the public encounters police regularly and may prioritize quality over costs if it means better training and implementation of public safety measures.

Aside from quality, there is a risk that cost-savings in the realm of lowered wages in one sector can affect other sectors as well. States have projected more revenue than expenditure for fiscal year 2013.<sup>216</sup> There is growing political will to dissolve unions and privatize service across a wide swath of the public sector,<sup>217</sup> and there is some evidence to suggest that these efforts are motivated by ideology rather than necessity.<sup>218</sup>

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212. See generally Freeman & Minow, *supra* note 2.

213. See Edwards & Filion, *supra* note 2, at 1 (noting that in 2006, the federal government spent \$415 billion on private contracts employing 2 million people, of whom 20% earned below the poverty threshold).

214. See AM. FRIENDS SERV. COMM., PRIVATE PRISONS: THE PUBLIC'S PROBLEM (2012), available at [http://afsc.org/sites/afsc.civicactions.net/files/documents/AFSC\\_Arizona\\_Prison\\_Report.pdf](http://afsc.org/sites/afsc.civicactions.net/files/documents/AFSC_Arizona_Prison_Report.pdf) ("Between 2008 and 2010, Arizona overpaid for its private prisons by about \$10 million. If the requested 2,000 medium security private prison beds are built, Arizona taxpayers can expect to waste at least \$6 million."); Brad W. Lundahl, et al., *Prison Privatization: A Meta-Analysis of Cost and Quality of Confinement Indicators*, 19 RES. ON SOC. WORK PRAC. 383, 383 (2009) (comparing costs and quality of confinement for private versus public prisons in 12 studies and concluding that "[c]ost savings from privatizing prisons are not guaranteed and appear minimal").

215. *Id.* at 392.

216. See *supra* Part II.A.1.

217. Kenneth Glenn Dau-Schmidt & Winston Lin, *The Great Recession, the Resulting Budget Shortfalls, the 2010 Elections and the Attack on Public Sector Collective Bargaining in the United States*, 29 HOFSTRA LAB. & EMP. L.J. 407, 413 (2012).

218. See Jeffrey Keefe, *Issue Brief No. 249: Desperate Techniques Used to Preserve the Myth of the Overcompensated Public Employee*, ECON. POL'Y INST. (Mar. 10, 2011), available at <http://s3.epi.org/files/page/-/IssueBrief294.pdf> (noting 32% lower salaries for California public sector workers than for similarly situated private sector workers).

Given that ideology, rather than cost, may be the true motive behind efforts to dissolve union contracts and pass laws to curb collective bargaining rights, the public should be mindful of the collateral consequences of privatization attempts. Prevailing wage laws exist as a buffer against cheap labor, so if municipalities privatize services, the attendant wage decline can depress other wages across the employment landscape, not just in the privatized service area.<sup>219</sup>

## 2. PUBLIC TRUST AND ACCOUNTABILITY

Private companies exist to produce goods or services at a profit, so when private companies serve a function that is normally performed by the government, trust is important. After all, part of the social contract requires some level of respect for the law and those who enforce it. Companies, however, may have an incentive to underreport crime in order to meet certain contractual obligations.<sup>220</sup> While similar risks may exist in the current structure because of reporting systems like Comp-Stat,<sup>221</sup> record-keeping relating to private prisons has also been vulnerable to abuse. Related to the concern about underreporting is the motivation for employees to fail to report abuses by their employers, given that their livelihoods depend on their employer, not the government.<sup>222</sup>

Allegiance to public service is an important factor that has been tested recently with the implementation of quasi-privatization schemes that lack transparency.<sup>223</sup> In hybrid systems, partnerships generally involve private security personnel who work for private employers and public police who work for the state, but when those distinctions blur, there is reason for concern about just whom the police are protecting.<sup>224</sup>

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219. See Dau-Schmidt & Lin, *supra* note 217, at 425 (“The theory behind prevailing wage laws is that the state is a powerful purchasing entity and should not enter the market to bid down employees’ wages. Thus, prevailing wage laws require that state contractors and subcontractors pay their employees not less than the prevailing rate of pay, including fringe benefits, for work of similar character in the county in which the work is performed.”).

220. See Bob Ortega, *Arizona Prison Oversight Lacking for Private Facilities: State Weighs Expansion Even as Costs Run High*, ARIZ. REPUBLIC (Aug. 7, 2011, 12:00 AM) <http://www.azcentral.com/news/articles/2011/08/07/20110807arizona-prison-private-oversight.html> (finding that private prisons did not meet contractual obligations and doing so would require laborious monitoring).

221. See Eterno & Silverman, *supra* note 194.

222. See generally Parker Graham, Comment, *Whistleblowers in the Workplace: The Government Employee’s “Official Duty” to Tell the Truth*, 65 SMU L. REV. 685 (2012) (detailing problems inherent in adjudicating First Amendment protections for government workers).

223. See Wolf, *supra* note 10 (discussing loaning public police to private companies in New York, Michigan, Chicago, Houston, and Portland).

224. See, e.g., *id.*; Beau Hodai, *Corrections Corporation of America Used in Drug Sweeps of Public School Students*, THE CTR. FOR MEDIA & DEMOCRACY’S PR WATCH (Nov. 27, 2012), <http://www.prwatch.org/news/2012/11/11876/corrections-corporation-america-used-drug-sweeps->

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In New York City, the police department has implemented one of these programs called the “Paid Detail Unit” that essentially leases public police to private corporations.<sup>225</sup> In return for this service, the taxpayers indemnify the private entity for any liabilities related to an officer’s actions, and the private entity pays the city an hourly fee for service.<sup>226</sup> The company gets an armed city police officer with arrest powers, but incurs no liability, and the public has no way of knowing that those officers are actually working for the company.<sup>227</sup> It begs the question, what would an officer protecting a business do given a conflict of interest between the bank’s wishes and the citizen’s rights?<sup>228</sup>

Corruption is also a concern that severely affects the public trust when private entities profit from public services, and is particularly serious in the criminal justice arena. One example of such corruption occurred between 2003 and 2008, when two judges in Pennsylvania accepted kickbacks from the owner of a private juvenile jail facility, incarcerating hundreds of children who appeared before them without counsel over a period of several years.<sup>229</sup> Both judges were found guilty and sentenced to significant prison terms, while thousands of convictions were overturned.<sup>230</sup> Where oversight is minimal and profit motives are at play, corruption has the potential to cost not just money, but also lives.<sup>231</sup>

While the State Action Doctrine covers those private entities that are authorized to act by the government, the law governing that doctrine is not as clear as one might hope.<sup>232</sup> Until a uniform approach to the kinds of private models at play is developed, there remains an ad-hoc approach that does little to reassure skeptics that private police will always be subject to state action culpability. In fact, the NYPD “Paid Detail Unit,” described above, offers an illustration of the type of situation that courts might have difficulty assessing given the complete entanglement between the public and private sectors: a sworn officer

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public-school-students (citing instance of Corrections Corporation of America (“CCA”) prison guards joining local police for drug sweep of local high school).

225. See Wolf, *supra* note 10.

226. *Id.*

227. *Id.*

228. *Id.* (noting the refusal by NYPD spokespersons to answer such a question).

229. Megan Annitto, *Juvenile Justice on Appeal*, 66 U. MIAMI L. REV. 671, 693–94 (2012).

230. *Id.* at 693 (citations omitted).

231. See Philip Caulfield, “Rot in Hell!” *Heartbroken Mom Whose Son Committed Suicide Confronts Crooked Judge*, N.Y. DAILY NEWS, Feb. 21, 2011, <http://www.nydailynews.com/news/national/rot-hell-heartbroken-mom-son-committed-suicide-confronts-crooked-judge-video-article-1.137452> (stating that judges involved in a kick-back scheme resulted in one child committing suicide after he was sentenced).

232. See generally Turner, *supra* note 5 (discussing the disparate approaches within the Supreme Court and lower courts applying differing factors and weighing them unevenly).

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working a shift for the sole benefit of a private entity.<sup>233</sup>

### 3. EFFICIENCY AND ACCOUNTABILITY

Efficiency tends to be touted as one of the most positive features of private contracting. When efficiency becomes a central goal of the private sector, by measuring it against the existing system, the bar can often be set quite low.<sup>234</sup> The private entity need only do as well as the public-sector actor and no better. This cost-benefit analysis skews the system's goals downward, rather than inspiring better approaches to existing shortfalls within a system.<sup>235</sup> Rather than assume the status quo is the best a city can do, perhaps it might solve some of the issues raised in policing to suggest other solutions that could benefit the public—not just in terms of cost, but also in terms of human value and trust.

Proponents suggest that competition is a failsafe measure that encourages efficiency and accountability,<sup>236</sup> but the obvious concern arises when there is no competition. Even though it exists in the private prison industry, the market is small,<sup>237</sup> and when a company finds its profits waning and leaves, the communities it deserts are devastated by debts, lost jobs, and lost revenue.<sup>238</sup> In small communities that depend on these markets, companies can use their power and leverage to exact whatever demands they wish. In the small town of Walnut Grove, Mississippi, private prison giant GEO Group<sup>239</sup> ran a juvenile facility and pressured lawmakers to lower the age range of those incarcerated, with the result that inmates from the ages of thirteen to twenty-two were housed together.<sup>240</sup> Operating with virtually no oversight, the jail was

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233. Cf. Joh, *The Paradox of Private Policing*, *supra* note 5, at 91–101 (noting the distinction between deputized officers and private officers).

234. See Dolovich, *supra* note 4, at 132.

235. See *id.* at 136.

236. See Volokh, *supra* note 2, at 141–43.

237. See Terry Carter, *Prison Break: Budget Crises Drive Reform, but Private Jails Press on*, 98 A.B.A. J. 44, 46 (Oct. 2012) (citing \$2.9 billion in revenue for the two major private prison companies, GEO Group and CCA).

238. See John Burnett, *Private Prison Promises Leave Texas Town in Trouble*, NPR (Mar. 28, 2011, 12:01 AM), <http://www.npr.org/2011/03/28/134855801/private-prison-promises-leave-texas-towns-trouble> (describing how the GEO Group left Littlefield, Texas, because Idaho stopped sending prisoners and consequently left the town with \$10 million in debt, which resulted in the town raising property taxes to avoid default).

239. Formerly Wackenhut, GEO Group (“GEO”) boasts “101 facilities, approximately 73,000 beds, and 18,000 employees around the globe. GEO’s facilities are located in the United States, United Kingdom, Australia, and South Africa.” *Career Opportunities*, THE GEO GROUP, INC., <http://www.jobs.net/jobs/geo/en-us/search/the-geo-group/ST7F71R722PDGHSRGH4F/page/2/> (last visited Feb. 2, 2014).

240. See Order Approving Settlement at 1, *Depriest v. Epps*, No. 3:10-cv-00663-CWR-FKB (S.D. Miss. Mar. 26, 2012), ECF No. 75, available at <http://www.aclu.org/files/assets/order.pdf>.

described by the judge, in a Consent Decree following a lawsuit, as having allowed

a cesspool of unconstitutional and inhuman acts and conditions to germinate, the sum of which places the offenders at substantial ongoing risk.

The Court understands completely why the DOJ would conclude that the sexual misconduct occurring at [the facility], including “brazen” staff sexual misconduct and brutal youth-on-youth rapes, was “among the worst that we have seen in *any facility anywhere* in the nation.”<sup>241</sup>

Whether a municipality can withstand the pressures imposed by private entities when they become the “only game in town” is something the public must assess, because once in place, institutional players can be difficult to eliminate.

Proponents of privatized criminal justice services suggest that contract and legislation drafting are sufficient to address accountability concerns.<sup>242</sup> However, there is evidence that even when such regulations exist, they can be ineffective or simply ignored.<sup>243</sup> For example, private prisons often tout their audit records as evidence that they fully comply with all local regulations and contract requirements, but there is little transparency in most states, so the public has no way of knowing whether the results are accurate.<sup>244</sup> For example, the company that conducts private prison auditing for one large private prison company charges so much for each day of inspection that accusations have been leveled against both the auditor and the prison company, suggesting that such high payments are made in exchange for favorable auditing reports.<sup>245</sup> Where policing is concerned, lack of transparency and oversight could be dangerous to both public safety and public trust. Even if legislation and contracting could obviate accountability problems, there is reason to fear that private companies may draft the contracts and bills

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241. *Id.* at 5 (emphasis in original).

242. See Volokh, *supra* note 2, at 151 & n.65; Freeman, *supra* note 197, at 1288 (arguing for partnership between public and private entities to enact regulations and regulatory schemes led by public entities, but noting that partnerships would require compromise from both sides).

243. See Mary K. Reinhart, *Arizona Private Prison Oversight Bills Die*, THE ARIZONA REPUBLIC (Feb. 15, 2011, 12:00 AM), <http://www.azcentral.com/arizonarepublic/local/articles/2011/02/15/20110215arizona-private-prison-bills.html>.

244. See Yana Kunichoff, *Expanding Private-Prison Industry Benefits from Weak Oversight Structure*, THE AM. INDEP. (Nov. 2, 2011, 9:49 AM), <http://americanindependent.com/202044/expanding-private-prison-industry-benefits-from-weak-oversight-structure> (noting that states have wide latitude regarding oversight and transparency, including twenty-seven states with mandatory inspection requirements and eight states with discretionary monitoring authority).

245. *Id.* (noting that auditor American Correctional Association (ACA) charges \$3,000 per day and that at least two private-prison employees work as auditors for ACA).

governing their own oversight.<sup>246</sup> Or worse, such regulatory requirements would not be implemented at all, given the history of oversight in the private prison industry, where legislators routinely refuse to pass any such oversight legislation.<sup>247</sup>

### III. POLITICS, ECONOMIC DISTRESS, AND THE LAW

An analysis of the advantages and disadvantages of police privatization cannot be complete without consideration of a powerful additional factor facilitated by doctrinal developments represented by *Lochner* and *Citizens United*. This Part addresses how these doctrinal developments sanction the powerful influence private businesses have over legislative activity and considers the consequences for privatizing public police forces.

#### A. *Who Makes Policy in Camden?*

Whether a community determines that privatizing its public police force is a net benefit or loss, transparency of the process is vital to making a fully informed decision. When the players remain anonymous or the process is shielded by laws that prevent the public from knowing the scope of political bargaining, there is a distinct problem that needs addressing. The legal and political landscapes currently reveal a lack of will or desire to prioritize the kind of transparency necessary to make such decisions. That chasm requires a much more robust public engagement to demand full disclosure about campaign financing and to know who profits from privatization efforts.

The Supreme Court, in reopening the door to laissez-faire constitutionalism,<sup>248</sup> has created an atmosphere wherein corporations effectively control legislative activity. Through the expanded rights recognized in *Citizens United*, corporations can influence elections through direct campaign contributions that were impermissible in the past.<sup>249</sup> Along with employing lobbyists who can pressure politicians to either create laws or remove barriers, corporations can now directly contribute to political campaigns, banking on the possibility that politicians who benefit from that spending will have an incentive to do their bidding. In order to privatize public services, one of the most important elements of a privatization strategy is to reduce revenue, while at the same time

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246. *Id.* (discussing lobbying by private prison industry to curtail regulations with federal agencies); *see also infra* note 264.

247. *See* Reinhart, *supra* note 243 (describing how five senate bills in Arizona were defeated despite numerous management problems).

248. *See generally* *Lochner v. New York*, 198 U.S. 45 (1905).

249. *See* *Citizens United v. FEC*, 558 U.S. 310 (2010).

making certain that the politicians tasked with spending are rewarded. This allows lobbyists to push for lower taxes for corporations and other affluent citizens, reducing revenue while the corporate treasury supplies the politicians with enough cash to stay in office. Certainly, there is no guaranteed victory for the politician; campaigns that have spent vast amounts of cash have sometimes failed.<sup>250</sup> But what is also true is that spending less on a campaign puts politicians at a distinct disadvantage.

Once the economy appears to become unsustainable and public services with their attendant benefits become seemingly too expensive, a private enterprise can then offer its services with the promise that more competition will reduce costs, as long as unions and bargaining rights can be limited. Once in place, without collective bargaining, the corporation offers lower wages to do the same job that was once handled by the public sector. In Camden, while the police officers have every right to form a union and begin bargaining anew,<sup>251</sup> the city also retains the power to implement the same reform again in the future with the same claim of economic necessity.

Without transparency about how political decisions are made, the public cannot be fully informed to make decisions about privatization plans; that was certainly the case in Camden. Interestingly, few of the media accounts about the Camden outsourcing plan considered who might be backing it, beyond the elected freeholders who cast their votes. Some residents loudly objected and blamed a local Democratic political party boss named George Norcross III.<sup>252</sup> Norcross is a well-known political powerbroker in southern New Jersey and serves as chairman of Cooper University Hospital.<sup>253</sup> Norcross takes credit for getting Governor Corzine to sign an executive order giving Cooper a medical school, expanding its campus in the city.<sup>254</sup> Norcross also takes credit for the

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250. E.g., Jeremy Ashkenas et al., *The 2012 Money Race: Compare the Candidates*, N.Y. TIMES, <http://elections.nytimes.com/2012/campaign-finance> (last visited Mar. 13, 2014) (noting that in his failed presidential campaign for the 2012 presidency, Mitt Romney slightly outspent Barack Obama, but both candidates spent nearly \$1 billion each).

251. Heather Haddon & Ricardo Kaulessar, *Baby Steps in Camden: Crime Dips in Camden as New County Police Force Replaces City Officers*, WALL ST. J., Aug. 6, 2013, <http://online.wsj.com/news/articles/SB20001424127887323968704578650171849946106>.

252. James Osborne, *Puzzling Moves from N.J. Political Boss George E. Norcross III*, PHILA. INQUIRER, Aug. 22, 2011, [http://articles.philly.com/2011-08-22/news/29914840\\_1\\_camden-county-political-decision-largest-teachers](http://articles.philly.com/2011-08-22/news/29914840_1_camden-county-political-decision-largest-teachers).

253. See *id.* (noting that Norcross is often called “the second most powerful figure in New Jersey politics”); Steve Volk, *George Norcross: The Man Who Destroyed Democracy*, PHILA. MAG. (Mar. 29, 2013), <http://www.phillymag.com/articles/george-norcross-man-destroyed-democracy/>; see also James Osborne & Craig R. McCoy, *Powerful Medicine: How George Norcross Used His Political Muscle to Pump up a Once-Ailing Cooper Hospital*, PHILA. INQUIRER, Mar. 25, 2012, [http://articles.philly.com/2012-03-25/news/31236877\\_1\\_nonprofit-hospitals-hospital-board-chairman-camden-county](http://articles.philly.com/2012-03-25/news/31236877_1_nonprofit-hospitals-hospital-board-chairman-camden-county).

254. Osborne & McCoy, *supra* note 253.

idea behind the new police force, which may provide more officers to secure the hospital.<sup>255</sup> Once that plan was finalized, Norcross worked with Governor Chris Christie to open four new charter schools in Camden, an issue important to the governor.<sup>256</sup> Just a month after the freeholders voted on the new Metro Police Division, a plan executed by Governor Christie to merge Cooper's medical school with Rutgers University was given final approval.<sup>257</sup> There was nothing illegal about the way these plans were put into place or the pressure brought to bear on the elected officials who some claim would be driven from office should they oppose Norcross, but the saga is an important one to consider, especially given that Cooper is ranked in the top twenty-five non-profit hospitals in expenditures for lobbying and campaign contributions.<sup>258</sup> Whatever the cause, the consequence of the county-wide outsourcing plan resulted in more police to patrol the area around Cooper Hospital at public expense.

#### B. *Who Will Make Policy for Private Police Forces?*

When scholars argue that private companies unduly influence politicians to pass favorable legislation that serves their interests,<sup>259</sup> critics point out that there is no clear evidence to prove such a *quid pro quo*.<sup>260</sup> In the wake of *Citizens United*,<sup>261</sup> answering this question has never been as important as it is today, given the vast amounts of money flowing into the electoral system through direct and indirect campaign contributions and advertising.<sup>262</sup> The level of spending by various PACs and individuals speaks to a greater need for transparency in order to know whether there is a smoking gun, and investigations are underway around the United States to uncover the source of some of that money.<sup>263</sup> Aside

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255. See Volk, *supra* note 253 (“[H]e has held numerous meetings with prominent South Jersey citizens, passionately extolling the virtues of switching to a county-based police force, a move he believes will bring better services at a reduced cost.”).

256. See *id.*; see also Jason Laday, *Gov. Christie Helps Break Ground in Camden on Norcross-Backed “Renaissance” School*, S. JERSEY TIMES, Mar. 5, 2014, [http://www.nj.com/camden/index.ssf/2014/03/gov\\_christie\\_helps\\_break\\_ground\\_on\\_norcross\\_school.html](http://www.nj.com/camden/index.ssf/2014/03/gov_christie_helps_break_ground_on_norcross_school.html).

257. Heather Haddon & Will James, *Rutgers Merger Signed into Law*, WALL ST. J., Aug. 22, 2012, <http://online.wsj.com/news/articles/SB10000872396390444270404577605583324769066>.

258. See Osborne & McCoy, *supra* note 253.

259. See Sharon Dolovich, *State Punishment and Private Prisons*, 55 DUKE L.J. 437, 543 (2005).

260. Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 STAN. L. REV. 1197, 1229–30 (2008).

261. See *Citizens United v. FEC*, 558 U.S. 310 (2010).

262. See *2012 Election Spending Will Reach \$6 Billion*, Center for Responsive Politics Predicts, CTR. FOR RESPONSIVE POLITICS (Oct. 31, 2012, 2:33 PM), <http://www.opensecrets.org/news/2012/10/2012-election-spending-will-reach-6.html> (listing available breakdown of PACs and individual spending).

263. Current investigations in Montana, California, and New York are attempting to uncover

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from unlimited campaign spending, legislative influence is another opaque form of direct political action by private entities.

Private entities can participate in writing legislation that directly benefits their interests. With a section devoted to criminal justice issues, including private prison and security interests, the conservative American Legislative Exchange Council (“ALEC”)<sup>264</sup> generates and vets model legislation for lawmakers to introduce; bills are available to members of the organization, which includes lawmakers, business entities, and private individuals.<sup>265</sup> Lawmakers often deny involvement with ALEC, but in at least one such instance, the lawmaker accidentally left ALEC’s copyright on the bottom of a bill, later claiming ignorance.<sup>266</sup> Of the many bills drafted and approved by ALEC, one of the most notorious is Arizona’s Senate Bill 1070, a state immigration law that allowed Arizona police officers to enforce federal immigration laws by requiring immigration documentation from any subject of a lawful stop.<sup>267</sup> Introduced by State Senator Russell Pearce, the bill was virtually identical to one drafted by an ALEC task force on which Pearce sat.<sup>268</sup> Pearce admitted to sending his own version to ALEC for endorsement, but

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what has been called “dark money” through 503(c)(4) organizations, which are considered social welfare non-profit organizations. See Sanjay Talwani, *Montana Dark Money Investigations Widen*, KRTV.COM (Nov. 15, 2013, 5:17 PM), <http://www.krtv.com/news/montana-dark-money-investigations-widen/>; Andy Kroll, *California Watchdog: “Koch Brothers Network” Behind \$15 Million Dark-Money Donations*, MOTHER JONES (Oct. 25, 2013, 8:42 AM), <http://www.isidewith.com/news/article/ever-wondered-how-dark-money-moves-californias-year-long-probe-j>; Nicholas Confessore, *Group Linked to Kochs Admits to Campaign Finance Violations*, N.Y. TIMES, Oct. 25, 2013, at A19. Through such organizations, hundreds of millions of dollars have been spent on local, state, and national elections with no disclosure requirement, and thus, no transparency. This is the loophole that the Supreme Court did not address in *Citizens United* when the Court found that transparency would not be an issue. *Citizens United*, 558 U.S. at 371.

264. ALEC is a non-profit organization with nine task forces, 2,000 state legislator members, and 300 corporate and foundation members. See generally ALEC, <http://www.alec.org> (last visited Feb. 4, 2014). Membership for private entities is anywhere from \$7,000 to \$25,000. See *id.*; see also Beau Hodai, *Publicopoly Exposed: How ALEC, the Koch Brothers and Their Corporate Allies Plan to Privatize the Government*, IN THESE TIMES, July 11, 2011, [http://inthesetimes.com/article/11603/publicopoly\\_exposed](http://inthesetimes.com/article/11603/publicopoly_exposed) (noting that 1,000 pieces of legislation are introduced every year, 17% of which become law, and that a two-year membership to lawmakers costs \$100).

265. See Hodai, *supra* note 264.

266. In 2011, Florida State Representative Chris Dorworth introduced legislation prohibiting unions from automatically collecting dues and requiring that unions get written permission every year from each member in order to use any dues for political activity. *Id.* Similar to other bills being proposed around the country, a public record request was made. While he denied having any idea how it got there, the last eleven pages of a stack of eighty-seven pages of draft bills and emails was stamped, “Copyright, ALEC.” *Id.*

267. S.B. 1070, 49th Leg., 2d Reg. Sess. (Ariz. 2010), available at <http://www.azleg.gov/legtext/49leg/2R/bills/SB1070S.pdf>.

268. See Beau Hodai, *Corporate Con Game: How the Private Prison Industry Helped Shape Arizona’s Anti-Immigrant Law*, IN THESE TIMES, Jun. 21, 2010, [http://inthesetimes.com/article/6084/corporate\\_con\\_game](http://inthesetimes.com/article/6084/corporate_con_game).

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according to the director of that task force, ALEC does not endorse bills—it simply drafts them.<sup>269</sup> In a hotel room where the task force met to draft the bill was a representative of Corrections Corporation of America (“CCA”).<sup>270</sup> No one from the public had access to the drafting, and only the task force members were present to vote on the language of the model bill.<sup>271</sup> Those task force members included state legislators and corporate representatives.<sup>272</sup> According to the president of private prison company GEO Group, the bill would greatly increase the number of immigrant detainees in the state.<sup>273</sup> After thirty-six members of the Arizona Senate co-sponsored it, private prison companies made donations to thirty of them.<sup>274</sup> CCA denied involvement in drafting the legislation and left ALEC in 2010 once the story became public.<sup>275</sup>

That the president of GEO Group has an interest in higher incarceration rates is not surprising, given the company’s business and affiliations; GEO is a member of ALEC and part of the task force that drafted the bill in Arizona.<sup>276</sup> The question this example is meant to highlight is whether society wants its police force owned by a company that may be drafting legislation that provides a direct benefit to that particular business and is doing so in secret.<sup>277</sup> For example, if a private police corporation were involved in drafting legislation related to the admissibility of arrest evidence, that would appear to be a conflict of interest. Yet corporate representatives sit with legislators doing just that, and the public is not part of that process. These activities are perfectly legal. ALEC is not required to disclose information about its membership or the source of its funding, and the public has no right to be present at its private meetings. As the public becomes more aware of ALEC and the close ties lobbyists cultivate with politicians, demands for greater transparency

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269. *See id.*

270. *See* Laura Sullivan, *Prison Economics Help Drive Ariz. Immigration Law*, NPR (Oct. 28, 2010, 11:01 AM), <http://www.npr.org/2010/10/28/130833741/prison-economics-help-drive-ariz-immigration-law>.

271. *See id.*

272. *Id.*

273. *Id.* (quoting GEO President during a conference call with investors a month after the governor signed the bill as saying, “I can only believe the opportunities at the federal level are going to continue apace as a result of what’s happening. Those people coming across the border and getting caught are going to have to be detained and that for me, at least I think, there’s going to be enhanced opportunities for what we do.”).

274. *Id.* (“Thirty of the [thirty-six] co-sponsors received donations over the next six months, from prison lobbyists or prison companies—Corrections Corporation of America, Management and Training Corporation and The Geo Group.”).

275. *See* BANKING ON BONDAGE: PRIVATE PRISONS AND MASS INCARCERATION, ACLU 15 (2011), *available at* [http://www.aclu.org/files/assets/bankingonbondage\\_20111102.pdf](http://www.aclu.org/files/assets/bankingonbondage_20111102.pdf).

276. *See* Hodai, *supra* note 268.

277. *See* Sullivan, *supra* note 270 (noting that State Senator Pearce and the ALEC task force drafted S.B. 1070 in a Hyatt hotel room).

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may become more pervasive. At that point, the advantages and disadvantages of privatizing the police can be more fully debated.

## CONCLUSION

Scholars analyzing privatization must take into account the current political influence available to private industry and the reemergence of economic liberty jurisprudence. The issues at play with respect to pure privatization can be present even in the context of outsourcing. There are arguments to be made in favor of privatization of certain public services or public-private partnerships, but they can no longer be considered in a political vacuum. The *Lochner* Court failed to account for the impact economic liberty laws had on the working classes at the turn of the twentieth century, and those who currently fail to account for the ways in which money and political influence drive privatization and outsourcing at the expense of the public do so at great peril. Analyzing accountability and economic ramifications fails to capture the nature of privatization beneficiaries and what motivates the ideology behind privatization. Drafting contracts to address efficiency and accountability does little if they are drafted by the very parties to be regulated, and the shroud of secrecy surrounding legislation erects a great wall between the public and the law.

It may be trite but it is time, at long last, to follow the money and recognize that privatization can no longer be considered in an altruistic frame by simply asking whether such programs better serve the public or are more cost effective than public services. This Article has sought to uncover the intersection of current law, political influence, and economic distress that allows plans to privatize the police to move forward and to demonstrate how all of these factors must be considered for the public to fully confront and address private policing plans in the future.

