ARTICLE

REGULATION AS PARTNERSHIP

JUSTIN (GUS) HURWITZ†

This article uses recent literature on Public-Private Partnerships (P3s) to argue that "Regulation as Partnership" is often a more productive approach to regulation than the more common adversarial and transactional approaches common to the contemporary regulatory environment. Partnerships, in which public entities engage the private sector to serve some government purpose (often to construct infrastructure) in exchange to some ownership interest derived from that purpose, have become popular since the 1980s. They are most often thought of as an alternative vehicle for financing public projects. But they primarily operate (and are most effective when) by aligning the incentives between the public and private project participants. This alignment of incentives stands in stark contrast to the often adversarial and transactional approach to much regulation – with regulation of the tech sector highlighted as an example in this article.

INTRODUCTION 118
I. TRADITIONAL MODELS OF REGULATION 121
A. *The Example of AT&T* 122
B. *Theories of Regulation* 124
1. The Public Interest 124
2. Rulemaking vs. Adjudication 126
3. Public Interest vs. Public Choice 128
4. Governing the Commons 129

† Associate Professor of Law, Director of the Nebraska Governance and Technology Center, Co-Director of the Space, Cyber, & Telecom Law Program, University of Nebraska; Director of Law & Economics Programming, International Center for Law & Economics. This paper benefited from input from participants at the 2020 Journal of Law & Innovation Symposium on "Rethinking Innovation Policy: The Role of the State" and input and participants at and financial support from the 2019 Center for the Study of the Administrative State Roundtable on "Should Internet Platform Companies be Regulated?" Particular thanks to Justin McCully and Jackson Slechta for research assistance. J.D., University of Chicago Law School (2007); M.A. Economic, George Mason University (2010), B.A. St. John's College (2003).

II. THE PARTNERSHIP MODEL 131
A. *Examples of P3s* 132
1. Infrastructure Projects as Public-Private Partnerships 133
2. Cybersecurity as a Public Private Partnership 135
B. *Theories of P3s* 138
1. Efficiency and Comparative Advantage 138
2. Incomplete Contracts and Agency Costs 139
3. Relational Contracting, Norms, and Self-Governance 141
III. REGULATION VS. PARTNERSHIP 143
A. *Is Regulation Partnership?* 143
1. The Example of AT&T, Redux 143
2. Indirect Regulation as Partnership? 145
3. Contemporary Industry and Regulators as Partners 146
B. *Why Isn't Regulation Partnership?* 147
1. The Adversarial Mindset 147
2. The Transactional Mindset 149
IV. REGULATION AS PARTNERSHIP 149
CONCLUSION & CODA 152

INTRODUCTION

The story of regulation over the course of the 20th century, and continuing through today, can be understood as one of oscillation between two competing poles: primary reliance on market-based forces and primary reliance on prescriptive regulatory oversight. Neither of these approaches to regulation, especially in dynamic or fast-moving industries, has proven to be an entirely satisfactory approach to facilitating the growth of socially important industries while maximizing the social benefits of those industries. This article uses the growth of a different mechanism for coordinating control of private enterprise that has grown in prominence in recent decades – the Public-Private Partnership (P3) – as a lens to examine these traditional modalities of regulation.

We see the traditional modalities of regulation play out in the broad legal-political arc of the 20th century, from the *Lochner* era to the new deal, to post-war stagnation and growth of the regulatory state, to the deregulatory push that ushered Carter out of office and Reagan into office, to the dot-com boom-then-bust and the great recession. We see this in the arc of antitrust

and industrial organization, from the origins of public interest regulation in *Munn v. Illinois* through *Nebbia v. New York*, and from the original, literal, anti-trust antitrust act to rise of antitrust law's rule of reason, through the embrace of the Structure-Conduct-Performance paradigm and its rejection in favor of the consumer welfare standard, to contemporary discussions across the world arguing for a more regulatory antitrust policy. And we see this in more overtly regulatory contexts. Telecommunications regulation, for instance, went back and forth from the primacy of market-based principles in prior to the 1913 Kingsbury Commitment, to command-and-control regulation following World War I, to reliance on antitrust in the government's 1956 suit against AT&T, to regulation during the *Computer Inquiries* and through the introduction of microwave-based long-distance, to antitrust with the 1984 break-up of AT&T, to regulation designed to fade into competition in the 1996 Telecom Act, to the net neutrality debates of the past decade-plus.

More recently, governments have occasionally embraced a new regulatory paradigm: the public-private partnership (P3). P3s have been embraced in a variety of contexts, and generally involve a governmental entity contracting with private industry to co-provide a service or amenity more traditionally provided by the government. There are several models of P3s, along with several explanatory theories for them – but they generally involve some transfer of risk from the government to the private entity paired with some promise of long-term benefit for the private entity. For instance, in the 1980s HUD used P3s to encourage the development of urban housing by awarding management of housing projects to the companies contracted to build them. Over the course of the 1990s, P3s grew exponentially in popularity in both the United States and globally, with governments turning to private industry to capitalize and build all sorts of infrastructure projects in exchange for ongoing operating rights. And more recently, P3s are an important part of the cybersecurity toolkit – where governments lack the resources to secure their network infrastructure so partner with private industry to provide secured infrastructure, typically in exchange for long-term service contracts of some form of liability protection.

Public-private partnerships initially developed organically, largely as an evolution of more traditional government contracting and procurement needs. They were not designed as a form of regulation. But as they have grown in use and sophistication, P3s have developed their own governance practices and norms – they are a form of regulation.

The story of AT&T and government regulation of the telephone industry invoked above presents a curious example of the at-times partnership-like nature of regulation. The history of AT&T is checkered with collaborations

– both implicit and explicit – with its regulators. It was instrumental to the war effort during World War II, and its researchers and leadership moved frequently between high-level government and corporate positions. And many of the company's excesses and failures were tolerated so long as it kept regulators and the public satisfied that it was providing an overall satisfactory service to the communities it served. In both examples, it was tacitly understood that the fate of the company was intertwined with the fate of the country and, so long as its operation was beneficial to its regulatory overseers, those regulators would focus their attentions on maintaining the relationship over managing the affairs of the company.

In other words, throughout much of the 20th century the telephone network was operated as public-private partnership of sorts – albeit an implicit one with undefined terms governing the relationship. AT&T presents a possibly extreme example – but once you start looking for elements of partnership in the history of regulation examples abound. This paper considers the lessons that can be learned from governments' recent embrace of the P3 model and what insights from that model can be translated to how we think about regulation more generally.

This question isn't of merely historical importance. Regulators have experimented with various types of more cooperative, partnership-like, regulation in recent decades. In the environmental setting, for instance, the EPA experimented with "negotiated rulemaking" in the 1980s and 1990s, where industry and regulators collaborate on the drafting of regulations. Over the past decade, cybersecurity regulation has widely embraced public-private partnership models. And there is discussion of more collaborative forms of regulation in other areas, such as the regulation of online platforms and online speech. Lessons from experience with P3s yields valuable insights as regulators explore increasingly collaborative regulatory modalities.

In an abstract sense this article is about theories of regulation – whether regulation is necessarily adversarial or whether it can be thought of in more collaborative terms, in terms of partnership between regulators and those they regulate.

But this paper is really about how we regulate the technology industry, and how that industry approaches its regulators. It is prompted by the observation that regulation of AT&T over the course of the 20th century – in many ways a paradigm of, and precursor to today's, technology firms – had many characteristics of a partnership between AT&T and the government. To be sure, AT&T was no paragon of corporate virtue and its history is a case study in traditional modalities of regulation. At the same time, AT&T was an incredibly important firm that made great contributions to our nation –

and often did so in collaboration with regulators and with the public interest in mind.

This stands in stark contrast to regulation of today's technology industry. The relationship is fraught on both sides. Regulators approach the industry adversarially, and the industry approaches regulation transactionally. The industry has no sense of corporate "noblesse oblige" – no sense of duty to the public interest; and regulators view the industry's private interests not merely as not aligned with, but actively antagonistic to, those of the public interests.

The purpose of this article, therefore, is to explore the nature of regulation as partnership. It is not to put forth any groundbreaking new theory of regulation or to make contributions to the literature on public-private partnerships. The literature on P3s is developing rapidly and the field presents many open questions. There is, for instance, no consensus definition of what constitutes a P3. This paper will present a working definition and draw from existing literature to explore the characteristics of P3s. But to the extent that that literature leaves questions unsatisfactorily resolved, it is not the purpose of this paper to improve upon that status quo.

This paper proceeds in four parts. Part I discusses the traditional understanding and characteristics of regulation, focusing as regulation, in general, as a way of the government exerting control over private conduct and exploring different permutations of how this control may manifest. Part II introduces the public-private partnership model. This discussion considers the origins of the concept, examples of P3s, and the theoretical underpinnings of the partnership model. Part III focuses on the differences between regulation and partnership. And Part IV synthesizes the previous parts to consider regulation as partnership.

I. TRADITIONAL MODELS OF REGULATION

The *sine qua non* of regulation – at least, or perhaps especially, in the American tradition – is government power over private conduct, typically justified as being in the public interest. This power may manifest in many forms and is often characterized in various dichotomies: ex ante vs. ex post, adjudication vs. rulemaking, judicial vs. administrative enforcement, standards vs. rules, and in certain contexts antitrust vs. "regulation." The essential difference across each of these dichotomies is that the former allows private conduct in the first instance and relies on some form of limiting or corrective legal action after the fact where that conduct is deemed to be problematic; whereas the latter is inherently prescriptive, specifying in more concrete terms the expectations or limitations on private conduct.

A. *The Example of AT&T*

The history of telecommunications regulation in the United States is remarkably illustrative of each of these dichotomies. This history, and the government's regulation of and relationship with AT&T in particular, is used throughout this article as a framing example. Indeed, it is arguably the motivating example animating this article: although it is often thought of in terms of traditional regulation, the government's oversight of and relationship with AT&T during the 20th century had many of the characteristics of partnership. For instance, while the government largely specified the services that AT&T was required to offer, it largely left design, implementation, and operation of those services to AT&T's discretion. This is similar to the contemporary paradigm example of a P3, discussed in sections II.A.1 and III.B2, in which the design and operation of infrastructure projects are "bundled." Perhaps even more dramatically, senior AT&T leadership had longstanding and ongoing relationships with government, industry, and academia. This "skin in the game" on both sides od the public/private divide aligned the firm's and regulators' incentives in ways that that are both central to the purpose of the P3 model,[1] and that overcome the adversarial/transactional mindset that characterized much of the current regulatory landscape.[2]

Starting with Theodore Vail's ascent to control AT&T in 1907, the company began a string of acquisitions and competitor relationships in support of his vision of "one system, one policy, universal service" – that is, a unified telephone network that operated the same across all operators and allowed customers on any one network to call customers on any other network.[3] This coordination across the industry led to an antitrust investigation that culminated in a settlement with the government in 1913, the Kingsbury Commitment.[4] This settlement specified the range of

---

[1] *See infra* section II.B.2 and II.B.3.

[2] *See infra* section III.B.

[3] *See, e.g.*, Tim Wu, *How Theodore Vail Built the AT&T Monopoly*, SLATE (Nov. 7, 2010), https://slate.com/technology/2010/11/how-theodore-vail-built-the-at-t-monopoly.html; *see also* Adam D. Thierer, *Unnatural Monopoly: Critical Moments in the Development of the Bell System Monopoly*, 14 CATO J. 267, 272 (1994), https://www.cato.org/sites/cato.org/files/serials/files/cato-journal/1994/11/cj14n2-6.pdf; Kevin Granville & Tiffany Hsu, *AT&T Has Had Many Run-Ins With the Government*, N.Y. TIMES (June 12, 2018), https://www.nytimes.com/2018/06/12/business/dealbook/att-antitrust.html.

[4] *See* Letter from N.C. Kingsbury, Vice President, American Telephone and Telegraphy Company, to James C. McReynolds, Attorney General, United States of America (Dec. 19, 1913), available at http://vcxc.org/documents/KC1.pdf.

agreements that AT&T was allowed to enter into with its competitors – and thus began the era of telephone regulation in the United States. Over the next 40 years we saw the rise of the Interstate Commerce Commission (ICC) and then the Federal Communications Commission (FCC) as the government controllers of the regulated telephone monopoly, created by Congress with near plenary power to regulate the telephone industry.[5]

But these regulations were unable to keep apace of innovation in the industry. In the 1950s the Department of Justice began a second major antitrust investigation against AT&T, which culminated in another settlement in 1956.[6] And thus began another decadal period of regulation, during which the FCC struggled to prescribe the rules governing how AT&T could (or could not) enter into the newly-developing computer market and how new entrants into the telecommunications field could interconnect their new devices and networks with AT&T's regulated network. This again gave way to another Department of Justice antitrust investigation – the investigation that led to the 1984 break-up of AT&T.[7]

This ping-pong between ex post, standards-based, judicially defined, antitrust enforcement and ex ante, rule-based, agency defined, administrative action – a ping-pong match to which we shall return – continues today: through the advent of cable television and the introduction of the 1976 Copyright Act[8] and multiple Cable Acts,[9] through the revolutionary 1996 Telecommunications Act,[10] and through the development of the modern Internet and fights over net neutrality.[11] And this pong-pong captures the full range of the regulatory spectrum.

On both sides of this spectrum we see the exercise of government power. Where government power is the defining characteristic of regulation, enforcement is its characteristic instrumentality. The relationship between private actors and government regulators under any permutation of regulatory structure is akin to that between prosecutor and defendant. The role of the regulator is to constrain the conduct of the private actor. And the role of the private actor, on the other hand, is to structure its conduct within the constraints defined by, or in some cases to structure its conduct to circumnavigate the limitations imposed by, the regulatory authority. This is

---

[5] Thierer, *supra* note 3, at 271-280.

[6] Granville et al., *supra* note 3.

[7] *Id.*

[8] 17 U.S.C. § 107.

[9] *See, e.g.*, 49 USC § 609 (1984); 47 CFR §§76.905; 913; 921; 922 (1997).

[10] 47 USC § 609 (1996).

[11] In the Matter of Protecting and Promoting the Open Internet, 14-28 F.C.C. 15-24 (Fed. Comm'n Commission Feb. 26, 2015), available at https://www.fcc.gov/document/fcc-releases-open-internet-order.

a fundamentally adversarial relationship, and, as with many parts of the American tradition, it is an exceptionally legalistic one.

B. *Theories of Regulation*

Regulation – what it is and why it is used – can be a contentious topic. At its broadest, "regulation" means the control of one thing by another. In the legal context, this control is accomplished by some governmental body constraining private conduct through any number of means. But before considering the "how" of regulation it is necessary to consider the "why."

1. The Public Interest

The focus of law and regulation is often divided into private- and public-facing institutions.[12] Private law institutions focus on constraining bad conduct by, and facilitating desired interactions between, private actors. This is the role, for instance, of tort, contract, and property law.[13] Public law institutions, on the other hand, focus on socially-desirable activities that individuals cannot undertake – for whatever reason – on their own.[14] Such activities include the provision of public goods, such as national defense and public safety. Public goods generally will not be provided by individual actors due to free riding concerns: there is no way to exclude others from using them once they have been provisioned, which prevents any individual actor from recovering the costs of provisioning the good. As a result public goods are underprovisioned by private actors in society (compared to the socially-desired levels).[15] It is therefore only through a coordinating mechanism such as the government that public goods can be provisioned.

Public goods fall more broadly into the category of government activity characterized by market failure: conduct that individuals would engage in through ordinary market activities in an efficient market (so is known to be socially desirable) but for the existence of some obstacle. Government often intervenes in – regulates – private conduct in the face of market failure, with the ostensible purpose of overcoming or removing that obstacle in order to

---

[12] John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012).

[13] *Id.*

[14] *Id.* (defining "public law" as it stands in contrast to private law). The focus of public law as falling upon socially-desirable activities – that is, the public interest – is discussed in the section below.

[15] *See, e.g.*, Tyler Cowen, *Public Goods*, LIBR. OF ECON. AND LIBERTY (last accessed Feb. 17, 2020), https://www.econlib.org/library/Enc/PublicGoods.html.

bring about a more socially desirable outcome. The market failure justification for regulation, however, almost always runs headlong into a question: how does the government know why individuals are not engaging in a given activity that the government believes to be socially desirable? Is it because there is some market failure preventing the activity; or is it because the government is mistaken in the belief that the activity is, in fact, socially desirable?[16]

As a legal matter, the answer to this question – or, at least, to the question of when the state can regulate for the purported purpose of promoting socially-desirable outcomes – in US law is rooted in *Munn v. Illinois* (1876).[17] In *Munn*, the state of Illinois had regulated the prices that grain elevators could charge for the storage of grain. Having been found guilty of charging rates in excess of the maximum regulated rate, Munn, the owner of grain warehouses and elevators, challenged the Illinois law as a taking and violation of Constitutional Due Process.[18] The Supreme Court upheld the Illinois statute, explaining "when private property is 'affected with a public interest, it ceases to be *juris privati* only.'"[19] The court continued, explaining that "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good . . . ."[20]

The approach of *Munn* proved unsatisfactory, giving rise to decades of uncertainty about what it meant for private property to be "used in a manner to make it of public consequence."[21] This approach certainly doesn't follow the market failure justification articulated above – it is potentially significantly broader than it.

This conundrum was resolved nearly 60 years later in *Nebbia v. New York* (1934).[22] In 1933, during the Great Depression era, New York enacted a law that set minimum prices for milk. Nebbia violated this law, selling milk at a price less than this regulated minimum.[23] As in *Munn*, Nebbia was charged

---

[16] This was a central question asked by Ronald Coase in his classic paper, *The Problem of Social Cost*. *See* Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 28-42 (1960) (critiquing the Pigovian tradition in economics).

[17] Munn v. Illinois, 94 U.S. 113, 113 (1876).

[18] *Id.* at 123.

[19] *Id.* at 126.

[20] *Id.*

[21] *Id.*

[22] Nebbia v. People of State of New York, 291 U.S. 502 (1934).

[23] *Id.* at 515.

with violating the price-regulation law and challenged it up to the Supreme Court. After lengthy discussion about the meaning of "affected with the public interest," the Court states plainly that "[t]hus, understood, 'affected with a public interest' is the equivalent of 'subject to the exercise of the police power'; and it is plain that nothing more was intended by the expression."[24] It continues that "[s]o far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare...."[25]

Under *Nebbia*, which remains good law today, the state is effectively free to pass whatever regulation it determines to be in the public interest – and regulation is, effectively, in the public interest by virtue of the state deeming it worthy of regulation. *Munn* and *Nebbia* both deal with the narrower case of price regulation, but are generally understood as finding the "public interest," as demonstrated by the government's determination that regulation is necessary, is sufficient to demonstrate that regulation is, in fact, necessary. Unless that regulation runs afoul of narrow Constitutional protections – such as the First Amendment or a violation of the Takings or Due Process clauses – such regulations are evaluated under the most forgiving standard of review.

This (legal) answer to the question of "why regulate" seemingly differs from the economic and political answer to the question. It is predicated on the government's desire (or expressed need) to regulate, not on the demonstration of a market failure. An alternative framing is that it gives deference to the government to answer the question asked above, whether individual actors aren't engaging in given activity because there is a market failure instead of because it is not, in fact, socially desirable.

2. Rulemaking vs. Adjudication

In the canonical account, once the government decides to regulate it can proceed in one of two forms: through legislative-style rulemaking or judicial-style adjudication.[26] This basic dichotomy applies across regulatory modalities: it is seen in federal, state, and administrative regulation.

The essential difference between rulemaking and adjudicatory approaches to regulation is timing: rulemaking is an ex ante, legislative, approach to regulation, focusing on defining rules to govern future conduct, whereas adjudication is ex post, focusing retrospectively on past conduct. This basic

---

[24] *Id.* at 533.

[25] *Id.* at 537.

[26] *Cf.* SEC v. Chenery Corporation, 332 U.S. 194 (1947) ("Chenery II"); SEC v. Chenery Corporation, 318 U.S. 80 (1943) ("Chenery I").

distinction between regulation and adjudication has been generally recognized. And it is enshrined as a fixture of modern administrative law, which defines the actions of agencies in its terms.

Importantly both modes of rulemaking allow for the development of regulation, albeit in different ways. Rulemaking is clearly a form of regulation: legislatures or agencies imbued by legislatures with rulemaking authority enact rules that govern the conduct of private parties. Nominally, adjudication is not merely a mechanism for enforcing rules already in existence – one would be forgiving for thinking that it is only a mechanism for implementing existing regulations, and not itself a means of regulation. But in practice adjudication is itself a form of regulation: all rules inherently contain ambiguities, and adjudication allows for the ex post shaping of rules, or the application of existing rules to novel circumstances.

There is, however, an important difference between adjudication and rulemaking – one that echoes the limitations of the state's ability to regulate in the name of the "public interest," discussed above: due process. Due process requirements limit the scope of both rulemaking and adjudication. Rules cannot be issued arbitrarily; they must be issued by some formal legislative process that gives them legitimacy.[27] And rules generally cannot have retrospective effect.[28] It violates principles of due process for the state to hold parties liable for conduct that was only prohibited after the time of the conduct.[29] Adjudication is also bound by the constraints of due process, albeit in different ways. Adjudication is inherently backwards-looking, so frequently considers past conduct that was not clearly prohibited. The general standard for conduct is whether parties had fair notice that it might run afoul of existing law.[30] This is an inherently nebulous standard – but in a common-law system such as ours, in which judges are asked to adjudicate inherently ambiguous laws, it is a necessary accommodation to the administration of justice. While it does potentially encumber the strictest interpretations of

---

[27] *See* Bi-Metallic Inv. Co. v. St. Board of Equalization, 239 U.S. 441 (1915) and Londoner v. City and County of Denver, 210 U.S. 373 (1908). These two cases, generally discussed together, generally define the contours of the government's need to comply with the due process requirement of the 14th Amendment when engaged in individualized adjudications and the reliance on the legislative process ("the proper state machinery") when engaged in legislative activity. *See also,* 5 U.S.C. 706(2)(A) ("The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . .").

[28] U.S. Constitution Art. I, § 10, cl. 1. ("No State shall . . . pass any . . . ex post facto Law . . . ."); Bowen v. Georgetown University Hospital, 488 U.S. 204, 223–24 (1988) ("Retroactive legislation has always been looked upon with disfavor . . . . [W]here quasi-legislative action is required, an agency cannot act with retroactive effect without some special congressional authorization").

[29] Id.

[30] *See* FCC v. Fox TV Stations, 132 S. Ct. 2307, 2317 (2012) ("A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required.").

due process, potentially imposing liability upon parties for conduct that was not clearly prohibited, it also imposes meaningful limitations on the state, channeling prospective regulation through legislative-style rulemaking processes. (Importantly, one of the checks on adjudicative regulation is the nature of remedies: generally, the greater the liability imposed for violation of regulations, the greater the process is due to establish the regulation.)

3. Public Interest vs. Public Choice

The account of regulation presented above – that it is generally justified by market failure, that it is undertaken in the "public interest," and that it is implemented through rulemaking and adjudication – was the dominant account through much of the 20th century. In the 1971 economist George Stigler offered a fundamentally different account of regulation: regulation was provided in response to market forces, subject to supply and demand, just as any other good in a market economy.[31] Under Stigler's theory of regulation, legislatures adopt rules in response to the private incentives of individual legislators. Under this theory the "public interest" model was replaced with a market model in which legislators sell policy in exchange for various forms of support from political constituencies. Legislators were, in effect, producers, selling regulations into the market. On the other side of the market were parties buying regulations – these parties may be firms, lobbying for firms through campaign contributions, fellow legislators, offering support for one legislator's regulations in exchange for support for their own proposals, or voters, offering their votes in exchange for preferred legislation.

Stigler's theory defined the contours of subsequent decades' debates over the nature of regulation. His theory articulated a private interest understanding of regulation that stood in apposition, and opposition, to the widely accepted public interest understanding.

There are various species of theory that fall under each branch of this dichotomous family. The Stiglerian private interest model, for instance, may include the "capture" theory of regulation, as well as being characteristic of schools of public choice economics and political economy.[32] On the other hand, every government is premised on the idea that government is possible – that regulation doesn't necessarily devolve to governance by market forces

---

[31] George Stigler, *The Theory of Economic Regulation*, BELL J. OF ECON. & MGMT. SCIENCE, v.2, no.1, 3, 3 (1971) ("[A]s a rule, regulation is acquired by the industry and is designed and operated primarily for its benefit.").

[32] *See, e.g.*, William F. Shughart II, *Public Choice*, LIBR. OF ECON. AND LIBERTY (last accessed Feb. 17, 2020), https://www.econlib.org/library/Enc/PublicChoice.html ("Because the vote motive provides reelection-seeking politicians with strong incentives to respond to the demands of small, well-organized groups, representative democracy frequently leads to a tyranny of the minority.").

but instead serves, through some mechanism, the polity. This mechanism may, for instance, be the public-mindedness of the actors that create and enforce regulation, truly acting in the spirit of the public interest; or it could be the result of governing institutions that insulate the "public interest" from private interest, creating a space in which forces of the public interest dominate over private interests; or it could be a mechanism of political accountability in which the polity exercises more direct power over government actors than private interests have the opportunity to.

Legal, economic, and political theorists have debated these and other theories of the control that public and private interests have over regulation for decades. This paper need not resolve these debates, however. What is important is to recognize that there are, broadly, two ways of conceptualizing the interests served by regulation: public and private interests. Regulation is widely assumed to serve the public's interest; but in many cases its mechanisms can be coopted to serve private interests. These interests are often at tension – especially where regulation is used to constrain private interests.

Partnership between public and private interests present a different way to manage these tensions. In some cases, P3s may prove more resilient to the concerns of public choice economics about the role of private interests in regulation. On the other hand, P3s may by subject to more trenchant or different forms of influence by private interests. These concerns are taken up further in Part III.

4. Governing the Commons

Nobel prize–winning economist Elinor Ostrom posited another resolution to market failures, which is worth noting briefly here. Based on her observations of how communities actually resolved common market failures – in her case, free-riding or over-consumption of public goods (in her vernacular, common pool resources) – she took exception to the standard formulation of market-based and regulation-based solutions. Rather, she argued, under suitable conditions local communities (that is, the users of the common pool resource) would develop governance institutions suitable to the characteristics of the resource. Such governance systems are more prescriptively regulatory than pure market-based mechanisms, but are informal compared to, and do not necessarily rely on, governmental regulatory mechanisms. As explained by one Ostrom scholar:

> The major insight that Lin [Ostrom]'s work on common-pool resource management emphasized was the evolved rule systems that emerged in order to provide accountability and effective mechanisms of punishment for those

> who violate the rules. Community based rules and community engagement found ways around the conflict-ridden situation of the commons, just as beekeepers and apple growers found ways around the situation of the externality, to realize the possibility of mutually advantageous social cooperation. These local systems of self-governance to preserve and protect the common-pool resource, Lin found in a diversity of human societies, persisted through time—in some instances for a century, in other instances dating back as far a millennium. . . . This leads to the second major lesson from Lin's work—it is the 'rules in use' that matter for social cooperation, not so much the 'rules in form'. In examining systems of governance, we need to distinguish between 'rules in form' (on the books) and 'rules in use' (the lived practice of everyday life) . . . .[33]

Ostrom's approach to regulation challenges and blends the characteristics of the theories described above – and, by virtue of defying traditional categorizations tends to be both richer and more easily overlooked. For instance, it challenges the notion of market failure, arguing that communities facing market failures can often develop self-regulatory norms that address the effects of the failure, without need to address its underlying causes.[34] On the other hand, it also challenges the need for, and nature of, the regulator-designed "public interest" response, arguing that the informal self-regulatory mechanisms of the community (or, in her vernacular, the "rules in use") can be more important than the formal regulation and enforcement mechanisms employed by the government (the "rules in form").[35] In a very real sense, her key argument is that communities self-govern, and this self-government is both more powerful and more effective than either market-based or capital-

---

[33] Peter J. Boettke, *Is the Only Form of 'Reasonable Regulation' Self Regulation?: Lessons from Lin Ostrom on Regulating the Commons and Cultivating Citizens*, 143 PUB. CHOICE 283, 288-9 (2010).

[34] This, for instance, is a central theme of Ostrom's GOVERNING THE COMMONS, which challenges the traditional binary of government regulation (the "Leviathan") and free-market privatization as the only solutions to collective action problems (a defining example of market failure), and argues for self-governance solutions to collective action problems such as seen with common pool resources. *See* ELINOR OSTROM, GOVERNING THE COMMONS 14 (Cambridge 1990) ("I argue that both [the central authority and parcelization approaches] are too sweeping in their claims. . . . Institutions are rarely either private or public – 'the market' or 'the state.' Many successful [common pool resource] institutions are rich mixture. of 'private-like' and 'public-like' institutions defying classification in a sterile dichotomy.").

[35] See Elinor Ostrom, Prize Lecture at The Workshop in Political Theory and Policy Analysis, Indiana University, Bloomington, IN 47408, and Center for the Study of Institutional Diversity, Arizona State University, Tempe, AZ, U.S.A.: Beyond Markets and States: Polycentric Governance of Complex Economic Systems (Dec. 8, 2009), https://www.nobelprize.org/uploads/2018/06/ostrom_lecture.pdf (discussing various examples where in which government regulation is assumed to be necessary to address market failures but in which self-regulatory, community governance solutions outperform government regulation).

G Government regulation. This represents a true "public private partnership" – more poignantly, "public" interests under this model are a manifestation of private interests. Among other things, this suggests a fundamentally different understanding of, and approach to, the concerns of the most common theories of "public choice." Under Ostrom's approach, the story of public choice is one of a mis-match between the design of public institutions as tools to address private concerns – as opposed to more commonly used accounts of private interests capturing public officials or public officials being individuals whose public decisions are governed by their own private interests.[36]

II. THE PARTNERSHIP MODEL

Public-private partnerships are of more recent vintage than more traditional regulatory structures.[37] Modern P3s find their origins in complex government development projects – projects where the completion of government undertakings depended significantly upon private industry. In the 1960s and 1970s, many of these projects had an air of industrial policy, with the government directing (or channeling) private resources to mass-scale government infrastructure or development initiatives. Starting in the 1980s, these partnerships began to take a more routinized, and smaller scale, structure. Urban housing, and related urban development, projects, for instance were increasingly undertaken as P3s. In these projects, the government would fund, and help to facilitate, the development of new housing projects; then those projects would be turned over to the private partners to administer day-to-day operations (including earning market-rate profits – as opposed, for instance, to regulated rates of return).

One important theme in the literature on P3s is that the term "public-private partnership" is used to describe a wide range of relationships between public and private entities, from arrangements that are little more than well-specified procurement contracts to far more ambitious initiatives. That said, P3s do have several common features, even if they have no universally

---

[36] Elinor Ostrom & Vincent Ostrom, *The Quest for Meaning in Public Choice*, 63 AM. J. ECON. & SOC. 105 (2004). Note discussion that Elinor Ostrom, in fact, served a term as the president of the Public Choice society. While her understanding of the field differs from its more common manifestations, her views were far from heterodox.

[37] The modern study of, and scale in the use of, P3s is of relatively recent vintage. It is undoubtedly the case that examples of P3s can be found throughout history. This article, however, need to delve into the history of P3s beyond recognizing the relatively recent vintage of attention to P3s as a form of governance.

accepted defining characteristics. Part II.A will describe examples of P3s to help orient the discussion.

Economists started studying P3s in earnest in the late 1990s, with key analytical works published around the turn of the century. Perhaps the defining work is Oliver Hart's analysis of them as a solution to the challenges of specifying contingency-complete procurement contracts for either the development or operation of infrastructure or similar projects.[38] One of the most common forms of P3 bundles the development and operation of a project, such that the entity contracted for its development has strong incentives to perform that part of its contract well in anticipation of having an ongoing obligation to operate and maintain the project.

This difference between P3s and traditional procurement contracts is the most defining feature of P3s: they attempt to align the incentives of the public and private parties, such that the contract takes on a more relational character than a transactional one. So long as both parties are committed to maintaining the value of that relationship, such contracts can be relied on as self-enforcing. If implemented correctly, this allows the parties to avoid the most complex parts of negotiating such contracts: specifying detailed contingencies, and monitoring and enforcing breaches of those requirements.

P3s have other notable characteristics or justifications. They are often discussed as a form of risk- and capital-pooling, where government and private actors come together, pooling resources, in a common enterprise. They are viewed as an efficient way to leverage comparative advantages of governmental and private actors in a single enterprise – relying, for instance, on private enterprise to structure capital, develop and implement innovative design, and manage the development process, but on government to implement compliance and regulatory obligations, scope the project to ensure it services necessary constituencies, and the like. And they are viewed as form of regulation, channeling private enterprise to serve public needs and to ensure ongoing democratic oversight of and satisfaction with ongoing provision of privately-managed services. Part II.B will dive more into the economic literature on P3s and consider the different economic explanations of them.

Part II.C will then describe the environments in which P3s succeed and contrast that to situations where they fail.

A. *Examples of P3s*

Public-private partnerships come in many forms and defy simply categorization of survey. It is useful, nonetheless, to consider some examples.

---

[38] *See* Part II.B, *infra*.

Two categories of examples are considered below: infrastructure projects and cybersecurity. Infrastructure projects are perhaps the most common form of P3. As discussed in Part II.B, they are also perhaps the most fraught, often sought out by public partners based on a misplaced belief that the P3 model offers a means to capitalize on greater efficiency or capabilities of private partners. Cybersecurity partnerships are of a different sort, often entered into out of necessity. Unlike infrastructure P3s, where public partners are capable of undertaking projects on their own but believe private partners have some greater ability to complete them efficiently, with cybersecurity public partners and private partners each approach the P3 because each lacks complementary capabilities that can only be provisioned by the other.

1. Infrastructure Projects as Public-Private Partnerships

The most talked-about examples in the literature of P3s are infrastructure projects. Transportation projects like toll roads have been popular around the United States.

For instance, the Texas Department of Transportation entered into a P3 with the LBJ Infrastructure Group in 2010 to construct the "IH 635 Managed Lanes Project," which was designed to "provide traffic congestion relief" on 13 miles of public highway.[39] The total investment in that project was $2.8B.[40] LBJ was given the contract to both design and build the roadway, as well as to operate and maintain it for 52 years.[41] In 2009, the Regional Transportation District of Denver, Colorado entered into a P3 agreement with Denver Transit Partners to design, build and operate the "Eagle Commuter Rail" project which would consolidate and extend a number of commuter rail lines.[42] Denver Transit Partners was given a 30 year commitment for operation of the completed project.[43]

Other infrastructure projects are undertaken as P3s, including in the areas of waste management, water provision, energy, broadband, government

---

[39] IH 635 MERGED LANES PROJECT MANAGEMENT PLAN, TEX. DEP'T OF TRANSP., 7 (2010), https://www.fhwa.dot.gov/majorprojects/pmp/pmp_ih365_lbj_txdot_1010.pdf.

[40] EDUARDO ENGLE ET AL., PUBLIC-PRIVATE PARTNERSHIPS TO REVAMP U.S. INFRASTRUCTURE, 11 (2011), http://www.informedcynic.com/P3/P3-reports/2011-partnerships-revamp-US-Infastructure.pdf#page=13.

[41] TEX. DEP'T OF TRANSP., *supra* note 39, at 5.

[42] *Background on the Eagle P3 Project,* FASTRACK REGIONAL TRANSPORTATION OF DENVER, http://www.rtd-fastracks.com/ep3_77 (last visited Apr. 29, 2020).

[43] *Id.*

buildings, and schools and universities.[44] Kentucky launched an ambitious statewide broadband construction P3 with Macquerie Capital in 2015.[45] The goal of that project is to construct a large middle-mile network that private companies and public bodies could use to connect to for last-mile Internet access.[46] Macquerie Capital was given the right to build and maintain the network for a period of 30 years.[47]

In 2015, Miami-Dade County announced its intention to enter into a P3 for the construction and operation of a biosolids waste processing plant.[48] The anticipated operation period will be 20 years.[49] Although it hasn't selected a partner for the project, as yet, Miami-Dade County intends to proceed with the project.[50] Formed in 2014,[51] Washington, D.C. has a dedicated Office of Public-Private Partnerships that looks for opportunities to expand public infrastructure with P3s.[52] Among other projects, Washington, D.C. has plans to engage or has already engaged P3s on modernizing public buildings,[53] updating the public street lights,[54] constructing public corrections facilities,[55] and building schools.[56]

---

[44] See, e.g., Engle et. al, *supra* note 40, at 11 (listing examples of private-public partnerships infrastructure projects across a variety of areas); PUBLIC-PRIVATE PARTNERSHIPS IN THE US: THE STATE OF THE MARKET AND THE ROAD AHEAD, PWC, 2 (2016), https://www.pwc.com/us/en/capital-projects-infrastructure/publications/assets/pwc-us-public-private-partnerships.pdf (providing examples of public-private partnership infrastructure projects beyond traditional toll roads).

[45] *Project Profile: KentuckyWired*, U.S. DEP'T. OF TRANSP. FED. HIGHWAY ADMIN., https://www.fhwa.dot.gov/ipd/project_profiles/ky_kentuckywired.aspx (last visted Apr. 29, 2020).

[46] *Id.*

[47] *Id.*

[48] MIAMI-DADE CTY. WATER & SEWER DEPT., MIAMI-DADE COUNTY WASD FACTS 1-2, 4 https://www.miamidade.gov/water/library/biosolids-processing-facility-project-fact-sheet.pdf (last visited April 29,2020).

[49] *Id.*

[50] Eric Singer, *National P3 Update: Water and Sewer Infrastructure*, BILZIN SUMBERG'S NEW MIAMI BLOG (June 18, 2019), https://www.newmiamiblog.com/2019/06/18/national-p3-update-water-and-sewer-infrastructure/.

[51] Public-Private Partnership Act of 2014, 62 D.C. Reg. 261 (Mar. 11, 2015)

[52] OFF. PUB.-PRIV. PARTNERSHIPS, https://op3.dc.gov (last visited April 29,2020).

[53] KATHRYN ROOS ET AL., D.C. OFFICE OF PUB.-PRIVATE P'SHIPS, DALY BUILDING MODERNIZATION PROJECT OVERVIEW, https://op3.dc.gov/sites/default/files/dc/sites/op3/publication/attachments/Daly%20Building%20Project%20Overview.pdf (last visited April 29,2020).

[54] *Project Profile: DC Smart Street Lighting*, OFF. PUB.-PRIV. PARTNERSHIPS, https://op3.dc.gov/node/1195519 (last visited April 29,2020).

[55] *Project Profile: Corrections Center*, OFF. PUB.-PRIV. PARTNERSHIPS https://op3.dc.gov/node/1195540 (last visited April 29, 2020).

[56] *Project Profile: Educational Facilities*, OFF. PUB.-PRIV. PARTNERSHIPS, https://op3.dc.gov/node/1197010 (last visited April 29,2020).

Long Beach, California launched the largest municipal P3 project in 2016: the construction of a six-block municipal center.[57] Montclair State University in New Jersey launched a P3 in 2011 to construct new housing for its students.[58] The University System of Georgia similarly launched a P3 process to build new student housing in 2018.[59] Alabama is underway in its plan to enter into a P3 for the construction of three new men's prisons in the state, using the private partner to finance and build the facilities, with the state subsequently leasing use of those facilities.[60]

Hospitals are frequently built using P3s as well. In the UK, the use of P3s to construct and operate hospitals for the National Health Service began in the 1990s (and was called "Private Finance Initiatives").[61] Canada also uses the P3 model for its hospital system. For example, the Brampton Civic Hospital in Ontario was begun under a P3 in 2003, with the contractual right to operate non-clinical services by the winning vendor for 28 years.[62]

2. Cybersecurity as a Public Private Partnership

Cybersecurity presents a different, but no less important, area where P3s can have good effect. As explained by Kristen Eichensehr, the United States has largely "backed into a de facto system of public-private cybersecurity."[63] Unlike with the case of discrete infrastructure projects, where public partners have sought out partnerships with private institutions in order to develop projects, the cybersecurity partnership "has accreted over time." This

---

[57] April Economides, *The New Long Beach Civic Center*, LONG BEACH BUS. J. (July 31, 2019), https://www.lbbusinessjournal.com/the-new-long-beach-civic-center/

[58] N.J. ASS'N OF STATE COLLEGES & UNIVS., PUBLIC-PRIVATE PARTNERSHIPS AT THE STATE COLLEGES AND UNIVERSITIES 1 (2015), http://www.njascu.org/SCU_Public_Private_Partnerships_61815.pdf.

[59] *University System of Georgia Seeks Proposals to Expand P3 Student Housing Program*, U. SYS. GA. (Apr. 20, 2018), https://www.usg.edu/news/release/university_system_of_georgia_seeks_proposals_to_expand_p3_student_housing_p/.

[60] Mike Cason, *5 Companies Tell Alabama They Can Finance, Build, Lease Prisons*, ADVANCE LOCAL (Aug. 26, 2019), https://www.al.com/news/2019/08/5-companies-tell-alabama-they-can-finance-build-lease-prisons.html.

[61] The track record of the Private Finance Initiatives has been criticized. *See*, Youssef El-Gingihy, *The Great PFI heist: The Real Story of How Britain's Economy has Been Left High and Dry By a Doomed Economic Philosophy*, THE INDEPENDENT (Feb. 17, 2018), https://www.independent.co.uk/news/long_reads/pfi-banks-barclays-hsbc-rbs-tony-blair-gordon-brown-carillion-capita-financial-crash-a8202661.html.

[62] David Barrows et al., *Public-private Partnerships in Canadian Health Care: A Case Study of the Brampton Civic Hospital*, 12 O.E.C.D. J. BUDGETING 1, 5 (2012), https://www.oecd.org/gov/budgeting/PPP%20Canadian%20healthcare.pdf.

[63] Kristen Eichensehr, *Public-Private Cybersecurity*, 95 TEX. L. REV. 467, 470 (2017) (internal quotations omitted).

accretion has resulted largely from the facts that the majority of our "cyber" infrastructure, including that used by public entities, is privately owned and operated – but that defending it against cybersecurity threats often requires the scale and tools only available to public entities. Over the past decades loose systems of information sharing and for coordinated action have developed to facilitate joint public-private cybersecurity activities that benefit both the public and private sectors.

Most of the important information systems exposed to cyberthreats are owned by private firms. Exposure to legal liability and an interest in service customer demand (including the demand not to put customers at risk) provides strong incentives for private firms to mitigate risk as best they can. Nonetheless, obtaining the necessary intelligence to effectively combat cyberthreats is difficult for any one firm acting alone. Consortia exist that track bugs and exploits, but their reach into particular incidents are limited by an affected firm's own disclosures. Law enforcement and government agencies are better positioned to understand when and where incidents occur, and to obtain useful information from affected systems. The roles of public officials and private firms is, therefore, likely to be mutually beneficial.

The federal government has long involved private firms in cybersecurity P3s in the form of "Information Sharing and Analysis Centers" ("ISAC").[64] The first such ISAC, the Financial Services ISAC, began in 1999, and "leverages its intelligence platform, resiliency resources and a trusted peer-to-peer network of experts to anticipate, mitigate and respond to cyberthreats."[65] In 2015, President Obama signed Executive Order 13691, which declared that

> Organizations engaged in the sharing of information related to cybersecurity risks and incidents play an invaluable role in the collective cybersecurity of the United States. The purpose of this order is to encourage the voluntary formation of such organizations, to establish mechanisms to continually improve the capabilities and functions of these organizations, and to better allow these organizations to partner with the Federal Government on a voluntary basis.[66]

---

[64] Megan Brown, *Cyber Imperative: Preserve and Strengthen Public-Private Partnerships*, NATIONAL SECURITY INSTITUTE (2018), http://nationalsecurity.gmu.edu/wp-content/uploads/2018/10/Cyber-Imperative-Final-Web.pdf.

[65] REDUCING CYBER-RISK IN THE GLOBAL FINANCIAL SYSTEM, FINANCIAL SERVICES INFORMATION SHARING AND ANALYSIS CENTER (FS-ISAC) (last visited Apr. 18, 2020), https://www.fsisac.com/what-we-do.

[66] Promoting Private Sector Cybersecurity Information Sharing, Exec. Order No. 13691, 3 C.F.R. 13691 (2015), https://obamawhitehouse.archives.gov/the-press-office/2015/02/13/executive-order-promoting-private-sector-cybersecurity-information-shari.

Under the ISAC model, state and federal government play coordinating roles to support and offer guidance to the private entities that operate networks or are otherwise on the "front lines" of cybersecurity activity. Network operators or those affected by cybersecurity incidents share information about, or request help from, public authorities. In some cases, such as in the context of criminal or nation-state activity, public authorities may take the lead in responding to incidents. In other cases, public authorities may collect information and analyze from affected parties and use that to help coordinate a private response to the incident. This approach is beneficial to both public and private partners. Most of the network infrastructure is owned and operated by hundreds or thousands of private companies. Because it does not control the networks, and, indeed, lacks the resources and capabilities to operate them even if they were publicly owned;, the government necessarily relies on private industry to secure these systems and take immediate responses to any incidents. On the other hand, responding to these incidents, and sometimes even just recognizing that they are occurring, requires visibility across the network infrastructure. No one private operator has such visibility, so coordination that can only be accomplished at a governmental scale is necessary, and is beneficial to the private partners.

Currently, all 50 states have a Chief Information Security Officer responsible for ensuring that government information is kept secure.[67] Some states leverage this office to interface with private industry of security and other IT-related topics. Michigan's CISP, for example, uses a "kitchen cabinet" of IT advisors to receive input on, among other topics, "ways to defend critical information, coordinate access and identity management, and embrace new and emerging technologies."[68]

This approach to partnership is different from that seen with infrastructure projects. In the cybersecurity context, the partners offer complementary capabilities, each bringing capabilities to the partnership that the other lacks – and, critically, having shared goals for the partnership. In the case of infrastructure projects, at least one of the parties (typically the government) is attempting to substitute its partner's capabilities for its own – the government *could* (and in fact often does) build and operate toll roads, schools, prisons, or hospitals on its own, but in some cases believes (for

---

[67] NATIONAL CONFERENCE OF STATE LEGISLATURES, STATEWIDE CHIEF INFORMATION SECURITY OFFICERS (Jan. 15, 2020) (last visited Apr. 18, 2020), https://www.ncsl.org/research/telecommunications-and-information-technology/state-statutes-creating-chief-information-security-officer-ciso-positions-in-state-government.aspx.

[68] Society for Information Management, *Why the Michigan CIO Teamed up with Local Tech Leaders on Infrastructure Policy*, MEDIUM (Mar. 8, 2017), https://medium.com/@SIMInt/why-the-michigan-cio-teamed-up-with-local-tech-leaders-on-infrastructure-policy-f8d46357eea4.

reasons discussed immediately below) that it will be advantageous to engage a partner in the development of operations of such projects.

B. *Theories of P3s*

As introduced above, the literature on P3s has focused a great deal on cost savings, efficiency, finance, and risk assignment. However, the literature has grown to include more robust economic explanations. Below in this section, each theory is surveyed.

1. Efficiency and Comparative Advantage

The most common benefits touted in the trade literature and by policymakers of P3 projects have to do with cost savings, efficiency, superior financing, and risk assignment.[69] However, it isn't clear why fundraising or risk assignment explain why government chooses to use P3s rather than traditional procurement or building its own capability. For instance, economist Oliver Hart calls this thinking "strange," explaining that that "it is hard to imagine an agent that is more able to borrow or to provide insurance than the government (with its enormous powers of taxation)."[70]

The explanation offered in the trade literature for this "strange" circumstance, that P3s would provide cost savings compared to the government undertaking projects directly, is comparative advantage. The argument is that the private sector is often better than the public sector at delivering on infrastructure projects at lower cost because it is incentivized by the need for profit, unlike the public sector. There are also incentives to deliver higher quality in order to win future contracts with government as well. On top of that, the private sector may have superior technical know-how and ability to take advantage of dispersed, tacit knowledge than a centralized authority.[71]

But, as Hart notes, a private company subject to the need for profit could also cut corners and deliver lower quality to keep costs down. Consider his example of prisons, which are sometimes operated directly by the

---

[69] Juan Rodriguez, *Public-Private Partnership Pros and Cons*, THE BALANCE SMALL BUSINESS (Aug. 27, 2019), https://www.thebalancesmb.com/public-private-partnership-pros-and-cons-844713; Peter Smet, *The Key Advantages of Using Public-Private Partnerships for Major US Infrastructure Projects*, REASON FOUNDATION (Aug. 12, 2019), https://reason.org/commentary/the-key-advantages-of-using-public-private-partnerships-for-major-us-infrastructure-projects/.

[70] Oliver Hart, *Incomplete Contracts and Public Ownership: Remarks, and an Application to Public-Private Partnerships*, ECON. J., Mar. 2003, at C69, C75.

[71] *See* F. A. Hayek, *The Use of Knowledge in Society*, ECON. J., Sept. 1945, at 519, 521 ("[S]o far as scientific knowledge is concerned, a body of suitably chosen experts may be in the best position to command all the best knowledge available . . . . ").

government and sometimes by private industry in partnership with the government:

> (1) The government can own a facility, a prison, say, and employ a manager to run it; or (2) the government can contract with a company owned by the prison manager to run the prison for a period of time . . . . [S]uppose that the prison manager can make two kinds of investment. He can invest in efficiency-enhancing ideas that raise the quality of prison services, e.g., develop new rehabilitation programmes; he can also spend time figuring out how to cut costs and quality, while staying within the letter of the contract. A government employee has little incentive to engage in either activity since it is easy for the government (as owner) to 'hold up' the employee without rewarding him appropriately. In contrast, a private prison owner-manager is less subject to hold up. The good news about this is that private ownership encourages the first, innovative type of investment. The bad news is that private ownership also encourages the second, quality-shading kind of investment. The choice between public and private ownership depends on which of these effects is more important.[72]

The example of cybersecurity described above may fit the comparative advantage explanation best. The dispersed knowledge of cyber-threats is much more likely to be known by private companies. Incentivizing the sharing of this information amongst affected industry and with proper authorities in order to protect consumers and citizens is to the benefit of society.

2. Incomplete Contracts and Agency Costs

Nobel prize-winning economist Oliver Hart identifies a better explanation for P3s: they serve to internalize costs of contractual performance between the parties, which can better align the incentives of the parties in cases where the terms of contractual performance cannot be well specified.[73] In his framing, they are a form of incomplete contracting.[74]

With complete contracts, the entire relationship between parties is specified, such that no discretion or autonomy between the parties remains. Thus, there would be no need for P3 projects as the government could just directly procure from the private sector and manage the projects themselves.

---

[72] Hart, *supra* note 70, at C71.

[73] *Id.*at C73 (explaining that the difference between the traditional and P3 contracting models is that, under the P3 model, the private counterparty internalizes certain costs of contract performance); C74 (explaining the circumstances where the P3 model is desirable).

[74] *See id.* at C72 ("In each case, the contract [between the government and the private entity] is assumed to be incomplete . . . . ").

In practice, however, no contract is complete. In incomplete contracts, the relationship isn't completely specified. Rather, each party retains autonomy over some portions of how it performs under the contract.

> The model suggests that the choice between PPPs and conventional provision turns on whether it is easier to write contracts on service provision than on building provision. . . . One of the (modest) benefits [of the model] is that it may shift attention from what seem to be secondary financing issues to what seems to be the central issue: (relative) contracting costs.[75]

As Hart explains, the choice of between a P3 (which he describes as bundling service with building) and "conventional provision" (described as unbundling) depends on relative contracting costs.[76] In his model, conventional contracting makes sense where the government can "well specif[y]" the terms on performance in a contract.[77] For instance, in his example of a contract for the construction and operation of a facility, a traditional procurement contracting model makes sense "if the quality of the building can be well specified, whereas the quality of the service [operating the services offered at the facility] cannot be."[78] But in the reverse case, where the quality of construction is difficult to specify, a partnership model may make sense.[79] The reason for this is that the private partner will need to operate the services post-construction, so will have an incentive to perform the construction in a matter that will facilitate the long-term operation of the facility.

Similarly, P3s can be used to reduce agency costs between the private participants and the government. This is effectively a variation on the incomplete contract perspective above. Agency costs arise when the interests of a principal, one who engages another to perform some service on their behalf, diverge from the interests of the agent, the person engaged to do a service.[80] Scholars have identified agency costs as including the monitoring expenditures by the principal (to make sure the agent is doing what he or she is supposed to), the bonding costs borne by the agent (limitations on agent

---

[75] *Id.* at C75.

[76] *Id.* at C74.

[77] *Id.*

[78] *Id.*

[79] *See id.* ("In contrast, PPP is good if . . . the quality of the building cannot be [well-specified.").

[80] *See* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) (defining agency costs as the sum of the residual loss "experienced by the principal due to this divergence" between his own interests and those of his agent's as well as the expenditures incurred by either party in order to minimize that loss).

agreed to as part of deal), and residual loss (the costs due to divergent interests even despite monitoring and bonding).

The agency problem arises as the private firms and the government may not always have aligned interests throughout the entirety of a project. As described above, private firms may wish to cut corners in order to hold down costs and maximize profits. Government agents may also have self-interest in being re-elected and can act opportunistically vis-à-vis private firms in refusing price flexibility, especially around elections. This has led some scholars to doubt whether P3s have actually solved agency problems in practice.[81]

The agency cost approach looks at the contracting process for P3s to efficiently allocate risks and responsibilities. As explained by Hart, a well-designed P3 aligns interests of the principal and agent by limiting the opportunities for moral hazard and adverse selection compared to regular procurement.[82]

3. Relational Contracting, Norms, and Self-Governance

Relational contracting has been explored by both legal and economic scholars. Legal scholar Ian Macniel pioneered an analysis of a subset of contracts not as discrete one-time events, but as relationships with built-in norms.[83] Scholars like Benjamin Klein have also studied relational contracts from an economic point of view, emphasizing the importance of reputation to participants in long-term incomplete contracts.[84] These two views diverge in important ways, but they share one important overlap in noticing that all exchanges are to some degree relational.[85]

---

[81] Florina Silaghi & Sudipto Sarkar, *Agency Problems in PPP Investment Problems* 2 (2018) (unpublished manuscript) (on file with Semantic Scholar), https://pdfs.semanticscholar.org/4d91/f97c30ac4b90c8cc00be1d8bdf634cdfaa6f.pdf (arguing that governments often mis-value P3 contracts and analyzing the optimal design of P3 contracts from within a real-options framework).

[82] See *supra*, note 73 (explaining that the P3 model allows principals to structure contracts so that their agents will internalize to costs of contractual performance).

[83] *See, e.g.*, Ian Macniel, *Relational Contract: What We Do and Do Not Know*, 78 WIS. L. REV. 483 (1985); Ian Macniel, *Values in Contract: Internal and External*, 78 NW. U. L. REV. 340 (1983).

[84] *See, e.g.*, Benjamin Klein & Kevin M. Murphy, *Vertical Integration as a Self-Enforcing Contractual Arrangement*, 87 AM. ECON. REV. 415 (1997); Benjamin Klein, *Transaction Cost Determinants of "Unfair" Contractual Arrangements*, 70 AM. ECON. REV. 356 (1980).

[85] Stefanos Mouzas & Keith Blois, *Relational Contract Theory: Confirmations and Contradictions*, 24 IMP CONF. 1, 2 (2008) https://www.impgroup.org/uploads/papers/6764.pdf (considering the ways in which understandings of relational contracts diverge in the P3 context and traditional economic contexts, and concluding that both "are, to some extent, relational.").

As Hart anticipated,[86] his model on incomplete contracts for P3s can be extended if the time limitation is removed. In a relational contract, norms that unite two parties over an extended period of time are very important for overcoming the agency problems identified above in an incomplete contract world.

> Relational norms refer to "behavioral expectations that are partially shared by a group of decision makers and directed toward collective or group goals." Relational norms include flexibility, information exchange, and solidarity. Flexibility is the notion that two parties are willing to make adaptations because of circumstances changing. Information exchange is the idea that two parties are willing to share useful information with each other. Solidarity refers to the idea that two parties are willing to maintain a bilateral relationship.[87]

These relational norms are especially important due to the long-term nature of P3 projects.[88]

One important characteristic of relational contracts is that they can be self-enforcing.[89] With such a contract, parties value the ongoing relationship created by the contract – or, less romantically, the expect stream of future benefits from ongoing performance of the contract – more than performance of any particular part of the contract itself. As such, parties are unlikely to breach the contract, even when it may be efficient for them to do so at any given point in time.[90]

This gives rise to another important characteristic of relational contracts. Because they are self-enforcing, they do not rely on any external enforcement

---

[86] *See*, Hart, *supra* note 70, at 75 ("Our model could be usefully extended in various ways. The model takes the length of contract as given - implicitly it is assumed that the world ends at date 2. As a result, it does not matter who owns the asset (prison) at the end of the contract. With more periods, both contract length and who owns the asset after the contract ends become interesting choice variables.")

[87] Xiaoan Zheng, Jingfeng Yuan, Jiyue Guo, Miroslaw J. Skibniewski & Sujun Zhao, *Influence of Relational Norms on User Interests in PPP Projects: Mediating Effect of Project Performance*, SUSTAINABILITY (June 2018), at 145, 148. https://www.mdpi.com/2071-1050/10/6/2027

[88] *Id.* at 149. (arguing that "[s]olidarity in the relational norms enables the public and private sectors to treasure the bilateral relationship and common interests rather than focusing on the maximization of self-interest.")

[89] *See*, Benjamin Klein, *The Role of Incomplete Contracts in Self-Enforcing Relationships*, 92 REVUE D'ECONOMIE INDUSTRIELLE 67, 68 (2000), *available at* https://www.persee.fr/doc/rei_0154-3229_2000_num_92_1_1037 (discussing the use of incomplete contracting terms to encourage self-enforcement by leveraging a transacting party's reputational capital).

[90] *Id.* at 76 (arguing parties to a contract have "reputational capital" that creates a "self-enforcing range" in which each party's "gain from non-performance remains less than the self-enforcing sanction that can be imposed.").

mechanism to ensure their ongoing performance. That is, they do not rely on the law – or even on the existence on a government to enforce that law – to ensure ongoing performance. Among other things, this is an example of the self-regulation or self-governance envisioned by Elinor Ostrom.[91]

III. REGULATION VS. PARTNERSHIP

Development of the partnership model for procurement over the past several decades raises the question of whether there is an analogous partnership model open to regulation – and, if so, whether such a model is desirable. This Part evaluates this model of regulation as partnership. It starts by arguing that regulation often is a form of partnership. It then asks the converse of the question, asking why regulation wouldn't be regulation. It then looks at the limitations of the regulation as partnership model and asks whether regulation should be viewed as partnership.

A. *Is Regulation Partnership?*

Part I presented a traditional understanding of regulation in which the government determines what conduct is in the public interest and uses its coercive powers to require private actors to comport their activity to the service of this interest. The story of regulation is, at times, more nuanced that this – in some cases it has a more partnership-like quality.

1. The Example of AT&T, Redux

Returning to the animating example of this paper, the regulatory history of AT&T during the 20th century was previously presented as an example of the dueling poles of market-based and more prescriptive approaches to regulation. That history, however, is more complicated. In many ways, the 20th century history of AT&T can also be understood as one of partnership with the federal government.

This partnership is best seen during the mid-century years surrounding the second world war and cold war. AT&T was instrumental to the both the hot and cold war efforts. AT&T's Bell Labs worked closely with academia and the defense industry to develop technologies essential for the war

[91] See *supra*, Part I.B.4.

effort.[92] AT&T was integral in the development of everything from radar, to the Internet, to satellite-based communications.[93] These, and many other, technologies were dual use, developed with as much mind to supporting government needs as to supporting AT&T's commercial mission. In return for this service to its government masters, AT&T was given great flexibility it how it conducted its business operations. This is perhaps most dramatically seen in the regulation of the prices it could charge consumers – the at-times lavish R&D costs associated with Bell Labs were generally treated as capital costs that were part of the base expenses that could be recovered with a guaranteed rate of return through its regulated prices.[94]

Another vantage through which we can see the partnership-like relationship is the seamless transition of senior AT&T leaders – again particularly through Bell Labs – between the company, government, and academia.

It is difficult to generalize the history of AT&T to other industries, companies, or contexts. The economic, technological, and political settings of the era gave rise to relatively unique institutional dynamics in which the lines between national defense establishment, industrial interest, and large parts of the academy were often blurred. The era gave rise to other large firms and industries – IBM and Xerox, the automobile and aerospace industries, for instance – that were allowed to serve private industry on arguably favorable policy terms in recognition of their strategic national importance. The history of government granted corporate charters in earlier eras sometimes carried similar expectations that corporations were allowed to carry out their corporate interests only with the expectation that they would serve the interests of the government (or crown), as well. Nonetheless, AT&T provides an arguably extreme example of this relationship.

AT&T also bore many of the negative hallmarks of these relationships – and of monopoly and regulations affected by public choice concerns. As technologically advanced as AT&T's research was, it was often slow to deploy new technologies, and invested heavily to keep competitors from entering its markets – which would have pushed to structure its business operations to serve a wider range of interest, sooner. For its part, AT&T relied on its relationship with the government, in which it tended to the government's interests, as a means to ensure that it could otherwise by run in accord with

---

[92] *See generally*, JON GERTNER, THE IDEA FACTORY: BELL LABS AND THE GREAT AGE OF AMERICAN INNOVATION (2012).

[93] *See id.* at 60-62 (describing AT&T's role in the development of radar technology); *see also id.* at ch. 6 (describing AT&T's role in the development of transistor technology); *see also id.* at ch. 12-13 (describing AT&T's role in the development of satellite technology).

[94] *See id.* at ch. 3 (describing growth of AT&T's revenues and the start of Bell Labs by funding from those revenues).

its own interests and vision of how the telephone and technology industries should operate. Neither the government's interest nor AT&T's interest, however, necessarily aligned with the public interest.

2. Indirect Regulation as Partnership?

The story of AT&T can be generalized, at least in a sense, into a discussion of other less direct forms of regulation than discussed in Part I – forms of regulation that may be more collaborative, or at least less intrusive, than more traditional regulation.

For instance, regulators may use tools such as "jawboning," regulation by "raised eyebrow" or the use of actual or threatened hearings or other public scrutiny, or even the threat of potential regulation to encourage industry to act in certain ways.[95] These are all forms of indirect regulation and operate under the same premise: increasing the costs for firms to engage in undesired conduct, without the need for actual, direct, regulation. The theory is simple: because no CEO likes to testify before Congress, spending time forced to answer questions intended to embarrass them and their company (to use one example), CEOs will conduct the company's business to avoid such experiences. Or, to use another example, because the threat of regulation and negative press coverage can adversely affect a company's stock performance, company leadership can be encouraged to take actions to avoid such adverse effects by tending to the interests of their would-be regulators.

The flipside of this is that industry may make accommodations to regulators in order to appease their concerns or to develop a reputation as "good corporate citizens" – in order to avoid the embarrassment or costs of being subject to "indirect regulation." This corporate "noblesse oblige" may serve the public interest – a firm may attempt to marshal positive public sentiment as a shield against abusive practices of regulators intent upon advancing their own interests. At least as likely, however, the incentive is for firms to keep regulators happy by tending to those regulators' interests. Thus, as with the history of AT&T, corporate and government interests may align with each other, but not with the public interest.

---

[95] H. Thomas Austern, *Expertise in Vivo*, 15 ADMIN. L. REV. 46, 50 (1963) (discussing "jaw-bone enforcement" and "the lifted eyebrow"). See *generally* Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority*, 1997 WIS. L. REV. 873 (1997); Tim Wu, *Agency Threats*, 60 DUKE L.J. 1841 (2011).

3. Contemporary Industry and Regulators as Partners

As is discussed in Part III.B, below, the contemporary understanding of regulation is not one of partnership. This is also seen in the discussion of indirect regulation, above. While there may be occasional moments of aligned incentives, most "partnership" is more instrumental towards private goals than an effort to establish or create common goals.

This is on remarkable display, again, in the telecommunications setting. In the 1980s and 1990s, for instance state and local regulators regularly used licensing obligations to extract concessions from cable companies – everything from channel capacity on cable networks to capital investment in various municipal projects. This form of rent extraction does bear some hallmark of partnership – the cable companies were generally allowed to maintain monopoly franchises, which they could use to fund the regulators' pet projects – but, again, the partnership is support in the partners' private interests, not the public interest.[96] Backroom bargains like these have remained common in the antitrust setting, with both federal regulators extracting concessions from in consideration for allowing mergers to go through (e.g., in the Comcast-NBCU Merger)[97] and state regulators doing the same (e.g., Colorado's decision not to challenge T-Mobile's acquisition of Sprint after the companies agreed to make significant state-specific investments).[98]

In the 1980s, the government experimented with a new form of rulemaking, "negotiated rulemaking" or "negotiated regulation," that aspired to a more cooperative approach to regulation.[99] This effort was prompted by concerns that the relationship between regulators and industry was too adversarial, and a belief that greater involvement in the regulated industry in the crafting of the regulations to which it would be subject would lead to the development of rules that were higher quality and that had greater support of those subject to them.

The negotiated regulation process has some of the hallmarks of partnerships: parties coming together to address some commonly defined goal on terms acceptable to each, capturing expertise of the parties across the development and implementation stages of rule development, greater

---

[96] *See generally* Thomas W. Hazlett, *Cable TV Franchises as Barriers to Video Competition*, 12 VA. J.L. & TECH. 1 (2007).

[97] *See, e.g.*, Comcast Corp., Gen. Elec. Co. and NBC Universal, Inc., 26 FCC Rcd. 4238 (2011) (memorandum opinion and order).

[98] *See* Colo. A.G., Assurance of Voluntary Compliance, (2019), https://coag.gov/app/uploads/2019/10/TMO-Colorado-AG-AVC-Fully-Executed.pdf.

[99] *See generally* Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 DUKE L.J. 1255 (1997).

engagement of parties that will be subject to the rules in the development of them. The promised benefits of negotiated rulemaking, however, have not borne out. Rather that producing rules with greater industry buy-in, research has shown that rules developed using negotiated rulemaking are challenged in court for often than rules developed through more traditional, "adversarial," approaches to rulemaking. Some of the reasons for this, along with other consideration of why regulation isn't partnership, are taken up in the next section.

B. *Why Isn't Regulation Partnership?*

The discussion above considered and criticized some of the ways in which regulation may have characteristics of partnership. The discussion below focuses on the conflicts between thinking of regulation as partnership.

1. The Adversarial Mindset

The American approach to regulation – and to law in general – is overwhelmingly adversarial.[100] This is seen in our common law traditions. It is seen in our earliest regulatory understandings of private interests as something standing apart from "the public interest." It is seen in the basic dichotomy between rulemaking and adjudication as the two dominant modalities of regulatory action.

The history leading up to the experiments with negotiated rulemaking in the 1980s capture some of these concerns: federal agency rulemaking in the 1960s and 1970s had become more and more time consuming, costly, and adversarial.[101] Implementation of the then-newly established EPA's rules were increasing compliance costs and viewed as hostile to industry. The FTC's efforts to regulate advertising directed at children led it to being dubbed the "National Nanny", and the Commission was even shut down by Congress for a period in response to its regulatory zeal.[102] In 1979 President

---

[100] *See, e.g.*, ROBERT KAGAN, ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW (2003).

[101] *Id.* at 46 ("In the 1960s and 1970s … Congress embraced adversarial legalism.").

[102] *see also* J. Howard Beales, *The FTC's Use of its Unfairness Authority: Its Rise, Fall, and Resurrection*, FEDERAL TRADE COMMISSION (May 20, 2003), https://www.ftc.gov/public-statements/2003/05/ftcs-use-unfairness-authority-its-rise-fall-and-resurrection ("The breadth, overreaching, and lack of focus in the FTC's ambitious rulemaking agenda outraged many in business, Congress, and the media . Even the Washington Post editorialized that the FTC had become the "National Nanny. Most significantly, these concerns reverberated in Congress. At one point, Congress refused to provide the necessary funding, and simply shut down the FTC for several days. Entire industries sought exemption from FTC jurisdiction, fortunately without success. Eventually, Congress acted to restrict the

Carted quipped that "It should not have taken 12 years and a hearing record of over 100,000 pages for the FDA to decide what percentage of peanuts there ought to be in peanut butter."[103]

Unsurprisingly, regulators' adjudicatory function is no less adversarial or burdensome – it is, after all, modelled on adversarial judicial proceedings.[104] But judicial proceedings require an active case or controversy in order for a matter to be heard by a court and are governed by various procedural safeguards that protect parties from unwarranted litigation and ensure parity of process.[105] Administrative proceedings, conversely, are subject to greatly reduced procedural safeguards.[106] Indeed, some agencies consciously use them as a mechanism for developing new regulation. In such cases, agencies may bring administrative actions against firms not so much based upon on the specific conduct of the firm but upon the agency's interest in developing new law outside of the rulemaking setting.[107]

This basic approach of developing law – and other forms of legally-binging rules – in an adversarial setting is deeply rooted in common law traditions. Lawmakers and regulators are overwhelmingly lawyers, trained in the common law tradition. This gives them a predisposition both towards adversarial settings and a belief that such proceedings will (over time and many cases – though many elide this element) lead to the development of good law. But that does not mean that the adversarial approach is the only one to regulation – let alone the best, or even particularly good, one.

FTC's authority, including legislation preventing the FTC from using unfairness in new rulemakings to restrict advertising. So great were the concerns that Congress did not reauthorize the FTC for fourteen years. Thus chastened, the Commission abandoned most of its rulemaking initiatives, and began to re-examine unfairness to develop a focused, injury-based test to evaluate practices that were allegedly unfair."). *See also The FTC as National Nanny,* WASH. POST (Mar. 1, 1978), https://www.washingtonpost.com/archive/politics/1978/03/01/the-ftc-as-national-nanny/69f778f5-8407-4df0-b0e9-7f1f8e826b3b/.

[103] PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: JIMMY CARTER 1979 BOOK 1 484 (1980)

[104] *See generally* Section 554 of the Administrative Procedure Act, 5 U.S.C. § 554 (2012).

[105] *See* U.S. CONST. art. III, § 2; U.S. CONST. amends. V, XIV (outlining the judicial process).

[106] Most agency adjudications are informal adjudication (governed primarily by APA Section 555), which, compared to formal adjudications (governed by Section 554), offers relatively modest process. *Cf.* 5 U.S.C. § 555(b), (c), and (e) *with* 5 U.S.C. § 554. The due process protections surrounding fact finding are significantly less in the administrative context than the judicial context. *See generally,* Evan D. Bernick, *Is Judicial Deference to Agency Fact-Finding Unlawful?*, 16 GEO J.L. & PUB. POL'Y 27 (2018).

[107] *See* Justin (Gus) Hurwitz, *Data Security and the FTC's UnCommon Law*, 101 IOWA L. REV. 955, 984 (2016) (noting that the "[Federal Trade] Commission [uses] its case-selection prerogative to guide the development of the law.").

2. The Transactional Mindset

Where regulators bring a counterproductively adversarial mentality to regulation, industry can bring a dangerously transactional mentality. Regulation can be viewed as a cost of doing business or an obstacle to be overcome. This is particularly true in static industries, industries subject to disruption, or firms newly subject to regulation. In such settings, "regulation" may seem backward looking or irrelevant to the firms' forward looking businesses. Why should Facebook worry about the privacy rules developed to regulate the telephone network? Why should Uber or Airbnb worry about regulations developed during an era of road weary hobbits travelling by ferry and staying the local inn? Regulators who would subject these businesses to rules designed for technologies of yesteryear are to be humored – and to the extent that they cannot be, technologies are designed around the regulators' authority. The purpose of the rules is to frustrate the purposes of the firm.

It can be easy to be sympathetic to this approach to law, especially when regulations seem as hopelessly outdated and regulators as hopelessly out of touch as they often do in the tech industry. But this assumes a static model of regulation, in which regulators do not learn, regulations do not change, and – perhaps most of all – where those regulations serve no broader purpose. All regulators believe their regulations serve important, broader, social purposes – and many do. The transactional approach to regulation only defers an ultimate reckoning with these regulators. More importantly, it only defers the day where the firm's business will need to be reconciled with the underlying purposes that the regulations serve.

IV. REGULATION AS PARTNERSHIP

The line between regulation and partnership is curiously blurry. The need for regulation is premised on a divergence between public and private interests, creating a need for regulators to impose rules to constrain or facilitate the conduct of private actors. The purpose of P3s is to harness private interests to accomplish public ends. Fundamentally, both are about aligning public and private interests.

On the other hand, the need for each arises in very different contexts. The need for regulation generally arises after some industry or technology has reached a critical mass of adoption to address concerns that arise with its operation. In such cases, the government is responding to the development or conduct of industry. A P3 is generally initiated by the government, and is undertaken to address a more discrete purpose, on terms defined at the

outset. Both, however, face the similar challenging of aligning potentially mismatched incentives between the public and private parties.

While often deployed based on ill-conceived notions of cost-savings and administrative efficiency, the value of the P3 model is greatest in the relational context. As articulated by Hart, a P3 model is really a form of incomplete contracting, where terms of the contract need not be fully specified because each party is endogenously incentivized to perform to the other party's satisfaction. The most common form of P3 falling into the mold is the two-stage development-management contract – but the greater the value of maintaining the relationship, the more likely the P3 arrangement will prove beneficial to all parties involved. The more interesting lesson from P3s, however, follows in the other direction: while the P3 model works better the more relational it is, it is more likely to fail the more transactional it becomes. Indeed, absent the minimum two-stage relationship, a "P3" is often little more than a procurement contract.

The same dynamic plays out in the regulatory context. The story of AT&T is one of an ongoing relationship between the firm and its regulators and stands in contrast to the more recent transactional approach to regulation seen in much of the technology industry.

Of course, there is nothing wrong with ordinary, transactional, procurement contracts. Indeed, they represent most government contracts. The P3 model is only used in a subset of arrangements. The same can be said for most laws and regulations. Signage requirements for trucks carrying dangerous materials and roadways should not be contingent upon a relationship between regulators and industry; nor should the fat content of skim milk or the peanut content of peanut butter or the requirements for obtaining a passport or buying a house.

The value of the relational model, for both P3s and regulation, is at its zenith where the relationship itself is the thing of value – where each party brings to the relationship skills, knowledge, or some other comparative advantage. AT&T brought R&D capabilities that it could leverage to satisfy specific government needs and the promise to connect everyone to the telephone network to its midcentury relationship with the federal government. The federal government brings an ability to coordinate and share information between state, local, federal, and international entities as a trusted intermediary to the cybersecurity community. In both cases, the counterparties care more about continuing the relationship than about the value of any specific interaction.

The entrances to the Federal Trade Commission building in Washington, D.C., are flanked by a pair of statues, jointly named *Man Controlling Trade*. Each statue depicts a muscular man struggling to control, with his bare hands,

an equally muscular horse. These statues are an evocative crystallization of the traditional adversarial relationship between private interests and the government. But the partnership model suggests that this understanding of the relationship is wrong – or at least incomplete. There are circumstances where the carrot is mightier than the stick, and where the power of the stick may be entirely illusory.

This critique goes both ways: just as it is wrong to think of the role of the regulator as adversarial to private interests, it is problematic for private interests to approach the regulator, and the public interest it purports to represent, in purely transactional terms. The horses outside the FTC building represent the real dangers that unconstrained commerce can represent – wild, rampaging, and destructive.

But there is a greater underlying truth to the FTC statues: men (to use the gender of adopted by the statue's artist) are governed by reason, whereas horses are governed by nature and instinct. There are twin assumptions that the private interests of commerce, on one hand, are wild, potentially dangerous to the public interest, and that their regulation, on the other, is necessarily in the public interest. To the extent that the status quo approach to regulation gives rise to a counterproductive adversarial/transactional dynamic, we should look to the regulators, governed as they are by reason as opposed to the uncontrollable wills of private enterprise, to correct for this dynamic. To the extent that the adversarial model of governance has proven to be counterproductive, fault for that lies with the laws and regulations that embraced adversarial governance, not those subject to them; and to the extent that partnerships, founded in relational governance, are preferable, responsible for adopting such a modality also lies with the regulators.

The standard, and most trenchant, critique of "partnership" models of governance is found in public choice. Regulators and regulation are subject to capture under the best of circumstances – and a partnership model of governance would seemingly embrace such capture. It would be akin to "regulating" the henhouse by partnering with the foxes to guard it. It is common, for instance, to point to examples such as AT&T's cozy relationship with the FCC, which led the FCC to give undue reliance to assertions by AT&T, such as the one that the "Hush-a-Phone" device – nothing more than a piece of plastic cupped over the mouthpiece of a telephone – had to be banned because it could potentially damage the telephone network.[108]

This concern misunderstands the public choice critique generally, and the concern of regulatory capture. A partnership-based approach to governance is just as susceptible to public choice concerns as an adversarial one. The concern raised by the public choice critique is that any public institution is

[108] See, e.g., Hush-A-Phone v. United States, 238 F.2d 266 (D.C. Cir. 1956)

subject to capture by private interests – and the challenge of the critique is to design institutions that are resilient to those interests.

Indeed, this is perhaps the greatest lesson and challenge raised by this paper's framing example of AT&T. AT&T was one of the great American companies. It was well-loved by most consumers, it was a committed and beneficial partner to the government, and it was one of the greatest sources of innovative activity in the country's history. But it was also a ruthless monopoly that used its relationship with the FCC to stifle competition and maintain its position within the economy.

CONCLUSION & CODA

The concluding portion of this paper is being written during a remarkable and tragic time: the nation and the world are in the throes of the novel coronavirus pandemic. While only a small and comparatively unimportant part of the history currently being written, this period carries important lessons about the power of regulatory partnerships.

Private industry is showing the good that it is capable of when the public interest is clear. From companies collaborating on urgently needed innovation[109] to firms making accommodations to benefit consumers in need,[110] industry – particularly the tech sector – has risen to the occasion of our current circumstances to demonstrate its fundamental humanity.[111] And

---

[109] *See, e.g.,* Darrell Etherington, *FDA Authorizes Production of a New Ventilator That Costs up to 25x Less Than Existing Devices*, TECHCRUNCH (Apr. 15, 2020), https://techcrunch.com/2020/04/15/fda-authorizes-production-of-a-new-ventilator-that-costs-up-to-25x-less-than-existing-devices/ ("Both medical device maker . . . and Boston Scientific . . . contributed to the development of the design.").

[110] *See, e.g.,* Allen St. John, *ISPs Raise Speeds and Suspend Data Caps in Response to the Coronavirus Pandemic*, CONSUMER REPORTS (Mar. 23, 2020), https://www.consumerreports.org/internet-providers/isps-respond-to-coronavirus-raise-speeds-suspend-data-caps-keep-america-connected-pledge/("[S]ome internet service providers (ISPs) are pledging to raise broadband speeds, suspend data caps, and generally make life easier for all.").

[111] *See, e.g.,* Steven Levy, *Has the Coronavirus Killed the Techlash?*, WIRED (Mar. 20, 2020), https://www.wired.com/story/plaintext-has-the-coronavirus-killed-the-techlash/ ("Facebook has gotten rare kudos for its responses to the pandemic . . . ."); Ryan Bourne, *The Techlash is Over – or at Least It Should Be*, THE TELEGRAPH (Apr. 9, 2020), https://www.telegraph.co.uk/business/2020/04/09/techlash-least-should/ ("The firms' business activities adjusted quickly, while the companies donated masks, testing assistance and relief for businesses to help the broader effort."); Casey Newton, *How COVID-19 is Changing Public Perception of Big Tech Companies*, THE VERGE (Mar. 26, 2020, 6:00 AM), https://www.theverge.com/interface/2020/3/26/21193902/tech-backlash-covid-19-coronavirus-google-facebook-amazon ("Where they once had been loath to intervene in matters of fact, suddenly Facebook and Twitter were prominently featuring links to high-quality information . . . ."); Jon Neiditz and Kilpatrick Townsend, *COVID-19: Terminate the Techlash!*, JD SUPRA (Mar. 30, 2020), https://www.jdsupra.com/legalnews/covid-19-terminate-the-techlash-11260/ (mentioning the creation of

many of these stories are facilitated by regulators that are working to waive rules or otherwise facilitate important work on an emergency basis, such as the Food and Drug Administration (FDA) issuing Emergency Use Authorizations[112] and the FCC waiving various rules, allowing flexible use of spectrum, and extending universal service funding to help keep people online.[113]

There are also less positive stories to be told and lessons to be learned. In the United States, our regulatory response was slow to facilitate widespread testing.[114] The Centers for Disease Control and Prevention (CDC) and FDA maintained their traditional, centralized, command-and-control approach to public health administration, denying private efforts to facilitate testing until well after the coronavirus had established its foothold in the United States. This stands in stark contrast to the experiences elsewhere. For instance, "Germany's equivalent to the U.S. Centers for Disease Control and Prevention ... makes recommendations but does not call the shots on testing for the entire country."[115] That approach is similar to that partnership-based approach used in the United States for cybersecurity, where federal authorities play an information gathering and analysis role, working to facilitate and support private responses to cybersecurity incidents.[116]

The introduction of this article explained that it is "really about how we regulate the technology industry, and how that industry approaches its regulators."[117] The dynamic in recent years has been acrimonious: regulators have too often approached the tech sector from an adversarial perspective and industry has responded in kind, either with its own adversarial position or by viewing regulatory compliance as a "cost of business" transaction. This dynamic is unfortunate and ultimately harmful to the public interest. Fortunately, there are alternative approaches to be explored, such as the

---

"tech innovations like an app that identifies everyone who has tested positive for COVID-19 within a certain physical distance").

[112] *See, e.g.*, Dave Sebastian, *FDA Approves Devices to Be Modified into Ventilators Amid Shortage*, WALL. ST. J. (Mar. 27, 2020 3:22 PM), https://www.wsj.com/articles/fda-approves-devices-to-be-modified-into-ventilators-amid-shortage-11585336944 (announcing the special authorization for medical devices to be modified as ventilators).

[113] *See* FEDERAL COMMUNICATIONS COMMISSION, KEEP AMERICANS CONNECTED PLEDGE, (2020), https://www.fcc.gov/keep-americans-connected.

[114] *See, e.g.*, Alec Stapp, *Timeline: The Regulations—and Regulators—That Delayed Coronavirus Testing*, THE DISPATCH (Mar. 20, 2020), https://thedispatch.com/p/timeline-the-regulationsand-regulatorsthat ("What's unfortunate is that there was no similar push at the beginning of the crisis to expedite coronavirus testing.").

[115] *See* Rob Schmitz, *Why Germany's Coronavirus Death Rate Is Far Lower Than In Other Countries*, NPR (Mar. 25, 2020, 12:03 PM), https://www.npr.org/2020/03/25/820595489/why-germanys-coronavirus-death-rate-is-far-lower-than-in-other-countries.

[116] *See supra* part II.A.2

[117] *See supra* Introduction.

partnership-based, relational models of governance considered in this article. Ultimately, no one model of governance is best for all contexts and no model is perfect for any single context. But adding consideration of partnerships to the standard binary choice between prescriptive ex-ante regulation and laissez-faire, market-based, ex-post enforcement expands the regulatory toolbox.