Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law

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I. Introduction

As the title suggests, this will be a dispassionate essay. I will not take sides concerning which political branch of the current federal government, the President or the Congress, is embarked on a course that is more likely to impair the appropriate role of American administrative law in structuring and checking administrative action. Nor will I attempt to determine whether ignorance of, or cynicism about, the law is the greater sin for would-be designers of public institutions. My stance is that of a neutral observer: a chronicler of current events and an analyst of their implications for the role of law in an imploding administrative state.

The thesis of this article is straightforward: Reform of the admin-
Administrative state is on everyone's agenda. The executive branch is busily "reinventing government" to make it more effective. Congress is proposing major "regulatory reform" legislation to promote more efficient and responsive regulation. Both initiatives are deeply problematic. The reinvention effort, by analogizing public to private action, confuses managing with governing. It therefore ignores the crucial legitimating role of public, particularly administrative, law. The congressional "regulatory reform" initiative, by contrast, exalts and exploits legal process. But the proposed "reforms" seem designed largely to skew, delay or thwart, rather than improve, administrative policy choice. Moreover, these independently destructive executive and legislative reform programs have a potential negative synergy. They may thus simultaneously undermine important legal norms while making government less effective.

II. MYOPIC MANAGERIALISM: THE REINVENTION INITIATIVE

Presidents and Congresses have always competed for the allegiance of implementing officials. Such, for good and ill, is our constitutional design. Whether this competition increases democracy and preserves freedom, or renders government inefficient and unaccountable, remains controversial. My interest, however, is in the contemporary terms of this ongoing debate—the rhetorical armaments with which each side pummels the other in the name of good government.

At least since the Brownlee Committee created the idea of the chief executive virtually from whole cloth, the President's main claims have sounded in managerial efficiency. Franklin Roosevelt said as much in seeking an end to government by "independent commission" and the authority to reorganize the executive branch. He got the lat-

1. A number of bills have been introduced. For a discussion of the major contenders see Bob Benenson, Procedural Overhaul Fails After Three Tough Votes, CONG. Q. Wkly. Rep., July 24, 1995, at 2159-62.
2. For a detailed history of the competition that exists between the legislative and executive branches of government, see James L. Sundquist, The Decline and Resurgence of Congress (1986).
3. President's Committee on Administrative Management, Report of the Committee 40-41 (1937) referred to what it called "our constitutional ideal of a fully coordinated Executive Branch responsible to the President" and in apocalyptic language referred to independent regulatory committees as constituting "a headless fourth branch of the government by haphazard deposit of irresponsible agencies and uncoordinated powers."
4. Sundquist, supra note 2, at 57-60.
5. Id. at 52-55.
ter, but the power to reorganize is not the power to direct. As Harry Truman famously remarked, "He'll sit here and he'll say, 'Do this! Do that!' And nothing will happen. Poor Ike—it won't be a bit like the Army." But Presidents have continued to seek control through managerial initiatives. Richard Nixon resuscitated FDR's reorganization authority and gained legislative approval for a vastly expanded Executive Office of the President. If the President was not to have direct authority to control every federal administrative appointee (Roosevelt's lament), he would at least have a staff—perhaps sufficient—to evaluate, coordinate and monitor the far-flung executive establishment.

More recently, Ronald Reagan, as chief executive officer ("CEO"), pioneered the use of the Vice President as chief operating officer ("COO"), giving George Bush a domestic portfolio of regulatory relief activities designed to tame a fractious regulatory bureaucracy. Al Gore is the current inheritor of this mantle, passed down from Bush through his Vice President Dan Quayle. Gore has taken to the job with enthusiasm, producing not one, but two, National Performance Reviews ("NPRs"). These NPRs are major proposals for revitalization—in his terms, reinvention—of the federal administrative establishment.

Without a tedious recounting of the linked history of presidential

6. For a history of the authorization and use of reorganization plans from the New Deal until the Nixon administration, see Sundquist, supra note 2, at 52-55. Prior to Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983), reorganization authority had always provided for a presidential proposal that went into effect absent a "congressional veto." Chadha's invalidation of the legislative veto caused subsequent reorganization authority to be cast in the form of a presidential proposal followed by a congressional statute under a "fast-track" procedure. See Reorganization Act Amendments of 1984 § 3(a), Pub. L. No. 98-614, 98 Stat. 3192 (codified at 5 U.S.C. § 906 (1988)).


administrative initiatives against the backdrop of ever-changing American managerial enthusiasms, it is safe to say that none of our "Chief Executives," or their COOs, have been immune to the management fraternities' panaceas du jour. Roosevelt's demands for straight lines of executive authority reflected Taylorist visions of hierarchical control. Nixon staffed up in response to a decade or more of academic emphasis on analytic capacity as the key to rational decision making in organizations. Today, Taylor has been turned on his head: devolution is in; hierarchy is out. Similarly, the staff-heavy, policy-analytic bureaus that were the legacy of the 1960s and 1970s are now viewed as bloated at best, dysfunctional on average. Management theory has taken a new tack, and Al Gore has become the guru of governmental reengineering, the primary publicist for the new management paradigm of lean, flat, "customer-driven" public organizations.

The Vice President's first National Performance Review ("NPR I") began with a report issued in September 1993 that promised nothing less than a revolutionary reshaping of the federal government. Streamlining, downsizing, and the empowering of line officials were the watchwords of the NPR's proposals. The NPR thus borrowed directly from the contemporary "customer-centered" and "empowerment-oriented" managerial philosophies that have spread rapidly throughout the private sector.

The 1993 NPR also promised $108 billion in savings. A substantial part of that savings was to come from eliminating jobs for approxi-
mately one-quarter-million government employees. With the Federal Workforce Restructuring Act of 1994, Congress quickly signed on to the downsizing goals outlined in the NPR. Indeed, the Act upped the NPR's ante by some twenty thousand employees. The NPR movement thus seemed to have interbranch appeal, to the extent that its proposals were consistent with the politics of deficit reduction.

But much of NPR I had little to do with simple cost savings. The Report urges downsizing from a particular perspective. Government bureaus are to be reconfigured to give better service by empowering line personnel to respond to "customer" demands. "Empowerment" here is essentially a form of internal deregulation. By executive order, President Clinton directed all agencies to jettison at least fifty percent of their internal "red tape." Thus, many of the jobs to be eliminated are those of middle managers who developed and oversaw agency systems and processes, audited compliance with internal agency policies, and evaluated personnel. They will not be needed once the regulations that they developed and policed—the "red tape" presumably strangling the line bureaucracy—have been discarded.

The streamlining process is to be overseen by a COO in each agency who is responsible to ensure that the bureau is, indeed, reengineered in the new mold. Each COO is also a member of the new President's Management Council, which functions as a central clearinghouse for developing and propagating managerial improvements to implement the vision of NPR I.

Should anyone doubt at least the rhetorical reality of this new managerialist movement, she should spend a few days in almost any public office "inside the beltway." For two years, "reengineering teams" have been churning out mountains of proposals for "reinventing" their bureaus to produce better "service" to "customers" at less cost. Presumably the better reinventors will not be among the 272,900

18. Id.
22. See NPR I, supra note 10, at 89.
23. Id. at 89-90.
managers who are to disappear from the public service between fiscal years 1994 and 1999.

III. SOME REALISM ABOUT MANAGERIALISM

It is difficult, indeed impossible, to oppose the broad goals of NPR I. Better government service at lower cost is not controversial. The problem is that these ambitious ideas concerning cutting "red tape," focusing on customers first, empowering employees, and getting back to basics seem to miss the point of the activities of most federal public agencies. In some areas, such as procurement, the activities of the federal government are similar to private enterprise. The primary goals of quality and cost-effectiveness are clear, and it is possible to identify who the customers are and what they want. Yet even here there are significant differences. Governments have always used procurement policy to further additional social goals—goals that suggest attention to different "customers." And, of course, public tolerance for any form of "corruption" is much lower when public funds are being spent. Much administrative "red tape" is an attempt to pursue complex, multiple objectives while guarding against the misuse of public money. Surely some "red tape" is just that. But do slogans like "customer driven," "empowerment," or the like tell us anything about what is expendable?

In other areas, application of these managerial concepts is even less obvious. When giving out Social Security disability benefits, for example, are the customers the claimants, the general working public that pays FICA taxes to support the program, or the public that politically supports the program? Surely "all of the above" is correct. These "customers," however, have differing interests. Whose demands are to be met? In making benefits determinations, at what point do procedural due process and administrative safeguards which ensure the integrity of the program become "red tape" that should be jettisoned in the interest of quicker service? And, if the "basics" of benefits adjudication are captured in goals such as "accuracy, fairness and timeliness," the difficult managerial problem lies in mediating the tension amongst those goals in the concrete operation of the program. How a "flat, lean, customer-driven" organization helps accomplish this feat remains mysterious.

To put the matter slightly differently, it is not clear that NPR I has understood the lessons of virtually all public management research since the Progressive Era's embrace of "rational democracy" domi-
nated by professional elites.\textsuperscript{24} NPR I argues that its recommendations are focused primarily on \textit{how} government should work, not on \textit{what} it should do.\textsuperscript{25} But, if scholars and practitioners of public administration know anything, it is that this distinction is both artificial and misleading. The \textit{how} of government operation powerfully shapes the \textit{what}, because means embody ends. It is impossible to think seriously about \textit{how} a program is to be run unless that thinking is driven by a sophisticated understanding of the \textit{what} that is the object of government action. Radically transforming the \textit{how} has major impacts on the \textit{what}.

Return for a moment to the disability benefits example. The front line troops in this activity are disability examiners. Their most direct "customers" are claimants for disability benefits. There seems little reason for either the customers or the "front line" examiners to be satisfied with current arrangements. The customers must now wait nine months on average for a decision on a claim, eighteen months to two years if they have to appeal, and fewer than half receive what they imagined would be a secure entitlement. Meanwhile, the examiners are awash in regulations and manual instructions and are continuously monitored by "middle managers"—supervisors, quality assurance personnel and administrative law judges.\textsuperscript{26} From the NPR I perspective, this system looks ripe for "reinvention." Indeed, it is being reengineered as we speak. But what direction should that reengineering take?

While the simplest solution would be to hire more examiners, this is ruled out by NPR I's dedication to trim personnel. Other possible approaches range from the silly to the grotesque. Make the customers happy by paying all claims? Speed up the decisions by throwing out the medical, vocational, and evidentiary criteria and flipping coins? Empower the line personnel by eliminating the rules, supervision, and quality assurance systems that seek to assure that the examiners' decisions are accurate or consistent? Tell disappointed claimants (sorry, "customers") that the appeals process has been dismantled because it disempowered front line personnel and made no clear contribution to swift and accurate processing of claims? Make it easier and quicker to

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\textsuperscript{24} For a more extended version of this argument, see David H. Rosenbloom, \textit{Have an Administrative Prescription? Don't Forget the Politics!}, 53 PUB. ADMIN. REV. 503 (1993).
\textsuperscript{25} See NPR I, supra note 10, at 2.
\textsuperscript{26} See generally JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983).
\end{flushright}
appeal because the "customers" like appeals, whatever their value in reaching proper determinations?

This burlesque of the reengineering processes' options is not meant to suggest that disability adjudication cannot be improved. I have argued for years that it can and should be. The point rather is that management babble about customers, flat organizations, and cutting "red tape" gives us very little purchase on what useful reform might look like. That purchase is lacking because the managerialist perspective it provides fails to understand that here, as elsewhere in government, the process is the product. Deciding who meets the eligibility criteria for disability payments is an interpretive enterprise whose quality and legitimacy must be evaluated more by the inputs—substantive standards, evidentiary rules, fact-gathering routines, justification requirements, quality checks, and appeal rights—than by the outputs. 

There is no objective, external referent for determining whether a claimant, given her health, age, education, and prior work experience, can do any job in the national economy paying at least $500 per month. Hence, to change the process of decision, to "reengineer" it, is to change the product as well—to rearrange, subtly or dramatically, the complex and cross-cutting purposes that underlie the scheme of disability insurance. Changing the rules and processes changes what is being done, not just how the government does it.

To be scrupulously fair, the second National Performance Review ("NPR II") does take up the "what" question by proposing the elimination, consolidation or "outsourcing" of a number of existing tasks. These proposals, however, do not really address the problem that I am discussing. NPR I's failure to recognize that the managerial cannot be separated from the political and that methods of implementation ultimately determine the substance of policy is not repaired—or even ameliorated—by NPR II's focus on "what" rather than "how."

To return to the more general point, talk about doing better for less fundamentally misunderstands the purpose of most federal administrative activity. To be sure, there is some relatively straightforward service delivery at the federal level—defense and the administration of public lands loom large in this regard. The postal service and Amtrak do, as well, although both have been already partially "privatized." But most federal agencies develop general norms and adjudicate cases.

27. See, e.g., id. at 28 (arguing that a less legalistic and more interdisciplinary adjudicatory process be employed).
They are in the governance business, not the service provision business. Their purpose is to pursue the common good, not to cater to the preferences of individual customers.

This category mistake—confusing citizens with customers—has major political and legal consequences. So conceived, NPR I has a reform agenda that conflicts with some central understandings about the political and legal control of administrative governance in the United States. On the political side, for example, NPR I seems committed to a "Greyhound theory" of congressional legislation and oversight. "Just tell us the destination and leave the driving to the front line administrators," seems to be the message to Congress. Indeed, it is hard to see how moving authority down the hierarchy could fail to lessen congressional control of public policy. It threatens to create a dispersed army of "empowered" public entrepreneurs who answer to "customers" as defined by their own understandings of the programs they administer. This is unlikely to be supported by a Congress already concerned about its ability to oversee the federal administrative establishment.29

There is much to be said for reducing congressional micromanagement of many programs. But not all, perhaps few, programs can be restructured to pursue objectively determinable goals that would permit radical bureaucratic devolution without loss of political accountability. To return to the prior example, I have no idea how to specify an objective output for the disability benefits program. Congress could demand that all claims be processed within thirty days, that thirty-five percent of applicants receive pensions and that the program support no more than 5.2 persons per 1,000 covered workers at any one time. Success or failure could then be measured no matter what the internal organization or processes of the Social Security Administration or what criteria of judgment were used by its examiners. But, if Congress took this approach, it would not have the foggiest notion of whether these objectives were in pursuit of sensible social insurance policies, or even whether they were consistent with each other.

Similarly, Congress could instruct health and safety agencies to save X number of lives and prevent Y number of serious illnesses or accidents per year while expending no more than Z dollars of public and private monies. But, even if such instructions were politically viable, they are operationally fraudulent. Only the most irresponsibly opti-

29. The lack of an explicit strategy to deal with Congress is one of the primary criticisms of the reinventing government effort. See DONALD F. KETTL, REINVENTING GOVERNMENT?: APPRAISING THE NATIONAL PERFORMANCE REVIEW (1994).
mistic social scientist would assert that anyone could come close to measuring whether a particular agency had either reached its public health and safety goals or remained within its cost constraints. Accountability would be a scientistic myth.\textsuperscript{80}

Hence, most of the time, Congress must specify purposes, criteria, powers, and processes in its enabling legislation, rather than simply objective goals. This legislative format presumes that administrators will be held accountable in part for inputs—subsidary rules, procedures, supervisory controls, and the like—because outputs will be poorly specified and/or difficult to measure. Political accountability thus entails explanation and oversight concerning the reasonableness of substantive decisions, the procedural fairness of decisionmaking, and the informal controls established to assure both. Congressional inquiries to the Secretary of Health and Human Services or the Environmental Protection Agency administrators about the reasonableness or fairness of agency actions can hardly be answered by the suggestion that front line officials now have authority to use their best judgment and Congress should talk to them. Political accountability seems to demand precisely the internal systems, middle management supervisors and planners, and documentation ("red tape") that NPR I seeks to abolish.

Finally, and most importantly for this discussion, it is possible that the enthusiasm for managerial reinvention has obscured the ways in which radical decentralization affects legal, as well as political, control. The long-term commitment of American administrative law has been to assure that administrative discretion is structured, checked, and balanced. Administrative efficacy must be weighed against demands for liberty and legality, as well as political accountability.

When pursuing this project, American administrative law tends to presuppose clear lines of authority, hierarchical control, and responsibility focused on the top level management of agencies. For example, lawsuits claiming an improper denial of Social Security disability benefits are nominally against the Secretary of Health and Human Services. Is it to be a defense in such a proceeding for the Secretary to point out that, in the process of agency reinvention, authority to make disability decisions has been devolved to lower levels of administration that are now effectively outside of her control? Are lower level bureaucrats to be made individually responsible in damages for errors in administra-

\textsuperscript{30} For an analysis of the difficulties of estimating the effects of health and safety regulation in one particular program, see Jerry L. Mashaw & David L. Harfst, The Struggle for Auto Safety (1990).
tion? Or is the project of legal control that has preoccupied American lawyers for 200 years to be abandoned in pursuit of faster service delivery?

While these questions may seem fanciful, they suggest the logical implications of NPR I's management philosophy. We really cannot have the cake of dispersed administrative discretion and ingest significant legal control of it as well. No one made this point, while coming down repeatedly on the side of extending the reach of legal controls, as tirelessly as Kenneth Culp Davis. Davis may have overdone it, but by and large American administrative law has followed suit—even in programs devoted primarily to service delivery. After all our canonical text on presumptive judicial review, the *Citizens to Preserve Overton Park v. Volpe* decision involves highway construction by an agency that had sought assiduously to satisfy its major customers.

The simple fact of the matter is that legal control is wonderfully bureaucratizing. Nothing focuses an administrator's mind more keenly on record keeping, turning square procedural corners, elaborate justificatory analysis, and a host of other red-tape-producing activities than the prospect of judicial review. Indeed many administrative law scholars, myself included, have laid the underperformance of a host of federal agencies squarely at the door of excessive, intrusive, or ill-timed judicial review.

The point is plain enough: NPR I's basic managerial presuppositions are on a collision course with administrative law's contemporary understanding of legality in administration. Although no mention of these matters can be found in the Vice President's manifesto, he has implicitly demanded a major rethinking of the structure of the legal control of administration. For without such a change, it seems impossible to imagine how the reengineering effort can succeed.


34. For an extended discussion of the political context of the *Overton Park* litigation, see generally Strauss, *supra* note 32.

IV. Ensuring Regulatory Rigor Mortis: Congress Pursues Regulatory Reform

While the implications of Vice President Gore's proposals for reinventing government are deeply antithetical to the control of discretion by law, current regulatory reform proposals in Congress head in precisely the opposite direction. Seizing on administrative law's capacity to incapacitate administration, Congress is proposing to impose additional layers of legal constraint on bureaucracies that are now struggling to meet minimal performance expectations.36

The use of procedure to put administrators out of business is hardly novel in American administrative law. One of my personal favorites is the Fulbright Amendment to the Walsh-Healey Public Contracts Act.37 Superbly representing the interests of Arkansas employers, the second lowest wage state in the Union at the time,38 Senator Fulbright managed to impose trial-type proceedings on rulemaking by the Labor Department whenever it sought to establish the prevailing wage rates for purposes of federal contracting.39 The Walsh-Healey program collapsed under the procedural weight of this adversarial mode of administration.40

But Senator Fulbright's piecemeal approach is legislatively burdensome.41 The activities of the administrative state can be crippled much more effectively by general provisions applicable to most regulatory activities. Moreover, the more general the requirement, the less it

36. See Benenson, supra note 1, at 2159-62.
37. For further illustration of how formal process affects the prevailing wage rate determination under the Walsh-Healey Act, see Wirtz v. Baldor Elec. Co., 337 F.2d 518 (D.C. Cir. 1963).
41. Requirements for formal rulemaking appear in several regulatory statutes enacted prior to the Administrative Procedure Act including the Walsh-Healey Act, certain laws administered by the U.S. Department of Agriculture, and the Federal Food, Drug and Cosmetic Act (for certain categories of rules). Id. at 1279-80. A handful of post-1946 laws, such as the Fair Packaging and Labeling Act and the Coal Mine Health and Safety Act of 1969 require trial type proceedings for the adoption of rules. Id. The great majority of federal statutes, however, are silent on the matter, thus incorporating the requirements of APA § 553, or else prescribe less formal rulemaking procedures. Id. at 1313-30. Few have had a good word to say for formal rule-making processes. For a general discussion, see id.
looks like simple obstructionism rather than reform in the interests of fairness and rationality. Indeed, while presidents emphasize administrative efficacy in their reform efforts, congressional legislation on administrative process, from the 19th century judicialization of the Interstate Commerce Commission to most contemporary reform proposals, marches under banners proclaiming procedural fairness, open government, and legal accountability.

Prior Congresses have hardly been pikers when it comes to imposing generalized procedural or analytic requirements on agency decision-making. The National Environmental Policy Act of 196942 ("NEPA"), the Paperwork Reduction Act of 1980,43 the Regulatory Flexibility Act,44 indeed the Administrative Procedure Act45 ("APA") itself, all impose information-gathering and analysis requirements on federal agencies. Only the first and the last, however, permitted judicial review of compliance. Moreover, NEPA demands only procedural compliance, while the APA's vague commands have been left to be elaborated almost exclusively by judicial interpretation.

To be sure, many commentators find existing analytic requirements, whether or not backed by judicial review, sufficient to disable many regulatory agencies.46 But, that is apparently not sufficient procedural protection for contemporary "regulatory reformers."

The current Congress led off with what some have called a "stealth" regulatory reform bill:47 Title II of the Unfunded Mandates Reform Act of 1995.48 That title codifies many of the analytic requirements that were contained in presidential executive orders from Carter through Clinton. The statute, however, makes a number of these requirements considerably more burdensome. In particular, it requires coordination and consultation with state, local, or tribal governments which might be affected by regulation and the inclusion of a summary of their comments in the rationale for any proposed or final rule.49 In addition, the agency must identify and consider a reasonable number of

46. See Mashaw, supra note 35, at 190-93.
49. Id. § 1533.
regulatory alternatives and "select the least costly, most cost-effective or least burdensome alternative."\textsuperscript{50}

While Title II requires that agencies report their compliance with its mandates to the Congress and to the Office of Management and Budget ("OMB"),\textsuperscript{51} Title IV of the Act provides for judicial review of compliance.\textsuperscript{52} Judicial review is limited to the procedural requirements of the Act and does not seem to contemplate review of the agency's substantive analysis of costs, benefits, or alternatives. However, the APA does contemplate substantive review of anything included in the rule-making record. And, contemporary proposals to amend the APA would, as we shall see below, add considerable legal leverage to these analytic demands.

Yet more analytic requirements were appended to the reauthorization of the Paperwork Reduction Act of 1995 in its amendments.\textsuperscript{53} Moreover, those amendments overruled \textit{Dole v. United Steelworkers of America},\textsuperscript{54} thus requiring that agencies receive OMB authorization to impose any information requirement, even when it is for the purpose of giving information to persons outside of the government. In short, the OMB is now authorized to second guess any agency's decision to use information as a regulatory technique.

Further regulatory reform is contemplated by the congressional leadership. The flavor of current thinking is exemplified by the "discussion draft" version of a bill introduced into the Congressional Record by Senator Dole and is based on his prior "Comprehensive Regulatory Reform Act of 1995" (section 343).\textsuperscript{55} Although the formal version of these proposals was stalled by a Democratic filibuster that narrowly survived a cloture vote,\textsuperscript{56} the Dole Bill suggests the thinking of the Republican majority and is the likely platform on which further efforts at regulatory reform will be built.

The Dole Bill would amend section 553 of the APA to make "informal" rulemaking procedure considerably more onerous.\textsuperscript{57} Among other things, it elaborates the material that must be in proposed and final rules, including a demand for the solicitation and consideration of

\begin{itemize}
  \item 50. Id. \S 1535(a).
  \item 51. Id. \S 1535.
  \item 52. Id. \S 1571.
  \item 54. 494 U.S. 26 (1990).
  \item 56. Benenson, \textit{supra} note 1, at 2159.
  \item 57. 141 CONG. REC. S8795-96 (daily ed. June 21, 1995).
\end{itemize}
alternative proposals from persons outside the agency in order to achieve the objectives of the rulemaking process in a less burdensome manner.\textsuperscript{58} Agencies must respond to these and all other comments on the proposed rule and explain how the "factual conclusions upon which the rule is based are substantially supported in the rule-making file."\textsuperscript{59} A number of the exceptions to the requirements of informal rule-making in section 553 are eliminated.\textsuperscript{60}

Section 706 is also amended to add a new basis for holding unlawful and setting aside agency action; that is, when a rule is "without substantial support in the rulemaking file, viewed as a whole, for the asserted or necessary factual basis, in the case of a rule adopted in a proceeding subject to Section 553."\textsuperscript{61} These requirements come very close to imposing on all agencies the peculiar rulemaking process that is credited with putting the Consumer Product Safety Commission out of the rule-making business.\textsuperscript{62}

But the Dole proposals go even further. They require an extensive risk characterization and risk assessment process for all major rules that regulate health, safety, or the environment.\textsuperscript{63} They would mandate cost/benefit analysis for all major regulations and require review of all existing regulations using this same analytic technique.\textsuperscript{64} With some exceptions, agencies are mandated to adopt the most cost-effective rule available.\textsuperscript{65} Any cost/benefit or risk assessment analysis must be summarized in the file of the rule-making proceeding and becomes a part of the factual basis subject to review by the judiciary.\textsuperscript{66} And, lest agencies fail to perform their required functions under the Regulatory Flexibility Act, the procedural and analytic requirements of that act are subjected to judicial review as well. Truth in packaging would require that this bill be titled "The Administrative Gridlock, and Lawyers and Economists Relief Act of 1995."

\textsuperscript{58} \textit{Id.}
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} See 5 U.S.C. § 553 (1994).
\textsuperscript{61} 141 CONG. REC. S8803 (daily ed. June 21, 1995).
\textsuperscript{63} 141 CONG. REC. S8800 (daily ed. June 21, 1995).
\textsuperscript{64} \textit{Id.} at S8800-01.
\textsuperscript{65} \textit{Id.} at S8802.
\textsuperscript{66} \textit{Id.}
There are many details and nuances to the Dole proposals, and they seem unlikely to pass without amendment. The basic idea, however, is not hard to grasp. While arguably reinforcing the accountability, reasonableness, and procedural fairness of administrative policymaking, these "regulatory reform" proposals are designed to stall and derail many rule-making efforts. They take some of the unfortunate tendencies of contemporary American administrative law to their logical conclusions. A legal regime that critics like Robert Kagan have characterized as exalting "adversarial legalism" over effective administration is opened up to yet further legal wrangling. If something resembling these "reforms" is passed, administrative legality will be in no danger, but effective administrative governance may warrant listing in the catalogue of endangered species. Put in terms of the history of the development of American administrative law, we might say that Congress will have finally overridden President Roosevelt's veto of the Walter Logan Act. Proceduralism backed by judicial review will have triumphed over the administrative state.

On the other hand, this use of law to defeat law-making may ultimately undermine administrative law itself. Two alternative scenarios seem plausible. If the programs that are crippled by these "reforms"—importantly the health and safety programs that must regulate by rules—retain substantial public support, then legal technicality will eventually come to be seen as the enemy of effective governance. And, in some future counterreformation, process fairness and rationality review may well be ignored in the interest of regulatory efficacy. In some new New Deal, administration will triumph over law.

Alternatively, the new hyperlegalism may remain, but be honored mostly in the breach. Many agencies can avoid using the regulatory techniques that are to be "reformed." Agencies such as the Food and Drug Administration, the Federal Communications Commission, or the Federal Energy Regulatory Commission, with broad licensing, certification or rule-making authority can control whole industries without ever issuing a single regulation. The Securities and Exchange Commission and the banking regulatory agencies can probably be equally effec-

68. Commentators report that this process is already well under way. See generally Michael Asimow, Non-Legislative Rulemaking and Regulatory Reform, 1985 DUKE L.J. 381; Robert A. Anthony, "Well, You Want the Permit, Don't You?": Agency Efforts to Make Nonlegislative Documents Bind the Public, 44 ADMIN. L. REV. 31 (1992).
tive through threats of prosecution, even raised eyebrows. The losses then will be in the form of openness, consistency, and, perhaps, rationality—precisely the values that administrative law has sought to protect. Discretion will be exercised, but it will be informal and hidden because the processes of formal action have become too legalistic to be utilized.

V. Conclusion

Readers of the preceding pages will certainly have noticed that the executive and legislative branches of the federal government have remarkably different ideas about what is needed to make administrative governance more responsive to the will of the people. The executive exalts efficacy seemingly heedless of its effect on legality. The Congress exalts legality precisely to destroy efficacy. That the two institutions are at cross purposes is not surprising. As I noted earlier, this results not only from partisan ideological differences, but because of a long-standing institutional competition built into our constitutional structure.

An optimistic vision of the separation of powers might suggest that this competition will end in a compromise: the ultimate resolution will be some moderate but consequential system of legal control that nevertheless permits effective governance.

But this optimistic vision may well be naive. The current executive neglect and congressional abuse of administrative law seem to have a negative form of synergy. Apparently agreeing only that government should be smaller, the combined activities of these political branches seem designed to ensure even higher levels of incompetence and illegality. Congress is bent on adding “red tape” at least as fast as the executive proposes to eliminate it. Moreover, the new “red tape” is backed by enforceable legal demands for compliance. But, with a radically downsized labor force, particularly in the staff positions necessary to meet the new regulatory reform requirements, agencies are unlikely to be able to act either effectively or legally.

Administrative law has always seemed to walk a fine line between impertinence and irrelevance. Impertinence because it risked delaying, deflecting, or derailing needed public action. Irrelevance because notwithstanding its claims to ensure legality, administrative discretion remained ubiquitous. Striking the proper balance between legality and efficacy has never been easy. It has motivated administrative law’s constant reform efforts over at least the last six decades. While arguably
within that continuing reform tradition, current movements in Con-
gress and the Executive Branch do not, in my judgment, promise much
assistance in the serious task of ensuring effective governance under
law.
GOVERNMENT ACCOUNTABILITY IN THE TWENTY-FIRST CENTURY

Marshall J. Breger*

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I. INTRODUCTION

In his exhaustive study, Oriental Despotism, Karl Wittfogel con­cludes that the need for “large-scale and government-managed works of irrigation and flood control” was the reason for the totalitarian structure of many ancient and medieval eastern societies.1 Put other­wise, centralized state control was needed in order to organize, run, and protect large-scale government public works projects. This notion of “Asiatic despotism” was viewed by Marx as an exception to his laws of economic development.2 Under “Asiatic despotism” it is the technologi­cal imperative, rather than the economic “mode of production,” that

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determines the structure of society and need for a strong, overbearing state.\(^3\)

The notion that technology necessitates bureaucracy and that bureaucracy would inevitably lead to an overreaching state was a popular one in the "short" twentieth century—the years from the outbreak of the First World War to the collapse of the USSR.\(^4\) Modern (meaning before the fall of the Berlin wall) Marxist scholars recognized the dangers inherent in what some termed the *bureaucratisation du monde*.\(^5\) Liberals prophesied that a knowledge-based elite, be they scientists or engineers, were taking over.\(^6\) Conservatives bewailed the advent of "The Technological Society" with its concomitant loss of faith.\(^7\) Many have accepted the inevitability of continued bureaucratic centralization, as evidenced by the title of a recent law review article: *The Rise and Rise of the Administrative State*.\(^8\)

In this short paper I hope to point out two aspects of twenty-first century political life that relate to the challenge of ensuring government accountability. The first point relates to how advances in computer and media technology increase the potential of government accountability and how these technological developments will increase implementation of the principle of subsidiarity, or, in the American context, devolution of political power to state and local governments. Second, I will address the impact of these developments on administrative law in the next century.

II. TECHNOLOGY AND GOVERNMENT ACCOUNTABILITY

Recently both futurists and students of democracy have begun to

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3. *Id.; see also* Marian Sawyer, *Marxism and the Question of the Asiatic Mode of Production* 41-46 (1977) (highlighting Marx's belief that Asian society's lack of private property ownership stems from the reliance on the government for "providing public works," including irrigation).


think about technological determinism in radically different terms. No longer does technological advance assume a more bureaucratic centralized society. Thus in *The Electronic Republic*, Larry Grossman has argued that:

> This is the first generation of citizens who can see, hear, and judge their own political leaders simultaneously and instantaneously. It is also the first generation of political leaders who can address the entire population and receive instant feedback about what the people think and want. Interactive telecommunications increasingly give ordinary citizens immediate access to the major political decisions that affect their lives and property.9

This means that technology can be used to make governments more accountable. The very same technology that is feared by technoludites10 and is the cause, so Marxists say, of “Asiatic despotism” also contains the potential for the kind of devolved (and involved) *demos* that conservatives support as well. Now, scholars like Michael Fitts suggest that too much knowledge can be bad for democracy.11 I incline, however, to the opposing view that increased information availability may in fact “reconnect” American voters to the political process and help solve this country’s problems with low voter turnout.12 Regardless of one’s views regarding the appropriate level of information availability, the emerging electronic republic, however, “brings enormous political leverage to ordinary citizens.”13 In this regard, technology empowers citizens by providing them with a playing field in which they can compete with professional lobbyists and politicians.

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10. See, e.g., Kirkpatrick Sale, *Rebels Against the Future: Lessons for the Computer Age* (arguing that “a world by the technologies of the industrial society is more detrimental than beneficial to human happiness and survival”); see also Michael Pellechia, *A Fascinating Look at Folks Rebellling Against the Future*, *Star Trib.* (Minneapolis), June 9, 1995, at 2 (comparing Sale with the Luddites of the Industrial Revolution).
11. See Michael A. Fitts, *Can Ignorance Be Bliss? Imperfect Information as a Positive Influence in Political Institutions*, 88 Mich. L. Rev. 917, 920 (1990) (contrasting Fitts’s argument with the traditional economic ideal of perfect information). This approach reminds one of the political scientists of the 1950s who argued that low voting rates reflect a healthy democracy in that people are not so unhappy that they feel compelled to vote. See Tom DeLuca, *The Two Faces of Political Apathy* 78 (1995).
12. See Ruy A. Teixeira, *The Disappearing American Voter* 154-58 (1992). This study of voting behavior suggests that a core cause of low turnout rates in American elections is that voters are not motivated. See id. at 57. One solution the author proposes is to make the voter feel more a part of the political process. See id. at 148-51. This could be done through the greater availability of information. See id. at 158-62.
A. Accountability Through Openness in Government

One distinctly American approach to ensuring government accountability has been a bias towards openness in government. This is best expressed through the Freedom of Information Act principle that, absent specific statutory exemptions, one should presume a general right of access to government documents. This bias towards openness recognizes Max Weber's insight that secrecy is a way that bureaucratic elites maintain both legitimacy and power. Open government is the way for citizens to control this "sociology of domination."

There can be no doubt that the task of maintaining openness in government becomes far easier in the computer age. For one, twenty-first century technology makes government disclosure easier and more efficient. Given that computer tapes are clearly "documents" under the Freedom of Information Act, the possibility of widening the ambit of government disclosure inexpensively becomes a real possibility.

Further, given the present state of computer technology, as electronic filing predominates, such document requests become simple tasks. Not only does ease of access improve—so does the quality of the information accessed. Today, if asked for file references on Jones, a government agency is likely to produce the file on Jones (and specific cross-references) rather than all the instances in which references to Jones appear in a database regardless of file title. This is understandable, as the manpower required to cross-check files in any systematic way would be inordinate. But with existing information retrieval technologies, such reference checks become simple tasks, as the subjects of Nexis database searches often learn to their discomfort. It is now possible to use hypertext to link files and documents that would otherwise take much more time to search and retrieve.

At the same time, technology makes it simpler for citizens around


16. Id.

17. Long v. IRS, 596 F.2d 362, 365 (9th Cir. 1979) (holding that "FOIA applies to computer tapes to the same extent it applies to any other documents"), cert. denied, 446 U.S. 917 (1980).
the country to be aware of agency regulations and to participate in agency rulemakings. Henry Perritt argues that information technology can be a tremendous help to the administrative state.\textsuperscript{18} Devices such as electronic bulletin boards and e-mail could facilitate the peaceful resolution of disputes in either the adjudicative or rule-making context.\textsuperscript{19}

The standard argument, of course, is that participation in agency rulemaking (as an example) is limited to those interest groups who can afford to participate in "inside the Beltway" games with lobbyists and lawyers. Ordinary citizens, it has been argued, cannot compete and in many instances do not even know about regulatory issues until they have been resolved one way or another. The classic liberal response, of course, is that public interest lawyers are the citizens' paladins; they read the Federal Register daily and act as citizen-surrogates. One of the reasons behind passage of the citizen-intervenor sections of the Magnuson-Moss Warranty Act\textsuperscript{20} in the 1970s was the perceived need for local public interest lawyers to be paid to come to Washington to represent local interests in FTC rulemakings.\textsuperscript{21}

Technology, however, may well make that approach obsolete. Modems and CD-ROMs make the Federal Register available in Boise, Idaho and Butte, Montana. Lexis and Westlaw make agency regulations and precedents available as well. Indeed, some agencies like the Nuclear Regulatory Commission have begun to use electronic filing as a primary tool in certain regulatory proceedings.\textsuperscript{22}

The SEC, for instance, uses a system which requires corporations to file several required documents electronically.\textsuperscript{23} Taxpayers are also able to file returns electronically with the IRS.\textsuperscript{24} These are just examples of what is possible for filing periodic reports required by any number of agencies. This electronic filing not only benefits the reporting


\textsuperscript{19} See id. at 1012.


\textsuperscript{21} See S. CONF. REP. No. 1408, 93d Cong., 2d Sess. 36 (1974), reprinted in 1974 U.S.C.C.A.N. 7755, 7768 (considering the payment of counsel to represent interests which would otherwise not be heard).


\textsuperscript{23} See 17 C.F.R. § 232.10-232.103 (setting forth the application and requirements of the SEC's electronic filing program, EDGAR).

\textsuperscript{24} See, e.g., Anne Willette, \textit{IRS Says PC Filers Get Quicker Returns}, USA TODAY, Feb. 8, 1996, at 1A.
entity, but also the citizen seeking access to the information. Rather than filing and waiting for a FOIA request, one can simply log onto a computer and download publicly available information from home.

Computer technology has also assisted government accountability by significantly empowering the “fifth estate” in promoting openness in government. With the growth of databases like Nexis and Westlaw, politicians can no longer change their views to suit their audience without their inconsistencies being revealed—the database tells all. Similarly, rookie reporters can gain immediate expertise through electronic data searches, turning otherwise puff interviews into killer interrogations. Technology, then, gives citizens the information they need to compete with professional lobbyists; it gives people on the geographical and political periphery the information resources required to compete with those in the center.

B. Accountability Through Direct Democracy

According to traditional voting theory, voter participation is said to serve several important functions in the operation of a democratic system. First, high rates of participation legitimize the government’s power to rule. Second, participation is a way to empower the average citizen. Third, informed participation in the political process has been viewed as a way to stimulate the intellectual development of the citizenry. These benefits, however, are only present with high rates of participation. This paper argues that technology, besides promoting access to the data needed to make democracy work, will also increase government accountability by promoting mechanisms for direct democracy. With advances in technology, interaction with the government becomes easier and, consequently, more citizens take part. Futurists


27. Id. at 774-75.

28. Id. at 775-76.

29. See Jeffrey B. Abramson et al., The Electronic Commonwealth (1988) (examining methods by which it becomes easier for citizens to affect their leaders, and easier for leaders to interact with their constituency); Edwin Diamond & Robert A. Silverman, White House to Your House: Media and Politics in Virtual America 3, 91-93 (1995) (exploring the numer-
have discussed this possibility for years. Some have spoken of voting on candidates and issues from your TV set. Others, like Ross Perot, have spoken of electronic town meetings.

Recently, we have had live examples of this hope that technology can be applied to effectuate democratic principles:

- Alaska has created a Legislative Teleconferencing Network and a Legislative Information Network. The Teleconferencing Network enables citizens in remote areas to appear before the Alaskan assembly. The network also allows elected representatives to hold tele-discussions with their constituents, and the Information Network allows citizens to send messages to their legislators.

- Building on a program developed in the 1980s in Hawaii, Jim Fishkin has established a National Issues Convention, where a random group of citizens will vote on issues, break into discussion groups, and reconvene to vote again. He argues that this process of informing voters enhances the operation of democracy, as the public too often votes without a full understanding of the issues at stake. Fishkin intends to use this program in the run-up to the 1996 election.

- The city of Santa Monica has a public access computer network that allows its residents to exchange electronic mail with the city (managers are required to respond within 24 hours) and conduct transactions such as acquiring building permits and licenses.

- Numerous World Wide Web home pages now allow citizens to access
information about state and city agency activities through the Internet. These home pages have proliferated over the last year at the federal level and have been a special project of both the White House and House Speaker Gingrich.41

Of course, there are real dangers here. Hannah Arendt has written that the rise of totalitarianism often is accompanied by the destruction of mediating institutions, leaving citizens atomized to face the awesome power of the state.42 As William Kornhauser has said: "Mass society is objectively the atomized society,"43 available for manipulation by the state. Thus far, however, the political fruits of technological change, be it C-Span and Larry King, or the talk groups on the Internet, appear to have promoted pluralism in the political system, even while bringing citizens closer to the decision-making process.

C. Accountability Through Devolution

The principle of devolution, often called subsidiarity in the European Union context,44 is based on the notion that decisions made closest to those affected are likely to be the best informed and certainly the most democratically based. It suggests that actions to implement legitimate government objectives should be taken at the lowest level of government capable of effectively addressing the problem.

This is not, of course, a new idea. The Anti-Federalists believed that the effort to extend a single republic in the United States would result in a loss of confidence in the legislature by the citizenry.45 As former Senator Malcolm Wallop noted in a recent law review article, there is a direct connection between the centralization of power and governmental accountability.46 But with the advent of the New Deal

42. See HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 460 (1966) (stating that totalitarian governments "destroy . . . all social, legal and political traditions of the country").
45. See JACKSON T. MAIN, THE ANTIFEDERALISTS: CRITICS OF THE CONSTITUTION 129-30 (1974) (noting that this concern was a core principle of antifederalist thought); THE ANTIFEDERALIST No. 14, at 36-38 (George Clinton) (Morton Borden ed., 1965) (expressing the belief that a republican system required a small territory, and that a centralized government was inadequate to represent the interests of such a geographically diverse population).
and the growth of the administrative state, the constitutional principles of federalism, our American version of subsidiarity, seemed to have become moribund. Nonetheless, there is significant evidence that the tide has turned.\(^{47}\) Both the Republican Congress and Bill Clinton have spoken about the need for federalist solutions such as block grants to the states for programs like welfare and law enforcement.\(^{48}\) Furthermore, the revival of Tenth Amendment scholarship and several recent Supreme Court cases bear witness to this trend.

For the first time in fifty years, the Court in the *Lopez* case struck down a statute on Commerce Clause grounds.\(^{49}\) In *Gregory v. Ashcroft*,\(^{50}\) Justice O'Connor found in the Tenth Amendment a rule of statutory interpretation requiring a heavy burden of showing that Congress intended to overrule the states’ "substantial sovereign power under our constitutional scheme."\(^{51}\) In *New York v. United States*, Congress had passed legislation requiring the states to dispose of low-level radioactive waste.\(^{52}\) The Court struck down the federal law, and, in her majority opinion, O'Connor asserted that "[s]tate governments are neither regional offices nor administrative agencies of the Federal Government."\(^{53}\)

It is more than simply pedantry to note that this focus on devolution is an expression not only of conservative Republican politics, but of "New Left" ideology as well. As it began in the sixties, the New Left, was committed to the "increase [of] democracy in the economic, political, and cultural life of the nation."\(^{54}\) Participatory democracy was an "early emphasis" of the New Left, before the movement became a more radical, revolution-oriented group.\(^{55}\) For example, in his book

\(^{47}\) Still, there is a view that state and local governments are not ready to handle newly devolved responsibilities. See Rochelle L. Stanfield, *Holding the Bag?*, NAT'L L.J., Sept. 9, 1995, at 2206 (arguing that these more accountable government units lack the experience and know-how to run the programs currently being considered for transfer from the federal government).

\(^{48}\) See *Cops and Commerce*, U.S. NEWS & WORLD REP., Dec. 11, 1995, at 26 (speculating that Clinton and Congress will agree to block grants for police spending); Elizabeth Shogren, *Clinton, as Promised, Vetoes GOP Welfare Bill*, PITT. POST-GAZETTE, Jan. 10, 1996, at A7 (reporting that Clinton accepts the structure of the welfare reform proposal—block grants to the states).


\(^{51}\) Id. at 461.


\(^{53}\) Id. at 188.


\(^{55}\) See JAMES L. WOOD, NEW LEFT IDEOLOGY: ITS DIMENSIONS AND DEVELOPMENT 6-7 (Sage Professional Papers in American Politics No. 04-022, 1975).
Reveille for Radicals. Saul Alinsky sets forth the model "By-Laws of the People's Organization." This proposed institution devolves power to the local level, guaranteeing representation for "any organization representative of the people . . . in that area." "All power to the people" may be New Left language, but it also reflects the views of the new conservative populism. Both believe in devolution to the most immediate governing authority, the reduction of bureaucracy, and increased government accountability.

Recent years have shown innumerable examples of how devolution to the states and privatization have created not only a more efficient government but one far more accountable to the public. These examples of devolution include recent efforts to promote "block grants" to the states to fulfill welfare responsibilities, as well as efforts to shift various environmental responsibilities to the states. Examples of privatization of hitherto governmental functions include experiments with school choice in Wisconsin and Pennsylvania, and privatization of hospital systems in New York.

At the same time, we have seen a proliferation of neighborhood associations such as residential community associations (130,000 of which regulated the lives of over 30 million residents by the end of the 1980s), as well as an explosion of special taxing districts parallel to

57. Id. at 221-28.
58. Id. at 222.
63. Id. at 314-15; see also infra notes 101-106 and accompanying text.
64. Id. at 42.
65. Clayton P. Gillette, Courts, Covenants, and Communities, 61 U. Chi. L. Rev. 1375, 1375 n.1 (1994). This article sketches some of the legal issues inherent in residential community associations. It focuses on the extent to which neighborhood associations can use "covenants" to require uniformity in the lifestyle of members.
local government, such as the 42nd Street Development Association, through which business is better able to meet its specific needs.66

The modern distrust of bureaucratic and managerial expertise (reflected, as Jerry Mashaw suggests, in the National Performance Review’s effort to slim down and “flatten” the federal government67) will not stop with the “reinventing government” effort of Vice President Gore. Instead of this Gore effort to make government more efficient, the focus of Newt Gingrich and congressional Republicans has been to review what activities are the appropriate functions of government—federal and state. Thus, there will be a need to develop criteria to look at various levels of federal, state, and city government and determine what core functions are best suited to each. There will be a need as well for criteria to determine when government is being inappropriately overextended. As Cleveland Mayor Michael White, a Democrat, has noted:

The city of Cleveland operates a convention center, two golf courses, and a host of other assets which would make a private-sector operator a profit—but we operate them at a loss. We are probably the only operator of parking lots in our area who doesn’t know how to make a profit on parking. Is it the height of heresy to suggest that companies who run convention centers, manage jails, and manage parking lots can deliver our constituents a better service at a better price?68

It is the burden of my argument that technology will make devolution more likely in the twenty-first century. That is to say, the shift of government responsibility to smaller government units can, and will, work far more successfully due to technology. In part, technology fosters decentralization because computer networks and videoconferencing permit interactive dialogue between persons on the periphery, thus reducing the necessity of control by the center. In part, the fact that technology flattens middle management empowers line workers and allows for a wide variety of choices within the administrative state. For the educational system to work, you need not have every student in every classroom in France following the exact same lesson plan each and every day. The same should be true with regulatory activity in these United States.

68. EGERS & O'LEARY, supra note 59, at 41.
III. ACCOUNTABILITY AND THE ADMINISTRATIVE STATE

A. The Standard Paradigm

The central theoretical issue for administrative law in the twentieth century has been the drive to curtail agency discretion both through formalized adjudication procedures and judicial review. This fear of empowering bureaucrats with flexibility reflects a traditional concern that the administrative state, if unchecked, would likely act arbitrarily and capriciously.

Historically, administrative law's effort to check discretion by procedure has encrusted government with inbuilt inefficiencies. Proceduralism leads to defensive government, in which the focus is on ensuring that improprieties do not occur in public service. As Jerry Mashaw has shown in his studies of the welfare state, proceduralism puts a premium on fairness. It also leads to centralized bureaucracy. This, of course, is the purpose of much administrative procedure—to ensure neutrality in the application of government power.

Let me give two brief examples. OSHA inspectors were historically understood to have no discretion in issuing citations when they saw cause for complaint. Any decisions to reduce penalties or waive prosecution had to be made by attorneys for OSHA (in the Solicitor's office). This lack of discretionary authority probably reflected industry's fears that OSHA inspectors possessed too much authority. The result has been continual complaints about the regulatory nightmare of OSHA. Under pressure from the Republican Congress, the Clinton administration has found that the OSHA inspectors do have some discretionary authority and have started to develop waiver programs for companies in substantial compliance or who are in a cooperating mode.

Similarly, much of the federal procurement process has been designed to use procedural safeguards to protect against favoritism and


70. See 29 U.S.C. § 658(a) (1988) (stating that the inspector, upon finding a violation, "shall . . . issue a citation to the employer") (emphasis added); Benjamin W. Mintz, OSHA: History, Law, and Policy 358, 482 (1984). Mintz notes that OSHA is "based on the principle that compliance inspections . . . are followed by inspections and penalties." Id. at 358. He notes that OSHA has interpreted the "shall" language in the statute quoted as "mandatory, thus precluding on site, sanction-free consultation by OSHA representatives." Id. at 482 n.1.

corruption. But as Steven Kelman, in the Administration of the Office of Federal Procurement Policy, has pointed out:

We should deal with corruption directly by very strict criminal sanctions. We should put corrupt people in jail for a long time. But you don’t want to make the system so inefficient on a daily basis that it make [sic] the lives of the 99.5 percent of honest people impossible. You don’t fight corruption by creating an awful procurement system.72

New efforts at procurement reform are starting to take this point into consideration.73 Allowing federal agencies to buy “off the rack” and simplifying how the government specifies the goods and services it wants by streamlining the writing of procurement specifications not only saves millions of dollars in employee time, but also empowers line employees to use their flexibility in solving problems. However, while these reforms will increase efficiency, they may well increase the possibility of unfair results in specific instances.

Some of the tensions in empowering bureaucracy can be seen in Philip Howard’s recent best seller, The Death of Common Sense.74 Howard cites numerous examples of foolishness by government bureaucrats. He points to the example of Mother Theresa, whose missionaries of charity set aside $500,000 to renovate an abandoned building for the homeless in the Bronx.75 The nuns did not believe that modern conveniences such as the dishwasher, washing machine, or elevator were necessary.76 The project ran aground on the city’s demand that they spend $100,000 for an elevator which they would never use.77 After two years Mother Theresa wrote the city that “[t]he Sisters felt they could use the money much more fruitfully for soup and sandwiches,” noting that the episode “served to educate us about the law and its many complexities.”78

While Howard’s complaint could have been written by Newt Gingrich, Howard offers a different solution. Although a severe critic of the bureaucratic process, he does not propose fewer rules or no rules; nor does he propose more detailed rules and more aggressive judicial

72. EGCERS & O'LEARY, supra note 59, at 143.
73. See Kathleen Day, Streamlining Procurement Begins Phase 2, WASH. POST, Feb. 9, 1996, at A19.
75. Id. at 3.
76. Id. at 4.
77. Id.
78. Id.
review. Instead, his remedy would empower bureaucrats by giving them more responsibility (or in administrative law terms more discretion) to take matters into their own hands. 79 He wants to give the bureaucrats flexibility to waive rules or not to waive rules, to accept individuated compliance solutions, and ignore the letter of the law to accomplish its "spirit." 80

Tracking Howard, the state of Florida has proposed a repeal of at least half of Florida's 28,750 rules by the end of the 1996 legislative session in favor of guidelines that will devolve greater discretion on agency officials. 81 These efforts, however, have achieved only limited success, because the governor has vetoed a bill to reform the rule-making process, while still searching for superfluous rules. 82 The Canadian Parliament has before it legislation that allows persons subject to regulations to propose alternative compliance plans that still meet the "regulatory goals of the designated regulation." 83

In contrast, much of the regulatory reform effort by Republicans over the last year has reflected a fear of empowering bureaucrats to do just about anything without checking procedures. Thus, the regulatory reform bill introduced by Senator Bob Dole looked to the judiciary to provide accountability for bureaucratic decision making, a somewhat unusual approach for avowed opponents of judicial activism. 84 The various iterations of this bill and its Contract with America analogues offer extensive, some say innumerable, opportunities for judicial review as a way of checking agency action. They provide review, for example, of the substance as well as the form of agency cost/benefit analyses and agency decisions to characterize rules as "major" or "minor." 85

These legislative proposals also attain accountability by making use of "sunset" provisions, in which a regulation loses force after a certain number of years and must be reauthorized, and "look-back" provisions, by which a member of the regulated community can ask or require an agency to review the efficacy of a particular rule at any time,

79. Id. at 180.
80. Id.
82. See Craig Quintana, Chiles Scuttles Regulatory-Reform Bill, ORLANDO SENTINEL, July 13, 1995, at C1 (reporting the governor's claim that his agencies have identified nearly 3,400 rules for repeal, and agencies controlled by the Florida Cabinet have identified another 2,600).
85. Id. (proposition 5 U.S.C. §§ 622-625).
perhaps even when the rule is about to be enforced on that party.86 Further, the Dole bill not only allows for more extensive judicial review of agency action, it would also require that proposed agency regulations be brought back to Congress and "laid on the table,"87 where Congress would have the opportunity to enact a "two-house" veto, clearly constitutional even under Chadha.88 Indeed the regulatory reform enthusiasts so distrust bureaucrats that they would codify executive branch review (and control) of agency rulemaking that includes peer review by outside scientists (including industry scientists) of the findings of agency experts who conduct cost/benefit analysis.89

In my view, technology will increase the opportunities for enlarged yet "structured" discretion. It allows Congress to be clearer in its goals and, in turn, to empower administrators with the flexibility needed to achieve those goals. We must remember that administrative courts first developed because of the need to make decisions heavily laden with changing social science facts. We now have coherent ways to master changing factual data. Thus, the opportunities for Congress to "double-check" regulatory goals will make it easier to accept a broader range of discretion by bureaucrats.

B. Emerging Issues in Administrative Law

If my views about technology and devolution are accurate, we are likely to see a very different set of issues facing the regulatory process. We will see, for example, a rebirth of interest in state and local administrative law, a subject shockingly ignored by most elite academics (the exceptions, of course, being Arthur Bonfield,90 Harold Levinson,91 and

86. See S. 343, 104th Cong., 1st Sess. § 4(a) (1995) (which includes a "look-back" provision as part of the proposed Comprehensive Regulatory Reform Act).
87. Id. (proposing 5 U.S.C. § 801).
91. See, e.g., Harold Levinson, Making Society's Legal System Accessible to Society: The Lawyer's Role and Implications, 41 Vand. L. Rev. 789 (1988); Harold Levinson. Legislative and
Michael Asimow\(^{92}\). I say shocking because in the last twenty-five years some of the most creative innovations in administrative law have been at the state level. The systems to provide centralized review of proposed state regulations in Arizona and California, which are, in many respects, far more sophisticated than OMB’s approach, are but one example.\(^{93}\)

It is hard for administrative lawyers to accept subsidiarity since, of course, we are in the business of rationalizing, not eradicating, centralized power. Nonetheless, the fact is that the devolution of government creates numerous issues of administrative law, particularly if one’s goal is devolution with accountability. Some of these issues are presented below.

1. **Issues of Preemption**

In the past twenty years, the prevailing jurisprudential notion has been that federal preemption is a doctrine that should be implemented in an expansive spirit.\(^{94}\) To do otherwise would be to condemn regulated business to a skein of 50 different state rules. Further, lacking any central control, there would be a “race to the bottom” in creating and enforcing regulations. Rick Revesz has convincingly shown that this is not true regarding state environmental regulation\(^{95}\) and that there is reason to believe this analysis would prove correct in other regulatory areas as well.\(^{96}\)

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\(^{93}\) See *ARIZ. REV. STAT. ANN. §§ 41-1051—41-1057 (Supp. 1995)* (establishing a governor’s regulatory review council); *CAL. GOV’T CODE §§ 11349-11349.6 (Deering Supp. 1996)* (establishing a procedure for review of proposed regulations).


\(^{96}\) *Id.*, a 1252-54 (suggesting that similar application of “race to the bottom” analysis is utilized ‘as the area of corporate law’).
2. Private/Public Cooperation

As Daniel Boorstin has suggested, Americans are a nation of joiners.97 Alexis de Tocqueville points out that Americans make associations to give entertainments, to found seminaries, to build churches, to diffuse books, to send missionaries to the antipodes; in this manner they found hospitals, prisons, and schools... Wherever at the head of some new undertaking you see the government in France, or a man of rank in England, in the United States you will be sure to find an association.98

More and more, government is devolving social welfare functions from rigid state bureaucracies to charitable associations. These charitable associations range from Catholic Charities and the Jewish Federation to neighborhood associations cleaning up and protecting their local neighborhoods. Senator Daniel Coats has encouraged this approach by proposing a tax credit of up to $500 ($1,000 for joint filers) to individuals donating both time and money to social service provider charities, which undertake many of the welfare tasks hitherto pursued by the government.99 At least one recent iteration of the Dole welfare bill would allow religious institutions to receive federal monies for this purpose.100

Developing rules for private involvement in previously public functions will be a growth area for administrative law and a challenge for government accountability. The growth of private sector entities which fulfill public functions creates numerous issues for the traditional administrative law paradigm. Public procurement rules could strangle private sector procurement; yet issues of fairness and accountability cannot be ignored.

3. The Administrative Procedure of Privatization

As the private sector begins to take over formerly governmental functions, a large number of issues arise regarding whether these new

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100. S. 1120, 104th Cong., 1st Sess. § 102(a) (1995) (allowing states to contract with religious organizations "to provide services and administer programs").
entities are to be run by private or public sector rules.\textsuperscript{101} Issues of tort liability, sovereign immunity, and procurement policy are affected by the choice between public and private regimes.

A glimpse into the kinds of issues to be addressed can be seen in an example close to Pittsburgh—the Wilkinsburg school privatization experiment.\textsuperscript{102} Two of the many issues related to that experiment are of particular interest to administrative lawyers: the selection process for contractors and the status of the "public" (or at least formerly public) work staff.

In the Wilkinsburg case, the school board contracted out an entire school's teaching function to a private company.\textsuperscript{103} However one views the result, the selection process was open and transparent, with the school board sending out requests for proposals with no preconceived private bidder in mind.\textsuperscript{104} There was a level playing field. The school board then hired an arm's-length consulting firm to review and grade suitable bids.\textsuperscript{105} As these kinds of privatizations expand, the "law" of the selection process will become increasingly relevant.

As to jobs, some of the former "public" employees in Wilkinsburg were laid off as the new "private" company brought on its own managers and line staff,\textsuperscript{106} raising interesting questions about the nature of public employment. The administrative law of privatization will have to develop criteria for what responsibilities, if any, the formerly public companies will have to the existing workforce.

The recent phenomenon of the mixed public/private corporation provides still more confusion on the issue of what law to apply.\textsuperscript{107} In cases of federal government corporations and the Agency for International Development investment funds, there is no clear answer as to

\textsuperscript{101} Marianne Lavelle, Public Works Go Private, NAT'L L.J., Sept. 25, 1995, at 1 (noting that the privatization of public works raises the question of whether the entity is governed by private or public law).

\textsuperscript{102} See Monica L. Haynes & Roger Stuart, All is Quiet During First Day of Classes at Turner School, PITT. POST-GAZETTE, Sept. 6, 1995, at C1 (describing the circumstances of the Wilkinsburg school board's decision to privatize one of its elementary schools).


\textsuperscript{104} Id.

\textsuperscript{105} Id.


\textsuperscript{107} See Lavelle, supra note 101, at A1 (discussing some of the problems faced by privatized ventures, and the issue of what law to apply).
whether the entity is public or private. This raises important questions of accountability because, when public money is involved, the possibility of potential taxpayer liability must be addressed. This problem is not peculiar to the American system. Great Britain faces similar questions of classification and accountability with what it terms “quangos,” which are semiautonomous business units fulfilling what have historically been viewed as public purposes.

IV. CONCLUSION

The last hundred years of the University of Pittsburgh School of Law celebrated in this centennial have been largely the century of the administrative state. Many believe that the trajectory will continue indefinitely. Such a path, however, can only lead to statism, which is inconsistent, as Hayek has shown, with personal liberty. As this article suggests, the administrative state will face new challenges and take on new forms in the twenty-first century. Advances in technology and the increased devolution of governmental activity to cities, states, and the private sector will increase government accountability while still empowering agency officials with the discretion they need to do their jobs creatively and effectively. That is the structure of government accountability I believe our children will be talking about at the symposium for the 200th anniversary of the University of Pittsburgh School of Law. Certainly it is the structure of government accountability we should strive for.


111. See Friedrich A. von Hayek, The Road to Serfdom (1941).