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ADMINISTRATIVE LAW IN THE TWENTY-FIRST CENTURY

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I

INTRODUCTION AND HISTORY

My canvas is dauntingly broad, and I must perforce paint with broad strokes. I will focus on administrative law in relation to government regulation, broadly understood. I will first briefly summarize the central elements of administrative law in the United States over the past century and show how they carry forward, reconfigured, into our current era. I will then assess the emerging new methods for achieving regulatory goals in the face of growing administrative fatigue and the implications of those new methods for administrative law. I will conclude with a précis of the emerging international aspects of administrative law.

The Rise of Administrative Regulation

The century just concluded witnessed a dramatic rise in the scope and intensity of administrative regulation. Markets and other complex forms of private ordering generate enormous benefits, but also market inefficiencies and failures, abuses of economic power and position, environmental degradation, safety hazards, economic insecurity,

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dependency, and other systemic ills. In response to the demonstrated inadequacies of private and criminal law, legislatures have adopted extensive administrative programs to prevent these ills. Such programs resort primarily to the command-and-control method of regulation, under which government imposes detailed prohibitions or requirements on the conduct of individual actors: A bank must have certain minimum capital; a power plant may not emit more than a specified amount of particulate matter air pollution; we have to separate paper and metal from our other trash.

Today, almost every area of activity is subject to government regulation; our physical and economic security and well-being depend upon it. There is virtually no area of law practice—whether it be securities and finance, child welfare, taxation, international trade, housing, employment, or almost any other practice field—that does not involve administrative regulation. This is why, beginning this spring, NYU is requiring our first-year students to take a new course on the regulatory administrative state to ensure that all of our graduates have a basic grounding in statutes, regulations, and the legislative, administrative, and judicial processes of regulatory government. If this initiative seems long overdue, consider that Harvard still adheres to the basic common law curriculum established by Dean Langdell in the nineteenth century.

Administrative Law

In liberal democratic societies, administrative regulation is itself regulated by administrative law. This law defines the structural position of administrative agencies within the governmental system, specifies the decisional procedures those agencies must follow, and determines the availability and scope of review of their actions by the independent judiciary. It furnishes common principles and procedures that cut horizontally across the many different substantive fields of administration and regulation.

The traditional core of administrative law has focused on securing the rule of law and protecting liberty by ensuring that agencies follow fair and impartial decisional procedures, act within the bounds of the statutory authority delegated by the legislature, and respect private rights.¹ Here the function of administrative law is primarily negative:

¹ See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 *Harv. L. Rev.* 1667, 1671-76 (1975) (describing statutory and procedural limitations on agency action); Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 *Harv. L. Rev.* 1193, 1202-03 (1982) ("By creating private rights of defense, the traditional model of administrative law curbs official bias or arbitrariness in the enforcement process and thus promotes impartial treatment. At the same time, the system limits

to prevent unlawful or arbitrary administrative exercise of coercive power against private persons.

In recent decades, U.S. administrative law has also assumed affirmative tasks. Through new procedural requirements and approaches to judicial review, it ensures that regulatory agencies exercise their policymaking discretion in a manner that is reasoned and responsive to the wide range of social and economic interests affected by their decisions, including both the beneficiaries of regulatory programs and those subject to regulatory controls and sanctions.²

The Evolution of U.S. Administrative Law

To see where we are going, we must look at where we have been. U.S. administrative law over the past century successively developed five different models or approaches.

1. The Common Law Model

Our early administrative law relied primarily on common law actions by citizens against regulatory officials as a means for judicial review of administrative legality.³ For example, in a celebrated late-nineteenth-century Massachusetts decision, the owner of an allegedly diseased horse brought a common law tort action in damages against public health officials who had killed it, reasonably but mistakenly believing that it was diseased.⁴ The court, per Justice Holmes, rejected the officials' defense that a statute for abating nuisances authorized their action, construing the statute to authorize destruction only when an animal was in fact diseased.⁵

2. The Traditional Model of Administrative Law

Beginning in the late nineteenth century, legislatures created railroad commissions and other regulatory agencies to deal with the consequences of industrialization. Tort actions would have been an awkward method of reviewing their decisions. In response, courts and legislatures developed what I have called the traditional model of ad-

the power of government, maintains a well-ordered sphere of private liberty, and preserves the system of market exchange.”).

² See Stewart, *supra* note 1, at 1711-90 (describing and assessing emergence of “interest representation” model of administrative law); see also Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. Rev. 543, 556-64 (2000) (reviewing various theoretical conceptions of role of agencies in administrative process).

³ See John F. Duffy, *Administrative Common Law in Judicial Review*, 77 Tex. L. Rev. 113, 121-30 (1998).

⁴ *Miller v. Horton*, 26 N.E. 100 (1891).

⁵ *Id.* at 102.

ministrative law,⁶ under which agencies were required to conduct trial-type adjudicatory hearings before adopting rate orders or other regulatory requirements.⁷ Courts scrutinized an agency's fact-findings based on the hearing record and determined whether the imposed requirements conformed to statutory authority. The creation of these new bodies generated a democratic anxiety: How could their exercise of power be reconciled with democratic government? The traditional model's answer was to treat the agencies essentially as subordinate adjudicatory bodies that are subject to close statutory and judicial control.⁸ Administrative law functioned as a "transmission belt" to legitimate the exercise of regulatory authority by ensuring, via judicial review, that particular impositions on private persons had been statutorily authorized by the democratically elected legislature.

3. *The New Deal Model of Regulatory Management*

The New Deal Congress created a raft of new federal regulatory agencies and endowed them with very broad powers through open-ended statutes. This step intensified democratic anxieties to the point of crisis.⁹ The agencies were attacked as an unconstitutional "fourth branch" of government.¹⁰ While application of the traditional model might ensure that agencies acted within the bounds of their statutory powers, those bounds were so wide as to give agencies vast discretionary powers, creating a palpable democracy deficit and the threat of arbitrary power. The Supreme Court went so far as to strike down the National Recovery Act as an unconstitutional delegation of legislative power to agencies,¹¹ a step that it has not since repeated.

In his widely influential 1938 book, *The Administrative Process*, prominent New Deal administrator James Landis appealed to the notion of regulatory management by experts to resolve the criticisms of the New Deal agencies.¹² Landis equated regulatory officials to busi-

⁶ Stewart, *supra* note 1, at 1671-76.

⁷ See, e.g., *ICC v. Louisville & Nashville R.R. Co.*, 227 U.S. 88, 91-93 (1913) (explaining nature of hearing required by underlying statute in ICC rate setting).

⁸ Stewart, *supra* note 1, at 1675-76.

⁹ See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 *J.L. Econ. & Org.* 180, 191-92 (1999) (describing bipartisan concern in 1940s that unchecked agency action would unduly expand power and influence of executive branch).

¹⁰ See generally Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 *Colum. L. Rev.* 573 (1984) (describing efforts to justify delegation of legislative power to administrative agencies).

¹¹ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 542 (1935) (holding delegation of legislative power in section 3 of National Industrial Recovery Act unconstitutional); *Pan. Ref. Co. v. Ryan*, 293 U.S. 388, 430 (1935) (holding section 9(c) of National Industrial Recovery Act unconstitutional).

¹² James M. Landis, *The Administrative Process* 6-46 (1938).

ness managers: Market capitalism had broken down, and the task of regulation was to manage business or other sectors of the economy to restore their economic health and protect the public. These goals, he argued, were implicit in the New Deal statutes. Guided by experience and professional discipline, expert administrators would adopt measures to secure these public interest goals. By these means, the regulatory bureaucracy would, in Landis's words, "eternally refresh[] its vigor from the stream of democratic desires."¹³ There would accordingly be only a limited need and role for formal legal hearings or judicial review based on conceptions of private rights; such conceptions were inconsistent with the broad managerial discretion necessary to nurture economic productivity.¹⁴

In 1946 Congress enacted the Administrative Procedure Act.¹⁵ It, and administrative law in the United States for the next twenty years, reflected an uneasy accommodation of the traditional model of administrative law and the Landis vision of regulatory managerialism.

4. *The Interest Representation Model*¹⁶

Basic changes in administrative law were made in the late 1960s in response to three interrelated developments:

- a) Widespread acceptance of Ralph Nader's critique that regulatory agencies had failed to protect the public and were "captured" or otherwise dominated by regulated industry.¹⁷
- b) The rise of public interest law through the proliferation of new legal advocacy groups in environmental, consumer, civil rights, labor, and other fields.¹⁸

¹³ *Id.* at 123.

¹⁴ See A.B. Wolfe, *Will and Reason in Economic Life*, 1 *J. Soc. Phil.* 218, 238-39 (1936) (arguing that administrative state headed by experts might limit political democracy but would have salutary effect on economic efficiency).

¹⁵ Pub. L. No. 79-404, 60 Stat. 237 (codified as amended in scattered sections of 5 U.S.C.).

¹⁶ See Stephen G. Breyer et al., *Administrative Law and Regulatory Policy* 26-30 (5th ed. 2002).

¹⁷ See, e.g., Robert C. Fellmeth, *The Interstate Commerce Omission: The Public Interest and the ICC: The Ralph Nader Study Group Report on the Interstate Commerce Commission and Transportation* 311-25 (1970) (detailing role of industry influence in failure of ICC to regulate for public interest); James S. Turner, *The Chemical Feast: The Ralph Nader Study Group Report on Food Protection and the Food and Drug Administration* 1-4 (1970) (arguing that FDA's efforts are stymied by power of lobbyists, trade associations, and large corporations); see also Charles McCarry, *Citizen Nader* 217 (1972) (noting that Nader and his followers believe American life "is based on a straight trade—political power in return for business profits, and vice versa"); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 *Harv. L. Rev.* 421, 448-49 (1987) (describing phenomenon of "capture").

¹⁸ See generally *Public Interest Law: An Economic and Institutional Analysis* (Burton A. Weisbrod et al. eds., 1978).

- c) A new wave of environmental, health, safety, civil rights, and other social regulatory programs adopted by Congress as part of a “rights revolution.”¹⁹

In response, agencies shifted, often in accordance with congressional mandates, from case-by-case adjudication to rulemaking as a more efficient, explicitly legislative procedure for implementing the new, far-reaching regulatory programs.²⁰ Courts concluded that the right to participate in agency decisionmaking and to obtain judicial review should no longer be limited, as it had been under the traditional model, to regulated firms and extended these rights to the new public interest advocacy groups.²¹ Through a new form of “hard look” review of agency discretion, courts required agencies to address and respond to the factual, analytical, and policy submissions made by the various participating interests and justify their policy decisions with detailed reasons supported by the rulemaking record.²² The result was what I have termed an “interest representation” model that seeks to assure an informed, reasoned exercise of agency discretion that is responsive to the concerns of all affected interests.²³ The traditional model functioned as a brake on regulation. Public interest plaintiffs used the new model and the citizen-suit provisions in the new regula-

¹⁹ See, e.g., Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 24 (1990) (“The most notable set of initiatives since the New Deal period occurred during the 1960s and 1970s. This period marked a revolution in the category of legally protected rights—a revolution that built on and materially expanded the New Deal.”); Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 *Va. J. Int’l L.* 1, 15 (2002) (noting different regulatory goals of “rights revolution” agencies and New Deal agencies).

²⁰ For a discussion of agency choices between rulemaking and case-by-case adjudication and the limitations on those choices, see William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence over Rulemaking*, 54 *Admin. L. Rev.* 611, 616 (2002) (“Federal and State agencies are sometimes constrained in their discretion to impose rules of conduct on private parties by means of case-by-case adjudication.”).

²¹ See Stewart, *supra* note 1, at 1723-56. But cf. Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 *Harv. L. Rev.* 553, 567 (2001) (noting that “additional resources . . . make it possible for concentrated industry interests to participate in more proceedings than do dispersed consumer and environmental interests”).

²² See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Life Ins. Co.*, 463 U.S. 29, 42-43 (1983) (remarking that judicial review ensures that agency decisions are based on all relevant data and supported by satisfactory explanations); *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (concluding that agency decisionmaking must include disclosure of all information relied upon, responses to material comments, and reasoned explanation of action taken); *Scenic Hudson Pres. Conference v. Fed. Power Comm’n*, 354 F.2d 608, 620-21 (2d Cir. 1965) (noting that while courts will not substitute their judgment for that of agencies, judicial review polices agencies’ duty to consider all relevant facts in decisionmaking).

²³ See Stewart, *supra* note 1, at 1711-90; see also Breyer et al., *supra* note 16, at 26-30.

tory statutes as an accelerator to force agency adoption and implementation of regulatory programs.

5. *Analytic Management of Regulation*

At the very same time that the interest representation model was reaching full bloom, President Reagan in 1981 issued Executive Order No. 12,291, requiring agencies to perform cost-benefit analyses of proposed major regulations and alternatives.²⁴ These analyses, as well as agency compliance with the executive order, were made subject to review by the Office of Management and Budget (OMB) but not by the courts. This initiative reflected a very different view of agency failure than Nader's, namely that a largely uncontrolled, hydra-headed array of federal regulatory agencies, afflicted with tunnel vision and spurred by "public interest" advocates, were using vague statutes to adopt ever more intrusive, rigid, and costly regulatory requirements, oblivious to their burden on the economy and U.S. international competitiveness. Short of outright deregulation, the cure is to discipline regulatory decisionmaking and eliminate unjustified regulation through cost-benefit analysis and centralized review and oversight in the executive office of the President.²⁵ This system, which is designed to regulate the regulators, does not operate through formal legal procedures and does not involve judicial review. It constitutes an administrative system of administrative law.

II THE CURRENT AND FUTURE STRUCTURE OF U.S. ADMINISTRATIVE LAW

Where does that leave us today and tomorrow? When we connect the dots, what do we see? The earlier approaches have not disappeared. Administrative law has been profoundly conserving.

²⁴ Exec. Order No. 12,291, 3 C.F.R. 127 (1982), reprinted in 5 U.S.C. § 601 (1988). This order was superseded by Exec. Order No. 12,866, 3 C.F.R. 638 (1994), reprinted in 5 U.S.C. § 601 (2000), which was issued by President Clinton. While modifying certain procedural and substantive aspects of the Reagan order, it maintained the basic system established by the Reagan order.

²⁵ See James F. Blumstein, *Regulatory Review by the Executive Office of the President: An Overview and Policy Analysis of Current Issues*, 51 *Duke L.J.* 851, 858-59 (2001) (explaining rationale behind Executive Order 12,291); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 *U. Chi. L. Rev.* 1, 3 (1995) (same). For contrasting views of the assertion of presidential authority in these and related initiatives, compare Cynthia R. Fiorina, *Undoing the New Deal Through the New Presidentialism*, 22 *Harv. J.L. & Pub. Pol'y* 227 (1998) (criticizing emerging presidentialism as inherently deregulatory and socially undesirable), with Elena Kagan, *Presidential Administration*, 114 *Harv. L. Rev.* 2245 (2001) (outlining and defending President Clinton's use of regulation to advance his policy and political agenda).

Through a process of evolutionary adaptation to changing societal circumstances, the older forms continue, but their function has been changed in the process.

Thus we still use tort law to redress official lawlessness, but in the form of § 1983²⁶ and *Bivens*²⁷ actions against officials who violate the civil rights of citizens. Agencies still hold trial-type adjudicatory hearings, but generally only when imposing penalties, license revocations, and other sanctions upon a given person. Rulemaking has become the dominant procedural vehicle for agency lawmaking.²⁸

The Landis vision of regulatory administration has been reinvented through the new tools of formal policy analysis, including cost-benefit analysis and quantitative risk assessment, in the new system of analytic management of regulation. Although the OMB regulatory-analysis review process was initially strongly antiregulatory and politically controversial, as the system has matured it has become widely accepted. It was reaffirmed by President Clinton.²⁹ Economic and other forms of regulatory impact analysis are increasingly used by public interest groups as well as by industry and are now being invoked by OMB itself to argue for more as well as less regulation.

At the same time, the judicially supervised model of interest representation continues in full force. Public participation through rulemaking and other processes and "hard look" review of agency discretion by courts have become central foundations of administrative law and practice.

In the future we will continue to rely on all four of these approaches. The tort and adjudicatory-hearing models will continue to be used to redress unlawful administrative impositions on specific persons. Analytic management of regulation and interest representation will continue to be used to structure and review agencies' exercise of discretionary lawmaking powers. The latter two systems operate in parallel and largely independently.³⁰ Thus a federal regulatory agency must prepare and submit regulatory analyses for OMB review before issuing new regulations and must also conduct rulemaking proceedings subject to judicial review. The two systems could easily be viewed as alternatives, inviting us to choose one over the other. I believe,

²⁶ 42 U.S.C. § 1983 (2000) (providing cause of action for deprivation of civil rights).

²⁷ See *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 391-92 (1971) (finding private cause of action under Constitution for violations of Fourth Amendment by federal officials).

²⁸ Peter L. Strauss, *From Expertise to Politics: The Transformation of American Rulemaking*, 31 *Wake Forest L. Rev.* 745, 755-56, 760 (1996).

²⁹ *Id.* at 767.

³⁰ See Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 *Cap. U. L. Rev.* 21, 38-54 (2001).

however, that we will continue to make extensive use of both approaches despite their seeming redundancy and inconsistency.

The two systems use very different means for addressing the potential democracy deficit created by broad statutory delegations to regulatory bureaucracies. The interest representation model creates a surrogate for the political process through judicially supervised legal procedures for representation and policy debate. This solution for legitimating agency discretion has important limitations. The interest representatives are self-appointed, not elected, and their accountability to their claimed constituencies may be subject to question.³¹ Moreover, the interest representation model may tend to produce regulatory measures that are compromises among the contending stakeholder interests, which may not be the measures that will secure the public good, or even be lawful.³²

Analytic management claims a dual means for legitimating agency policy choices. First, it uses cost-benefit analysis as a method for taking into account the interests of all affected citizens and selecting regulatory measures that will enhance societal welfare. Thus it functions in a quite different way as a surrogate for the legislative process, in aggregating interests to determine regulatory policy. Second, the system of OMB review is established by and accountable to the President, who enjoys electoral legitimation. But these solutions to democracy deficit also have significant limitations. Cost-benefit analysis often neglects distributional concerns and noncommodity values, and it dispenses with public debate and deliberation.³³ Further, the

³¹ For a discussion of some of the limitations of an interest group representation model of administrative law, see Jim Rossi, *Participation Run Amok: The Costs of Mass Participation for Deliberative Agency Decisionmaking*, 92 *Nw. U. L. Rev.* 173, 236-41 (1997) (warning that broader participation can degrade agency decisionmaking in part by causing agencies to favor political compromise over bold action); Mark Seidenfeld, *Empowering Stakeholders: Limits on Collaboration as the Basis for Flexible Regulation*, 41 *Wm. & Mary L. Rev.* 411, 427-45 (2000) (arguing that internal structure and dynamics of interest groups may make them incapable of participating in collaborative regulatory schemes); Stewart, *supra* note 1, at 1762-70 (discussing threshold problems of "which interests are to be represented and the means by which such representation is to be provided").

³² See generally William Funk, *Bargaining Toward the New Millennium: Regulatory Negotiation and the Subversion of the Public Interest*, 46 *Duke L.J.* 1351 (1997) (criticizing negotiated rulemaking for impairing agencies' consideration of public interest); William Funk, *When Smoke Gets in Your Eyes: Regulatory Negotiation and the Public Interest—EPA's Woodstove Standards*, 18 *Env'tl. L.* 55 (1987) (contending that negotiated rulemaking both renders agencies mere facilitators of consensus reached by stakeholders and poses danger of agencies exceeding their statutory authority). But cf. Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 *N.Y.U. Env'tl. L.J.* 32 (2002) (outlining successes of regulatory negotiation).

³³ See Lewis A. Kornhauser, *On Justifying Cost-Benefit Analysis*, 29 *J. Legal Stud.* 1037, 1054 (2000). But cf. Exec. Order No. 12,866, 3 *C.F.R.* 638 (1994), reprinted in 5 *U.S.C. § 601* (2000) (attempting to address shortcomings in cost-benefit analysis).

connection between review by OMB economists of EPA regulations and electoral accountability is at best attenuated.³⁴

While each model thus has serious limitations as a solution to democracy deficit, together they can be viewed as complementary. Each tends to compensate for the normative limitations of the other. The centralizing focus of executive office management of regulation and the centrifugal tendencies of the interest representation model check and balance each other. These checks and balances, as well as our tendency to hedge our bets in matters of governance, help explain why we continue to use both approaches. Nonetheless, there are serious tensions between them, both at the level of principle and of practice.

Regulatory Administrative Fatigue

Today we face an acute problem of growing regulatory fatigue.³⁵ The public demands higher and higher levels of regulatory protection, yet regulatory administrative government seems less and less capable of providing such protection in an efficient and effective manner. It generally takes a very long time to formulate and adopt new regulations and a long time to implement them.³⁶ Regulatory results often fall short of expectations at the same time that regulatory requirements grow ever more burdensome.

In my view, these headaches are primarily due to excessive reliance on command-and-control methods of regulation—the dominant approach that we have used for achieving regulatory goals over the past hundred years. This method, especially when centralized through federal regulation, suffers from the inherent problems involved in attempting to dictate the conduct of millions of actors in a quickly changing and very complex economy and society throughout a large and diverse nation.³⁷ These problems have become more acute as reg-

³⁴ See Margret Carde, *Can Bambi Ride Herd over Godzilla? The Role of Executive Oversight in EPA's Rulemaking for the Waste Isolation Pilot Plant*, 36 *Nat. Resources J.* 643, 675-76 & n.248 (1996) (arguing that, in context of congressional nuclear waste policy, OMB oversight of EPA can obscure rather than clarify political accountability); Erik D. Olson, *The Quiet Shift of Power: Office of Management & Budget Supervision of Environmental Protection Agency Rulemaking Under Executive Order 12,291*, 4 *Va. J. Nat. Resources L.* 1, 28-35, 55-57 (1984) (concluding that OMB review of EPA rulemaking has not increased agency accountability or promoted vigorous analysis).

³⁵ See generally Ian Ayres & John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992); Stewart, *supra* note 30, at 27-38.

³⁶ Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 *Tex. L. Rev.* 483, 483-84 (1997) (noting that recent developments in administrative law designed to expand public participation have unintentionally obstructed rulemaking with unnecessary analytic hurdles).

³⁷ See Stewart, *supra* note 30, at 27-38.

ulation has intensified. The inflexibility and rapid obsolescence of the detailed conduct blueprints issued by federal agencies make them simultaneously more burdensome and less effective. In addition to undermining the efficacy of regulation, the proliferation of rigid and unresponsive controls undermines the legitimacy of regulation in the eyes of the regulated community and impairs regulatory accountability.³⁸ These problems have become worse as federal command regulation has spread and intensified in response to public demands.

The two models of administrative law upon which we currently rely to structure federal agencies' exercise of their discretionary powers to make law and policy are incapable of curing these inherent problems. Indeed, they make them worse, exacerbating regulatory fatigue. The lawyer-driven interest representation process produces significant delay in the regulatory process.³⁹ Major rules take a minimum of five years to be adopted. Judicial review involves additional delay and may be followed by new rulemaking if a regulation is set aside by the courts. The result is "ossification" of the rulemaking process.⁴⁰ OMB regulatory analysis and other forms of regulatory impact review have also contributed to "paralysis by analysis."⁴¹ Agencies increasingly turn to less formal, less accountable, and more opaque methods of making regulatory policy.⁴²

One response to these problems is deregulation at the federal level, on the premise that the failures of regulatory government are even worse than the failures of markets or that regulatory problems

³⁸ See *Regulatory Encounters: Multinational Corporations and American Adversary Legalism 404-05* (Robert A. Kagan & Lee Axelrad eds., 2000); Richard B. Stewart, *Reconstitutive Law*, 46 Md. L. Rev. 86, 103-04 (1986).

³⁹ Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. Rev. 1, 5, 18-19 (1997) (claiming that adversarial interest representation process results in slow, rigid, and uncreative rulemaking).

⁴⁰ See Seidenfeld, *supra* note 36, at 483 ("The term 'ossification' refers to the inefficiencies that plague regulatory programs because of analytic hurdles that agencies must clear in order to adopt new rules."); see also Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1387-1436 (1992) (providing overview of causes and consequences of ossification); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 Admin. L. Rev. 59, 60-66 (1995) (same).

⁴¹ For discussions on how risk assessments and impact analyses can be expensive and can delay agency decisionmaking significantly, see Celia Campbell-Mohn & John S. Applegate, *Learning from NEPA: Guidelines for Responsible Risk Legislation*, 23 Harv. Envtl. L. Rev. 93, 126-27 (1999); Thomas O. McGarity, *The Expanded Debate over the Future of the Regulatory State*, 63 U. Chi. L. Rev. 1463, 1523 (1996).

⁴² See Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like—Should Federal Agencies Use Them to Bind the Public?*, 41 Duke L.J. 1311, 1332-55 (1992) (providing examples of agencies' use of nonlegislative policy documents to bind public); Lars Noah, *Scientific "Republicanism": Expert Peer Review and the Quest for Regulatory Deliberation*, 49 Emory L.J. 1033, 1068-69 & n.161 (2000) ("[A]gencies may well attempt to circumvent [ossifying] reforms by opting for less formal mechanisms . . .").

should be addressed at the state and local levels. While there is some merit in this instinct, there are serious failures of market ordering that must be addressed at the federal level. The question is, how?

New Regulatory Methods

The answer lies in the adoption of new regulatory methods and instruments to ease the problems created by overreliance on centralized command-and-control methods. Two such new methods are emerging in regulatory practice. They are government-stakeholder network structures and economic incentive systems.

Various forms of flexible agency-stakeholder networks for innovative regulatory problem-solving have developed in order to avoid the limitations of top-down command regulation and formal administrative law procedures.⁴³ Rather than attempting to dictate unilaterally the conduct of the regulated, regulatory agencies have developed a number of strategies to enlist a variety of governmental and nongovernmental actors, including business firms and nonprofit organizations, in the formulation and implementation of regulatory policy.⁴⁴ Here are some examples: agency-supervised regulatory negotiation among representatives from industry, public interest, and state and local government to reach consensus on new agency regulations outside the formal administrative law rulemaking processes;⁴⁵ cooperative arrangements involving governmental and nongovernmental entities in delivering family services or administering Medicare;⁴⁶ and negotiation, in the draconian shadow of the Endangered Species Act,⁴⁷ of regional habitat conservation plans by federal natural re-

⁴³ See generally Freeman, *supra* note 39 (advocating collaborative governance model of administrative law as alternative to interest representation model); Georgette C. Poindexter, *Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory to Craft Legal Process*, 15 Va. Env'tl. L.J. 37 (1995) (applying normative principles of stakeholder theory to address needs of all relevant constituencies, promoting equity while permitting economic growth); Seidenfeld, *supra* note 31, at 414-26 (refining stakeholder theory to improve collaborative approaches); Stewart, *supra* note 30, at 60-94 (outlining use of contractual and quasi-contractual regulatory programs).

⁴⁴ See Neil Gunningham & Peter Grabonsky, *Smart Regulation: Designing Environmental Policy* 123-29 (1998).

⁴⁵ On the virtues of this approach, compare Cary Coglianese, *Assessing Consensus: The Promise and Performance of Negotiated Rulemaking*, 46 Duke L.J. 1255 (1997) (reviewing and finding fault with negotiated rulemaking), with Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 Geo. L.J. 1 (1982) (supporting use of negotiated rulemaking).

⁴⁶ See generally Notice, *Medicare and Medicaid Programs Health Care Financing Research and Demonstration Cooperative Agreements and Grants for Fiscal Year 1991*, 56 Fed. Reg. 26,120 (June 6, 1991).

⁴⁷ Pub. L. No. 93-205, 87 Stat. 884 (1973) (codified as amended at 16 U.S.C. §§ 1531-1544 (2000)). See generally Notice, *Medicare and Medicaid Programs Health Care Financ-*

source management agencies, private landowners, developers, and state and local governments.⁴⁸ In these examples, federal agencies are active, often dominant partners in the process, and the result is a quasi-contractual working relationship among the participants to solve regulatory problems on a coordinated basis. Rather than centralized mass production, this method embraces a post-industrial strategy for producing regulation. Its watchwords are flexibility, innovation, benchmarking, transparency of performance measures, and mutual learning by doing.⁴⁹ In the European Union, this approach is being widely used, under the title of the Open Method of Coordination (OMC), to implement social service regulatory programs in the member states.⁵⁰ Agencies appear to have a variety of reasons for adopting these strategies in order to advance their missions: short-circuiting the transaction costs of more formal processes, securing the cooperation of constituencies who can support the agency's mission or withhold efforts to obstruct it, tapping the knowledge and experience of these constituencies, and securing their participation in more effective implementation of an agency's policies. Nongovernmental constituencies also have a range of incentives for participation. The mutual incentives of the participants and the means by which different institutional arrangements enlist them are important issues for study.

ing Research and Demonstration Cooperative Agreements and Grants for Fiscal Year 1991, 56 Fed. Reg. 26,120 (June 6, 1991).

⁴⁸ See generally Bradley C. Karkkainen, *Collaborative Ecosystem Governance: Scale, Complexity, and Dynamism*, 21 Va. Envtl. L.J. 189 (2002) (describing emerging model of "collaborative ecosystem governance" that emphasizes designing local ecological solutions through broad public-private cooperation, coordination, and information sharing); see also Albert C. Lin, *Participants' Experiences with Habitat Conservation Plans and Suggestions for Streamlining the Process*, 23 Ecology L.Q. 369, 379 & n.49 (1996) (outlining negotiation process under Endangered Species Act).

⁴⁹ See generally Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 Colum. L. Rev. 267, 283 (1998) (offering "democratic experimentalism" as model of governance "that responds to the conditions of modern life").

⁵⁰ Joshua Cohen & Charles F. Sabel, *Sovereignty and Solidarity: EU and US*, in *Governing Work and Welfare in a New Economy: European and American Experiments* 691, 694-95 (Jonathan Zeitlin & David Trubeck eds., forthcoming 2003) [hereinafter *Governing Work*], available at http://web.mit.edu/polisci/research/cohen/sovereignty_and_solidarity_EU_and_US.pdf. For a description of the Open Method of Coordination (OMC), see Caroline de la Porte & Philippe Pochet, *Introduction*, in *Building Social Europe Through the Open Method of Co-ordination* 11, 13-16 (Caroline de la Porte & Philippe Pochet eds., 2002). For an evaluation of the operation of the OMC in employment policy, see Catherine Barnard & Simon Deakin, "Negative" and "Positive" Harmonization of Labor Law in the European Union, 8 Colum. J. Eur. L. 389, 411-12 (2002); David M. Trubek & James Mosher, *New Governance, EU Employment Policy, and the European Social Model*, in *Governing Work*, supra, at 95, available at <http://www.jeanmonnetprogram.org/papers/01/011501.html>.

Some network regulatory methods depart even further from the command model, removing agencies from direct substantive engagement through strategies for “governing at a distance.” Through these strategies, the agencies create structures or incentives for private sector problem-solving. Examples include information-based approaches, such as the EPA’s toxic release inventory (TRI), which requires sources to monitor and report and then publicize information about toxic air pollutant emissions from individual facilities.⁵¹ The TRI program has resulted in dramatic reductions in such emissions as a result of informal pressures on firms generated from the information publicity.⁵² Information-based approaches have also been used to promote regulatory goals in health care.⁵³ Other examples include government encouragement of corporate environmental management and audit systems to track and improve environmental performance,⁵⁴ and EPA and Energy Department voluntary partnership programs with industry to reduce energy use and carbon dioxide emissions.⁵⁵ In these methods, which have been termed “reflexive law,” government develops frameworks and communication channels to promote self-regulating measures by nongovernmental entities.⁵⁶ Agency-supervised industry self-regulation in fields such as securities, broadcasting, and film provides another version of this general strategy.

A second, entirely different emerging response to regulatory fatigue is the use of economic incentive systems. Examples include tradable pollution permits and environmental taxes, infrastructure and environmental impact charges on developers, and experiments with economic incentives for health care providers. Rather than dictating conduct, these methods use prices—for example, a tax on each unit of pollution emitted—to steer conduct in the desired direction

⁵¹ Stewart, *supra* note 30, at 138-39.

⁵² See Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 *Geo. L.J.* 257, 259-63 (2001) (noting TRI’s success in enabling firms to benchmark, monitor, and improve environmental compliance).

⁵³ See generally William M. Sage, *Regulating Through Information: Disclosure Laws and American Health Care*, 99 *Colum. L. Rev.* 1701 (1999) (analyzing mandatory disclosure laws in regulation of health care industry).

⁵⁴ Stewart, *supra* note 30, at 134-36, 143-45.

⁵⁵ See Alan S. Miller, *Energy Policy from Nixon to Clinton: From Grand Provider to Market Facilitator*, 25 *Env’tl. L.* 715, 728 n.111 (1995) (highlighting Department of Energy Climate Challenge programs and EPA Energy Star and Green Lights programs).

⁵⁶ Stewart, *supra* note 30, at 127-34. See generally Eric W. Orts, *Reflexive Environmental Law*, 89 *Nw. U. L. Rev.* 1227, 1232 (1995) (“[R]eflexive environmental law aims to establish self-reflective processes within businesses to encourage creative, critical, and continual thinking about how to minimize environmental harms”); Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 *Law & Soc’y Rev.* 239 (1983) (comparing reflexive law to other evolutionary law theories).

while leaving regulated actors the flexibility to select the least costly method of doing so. Taxing pollution also provides a powerful impetus for private sector innovation to develop and adopt less polluting ways of doing business.⁵⁷ Economic incentives are a logical next step beyond the current OMB process. Rather than using economic tools to discipline command regulators, it eliminates command regulation and uses economic instruments to reconstitute the market itself for regulatory ends.⁵⁸ Make no mistake—this is not deregulatory laissez-faire. In order to work, there must be strong monitoring and enforcement to prevent cheating. Properly designed and enforced tradable pollution permit systems, for example, have simultaneously achieved huge reductions in air pollution and dramatic cost savings—up to fifty percent or more—relative to traditional command techniques.⁵⁹

In order to win broad acceptance, the new methods must provide superior regulatory results. They must also confront questions of legal accountability and political legitimacy. The network strategy deliberately blurs the traditional distinction between public and private in favor of a cooperative fusion.⁶⁰ The premise is that competency must match the scope of regulatory problems, which increasingly cross jurisdictional lines. The network participants form a community of specialized knowledge and experience with respect to a particular regulatory problem, yet represent different governmental, social, and economic interests and perspectives.⁶¹ These features may go some distance to validate the regulatory policies that emerge. Network methods of regulation, however, deliberately shrink the role of formal government lawmaking or enforcement actions, which are the focus of administrative law as we know it. In the reflexive law versions, government, like the Cheshire Cat, almost disappears. As important decisions are shifted to informal processes involving nongovernmental actors, how is the law to prevent factional abuse of power, curb the

⁵⁷ See generally Richard B. Stewart, *Economic Incentives for Environmental Protection: Opportunities and Obstacles*, in *Environmental Law, the Economy and Sustainable Development: The United States, the European Union and the International Community* 171 (Richard L. Revesz, Philippe Sands & Richard B. Stewart eds., 2000) [hereinafter Revesz, Sands & Stewart] (analyzing use of economic incentive systems in national and international contexts).

⁵⁸ See Stewart, *supra* note 38, at 88-89.

⁵⁹ Stewart, *supra* note 57, at 180-84, 212-14.

⁶⁰ Alfred C. Aman, Jr., *The Limits of Globalization and the Future of Administrative Law: From Government to Governance*, 8 *Ind. J. Global Legal Stud.* 379, 399 (2001) (“With a transformative approach to administrative law, the line between the public and the private is blurred at best.”).

⁶¹ See Dorf & Sabel, *supra* note 49, at 314-23 (outlining governing model of “democratic experimentalism”).

tyranny of expertise, and ensure public-regarding outcomes, including distributional equity?

The network is not a legally accountable entity. In some cases, the network process will eventually result in formal legal arrangements involving governmental authorities, memoranda of understanding, licenses for regulated entities, even formal regulations. These can be reviewed by courts for excess of power—manifest violations of statutory or constitutional limits. There may, however, be many participating governmental entities, from different levels of government, subject to review in different courts. Even if the negative, power-checking functions of administrative law can be successfully maintained, it is hard to see how the interest representation model, which relies on formal legal procedures for decisionmaking, can be successfully applied to network arrangements. Successfully subjecting network decisionmaking to a system of regulatory analysis review on the OMB model is also quite problematic.

Network method proponents argue that transparent systems of information and exchange will provide safeguards and allow for program review.⁶² This strategy has yet to be spelled out. The federal government will have to take a strong role in specifying benchmarks and assuring accurate monitoring and reporting of regulatory performance, which would enhance the political visibility and accountability of the method of regulation.⁶³ There may, however, be significant tradeoffs between efficiency and accountability in this as in other applications of administrative law.

Economic incentive systems also reduce the reach of administrative law; they do so by delegating to market actors, via price signals, implementation decisions currently made by government agencies through more or less formal processes subject to judicial review. As a result, those adversely affected by the implementation decisions of private actors—regarding, for example, the level of pollution discharges at various locations—may have only limited legal redress, targeted at the overall design of the system rather than specific regulatory outcomes. Thus, there are likely to be problems in ensuring regu-

⁶² See Aman, *supra* note 60, at 396 (“An approach to administrative law that focuses on the interchanges between domestic and external actors, as well as public/private partnerships, should concentrate on the need for transparency and participation.”); see also Alfred C. Aman, Jr., *Proposals for Reforming the Administrative Procedure Act: Globalization, Democracy and the Furtherance of a Global Public Interest*, 6 *Ind. J. Global Legal Stud.* 397, 415-17 (1999) (proposing applying APA and Freedom of Information Act requirements to private entities acting as proxies for government entities).

⁶³ See Dorf & Sabel, *supra* note 49, at 345-48 (emphasizing importance of administrative agencies to benchmarking).

latory equity on a retail or “as applied” basis.⁶⁴ Unlike network strategies, however, economic incentive systems maintain a firm distinction between government and governed, and thereby fix clear responsibility.⁶⁵ Decisions by agencies regarding the goals and design of incentive systems are subject to rulemaking procedures and judicial review in the normal course. By greatly reducing the decisions that government must make, economic incentive systems may promote political accountability.⁶⁶ For example, under tradable pollution permit or environmental tax systems, government decisions are targeted toward the overall level of incentives—for example, the overall level of emissions permitted under a cap-and-trade permit system—rather than myriad implementation details, which are made by firms.

Interim Conclusions

On the basis of these developments, what may we provisionally conclude regarding U.S. administrative law in the coming decades?

1. Administrative law will continue to be evolutionary and strongly conserving in character. The several existing forms and remedies will be maintained, although their applications may change, even as new ones are developed and added. The system of regulatory analysis and review in the Executive Office of the President will be strengthened, as advocated by Justice Breyer and others, to include scientific and technological as well as economic components, a more explicit priority-setting function, and the capacity to design and assess new methods of regulation.⁶⁷

⁶⁴ See Eckard Reh binder, *Market-Based Incentives for Environmental Protection*, in Revesz, Sands & Stewart, *supra* note 57, at 245, 248-49 (advocating judicial review over particular effects of broad economic incentive systems).

⁶⁵ Cf. Aman, *supra* note 60, at 379-80 (commenting that shift from state-centered command-and-control approach to market forms of regulation has resulted not only in market incentive systems but also in public-private partnerships). Aman, however, notes that market forms of regulation have become more commonplace, “but not because of a philosophical decision to cede power to the private sector, as if this were a zero-sum game between ‘the public’ and ‘the private.’ Rather, the market and private actors are more prominent because they can approach problems without the limitations of arbitrary, territorial boundaries imposed on them.” *Id.* at 391.

⁶⁶ See Bruce A. Ackerman and Richard B. Stewart, *Reforming Environmental Law*, 37 *Stan. L. Rev.* 1333, 1356-57 (1985) (arguing that agency decisions on appropriate incentives would generate public discussion about environmental dilemmas and congressional policy). For criticism of this claim, see Lisa Heinzerling, *Selling Pollution, Forcing Democracy*, 14 *Stan. Envtl. L.J.* 300, 311-18 (1995).

⁶⁷ See Stephen G. Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* (1993); see also Edward W. Warren & Gary E. Marchant, “More Good than Harm”: A First Principle for Environmental Agencies and Reviewing Courts, 20 *Ecology L.Q.* 379, 438-39 (1993) (discussing improved and expanded executive branch oversight of regulation).

2. There will continue to be strong incentives to economize on the centralized command-and-control method of regulation. Excessive regulatory costs and other deterrents to investment will become of growing concern in an increasingly tightly integrated global economy. When federal regulation is called for, there will be growing use of economic incentives and network methods, although command regulation will continue to play a major role.

3. As between the new methods of regulation, I tend to favor economic incentive systems over network strategies because I think they are more likely to be efficient and effective and because they fix clearer legal and political accountability in the government. Yet there will also be a strong need for new regulatory arrangements that cut across governmental units and that bridge the governmental, for-profit, and nonprofit sectors.

4. New forms of administrative law will be developed to address the distinctive issues presented by the new network and economic incentive methods of regulation. Our existing models of administrative law have largely developed in response to a single method of regulation: the command method. The adoption of entirely different methods of regulation will invite and require the development of new approaches to administrative law. Formal legal procedures, backed by judicial review, will be targeted toward protecting private rights from particularized applications of regulatory power, although there may be renewed scope for tort law as well. The affirmative side of administrative law in structuring discretionary lawmaking will increasingly rely on structures that are not centered on courts and thus will conserve scarce judicial resources.

5. It will be critically important to ensure that, insofar as possible, new regulatory methods and forms of administrative law promote rather than undermine ultimate responsibility on the part of the political branches of the government for regulatory programs and outcomes. Administrative law strategies such as interest representation or analytical managerialism must ultimately support and be supported by the primacy of electoral mechanisms for accountability. In a democratic system of representative government, these strategies cannot be wholly self-legitimizing from a normative perspective.

6. A further point is the importance of legal change and evolution as a subject of study. The pathways of evolution for the regulatory techniques and administrative law models sketched above have been shaped by the need to adapt to changing external economic and political circumstances but also by factors endogenous to legal and regulatory cultures and their interaction. The regulatory problems

confronting the United States and the EU are similar in many ways, yet the two systems are developing different regulatory techniques and very different mechanisms of governance and accountability to deal with them. These questions merit research not only for better understanding the character and role of law in advanced industrial societies, but also for identifying the most fruitful and effective means by which a given society can address emerging regulatory challenges.

III INTERNATIONAL ASPECTS OF REGULATION AND ADMINISTRATIVE LAW

The future evolution of administrative law in the United States must also confront the international aspects of regulation, a subject that will assume great significance in the coming decades. I have time to note only a few key issues and possible linkages.

Some (but far from all) of the problems generated by global economic integration and development exceed domestic regulatory capacities. Examples range from climate change to trade regulation to intellectual property. Various international regulatory arrangements to address these problems are emerging at the bilateral, regional, and global levels. They have assumed two basic forms: horizontal and vertical arrangements.

Horizontal arrangements involve informal cooperation among national regulatory officials to coordinate policies and enforcement practices in areas such as antitrust, telecommunications, chemicals regulation, and transportation safety. Such coordination helps to reduce barriers to trade and commerce created by differing national regulations and to address transnational regulatory problems that exceed purely domestic capabilities.⁶⁸ For example, national regulators may agree to accept each others' product regulatory standards as mutually equivalent or pool information and coordinate antitrust measures with the practices of multinational firms.

Vertical arrangements consist of treaty regimes that establish international regulatory rules and international organizations to secure their implementation through domestic measures. Examples include trade regimes like NAFTA and the WTO and such environmental regimes as the Montreal Protocol (regulating stratospheric ozone-de-

⁶⁸ For an introduction to the concept of horizontal networks, see generally Ann-Marie Slaughter, *The Accountability of Government Networks*, 8 *Ind. J. Global Legal Stud.* 347 (2001) (describing transgovernmental regulatory networks and problems of accountability); see also Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 *Int'l Org.* 1 (1992) (exploring effects of international policy coordination on decisionmaking processes).

pleting chemicals) and the Kyoto Protocol (regulating greenhouse gas emissions).⁶⁹

Other types of arrangements are currently emerging. The World Summit for Sustainable Development at Johannesburg spawned an array of partnership arrangements among national governments, multinational businesses, and environmental, consumer, labor, developing country, and other nongovernmental organizations (NGOs) in order to achieve international regulatory and development goals; in some cases, these partnerships will involve international organizations as well. These arrangements bear a resemblance to some of the network methods of regulation discussed in the domestic context. The systems of international greenhouse gas emissions trading authorized by the Kyoto Protocol represent a critically important international application of economic incentive systems to address climate change.

Under these various types of arrangements, the regulatory policies and rules applied at the domestic level in the United States and other countries will increasingly have been established through extranational processes not directly subject to domestic administrative law.⁷⁰ For example, a horizontal network of national airline or telecommunications regulatory officials may agree informally to a common regulatory policy that is subsequently implemented domestically by participating U.S. regulators through rulemaking or enforcement actions. While these domestic implementing decisions are subject to U.S. administrative law procedures and judicial review, the underlying policy was adopted through extranational processes that are not. Moreover, in some cases there may be no formal domestic decision at all, but merely administrative exercise of discretion—for example, a decision not to enforce U.S. requirements against imported products because of a prior informal agreement on functional equivalence or mutual recognition of regulatory standards.

The displacement of domestic administrative law is more obvious in the case of international treaty regimes, under which domestic regulatory measures may be held contrary to international law. A widely publicized example is the decision by the WTO Appellate Body that U.S. laws banning imports of tuna caught in violation of U.S. regula-

⁶⁹ See Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, art. 2, 26 I.L.M. 1550 (entered into force Jan. 1, 1989); Kyoto Protocol to the United Nations Framework Convention on Climate Change, Conference of the Parties, 3d Sess., Agenda Item 5, U.N. Doc. No. FCCC/CP/1997/L.7/Add.1 (1997), 37 I.L.M. 32 (1998), available at <http://unfccc.int/resource/docs/cop3/l07a01.htm>.

⁷⁰ See Eleanor D. Kinney, *The Emerging Field of International Administrative Law: Its Content and Potential*, 54 *Admin. L. Rev.* 415, 425-32 (2002) (describing challenges posed when local and national governments cede power to international regulatory bodies).

tory requirements that protect dolphins were contrary to WTO free trade disciplines.⁷¹

Environmental and other NGOs in the United States and abroad vehemently criticized this decision and other decisions by WTO and NAFTA tribunals, the IMF, the World Bank, and other international bodies in a virtual replay of Ralph Nader's attacks on U.S. federal regulatory agencies in the 1960s. Indeed, Nader is still around, making criticisms of the WTO that are virtually the same as those he levied against the FTC thirty-five years ago.⁷² The critics have protested the delegation of extensive powers to supposedly objective, expert bodies without adequate mechanisms of legal or democratic accountability, and they have asserted that decisions are made through an opaque "insider" process that systematically serves corporate profit to the detriment of other social interests.⁷³

How feasible and desirable is it to develop an administrative law for these new arrangements that will serve both the negative (power-checking) and affirmative (power-directing) functions of administrative law in a wholly domestic setting? We can simultaneously extend domestic administrative law to the extranational aspects of regulation and begin the groundwork for a new international administrative law. Each of these techniques may be able to support and reinforce the other.

As an example of the first route, U.S. courts dealing with domestic agency decisions implementing policies adopted by transnational regulatory networks might require U.S. regulators to afford public notice and comment before entering into international discussions and negotiations. Where a domestic regulatory decision results from such discussion, U.S. agencies might be required to include a summary of the network considerations and discussions in the notice of a proposed rule and discuss them in the final decision. Notice and opportunity for comment might also be required for enforcement policies based on mutual recognition and similar approaches. Other participating nations might come to impose similar requirements, which might coalesce and ripen into *de facto* transnational administrative law.

A similar "bottom-up" path of legal development might be taken with respect to decisions of international treaty regimes and organiza-

⁷¹ GATT Panel Report on the United States—Restrictions on Imports of Tuna, GATT Doc. DS21/R (Sept. 3, 1991), available at 1991 WL 771248.

⁷² See Ralph Nader, Introduction to Lori Wallach & Michelle Sforza, *The WTO: Five Years of Reasons to Resist Corporate Globalization* 6, 6 (1999) (insisting that WTO and NAFTA represent "an unaccountable system of transnational governance designed to increase corporate profit").

⁷³ See *id.* at 10.

tions. For example, the domestic courts of treaty parties might refuse to recognize decisions of international organizations that did not satisfy basic standards of transparency, opportunity for input by affected interests, and reasoned decision.⁷⁴ Alternatively, under a “top-down” approach, a treaty regime might adopt such procedures for administrative determinations under the regime. In this context, we must, to an even greater extent than in a purely domestic context, liberate ourselves from a court-centered conception of administrative law. NGOs often advocate wholesale importation of interest representation models of administrative law on the U.S. domestic model. International practice, however, has already begun to generate a variety of different approaches, including the World Bank inspection panel;⁷⁵ the procedures of the NAFTA Commission for Environmental Cooperation;⁷⁶ the EU comitology process for including member states, stakeholder interest group representatives, and experts in administrative implementation of Community legislation;⁷⁷ and the inclusion of NGO observers in decisionmaking by the Codex Alimentarius on international food safety standards and under the Convention of Trade in Endangered Species.⁷⁸

⁷⁴ For a reconceptualization of administrative law in a global context that emphasizes transparency and the extension of public law values, see Aman, *supra* note 60.

⁷⁵ See generally Daniel D. Bradlow, *International Organizations and Private Complaints: The Case of the World Bank Inspection Panel*, 34 *Va. J. Int'l L.* 553, 555 (1994) (“The Bank’s creation of the Panel could expand the scope of international administrative law to include the adjudication of disputes between international organizations and private parties regarding an international organization’s compliance with its own internal operating rules and procedures.”).

⁷⁶ See generally Gillian Dale, *NAFTA: Commission for Environmental Cooperation*, 1996 *Colo. J. Int'l Envtl. L. & Pol'y* 26 (describing CEC structure and process); Sarah Richardson, *Sovereignty, Trade, and the Environment—The North American Agreement on Environmental Cooperation*, 24 *Can.-U.S. L.J.* 183 (1998) (analyzing effects of CEC on accountability, transparency, and consensus among member states); Stefan R. Miller, *Comment, NAFTA: A Model for Reconciling the Conflict Between Free Trade and International Environmental Protection*, 56 *U. Pitt. L. Rev.* 483, 509-22 (1994) (providing overview of NAFTA environmental provisions).

⁷⁷ See generally EU Committees: *Social Regulation, Law and Politics* (Christian Joerges & Ellen Vos eds., 1999) (providing overview of EU committee system); Michelle Egan & Dieter Wolf, *Regulation and Comitology: The EC Committee System in Regulatory Perspective*, 4 *Colum. J. Eur. L.* 499 (1998) (describing impact of comitology procedures on EC regulatory system).

⁷⁸ For discussions regarding nongovernmental organization (NGO) observer rights at Codex Alimentarius meetings, see Robert F. Housman, *Democratizing International Trade Decision-Making*, 27 *Cornell Int'l L.J.* 699, 718-20 (1994); Lori M. Wallach, *Accountable Governance in the Era of Globalization: The WTO, NAFTA, and International Harmonization of Standards*, 50 *U. Kan. L. Rev.* 823, 836-38 (2002); Lewis Rosman, *Note, Public Participation in International Pesticide Regulation: When the Codex Commission Decides, Who Will Listen?*, 12 *Va. Envtl. L.J.* 329 (1993). For discussions regarding NGO observer and participation rights in the context of other international treaties and organizations, see Kathleen Rogers & James A. Moore, *Revitalizing the Convention on Nature*

Many critics of current arrangements call for greater democracy in international governance. In a world where conceptions of political legitimacy still revolve around the nation-state, we have yet to develop a convincing conception of what democratic global governance might be, much less how to achieve it. As an administrative lawyer, my instincts are more modest. The domestic experience of democracies with advanced economies, the EU's arrangements for regulatory governance, and emerging international practice suggest a variety of techniques by which the basic goals of administrative law—fair, responsive, and accountable decisional procedures—can begin to be achieved, even if we have to wait for democracy. The pressures to develop and adopt such techniques are growing. Criticisms of the decisional procedures of international financial and trade regulatory organizations are mounting. Courts in the United States and elsewhere are unlikely to sit idly by as domestic laws adopted through such procedures are trumped by international decisions that are not.

The challenge posed to administrative law by regulatory governance is significantly greater in the international than in the domestic context. Domestically, regulatory agencies generally operate at one remove from elected legislatures. As we have seen, a central issue for administrative law is how to ground the administrative exercise of regulatory authority in electorally based representative government. International regulatory networks and organizations operate at an even further remove and involve many nations as well as nonstate actors. For many globalists, these circumstances demand the development of a separate, wholly supranational system of governance on the interest representation model in order to inform, discipline, render accountable, and legitimate international regulatory and financial decisions. Transnational public interest representatives, multinational businesses, and other civil society actors would play a major role in these arrangements. It is further claimed that these arrangements would help fill an enormous democracy deficit in current international institutions.⁷⁹

Protection and Wild Life Preservation in the Western Hemisphere: Might Awakening a Visionary but "Sleeping" Treaty Be the Key to Preserving Biodiversity and Threatened Natural Areas in the Americas?, 36 Harv. Int'l L.J. 465, 502-05 (1995) (describing growing importance of NGOs in international environmental law); Kal Raustiala, Note, The "Participatory Revolution" in International Environmental Law, 21 Harv. Envtl. L. Rev. 537, 547-48 (1997) (discussing broad NGO participation in Convention on International Trade in Endangered Species); Daniel Vice, Note, Implementation of Biodiversity Treaties: Monitoring, Fact-Finding, and Dispute Resolution, 29 N.Y.U. J. Int'l L. & Pol. 577, 616-19 (1997) (same).

⁷⁹ Alfred C. Aman Jr., Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law, 28 Fordham Urb. L.J.

I think that we should maintain a healthy skepticism towards these proposals and, in particular, should resist the temptation to equate governance arrangements based on stakeholder interest representation with democratic government. We must also be mindful of the risk that providing too great a role for stakeholder representatives could compromise the ability of international regimes to successfully carry out their primary functions. Here again the tension between accountability and efficiency presents itself. The liberalization of international trade over the past fifty years has brought enormous economic benefits, including to developing countries. Would these same benefits have occurred under an international regime of stakeholder governance that would inevitably tend to focus on slicing up the economic pie rather than expanding it?

Neither stakeholder networks nor specialized managerial expertise can substitute for representative forms of democratic government based on electoral legitimation. This is not simply or primarily a matter of preserving the sovereignty of powerful states like the United States. For all the talk of globalization, the well-being of individuals, most especially those in poor countries, ultimately depends on well-functioning national governments. In this respect, we should carefully scrutinize the justifications for, and not lightly adopt, international systems of regulation that displace domestic law. The development of the international aspects of administrative law should, to the extent feasible, work through and build on domestic administrative law, with the ultimate aim of strengthening rather than substituting for (and thereby potentially weakening) national systems of decisionmaking and electoral accountability. Just how this is to be accomplished is at present unclear, but the difficulty should not deter us from the effort. There will also be a need to consider how the new methods of regulation on the domestic front, and the new approaches to administrative law that will be needed to address these new methods, will relate to the international aspects of regulation and administrative law.

These tasks represent a great challenge in light of the circumstances of global interaction and interdependency. Yet the democratic nation-state is a grand experiment only two centuries old; notwithstanding globalization, its resources are not yet exhausted. The questions that I have presented are not academic. They are already upon us. If our responses must of necessity be, in the main, incremental in character, our vision must not be.

1477, 1479, 1505-06 (2001) (claiming globalization's democracy deficit can be offset by linking domestic markets to global interest networks).