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Government Accountability in the Twenty-First Century

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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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1. KARL WITTFOGEL, *ORIENTAL DESPOTISM* 3 (1995).

2. Karl Marx, *The British Rule in India*, N.Y. DAILY TRIB., July 25, 1853, in 12 KARL MARX & FREDERICK ENGELS: COLLECTED WORKS 125 (Progress Publishers, Moscow 1979).

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 *bureaucratization 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

3. *Id.*; see also MARIAN SAWER, *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).

4. I borrow the term from ERIC HOBSBAWM, *THE AGE OF EXTREMES: THE SHORT TWENTIETH CENTURY 1914-1991* (1994).

5. See BRUNO RIZZO, *LA BUREAUCRATISATION DU MONDE* (1939). Part I of this book was translated as *THE BUREAUCRATIZATION OF THE WORLD* (Adam Westoby trans., The Free Press 1985).

6. See, e.g., JOHN K. GALBRAITH, *THE NEW INDUSTRIAL STATE* 282-95 (1967) (discussing the educational and scientific establishment); Daniel Bell, *Notes on the Post-Industrial Society (I)*, *PUB. INTEREST*, Winter 1967, at 24, 27-28; Zbigniew Brzezinski, *America in the Technetronic Age*, *ENCOUNTER*, Jan. 1968, at 16.

7. See JACQUES ELLUL, *THE TECHNOLOGICAL SOCIETY* (John Wilkinson trans., 1964) (1954).

8. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *HARV. L. REV.* 1231 (1994).

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 technoluddites¹⁰ 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.

9. LAWRENCE K. GROSSMAN, *THE ELECTRONIC REPUBLIC* 4 (1995).

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 Rebelling 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.

13. GROSSMAN, *supra* note 9, at 147.

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.¹⁴ This bias towards openness recognizes Max Weber's insight that secrecy is a way that bureaucratic elites maintain both legitimacy and power.¹⁵ Open government is the way for citizens to control this "sociology of domination."¹⁶

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,¹⁷ 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

14. See 5 U.S.C. § 552 (mandating that federal agencies make certain information available to the public unless protected by a specific exemption); *Cuneo v. Schlesinger*, 484 F.2d 1086 (D.C. Cir. 1973) (holding that FOIA creates a liberal disclosure requirement, and that exemptions are to be construed narrowly). Sweden apparently has this general right of access as well. See Peter Seipel, *The Technology of Insight: Computers and Informed Citizens*, 69 CHI-KENT L. REV. 417, 418-19 (1993).

15. DIRK KASLER, *MAX WEBER: AN INTRODUCTION TO HIS LIFE AND WORK* 161-68 (1988) (discussing Weber's theory of the "sociology of domination").

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.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.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 Act²⁰ 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.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.²²

The SEC, for instance, uses a system which requires corporations to file several required documents electronically.²³ Taxpayers are also able to file returns electronically with the IRS.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

18. Henry H. Perritt, Jr., *President Clinton's Information Infrastructure Initiative: Community Regained?*, 69 CHI-KENT L. REV. 991, 1011-13 (1994).

19. See *id.* at 1012.

20. Magnuson-Moss Warranty—Federal Trade Commission Improvement Act (codified as amended at 15 U.S.C. § 57a (1988)). Pub. L. No. 93-637, 88 Stat. 2183 (1975).

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

22. See, e.g., 60 Fed. Reg. 17,902, 17,916 (1995) (to be codified at 10 C.F.R. pt. 52) (allowing required filings to be made in electronic form, rather than by express mail).

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

24. See, e.g., Anne Willette, *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.²⁵ First, high rates of participation legitimize the government's power to rule.²⁶ Second, participation is a way to empower the average citizen.²⁷ Third, informed participation in the political process has been viewed as a way to stimulate the intellectual development of the citizenry.²⁸ 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.²⁹ Futurists

25. See generally Stephen Earl Bennett & David Resnick, *The Implications of Nonvoting for Democracy in the United States*, 34 AM. J. POL. SCI. 771 (1990); M. MARGARET CONWAY, *POLITICAL PARTICIPATION IN THE UNITED STATES* 189-90 (2d ed. 1990) (concluding that participation is a positive influence on the citizen's perception of government). This importance placed on high participation counters the 1950s view that low participation reflected an unconcerned citizen population. See WALTER DEAN BURNHAM, *THE CURRENT CRISIS IN AMERICAN POLITICS* 153 (1982).

26. Bennett & Resnick, *supra* note 25, at 773-74.

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.³⁰ Some have spoken of voting on candidates and issues from your TV set.³¹ 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.³² The Teleconferencing Network enables citizens in remote areas to appear before the Alaskan assembly.³³ The network also allows elected representatives to hold tele-discussions with their constituents,³⁴ and the Information Network allows citizens to send messages to their legislators.³⁵

- Building on a program developed in the 1980s in Hawaii,³⁶ Jim Fishkin has established a National Issues Convention,³⁷ 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.³⁸ Fishkin intends to use this program in the run-up to the 1996 election.³⁹

- 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.⁴⁰

- Numerous World Wide Web home pages now allow citizens to access

ous experiments bringing television to the voters).

30. See ABRAMSON ET AL., *supra* note 29, at 164-165.

31. *Id.*

32. GROSSMAN, *supra* note 9, at 156.

33. *Id.*

34. *Id.*

35. *Id.* at 156-57.

36. Hawaii's Televote program was an experiment whereby voters were asked to read material on an issue and phone in their thoughts or votes. *Id.*

37. See JAMES S. FISHKIN, *THE VOICE OF THE PEOPLE: PUBLIC OPINION AND DEMOCRACY* (1995) (providing the text for a nationally televised discussion of issues).

38. *Id.* at 33-34. For a critical examination of Fishkin's theories about the proper operation of democracy, see Phillip E. Converse, *Fishkin's National Issues Convention Has Real Scientific Merit*, PUB. PERSP., Dec. 1995/Jan. 1996, at 11; Everett K. Ladd, *Fishkin's "Deliberate Poll" Is Flawed Science and Dubious Democracy*, PUB. PERSP., Dec. 1995/Jan. 1996, at 41; Warren J. Mitofsky, *It's Not Deliberative and It's Not a Poll*, PUB. PERSP., Dec. 1995/Jan. 1996, at 4; Frank Newport, *Why Do We Need a Deliberative Poll?*, PUB. PERSP., Dec. 1995/Jan. 1996, at 7.

39. Nancy Kruh, *Citizen Fishkin—Austin Professor Plans a Convention to Educate the American Electorate*, DALLAS MORNING NEWS, Dec. 21, 1995, at 1C.

40. See GROSSMAN, *supra* note 9, at 157; Julie Pitta, *Electronic Democracy*, FORBES, Oct. 1, 1990, at 132.

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

41. See Barbara J. Saffir, *Exploring Federal Web Sites.*, WASH. POST, Aug. 28, 1995, at A21; Bob Minzesheimer, *Congress Signs on to the "Information Revolution,"* USA TODAY, Jan. 6, 1995, at 8A.

42. See HANNAH ARENDT, *THE ORIGINS OF TOTALITARIANISM* 460 (1966) (stating that totalitarian governments "destroy . . . all social, legal and political traditions of the country").

43. WILLIAM KORNHAUSER, *THE POLITICS OF MASS SOCIETY* 33 (1959).

44. George Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United States*, 94 COLUM. L. REV. 332 (1994).

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).

46. Malcolm Wallop, *The Centralization of Power and Governmental Unaccountability*, 4 CORNELL J.L. & PUB. POL'Y 487 (1995).

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).

49. *United States v. Lopez*, 115 S. Ct. 1624 (1995).

50. 501 U.S. 452 (1991).

51. *Id.* at 461.

52. 505 U.S. 144, 150-51 (1992).

53. *Id.* at 188.

54. EDWARD J. BACCIOCCO, JR., *THE NEW LEFT IN AMERICA* 109 (1974).

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,⁵⁶ Saul Alinsky sets forth the model "By-Laws of the People's Organization."⁵⁷ This proposed institution devolves power to the local level, guaranteeing representation for "any organization representative of the people . . . in that area."⁵⁸ "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.⁵⁹ These examples of devolution include recent efforts to promote "block grants" to the states to fulfill welfare responsibilities,⁶⁰ as well as efforts to shift various environmental responsibilities to the states.⁶¹ Examples of privatization of hitherto governmental functions include experiments with school choice in Wisconsin⁶² and Pennsylvania,⁶³ and privatization of hospital systems in New York.⁶⁴

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),⁶⁵ as well as an explosion of special taxing districts parallel to

56. SAUL ALINSKY, *REVEILLE FOR RADICALS* (1946).

57. *Id.* at 221-28.

58. *Id.* at 222.

59. See WILLIAM D. EGGERS & JOHN O'LEARY, *REVOLUTION AT THE ROOTS: MAKING OUR GOVERNMENT SMALLER, BETTER AND CLOSER TO HOME* 64 (1995) (arguing that devolution results in "decentralizing government" and "transferring responsibility from government to individuals, families and voluntary associations."). These are not just conservative or Republican ideas. See generally DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR* (1992); JACOB B. UKELES, *DOING MORE WITH LESS* (1982).

60. See H.R. 4, 104th Cong., 1st Sess. (1995). Title I of this bill is entitled "Block Grants for Temporary Assistance for Needy Families."

61. See Robert V. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1142 (1995) (noting the recent shift toward increased state responsibility and its potential impact on environmental policy).

62. EGGERS & O'LEARY, *supra* note 59, at 102-04.

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.

66. See, e.g., Susan McGinn, *Business Zones, Amid Questions, Gain Popularity*, N.Y. TIMES, Sept. 11, 1994, Section 13LI, at 1.

67. Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405 (1996).

68. EGGERS & 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.⁶⁹ 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.⁷⁰ 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.⁷¹

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

69. See JERRY L. MASHAW, *BUREAUCRATIC JUSTICE* 171-72 (1983); JERRY L. MASHAW, *DUE PROCESS IN THE ADMINISTRATIVE STATE* 158-60 (1985); Jerry L. Mashaw, "Rights" in the *Federal Administrative State*, 92 *YALE L.J.* 1129, 1132 (1983).

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.

71. See OSHA Policy on Written Program Violations Seeks "Consistent Enforcement" of Standards, *O.S.H. Rep. (BNA)* No. 24, at 828 (Nov. 15, 1995).

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, 1995, at A19.

74. PHILIP K. HOWARD, *THE DEATH OF COMMON SENSE* (1994).

75. *Id.* at 5.

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.*

81. William Booth, *Florida Seeks End to Rule by the Book*, WASH. POST, Mar. 14, 1995, at 1.

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).

83. House of Commons, Bill C-62, 1st Sess., 35th Parliament (1st reading Dec. 6, 1994).

84. S. 343, 104th Cong., 1st Sess. (1995).

85. *Id.* (proposing 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).

88. *INS v. Chadha*, 454 U.S. 812 (1981).

89. S. 343, 104th Cong., 1st Sess. § 4(a) (1995) (proposing 5 U.S.C. § 640, which would establish a program by which agency experts and their findings would be reviewed by another panel of scientists). A separate bill would codify traditional OMB review of proposed regulations. See S. 291, 104th Cong., 1st Sess. § 403(b) (1995).

90. See, e.g., Arthur E. Bonfield, *The Quest for an Ideal State Administrative Rulemaking Procedure*, 18 FLA. ST. U. L. REV. 617 (1991); Arthur E. Bonfield, *State Administrative Policy Formulation and the Choice of Lawmaking Methodology*, 42 ADMIN. L. REV. 121 (1990); Arthur E. Bonfield, *The Federal APA and State Administrative Law*, 72 VA. L. REV. 297 (1986); Arthur E. Bonfield, *State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo*, 61 TEX. L. REV. 95 (1982). See also ARTHUR E. BONFIELD & MICHAEL ASIMOW, *STATE AND FEDERAL ADMINISTRATIVE LAW* (1989).

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 Asimow⁹²). 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 regulation⁹⁵ and that there is reason to believe this analysis would prove correct in other regulatory areas as well.⁹⁶

Executive Veto of Rules of Administrative Agencies: Models and Alternatives, 24 WM. & MARY L. REV. 79 (1982).

92. See, e.g., Michael Asimow, *California Underground Regulations*, 44 ADMIN. L. REV. 43 (1992); Michael Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067 (1992).

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).

94. See William W. Bratton & Joseph A. McCahery, *Regulatory Competition, Regulatory Capture, and Corporate Self-Regulation*, 73 N.C. L. REV. 1861, 1862 (1995) (advocating "partial federal preemption of state law's allocation to management of agenda control over corporate charter amendments"); William W. Buzzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35, 111 (1995) (noting that the "first wave" of scholarship favored federal preemption in the environmental context).

95. See Rick Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992) (arguing that interstate competition may in fact benefit the cause of environmental regulation).

96. *Id.* at 1255-54 (suggesting that similar application of "race to the bottom" analysis is utilized in 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 inns, to construct 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

97. See DANIEL J. BOORSTIN, *THE AMERICANS: THE NATIONAL EXPERIENCE* 49-50 (1967).

98. ALEXIS DE TOCQUEVILLE, *2 DEMOCRACY IN AMERICA* 106 (Phillips Bradley trans., Alfred A. Knopf 1994) (1840).

99. See 141 CONG. REC. S12906-07 (daily ed. Sept. 8, 1995) (statement of Sen. Coats) (describing the Coats amendment and its tax credit). See generally William J. Bennett & Dan Coats, *Moving Beyond Devolution*, WALL ST. J., Sept. 5, 1995, at A14 (discussing the theory of devolution to charitable institutions and individuals, which is the theory behind the tax credit).

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.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 Wilksburg school privatization experiment.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 *Wilksburg* case, the school board contracted out an entire school’s teaching function to a private company.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.¹⁰⁴ There was a level playing field. The school board then hired an arm’s-length consulting firm to review and grade suitable bids.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 Wilksburg were laid off as the new “private” company brought on its own managers and line staff,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.¹⁰⁷ In cases of federal government corporations and the Agency for International Development investment funds, there is no clear answer as to

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).

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 Wilksburg schoc. board’s decision to privatize one of its elementary schools).

103. Monica L. Haynes & Matthew P. Smith, *Company to Run School; Wilksburg Board Approves Private Contract to Run Turner*, PITT. POST-GAZETTE, Mar. 22, 1995, at B1.

104. *Id.*

105. *Id.*

106. See Monica L. Haynes, *Two Dozen Wilksburg Teachers Furloughed*, PITT. POST-GAZETTE, July 26, 1995, at A1.

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.¹⁰⁸ This raises important questions of accountability because, when public money is involved, the possibility of potential taxpayer liability must be addressed.¹⁰⁹ 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.¹¹⁰

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.¹¹¹ 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.

108. See A. Michael Froomkin, *Reinventing the Government Corporation*, 1995 U. ILL. L. REV. 543, 605-14 (1995) (discussing issues of inconsistent treatment and accountability of federal government corporations); David B. Ottaway, *At U.S.-Sponsored Enterprise Funds, a Question of Authority*, WASH. POST, Feb. 14, 1996, at A19 (describing the issues raised when public funds are involved in a nominally private operation).

109. See THOMAS H. STANTON, SAYING GOODBYE WHEN THE JOB IS DONE: THE COMING PRIVATIZATION OF GOVERNMENT-SPONSORED ENTERPRISES 4-5 (1995) (arguing for complete privatization because of potential taxpayer liability).

110. See CAROL HARLOW & RICHARD RAWLINGS, LAW AND ADMINISTRATION 32-34 (1984).

111. See FRIEDRICH A. VON HAYEK, THE ROAD TO SERFDOM (1941).