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Globalization, Democracy, and the Need for a New Administrative Law*

ALFRED C. AMAN, JR.**

INTRODUCTION

American administrative law is inextricably linked with the history of the relationship of the market to the state. This relationship, especially at the federal level, has varied over time, from the laissez-faire economic philosophy that typified federal involvement (or the lack thereof) in the nineteenth and early twentieth centuries,¹ to the interventionist approaches taken by the federal government during the New Deal and beyond.² Indeed, modern administrative law is, in large part, a product of federal attempts to regulate private enterprises through the creation of federal administrative agencies and administrative processes designed to control and legitimate agency power.

Elsewhere I have argued that a new administrative law is emerging, characterized in part by the following factors:

- (1) new blends of public and private power at all levels of government;
- (2) a redefinition of what is public and what is private;
- (3) greater reliance on bargaining and negotiation models of decisionmaking when it comes to the way the state exercises its power;
- (4) a diminution of public participation stemming from increased reliance on privatization and, in effect, the delegation of public functions to private entities; and
- (5) a market discourse that arguably narrows the role of noneconomic values in decisionmaking processes.³

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1. See Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 *STAN. L. REV.* 1189, 1248 (1986).

2. See *id.* at 1248-53.

3. See Alfred C. Aman, Jr., *Law For a New Century*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 90, 96-97 (Michael Taggart ed., 1997).

In this Article, I will argue that these emerging trends are indicative of the ways globalization has changed the nature of the relationship of markets to the state, creating a democracy deficit and necessitating new roles for administrative law.⁴ I will make this argument by focusing primarily on privatization and, in particular, the privatization of prisons and social services for the poor.⁵ These areas highlight the importance of providing citizens with opportunities to raise issues that do not easily translate into economic terms alone. Moreover, prisoners, as well as other needy citizens in our society, are not likely to have much impact in normal political arenas; accordingly, they have particular needs for transparency and participation in the processes that affect them directly. The democracy issues raised by privatization and globalization are especially apparent in these contexts.

One form of governmental intervention into the market that has been quite rare in the United States has been nationalization—that is, government ownership of industries such as electric utility companies, communications companies, or airlines.⁶ The U.S. approach has been to regulate the private enterprises that provide such services. As a consequence, what I have elsewhere called the Global Era of Administrative Law,⁷ has been dominated by various degrees of deregulation, rather than the kind of privatization that results from the sale of governmentally owned enterprises.⁸

Both privatization and deregulation take many forms. Some forms of deregulation, such as those accomplished by legislation, result in the outright repeal of regulatory structures and agency-enabling acts;⁹ others, instituted by administrative agencies themselves, result in the repeal of some rules and/or

4. See Alfred C. Aman, Jr., *The Globalizing State: A Future-Oriented Perspective on the Public/Private Distinction, Federalism and Democracy*, 31 VAND. J. TRANSNAT'L L. 769 (1998).

5. As Judge Patricia Wald has noted:

The privatization train is not reserved for criminals. State and local governments have contracted with private operations to take care of the most vulnerable, dependent, and disempowered members of society—children, the unemployed, the physically and mentally disabled—whose servicing for most of the twentieth century has been considered quintessentially a “public” responsibility.

Honorable Patricia M. Wald, *Looking Forward to the Next Millennium: Social Previews to Legal Change*, 70 TEMP. L. REV. 1085, 1098 (1997).

6. Though nationalization is rare in the United States, there are some exceptions. The Tennessee Valley Authority was created as a government corporation to undertake the building and operation of dams. See Richard Wirtz, *The Legal Framework of the Tennessee Valley Authority*, 43 TENN. L. REV. 573, 574-75 (1976).

7. See ALFRED C. AMAN, JR., *ADMINISTRATIVE LAW IN A GLOBAL ERA* 2 (1992).

8. See *id.*

9. See Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978).

their replacement with rules that use markets and market approaches as regulatory tools, thereby replacing command-control regulatory approaches with incentive-based regulation.¹⁰ Such uses of the market and market-based approaches are, in this sense, a means to an end, not ends in themselves. At the federal agency level, such forms of deregulation usually are subject to the Administrative Procedure Act (APA).¹¹ An agency's repeal or change of an existing rule, for example, is treated procedurally the same way as the promulgation of a new rule.¹² The substitution of market approaches for more direct regulation has usually been upheld by reviewing courts, particularly when economic regulation has been involved.¹³

Just as there are many forms and degrees of congressional and agency deregulation, privatization also can take many forms, and these forms represent varying degrees of separation from the public body delegating responsibilities to the private actors involved. As Professor Lester Salamon has noted, privatization in the United States has meant the development of various tools of governance.¹⁴ Indeed, what he calls the "new governance" includes a variety of tools that government at all levels can employ in carrying out their tasks, including contracting out or outsourcing, grants, tax expenditures, vouchers, direct loans, government corporations, and franchises.¹⁵

There are similarities and differences between different forms and degrees of deregulation and the various forms that privatization can take. Like deregulation, some forms of privatization are the result of legislative action, which seeks to provide a market where a regulatory regime once existed. For example, the legislature may sell off a governmentally owned entity to private

10. See, e.g., Bruce A. Ackerman & Richard B. Stewart, *Reforming Environmental Law*, 37 STAN. L. REV. 1333, 1341 (1985).

11. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000).

12. See *Motor Vehicle Mfrs. Assn v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 30 (1983).

13. See AMAN, *supra* note 7, at 42-62.

14. See Lester M. Salamon, *The New Governance and the Tools of Public Action: An Introduction*, in THE TOOLS OF GOVERNMENT 1, 1 (Lester M. Salamon ed., 2002).

15. See *id.* at 33. In addition to tools for providing governmental services, agencies utilize similar market approaches, such as regulatory contracts to carry out their statutory duties. See Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 189-201 (2000). For excellent analysis of various public/private forms of governance, and the relationships between public and private actions, see generally Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) [hereinafter *The Private Role in Public Governance*]; Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, in THE LIMITS OF LEGAL ORDER 331 (1999).

parties, as was common in Europe in the 1980s.¹⁶ Like the deregulation that results from the wholesale statutory repeal of a regulatory regime,¹⁷ the market is intended to replace the government completely when government-owned assets are sold to private buyers.

Perhaps the most common form of privatization in the United States—and the primary focus of this Article—is the use of the private sector to deliver what once were governmentally provided social services. The primary governance tool in these cases is the contract. The management of prisons, for example, has been increasingly outsourced to the private sector at both the federal and local levels.¹⁸ Garbage and snow removal also are now commonly handled by private providers,¹⁹ and various aspects of welfare administration,²⁰ such as eligibility determinations, are carried out by private entities. Contracting out, or outsourcing, for such purposes is somewhat akin to agency deregulation, in which government agencies remain involved but now use market approaches to carry out their statutorily mandated goals. In the outsourcing context, a governmental agency is still responsible for the services provided, but has decided to opt for a private means of carrying them out. What differentiates this kind of privatization from deregulation, however, is the fact that privatization involves services, not regulation, and private parties now perform the functions involved. In effect, the government delegates responsibility for

16. For an interesting discussion of the differences between privatization and deregulation in the United States and Europe, see generally Giandomenico Majone, *Paradoxes of Privatization and Deregulation*, in JOURNAL OF EUROPEAN PUBLIC POLICY 4 (1994).

17. See, e.g., Airline Deregulation Act, *supra* note 9.

18. See Shymeka L. Hunter, *More Than Just a Private Affair: Is The Practice of Incarcerating Alaska Prisoners in Private Out-Of-State Prisons Unconstitutional?*, 17 ALASKA L. REV. 319, 327-28 (2000).

Given the way the federal government and states like Alaska have supported the private sector's prison ventures and the booming market, it is perhaps not surprising that by 1996 there were more than one hundred private jails and prisons located across twenty-seven states. As of 1997, the private prison industry was grossing 550 million dollars annually; Alaska is among the twenty-five states that make use of private prisons. Thirty-one states, the Federal system, and Washington, D.C., reported a housing total of 71,208 prisoners in private facilities in 1999. Specifically, Alaska housed thirty-five percent of its prison population in private facilities during 1999, making it second only to New Mexico's thirty-nine percent.

Id.

19. See Lewis D. Solomon, *Reflections on the Future of Business Organizations*, 20 CARDOZO L. REV. 1213, 1216 (1999) ("Virtually any asset or service that a local government owns or provides has been privatized somewhere in the United States in some manner, including fire protection, police protection, waste water treatment, street lighting, tree trimming, snow removal, parking structures, railroads, hospitals, jails, and even cemeteries.")

20. See Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1207-08 (2000).

services to private actors. When agencies employ market incentives or market-based rules to carry out their goals, they are engaged directly in regulatory action and the agency itself—already a state actor—usually remains in charge.²¹ The public/private partnerships that result when agencies contract out for social services, however, implicate administrative law in ways that are more complex than when an administrative agency remains directly involved in the regulatory process.²²

In this Article, I focus primarily on privatization in the form of outsourcing basic social services, because it is especially in such contexts that we can see the impact of globalization on the domestic scene. I will make a two-part argument in this regard. First, I will argue that privatization today should be understood as a principal effect of globalization. In this sense, it is not merely one means among others for making government more efficient or for expanding the private sector. Nor is it just a reflection of current political trends and a swing of the regulatory pendulum from liberal to conservative. Rather, the increasing reliance on “the new governance”²³ is indicative of a changing relationship between the market and the state, one characterized by a fusion of public and private values, rhetoric, and approaches—a fusion that is itself integral to the fusion of global and local economies. Privatization is the result of these fusions. It, in effect, increases the exposure of the state to external economic and political pressures that tend to accelerate globalization, in large part, because private actors fully exposed to the global economy now carry out the delegated tasks. The global political economy places great pressures on all entities—public and private—to be cost-effective if they wish to be competitive.²⁴ This encourages such delegations on the part of the state, and it raises concerns over whether the cost savings that result from such public

21. This is, however, not always the case. When, for example, agencies rely on tradeable pollution permits, they create incentives on the part of the private parties involved to undertake the enforcement against those who cheat. The government is, in effect, not involved in the enforcement of the requirements of these permits and the choice of tradeable permits rather than command control regulations lessens the direct involvement of the state in the enforcement process.

22. For the most part, agency deregulation in the form of market incentives largely overlaps with what might be called the reinvention of government approach to reform. For a discussion of how this approach differs from privatization in an ideological sense and privatization in the sense of market tools for public purposes, see Salamon, *supra* note 14, at 14-16. For a discussion of some of the legal issues presented by reinvention of government approaches, see Alfred C. Aman, Jr., *A Global Perspective on Current Regulatory Reforms: Rejection, Relocation or Reinvention?*, 2 *IND. J. GLOBAL LEGAL STUD.* 429, 450-63 (1995).

23. See *supra* note 14.

24. For a discussion of the various ways that competition in a global economy can affect state entities, politics, and the law they apply, see Aman, *supra* note 4, at 780-91.

delegations to private entities occur at the expense of democratic processes, legitimacy, and individual justice. Given the role that the public/private distinction plays in U.S. administrative law, privatization, in this global context, tends to reduce the democratic public sphere in favor of other arrangements that are likely to be less transparent and accountable to the public, and less exposed to competing value regimes. I call this scenario the “democracy deficit.”

The democracy deficit is primarily the result of the application of a traditional conception of the public/private distinction that is likely to lessen considerably the public sector’s responsibilities for transparency and accountability when private actors perform certain tasks. Justifications often provided for such an approach begin with the assumption that policymaking and administration can, in fact, be separated—an assumption that most commentators reject.²⁵ Even in privatized contexts, private actors inevitably make policy when they carry out their delegated tasks and interpret the contracts under which they operate. The second element of my argument, then, is that a new kind of administrative law can and should be created to respond to the “democracy deficit” associated with privatization. It need not rely solely on traditional procedural approaches, arguably designed for governmental agencies carrying out regulatory functions. At the same time, it is important to emphasize that what is at stake are the values of public law—transparency, participation, and fairness. Various procedural approaches may be necessary to ensure the realization of these values. The values of the APA, though not necessarily the precise procedural devices it currently employs,²⁶ need to be extended to various hybrid, public/private arrangements if we are to ensure the legitimacy of those partnerships. Given a reorientation of states and markets

25. Jody Freeman has described the actual cumulative process of policymaking and subsequent implementation and enforcement as “fluid.” She explains that “[a]dministrative law scholars tend to take snapshots of specific moments in the decisionmaking process (such as the moment of rule promulgation) and analyze them in isolation. Rules develop meaning, however, only through the fluid processes of design, implementation, enforcement, and negotiation.” *The Private Role in Public Governance*, *supra* note 15, at 572; see also Michael Aronson, *A Public Lawyer’s Responses to Privatization and Outsourcing*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 50, 50-58 (Michael Taggart ed., 1999).

26. For purposes of this Article, references to the Administrative Procedure Act (APA) are intended to suggest the use of procedures for hybrid decisionmaking that may or may not be the same as the procedures found in the APA. In many instances, if the APA is to apply it must be amended to fit the needs of hybrid arrangements involved, such as the provisions dealing with contracting out agency duties, see text at notes 101-102, *infra*; in others, it is important to determine which types of private entities should be affected by APA extensions. For a discussion of the scope and coverage of the Freedom of Information Act, as it relates to the private sector, see Alfred C. Aman, Jr., *Information, Privacy, and Technology: Citizens, Clients or Consumers?*, in *FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION* 320, 333-36 (Jack Beatson & Yvonne Cripps eds., 2001).

due to globalization, this Article will set forth some of the key issues that a new administrative law should now address and argue that the underlying theory and purpose of administrative law need to be reconceptualized.

The pragmatics of globalization make privatization the critical terrain in which a new administrative law might respond by assuring public fora for input and debate and a flow of information that can help create a meaningful politics around the decisions of private actors. Globalization also highlights the changing ways in which the state now interacts with private entities and the consequent need for a new theoretical conception of administrative law. To develop these themes, Part I of this Article first discusses more fully the relationship of privatization to the state, the private sector, and law. In light of the changing relationship of the state to the private sector, Part II then highlights some of the issues that a new administrative law should consider. In Part II, I argue for a reconceptualization of the underlying theory and purpose of administrative law in these privatized contexts. Part III concludes by suggesting procedural reforms to deal with these issues.

I. THE IMPACT OF GLOBALIZATION ON STATES AND MARKETS

First, I turn to globalization as the context for privatization. Globalization is a short-hand term for complex social, economic, and political processes that in effect denationalize and deterritorialize states.²⁷ The transnational flow of capital and communication increasingly occurs with little or no agency of the state. At the same time, for states to deal effectively with transnational problems such as pollution or economic opportunities, such as the attraction of investment from outside investors, they must partner with entities that selectively suspend or, in effect, deterritorialize their boundaries.²⁸

27. See Jost Delbrück, *Globalization of Law, Politics, and Markets—Implications for Domestic Law—A European Perspective*, 1 IND. J. GLOBAL LEGAL STUD. 9 (1993); see generally PETER DICKEN, *GLOBAL SHIFT 1-8* (2d ed. 1992) (analyzing the process of globalization resulting from the interactions between states and corporations); WILLIAM GREIDER, *ONE WORLD, READY OR NOT* (1997); KENICHI OHMAE, *THE BORDERLESS WORLD: POWER AND STRATEGY IN THE INTERLINKED ECONOMY* (1990); SASKIA SASSEN, *CITIES IN A WORLD ECONOMY* (1994); SASKIA SASSEN, *THE GLOBAL CITY: NEW YORK, LONDON, TOKYO* (1991) [hereinafter *THE GLOBAL CITY*]; Alfred C. Aman, Jr., *The Earth as Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 YALE L.J. 2107 (1993) [hereinafter *Eggshell*]; Alfred C. Aman, Jr., *Introduction to Symposium, The Globalization of Law, Politics and Markets*, 1 IND. J. GLOBAL LEGAL STUD. 1 (1993); Saskia Sassen, *Toward a Feminist Analytics of the Global Economy*, 4 IND. J. GLOBAL LEGAL STUD. 7 (1996).

28. See Alfred C. Aman, Jr., *Privatization and the Democracy Problem in Globalization: Making Markets More Accountable Through Administrative Law*, 28 FORDHAM URB. L.J. 1477, 1483-84 (2001).

Globalization draws states and nonstate entities into a range of partnerships and hybrid forms of governance that push and pull the “national interest” across national lines, and compress the national interest with economic interests. In practical terms, there is much more competition at the global level for investment and among private firms for market share. These same kinds of denationalizing forces and extraterritorial needs affect all levels of government, local, state, and national. By delegating public functions to private entities, governmental units become more and more like private firms competing in a global marketplace.²⁹

A. *The Global Marketplace*

If we were to view the shift from public to private as only another possible regulatory outcome, one driven either by public-spirited interest group politics, or the capture of the legislative process by powerful actors, one could argue that this is just a new regulatory technique, or a more cost-effective way of carrying out the tasks of government in a competent fashion. “Third-party governance” represents a set of effective tools for achieving public ends;³⁰ but this not the full story. The shift from hierarchy to networks that these new approaches embody³¹ is indicative of changes that resonate with fundamental changes in our overall political economy. The delegation of public functions to private bodies now occurs as part of a larger, global regulatory context in which nonstate actors play an increasingly prominent role at all levels of government.³² At the state or local level, problems may have transjurisdictional aspects that highlight the limitations of the territorial boundaries that define states and various government units. The territorial limitations of state power can be overcome by partnerships with entities that have no such restrictions or with other states who share similar concerns. There are strong incentives and,

29. States can also feel pressure to act like private firms by trying to speed up their reaction time to issues, to resolve issues quickly, or to sidestep aspects of the political process. See, e.g., Natalie R. Minter, *Fast Track Procedures: Do They Infringe Upon Congressional Constitutional Rights?*, 1 SYRACUSE J. LEGIS. & POL'Y 107 (1995) (arguing that utilizing fast track legislation removes power from the legislative branch in favor of the executive branch).

30. Salamon, *supra* note 14, at 15.

31. See *id.* at 11-14.

32. For a discussion of the rise of and importance of nonstate actors in international law, see Stephan Hobe, *Global Challenges to Statehood: The Increasingly Important Role of Nongovernmental Organizations*, 5 IND. J. GLOBAL LEGAL STUD. 191, 192-93 (1997).

indeed, often a need on the part of the public sector to partner with other states and with private entities, if a particular governmental unit is to succeed.³³

The global economic context in which many industries now operate adds another important dimension to these incentives to partner. The global economy is marked by increased competition in both the public and the private sectors. As private companies vie for markets, states and localities vie for investment and the economic prosperity it spawns. The currency used in this competition often results in low taxes and low regulatory costs derived from various forms of deregulation as inducements to investment in a particular place.³⁴ It can also result in different choices by governmental entities in how they decide to fulfill their public duties. Efficiency concerns make direct private providers of services who can conceptualize their service area without regard to territorial boundaries very attractive, particularly if they are able to achieve their economic goals more efficiently. A company that manages private prisons, for example, can theoretically provide its services throughout the nation, not simply in one jurisdiction and, in so doing, realize economies of scale that a more territory-specific governmental entity might not achieve. Over and above economies of scale, private actors and market approaches can introduce new management techniques more easily, perhaps fire workers more readily, and make some of the tough resource allocation decisions that public officials might just as well avoid.³⁵

Such efficiencies, the extraterritorial perspective, and pragmatic flexibility that private actors can provide encourage privatization. The affirmative involvement of the private sector in public functions through privatization may increase efficiency and encourage innovation, but particularly in the context of social services traditionally provided by the government,³⁶ procedural and

33. See Todd Wildermuth, *Counties Consider Swapping Some Snow Removal Road Duties*, TRINIDAD PLUS & THE RATON RANGE, Mar. 24, 1998 ("Certain roads in one county are more easily accessible from the neighboring county, making it convenient and time-effective for the neighboring county's crews to handle snow removal on those portions of road."), available at <http://www.trinidadco.com/stories98/news/03/24/road.htm> (last visited July 13, 2002). Efficiencies like this can also be attained with "regulatory services" as well. There often are economies of scale to be achieved between state clean air acts and clean water acts. Pollutants do not follow boundaries, making interstate air compacts (ozone) and watershed management necessary. See, e.g., Charles E. McChesney II, *The Interstate Ozone Pollution Negotiations: OTAG, EPA, and a Novel Approach to Negotiated Rulemaking*, 14 OHIO ST. J. ON DISP. RESOL. 615, 615-26 (1999).

34. See Aman, *supra* note 28, at 1481-83.

35. See *id.* at 1481-83 (discussing legitimate and illegitimate global currencies used to achieve certain kinds of efficiencies).

36. Social services that focus primarily on the poor and the disadvantaged do not lend themselves to economic discourses alone. Moreover, the affected individuals are not as likely to have the kind of attention from the political system that other more prominent and wealthy groups of voters may have. For a discussion

structural issues arise that challenge conventional versions of administrative law theory. Dimensions of citizenship and opportunities for democratic participation are often lost in the translation of public values and goals to market values and market realities. Some of the market-state relationships that result are structurally flawed in ways that call for a vibrant and new administrative law, if we are to accomplish the positive aspects of these public/private partnerships without undermining our roles as citizens.³⁷ Public law values such as transparency, participation, and neutrality need to be assured as well, though not necessarily by traditional procedural approaches. Just as so-called soft law in international law contexts can play a significant role in shaping the behavior of some states,³⁸ so too can a kind of “soft procedural law,” especially that designed to further the flow of information, affect and encourage public-regarding behavior on the part of private actors.³⁹ Conflicts of interest, as we shall see,⁴⁰ may loom large in the fusion of public and private values that privatization encourages; they need to be minimized, given the predominance of the profit motive among the for-profit providers of social services. To achieve such goals without undermining the creativity and efficiency of public/private partnerships requires a new understanding of the

of the morality of excluding certain citizens from the requirement of being members of the workforce, see Jerry L. Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Matthews v. Eldridge?: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 46-54 (1976).

37. See text at notes 90-91, *infra*.

38. See generally Matthew B. Kirsner, *Consumer's Union of U.S., Inc. v. Kissinger: A Domestic Response to Soft Law in the International Normative System*, 2 J. INT'L LEGAL STUD. 41 (1996). Professor Kirsner notes that:

[T]he normative system of international law is increasingly comprised of legal standards of vague substance known as “soft law.” Such provisions do not create legally enforceable rights and duties. Rather, these provisions may be unilateral, voluntary, and enacted outside of official diplomatic channels. The soft law phenomenon is primarily embodied in economic and political treaties providing for preliminary consultations or negotiations, as well as resolutions of international organizations.

Id. at 41 (footnotes omitted).

39. See, e.g., Cynthia A. Williams, *Corporate Social Responsibility in an Era of Economic Globalization*, 35 U.C. DAVIS L. REV. 705, 735 n.101 (2002). Professor Williams argues that:

U.S. multinationals bring with them “the glare of public scrutiny and the changes it can induce in an increasingly global marketplace. When local producers in Vietnam, Pakistan, or Honduras exploit their work force, few in the West hear of it, especially if the products are not exported to Western markets. But when those same producers become suppliers to Reebok, Levi Strauss, or Walt Disney, their actions make headlines in the United States.”

Id.

40. For an extended discussion of the characteristics of the globalizing state and its need to bargain and to partner, see Aman, *supra* note 4, at 791-816.

state's role in a global economy and its relationship to private actors and the market.

Globalization affects both states and the private sector. States remain important but must, in many ways, change the ways in which they seek to carry out their concept of the public interest. Private actors in various industries also have changed dramatically the way they do business, and private entities in almost every field are subject to competition worldwide. As the following parts will show, changes in the ways the public and the private sectors now operate ultimately affect the law as well.

B. The Globalizing State

The concept of the globalizing state signifies a state that no longer has a monopoly on the policies it creates and promulgates, but must increasingly cooperate, bargain, and partner with other states and private entities to achieve its goals.⁴¹ In so doing, it often is under pressure to harmonize or converge its regulatory approaches with other states as it tries to resolve economic and environmental issues internationally, and increasingly, it resorts to market approaches and the delegation of public functions for private entities to carry out its domestic duties.⁴² These state to state and public and private partnerships, of necessity, open the state up to all of the kinds of global economic pressures prevalent today and, in the process, encourage approaches to issues that are global in nature. As Saskia Sassen has argued, the state is less in control of the outcomes of such political and economic processes, in part because those processes now include actors from other states, as well as transnational nonstate entities. Sovereignty and territory as we have known these concepts have become "somewhat de-centered."⁴³ The end result is a state that is itself de-centered and no longer the primary unit of analysis, even in questions of creating public policy.

Global processes de-center the state in various ways. As noted above,⁴⁴ global processes often bypass the state altogether as capital, culture, ideas, images, and the like flow across boundaries without the direct agency of the state.⁴⁵ States' powers are fragmented as they increasingly must share them

41. *See id.* at 812-13.

42. *See id.* at 815-16.

43. SASKIA SASSEN, *LOSING CONTROL?* 28-31 (1996).

44. *See text accompanying note 40, supra.*

45. *See generally* ARJUN APPADURAI, *MODERNITY AT LARGE* 237 (1996).

with other states and nonstate actors to achieve their goals.⁴⁶ Quite apart from whether we conceptualize states as strong or weak, they need private entities and other states to achieve their goals. States are now much more open to the kinds of global economic pressures experienced by global actors and they themselves are becoming more global. States' reactions to these processes, be they the lowering of trade barriers, entering into environmental treaties, or opting for privatization, encourage and, indeed, accelerate global processes. The end result is double-edged. As the state responds to global forces and processes, it accelerates their impact. States do not ultimately disappear in this process. They remain significant players; however, they are now part of a much larger network of other actors with whom they are not necessarily or even likely to be in a hierarchical relationship.⁴⁷ Under such conditions, levels of public and private power are layered by networks of actors and rules that derive not only from other states, but private entities as well.⁴⁸

C. Globalization and the Private Sector

Just as the globalizing state is a double-edged concept, with the state both responding to and furthering the processes of globalization, so too is the impact of the private sector double-edged. As businesses respond to global forces and technologies, they create new modes of operation and a global economic infrastructure that accelerates globalization.

46. See Philip G. Cerny, *What Next for the State?*, in GLOBALIZATION: THEORY AND PRACTICE 123, 124-25 (Eleanore Kofman & Gillian Youngs eds., 1996). He argues that:

[G]lobalization entails the undermining of the public character of public goods and of the specific character of specific assets, i.e. the privatization and marketization of economic and political structures. States are pulled between structural pressures and organizational levels they cannot control. Economic globalization contributes not so much to the supersession of the state by a homogeneous global order as to the splintering of the existing political order. Indeed, globalization leads to a growing disjunction between the democratic, constitutional and social aspirations of people—which are still shaped by and understood through the frame of the territorial state—on the one hand, and the dissipating possibilities of genuine and effective collective action through constitutional political processes on the other.

Id. at 130.

47. Global networks and web-like structures at the international level are similar to the networks that make up the new governance and suffer from many of the same issues and problems involving accountability, legitimacy, and democracy. See Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 IND. J. GLOBAL LEGAL STUD. 347, 347-50 (2001) (discussing the difficulties of maintaining accountability across transnational networks).

48. See GUNTHER TEUBNER, GLOBAL LAW WITHOUT A STATE (1997); Harold J. Berman, *The Law of International Commercial Transactions (lex mercatoria)*, in A LAWYER'S GUIDE TO INTERNATIONAL COMMERCIAL TRANSACTIONS (lex mercatoria), Part III, folio 3 (W. S. Surrey & D. Wallace, Jr. eds., 1983).

Businesses organize themselves in ways that both influence and adapt to the political, legal economy of which they are a part. During the New Deal and the state-centered approach to law that dominated that era, corporations were more national in their orientation and more hierarchical in their dealings within and outside the corporation. As I have argued elsewhere:

Corporations . . . could be viewed as comparable in structure to the large buildings many of them occupied—many floors high, with the executives at the top and workers scattered below. The company usually located manufacturing plants nearby and often kept the materials and inventories necessary for these plants to function on the premises.⁴⁹

Such a place-specific approach to manufacturing is no longer the way most global companies now do business. New technology industries such as computers, as well as those whose operations are transformed by such technologies, such as banking, are now global in scope and operation.⁵⁰ They are web-like in the ways in which they use technologies to link up with suppliers, fabricators, and the manufacturers of some or all of the parts necessary for the product involved.⁵¹ Sometimes it is hard to know where the center of a particular company is, as it is, in many ways, made up of a series of independent contractors around the world, each performing a particular task in the most cost-effective way.⁵² Indeed,

transnational corporations decide where it is most cost-effective to locate various activities in the value chains connected with the production and marketing of goods and services. They may locate research and development in one

49. *Eggshell*, *supra* note 27, at 2117.

50. See Wolfgang H. Reinicke, *Global Financial Markets: Pioneers in Global Public Policy*, in *GLOBAL PUBLIC POLICY* 102, 102-35 (1998).

51. See ROBERT REICH, *THE WORK OF NATIONS* 110-18 (1991).

52. With the growth of vast transnational corporations, corporate national identity has become an increasingly malleable concept. For example, U.S. corporations are increasingly willing to change their corporate 'nationality,' to take advantage of lower corporate taxes. See David Cay Johnston, *U.S. Companies File in Bermuda to Slash Tax Bills*, *N.Y. TIMES*, Feb. 18, 2002, at A1. As a further step towards decentralization, some companies have taken to forming "virtual corporations," defined as "temporary network[s] or loose coalition[s] of manufacturing and administrative services that come[] together for a specific business purpose and then disassemble[] when the purpose has been met." P. Maria Joseph Christie & Reuven Levary, *Virtual Corporations: Recipe for Success*, *INDUS. MANAGEMENT*, July 1, 1998, at 7.

country, component assembly in another, final assembly in another country, and distribution networks in yet another. They also decide how much to customize the globally conceived products for local markets.⁵³

Just as the state is de-centered, so too are many industries that now organize themselves and operate in a global fashion. Flexibility, networks, and contractual approaches to manufacturing and other phases of business parallel the kinds of changes states are experiencing and represent the kinds of challenges that exist if states are to participate in, or exercise influence over, aspects of businesses organized in this fashion. That law both influences and is influenced by the dominant corporate organizational forms of the day is no surprise. In *The Administrative Process*, for example, James Landis, one of the primary architects of the New Deal, looked to business for inspiration when it came to the constitutional separation-of-powers approaches most appropriate for administrative agencies. He noted:

[W]hen government concerns itself with the stability of an industry it is only intelligent realism for it to follow the industrial rather than the political analogue. It vests the necessary powers with the administrative authority it creates, not too greatly concerned with the extent to which such action does violence to the traditional tripartite theory of government organization.⁵⁴

The corporation of the twenty-first century is more flexible, more multicentered, web-like, and global in its reach than its twentieth-century ancestors. Law will inevitably follow these new forms, but in so doing, it faces a number of challenges. There are public law values that global markets are not likely to take into account and the fluid, network-like structures that various contractual approaches produce may be at odds with many of the more traditional, hierarchical assumptions found in many areas of the law. Indeed, the hierarchical nature of law traditionally conceived along with its place-specific source of authority and legitimacy poses significant, but not insurmountable, problems for how best to conceptualize and apply a new administrative law. The multidimensional and decentered nature of both states

53. Aman, *supra* note 4, at 781; see authorities cited *supra* in note 37.

54. JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 11-12 (1938).

and businesses in a global economy encourage a multidimensional and flexible approach to law as well.

II. GLOBALIZATION, ADMINISTRATIVE LAW, AND THE DEMOCRACY DEFICIT

The globalizing state fuses in approach and in rhetoric the cost-conscious language of the market with the public interest goals of the state, eliminating any bright-line distinctions that once might have existed between “the market” and “the state.” The fusion between public and private that results is not unlike that which occurs between the global and local, as the local and the global become “modalities of a single, dynamic system (broadly speaking), not simply an arrangement of parts and a whole.”⁵⁵ However, the combination of fusions—public and private and global and local—can create legal confusions, particularly given the way U.S. law is geared to bright-line distinctions between public and private.

While the private provision of public services is of a piece with the need for global competitiveness generally, the essentially public nature of the enterprise can be lost in approaches to accountability that are oriented towards aggregate cost and profitability rather than individual justice and democratic participation.⁵⁶ More importantly, the discourse that results and the means by which success is determined often are dominated by economic values without any effective way of determining what noneconomic values are relevant and how their importance might be assessed. This is particularly a concern when we are dealing with privatization and social services for the poor, but the ability of market discourses to dominate other kinds of public values is not limited only to welfare recipients or prisoners. Market values and the kinds of accountability that markets enforce are not necessarily sufficient in a variety of contexts—from education to snow removal—in need of greater transparency, participation, and explicit consideration of noneconomic values.⁵⁷

55. Aman, *supra* note 4, at 813.

56. For an interesting analysis of the difficulties of assuring accountability when private actors are employed, see Diller, *supra* note 20, at 1121. See also Paul L. Posner, *Accountability Challenges of Third-Party Government*, in *THE TOOLS OF GOVERNMENT* 523, 523-51 (Lester M. Salamon ed., 2002).

57. See Posner, *supra* note 56.

The democracy problem is and should be one of the primary concerns of the new administrative law.⁵⁸ The democracy problem in globalization arises from the disjunction between global socioeconomic and political processes, on the one hand, and local processes of democratic participation, on the other. The resolution of such disjunctures is most often left to the market; however, in some contexts (for example, the privatization of prisons), such privatizations can intensify the democracy problem—because when regulation is given over to the market, the public may no longer be as directly involved in decisionmaking, nor is the information that would make public participation meaningful available. In domestic settings, particularly in the United States, globalization complicates both the form and content of democracy because it rearranges the lines between public and private entities, multiplies the number and range of institutional sites in any one decisionmaking process, and tends to enlarge the private sector by delegating public functions to private fora.⁵⁹

There are a variety of possible procedural responses to the procedural and structural questions presented by privatization. Perhaps the most common form of response is what we can call a traditional labeling approach: The actions taken are labeled either public or private. If public, a certain legal regime naturally follows with the application of the Due Process Clause; if private, another set of preordained rules may apply, including common law approaches.⁶⁰

There are many problems with the labeling approach, particularly as applied to social services for the poor. Even if traditional due process protections extend to such contexts,⁶¹ the constitutional law that now exists may

58. See 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, 383-89 (2001) [hereinafter *The Limits of Globalization*]; 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, 412-18 (1999) [hereinafter *Proposals for Reforming the Administrative Procedure Act*].

59. See *The Limits of Globalization*, *supra* note 58, 383-84; *Proposals for Reforming the Administrative Procedure Act*, *supra* note 58, 399-401.

60. See, e.g., *McKnight v. Richardson*, 521 U.S. 399 (1997) (discussing private prisons); see also *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (discussing state action).

61. Private prisons are treated as “state actors” for purposes of civil rights suits. *Street v. Corr. Corp. of Am.*, 102 F.3d 810, 818 (6th Cir. 1996); *Payne v. Monroe County*, 779 F.Supp. 1330 (S.D. Fla. 1991); DOUGLAS McDONALD ET AL., PRIVATE PRISONS IN THE UNITED STATES 59 (1988). In *West v. Atkins*, 487 U.S. 42, 57 (1988), the U.S. Supreme Court held that a physician who is under contract with the state to provide medical services to inmates at a state prison hospital on a part-time basis acts “under color of state law,” within the meaning of 42 U.S.C. § 1983 (2000), when he treats an inmate. *West*, 487 U.S. at 57. In the context of private prisons, the court in *Payne* reiterated the basic principle that:

not be very effective and, in most instances, courts are increasingly reluctant to intervene.⁶² Even if this is not the outcome in a particular case, such case-by-case approaches ignore larger democratic needs that a space for politics might provide. Quite apart from the individual issues of a case, there often are the larger policy issues that a single court case is not likely to encompass.⁶³ If, on the other hand, the private label is invoked, the resort to the common law and private remedies and regimes may also be insufficient to deal with the public aspects of the problems involved. More important, and beyond what a private cause of action might or might not provide, the problem with the labeling approaches is that they fail to recognize the reasons for the public/private questions now being presented. Those reasons involve the transformative effect of the global economy on our legal system and the need to devise responses that are sufficiently flexible to meet the demands of a world in which the relationship of markets to states is now significantly different. A transformative approach to administrative law, one that recognizes that global forces need not be linear or their market outcomes inevitable, is necessary.⁶⁴ Administrative

A § 1983 action can be maintained when it can be established that the defendant acted under color of state law or exercises power possessed by virtue of state law. In *West*, the court found the requisite state action where a private physician was employed by the state to perform a duty of the state. Where a function which is traditionally the exclusive prerogative of the state is performed by a private entity, state action is also present.

Payne, 779 F. Supp. at 1335 (citations omitted).

62. See Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 *passim* (1996). Cynthia R. Farina, however, takes issue with broad-brush approaches to due process. She argues that due process rights are not coming to an end. See Cynthia R. Farina, *Misusing "Revolution" and "Reform": Procedural Due Process and The New Welfare Act*, 50 ADMIN. L. REV. 591, 591-92 (1998). Whether or not courts are likely to and, indeed, should intervene, the questions that remain are whether this is the best way to generate the kinds of procedural protections necessary to protect individuals in these hybrid contexts and whether there are needs for public fora that go beyond the issues of an individual case and that require discussion of the broader policy issues that may be involved, including conflict of interest considerations that may not rise to a constitutional level.

63. For example, cases dealing with specific prison conditions of certain disciplinary matters will not likely consider the larger issues often underlying such questions, such as the respective roles of punishment and rehabilitation in prisons today.

64. See DAVID HELD ET AL., *GLOBAL TRANSFORMATIONS* 7-10 (1999). David Held describes the point of view of a transformationalist in the following way:

[T]ransformationalists make no claims about the future trajectory of globalization; nor do they seek to evaluate the present in relation to some single, fixed ideal-type globalized world, whether a global market or a global civilization. Rather, transformationalist accounts emphasize globalization as a long-term historical process which is inscribed with contradictions and which is significantly shaped by conjunctural factors.

Id. at 9; see also *The Limits of Globalization*, *supra* note 58, at 396-400.

law can be a means of resisting some aspects of globalization and facilitating others to understand more fully which changes should be resisted and which changes should be furthered. The next part argues for the need to understand the relationship of markets to the state in a new way and why a different theory of administrative law may be necessary.

A. State-Centered Approaches to Administrative Law

Administrative law, as reflected in the APA,⁶⁵ is built around the act's assumptions about the market and the state, assumptions that reflect the state action doctrine in the Constitution.⁶⁶ Due process and other constitutional rights apply to states and state actors, not to the private sector.⁶⁷ Administrative agencies are defined as state actors and the procedural protections that apply, both constitutional and statutory, are designed for a relatively clearly demarcated public sphere.⁶⁸ It is state-centered by definition.

There are three primary political theories usually invoked to explain how the state in general and agencies in particular act in relation to the private sector and interest group lobbying—pluralism, public choice, and republican theory.⁶⁹ The major theoretical underpinnings of administrative law assume that the market and the state are separate worlds, though they do interact. Pluralistic theorists see the outcome of state legislative and regulatory action ultimately as the product of voluntary interaction among autonomous interest groups.⁷⁰ From this interaction, solutions to problems emerge that are in the public interest. On the other hand, public choice theorists posit a political marketplace, not unlike the economic marketplace, where powerful groups demand legislation or regulation that is ultimately supplied by legislators and regulators. Many of these theorists reject the notion that there is something even called the public interest.⁷¹ Republican theorists see legislative and regulatory outcomes as the

65. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000).

66. The APA applies to state agencies only. Section 551(1) applies to agencies, which it defines as "each authority of the Government of the United States . . ." 5 U.S.C. § 551 (2000).

67. For an excellent analysis of the state actor doctrine and some of its ambiguities, see generally Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302 (1995).

68. See *supra* notes 52 and 53.

69. For an excellent discussion of these theories and their relationship to U.S. and U.K. constitutional and administrative law, see generally P.P. CRAIG, *PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA* (1990).

70. See *id.* at 58-63.

71. See *id.* at 63-67.

products of a deliberative process in which a public interest can be defined and achieved.⁷²

All of these state-centric theories are designed to account for how state actions come about, either at the legislative or the regulatory level. Agencies are set squarely in the state sphere, but as a guide to administrative law, this map is now incomplete. The “province of administrative law” also includes administration by private entities and hybrid public/private bodies, such as federal corporations.⁷³ The relationship of the market to the state in such bodies differs from earlier notions that assumed a relatively clean division between public and private. Rather than private interest groups persuading state actors to undertake a certain course of action, public bodies themselves now often determine who, when, and how to delegate public functions to private actors. Private actors, either alone or in partnership with the state, are important administrators and policymakers.⁷⁴ States need them to solve problems and compete effectively in the global economy, and private entities can now provide certain kinds of technical experience and cost-effective management.

When one focuses on such mixes of public and private power from a global point of view, it is apparent that the nature of the state’s role and relationship to global markets and the private sector is changing. Privatized market-oriented approaches to services and regulation raise theoretical questions that go to the heart of the U.S. administrative process and require new ways of understanding it, as well as highlight new risks that can arise from a fusion of public and private mechanisms and values. For reasons developed below, the risks of a kind of corporatism taking over are not at all insignificant. Its impact on public law values and the democracy deficit are potentially profound.

B. The Globalizing State and the Risks of Neo-Corporatism

As a practical theory, corporatism has many meanings and it is difficult to sum up its essence.⁷⁵ Yet, some of the basic elements of the theory that can be discerned resonate with many of the privatization trends described above, to the

72. See Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

73. See generally THE PROVINCE OF ADMINISTRATIVE LAW, *supra* note 3; *The Private Role in Public Governance*, *supra* note 15.

74. See generally THE PROVINCE OF ADMINISTRATIVE LAW, *supra* note 3.

75. See CRAIG, *supra* note 69, at 148-53. See generally ALAN CAWSON, CORPORATISM AND POLITICAL THEORY 22-46 (1986).

point of suggesting the relevance of a kind of neo-corporatism theory for administrative law. These neo-corporatist aspects raise serious concerns and suggest new roles for administrative law to play.

Corporatist theory involves several aspects that are relevant and apply to the current situation. First, corporatism denies the basic pluralist idea that policy emerges from the free and voluntary interaction of multiple interest groups. In effect, it assumes that the government bargains only with selected, representative interest groups or peak organizations, with subsequent deal-making among those groups with respect to public policy in key areas.⁷⁶ Second, during the bargaining that ensues, corporatist theory holds that the state is operating with a public interest goal in mind. It is not a captured entity, but an independent player with a very important seat at the policymaking table.⁷⁷ In so doing, the state does more than simply reflect the sum total of the preferences of its constituents, but rather seeks to assert its view of the public interest in the bargaining that ensues. Third, as a result of these state approaches, corporatist theory holds that the state is elitist in nature—democratic in neither purpose nor result. The bargaining that the state engages in, from a corporatist perspective, often represents an attempt to avoid a confrontational mode of governance and to reach a politics of accommodation.⁷⁸ To achieve this degree of consensus, however, normal political processes usually are sidestepped. What often substitutes for traditional democratic processes are technocratic and managerial solutions. It is

76. Phillippe C. Schmitter has defined corporatism in the following way:

Corporatism can be defined as a system of interest representation in which the constituent units are organized into a limited number of singular, compulsory, noncompetitive, hierarchically ordered and functionally differentiated categories, recognized or licensed (if not created) by the state and granted a deliberate representational monopoly within their respective categories in exchange for observing certain controls on their selection of leaders and articulation of demands and supports.

Phillippe C. Schmitter, *Still the Century of Corporatism*, in TRENDS TOWARD CORPORATIST INTERMEDIATION 7, 13 (Phillippe C. Schmitter & Gerhard Lehmbruck eds., 1979). Though the new governance, with its emphasis on networks rather than hierarchy, would seem to undercut this view, the combination of the relatively few groups involved in providing some of the services, such as private prisons, coupled with the narrowing of the discourse to largely economic terms and the state's need to be as efficient as possible, all militate in favor of bargaining relationships between the state and the interest groups selected to undertake the public tasks at hand. *But see* R. Salisbury, *Why No Corporatism in America*, in TRENDS TOWARD CORPORATIST INTERMEDIATION, *supra*, at 213, 216 ("In the United States however, it has been unusual for official recognition to be granted any organized indirect groups, and it has been even more rare for such recognition to be given to groups purporting to speak for an entire section.")

77. *See* CAWSON, *supra* note 75, at 35.

78. *See, e.g.*, J. H. H. Weiller, et al., *European Democracy and Its Critique*, in THE CRISIS OF REPRESENTATION IN EUROPE 26, 32-33 (1995) (Jack Hayward ed., 1995).

technocracy and various forms of expertise that often provide the legitimacy for results that occur outside traditional democratic processes.⁷⁹

Each of these three aspects of corporatist theory resonate with the ways current government and governance operate in traditional and, especially, in privatized contexts. In this sense, I suggest that a type of neo-corporatism may help explain and highlight the risks to democracy and the fundamental values of administrative law that some of these hybrid approaches to government can encourage. While it might initially seem that the idea of peak organizations is foreign to U.S. politics, given the wide diversity of views and groups that exist, the reality of the administrative process is quite different. Once issues are funneled through an administrative process, there usually is a significant drop-off in the number of interest groups with the resources necessary to participate and therefore capable of influencing agency decisions. Those that do persist are, in some sense, like peak organizations. They are not chosen or selected by the government but neither are they infinitely diverse. Perhaps more important, the economic discourse involved means that most of these groups are likely to speak the same language. Peak organizations are not at all typical in the United States, but the economic discourse that increasingly dominates much of regulation, and certainly, the *raison d'être* for privatization, narrows the discourse in such a way as to make most groups sound essentially the same. There may be no peak organization, *per se*, but the discourse is so similar that this may be a distinction without a difference.

In most privatization contexts involving outsourcing and contracting out, the number of parties involved is naturally small, often involving, as in the prison context, only two or three major corporations who compete to manage prisons.⁸⁰ Once one of these contractors is chosen, as in many contractual arrangements, long-term relationships may develop, threatening even further to diminish the number of bargaining parties at the table involved. "A mutually dependent bargaining relationship emerges between government and the corporate sector, in which favorable policies are traded for co-operation and expertise."⁸¹ As one commentator on corporatist theory notes:

. . . [P]luralism is prescribed on a separation between public and private: between the sphere of government, and the

79. *See id.*

80. *See* Sharon Dolovitch, Address at the UCLA Law Review Symposium (Mar. 1, 2002).

81. CRAIG, *supra* note 69, at 150.

private groups of civil society. By contrast the stress within corporatist writing has been on the growing interrepresentation of the public and the private spheres. The crucial concept is that of public policy as the outcome of a bargaining process between state agencies and those organized interests whose power in the political marketplace means that their cooperation is indispensable if agreed policies are to be implemented.⁸²

Indeed, the globalizing state needs not only the political support of certain groups but their know-how and expertise to carry out tasks in cost-effective and, often, politically uncontroversial ways.

The relationship of technical expertise to the state and the ability of private providers to produce it suggests another neo-corporatist element in governance at the domestic level. While technical expertise may very well constitute an important mode of legitimacy, the use of an economic discourse alone may be too narrow to qualify as a mode of legitimacy, especially when we are dealing with social services that have significant noneconomic values at stake.⁸³ If only efficiency values are relevant, the use of this kind of technocracy as a legitimizing device may simply be a mask for ideology⁸⁴ and, as such, not a mode of legitimacy at all. Such an approach would further some of the worst aspects of corporatism if there is no opportunity to temper economic values with noneconomic values.

The need for increased bargaining on the part of the state to achieve goals that are realistically enforceable is indicative of a state that can no longer accomplish its objectives by direct command-control regulations. This is true for a number of reasons. First, as noted above, the processes of globalization can restrict a state's options in various ways, not the least of which is that they make it relatively easy for some industries to move production around the globe, avoiding excess costs, but often affecting local political decisions that involve local employment opportunities as well. Thus, there is a greater premium on the part of the state to negotiate with potential regulatees, perhaps to convince them of the necessity of the regulation and that what it proposes is

82. CAWSON, *supra* note 75, at 35.

83. For a critique of the use of technocracy in this sense, see Weiller, *supra* note 78, at 33. "The technocratic and managerial solutions often mask ideological choices which are not debated and subject to public scrutiny beyond the immediate interests related to the regulatory or management area." *Id.*

84. *See id.*

as cost-effective as possible.⁸⁵ This relates closely to enforcement. As the funding of agencies decreases, effective enforcement of the regulations promulgated by agencies increasingly requires the cooperation of the regulated. They need to be given the discretion to reach the desired results in ways that make sense for them. Industries also increasingly need to be part of the planning and regulatory process.⁸⁶

The increasing reliance on markets, market approaches, and private actors as substitutes for more direct forms of governmental involvement highlight efficiency concerns, and they also suggest a regulatory discourse that is much closer to market concerns and modes of operation than what a more public discourse is likely to produce. The outcomes produced are likely to be more in tune with economic interests; a market discourse applies especially easily to companies doing business in multiple countries. They are freer to reject the political costs of doing business in any one jurisdiction if they can move production around the globe relatively easily.⁸⁷

Whether or not a new corporatism accurately describes or accounts for—from a pure theoretical point of view—the relationship of the government to interest groups, there are elements of the theory that raise serious concerns when viewed through the lens of privatization, particularly hybrid public/private approaches dealing with social services that involve issues that inevitably go well beyond a purely economic discourse.

Administrative law has always been grounded upon basic norms. These norms include transparency, participation, and fairness, and they are built upon the norm of democracy. Indeed, it may be that the purpose of a new administrative law is to bring legitimacy to the public/private decisionmaking process by creating a space for a politics that can involve economic *and* noneconomic values. When one starts from the premise—namely, that a process is developing that is best described as neo-corporatist in character, one that fuses the public and the private in ways that make it easy for the economic side of the discourse to dominate certain aspects of policy—fundamental issues

85. For a case study on the role various corporatist approaches played in attracting foreign investment to some states in the Midwest, see generally ROBERT PERRUCCI, *JAPANESE AUTO TRANSPLANTS IN THE HEARTLAND: CORPORATISM AND COMMUNITY* (1994).

86. For a general discussion of the private involvement in relation to administrative accountability, see *The Private Role in Public Governance*, *supra* note 15, at 574-92 (analyzing “the reality of the extensive private role in every dimension of administration and regulation”).

87. See generally DICKEN, *supra* note 27.

emerge, as well as an opportunity for administrative law to play a significant role for reform.

C. *Emerging Issues*

Perhaps the most important set of procedural and structural problems that arises from the neo-corporatist trends noted above involves what I have called a “democracy deficit.” Privatization has been one of the primary forms of marketization in the United States. Some might say that there is not great tradeoff for democracy if snow removal shifts from a city garage to a private contractor or even if a publicly operated prison is now managed by a for-profit private corporation. Nonetheless, the fact that such trends in management are driven by global processes assures us that a larger transformation is underway. The connection between the relatively minor example of snow removal and the more significant changes in approach to prisons or welfare is in their common connection to globalization and the structural aspects of their insulation from the public.

Democracy involves more than just market forces and outcomes. It involves and requires more than representation and a chance to hold public officials accountable through the ballot box.⁸⁸ Legitimacy comes in many forms and through many fora. Administrative law can facilitate the creation of multiple fora for policy discussions to occur. It can help, if necessary, a politics to develop if contractual obligations are not met or need to be revised. Focusing on the “democracy deficit” brought about by globalization does not mean that only traditional legitimacy arguments, so common in administrative law, are relevant.⁸⁹ In fact, the major difference between legitimacy concerns expressed in traditional public law terms and today’s concerns. We have

88. See *The Private Role in Public Governance*, *supra* note 15, at 664-73 (discussing the true measures of “aggregate accountability”); Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 755-69 (2001).

89. *Proposals for Reforming the Administrative Procedure Act*, *supra* note 58, at 412-13; Aman, *supra* note 4, at 816-19. For perspectives on democracy and administrative law in Eastern Europe, see generally Paul Brietzke, *Democratization and . . . Administrative Law*, 51 OKLA. L. REV. 1 (1999), which stresses that a well-structured administrative state is crucial to the democratization process. Randall Peerenboom has conversely proposed that deregulation and involving private actors in rulemaking and implementation may actually serve to *reduce* the Chinese “democracy deficit” by inviting shared governance. Randall Peerenboom, *Globalization, Path Dependency and the Limits of Law: Administrative Law Reform and Rule of Law in the People’s Republic of China*, 19 BERKELEY J. INT’L L. 161, 253-58 (2001). Because China maintains a vast administrative bureaucracy that is inaccessible to citizens, reform is seen to encourage accountability, even though Peerenboom recognizes that private actors also have accountability concerns. See *id.* at 257.

moved from questions concerning the proper role of judges as opposed to legislators, when it comes to policymaking, to issues concerning whether there will be any public input at all. It is not just a connection with an elected official that matters. What matters more are opportunities for interested individuals to have input in policymaking processes generally, as well as in the specific cases that may affect them.

Beyond traditional notions of electoral accountability, democracy requires the means by which issues can be drawn, information shared, and a meaningful politics created. This involves multiple fora for values and views to be expressed publicly, issues beyond those likely to be relevant to just an economic conception of the problems at hand. Legitimacy requires more than a process simply to “check up” on those in positions of responsibility, to see if they are doing their job. It also involves creating the kind of information necessary to understand the issues involved for a real debate to ensue and for new ideas to be suggested. Administrative law can and should play an important role in making fora available to consider and assess new approaches to issues including those considered by public/private hybrids as well. The public/private distinction should not unduly shield decisionmaking processes from opportunities for participation and the articulation of values and points of view that enrich our politics and, indeed, make meaningful political discussion possible.

Closely related to these democracy concerns are questions of citizenship. Quite apart from the decisionmakers involved, how do we conceptualize those affected by these decisions? In addition to being citizens, individuals are increasingly treated as consumers, customers, and clients as well. Each of these labels—citizen, customer/consumer, and client—carry different expectations with regard to individual and collective responsibility for the provision of services.⁹⁰ At what point does the convergence of market processes, private decisionmakers, and individuals as consumers, customers, or clients actually

90. For a discussion of the respective roles of citizen, client, and privacy, see Alfred C. Aman, Jr., *Information, Privacy, and Technology: Citizens, Clients, or Consumers?* in *FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION* 327, 327 (Jack Beatson & Yvonne Cupps eds., 2000). In that article, I explained:

The role of consumer and client differ . . . when citizens are clients they are, in effect, part of a contract for carrying out a public function. In other words, they are like third-party beneficiaries As consumers, however, citizens undertake certain transactions for themselves alone. Citizens as clients may need information from the government and the private sector, but as consumers, they may need to prevent personal information from being used privately in ways of which they are unaware.

Id.

undercut our ability as citizens to engage in the broader kinds of participation necessary for a vibrant political process?⁹¹ It is important that the legal discourses triggered by the public/private distinction do not undercut or mask the role that citizens need to play.

A third related set of issues for the new administrative law involves conflict of interest concerns. The state-centric aspects of traditional administrative law have focused primarily only on public administrators, and when it comes to conflict questions the law asks such questions as whether there was a personal economic interest tied to the decision involved,⁹² whether there were inappropriate *ex parte*⁹³ contacts, or whether there was undue bias on the part of the decisionmaker involved.⁹⁴ Economic gain is a particularly relevant criterion when applied to some forms of privatization, where the decisionmakers involved are chosen in part because of the incentives provided by their duty to try to make a profit. Clearly, to obviate this problem, the parameters of the delegated task must be set forth with clarity. Delegation-like doctrine requirements can and should surface in this context, because it can only be assumed that a private prison provider will want to carry out its duties in as profitable a manner as possible. To assure that this does not include riding roughshod over prisoners' rights, legislative and contractual detail is necessary. Such an approach can thus eliminate a financial conflict by making clear the challenges the contractor must meet before any profit is possible.

In contexts covered by the APA, conflict questions turn largely on the nature of the proceedings involved. Are they adjudicatory or legislative? Such

91. See HINDY LAUER SCHACHTER, REINVENTING GOVERNMENT OR REINVENTING OURSELVES? 7-9 (1997); Aman, *supra* note 4, at 799.

92. See, e.g., *Tummeley v. Ohio*, 273 U.S. 510, 532 (1927). In *Tummeley*, the Court noted the inherent conflict that an economic interest in the outcome created:

[T]he requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it out without danger of injustice. Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.

Id.

93. 5 U.S.C. § 557(d)(1)(B) (2000), which provides:

[N]o member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication relevant to the merits of the proceeding.

Id.

94. See, e.g., *United States Steel Workers of Am. v. Marshall*, 647 F.2d 1189, 1192 (D.C. Cir. 1980).

a discourse normally would not apply in privatized settings. Private providers are implementing public policies, but of course new policies and approaches inevitably emerge in the dynamic contexts in which they operate. Moreover, there are some new, deregulated markets in which private bodies and private actors now make decisions with significant public implications. This clearly is one of the lessons of the Enron debacle.⁹⁵ More specifically, private providers of public services clearly have the profit motive in mind—that is, their obligations to their shareholders. Yet, public policy concerns may require approaches, actions, or the sharing of information in a timely fashion that might further some public goals, but increase private costs. What are the conflicts of interest requirements of such participants in these contexts? The very nature of public and private enterprises differ. The profit motive can be a good incentive, but, in public settings, it is not the sole goal, and it can conflict with other values. Indeed, what happens when market-oriented, bottom-line considerations drive decisions that adversely affect human rights? A private prison provider may have more incentives to construe as narrowly as possible the due process or Eighth Amendment requirements of the Constitution, even assuming they apply fully in a private setting.⁹⁶ Can all such matters be dealt with specifically before they arise, by statute, without unnecessarily burdening public/private decisionmaking processes?

III. REFORMS

The risks of neo-corporatism and the changing relationship of the market to the state suggest the need for reforms. In engaging in this process, it is important to understand the pluralistic aspects of the law developing in various privatization contexts,⁹⁷ but at the same time it is also important to reorganize the need for basic democratic values to be furthered. Democracy and neutrality are essential for the legitimacy of any regime with broad public significance; this is particularly true when we are dealing with social services involving the

95. See, e.g., Richard A. Opiel, Jr., *U.S. Regulators Are Requiring Full Details of Energy Sales*, N.Y. TIMES, May 15, 2002, at C1.

96. See Joseph E. Field, *Making Prisons Private: An Improper Delegation of a Governmental Power*, 15 HOFSTRA L. REV. 649, 662-63 (“The presence of a profit motive results in private prisons substituting the goal of the general welfare of society with the goal of profit maximization. In this manner, cost considerations may hamper, if not totally override, society’s interest in correctional policy.”)

97. As Lester Salamon has noted with regard to the many tools of governance now employed, each has its own “political economy” and each “imparts its own ‘twist’ to the operation of the programs that embody it.” Salamon, *supra* note 14, at 2.

poor, as in welfare, or with prisoners. Markets and market processes are but means to ends in these contexts. By definition, welfare recipients and prisoners fall outside the normal economy. But quite apart from the demands for transparency, participation, and fairness in such contexts, privatization raises important accountability and legitimacy concerns, particularly when it is no longer simply a device among many for the way governments operate but is nothing short of a quiet revolution in how to cope with public problems.⁹⁸ The APA of the twenty-first century must find ways to ensure that the values of administrative law remain relevant. To accomplish this, I suggest beginning with three basic reforms.

First, it is important to recognize that the public or private label we place on an actor wielding power over others is less important than the *power relationships* that are established. To this end, we might take a page from the United Kingdom's approach to natural justice questions.⁹⁹ Procedural protections should be designed to assure there is a flow of information about the operation of hybrid partnerships and the creation of a meaningful politics. A twenty-first century APA should apply to some private actors as well as the state, particularly when private actors have significant power over the constituents with whom they deal and they are engaged in public functions. Extension of the APA does not mean the same procedures must be used that were devised for a different era, or that we over-judicialize hybrid arrangements. However, we need to create new and alternative ways to assure that the basic values of administrative law are furthered. New, informal, and flexible procedures must be developed.

At the same time, there are some APA provisions that remain relevant and should be amended. The contracting-out provision in section 553 is a prime example.¹⁰⁰ Contracts used to outsource social services to the poor or to private prison managers should be viewed as rules, subject to notice and comment, and as the beginning of a process, not the end of a private negotiation. As I have argued elsewhere,¹⁰¹ contracts of this kind are part of an evolving process of governance, not the final result of private negotiations. Input on a regular basis

98. *See id.* at 1.

99. *See, e.g.,* *Bonsor v. Musicians' Union* 1 Ch. 479 (1954); *R. v. Monopolies and Mergers Comm.* Ex. p. *Argyll Group Plc* 2 All E.R. 257, (Court of Appeal 1986).

100. Section 553 of the APA provides exemptions from its general rulemaking procedures. Among these is one granted for "matter[s] relating to . . . contract." 5 U.S.C. § 553(a)(2) (2000). This exemption has, however, generally been construed narrowly by the courts.

101. Aman, *supra* note 28, at 1502.

is necessary if citizens are to have a meaningful role in the policymaking process. If policy questions arise within the framework of the contract involved, the flexibility necessary to react to them on the part of citizens should exist. Contracts need to be open to such change if participation is to be meaningful.

Many conflict of interest concerns can also be addressed in terms of contract reform. Not unlike the delegation doctrine, there must be a level of specificity in the contract provided sufficient to make clear the obligations of the provider involved: Not only *what* must be accomplished but *how* should be specified to ensure that some efficiencies are not achieved for the wrong reasons. Administrative law also needs to further the development of new approaches beyond the extension of well-known procedural types of protections. One approach to conflict of interest problems is to involve third parties as auditors in various contexts. What the Government Accounting Office does for public policies might be duplicated by private group certification of the private delivery of social services. For example, as Professor Robert Fischman has noted, "Market certification of sustainable forest management is a new development of the past decade."¹⁰² Professor Fischman describes the Forest Stewardship Council as "an independent, non-profit coalition of environmental groups, citizens, economic development organizations, and the timber industry," who sponsor private audits of forestry practices. Providing information and the opportunity for input and dialogue by a variety of private parties deeply concerned with all of the issues—economic and environmental—can help further a relatively unbiased approach to policymaking. As the Enron debacle now stirs Congress to action, and accounting firms are likely to be regulated for conflict of interest concerns, this could be an opportunity to consider the kinds of conflicts that arise in the hybrid partnerships we have been discussing. Congress should not overlook this significant area of governance as it seeks to reform the accounting industry.

The province of administrative law is broad. It can and should involve the application of public law values to private actors and the creation of informal approaches to ensure that a multiplicity of voices are heard and that noneconomic as well as economic issues are considered.

102. Robert L. Fischman, *Stumbling to Johannesburg: The United States' Haphazard Progress Toward Sustainable Forestry Law*, 32 ENVTL. L. REP. 10,291, 10,304 (2002).

CONCLUSIONS

My purpose in this Article has been to suggest that administrative law is an appropriate and timely arena within which to address some of the antidemocratic tendencies inherent in globalization. I have focused especially on privatization, because it is most visibly in that context that globalization can be seen to set the premium on the innovations that bring states and businesses into partnerships and hybrid arrangements in new ways. This in itself is not antidemocratic; indeed, I have stressed both the necessity and the desirability of acknowledging the extent to which states might take a legitimate interest in the conditions affecting investment, entrepreneurship, and market share. Rather, my concern is with the fact that the pragmatics of those initiatives concentrate decisionmaking power and authority at the executive level (of both government and corporations), and correspondingly tend to preclude public involvement in ways that an agency-mandated deregulatory process, for example, would not. As certain issues move from the hearing room to the boardroom, public participation diminishes, but not the need for public participation; transparency and accountability to the public (beyond the shareholders) are similarly diminished—but not the need for transparency and accountability.

Globalization—with its steep competitive gradients and high stakes in profits gained or lost—makes these developments signs of a pattern of change that in my view is likely to sharpen and accelerate, excluding citizens from participation (even at the level of information) in the decisions that define the value of their tax dollars as well as the scope of the state's democratic institutions. Reform is urgent. Finding meaningful ways of addressing the democracy deficit is timely and worthwhile, given the inherent value of preserving the maximum scope for democratic responsibility.

The value I have placed on democracy in the course of this Article is, in my view, an appropriate reflection of the value of democracy as an end in itself—given its inherently fundamental importance to the classical liberal ideal. By this I mean that I accord the highest priority to law's use as a means of protecting and preserving the fora for democratic deliberation. Even if executives in seclusion reach the same decision as an agency operating in full sunshine, the democracy deficit reflects the lost opportunity for the public to participate in the deliberation by which the value regimes that determine outcomes are themselves defined, distinguished, and decided from among plural possibilities. This particular value—the value of deliberation over values—is especially important as globalization intensifies the contact among

different value regimes and social priorities. In short, I regard as inherently appealing a forum in which people can respond to globalization by deciding the price, so to speak, they are willing to pay for efficiency and profitability, and by doing so in contexts where they can and must negotiate their priorities with other stakeholders—even stakeholders from other countries.

Administrative law is appropriate as the vehicle for addressing the democracy deficit in this way. It is in administrative law that the rules for public participation in the form of information and input, as well as for government and industry accountability, are set. The APA is available as a platform for procedural reforms of this kind, that is, reforms that would counter the democracy deficit by retaining the segments of the private sector that were spawned by privatization or public-private hybrids within the purview of the APA's procedures. It need not be applied in old ways, but reformulated and reconceptualized for the problems and possibilities of a global era.

Finally, I would suggest that taking account of the global context in which administrative law now functions also means theorizing afresh the nature of pluralism and republicanism in relation to the administrative process. It is, of course, possible to conceive of privatization and democracy in terms of the classical theories of pluralism and republicanism—as but one technology of marketization among others, and as one deliberative process among others. As I indicated at the outset, though, pluralism and republicanism as currently framed imply a territorialized state, and indeed a nation-state that contains all the prospective participants—and these on more or less equal footing before the state. As currently framed, these theories cannot account for the highly ambiguous line between the public and private sectors *in practice*, or the extent to which key industries or even individual companies might figure in a government's policy planning. It would be naive to imagine that such fusions do not exist, or to imagine that they are not necessary. Absent democratic checks, the current scenario appears to be evolving in a way reminiscent of corporatism, at least to the extent that public-private partnership is now at the very core of the state's self-legitimizing practices. My recommendations for addressing the democracy deficit are not aimed at rolling back the clock, but at acknowledging the current state of affairs and exposing that fusion at the core of government to democratic procedures and open political debate. Administrative law can play a vital role in the new governance structures and processes now taking shape, ensuring opportunities for individuals, in their capacities as citizens, to participate in the decisions that significantly affect our lives and the communities of which we are a part.

