

# A CONSERVATIVE'S COMMENTS ON EDLEY AND SUNSTEIN

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## I. REGARDING EDLEY

I find Professor Edley's perspective on the administrative process of great interest.<sup>1</sup> Like him, I agree that there exist today various crises both in administrative law and in the regulatory process. Notwithstanding the eight years of the "Reagan Revolution," the administrative state has not yet been tamed. Even a short list of our regulatory ills must include such problems as inefficiencies in mass adjudication (which hurt the ordinary citizen), bureaucratic paralysis (whether or not you accept public choice theory), and structural rigidity (which fails to exploit market incentives or use private sector opportunities where appropriate). Professor Edley's list is, of course, much longer.<sup>2</sup> He fails, however, to distinguish between problems that stem from administrative structure and process, and those that stem from the political arena.

The key to Edley's thinking is his classification of both administrative law issues and decisions into what he calls a "trichotomy."<sup>3</sup> The trichotomy attempts to apprehend and reconcile those factors of science, politics, and adjudicatory fairness that are relevant to any administrative law decision.<sup>4</sup> Professor Edley suggests (correctly, I believe) that each of the approaches to present-day agency decisionmaking—science, politics, and adjudicatory fairness—utilizes separate decisional methodologies.<sup>5</sup> Thus, if a problem is one of science, you use technical expertise; if politics, you look to interest accommodation or balancing; and if adjudicatory fairness, you use procedural due process. Put this way, Edley's trichotomy offers a helpful explanatory framework to the rich texture of administrative law. I find, however, that it provides little advice on future decisionmaking and, to that extent, it is not heuristic.

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1. See Edley, *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561.

2. See *id.* at 564-65.

3. See *id.* at 568.

4. See *id.*

5. See *id.* at 568-69.

In place of the all-encompassing trichotomy, Edley proposes an alternative decisional methodology—"sound governance"—that requires viewing the three paradigms as an integrated trio.<sup>6</sup> Ultimately, Edley wants the "project" of administrative law to "move away from its anachronistic focus on discretion and face directly the problems of sound governance."<sup>7</sup> And sound governance, he tells us, is a job not only of agencies but of courts. Indeed, in his book, he writes: "[M]y argument is that the proper judicial motivation is sound governance and that sound governance should be the engine of judicial innovation and action."<sup>8</sup>

It is clearly hard to oppose a concept such as sound governance, but I find that as a heuristic device it is not helpful. In fact, I suspect that Edley's sound governance theory is in some respects a metaphor for that *dreaded thing*—judicial activism. Perhaps Edley believes that by cutting the constraints of separation of powers, law and politics will become one: the trichotomy will collapse into itself, with the judiciary assuming ultimate authority.<sup>9</sup> In this, Edley assumes that federal judges would be better guardians of public policy than, for example, the Commissioners of the Federal Energy Regulatory Commission (FERC) or the Interstate Commerce Commission (ICC). My objection to this contention is the same as Judge Wald's: It is not judges' work to invite a "dialogue" between courts and agencies on the norms of sound governance."<sup>10</sup> As *Chevron* correctly points out, "[t]he responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . ."<sup>11</sup> Thus, "policy arguments are more properly addressed to legislators or administrators, not to judges."<sup>12</sup> That work is better suited for think tank organizations, such as the American Enterprise Institute, the Brookings Institution, or the Heritage Foundation. Indeed, I would argue that Edley's version of administrative law is not law, but rather politics; he attempts to pull back into the law school what has been slipping away to the Kennedy School. His trichotomy is the project of public policy, not of administrative law.

As a matter of political theory, I find it difficult to understand why Edley assigns the sound governance project to the judicial "pew" rather than to the pew of politics and public policy. Although many of the

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6. See C. EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 213 (1990).

7. *Id.*

8. *Id.* at 129.

9. Yes, he truly suggests this. See Edley, *supra* note 1, at 582.

10. Wald, *The "New Administrative Law"—With the Same Old Judges in It?*, 1991 DUKE L.J. 647, 648.

11. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 864 (1984).

12. *Id.* at 866.

questions that Edley asks of the sound governance project are legitimate, they are questions for students of public policy, political science, and legislatures, not for courts. It is the job of Congress to wrestle with the relationships between the three legs of the tripod. It is Congress, acting within the context of the Constitution, that directs judges as to when a particular paradigm should be utilized.<sup>13</sup> As *Vermont Yankee*<sup>14</sup> points out, it is in one sense Congress's job to say when it wants to ensure additional procedural "fairness" through the Administrative Procedure Act (APA).<sup>15</sup> And it is Congress's job to say when it wants agencies to incorporate policy (Edley would say political) considerations in their decision-making process.<sup>16</sup>

Like it or not, judges are not trained either in policy analysis or in scientific truth-seeking. Indeed, in a recent review of Edley's book, Tom Sargentich suggests that agency fact-finding receives a high degree of deference from courts on the grounds that such findings result from a method of reasoning distinct from that to which courts are accustomed.<sup>17</sup> (Perhaps the appropriate word should be "qualified" rather than "accustomed.") Lack of competence may not be an institutional characteristic in the hallowed halls of Harvard, but the question of institutional competence ought not be ignored in considering the nature and limits of judicial review of agency action.

Although Edley's obsession with the judiciary as the key to sound governance is questionable, I do not mean to imply that the judiciary cannot make positive contributions to the sound governance project. Congress has often failed in its responsibility by writing ambiguous and inconsistent statutes forged in the political to and fro of the legislative process. Indeed, the ambiguity is not always inadvertent, but sometimes actually intentional. The sad fact is that Congress often accepts innumerable linguistic ambiguities to get a piece of legislation passed, and then leaves it to the courts to decipher its meaning.

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13. See Williams, *The Roots of Deference* (Book Review), 100 YALE L.J. 1103, 1108 (1991) (reviewing C. EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990)) ("Edley, though emphatic (and correct) that agency decisions draw on three of his modes of reasoning, disregards the agency and party choices that typically make one mode pivotal in court. The effect is to impute to courts rather fanciful opportunities to choose among modes and thus degrees of deference.").

14. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 546 (1978).

15. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372 (1988).

16. *Id.* at 557.

17. See Sargentich, *The Future of Administrative Law* (Book Review), 104 HARV. L. REV. 769, 776 (1991) (reviewing C. EDLEY, *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* (1990)).

If Congress were more disciplined in the making of statutes, the pressure on the judiciary to engage in an overweening activism would significantly diminish. I humbly suggest that if judges find the statutory language incoherent, they might say so. Indeed, they might even say that "we can't decide this because it is incoherent." I think such actions would spur Congress to go back and see how to improve the statute. Rather than seek out less and less credible legislative history to aid in statutory interpretation, courts might state: "Look, we are going to hold off the final opinion for six months to see if Congress clarifies, by statute, what it meant." This does not mean that judges should refuse to apply a statute. By stating that a statute is inexplicable, however, Congress's attention will focus on the need for more careful drafting and a more accountable legislative process.

Implementation of this kind of "appropriate" judicial activity can be seen in the efforts of Robert Katzmann, in concert with the United States Court of Appeals for the District of Columbia Circuit, to create better judicial-congressional interaction.<sup>18</sup> Katzmann has set up an informal arrangement with the Circuit by which the court sends to the Governance Institute cases that criticize statutes as utterly confusing or indecipherable. The Institute then collates these opinions and sends them to relevant House and Senate Committees. After a year in operation, the results of this process indicate that the concept is worth exploring, and perhaps ought to be institutionalized in some official government body—be it the Judicial Conference, a congressional committee, or the Administrative Conference of the United States.<sup>19</sup>

One problem with Edley's strategy is his extremely dense, and at times impenetrable, language. For example, take the following con-

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18. See Katzmann, *The Continuing Challenge*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY 185-89 (R. Katzmann ed. 1988) [hereinafter Katzmann, *The Continuing Challenge*]. Katzmann appreciates the sensitivity of judges to the separation of powers doctrine and to other legal concerns. However, the Constitution does not prohibit communication between the branches. See Katzmann, *Building Bridges: Courts, Congress, & Guidelines for Communications*, BROOKINGS REV., Spring 1991, at 42, 43 ("Beyond prohibiting the court from issuing advisory opinions, the Constitution itself offers few clues about the character of relations between Congress and the courts."). As stated by Congressman Robert Kastenmeier:

A radical restructuring of the relationship between the branches is not necessary, but each branch should give priority to institutional reforms. If the judiciary and the Congress are to interact intelligently, each has to understand the activities of the other. And, by necessity, this understanding must incorporate improved channels of communication which contribute to rational decision making and to reasoned listening.

FEDERAL COURTS STUDY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 92 (1990).

19. See Katzmann, *The Continuing Challenge*, *supra* note 18, at 185-87; see also Remarks of Robert A. Katzmann before the D.C. Circuit Judicial Conference, 124 F.R.D. 241, 322-26 (1988); Coffin, *The Federalist Number 86: On Relations between the Judiciary and Congress*, in JUDGES AND LEGISLATORS: TOWARD INSTITUTIONAL COMITY, *supra* note 18, at 21.

clusory statement found in his book, *Administrative Law*: “[T]he post-trichotomy model of law would transmute the deathless discretion permitted and generated by the present doctrinal structure into a different form of discretion, centered on the evolution and application of norms directly tied to a modernist objective.”<sup>20</sup> Fortunately, Edley later restates his vision of the future: “The central aspect of this evolutionary image is partnership. The court joins the agency and the legislature to confront directly the problems of governance in a complicated and uncertain world.”<sup>21</sup>

When the APA was passed in 1946, it was intended to place a “floor” on some elements of procedural fairness under federal agency processes, while preserving the essential benefits of administrative action—speed, low cost, informality, and agency expertise. Over the years, these processes have taken on increasing formality, complexity, and, often, rigidity. Although traditional administrative procedures are certainly fair (and perceived as such), they can be expensive and time-consuming. Delay is often the rule rather than the exception. The high cost of participation in the administrative process or court review can freeze out smaller, less affluent interests. Formality also tends to place a premium on procedural expertise. Citizens who may be quite effective when informally attempting to persuade their colleagues or friends of the justice of their cause can become reticent when placed in a forum that forces them to present their views within procedural constraints designed for law school graduates. With the passage of the Administrative Dispute Resolution Act of 1990<sup>22</sup> and its companion Negotiated Rulemaking Act of 1990,<sup>23</sup> we see a renewed congressional emphasis on restoring those important benefits while adding a somewhat new dimension—an enhanced participation by private parties in the actual decisionmaking of the government.<sup>24</sup>

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20. C. EDLEY, *supra* note 6, at 263.

21. *Id.* at 264.

22. Pub. L. No. 101-552, 104 Stat. 2736 (to be codified in scattered sections of 5 U.S.C. and 9 U.S.C.).

23. Pub. L. No. 101-648, 104 Stat. 4969 (to be codified at 5 U.S.C. §§ 581-590).

24. Both the Administrative Dispute Resolution Act and the Negotiated Rulemaking Act are based on numerous recommendations of the Administrative Conference of the United States (ACUS). *See, e.g.*, Procedures for Negotiating Proposed Regulations (Recommendation No. 82-4), 1 C.F.R. § 305.82-4 (1991); Procedures for Negotiating Proposed Regulations (Recommendation No. 85-5), 1 C.F.R. § 305.85-5 (1991); Agencies' Use of Alternative Means of Dispute Resolution (Recommendation No. 86-3), 1 C.F.R. § 305.86-3 (1991); Assuring the Fairness and Acceptability of Arbitration in Federal Programs (Recommendation No. 87-5), 1 C.F.R. § 305.87-5 (1991). *See generally* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK: FEDERAL AGENCY USE OF ALTERNATIVE MEANS OF DISPUTE RESOLUTION (1987); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, SOURCEBOOK: NEGOTIATED RULEMAKING (1990).

Clearly, Edley believes that contemporary administrative law is hung up on an "antidiscretion project," that is to say, the effort to make the administrative state "safe for liberty and palatable to democracy only when constraints are imposed on administrative discretion through judge-made law and congressionally enacted procedural safeguards."<sup>25</sup> Edley also believes that the purpose of constraining administrative discretion is to protect "the legitimacy of blurred institutional roles."<sup>26</sup> This is a conceptual mistake. The constraint of discretion does not depend on "murky separation-of-powers constructs."<sup>27</sup> Indeed, the two have nothing to do with each other. The effort to constrain administrative discretion flows from traditional concerns for asserting the rule of law. It is the reason why the magisterial A.V. Dicey claimed there could be no administrative law in England, because administrative law ran counter to judicial supremacy and the rule of law.<sup>28</sup> The less formality, the greater the administrative flexibility, and the greater the danger of agency impropriety—or so the real anti-discretion project goes.

The key to discussing discretion is to analyze which areas of discretion are licit and which are illicit. Consider, for example, the problem of grant procedures. The question of how government grants should be distributed underscores the extent to which administrative law is not necessarily a matter of technocratic expertise, but of political choices—and that such choices can be licit.

Edley's trichotomy correctly notes that there is science, and there is politics.<sup>29</sup> The challenge is how to integrate politics into *administration*, and not, as Edley suggests, to politicize the courts.<sup>30</sup> The key is bureaucratic accountability. Courts play a role, but ultimately elected officials—whether in the legislative or executive branch—should be held accountable because they are elected by the people. The trichotomy, of course, covers the waterfront. And I am certain that the efforts to integrate politics and administration, like many others, can be accommodated within it. It is, I believe, where the action is and should be in administrative law.<sup>31</sup>

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25. Edley, *supra* note 1, at 566.

26. C. EDLEY, *supra* note 6, at 215.

27. *Id.*

28. A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 267-69 (1959) ("[T]he attempt made by the Crown . . . to form a strong central administration . . . was at bottom repugnant to the manners and traditions of the country. . . . [T]he exercise of discretionary power by the Crown was inconsistent with our system of administration and the ideas of English law.").

29. See Edley, *supra* note 1, at 568-69.

30. See *id.* at 601.

31. Thus, one might question the proper reading of *Rutan v. Republican Party of Ill.*, 110 S. Ct. 2729 (1990) (holding that conditioning hiring decisions on political belief and association violates

Edley also criticizes *Chevron* for placing abstract constraints on the role of courts.<sup>32</sup> *Chevron*'s deference requirement is perhaps what agitates Edley most about administrative law. For under *Chevron*, courts engage in deference, not due to a theory of presumed agency expertise, but because of "separation of powers" and democratic accountability considerations. *Chevron* teaches us that courts should defer to administrative agencies in the case of statutory ambiguity because statutory analysis is less of a scientific process than the explication of a range of legitimate meanings, each representing different policy options. In such circumstances, in Judge Laurence Silberman's words, "agencies—even the independent ones—have superior political standing to the life-tenured federal judiciary in performing that policymaking function."<sup>33</sup> Agencies, unlike judges, have a more direct relationship with the democratic process. They are part of the executive branch that, whatever its faults, holds the institutional processes to reflect popular will.

Nevertheless, I must say to Edley, "don't knock the 'antidiscretion' project," or (following Kenneth Culp Davis) what I would more fairly call the "structured discretion" project.<sup>34</sup> It has served freedom well. As one watches with some awe the flood tide of freedom spill over into Eastern Europe, one is struck by the efforts of lawyers in those countries to recreate western notions of holding officials accountable to the rule of law. Indeed, even the Soviet Union has endeavored to include judicial review of administrative agency conduct in its new package of legal reforms.<sup>35</sup> This notion that every man is subject to the law, that the "humblest is the peer of the most powerful,"<sup>36</sup> is central to the antidiscretion project. The critical legal thinkers may disparage it, but in the real world

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applicants' first amendment rights in absence of a vital governmental interest), and the meaning of the Three Sisters Bridge litigation, see *District of Columbia Fed'n of Civic Ass'ns, Inc. v. Volpe*, 434 F.2d 436, 443 (D.C. Cir. 1970) (stating that a legislature "may not constitutionally disenfranchise a group of citizens because of their expected views"). Further, one might explore the kinds of questions to be asked when agencies change their minds for political reasons. See, e.g., *Automobile Salesmen's Union Local 1095 v. NLRB*, 711 F.2d 383 (D.C. Cir. 1983) (deferring to the NLRB's statutory interpretation used in the agency's decision to reverse precedent and replace the "pattern of conduct" cases with a new rule); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983) (overturning an agency's rescission of an automobile passive-restraints rule while permitting the agency to provide a record for the change in policy).

32. See C. EDLEY, *supra* note 6, at 66, 120, 261. Indeed, Edley refers to the case as "infamous." See Edley, *supra* note 1, at 573.

33. Silberman, *Chevron—The Intersection of Law and Policy*, 58 GEO. WASH. L. REV. 821, 823 (1990).

34. See K. DAVIS, *DISCRETIONARY JUSTICE* 97-99 (1977).

35. Of course, nothing has yet been implemented. For a collection of essays concerning the status of administrative law in the Soviet Union, see *SOVIET ADMINISTRATIVE LAW: THEORY AND POLICY* (G. Ginsburgs ed. 1989).

36. *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

most would prefer to live in a society "planted thick with laws"<sup>37</sup> rather than try to "stand upright in the winds that would blow"<sup>38</sup> without the protective thicket proffered by the rule of law.<sup>39</sup>

## II. REGARDING SUNSTEIN

Professor Sunstein proposes that the next generation of administrative law scholarship shift its focus from its "traditional preoccupation with the judiciary to a focus on congressional and bureaucratic processes[, which] remain ill-understood despite the fact that they have far more important roles in government regulation."<sup>40</sup> In Sunstein's view, regulation can benefit from "strategies that will incorporate an understanding of market forces, promote the democratic character of modern government, and increase international competitiveness while minimizing undesirable side-effects and reducing regulatory costs."<sup>41</sup> I agree with Sunstein that we must shift our attention away from courts and toward different audiences, such as Congress, administrators, and the public. Instead of concentrating on judicial review as an external constraint on administrative discretion, we must examine regulatory failures of the past to develop policies and processes that will avoid such failures in the future.

Where I differ, however, is that I believe Sunstein's "substance project" can only be successfully addressed by examining the "especially pervasive and often overlooked problem" of administrative structure.<sup>42</sup> In studying issues of structure and process (I consider structure and process as opposite sides of the same coin), judicial review is but one approach. Thus, Sunstein's view of procedure should be seen as a critique

37. R. BOLT, *A MAN FOR ALL SEASONS*, act I, at 39 (1960).

38. *Id.*

39. "Left wing" critics of legal structure have praised the role played by the rule of law in society. As E.P. Thompson, the well-known historian and social critic, has pointed out:

[T]here is a difference between arbitrary power and the rule of law. We ought to expose the shams and inequities which may be concealed beneath [the] law. But the rule of law itself, the imposing of effective inhibitions upon power and the defense of the citizen from power's all-intrusive claims, seems to me to be an unqualified human good.

E. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT 266* (1975). Not surprisingly, Thompson's support of this bourgeois virtue failed to find favor with many of his "left wing" colleagues. See, e.g., B. FINE, *DEMOCRACY AND THE RULE OF LAW: LIBERAL IDEAS AND MARXIST CRITIQUES* 169-89 (1984); Horwitz, *The Rule of Law: An Unqualified Human Good?* (Book Review), 86 *YALE L.J.* 561, 565-66 (1977) (reviewing D. HAY, P. LINEBAUGH, J. RULE, E. THOMPSON & C. WINSLOW, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975)).

40. Sunstein, *Administrative Substance*, 1991 *DUKE L.J.* 607, 642.

41. *Id.* at 610. Although Professor Sunstein encourages reform in the area of "social" regulation, I would venture to say that by his inclusion of discrimination within this category, he implies that "economic" regulation can benefit as well. See *id.* at 609.

42. *Id.* at 627.

of the American penchant to equate administrative law with judicial review (an opinion I share).

At the Administrative Conference, we broadly interpret our mandate to "study the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies . . . ." <sup>43</sup> Our commitment goes beyond judicial review, and focuses on issues of structure and process that lead to the improvement of administrative law. Thus, at the risk of sounding parochial, I would urge that Professor Sunstein supplement his call for reform of administrative substance with what I would label (perhaps facetiously) the *process project*. <sup>44</sup> This "process project" should focus on problems of governance (hopefully "sound") that have little or nothing to do with courts. On my own short list of study areas I would include the following:

### 1. *Congressional Micro-Management*

By this I mean the post-*Chadha* <sup>45</sup> experience on Congressional oversight of the regulatory process, and whether it has fostered a more effective administration. <sup>46</sup> This includes the use of appropriations riders, the oversight hearing, the confirmation process, and other forms of involvement in regulatory process.

### 2. *Keating Five Redux* <sup>47</sup>

By this I mean the proper response of agencies to congressional inquiries/pressure that inevitably leads to an examination of the role of individual members of Congress representing their constituencies' interests. <sup>48</sup> One example is Senator Robert Dole's (R-Kan.) recent introduc-

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43. Administrative Conference Act of 1964, 5 U.S.C. §§ 574 (1988).

44. Cf. Sunstein, *supra* note 40, at 631.

45. *INS v. Chadha*, 462 U.S. 919 (1983) (holding legislative veto contrary to separation of powers doctrine).

46. See C. FOREMAN, JR., *SIGNALS FROM THE HILL: CONGRESSIONAL OVERSIGHT AND THE CHALLENGE OF SOCIAL REGULATION* (1988) (analyzing what legislative oversight of agencies' regulatory programs has actually accomplished).

47. Over a two-month period starting on November 15, 1990, five United States Senators, dubbed the "Keating Five," were investigated by the Senate Select Committee on Ethics regarding whether large campaign contributions they received from Charles H. Keating, Jr., president of the failed Lincoln Savings and Loan, prompted them to intervene with regulators on Keating's behalf. The senators were Alan Cranston (D-Cal.); Dennis De Concini (D-Ariz.); Donald Riegle, Jr. (D-Mich.); John Glenn (D-Ohio); and John McCain (R-Ariz.). See Editorial, *The Keating Five Three One*, *Christian Science Monitor*, Mar. 4, 1991, at 20, col. 3; Mayer, *The Keating Five Adds Up to Just Two*, *Newsday*, Feb. 8, 1991, at 61, col. 1.

48. This is the classic debate over the role of the representative. The Madisonian view suggests that elected officials ought to act as "trustees" of the public interest (if that is definable) "refin[ing] and enlarg[ing] the public views" to "discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations." THE

tion of legislation that requires public disclosure of congressional inquiries regarding (among other things) ongoing enforcement actions.<sup>49</sup>

### 3. *The Role of Federalism*

By this I mean how programs with the need for federal standards operate in the context of local solutions. Questions of federal preemption in the Occupational Safety and Health Administration (OSHA),<sup>50</sup> bank regulation,<sup>51</sup> and the Environmental Protection Agency (EPA)<sup>52</sup> become relevant as is the role of block grants and other decentralized forms of grant management.<sup>53</sup>

### 4. *Non-traditional Forms of Bureaucratic Accountability*

By this I mean the development of citizen safeguards as ombudsman,<sup>54</sup> inspectors general,<sup>55</sup> institutionalization of whistleblower

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FEDERALIST NO. 10, at 82 (J. Madison). John Adams's competing view was that a representative legislature "should be an exact portrait, in miniature, of the people at large, as it should think, feel, reason and act like them . . ." 4 J. ADAMS, *Letter to John Penn*, in THE WORKS OF JOHN ADAMS 205 (1850). See generally H. PITKIN, THE CONCEPT OF REPRESENTATION (1967).

49. See The Comprehensive Campaign Finance Reform and Ethics Act of 1991, S. 6, 102d Cong., 1st Sess. § 201, 137 CONG. REC. S503, S504 (daily ed. Jan. 14, 1991).

50. See Note, *Getting Away with Murder: Federal OSHA Preemption of State Criminal Prosecutions for Industrial Accidents*, 101 HARV. L. REV. 535 (1987).

51. See Kreissman, *Administrative Preemption in Consumer Banking Law*, 73 VA. L. REV. 911 (1987).

52. See Comment, *An Enemy of the People: Prosecuting the Corporate Polluter as a Common Law Criminal*, 39 AM. U.L. REV. 311 (1990). See generally Wolfson, *Preemption and Federalism: The Missing Link*, 16 HASTINGS CONST. L.Q. 69, 69 (1988) (warning that the federal preemption doctrine threatens to become "the new Lochner").

53. See L. BROWN, J. FOSSETT & K. PALMER, THE CHANGING POLITICS OF FEDERAL GRANTS 147-52 (1984).

54. See D. ANDERSON & D. STOCKTON, OMBUDSMEN IN FEDERAL AGENCIES: THE THEORY AND THE PRACTICE (1990) (report for ACUS); Frank, *The Ombudsman—A Challenge*, INT'L BAR J., Nov. 1971, at 32. Some federal agencies, including the Internal Revenue Service, the Army Materiel Command, and the Food and Drug Administration, have ombudsmen. See The Ombudsman in Federal Agencies (Recommendation No. 90-2), 1 C.F.R. § 305.90-2 (1991).

55. Inspector General Act of 1978, 5 U.S.C. app. § 3 (1988).

*qui tam* actions<sup>56</sup> or whistleblower protection statutes,<sup>57</sup> and the use of private attorneys general.<sup>58</sup>

### 5. *A Coordinated Regulatory Policy*

By this I mean the role of the Office of Management and Budget review system,<sup>59</sup> its comparison to state regulatory review programs in such states as Arizona<sup>60</sup> and California,<sup>61</sup> the role of the Council on Environmental Quality (CEQ), the roles of the Administrative Conference of the United States, Advisory Commission on Intergovernmental Relations (ACIR), and other coordinating bodies.

### 6. *Cost Efficiency in Regulation*

By this I mean the use of cost-benefit analysis in decisionmaking,<sup>62</sup> a reinstatement of *de minimis* exceptions as a rule of interpretation in regu-

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56. False Claims Act Amendments of 1986, Pub. L. No. 99-562, 100 Stat. 3153 (codified at 31 U.S.C. §§ 3729-3733 (1988)). These amendments substantially broaden the opportunities for *qui tam* actions—when a private individual, acting on behalf of and in the name of the United States, sues those who submit false claims for payment of government funds. If successful, these private attorneys general are entitled to up to 25% of the awarded damages. See generally United States *ex rel.* Newsham v. Lockheed Missiles & Space Co., 722 F. Supp. 607 (N.D. Cal. 1989) (holding that *qui tam* actions do not violate separation of powers even though prosecutorial functions are delegated to private parties); United States *ex rel.* Stillwell v. Hughes Helicopters, 714 F. Supp. 1084 (C.D. Cal. 1989) (holding that *qui tam* provisions of the False Claims Act do not violate separation of powers or appointment clause). See also Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L.J. 341 (1989); Vogel, *Citizens' Lawsuits Based on the False Claims Act Have Multiplied*, NAT'L L.J., Nov. 26, 1990, at 20, 32-34.

57. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified as amended in scattered sections of 5 U.S.C.) (giving enhanced authority and responsibility to the Office of Special Counsel to protect whistleblowers and other employees victimized by prohibited personnel practices, and providing whistleblowers with an independent right to take cases before the Merit Systems Protection Board).

58. For a discussion of EPA's experience with private attorneys general, see Coordination of Public and Private Enforcement of Environmental Laws (Recommendation No. 85-3), 1 C.F.R. § 305.85-3 (1991); Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833 (1986).

59. Substantive regulatory review is conducted by the Office of Information and Regulatory Affairs (OIRA), a division of OMB, which was created in 1980 pursuant to the Paperwork Reduction Act of 1980, Pub. L. No. 96-511, § 3503, 94 Stat. 2812, 2814 (codified at 44 U.S.C. §§ 3503-3520 (1988)).

60. See, e.g., Falk, *State Regulatory Development and Reform: An Overview*, 1985 ARIZ. ST. L.J. 261; Rose, *Executive Oversight of Rulemaking in Arizona: The Governor's Regulatory Review Council—The First Three Years*, 1985 ARIZ. ST. L.J. 425.

61. See M. PRICE, EXECUTIVE CONTROL OF RULEMAKING: THE OFFICE OF ADMINISTRATIVE LAW IN CALIFORNIA (1981) (report for ACUS).

62. See Exec. Order No. 12,291, 3 C.F.R. § 127 (1982) (requiring executive branch agencies, in the context of certain "major rules," to observe, unless precluded by law, specified cost-benefit formulae when regulating and issuing initial and final Regulatory Impact Analyses).

latory law, and a focus on how to provide process in agency adjudication with a sensitivity to cost considerations.

Thus, there exist numerous areas of process and structure that do not involve issues of judicial review. Although I believe that a focus on substance as the future goal for administrative law is valuable, it requires that we study coextensive structures that better effectuate our substantive goals.

Americans tend to accept the given as set in stone. In fact, regulatory structures that can be used to solve a regulatory problem abound. The New Deal saw the growth of multi-member independent regulatory agencies. More recently, the impetus for multi-member commissions has flagged.<sup>63</sup> The current trend is to establish separate independent agencies with a single head. For example, Congress has considered transforming the Nuclear Regulatory Commission into a single-member agency<sup>64</sup> and bringing the Federal Energy Regulatory Commission within the executive branch with a single commissioner.<sup>65</sup> Additionally, the Office of Government Ethics was emancipated from the Office of Personnel Management, to provide it with some perceived measure of autonomy.<sup>66</sup> A new preference has emerged toward elevating an agency's stature to cabinet status, as seen most recently with the Department of Veterans Affairs.<sup>67</sup> A similar effort is underway for the EPA.<sup>68</sup>

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63. *But see* Social Security as an Independent Agency Act, H.R. 791, 101st Cong., 1st Sess. (1989) (a bill to remove the Social Security Administration from the Department of Health and Human Services and establish it as an independent agency headed by a three-member bipartisan board).

64. During the 100th Congress, the Senate passed S. 2443, 100th Cong., 2d Sess., 134 CONG. REC. S11,049-01 (1988), which proposed to replace the five-member Nuclear Regulatory Commission with a single administrator. At the time, the House declined to go along with the plan. In the next Congress, the proposal was re-introduced but not enacted. *See* Nuclear Regulation Reorganization Reform Act of 1989, S. 946, 101st Cong., 1st Sess., 135 CONG. REC. S5427 (daily ed. May 16, 1989).

65. The Bush Administration made this proposal last year in the National Energy Strategy package. *See* S. 570, 102d Cong., 1st Sess., 135 CONG. REC. S2775 (daily ed. Mar. 6, 1991); H.R. 1301, 102d Cong., 1st Sess. (1991). The Senate Energy Committee has rejected the proposal; the House has not yet acted.

66. Act Reauthorizing Office of Government Ethics, Pub. L. No. 100-598, 102 Stat. 3031 (1988) (codified at 5 U.S.C. app. §§ 401-408 (1988)).

67. Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988) (codified at 38 U.S.C. § 201 note (1988)). Admittedly, this movement is counterintuitive in that cabinet status may be seen as highlighting an agency's nexus with the Executive.

68. On June 13, 1991, a bill to elevate the EPA to cabinet status, S. 533, 102d Cong., 1st Sess., 137 CONG. REC. S14,028-32 (daily ed. Oct. 1, 1991), was reported out of the Senate Governmental Affairs Committee. *See* S. REP. NO. 82, 102d Cong., 1st Sess. (1991). A similar bill failed in the last Congress. S. 2006, 101st Cong., 2d Sess., 136 CONG. REC. S122-26 (daily ed. Jan. 23, 1990).

At the same time, Congress has added to the administrative bestiary new regulatory structures reminiscent of the British "quango."<sup>69</sup> These include government-sponsored enterprises, public corporations, commissions, and boards and authorities—all with different responsibilities and different organizational structures. For example, the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),<sup>70</sup> created the Resolution Trust Corporation (RTC), giving it primary responsibility for handling cases involving former FSLIC-insured institutions that had been or would be placed in conservatorship or receivership. By statute, the RTC is governed by the FDIC Board of Directors.<sup>71</sup> However, Congress created an additional five-member oversight board composed of the Secretary of Treasury, the Secretary of Housing and Urban Development, the Chairman of the Board of Governors of the Federal Reserve System, and two members from outside the government nominated by the President and confirmed by the Senate.<sup>72</sup> Some members of Congress have proposed to reformulate the board so that majority control is in the hands of individuals with no other governmental duties. One proposal would reconstitute the RTC board to include nine members.<sup>73</sup> Another would establish a single board of seven voting members.<sup>74</sup> Each of these structural formulations has its advantages and disadvantages. The point, for our purposes, is that "structure has consequences"—consequences regarding efficiency, fairness, and democratic accountability. The effect of structure on each of these values must be weighed in the balance.

In that regard, we must remind ourselves that such "delicately balanced and innovative institutions"<sup>75</sup> must not distend the central princi-

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69. "Quango" is British slang for "Quasi-Autonomous National Governmental Organization." See Barnes, *The Failure of Privatization*, NAT'L REV., July 18, 1986, at 38; FCA Cottons to "Quango," L.A. Times, Feb. 22, 1988, at D1, col. 1; Garrett, *Goodbye to Quangos, Welcome to Pingos; The Whitehall Revolution*, Financial Times, Aug. 16, 1990, at 15, col. 6.

70. Pub. L. No. 101-73, § 501, 103 Stat. 183, 363 (1989) (to be codified at 12 U.S.C. § 1441a).

71. See 12 U.S.C.A. § 1441a(b)(8)(A) (West Supp. 1991).

72. See 12 U.S.C.A. § 1441a(a) (West Supp. 1991).

73. See Resolution Trust Corporation Reorganization Act of 1991, S. 389, 102d Cong. 1st Sess., 137 CONG. REC. S1795 (daily ed. Feb. 7, 1991). The board would consist of three current government members, the Chairman of the FDIC, and five members from the private sector appointed by the President subject to Senate confirmation. One of the private sector appointees would serve as the full-time Chairperson.

74. See Loan Simplification Act, S. 572, 102d Cong, 1st Sess. (1991). In addition to the three FDIC board members who would continue to serve (the Director of the Office of Thrift Supervision would leave the current board and the Comptroller of the Currency would become a non-voting member of the new board), the bill would add four full-time members subject to presidential appointment and Senate confirmation. One of the full-time members would serve as the Chairperson.

75. *Citizens for the Abatement of Aircraft Noise, Inc. v. Metropolitan Washington Airports Auth.*, 917 F.2d 48, 61 (D.C. Cir. 1990) (Mikva, J., dissenting), *aff'd*, 111 S. Ct. 2298 (1991).

pal of the unitary executive. At its root is not only a constitutional doctrine "to take Care that the Laws be faithfully executed,"<sup>76</sup> but a democratic principle: if "the buck stops here," the person who carries the buck must be able to hold bureaucrats accountable. Not all "innovative . . . governmental experiment[s]"<sup>77</sup> in structure will encroach upon the separation of powers principle, but they must first be analyzed from that constitutional perspective.

Nonetheless, I certainly agree with Professor Sunstein's call for the reform of administrative structures motivated by a "strong presumption in favor of flexible, market-oriented, incentive-based regulatory strategies."<sup>78</sup> Professor Sunstein attributes many of the regulatory failures in the United States to "the use of rigid, highly bureaucratized 'command-and-control' regulation."<sup>79</sup> He proposes the implementation of performance standards, which I understand to mean "standards that prescribe the regulatory result to be achieved."<sup>80</sup> Their advantage includes leaving regulated entities free to choose or invent "least cost solutions."<sup>81</sup> They foster innovation, produce more flexible results-oriented policy, and are less damaging to competition in the free market. An example is the Consumer Product Safety Commission, which adopted a performance standard requiring a "sharp points" laboratory test for toys and toy parts.<sup>82</sup> This was an easier standard to write and certainly more cost effective than trying to specify myriad design and material options acceptable for toys.<sup>83</sup>

Performance standards, however, can sometimes be harder to write, harder to administer (both practically and as a matter of legal process), and may provide competitive advantages for larger and more sophisticated firms.<sup>84</sup> Thus, when OSHA changed its fire safety rule dictating

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76. U.S. CONST. art. II, § 3.

77. *Metropolitan Washington Airports Authority*, 917 F.2d at 61.

78. Sunstein, *supra* note 40, at 633.

79. *Id.* at 627.

80. Regulation by the Occupational Safety and Health Administration (Recommendation No. 87-10), 1 C.F.R. § 305.87-10 (1991).

81. See ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, PERFORMANCE STANDARDS: A PRACTICAL GUIDE TO THE USE OF PERFORMANCE STANDARDS AS A REGULATORY ALTERNATIVE (1981); Haas, *More Bang for the \$*, NAT'L J., Apr. 20, 1991, at 929.

82. See 16 C.F.R. § 1500.48 (1991).

83. Conversely, sanitary plumbing is subject to strict federal guidelines regulating construction and safety standards. See 24 C.F.R. § 3280.603 (1991).

84. The Administrative Conference encouraged OSHA's use of performance standards whenever they would provide equivalent protection to that provided by design standards. See *supra* note 81. The recommendation, however, emphasized that the choice of regulatory technique must consider whether the standard could be readily understood and monitored and whether it would, in fact, lower compliance costs. See also Shapiro & McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 37-38 (1989).

the exact height for mounting fire extinguishers and substituted a performance standard stating that the extinguishers must be "accessible,"<sup>85</sup> some in the industry complained that the burden of compliance became more difficult.<sup>86</sup> Notwithstanding this sort of problem, the federal government has only begun to use performance standards effectively. The Nuclear Regulatory Commission (NRC), an agency that has hewed rigidly to command-and-control regulation, is just beginning to re-examine the use of performance standards.<sup>87</sup> Such efforts are positive and should be encouraged.<sup>88</sup>

In addition to performance standards, we must examine the extent to which self-certification works. Consider the Export Administration Act, under which many transaction approvals are completely delegated to exporters.<sup>89</sup> If the checking is performed properly, they can self-certify wholesale. However, if the exporters make even one mistake, then individual validating licenses are required in which every item must be sent before the regulatory agency to certify that the item will not be improperly distributed or used.<sup>90</sup> This is an example of how one can couple corporate self-interest with self-certification to accomplish significant regulatory goals.<sup>91</sup>

In that regard I would applaud Sunstein's recognition of the value of risk disclosure as a regulatory device. As Sunstein remarked at the symposium, it provides an incentive to industry to improve so that they do

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85. See 29 C.F.R. § 1910.157(c) (1990).

86. See, e.g., Rader, Smotherman & Ehlike, *How to Handle an OSHA Case: An Employer's Rights and Options*, 33 BAYLOR L. REV. 493, 494 (1981).

87. On October 30, 1990, I discussed the use of performance standards before the NRC, which, since Three Mile Island, has strongly adhered to a command-and-control strategy for regulating nuclear power plants. The Commission's argument against returning to performance standards is that, in the context of nuclear regulation, you need bright-line rules to indicate whether the industry is violating the law.

88. See Federal Program Performance Standards and Goals Act of 1991, S. 20, 102d Cong., 1st Sess., 137 CONG. REC. S623 (daily ed. Jan. 14, 1991) (requiring the development of performance goals for all federal programs to be incorporated in the budget, and requiring the annual filing of reports of actual performance as compared to these goals).

89. See 50 U.S.C. app. §§ 2401-2420 (1988). The Act expired on September 30, 1990. However, the export controls program continues in effect by an Executive Order issued under authority of the International Emergency Economic Powers Act, 50 U.S.C. § 1702 (1988). See Exec. Order 12,730, 3 C.F.R. § 305 (1990), reprinted in 50 U.S.C.A. § 1701 note (West 1991). Legislation to extend and amend the Act was passed by Congress in 1990 but vetoed by the President. A similar measure was reintroduced in 1991, see Export Administration Reauthorization Act of 1991, S. 320, 102d Cong., 1st Sess. (1991), and has been referred to the House Judiciary Committee and the House Foreign Affairs Committee. 137 CONG. REC. S1160 (daily ed. Feb. 26, 1991).

90. See H. FENTON, RECOMMENDATIONS FOR INJECTING NEEDED OPENNESS AND DUE PROCESS REFORMS INTO UNITED STATES EXPORT CONTROLS PROCEDURES (1991) (report for ACUS).

91. See Sunstein, *supra* note 40, at 620 (stating that regulation does not always override individual goals: "[G]overnmental coordination of private behavior structures and organizes private choices, and should not be seen as rejecting them.").

not appear at the bottom of published risk lists.<sup>92</sup> Further, the focus on risk information disclosure treats the "object" of a regulation, be it the consumer, employee, or citizen, as a participant in the regulatory process, responsible for receiving facts and weighing the risks.<sup>93</sup>

The litigation "explosion" and resulting crisis of "mass justice" have led to the consideration of new structures of administrative adjudication (this, frankly, is the area in which the average citizen is most likely to "experience" administrative law). One example is the lay tribunal, often used in British administrative procedure, which focuses less on precedent and procedural formality and more on the substantive results, with a concomitant restriction of judicial review of fact.<sup>94</sup> Indeed we need to consider whether there are ways to improve front-end procedures in areas like asylum adjudication<sup>95</sup> or social security disability processes<sup>96</sup> and then provide fewer bites at the apple at the back-end of the process.<sup>97</sup>

Furthermore, we need to consider where and how proceduralism stands in the way of reform. For example, there is often a failure to examine whether a situation demands emergency fast-track regulatory action.<sup>98</sup> We must question our assumptions regarding administrative process and procedure, in spite of the fact that the "rights" revolution caused many to equate more and more procedure with due process fairness. It is hoped that with the passage of the Administrative Dispute

92. Imagine how bank lending practices would improve if the disclosure of bank risk ratios were required.

93. One should not underestimate Sunstein's point that to "require industries to disclose the existence of risks to the public until a regulation has been issued that establishes that the risks are insignificant" will likely cause industry to press for more stringent safety regulations. Sunstein, *supra* note 41, at 632. I am not certain, however, if such disclosure is *in itself* a sufficient regulatory device.

94. JUSTICE-ALL SOULS REVIEW COMMITTEE, ADMINISTRATIVE JUSTICE: SOME NECESSARY REFORMS 212 (1988) (reviewing the British lay tribunal procedure).

95. See Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. PA. L. REV. 1247 (1990).

96. See *The Disability Appeals Process Reform Act of 1991: Hearings on H.R. 1799 Before the Subcomm. on Social Security of the House Ways and Means Comm.*, 102d Cong., 1st Sess. (1991) (testimony of Marshall J. Breger).

97. Recent studies of mass entitlement programs have urged the notion of "bureaucratic justice," arguing that case-load pressures make it necessary to reconceptualize the meaning of due process. See J. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 22, 34-40 (1983) (evaluating the structure and management of the Social Security disability program); Koch & Koplow, *The Fourth Bite at the Apple: A Study of the Operation and Utility of the Social Security Administration's Appeals Council*, 17 FLA. ST. U.L. REV. 199 (1990).

98. This question arose with the FDA's handling of applications relating to AIDS therapies. See Foreman, *The Fast Track: Federal Agencies and the Political Demand for AIDS Drugs*, BROOKINGS REV., Spring 1991, at 30; cf. *In re Barr Laboratories, Inc.*, 930 F.2d 72, 75 (D.C. Cir. 1991) (denying mandamus based on Food and Drug Administration's failure to act on generic drug applications within statutory deadline where result would impose offsetting burden on other applicants).

Resolution Act<sup>99</sup> and the Negotiated Rulemaking Act<sup>100</sup> agencies will take advantage of new mechanisms of administrative process. Indeed, recalling the *raison d'être* of the administrative state, we may yet be forced to question whether proceduralism may at times impair both fairness and efficiency.

I will only briefly mention Professor Sunstein's famous statutory "canons."<sup>101</sup> I believe statutory interpretation has been over-analyzed in recent years.<sup>102</sup> Although the subject may yet provide grist for the mill of the literary theorist (but I doubt it), it has become far too esoteric for the practicing lawyer and, dare I say, the real-life judge. Except for his discussion of regulatory rationales, Sunstein's Article excises that aspect from his analysis of the regulatory state. My criticism is that Sunstein would not merely read statutes in derogation of the common law, but also to effectuate a host of subjective goals, such as civil rights and environmental values, which are bound up in his understanding of civic virtue. Suffice it to say that Professor Sunstein, like Professor Edley, would require a degree of judicial activism which is rarely practiced, even by its surviving devotees.

My final comments concern Sunstein's support for neo-Republicanism.<sup>103</sup> Everybody seems to want to be a neo-Republican.<sup>104</sup> It is hard to be against a notion that embraces civic virtue. The true meaning of the term emphasizes an individual's role in society as a savior; focusing on people who engage in the public sphere and in the public space as citizens of a republic rather than as individuals engaging in private, selfish, possessive kinds of activity. Although there is much benefit in that approach, I must note that where virtue has reigned—Calvin's Geneva,<sup>105</sup>

99. Pub. L. No. 101-552, 104 Stat. 2736 (to be codified in scattered sections of 5 U.S.C. and 9 U.S.C.).

100. Pub. L. No. 101-648, 104 Stat. 4969 (to be codified at 5 U.S.C. §§ 581-590).

101. See C. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 235-38 (1990).

102. See, e.g., Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549 (1988); Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989); Faber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281 (1989); Fallon, *Of Legislative Courts, Administrative Agencies and Article III*, 101 HARV. L. REV. 916 (1988); Mikva, *A Reply to Judge Starr's Observations*, 1987 DUKE L.J. 380; Shapiro & Glicksman, *Congress, The Supreme Court, and the Quiet Revolution in Administrative Law*, 1989 DUKE L.J. 819; Starr, *Observations About the Use of Legislative History*, 1987 DUKE L.J. 371; Starr, *Of Forests and Trees: Structuralism in the Interpretation of Statutes*, 55 GEO. WASH. L. REV. (1988).

103. Defined by Edley as "the resurgence of interest in the possibility of civic virtue, public deliberation, public-regarding behavior, and freedom as and through self-governance by individuals and collectives." Edley, *supra* note 1, at 589.

104. Besides Professor Sunstein, other devotees include Jerry Frug and Mark Tushnet.

105. See W. BOUWSMA, *JOHN CALVIN: A SIXTEENTH CENTURY PORTRAIT* 204-13 (1988).

Puritan Massachusetts,<sup>106</sup> and maybe even Jacobin France<sup>107</sup>—the academic free spirit has not been in favor. There is an important place in society for virtue, and it is necessary to emphasize the duty of participation, the duty of citizenship, and the duty of effectuating the public space. However, the public duties alone have limitations. If you just focus on the public space and altruist endeavor, you do not leave much for individuality to effectuate one's own personal and private domain.

I sometimes fear that there is a bit of Yuppie populism about civic republican thought. The "haves" so often think of society as including only people like themselves that they ignore the grass-roots participation and volunteer activity going on in America today. There are many lower-middle class communities with traditional values that emphasize the helping hand in an enduring community structure. These people often have the kind of values that are generally not going to get high marks in the civic republican world view; they include evangelical religious communities. So although we have conditions for populism, we will not necessarily be able to recreate them in the more rarified form of civic republicanism. In the context of administrative law, civic republicanism falters by refusing to acknowledge the influence of structures and processes—past, present and future—on the substance of political theory. Thus, I would ask Professor Sunstein how he sees civic republicanism specifically affecting the administrative state.<sup>108</sup> I would say that it means more federalism, greater public participation, expanded negotiated rulemaking, and a sharper focus on ethics in the public service tradition, but I do not believe it can impact more than that. Thus, the value of this analysis for administrative law in the twenty-first century remains to be developed.

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106. See G. HASKINS, *LAW AND AUTHORITY IN EARLY MASSACHUSETTS* 222-31 (1960) (analyzing the Puritans' emphasis on conformity and the attainment of religious and social practices at the expense of individual personal liberty); R. PERRY, *PURITANISM AND DEMOCRACY* 110 (1944) (discussing how the Puritans used "consociation" to develop a centralized system of governance that suppressed heresy and enforced external observances).

107. See C. BLUM, *ROUSSEAU AND THE REPUBLIC OF VIRTUE: THE LANGUAGE OF POLITICS IN THE FRENCH REVOLUTION* 216-37 (1986).

108. Indeed, John Hart Ely goes further, suggesting that although a number of commentators find "the republican tradition" of "significant intellectual interest," its "social and political assumptions seem substantially irrelevant to 20th century America." Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts are No Different From Legislatures*, 77 VA. L. REV. 833, 840 n.15 (1991).