Democratization and Administrative Law

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DEMOCRATIZATION AND . . . ADMINISTRATIVE LAW*

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The democratization revolution that swept Eastern Europe and much of the Third World in the late 1980s and early 1990s is the most exciting and hopeful trend of the late twentieth century. Initial enthusiasms and a wishful thinking about this "springtime of peoples" and a "second independence from colonialism" are now

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1. "The coming century could see, at last, the full flowering of the idea of democracy," especially as "the attacks of both communism and fascism" have been beaten back. It Means Government by the People, and We Are the People, ECONOMIST, Dec. 21, 1996, Survey at 1, 1. Recent events reflect a "third wave" of democratization, beginning in 1974 and in full flood by 1989. See Samuel P. Huntington, Democracy for the Long Haul, J. DEMOCRACY, Apr. 1996, at 3. Some countries recently experimenting (at least) with democracy are Mongolia, Nepal, the Philippines, Benin, Central African Republic, Cape Verde, Congo, Ethiopia, Ivory Coast, Madagascar, Mali, Malawi, Senegal, South Africa, Togo, and Zambia. Eighteen African countries are scheduled to have national elections in 1996, and eight in 1997. See Democracy, African Style, ECONOMIST, Feb. 3, 1996, at 17 [hereinafter Democracy, African Style] (describing a bowling-over of "dinosaur dictators and their one-party-states"). Recent events in Argentina, Brazil, Chile, and Nicaragua mean that (except for Cuba) all of Latin America is democratic in varying degrees. Two-thirds of Latin Americans see democracy as the best system of government, but this ranges from 86% in Uruguay to 41% in politically-chaotic Ecuador. See Brightening Up, ECONOMIST, Apr. 4, 1998, at 38, 38. Peruvians see President Fujimori as an effective authoritarian. Marketization is also proceeding apace in Latin America, but there is a growing backlash among "populists." See Reforming Latin America, ECONOMIST, Nov. 26, 1994, at 39; Gestures Against Reform, ECONOMIST, Nov. 30, 1996, at 19; see also Guillermo O'Donnell, Illusions About Consolidation, J. DEMOCRACY, Apr. 1996, at 34, 35-36 (stating most Latin American countries are "polyarchies," Robert Dahl's characterization of a type of democracy, although, like Yeltsin, Peru's Fujimori was elected democratically and then he abolished polyarchy); infra note 2 and accompanying text.
giving way to more careful analyses about what democracy means, about strategic withdrawals or a clear backsliding from it, about the better means for consolidating democracy, about the constraints and opportunities in particular countries, and about the relationship between democratization and development. The best in current thinking stresses that there is no need to choose between doing good (democracy) and doing well (development). If leaders in nascent democracies are lucky and smart, they will slowly guide their countries towards some form of social democracy, where the benefits of economic growth are distributed rather widely. My article aims to contribute to a clearer thinking on this subject, thinking which will have to be modified to suit particular national contexts, by stressing the importance of a rather strict (or Weberian) administrative law.

I. The Problem Sketched

The democratization revolution lacks historical models, a convincing theory of causation, and elaborate normative justifications (as opposed to slogans). This, plus the virtual collapse of an analytical Marxism and the paucity of overarching theories of a social democracy, made it all but inevitable that American conservatives would rush to fill an analytical vacuum. They quickly linked democratizing events to a marketization: the rapid privatization and deregulation of almost everything. While some critics see this link as by no means inevitable, a conservative (neoclassical economics-dominated, nineteenth-century liberal) thesis soon came to dominate thinking: "economic freedoms" — broad and unregulated property and contract rights, exerted in unregulated markets — necessarily precede

2. BRUCE ACKERMAN, THE FUTURE OF LIBERAL REVOLUTION 1, 25, 119 (1992); Huntington, supra note 1, at 4 (commenting that after the euphoria, we become sadder but wiser); id. at 5 (stating that like other dialectical aspects of history, democratization loses momentum and generates countermovements); WHEN COLD WARRIORS QUIT, ECONOMIST, Feb. 8, 1992, at 13; see also O'Donnell, supra note 1, at 35-36; Fred Hiatt, SUHARTO'S FALL, WASH. POST, May 24, 1998, at C7 ("Democracy isn't born when a dictator resigns, nor even with the first election; it evolves, and with luck strengthens, over years. Major constraints are a lack of imagination, a fear of chaos, and the absence of culture-specific factors — South Korea had the middle class that Indonesia mostly lacks; the Philippines, a stronger memory of democracy and a single leader behind whom the opposition could unite."); Julia Watson, WAKING THE TEMPESTS, INT'L HERALD TRIB., July 1, 1996, at 9 (quoting and reviewing an Eleanor Randolph book about Russia, in ways which apply to some other democratizations) ("Democracy by 1995 became an unfriendly concept" meaning "lack of control or even weakness" and ideas imposed by foreigners, contrary to Russians' desire to move "in their own fashion and at their own speed"); Democracy, African-Style, supra note 1, at 17 (stating politicians used "democracy as a route to power, but they did not become democrats," citing Ethiopia's Meles and Kenya's Moi and their failures at the democratic inclusion that brings stability); POLLS TO NOWHERE, ECONOMIST, Nov. 23, 1996, at 20, 20 (stating as in Zambia and in the election of ex-soldiers elsewhere, "democratic travesty" is an African pattern).


or arise at the same time as the political freedoms we associate with democracy. The endpoint of this process — the economists' equilibrium or Francis Fukuyama's "end of history" — is thus a liberal democracy.5

5. See Paul H. Brietzke, Law, Democratization, and Markets, in LAW & ECONOMICS: NEW AND CRITICAL PERSPECTIVES 31, 32-36 (Robin Malloy & Christopher Braun, eds. 1995) [hereinafter Brietzke in Malloy]; see also DAVID W. CONKLIN, COMPARATIVE ECONOMIC SYSTEMS 7, 8-9 (1991) (discussing that for neoclassicists, efficient production and distribution decisions are made by individuals in free markets where, despite their critics' emphasis on market failures, price fluctuations are expected to equilibrate supply and demand in socially-beneficial ways); id. at 96 (discussed in infra note 59); FRANK EASTEBROOK & DANIEL FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 15 (1991) (stating that a neoclassical liberal democracy is a contract-based "voluntary and unanimous agreement among the affected parties"); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 4-5, 7, 9-10 (1962); Kanishka Jayasuriya, The Political Economy of Democratization, in TOWARDS ILLIBERAL DEMOCRACY IN PACIFIC ASIA 107, 117 (Daniel Bell et al. eds., 1995) (stating in "neoclassical institutional theory" the relation of private and state sectors is that of principal and agent); Cass Sunstein, Property and Constitutionalism, ECONOMIC FOUNDATIONS OF PROPERTY LAW 88 (Robert Ellickson et al. eds., 1995) (in Eastern Europe, democratization takes a role secondary to marketization and economic development); Bhagwati, supra note 3, at 51-52 (stating the "old, dismal, and deterministic view . . . that perestroika must precede glasnost"); rather, it is economic growth that creates an effective demand for democracy in, e.g., South Korea and Germany); id. at 54 ("The dividends from political democracy are likely to be compounded if it is combined with markets."); id. at 62 (commenting that markets can deliver growth without democracy but, without markets, democracy is unlikely to deliver sufficient growth); Paul Kennedy, Political Barriers to African Capitalism, 32 J. MOD. AFR. STUD. 191, 193 (1994) (stating capitalist industrialization "always . . . linked to the rise of a productive, expansionary bourgeoisie"); id. ("The capitalist genie first needs to be fully unleashed in a still part-traditional and perhaps hostile society."); id. at 213 (stating that this "traditional view" plays down the crucial role of the state and a modernizing political elite, in creating the institutional preconditions for markets); Juan J. Linz & Alfred Stepan, Toward Consolidated Democracies, J. DEMOCRACY, Apr. 1996, at 14, 28-29 ("dubious assumption" that economic improvement can be achieved at the same time as the legitimation of democratic institutions that must occur in "imploded command economies"); Richard A. Posner, The Cost of Rights: Implications for Central and Eastern Europe — and for the United States, 32 TULSA L.J. 1 (1996) (portraying Eastern Europe as a "central arena" for a "central issue," specifically "the contest between Western-style liberalism and rival ideologies"); id. at 3 (stating that as negative liberties, property rights are "less of a burden on the public fisc" and create "immense benefits" as "the cornerstone of a system of free markets and democratic political governance"); Theodore Draper, Mission Impossible, N.Y. REV. BOOKS, Oct. 4, 1994, at 31-32 ("American liberal democratic internationalism" had its origins in the ideas of Woodrow Wilson, and its "most ambitious program" concerned Postwar Japan and Germany); Tony Judt, New Germany, Old Nato, N.Y. REV. BOOKS, May 29, 1997, at 42 ("It is not markets that make democrats . . .; democracy makes democrats (and markets, too)," in what verges on a tautology) (citing Juan Linz and Alfred Stepan); Robert D. Kaplan, Democracy's Trap, N.Y. TIMES, Dec. 24, 1995, at E9 (stating that America must curb its "missionary zeal" for a destabilizing multiparty democracy, and attend to "exploding populations, diminishing natural resources, struggling governments, and ethnic rivalries"); Daniel Singer, The Real Eurobattle, NATION, Dec. 23, 1996, at 22 (stating that ideas described in the text are also followed in the French pensée unique and by "Maggie (There Is No Alternative) Thatcher"); The Myth of the Powerless State, ECONOMIST, Oct. 7, 1995, at 15, 15-16 (discussing the "heralds of the vanishing state" and quoting an unnamed British former Chancellor of the Exchequer in saying that "the nation state as it has existed for nearly two centuries . . . has been savagely crippled by market forces"); infra note 8. See generally FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992) (arguing that history has come to an end in a Hegelian sense because liberal democracy and market economies have thoroughly defeated the communist party-state); FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY (1960) (arguing that markets create a "spontaneous order" out of complex chaos, creating the means for the progress of civilization).
The reality of the Third World necessarily suffers in comparison with this economists' ideal, which holds that imperfect or nonexistent Third World markets will soon work much better than the admittedly imperfect governments there. Politics is seen as an inferior kind of economic transaction, a long-term service contract used to dupe citizens. Efficiency and liberty (a tolerance for almost anything you might want to do) pursued through the minimal (or nightwatchman) state is thus strongly preferred over equity, equality, and the stronger state necessary to the pursuit of such goals. But people live in societies and polity rather than in markets, and the conservative thesis lends too little support to the fledgling democracies that are expected to do something, right now, to improve citizen welfare and to escape from the low-level equilibria of a subsistence agriculture, for example. From the perspective of a comparative law, politics, and economics, the conservative thesis is primitive. The ethnocentric and often-explicit assumption is that the law, political culture, and business practices of the United States are transplants necessary and sufficient to a democracy everywhere. (This assumption echoes that of a more left-leaning, 1960s law and development "movement": development meant becoming more like the United States.) A new democracy is not a tabula rasa, however. It carries the benefits and burdens of a particular past, and it must deal with the "demonstration effect" of affluence in other countries from within a subordinate position in the international division of labor.6

6. See Brietzke in Malloy, supra note 5, at 32-37; Paul H. Brietzke, Designing the Legal Frameworks for Markets in Eastern Europe, 7 TRANSMI. LAW. 35, 38 (1994) [hereinafter Brietzke, Designing]; Paul H. Brietzke, Accountability in the "Brave New World" of Development, 1992 THIRD WORLD L. STUD. 99, 108, 125 [hereinafter Brietzke, Accountability]; see also Gianmaria Ajani & Ugo Mattei, Codifying Property Law in the Process of Transition: Some Suggestions from Comparative Law and Economics, 19 HASTINGS INT'L & COMP. L. REV. 117, 118 (1995) (stating the "American-based" "sometimes law and economics" approach doesn't take a post-socialist law into account); id. at 127 (discussing the East European pendulum swing from one utopia to another, from socialism to a 19th-century vision of constitutionally-protected property); Brietzke, Accountability, supra, at 101 (stating that the conservative thesis is in part a recycling of the "old" growth economics, where "right-wing intuitions" are reinforced "with counterfactual speculations and the powerful logic of a neoclassical economics"); Hiatt, supra note 2; Peter B. McCutchen, Mistake, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best, 80 CORNELL L. REV. 1, 8 (1994) (stating the American system "is driven by an almost paranoid distrust of political power"); Mark J. Roe, Backlash, 98 COLUM. L. REV. 217, 217 (1998) (stating that "politics can disrupt markets," and that inefficient legal structures designed to quell a destabilizing, citizens' backlash over economic conditions will easily survive critiques by conservative economists); id. at 221-26 (discussing the impact of this proposition in Argentina, Germany, and Italy); id. at 240 (stating the American-centered nature of law and economics causes this proposition to be ignored, because risks of political turmoil have been trivial for most of U.S. history); Thomas W. Waelde & James L. Gunderson, Legislative Reform in Transition Economies: A Short-Cut to Social Market Status, 43 INT'L & COMP. L.Q. 347, 365 (1994) (discussing that it is unlikely the Russian public will be satisfied by "uncontrolled excesses and suffering" caused by the "raw, first stage capitalism" that is arguably proposed by the conservative thesis); id. at 373 (discussing "the enthusiasm by U.S. lawyers for remaking Russia in an American way"); infra note 21. But see Posner, supra note 5, at 1 (stating while some think that when economics "is applied to political or social matters it kills them by reducing things of the spirit to objects of trade," economics is really "about the management of scarcity" and thus "the need to make tradeoffs"); id. at 2 (stating the "extraordinarily
This conservative thesis would remain a "soft" cultural influence, were it not for the practical implementation it receives from senior officials of such "donors" as the World Bank, the International Monetary Fund, and the U.S. Agency for International Development. These agencies use the acute dependence on foreign resources in Eastern Europe and the Third World to pressure aid recipients towards a liberal (donor) democracy, but the "structural adjustments," "shock therapy," and other conditions attached to this aid can frustrate opportunities for development as well as for democracy. The poor of the Third World have been "adjusting" and waiting for a (Reaganite) "trickle down" for some fifteen years, so that their leaders can obtain "loans" which are essential to survival in office but which cannot be repaid. Shock therapy or a Big Bang requires almost everything to be deregulated and privatized quickly, to minimize suffering but also to minimize the evaporation of political support and the entrenchment of opposition. Wealthy Germany has had acute political and financial difficulties while applying such a therapy to the former East Germany. Most other countries have experienced the shock without much therapy. The European Union (EU) has recently recom-

complex and ramified" U.S. system of legal rights "may not be transportable across national boundaries\); id. at 8 (commenting that American rights are not universals but the culmination of a specific history and culture). Posner is a leader in the neoclassical Chicago School of law and economics that heavily influences the conservative thesis.

7. Like communist party-state leaders before them, agency donors usually blame a mediocre performance on the patient rather than on the therapy, on failures of domestic implementation rather than on failures of the ideological gospel. See Brietzke in Malloy, supra note 5, at 35-38; Polls to Nowhere, supra note 2; Conklin, supra note 5, at 7 (discussing the conservative European and American view that "only a society based upon the individualism of the competitive market will have the determination to reject totalitarianism"); Jeffrey Sachs, A New Blueprint, ECONOMIST, Oct. 1, 1994, at 23, 23 (the guru of shock therapy, arguing that we are "closer than ever before to the global, co-operative, free-market arrangements championed . . . at Bretton Woods," where the IMF, the World Bank, and the GATT were created more than 50 years ago); id. at 24 (stating most IMF clients don't need temporary loans but rather help in dealing with a total collapse of confidence in the state's economic policies); id. (stating World Bank should phase out project financing, to concentrate on Africa's urgent needs); Singer, supra note 5, at 22; Kevin Watkins, Letter to the Editor: Extortionate, ECONOMIST, Apr. 27, 1996, at 8, 8 (Oxfam International official, arguing that the need to repay IMF loans is "destroying human development prospects" in Uganda and Zambia); All of a Sudden Every Banker is a World Banker, ECONOMIST, July 27, 1996, at 61, 61 (stating the Bank's proper job is to expand on "prodding governments into reforming their regulatory systems, cleaning up their banking systems and improving their jurisdictions"); A Land of Potential, ECONOMIST, Nov. 2, 1996, at 45, 46 (Tanzania's "President Benjamin Mkapa follows the party line of the IMF, the World Bank, and foreign-aid donors: a tight budget, a slimmer civil service, privatization and free-market\); Mr. Wolfensohn's New Clients, ECONOMIST, Apr. 20, 1996, at 63 (discussing attempts at World Bank reform, some of which would alter practices discussed in the text); Stuart S. Nagel, 1 Law & Society Controversies 123 (1993) (unpublished University of Illinois teaching materials) ("The World Bank may be a bureaucratic institution that lacks . . . flexibility and does not adequately appreciate political science").

A gloomy view is offered in A Global Poverty Trap?, ECONOMIST, July 20, 1996, at 34, 34:

70 [C]ountries have lower average incomes than in 1980, and an alarming 43 are poorer even than they were in 1970. In Ghana, a country whose 13 recent years of hard economic reform are held up as a model by the World Bank, present growth rates will not make the average poor person much richer for another 30 years.

Id.
mended a somewhat more social democratic transition, a path which has influenced East European countries seeking EU membership.

II. Why Administrative Law?

The neoclassical economics of the conservative thesis has prompted many analyses of American-style constitutions, which are to constrain governmental power tightly during the transition to democracy, and also of the American-style private (property, contract, and corporations) laws thought to be both necessary and sufficient to a marketization.

Administrative law has not been analyzed in any detail, however, probably because advocates of the conservative thesis anticipate a new withering away of the state. (This withering away is as improbable as Marx's; conservative theorists stand Lenin on his head, while trying to unscramble the eggs of bankrupt regimes.) Such legal neglect is unfortunate: administrative law is the transmission belt for conveying a new and hopefully more democratic

8. See Brietzke, Designing, supra note 6, at 32-37, and sources cited therein. The argument is a libertarian, contractarian: all social relations must be wholly voluntary (private), with markets coordinating actions, fostering unanimity without conformity, and reducing social strains by decreasing the number of things that must be decided politically. See FRIEDMAN, supra note 5, at 7, 9-10, 15. In a manner reminiscent of a Social Darwinism, markets create a spontaneous order out of a complex chaos, without the stronger state that endangers political and economic freedoms. See generally HAYEK, supra note 5. All that is needed is the authority of private managers to attract capital, hire and fire, set wages and prices, and make other production decisions; and the corresponding accountability of managers (through markets and "hard" budget constraints) to the owners of capital [but not to labor]. Bankruptcy and the loss of managerial jobs are the sticks, and profit is the carrot, that will cause private managers to act in the public interest [defined as the simple sum of selfish private interests].

Brietzke, Designing, supra note 6, at 39; see also Waelde & Gunderson, supra note 6, at 353 (property, contract, and companies law as the three "fundamental building blocks" of the "first stage" of capitalist law) (citing Oliver Williamson and Henry Sumner Maine).

9. Administrative law "keeps governmental powers within their legal bounds" and protects against governmental abuse. BERNARD SCHWARTZ, ADMINISTRATIVE LAW 1 (3d ed. 1991) (citing Wade); see also H.B. JACOBINI, AN INTRODUCTION TO COMPARATIVE ADMINISTRATIVE LAW 1 (1991); William Nelson, The Growth of Distrust: The Emergence of Hostility Toward Government Regulation of the Economy, 25 Hofstra L. Rev. 1, 9 (1996) (quoting New York case) (arguing that the buttressing of due process after World War II freed administrative law in the U.S. from "impermissible or irrelevant considerations or unsupported conclusions"); id. at 53 (discussing that while determining if proper procedures were followed, U.S. courts are free to invalidate "regulations when their goal was simple redistribution"); Rogers Smith, Political Jurisprudence, the "New Institutionalism," and the Future of Public Law, 82 AM. POL. SCI. REV. 89 (1988) (stating that, unable to link the normative and the positive, jurisprudence has not unified public law "into an influential intellectual discipline") (citing David O'Brien); Enigmatic, ECONOMIST, Nov. 16, 1996, insert at 9, 9 (quoting Hans Bekke et al.) (describing civil services as "mediating institutions that mobilise human resources in the service of the affairs of the state"); supra note 6. Especially in the U.S., administrative law can be thought of as a specialized segment of constitutional law. See Enigmatic, supra. It involves questions such as: Is there authority for the act in question? How and to what degree was this authority acquired? Is power being exercised properly and fairly? Who decides on proper administrative procedure, and how? See id. at 15. Administrative law "structures how public authorities work" and determines when, how, and for whose benefit the state intervenes. See Peter Bayne, Administrative Law and the New Managerialism in Public
political system to society and the economy, and for marshalling scarce resources for developmental and other purposes. Democracy neither creates nor strengthens a state, initially at least, and democracy comes most readily to a country with an established bureaucracy. The rise of the administrative state is "probably the most significant legal trend of the last century"10 and, as President Reagan and Prime Minister Thatcher learned, this administrative state cannot be wished away through attempts to privatize a public law. Such attempts can lead to the likes of the savings and loan debacle and the enrichment of a prime minister's cronies through privatizations. While the culture and techniques of the common law would lend some support to such privatization efforts in the Third World, this tactic would likely leave many colonial and other authoritarian, post-independence rules in place. This would hardly promote the governmental stability, coherence, transparency, fairness and accountability that are desirable in a democracy, and that are widely associated with the "rule of law."11


For conservative or neoclassical economists, administration involves organized special interests bargaining for cash subsidies and barriers to their rivals entering the relevant markets. See id. at 35 (public choice theory). Their conservative preference for marketplace outcomes limits regulators' power to increase social welfare, id. at 40, and the conservatives have "not gone very far" in making their case, id. at 51. Compare id. at 161 ("Strong claims about the inevitability of regulatory failure due to the regulated parties' privileged access . . . are untenable in the light of the decisionmaking procedures . . . , the broader legal environment . . . , and the available evidence about the types of parties that participate"), with id. at 51 n.141 ("Unhappily, public choice theory demonstrates what experience suggests — that our institutions of collective choice have a limited capacity to serve the public interest.") (quoting Robinson, Gellhorn and Bruff). This debate clearly revolves around American concepts and conditions, and it is possible that incumbents (or special interests) could thoroughly dominate administration in European or Third World countries.

10. Federal Trade Comm'n v. Rubberoid Co., 343 U.S. 470, 487 (1952) (Jackson, J., dissenting); see also Tony Prosser, Towards a Critical Public Law, in ADMINISTRATIVE LAW, supra note 9, at 63, 71 (terming the "transmission belt" theory a 1970s American view); Brietzke, Administrative, supra note 9, at 678; Kaplan, supra note 5, at E9.

11. RICHARD J. PIERCE, JR. ET AL., ADMINISTRATIVE LAW AND PROCESS 521 (1985). Compare id. at 1 (stating public and private law are essentially different models of dispute resolution), with SCHWARTZ, supra note 9, at 77-78 (discussing distinction between private and public law as "untenable," especially since many common law actions have been withdrawn to an administrative law). See also Brietzke, Accountability, supra note 6, at 107-08 (stating that the neoclassical economics that underpins the conservative thesis was formulated in 1880-1900, or just before the massive growth of a public and private bureaucratization that it thus accounts for poorly); Thomas Carothers, The Rule of Law Revival, FOREIGN AFF., Mar./Apr. 1998, at 95, 97-98; infra notes 18-20 and accompanying text (Third World traditions in administrative law); infra notes 70-76 and accompanying text (privatization).

In foreign policy, the rule of law is thought to cut through the dilemma of human rights versus economic interests — in China, for example — by advancing both principles and profits. See Carothers, supra, at 95. This respect for the sovereignty of the people and the constitution is central to both
Administrators in the Third World and elsewhere can play many different legal roles, roles neglected by devotees of the conservative thesis. Administrators can be creators of more efficient and humane replacements for governance through coercion and nepotism, providers of the services citizens demand, protectors as well as violators of citizen rights, regulators, initiators of change, and planners and entrepreneurs in some situations. Administrators are also expected to deal with the tendencies towards conflict caused by an ethnic and religious nationalism, a topic best treated separately. All of these roles help to legitimize both the enduring state and the government currently in power, and to flesh out a new constitution in ways which are less formal and more easily changed than the document itself.

Constitutions can, however, often be changed as easily as statutes.

Perhaps the greatest challenge administrators face during a transition involves dealing with an apparent paradox, which goes to the heart of the conservative thesis as well as democratization itself: massive governmental intervention, by "reformers," will be required to end a massive governmental intervention, by "incumbents." These incumbents — called apparatchiks or the nomenklatura in Eastern Europe — are extremely resilient and opportunistic. They will often support conservative and World Bank calls for a minimalist state because such a state offers many opportunities for replacing a defunct state capitalism with a corruption-laden "crony" (or "pseudo market") capitalism, which the incumbents can continue to dominate. Bankrupt regimes, having abandoned statism but having not yet achieved viable new political and economic arrangements, are often willing to sponsor drastic reforms. Leaders know that a fairly strong state will be required to change an authoritarian political system and the low-level equilibria of under-development. Incumbents can often block, deflect or delay reforms, however.

democracy and marketization; for example, it tempers the corruption and crime that erode support for democracy and scare off foreign investors. See id. at 47, 99. It involves weeding out antiquated laws, strengthening institutions, and increasing governmental compliance with law. See id. at 99-100.


13. See JOHN A. RCHI, TO RUN A CONSTITUTION: THE LEGITIMACY OF THE ADMINISTRATIVE STATE xi, 66 (1986); Brietzke, Administrative, supra note 9, at 678; LINZ & STEPHAN, supra note 5, at 20; see also GABRIEL ALMOND & SIDNEY VERBA, THE CIVIC CULTURE 7 (1965) (discussing attitudes both of awe at the reasoned transformation of violence into a constructive instrument and of pessimism over a fragile, intricate, and subtle mechanism); PIERCE ET AL., supra note 11, at 25 ("Administrative law is an attempt to legitimize regulatory decisions as being democratic"); J.B. Schneewind, The Divine Corporation and the History of Ethics, in PHILOSOPHY OF HISTORY 173, 176-77, 183 (Richard Rorty et. al. eds., 1984) (discussing that coordination and cooperation are used to produce what no individual can produce alone, and for which no individual is responsible, for the common good); Mathew J. Costello, Administration Triumphs Over Politics: The Transformation of the Tanzanian State, 39 Afr. Stud. Rev. 123 (1996) (explaining that due to the economic crises of the 1980s and the intervention of international actors such as the IMF, the Tanzanian "state is coming increasingly under the sway of an administrative ethos"); Roe, supra note 5, at 217, 221-26, 240.
Strategic withdrawals, selective nonenforcements, the appearance rather than the substance of reform, or backsliding toward an authoritarianism frequently result. Consider the recent history of Russia. Reformers have the difficult task of implementing programs to counter incumbent efforts, before there are many "true" capitalists for the reformers to rely upon: that is, capitalists who possess economic as well as political or even Mafia-style productivity.\(^4\)

If the reformers are lucky and smart, more productive and democratic institutions will emerge slowly and in almost-dialectical ways, from older institutions and in part from people who have been forced out of previously secure arrangements. Consider changes in the marketing of oilseeds in Ghana, for example.\(^5\) The political and legal power to reorganize is significant because it

\(^{14}\) See Brietzke in Malloy, supra note 5, at 45-46; Maria Los, In the Shadow of Totalitarian Law: Law-Making in Post-Communist Poland, in TOTALITARIAN AND POST-TOTALITARIAN LAW 275, 287, 293 (Adam Podgorecki & Vittorio Olgiate eds., 1996); Brietzke, Administrative, supra note 9, at 654, 694-96; Brenda Chalfin, Market Reforms and the State: The Case of Shea in Ghana, 34 J. MOD. AFR. STUD. 421, 431 (1996); Robert Patton, Jr., Africa in the Age of Democratization: The Civic Limitations of Civil Society, 38 AFR. STUD. REV. 67, 82 (1995); Waelde & Gunderson, supra note 6, at 349; Sachs, supra note 7, at 23; see also CONKLIN, supra note 5, at 325 (citing Robert Amman, on political obstacles to reform in Russia); Los, supra, at 310 (stating that Polish Senators saw the role of the state as dismantling itself during the transition, rather than as building new institutions); id. at 322 (discussing the hidden resistance by tightly-knit networks of the former nomenklatura in Poland); Dusan Heyndrych, Transforming Czechoslovakian Public Administration, 71 PUB. ADMIN. 41, 47 (1993); Kennedy, supra note 5, at 193; Linz & Stepian, supra note 5, at 20-21 (stating that an outgoing undemocratic regime entrenches key bureaucrats in politically-sensitive areas); Posner, supra note 5, at 5 ("A government . . . must be strong, in order to protect and enforce rights, but strong government is a threat to those rights."); Waelde & Gunderson, supra note 6, at 355 (stating that the "social market economy" becomes problematic if it is introduced "before the emergence of the social and political forces which have brought about these laws in Western societies after decades-long struggles"); Judt, supra note 5 (stating that incumbents can return to power without provoking a crisis in some countries but, "in Croatia, Slovakia, or Ukraine, where no prior effort had been made to put in place the legal forms and institutional restraints of a pluralist polity," incumbents "represent a continued barrier to any democratic transition"); On the Right Tracks, ECONOMIST, Aug. 19, 1995, at 78 (discussing the "stop-go adjustments" in Russian reforms); Falling Rubles, WASH. POST, Aug. 18, 1998, at A14 (Internet version) (discussing the "financial meltdown" caused by failed Western strategies and domestic dissensus over the speed of transition to a market economy, tendencies which hurt ordinary Russians); infra note 54 and accompanying text. Adam Podgorecki puts it well: "Planned social change in the crucial phase of the transition . . . uses law as its main instrument. Contrary to general opinion, it is not so much the economy which directly restores democracy; instead, law must first establish suitable conditions for free market development." Adam Podgorecki, Conclusions, in TOTALITARIAN AND POST-TOTALITARIAN LAW, supra, at 341, 356; see also Keeping China Off the Rocks, ECONOMIST, Feb. 10, 1996, at 35.

The reformist wing realises that [undemocratic] China's markets cannot work properly without stronger institutions to set the rules: a central bank that can set monetary policy, a well-regulated capital market, a parliament that is able to scrutinise legislation. The conservatives like most of these ideas, because they see them helping the political centre to win back power and reign in unruly provinces.

\(^{15}\) See Chalfin, supra note 14, at 438-39; Ann and Robert Seidman, Beyond Contested Elections: The Processes of Bill Creation and the Fulfilment of Democracy's Promises to the Third World, 34 HARV. J. ON LEGIS. 1, 6-7 (1997) (explaining that good institutions are at least as important as good laws and good personnel, given the institutional content of underdevelopment, of "problematic repetitive
sets new forces to work, and because it can signal that more democratic forces are assuming managerial control. For example, and paradoxically, state power can be used to promote those civil society institutions (occupational, religious, and charitable associations, etc.) that will eventually operate to check and constrain state power — and incumbents’ power as well. However, a genuine democratization (as opposed to the “Chinese solution” of economic progress under a continued political repression) spawns credible public demands for economic growth and welfare safety nets, and perhaps demands for the conservatives’ narrow economic freedoms as well. These demands are of a magnitude and arrive at a speed with which no reform can cope.  

These numerous and often contradictory pressures create strong temptations for reformers to become the kind of authoritarians that the reformers were originally empowered to replace. Such temptations provide administrative law with important new roles to play: constraining incumbents wherever possible in the course of changing official habits, and keeping reformers at their tasks in more or less democratic ways. Americans might see this process as a New Deal in reverse, albeit more creative and better coordinated. Still, a serious gap would remain between political and legal programs which come from the top down, just as in the past, and the pressures for democratic reforms that, originally at least, operate from the bottom up (or from the outside in). This gap can be partly filled with new accountability devices in administrative law, devices which help to keep the “top” responsive to the needs of the “bottom” while denying a veto power to incumbents as-incumbents. At this point, the incumbents’ colonial and post-independence administrative law becomes a serious stumbling block to democratization, marketization, and development.

Administrative laws in the Third World still contain a heavy admixture of barren and mechanical transplants from the former colonial power. This colonial law was and is characterized by a “muddling through,” under vague grants of a broad
discretion that were not subjected to a French separation of powers or a British independence of judges within the colonial civil services. As in the Russian and Chinese Empires, colonial administrators were the eyes, ears, and hands of a remote power which took all of the important decisions.\(^{18}\) For example, the "law" under which many people are still detained without trial in former British colonies is basically the Public Order Act, rushed through the British Parliament in 1936 to deal with Oswald Moseley and his Brown Shirts. This Act was transplanted to the colonies because it was useful for dealing with pro-independence politicians. It remains useful to many current politicians for dealing with their enemies, although the Zambian Supreme Court declared it unconstitutional in 1996.\(^{19}\)

At independence, the attitude, typified by Ghana's Kwame Nkrumah, was that if only we acquire the colonists' power, unfettered by Lancaster House constitutions, etc., all will be well. A thin veneer of one-party, thoroughly planned and/or socialist precepts was often applied to colonial administrative laws. Colonial experiences frequently led independence politicians to conclude that capitalism is inherently unfair and exploitative — attitudes that persist to this day in varying degrees. Over time, a style of administrative law evolved which suited the Third World's many recurring military regimes: rapid decrees-as-orders, usually promulgated during a declared "emergency." These orders bear little relation to each other or to more general goals, and they reflect a passion for extending a personalized control. Perhaps as in colonial times, these decrees are full of not-so-veiled threats, and they are applied with a capriciousness calculated to create uncertainty and insecurity. Such laws are or were accompanied by a rapid cycling of bureaucrats through various offices, so that they could develop neither a power based on patron-client relations nor an expertise.\(^{20}\) In sum, administrative law as currently practiced is the body of rules least suited to democracy, or to anything other than a rather petty despotism, in Eastern Europe and the Third World.

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18. See JACOBINI, supra note 9, at 15, 75-84; Brietzke, Accountability, supra note 6, at 124; Brietzke, Administrative, supra note 9, at 665; Paul J. Magnarella, The Comparative Constitutional Law Enterprise, 30 William & Mary L. Rev. 509, 517 (1994); see also JACOBINI, supra note 9, at 113 ("most countries have adopted systems of administrative law modelled either on the French or the British pattern," with Continental Europe following French patterns but not as carbon copies); id. at 134 (in Africa, it is "not completely clear . . . what influences have been involved" beyond authoritarian traditions and an abandonment of a French separation of powers); Magnarella, supra, at 515, 517 (stating that etiology and teleology explain why post-colonial law is "highly derivative" from colonial power); Rodolfo Sacco, Mute Law, 43 Am. J. Comp. L. 455, 455 (1995) (legal anthropology demonstrates that history is not as "past" as we might think); infra notes 25, 39 and accompanying text.


20. See Kennedy, supra note 5, at 208; Magnarella, supra note 18, at 515; see also Seidman, supra note 15, at 43 ("Third World officials . . . conceptualize the independence revolution as self government and welfare payments to the poor."); Louise Shelley, Post-Totalitarianism and Soviet Law, in TOTALITARIAN AND POST-TOTALITARIAN LAW, supra note 14, at 251, 254 (describing "legal anomic," with old protections gone but with order and Western-style rights absent); id. at 256 (explaining that old organs retain influence, even though they have lost legal authority); Waelde & Gunderson, supra note 6, at 359-60 (stating earlier capitalist development in Russia was "impaired by half-hearted law-making as well as semi-feudal restrictions on economic activity"); infra notes 39, 66 and accompanying text.
Can the comparative law\textsuperscript{21} that is so conspicuously ignored by advocates of the conservative thesis help to set nascent democracies on better roads to reform? Comparatists would argue that such transitions represent the clearest need for eclecticism and even originality in choosing legal techniques, for channelling particular facets of a democratic will in particular directions. Law is one form of the language of political, social, and economic thought, and inevitable philosophical differences among countries are compounded by the difficulty of translating legal concepts into another language and culture. Unfortunately, the tendency, encouraged by advocates of the conservative thesis, is to a verbatim transplantation motivated by the perceived prestige of the legal donor: Venezuela may borrow laws from the U.S., and Somalia from the Soviet Union or Italy, but not vice versa. This process is not really voluntary, since most transplants aim to appeal to foreign donors and investors — just as transplants into Germany and Japan appealed to the victorious Allies after World War II. Legal transplants spawn very high transaction costs (as economists call them), owing to differences in aims, cultures, and legal traditions. Many regimes try to economize on these costs in the short run through verbatim transplants, but this reluctance to incur the

\\textsuperscript{21} At the least, comparative law helps to bridge theories of politics, society, and the economy, and it locates particular countries within a broader legal universe through a jurisprudence (\textit{jurisprudence} in French) which seeks to answer questions about why institutions and rules are different or similar in different countries. \textit{But see} \textit{Stuart S. Nagel, 2 Law and Society Controversies and Win-Win Solutions 249} (unpublished University of Illinois teaching materials, 1993) ("Any substantive conclusion would have to turn on (1) the goals and alternatives that are included, (2) the relative weights of the goals, and (3) the perceived relations between the goals and the alternatives."). Comparatists are properly modest about their discipline. \textit{See William Ewald, Comparative Jurisprudence (I): What Was it Like to Try a Rat?, 143 U. Pa. L. REV. 1889, 1891 (1995)} (stating that comparative law is "superficial and unsystematic, dull and prone to error"); \textit{id. at 2113} (explaining context and ideas are extremely important to comparatists, but they require understanding everything before anything can be understood); \textit{Magnarella, supra} note 18, at 509 (quoting Zweigert & Kotz) ("comparatists . . . are perfectly embarrassed about their methodology, and see themselves as being still at the experimental stage"). The basic questions must be investigated afresh in each instance: How do institutions affect practices? Will reforming one change the other? What is the precise relevance of the socioeconomic and cultural surroundings? Is the quality of citizens relevant; does every person get the government it deserves? \textit{See Putnam, supra} note 12, at 3.

Contrary to the ethnocentricity of advocates of the conservative thesis, "French administrative law is . . . perhaps the most important, ["complete and satisfactory"] model . . . in the modern world." \textit{Jacobi}, \textit{supra} note 9, at 99, 114. Earlier faults, partly misunderstood by A.V. Dicey among others, have been remedied to create a prompt and inexpensive system accepted widely by citizens in many countries. \textit{Id.} French administrative courts try to develop sound principles of administration as well as of law, and annul decisions for errors of fact as well as errors of law. \textit{Pierce et al., supra} note 11, at 3; \textit{Schwartz, supra} note 9, at 2. Yet the "differences [among systems of administrative law] are much more shallow than is often claimed." Civil law countries, especially Germany and Japan, have adapted American economic policies to their own legal style — "central bank autonomy, competition law, . . . with more recent influences from company law, consumer and environmental protection and even civil rights . . . ." Waelder \& Ganderson, \textit{supra} note 6, at 373. But see Rodolfo Sacco, \textit{Legal Formants: A Dynamic Approach to Comparative Law (I)}, 39 AM. J. COMP. L. 1, 7 (1991) (explaining that some have underestimated the importance of superficial differences).
high costs of a legal adaptation prior to reception of the transplant turns out to be much more expensive in the long run.22

III. A Reformist Overview

Absent reforms of the rather sorry bodies of administrative law in Eastern Europe and the Third World, nothing will work the way it is supposed to in government. A mere overlay of new institutions will work little better than those they replace or circumvent, unevenly and incoherently. Such outcomes would seem to bear out the conservatives' desire to create a minimal or nightwatchman state, as a logical consequence of the neoclassical economics theory that governments fail regularly. The strongest rejoinder to this conservative argument stresses the importance of the developmental roles of a rather strong and activist state; needs for a nation building mirror the reconstructions regularly undertaken by more developed and capitalist countries. Nation building is important because state power has imploded in a significant number of countries and, in Africa, incomes have declined by 20% to 25% since independence. In the absence of development, the most citizens can hope for is to be left alone by soldiers, police, and bureaucrats. These citizens will then live lives which are rather nasty, brutish, and cut short by hunger, disease, poverty, crime, and oppressive socioeconomic relations. The many poor people in Eastern Europe and the Third World use meager and immobile family resources to seek a living and a modicum of privacy and security, with no congenial institutions (sensible proprietorships and coops, untainted by clumsy and corrupting licensing requirements, for example), no sophisticated infrastructures, no meaningful incentives, and no means to tempt the resources owned by others away from the pursuit of monopoly rents in the "modern" sector. This is simply too fragile a basis for consolidating democracy, and for damping the appeal of charismatic, would-be authoritarians: Juan Peron

22. See Jack Hiller, Language, Law, Sports and Culture: The Transferability or Non-Transferability of Wants and Lifestyles Through Law, in LAW, LANGUAGE AND DEVELOPMENT 47 (Lakshman Mamsinghe & William Conklin eds., 1985); Shelley, supra note 20, at 265; Ajani & Mattei, supra note 6, at 118 (discussed supra note 6); id. at 122-23, 135; Brietzke, Administrative, supra note 9, at 681, 696-97; Sacco, supra note 21, at 12; see also JACOBINI, supra note 9, at 161; Posner, supra note 5, at 2, 8 (quoted supra note 6); id. at 18 ("[W]e do know how to intervene directly to change a nation's political or legal culture."); Sunstein, supra note 5, at 99 n.6 (asserting a "contrarian" view to that of Montesquieu et al.; I would argue a view consistent with the conservative thesis, that constitutions should force people to take measures they would not otherwise take under their traditions and history); Wasilie & Gunderson, supra note 6, at 360 (quoted infra note 60); id. at 369-70 (explaining that there is little empirical evidence on a "legislative copying," which will have no or perverse effects if it does not fit into a legal culture which is itself changing); see also Felix Rohatyn, World Capital: The Need and the Risks, N.Y. REV. BOOKS, July 14, 1994, at 48, 50.

The American political system may not be an appropriate model for every developing country . . . ; however many of the features of American capital markets should serve as the model . . . . The legal protections; the requirements of disclosure; the variety of financial instruments available . . . ; the technical capacities of the system . . . will be necessary for the capital markets of the future.

Id.
or Huey Long, for example. Democratizing governments must go beyond the conservatives' harmonizing of private interests, to offer some of the means for escaping from the low-level equilibrium traps that keep so many people poor. These means would include the institutional preconditions for markets, for otherwise incorporating economically isolated families into wider and increasingly interdependent projects, and for other planned social changes — including ways to make these changes more acceptable to the groups most threatened by them. Perhaps African Lincs could then stand alongside the Asian Tigers as newly industrializing countries.

The reform of administrative law is thus a process of discovering the conditions that will lead to workable representative institutions. Each reform has its own costs and benefits, which will likely change over time. Reforms will necessarily be piecemeal and even opportunistic: the capacity and will to change everything at once are lacking, incumbents and an authoritarian legal culture will resist some changes but not others, new vested interests will emerge to incorporate many of the incumbents, and the credible appearance (at least) of a responsiveness to fluctuating public demands must be maintained. Yet the reform process must at the same time "develop a coherent and consistent set of guidelines which seek to achieve ends and goals within the scope of powers and which determine particular decisions."24

These difficult tasks can best be understood if we begin with a (comparative) positivist perspective on public law, in contrast to the nihilistic legal culture and

23. See Podgorecki, supra note 14, at 356; Prosser, supra note 10, at 65; Brietzke, Accountability, supra note 6, at 112 and Brietzke, Administrative, supra note 9, at 645, 647, 678, 697; Kennedy, supra note 5, at 201, 213; Seldman, supra note 15, at 2; Waelde & Gunderson, supra note 6, at 365; see also OLIVER WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 150 (1985) (stating that, compared to families, markets have shorter time horizons, are less forgiving, and are less able to mobilize energies); Brietzke, Accountability, supra note 6, at 100 (discussing Goren Hyden's study of how peasants hide from the Tanzanian state in their precapitalist economy, which thwarts rural changes); Linz & Stepam, supra note 5, at 29 (stating that many analysts feel "economic and political gains must not only be pursued but occur simultaneously"); Roe, supra note 6, at 227-28 (explaining that markets can forestall revolution if, for example, disgruntled employees can change employers or set up their own businesses, but this will not work if the employee resents everyone in society or cannot imagine alternative organizations for production and politics); id. at 229 ("The market cannot reliably produce political stability because public goods problems, informational blockages, and political barriers can each prevent transformation."); Sachs, supra note 7, at 24 (stating that "Latin America attracted $190 a head in foreign-capital inflows" in 1993, but "Africa just $8 a head"); A Global Poverty Trap?, supra note 7, at 34 (stating that 30 years ago, the world's poorest 20% had 2.3% of income, but they now have 1.4%; the richest 20% increased their share from 70% to 85%); PUTNAM, supra note 12, at 159 (wondering why "so many countries remain underdeveloped: inadequate resources? government mistake? center-periphery dependencia? market failures? culture?"). My approach is similar to the new "public interest" theory described in Croley, supra note 9, at 66-70, 105 tbl. 1.

24. D.J. Galligan, The Nature and Functions of Policies within Discretionary Power, in ADMINISTRATIVE LAW, supra note 9, at 311, 312; see also CONKLIN, supra note 5, at 309; PUTNAM, supra note 12, at 63 (explaining that "who governs" raises questions of distribution and redistribution — "Who Gets What, When, an How" — plus the rigorous evaluation of institutional performance inherent in "How well?"); Croley, supra note 9, at 6 (stating that theories of administration are often abstractions far above actual processes, with little attention paid to necessary institutions); Los, supra note 14, at 322.

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the public distrust of law that is often evident in Eastern Europe and the Third World. Sitting atop this public law pyramid in most of the new democracies is a "hybrid" constitution: one which attempts to achieve the best of parliamentary (British) and presidential (American or French) democracies, but which seems likely to often achieve the worst of both systems. Such failures occur because important accountability and control mechanisms have been all but bred out of the hybrid: strict procedural requirements and a separation of powers for the Americans and the French, and traditions of ministerial responsibility to Parliament and a judicial independence in Britain. A hybrid constitution is thus conducive to an elective dictatorship of a type that some critics saw in the erosion of traditions in Thatcher's Britain, while an American-style paralyzing political system of the gridlock nevertheless remains a constant threat.

This hybrid is not an altogether bad system, although it places a heavy burden on elections to generate democratic results, and on effective guarantees of constitutional rights. Contrary to the wishful thinking embedded in the conservative thesis, there are no inherent limits to the power of public choice (no "natural" rights of property, for example), especially when reformers have (or recently had) much public support for evicting the incumbents. It is thus irrational for reformers to accede to conservative requests and to saddle themselves with a government so weak as to collapse during the next crisis.25 There is already too much sad experience with such regimes in the Third World. Rather, reformers can initially fill the control and accountability vacuums in hybrid constitutions with an "internal" administrative law:26 administrators are evaluated under objective criteria by superiors in a bureaucratic hierarchy, with superiors being held accountable in turn by parliamentarians who have an electoral accountability to the people. As democracy is being consolidated, and to help implement the paradox discussed earlier, the direct accountability of administrators to citizens can then be added in various ways27 — as in India, for example. Perhaps it is needless to say that such a democratic consolidation is haunted by the specter of a military intervention, where the military has not effectively given up the institutional

25. See JACOBINI, supra note 9, at 87, 99; PIERCE ET AL., supra note 11, at 27; Prosser, supra note 10, at 68; ROHR, supra note 13, at 66; Shelley, supra note 20, at 253; Bhagwati, supra note 3, at 56-57 (quoted infra note 31); Brietzke, Designing, supra note 6, at 53; Brietzke, Leap, supra note 12, at 19; Huntington, supra note 1, at 83; see also JACOBINI supra note 9, at 113, 133 (stating that many former French colonies retain much of French administrative law, often while abandoning the dual system of courts and thus a French separation of powers, in an old Belgian-style "unique" system; a growing judicial timidity has also been noted); Prosser, supra note 10, at 65 (explaining that positivism's criterion of relevance is that rules pass formal tests of a legal validity); Shelley, supra note 20, at 265 (stating that the U.S.S.R.'s "collapse from within" has left a "post-totalitarian legal void" exacerbated by a resurgence of nationalism); Roe, supra note 6, at 217, 221-26, 240; supra notes 17-18 and accompanying text.

26. See infra notes 29-35 and accompanying text.

27. See Emerson Tiller & Pablo Spiller, Strategic Instruments: Politics and Decision Costs in Administrative and Judicial Process (rev. manuscript, July 29, 1996) (unpublished manuscript on file with author) (stating that different administrative designs entail different decision and review costs, and are "strategic" in that they increase or decrease the costs of competing regulators and politicians); supra note 14 and accompanying text; infra notes 39-50 and accompanying text.
prerogatives of control under the new constitution. It seems almost impossible to take powers away from a military which wishes to keep them.

Moving downward from a constitution and into the hierarchy of public law, positivists such as Hans Kelsen would like to see increasingly specific and concrete applications of norms — applications which draw their inspiration and authority from higher norms. What we often see instead, especially in Eastern Europe and the Third World, is disruptions of such hierarchies by elites, for self-interested rather than democratic or developmental purposes. Even more frequently, we see many legal paradoxes, gaps, and weak points within the hierarchy of constitutional and administrative law in all countries. Legislation, regulations made by administrators, and official actions are unconstitutional (although courts may be unable or unwilling to say so); regulations or actions may exceed the authority of, or be at cross-purposes to, the relevant legislation; and actors — politicians, administrators, judges, and "ordinary" citizens — frequently ignore, misunderstand, or are unaware of the relevant legislation or regulation. Channels of communication up, down, and sideways in the administrative hierarchy are usually weak and sometimes blocked. (This is because good news tends to be reported upwards, to please superiors; bad things tend to flow downwards, to cow subordinates; and any information that is a potential source of power tends to be kept secret.) This makes governmental processes less transparent and inhibits the "feedback" essential to evaluations of what is being done, and how well. The effects are a massive political and legal indeterminacy, bribery to get what one wants under these conditions of uncertainty, and an official capriciousness which increases the officials' power and opportunities for further bribes. We can follow Gunnar Myrdal in calling this a "soft state," provided we realize that such a state is far from soft on the poor and powerless.

28. See 2 Gunnar Myrdal, Asian Drama 1126, 1132 passim (1968); see also Jacobini, supra note 9, at 2; Pierce et al., supra note 11, at 37-39; Susan Rose-Ackerman, Corruption: A Study in Political Economy 9 (1978) ("Not only is bribery seldom a surplus-maximizing procedure [but it also] neglects distributional objectives and weighs outcomes in favor of the wealthy."); Shelley, supra note 20, at 253-54; Brietzke, Administrative, supra note 9, at 662-64; Fatton, supra note 14, at 91; Hiatt, supra note 2, at C7 (discussing nepotism and corruption in Indonesia's democratic Suharto regime); Kennedy, supra note 5, at 198 (describing soft African states as Thomas Callaghy's "Lame Leviathans," incapable of development or social stability). But see David M. Jones et al., Towards a Model of Illiberal Democracy, in Towards Illiberal Democracy in Pacific Asia 163 (Daniel Bell ed., 1995) (discussing "the evolution of a rationalistic and legalistic technocracy that manages the developing states as a corporate enterprise" in "a managed rather than a critical public space and civil society"); Ewald, supra note 21, at 2099 (the Rechtsstaat's original advocates were not democrats; rather, they emphasized order and correct bureaucratic procedures); O'Donnell, supra note 1, at 42 (Italy, India, and Japan endure, even though they do not function according to their formal rules); Rodolfo Sacco, Legal Formants: A Dynamic Approach to Comparative Law (II), 39 Am. J. Comp. L. 343, 343-44 (1991) (stating that a "sources of law" analysis misleadingly suggests that there is a single answer to every question, and positivism fosters the "dangerous illusion" that law is created and enforced by the state); id. at 387-88 (Kelsen stresses universal features, at the expense of historical features).
A. An Internal Administrative Law

In the economists' transaction-cost sense, it is probably cheaper in the long run to scrap an undemocratic, colonial-tinged hierarchy and begin anew — perhaps under a "revolutionary" theory of law which seeks to implement a new and compelling vision of society. But the short-term costs of building a whole new system, and of reintroducing legal vacancies which have been more or less filled in the past, are simply too great to bear. It also seems to be a fact of political life that existing institutions, rules, and personnel will be used somehow, if possible and after some recycling; even thoroughgoing revolutions result in many ancien rules and institutions being retained. With judicial review, legislative investigations, and many other external controls over administration remaining absent or weak during the early stages of a transition to democracy, a bureaucracy in flux can most cheaply and quickly be made to better approximate the positivists' ideal through an internal administrative law.29

This hardening of the soft state requires a consistent redirecting of incentives, organizations, and the culture of a bureaucratic professionalism, towards more democratic ends and initially within the bureaucracy only. Legislatures can then be expected to assume investigative and supervisory roles only over a fairly long span of time. This will occur through a tightening of bureaucratic performance criteria, and through the rewards and punishments of bureaucratic performances that are embedded in budget appropriations, in prospects for promotion, and in definitions of bureaucratic jurisdictions. A legislature should, and likely would, offer a premium to administrative agencies demonstrably able to control themselves, but political cultures and hybrid constitutions have left most Third World legislatures (and courts) weak and dominated by the "executive."30

29. See Jerry Mashaw, Bureaucratic Justice: Managing Social Security Disability Claims 16, 227 (1983) (original analyses of internal administrative law); Pierce et al., supra note 11, at 42; see also Carlos Santiago Nino, The Constitution of Deliberative Democracy 33-35 (1996) (analogizing public law reforms to architects for a cathedral long under construction, and stating that tearing down and building anew reflects the judgments that no cathedral is better than a bad one, and "that there is a specific rationality for acting in collective enterprises"); supra note 28 and accompanying text.

30. See Heyndrych, supra note 14, at 47; see also Kenneth C. Davis, Administrative Law Text 226 (3d ed. 1972) (discussing the "internal checks and balances" on institutional decisions); Jacobini, supra note 9, at 11 (discussing intra- and inter-agency decisions); Pierce et al., supra note 11, at 21 (stating that "[b]oth the public interest and political explanations for regulation" ignore the crucial question of "how does the public purpose of a regulation relate to the political process that produced it"); Costello, supra note 13, at 144 (citing Rueschmeyer & Evans on the "Weberian perspective" that an "esprit de corps" enhances a bureaucratic responsiveness); Seidman, supra note 15, at 27 (explaining that Third World law making typically involves "the coordinated activities of civil servants in originating ministries, a prioritizing authority . . . , and a central drafting office"); id. at 45 ("Competitive elections have not prevented executive monopolization of legislative power and have proved insufficient to inspire institutional transformation."); see also John Hart Ely, Democracy and Distrust 131 (1980). In theory, the legislature makes laws and administrators apply them. "Anyone who has seen Congress in action, however . . . will know that the actual situation is very nearly upside down." Id. Legislators run errands for constituents and second-guess administrators, effectively leaving the operative meaning of
Kenneth Culp Davis, an American administrative lawyer, has inspired an international mini-movement for reducing necessary bureaucratic discretion under tightly drawn standards, and for eliminating unnecessary discretion: "We should not fail to clarify standards when we have the requisite understanding . . . , we should not fail to develop principles when experience leads towards principles, and we should not fail to formulate rules when rules have become feasible." The understanding, experience, and feasibility judgments necessary to pursue such a plan become the responsibility of the reformers, who will presumably consult comparative materials while redesigning administrative laws. A cabinet minister obviously needs much more discretion than a park foreman, in order to do her job effectively, yet the jobs of most bureaucrats are more like the park foreman's than that of the minister — who is more likely to face political accountability. Most bureaucratic tasks are thus amenable to quite specific directives which permit ongoing evaluations by superiors: "Cut the grass when it grows too long" (for the park foreman), rather than a military-style elimination of initiative and creativity as well as discretion — "Cut the grass with a Bloggs mower when it exceeds 9 cm. in length on average." Bureaucratic discretion is useful to society only in nonrecurring situations, where the political and technocratic judgments of the relevant administrator are likely to be significantly better than those of the reformer, who drafts the rule and who (hopefully) has the wider implications of possible decisions in view. Administrative law can still be quite flexible, describing bureaucratic outcomes which are desired but not required and allowed

law to "faceless bureaucrats." Id. But see Jones et al., supra note 28, at 163 (discussed supra note 28); id. at 165 (explaining that East Asian law is an extension of administrative technique, of an attenuated Confucian understanding rather than of Western constitutional machinery).

31. DAVIS, supra note 30, at 100; see also id. at 15, 23 (discussing the "habit" of granting more and less controlled discretionary power than is necessary); id. at 90-92 (discussing "discretionary injustice," the means of confining necessary discretion, and the sense of legal progress from standards to principles and then to rules); Galligan, supra note 24, at 312 (discussing the "deeply embedded view" that to discipline discretion is to denature it); id. at 313 (stating that case-by-case policies are often unexpressed and difficult to extract); JACOBIN, supra note 9, at 9-10 (discussing the much unregulated discretion typically found in police and defense matters); Jeffrey Jowell, The Legal Control of Administrative Discretion, in ADMINISTRATIVE LAW, supra note 9, at 178, 242-44; SCHWARTZ, supra note 9, at 215 (explaining that without meaningful standards, judicial review is impossible and the parties will likely resort to "extralegal influences"); Stanley Surrey, Tax Administration in Underdeveloped Countries, in READINGS ON TAXATION IN DEVELOPING COUNTRIES 479, 484 (Richard M. Bird & Oliver Oldman eds., 3d ed. 1975) (The "legal command should be precise, its boundaries defined, its exceptions clear, the possibilities of its abuse anticipated and blocked."); Bhagwati, supra note 3, at 56-57 (stating that "[r]estraints on arbitrary power are vital if development is to be sustained," but that the danger of a democratic gridlock then arises); Kennedy, supra note 5, at 192 (stating that cultural constraints and entrepreneurial potential are largely irrelevant if state power is wielded in an arbitrary and predatory fashion); Linz & Stepan, supra note 5, at 19 (stating that it is vital during democratic consolidation to define and increasingly limit discretion). But see DAVIS, supra note 30, at 19 (stating that discretion may be the only practical alternative where principles and/or policies conflict and precedents give no meaningful guidance); id. at 101 (citing danger that administrative law will give prefabricated answers to questions, answers unresponsive to changed circumstances); SCHWARTZ, supra note 9, at 70 ("[I]t asks too much of an agency to make policy when Congress could make none.").
but not desired, and promoting evaluations of the administrator's judgment and good faith.  

The point of requiring specific bureaucratic performances under administrative law is to reduce or eliminate the major discretionary power: the power to do nothing. For the first time in many East European and Third World countries, bureaucrats would have to actually do things besides shuffling papers and drinking coffee (or tea, depending on the local culture). This would increase the bureaucrat's creativity (paradoxically, by constraining it) and productivity, substitute regime goals for the bureaucrat's tendency to maximize personal wealth and power through a minimum of effort and visibility, and reduce the need for a bribe to overcome the bureaucrat's lethargy. This is particularly so when bureaucratic job descriptions are publicly known. Ordinary citizens can then know when to complain — "Cut the grass!" — and to pursue the matter with the bureaucrat's superior, when it is in the citizen's democratic or self-interest to do so. Requiring particular outputs from a bureaucrat creates the obligations to provide her with the necessary inputs, and to then leave her free to choose the means of producing as many outputs as possible. This should make her job more interesting and rewarding. Inputs and outputs should be reformulated as circumstances change, of course.  

A reasonable number of such tasks constitutes the bureaucrat's job description, and careful definitions of tasks and outputs provide a relatively objective basis for a superior's evaluation of the bureaucrat's performance. Promotion, demotion, and salary should turn on such evaluations of performance, rather than on services performed for political or economic elites, and the superior should get evaluated in turn on the quality of these evaluations. (In comparison, agency adjudication such as occurs under the U.S. Administrative Procedure Act can yield independent and useful policy judgments, but at an unacceptably high cost in a poor country.) If all of this cannot be done sensibly for a particular job, at any but the very highest levels in the bureaucracy, the job can probably be abolished or restructured. A premium should be offered for the bureaucrat's ability to distinguish the essential — meeting the needs of the poor, for example — from the merely

32. See J.H. Gray, Discretion in Administrative Law, in ADMINISTRATIVE LAW, supra note 9, at 285, 286-87; Jowell, supra note 31, at 265.
33. See DAVIS, supra note 30, at 90; Brietzke, Administrative, supra note 9, at 673-76, 684-85; see also DAVIS, at 99 (noting in common law systems the flexibility of structuring discretion through "open" precedents, those of a variable bindingness); ROSE-ACKERMAN, supra note 28.

Respondents surveyed in Tanzania's National Development Corporation and Ministry of Agriculture were solely concerned with task performance — with technical criteria in what is seen as an objective process. Costello, supra note 13, at 124. It is clear who is responsible for what in these agencies, and politicians interfere only occasionally. Id. at 130. With "less largesse to distribute, Ministers can build only work dependencies; personnel control is largely out of their hands . . . ." Id. at 135. When officialdom knows it must listen to public needs or lose its job, listen it will. Watch South Africa's dismal basic services improve now that its black majority has the vote. Kernels have been known to raise hell when a rural health clinic goes unstaffed for too long; so not many do.

desirable — building leisure facilities for the elite, for example. By law, these outputs should be carefully coordinated within and across agencies, so that they add up to desired outcomes. Performance criteria and evaluations should offer incentives for bureaucrats to cooperate and compete in ways which maximize these outcomes, rather than merely allowing bureaucrats to continue to build patron-client relationships and to shirk responsibilities.34

The aim of an internal administrative law is to increase the efficiency and integrity, and thus the legitimacy, of administration by increasing the rationality of both governmental means and ends (which are usually means to even higher ends), increasing the congruence between previously undemocratic means and newly democratic ends, and laying or reinforcing the foundations for citizen rights under public law. Such reforms would admittedly spawn large increases in a particular kind of transaction cost — the cost of bureaucrats monitoring each other's performance fairly — but the productivity gains from this monitoring (through reductions in bureaucratic opportunism and shirking) would easily outweigh the higher costs. As in any complex legal project, difficult "jurisprudential" tradeoffs among legal certainty, legal complexity, and implementing sensible public policies would have to be made. Nevertheless, these reform proposals are superior to those offered by other social scientists: theorists of a development administration or those applying private business techniques to a public administration. Development administration is arguably a "postmodern" approach to countries which have yet to experience many or any of the benefits reflected in the modernism of my proposals: the benefits of Max Weber's "legal-rational legitimacy" or Kenneth Culp Davis's "softer" rule of law, where ensuring the right decision at the right time is only a part of long-term changes in the bureaucratic culture.35

34. See Jowell, supra note 31, at 248; Brietzke, Accountability, supra note 6, at 125; Brietzke, Administrative, supra note 9, at 670, 673, 675-76; see also PUTNAM, supra note 12, at 174 (finding dangers in a bureaucracy of what Pitt-Rivers calls the lopsided friendship of clientelism); KENNETH WHEARE, MALADMINISTRATION AND ITS REMEDIES 11 (1973). According to Wheare, maladministration is

action (or inaction) based on . . . improper considerations or conduct. Arbitrariness, malice or bias . . . are examples of improper considerations, neglect, unjustifiable delay, failure to observe relevant rules and procedures, failure to take relevant considerations into account, failure to establish or review procedures where there is a duty . . . to do so, are examples of improper conduct.

Id.

35. DAVIS, supra note 30, at 99-100; Brietzke, Administrative, supra note 9, at 667, 678, 686; Brietzke, Designing, supra note 6, at 59; Kennedy, supra note 5, at 195; see also DAVIS, supra note 30, at 15-16. Davis contrasts his "softer" rule of law (see supra note 31 and accompanying text) with the "extreme" version in FRIEDRICH HAYEK, THE ROAD TO SERFDOM (1944) (citing A.V. Dicey) (see supra notes 5-6 and accompanying text) and Leon Duguit, stating that "[N]o organ of the state may render an individual decision which would not conform to a general rule previously stated." Id.; see id. at 17 ("[M]en of action in all governments . . . have summarily rejected . . . philosophical yearnings" for an extreme rule of law); PUTNAM, supra note 12, at 166 (discussing Oliver Williamson's emphasis on the role of bureaucratic institutions in reducing transaction costs); Brietzke, Administrative, supra note 9, at 668 (examining Weber's emphasis on professionalized hierarchies constrained by secular, modern,
Theories of development administration seem to have fallen on rather hard times in recent years, probably because proposals have regularly failed to promote development or democratization. Still, the World Bank, the U.S.A.I.D., and other donors often sponsor the theorists' "institution-building" efforts that typically create an overlay of new institutions which work little better than the institutions they unevenly and incoherently replace. The antithesis of a Weberian, internal administrative law, development administration requires that existing hierarchies and definitions of tasks be relaxed, so that administrators can creatively perform tasks which are partly of their own devising. These tasks are to be performed within networks largely created by the bureaucrats themselves. Perhaps inevitably, the outcomes from implementing such recommendations are usually inaction, corruption, confusion, and other bureaucratic pathologies, as in Ethiopia, for example.

The precepts of development administration seem to flow from a bias that runs deep in social science, especially in the U.S., against coercion and in favor of consensus achieved through a pluralistic bargaining. This bias leaves development administration theorists reluctant to use conflict, coercion, and even competition in small and strategic doses, to overcome bottlenecks and the low-level equilibrium traps of underdevelopment and petty despotism. The managerial or private-sector model of public administration, on the other hand, elevates an economic rationality over a legal rationality. While the managerial model generates some useful insights which have been incorporated throughout this article, most of the outputs from a public administration are very different in purpose and effect from those of business bureaucrats.
The most serious objection to a strict, Weberian internal administrative law is its inconsistency with the political culture of an East European or Third World country. This is an incumbents' culture of underdevelopment rather than an underdeveloped culture, and it will have been markedly softened by a democratization revolution. New leaders trying to rehabilitate an imploded and bankrupt state are usually willing to attempt so radical a reform as an internal administrative law, if it promises quick, significant, and relatively inexpensive progress. A strict internal administrative law is calculated to respond to the massive uncertainties of leaders and citizens alike, precisely because it is so very different from what was done in the authoritarian past, and because it promises to reduce uncertainty by institutionalizing an accountability over time. The successful application of such a law will change the political culture over time, although the culture will also be changing the way the law gets applied in the meantime. Like other ideal types, this Weberian administrative law would have the real-world goal of keeping inevitable deviations (inaction, bribery, etc.) within reasonable bounds. This is certainly a more feasible solution than the wholesale transplantation of American political and business cultures, as prescribed under the conservative thesis.

B. Additional Accountabilities

An internal administrative law embodies many accountability devices, but it will not create a democratic system by itself; it would suit a stronger authoritarian state almost as well. Products are more important than fair procedures under an internal administrative law which, like other human institutions, will sometimes or frequently fail to deliver. Accountability delivered from outside the bureaucracy is thus necessary in a democracy. These external accountabilities are more expensive than internal controls, and much more likely to subvert defined goals by furnishing pressure points to undemocratic, would-be veto groups: multinational corporations or incumbents from the former regime, for example. External accountabilities should thus be defined and developed carefully, to maximize a democratic responsiveness and curbs on bureaucratic failures while minimizing (net) transaction costs and opportunities to subvert democratically decided policies. Needless to say, internal and external accountabilities are necessarily interrelated: administrative actions taken under broad and vague grants of discretion, actions which are not evaluated on the record by bureaucratic superiors, are essentially unreviewable by a judge or even an ombudsman — prerogatives of the British Crown, for example. Such unreviewable discretion harkens back to a colonial

Administrative, supra note 9, at 652-53, 671; Management Focus: Leviathan Re-engineered, ECONOMIST, Oct. 19, 1996, at 67 [hereinafter Leviathan Re-engineered]; see also infra note 55 and accompanying text. But see ROBERT K. MEITON, SOCIAL THEORY AND SOCIAL STRUCTURE 239 (1968) (finding that for Peter Blau, bureaucratic overcompliance leads to insecurity in organizational relationships, to status anxiety, and to frustration of personal goals, although I would argue that much of this can be put to good use by an internal administrative law); Leviathan Re-engineered, supra, at 70 (stating that while holding schools and hospitals to performance targets is no longer controversial, the private-sector model frequently creates "one-size-fits-all" explanations).
muddling through and a post-independence use of "emergency" powers, and many Third World judges see judicial review as merely an exercise in legal interpretation.39

A legislature and, depending on the degree of separation of powers in a hybrid constitution, the parts of the executive not involved in the administrative action in question, can hold administrators to account through the power to reorganize bureaus and to change their budgets. The information relevant to this account-ability, and the incentives to obtain such information, are frequently lacking, however. It is also possible to imagine a bureaucracy so well designed and committed that it is more responsive to citizens' expressed needs than are the politicians. (Arguably, this was often the case during the Reagan, Bush, and Clinton administrations.) Given such shortcomings, there is at least some judicial review of administrative action in all democracies. This is a focused but guaranteed public participation, which is (by definition) valuable to citizens who have the resources to mount a challenge, and also valuable to society, to the extent that the benefits conferred through administrative actions become publicly known and defended under predetermined procedures. The availability of such a review helps to deter bureaucrats from favoring special interests in extralegal ways, and it lessens the likelihood that a challenger will use such extralegal means as bribery or taking to the bush with guns. Special interests, tightly organized groups with high per capita stakes, are usually the main beneficiaries of judicial review, however.40

The type of court known to the common law offers the most expensive of accountabilities, although private parties bear some of the transaction costs. The heavy presumption of administrative propriety and the "natural justice" rubric in British administrative law offer little prospect of an informed bureaucratic supervision. There has recently been some experimentation, especially in southern Africa, with an American ("Warren Court") judicial activism as an overlay to British-style laws. It is too soon to tell, but such activism presumably entails the

39. See Gray, supra note 32, at 294; PIERCE ET AL., supra note 11, at 37, 92; SCHWARTZ, supra note 9, at 69; Brietzke, Administrative, supra note 9, at 686; see also Jowell, supra note 31, at 244 (quoting Richard Tittuus, "rights" create a "pathology of legalism" in, e.g., the administration of welfare benefits); PUTNAM, supra note 12, at 177 (finding third-party enforcement an inadequate solution to the dilemmas of collective action); Ajani & Mattei, supra note 6, at 133 (stating that it is more expensive to devise a rule through litigation, rather than ex ante); Tiller & Spiller, supra note 27, at 10, 26 (stating that judicial review may be hazardous to the policy preferences of politicians and administrators, and judicial behavior may be a function of whether the net utility of reversing the status quo is greater than accepting it); supra notes 18-20 and accompanying text.

40. See Jowell, supra note 31, at 258-59; PIERCE ET AL., supra note 11, at 91; ROHR, supra note 13, at 45; see also DAVIS, supra note 30, at 92 (judicial management of "discretionary injustice"); JACOBINI, supra note 9, at 10 (stating that the forms and purposes of adjudication in administrative actions serve as the basis for comparative classifications); Jowell, supra note 31, at 243 (finding control over discretion legalizes and even judicializes decisions); WHEARE, supra note 34; Nelson, supra note 9, at 46 (noting that in regulatory matters and after World War II, U.S. courts assumed a new role as arbiters of the claims of special interest groups); Different Roads to Development, supra note 33.
transplantation of many inappropriate doctrines, doctrines conducive to a political gridlock because they often operate to empower undemocratic veto groups.41

By way of contrast, an uncodified French administrative law seems to offer a cheaper, quicker, and more technically informed supervision by separate, specialist courts. These courts will sometimes require administrators to reconsider decisions (contentieux gracieux), or inquire into the substance of bureaucratic rationality under rubrics such as excès de pouvoir or détournement de pouvoir. (These mean in excess of granted powers or abuse of power, but such concepts are very different from those in an Anglo-American common law.) But it has proved difficult for inexperienced, rather timid judges to apply these concepts in very different, Third World cultural contexts. This is especially so in the many former French colonies where separate administrative courts have been dispensed with, in part to economize on scarce judicial manpower. In any event, transplanting civil law concepts into a common law system, or vice versa, has so far proved all but impossible, with very partial exceptions in a few "mixed" jurisdictions: South Africa, Ethiopia, Scotland, Sri Lanka, Quebec, and Louisiana.42

The "very notion that law should govern . . . does not sit very easily with a goals-oriented administration";43 judges are at the mercy of a political culture they can do little to change "and it is hard to fault them for guarding their flanks."44 For all the reasons outlined here, it seems logical to restrict judicial review to situations where administrative action directly violates citizens' constitutional rights. As we shall see,45 the influence of undemocratic veto groups can then be reduced through careful definitions of property rights, but courts would still have the difficult task of balancing constitutional rights against the requirements of a sensible majority rule. Complainants would likely have to prove that administrative actions violate not only their special interests but also the public interest — the common good or public health, safety, and morals — to obtain a judicial remedy. Since these are precisely the standards that administrators are asked to apply under many broad and vague grants of discretion, judges would often and literally be second-guessing the administrators. Judges should thus develop their own self-

41. See Brietzke, Administrative, supra note 9, at 691-92; Ruedisili, supra note 19; see also DAVIS, supra note 30, at 99 (noting the flexibility of a five-fold classification of precedents in administrative law — almost always binding; always considered, usually binding; usually considered, seldom binding; occasionally considered, never binding; and almost never considered). See generally MARC GALANTER, COMPETING EQUALITIES: LAW AND THE BACKWARD CLASSES IN INDIA (1984) (examining how Indian courts have adapted constitutional rules to promote a greater measure of equality); McCutchen, supra note 6, at 13 (quoting Supreme Court Justice Stevens, who paraphrases Mark Twain in stating that "the report of the death of the doctrine [of stare decisis] is exaggerated").

42. See L. NEVILLE BROWN & JOHN GARNER, FRENCH ADMINISTRATIVE LAW 15, 22, (1973); JACOBINI, supra note 9, at 133; Brietzke, Administrative, supra note 9, at 692. But see Ajani & Mattei, supra note 6, at 132 (stating that a common law system with a unitary judiciary may be preferable in that it would be more creative and less inclined to bureaucratic reasoning, because greater attention is paid to individual rights and markets).

43. Bayne, supra note 9, at 88; see also supra note 11 (regarding the "rule of law").

44. JACOBINI, supra note 9, at 134.

45. See infra notes 62-65 and accompanying text; infra note 88 and following text.
denying injunctions on power, to avoid creating their own abuses of power and discretion while maintaining their independence.

The problems and costs associated with a judicial review of administrative action have led a growing number of jurisdictions to experiment with ombudsman-like institutions. A rare success in spanning the civil law/common law Great Divide, the ombudsman's ability to resolve complaints informally, cheaply, quickly, and usually quietly makes it quite popular. Modelled on the New Zealand ombudsman, the Tanzanian one serves as a "poor man's lawyer" and "has done much to tidy up procedures, irregularities, delays, inconsistencies, and other assorted problems."

The success of an ombudsman turns on the political commitment to resolve legitimate complaints, usually without litigation, and on the availability of respected and tactful officials to head the organization. The process will fail if it reflects a sustained opposition to government, and it often fails for other reasons.

For our purposes, the institution is weak because it usually remedies particularized injustices quietly, rather than generating sustained publicity and coherent reform proposals concerning systematic bureaucratic failures. A procurator, such as was found in many communist party-states, made legally and culturally independent of the executive and party politics, is thus a better solution, perhaps in some procurator/ombudsman hybrid such as Mongolia is experimenting with.

The best of external accountabilities in the long run, and one of the best ways of dealing with the democratization paradox described earlier, is the development of a civil society. If groups of like-minded citizens have the quintessentially democratic rights to organize and to participate in politics, they will have the means to create other rights for themselves, plus the incentives and some of the means to obtain information about what government is doing and how well. As buffers and mediators between the individual and the state, such nongovernmental organizations (NGOs) try by various legal and political means to keep government officials acting in ways which favor the group. NGOs try to create organizational "muscle" to rival the bureaucracy's, especially by federating or otherwise cooperating with each other or with international organizations: Amnesty International, Greenpeace, and the many other organizations that emulate them with varying degrees of success. While serving as alternative channels of recruitment into politics and the bureaucracy, NGOs lessen society's dependence on the state. NGOs of students, peasants, women, workers, human rights advocates, or citizens with common occupational, religious, ethnic, charitable, social, sporting, or political bonds contribute to a political stability by exerting diverse and cross-cutting influences on citizens. (The same citizen may belong to religious, women's, nonprofits...)

46. JACOBI, supra note 9, at 208. An ombudsman has been used in Scandinavia, New Zealand, Britain, France (Mediatour procurator), Tanzania, Gambia, Sudan, Mauritius, Zambia, Nigeria (except in the many areas where the military has an interest), Ghana, Israel, Egypt, Kuwait, Morocco, Jordan, the Philippines, Japan, India, Australia, and in several states (most notably Hawaii) in the United States. Citizen complaint bureaus are also widely used in Asia, Canada, the United States, and some Latin American countries. Id. at 14, 53, 201-13.

47. See id. at 223-24.

48. See supra note 14 and accompanying text.
social, human rights, etc. NGOs, and thus feel less fractured along religious or
gender divides.) Self-empowered groups tend to humanize bureaucracies and to
reduce social distances in a democracy. As in a public administration, the
seemingly paradoxical combination of competition and cooperation within and
among civic organizations serves to forestall opportunism, and generates the
economies of larger-scale activities that are conducive to development.49

A new democracy must tread softly in matters of a civil society. An eman-
cipatory harmony of interests will not always (or perhaps often) be attained
through an associational pluralism.50 Careful institutional designs by reformers-as-
regulators can deflect some of the conflict from the state and channel it in more
"useful" directions, but such regulations will likely be seen as an interference with
the rights to organize and participate. NGOs are often slow in coming to many
sectors of a new democracy, especially when citizens have been demoralized by

49. See Almond & Verba, supra note 13, at 256, 368; Putnam, supra note 12, at 152-53, 160;
Brietzke, Administrative, supra note 9, at 689; see also Prosser, supra note 10, at 67 (citing Poulontzas
and Habermas and discussing "compenetration" — the perceived decline of the separation of state and
civil society, due to increased state economic intervention and the growth of voting rights, unions,
oligopolies, and trade associations); Putnam, supra note 12, at 11 (discussing ideas of Dahl, Lipset,
Plato, Almond & Verba, and especially de Tocqueville, on how civic associations reinforce "habits of
the heart"); id. at 115 (contrasting civil society with the French concept of incivisme, citizenship stunted
in a hierarchy and by "boss concept," two factors that lead to low rates of a political participation driven
by dependence or greed); id. at 117 (discussing the correlation between civil society and Benjamin
Barber's "strong democracy"); id. at 159 (stating that civil society is the main reason why the North has
responded to challenges and opportunities better than has the South); id. at 183 (explaining that on the
demand side, citizens expect better government where civil society is strong and, partly through their own
efforts, they get it); Bhagwati, supra note 3, at 61 (emphasizing the sharp drop in Third World
governments' hostility toward foreign institutions, especially NGOs); Costello, supra note 13, at 145
(stating that in Tanzania, the ruling TANU/CCM Party sought to undermine any organization outside
itself); Fatton, supra note 14, at 67 (stating that civil society is private spheres resisting state incursion,
in a dialectical interaction rather than an unmitigated opposition); id. at 82 (discussing civil society as a
watchdog, curbing monopolizing tendencies of government); id. at 84 (discussing quasi-bourgeois,
liberalizing middle sectors in the civil societies of Francophone Africa); id. at 85; Hiitt, supra note 2
("absence of viable political parties and civic institutions after 32 years of stifling dictatoral rule" in
Indonesia); Kennedy, supra note 5, at 201 (noting the dynamism of development, "incorporating ever
more citizens in a multiplication of society-wide and increasingly-interdependent projects"); Linz &
Stepan, supra note 5, at 17-18 (stating that recent struggles in Latin America and Eastern Europe
emphasize "civil society versus the state," an important perspective where political organizations
previously forbidden and weak, but this perspective ultimately poses a false dichotomy, in light of
institutional routinization and intermediation); Los, supra note 14, at 309 (explaining that communist
party-states had no civil societies because the state was seen to incorporate all of the individuals' needs
and values); id. at 310 (discussing "mafia" networks substituting for missing mediation structures in, e.g.,
access to state services in Russia); Celestin Monga, Civil Society and Democratization in Francophone
Africa, 33 J. Mod. Afr. Stud. 359, 360 (1995) (describing civil society as "reclaiming the right of self-
expression, all too long confiscated by the institutions of power"); Posner, supra note 5, at 5; Mr.
Wolfensbohn sets the Score, ECONOMIST, Oct. 5, 1996, at 70, 70 (noting the new World Bank President
"has welcomed co-operation and criticism from...NGOs...private foundations and anyone else who
shows the slightest interest"); Polls to Nowhere, supra note 2, at 20 (noting a "deeper transformation"
below the surface of African politics, in that new regional, commercial, ethnic and religious bodies are
growing up outside the state, while "governments are losing crucial sources of patronage").

50. See Fatton, supra note 14, at 73-75.
long traditions of authoritarianism, so the temptation is for government to sponsor NGOs in crucial areas — perhaps with Democracy and Governance funding from the U.S.A.I.D. Such NGOs will have difficulty in attaining and maintaining independence from government, especially if senior politicians choose "corporatism" as a significant mode of governance. As we shall see, corporatism readily attains many of the goals of a social democracy in several European countries, but a lack of the "corporations" independence exposes the system to the risk of fascism (corporate syndicalism) under the likes of Mussolini or Juan Peron. On the other hand, strong and independent NGOs create the danger of a governmental gridlock, if the political or legal system offers them enough leverage to defeat policies which have been decided upon democratically. As in the U.S., NGOs must then be bought off by granting them benefits far in excess of those required by the public interest — in a democracy or development, for example.

C. Lawyers' Roles

The consolidation of a democracy clearly requires many difficult and pressing tradeoffs and choices: for example, between rapid economic growth and corrective justice for those who have suffered under past policies, and who may now create political instability. A lawyer like me will inevitably emphasize the legal dimensions of tradeoff and choice. Most leaders in nascent democracies seem aware of the importance of legal change, but they tend to view lawyers' roles in superficial and mechanistic ways. Perhaps they agree with Richard Posner, the leading representative of the Chicago School of law and economics which has contributed mightily to the conservative thesis discussed earlier: "lawyers . . . revere rights and are not professionally sensitive to cost." Rights are important, of course; if lawyers do not look after them, who will? Certainly not politicians and bureaucrats preoccupied with the day-to-day exercise of their own power. Cost is also important, especially in an underdeveloped country, and I try to reflect on costs (best measured in terms of the opportunities foregone by making particular choices) throughout this article. While they may not use Judge Posner's economics jargon, most lawyers qua lawyers are also keen to minimize (monopoly or economic) rent-seeking behavior: the extraction of benefits unwarranted by economic productivity or by persuasive justice claims, behavior which contributes to a sense of injustice among other citizens. Advocates of the conservative thesis see rent-seeking in government but play down the extent to which it occurs in the private sector as well. The lawyers' regulations and competition policies are thus disdained.53

51. See infra notes 86-88 and accompanying text.
52. Posner, supra note 5, at 13; see also ALMOND & VERBA, supra note 13, at 373 ("What seems to be called for is the simultaneous development of a sense of national identity, subject and participant competence, social trust, and civic competence"; these are seemingly insurmountable obstacles in the face of limited resources and capacities); O'Donnell, supra note 1, at 42 (arguing that "conceptual quandaries" render democratic consolidation problematic); supra notes 5-7 and accompanying text. But see JACOBINI, supra note 9, at 161 (noting that much of the relevant commentary touches context and administrative science rather than law, and concern with individual rights is less evident than in the West).
53. See Brietzke, Accountability, supra note 6, at 100; see also supra notes 5-7 and accompanying
Above all, public lawyers attend to the legitimacy of law, which is perhaps their main contribution to Judge Posner's "value clarification." Legitimacy is extremely scarce worldwide, and a valuable resource because it economizes on the use of other scarce political resources: less in the way of coercion, administrative capacity, etc., is needed to secure compliance with a decision regarded as legitimate. Legitimacy fosters trust in government, and flows from long-term perceptions of law promoting timely, rational, and well-coordinated decisions, by persons constrained by law and acting for the benefit of broad segments of the public. The pursuit of legitimacy casts public lawyers in a planner's role which is disdained under the conservative thesis, with its preference for the minimalist state. The need to plan is an important justification for a stronger and rather activist state, to consolidate democracy by dealing with the paradox described earlier. This is a task too important to be left solely to politicians and/or neoclassical economists from overseas.

The technical requirements of drafting legislation and regulations can force all of the parties (not just the lawyers) to define means and ends clearly and consistently. Problems encountered while implementing these and other, older laws similarly reflect a carelessness or unresolved policy or value conflicts. After framing the issues more precisely, lawyers can help to negotiate politically acceptable compromises where contradictions cannot be eliminated. It is unrealistic to follow development administration theorists in the hope that lower-level bureaucrats will consistently improve on the handiwork of senior policymakers. The lawyers' demand for clarity and precision is a professional check and balance on the often fuzzy and wishful thinking of politicians and social scientists. If this lawyers' check is not applied effectively, the outcome will likely be one of wholesale and incoherent transplants of rules and institutions, transplants which will amount to a fig leaf covering an unchanged reality.

Trained to deal with rapid changes in imperfect institutions, lawyers in the new democracies should constantly work on improving the coordination and "fit" among institutions and rules old and new. A plan is needed, so that inevitably piecemeal reforms move in the direction where the country wants to wind up, and so that the avoidable risks of uncertainty are not imposed on citizens. Time is too short for a decades-long preparation of codes, so much of the effort will

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54. See Brietzke, Accountability, supra note 6, at 122; Brietzke, Administrative, supra note 9, at 682; see also Sacco, supra note 18, at 455-56 (stating that law precedes design, which is a term for sophisticated legal experience); supra notes 5-7, 11, 14, 35 and accompanying text.

55. See Brietzke, Accountability, supra note 6, at 121, 125; Brietzke, Administrative, supra note 9, at 679, 683; Waelde & Gunderson, supra note 6, at 370; see also Pierce et al., supra note 11, at 22 (stating that in the United States, the professional socialization of bureaucrats is towards problem solving through rational analysis, rather than through negotiation and accommodation); Surrey, supra note 31; Ajani & Mattei, supra note 6, at 118 (noting that lawyers infuse economies models with the realities of institutional arrangements and problems); id. at 123 (finding that the inconsistent and unsystematic reception of legal transplants causes legal fragmentation); Waelde & Gunderson, supra note 6, at 370-71 (arguing ineffective law is worse than none at all, confusing to market participants, etc.); id. at 373; supra notes 36-38 and accompanying text.
necessarily concentrate on the most problematic areas and on filling gaps. In particular, a planned redistribution of rights, privileges, and duties is needed, to avoid the ad hoc (or the conservative's "invisible hand") proliferation of rights that automatically favors domestic elites and foreign owners of resources. Certain strategies of economic growth (chiefly "trickle-down") require this kind of favoritism, but the decision to take this path should be made explicitly and with a view towards eventually attaining a coherent and politically viable balance between liberty and equality. One way to do this is through planned reductions in the barriers that the poor face when they seek to enter markets and other institutions of the rich. This is not a redistribution of income but of the opportunities and resources that the poor can use to produce their own income over time. There should also be a planned redrawing of the boundaries between public and private actions, and thus between public and private law, rather than a simple and reflexive privatization of almost everything. As in more established democracies, these boundaries would change over time and become refined in the light of experience. Some centralized legal planning authority is desirable, lodged in a "pilot agency" dealing with industrial policy, with a procurator, with a parliamentary commissioner for administration having the legal powers to match the job title, or in some other bureau.

The conservative thesis emphasizes governmental failures to the exclusion of failures in private markets, while institutional or welfare economists and many social democratic politicians reverse this emphasis. A more neutral and pragmatic perspective is that transitions to democracy are hard on behaviors and institutions, and that everything — individual behavior, competition, markets, private and public enterprises, administrative agencies, political and judicial processes, even the constitution itself — will fail if it is pushed too hard or never allowed to develop. Legal reformers should thus make the best of the particular circumstances and failures in a new democracy, by aiming for the lowest net rate of failure attainable throughout the private and public sectors. (This can be regarded as still another development process.) For example, and contrary to the assumptions of conservative neoclassical economists, markets do not always or often spring up quickly and perform their fully competitive functions automatically. A fair amount of governmental regulation will thus be appropriate in the medium term — a rather activist government is made necessary by private market failures — or else "pseudomarket" or "parody of the market" conditions will be (undemocratically) dominated by incumbents from the previous regime and by foreign investors.

56. See CONKLIN, supra note 5, at 331; Brietzke, Accountability, supra note 6, at 122, 124-25; Los, supra note 14, at 322; Waelde & Gunderson, supra note 6, at 375; see also DAVIS, supra note 30, at 2 (discussing the need to transfer know-how from advanced to backward agencies, such as police, welfare agencies, parole boards, etc.); A Land of Potential, supra note 7, at 46 ("[Our people] must change from what they were to what they want to be. They don't know how to manage a capitalist system.") (quoting Tanzanian parliamentarian Iddi Simba).

57. See infra notes 68-69 and accompanying text.

58. See supra note 47 and following text.

59. See Los, supra note 14, at 293; see also CONKLIN, supra note 5, at 96 (explaining that
Too much of the wrong kind of regulation will, on the other hand, retard a genuine marketization and the emergence of a private entrepreneurship. Also, the conservative's amoral criterion for creating and distributing wealth — from each according to his ability and to each according to his marginal productivity, as this is judged by imperfect or nonexistent markets — will often leave the poor unable to reward each other out of their poverty, and unable even to enter the rich people's markets. This is the economic apartheid seen in the ghettos of the United States, for example, something a new democracy would do well to avoid.

Especially in nascent democracies pursuing an economic development, government is neither all bad (the conservative thesis) nor all good (the position of many European welfare economists and social democratic politicians), but rather is the problem and the solution in roughly equal measures. Government can be bent more towards solutions and away from creating problems through careful

neoclassical economists stress that free enterprise is important in itself and is essential to democracy, but market failures reduce an equality of opportunity; WILLIAMSON, supra note 23, at 327 ("Until we realize that we are choosing between social arrangements which are all more or less failures, we are not likely to make much headway.");) (quoting Ronald Coase); Brietzke, Accountability, supra note 6, at 104, 111, 115; id. at 110 (stating that governmental or market failures are literally matters of definition, of what we want done that the system is not doing); id. at 113 (holding that costs and benefits will be unpriced or wrongly priced in imperfect markets, leading to a lack of accountability for their use and abuse); id. at 117 (theorizing that the poor wind up paying more of the costs of marketization, especially when government takes a tough stance against higher wages); Brietzke, Designing, supra note 6, at 54 (stating that the marketing of certain goods, services, and labor is fairly easy, but it is much more difficult and time consuming to make marketable technology, capital, other financial assets, foreign exchange, natural resources, and even land); Crole, supra note 9, at 3 (quoted infra note 77); Linz & Stepan, supra note 5, at 22 (emphasizing that even if a democracy began with a pure market economy, politics would soon turn it into a mixed, i.e., private and public, economy); A.E. Rodriguez & Malcolm B. Choate, Limits to Antitrust Policy for Reforming Economies, 18 HOUSTON J. INT'L L. 311, 358 (1996) ("[T]he institutional requirements essential to create efficient markets entail a set of political and economic institutions that provide for low transaction costs and credible commitment.") (citing Douglas North); supra notes 5-7, 23 and accompanying text. But see Sohn & Sarris, supra note 16, at 302 (stating that in the neoclassical critique of the 1960s and 1970s, P.T. Bauer argued publicly that bureaucratic failure is worse than market failure).

Like governmental failures, market failures detract from efficiency and justice:

- Imperfect competition may result from increasing returns to scale or barriers to entry.
- Externalities may cause discrepancies between private and social rates of return, and hence between the optimal private social patterns of investment and production. Individual consumers may lack the knowledge or wisdom necessary . . . to make choices that are in their own best interests. Furthermore, the free market's distribution of income, wealth, power, and opportunity is considered by some to be excessively unequal and unfair.
- [U]nemployment may be prolonged and severe.

CONKLIN, supra note 5, at 3-9; see also id. at 41-42 (discussing problems of public goods, which are things belonging to all, which none thus wish to pay for, and which government must often provide); Roe, supra note 6, at 227-29 (discussed and quoted supra note 23); State and Market, ECONOMIST, Feb. 17, 1996, at 64, 64 (stating that the conditions for efficiency are "far too demanding to be met in the real world," owing to "pervasive" market failures); id. (hypothesizing that the unemployed find it difficult to price themselves into work because employers assume that they are "lemons"); id. at 67 (stating that government can fix some market failures by, e.g., requiring that power from a utility be available to all and of a certain quality); id. ("Just as the dangers of market failure are often exaggerated, so too are the skills of government.").
reforms of administrative law. Failures of government and of private markets are almost always failures of incentives and organization, such as those stemming from the separation of ownership and control in large (public and private) business enterprises. Such failures to align the self-interest of politicians, bureaucrats, businesspeople, or "ordinary" citizens with the public interest (in democratization, development, etc.) can be ameliorated through a more rational, often more market-mimicking administrative design. Particularly important is a dismantling of the remaining elements of a military model of administration, of the orders-backed-by-threats that paralyze initiative and creativity as well as reduce discretion.60

If internal and external accountabilities are frail or often unavailable for the review of administrative actions, democratization and development will likely fail over time as initial enthusiasms give way to authoritarian and other self-serving temptations. Failure is also likely if there is no thoughtful redesign of the incentives, organizations, and coordinating mechanisms in administrative laws. Reformers must walk a tightrope, since "each decision has its own advantages and shortcomings, and for each society these may change over time."61 The tradeoffs and choices that reformers should consider in the most important policy areas are sketched in the next part.

IV. Some Specific Topics

Property rights generate deep political disputes in all democracies. Consider what an economist might see as a widespread "intransitive preference": many citizens demand broad property rights in theory, only to reject outright the unequal distribution of wealth and power that necessarily flows from such rights in practice. Rapid privatization and marketization, under broad property rights in a new democracy, are thus likely to produce a politically unacceptable, stability-endangering distribution of wealth and power, as in Russia for example. In part for this reason, almost all of the new constitutions in nascent democracies wisely ignore conservative calls for the broad property rights characteristic of a liberal democracy. Such rights are the conservative's recipe for inaction; virtually all governmental policies and programs necessarily alter property rights, if these rights are defined as the means to obtain future income streams.62 For example, Article

60. See Brietzke, Designing, supra note 6, at 55; see also K. Migara & O. Desilva, Institutions and Economic Development 2-4 (Olin Bus., Law & Econ. Studies No. 8, 1993); id. at 9 ("Efficient" social institutions are those that guarantee both optimal aggregate outcomes as well as distributive justice," a perspective ignored by neoclassical growth theory) (emphasis omitted); Waelde & Gunderson, supra note 6, at 360 ("The effectiveness of law is usually intimately linked to the institutional set-up of government and economic organizations, as well as the shape, force and focus of social and economic forces and their interaction."); supra note 20 and accompanying text.

61. Conklin, supra note 5, at 309; see also Pierce et al., supra note 11, at 107 (citing Peter Strauss, on the need for independent decisions versus need for an accountability); Carothers, supra note 11, at 96, 103, 105 (stating that foreigners can provide technical and financial means for reform, but that Americans are wrong to think that this will substitute for the internal will to reform); Croley, supra note 9, at 6 (discussed supra note 24).

62. See Conklin, supra note 5, at 36, 74; Brietzke, Designing, supra note 6, at 41-42, 54; see also
40 of the 1994 Ethiopian Constitution states that citizens "own private property . . . unless the law provides otherwise in the public interest," with a "full right" only to the ownership of immovables and improvements to land. This rather narrow definition of what amounts to a governmental "taking" of private property is accompanied by relatively generous compensation when a taking occurs, at market prices. Government is thus empowered to tame the intransitive preference, in ways somewhat similar to those provided under the German Basic Law,63 but many Ethiopians will remain deeply and properly suspicious unless and until administrative reformers flesh out this cryptic provision fairly.

The essence of administrative regulation is that many distributive (rather than merely technical) decisions must be made, ideally as a part of planned reforms in administrative and private laws. Should the law empower polluters or environmental protection groups, the senior management of multinational corporations or the local consumers of their products? For Ajani and Mattei, power automatically brings liability with it and "liability rules should be part of the very idea of property rights."64 A government which goes overboard in taking property away from citizens becomes more dictatorial and reduces the incentives to save, invest, and produce, yet the public interest is clearly implicated in almost all large commitments of resources. In other words, property rights are not "natural," inevitable, and costless. They lie within the gift of the state, to further democracy, development, and/or the interests of particular elites. Each country should develop the structures and functions of property appropriate to its particular circumstances: Who should have the opportunity to take which private initiatives, and to what extent should others be excluded from these opportunities as "trespassers"? Through a dialectical process, private property limits state power, especially when property is wielded by organized elements in a civil society, while democratic processes express the community standards which limit property rights and thus the opportunity to veto majoritarian policies.65

Ajani & Mattei, supra note 6, at 128 ("[S]ocieties can always be situated between two revolutions: one which deprives the rich of their wealth and one which brings them again in possession of that wealth.") (quoting Fustel de Coularges); Roe, supra note 6, at 231 (explaining that neoclassical economists see property rights as prior to production; protect them and production occurs, ignoring that some ways of producing wealth create more political turmoil than others); supra note 5 and accompanying text.

63. See German Basic Law, Art. 1(1) (explaining that it is Kantian duty to use all state power to protect human dignity); id. at Art. 14 (stating that limitations on property are "only permissible in the public good," and decisions about compensation balance public and individual interests); Ewald, supra note 21, at 2060, 2062 (finding that German "third way" corrects John Locke's error of elevating property to too high a plane).

64. See Ajani & Mattei, supra note 6, at 127, 133 (citing Leon Duguit). It is unclear whether "liability rules" are being used in Calabresi's sense, as would be extremely appropriate. See Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, in PERSPECTIVES ON PROPERTY LAW 236, 243-47 (Robert Ellickson et al. eds., 1995); see also Ajani & Mattei, supra note 6, at 131 (stating that economists are wrong to see private law as creating property rights and public law as destroying them, especially if the problem is defined as curing externalities and other market failures); Croley, supra note 9, at 3 (quoted infra note 77).

65. See BRUCE ACKERMAN, ECONOMIC FOUNDATIONS OF PROPERTY LAW vii (1975); Brietzke, Designing, supra note 6, at 38, 41-42, 60. Compare CONKLIN, supra note 5, at 64 (stating that
Uncertainties can be substantially reduced by spelling out the nature and extent of property rights, as well as through the piecemeal-but-planned reform of administrative laws, the reduction of discretion and a colonial or military-style capriciousness in administration, and the defense in public of benefits conferred by the bureaucracy. Much bureaucratic work remains to be done, to reduce uncertainty in other ways. For example, "four-fifths of the countryside in developing countries has no legally recognised owner. Two-thirds of Mexico City's residents have no proper deeds." There are many risks associated with attempting a democratization revolution, risks which citizens are keen for government to reduce wherever possible. Many citizens are close to being behind John Rawls's "veil of ignorance," rationally uncertain of their position in the new society that is emerging fitfully.

Conservative (neoclassical) economists assume that information is the antidote for such uncertainty, and that the ability to create, receive, understand, and use information arises automatically through markets — especially for entrepreneurs. Yet markets, media, and other information sources remain underdeveloped throughout the Third World. Elites thus have greater opportunities to obtain and manipulate information for their own advantage, as in "pyramid" investment schemes in Russia, Albania, and some Third World countries. Public administrators thus have a major role in playing the costs of private transactions by improving the flow of information, especially by insisting on the disclosure of private information (except for trade secrets and the like) as a quid pro quo for access to governmental information. Risk-sharing institutions which

communist economic systems define freedom as the absence of exploitation, and thus aim for appropriate wages and the elimination of private property) with Sunstein, supra note 5, at 92 (standing for the proposition that private property has a salutary effect on citizens' relations with the state and on citizens' understanding of that relationship). See Breetzke, Accountability, supra note 6, at 118 (finding that property rights may have the effect, if not the purpose, of exalting the privileges of economic elites, including the ability to veto the democratic will of the majority); id. at 120 (finding that property rights license owners of capital to earn monopoly rents de facto, in nonexistent or underdeveloped markets, and to drive hard bargains in labor markets that amount to denials of equal opportunity); Posner, supra note 5, at 2 (emphasizing the indirect costs of enforcing rights, which are the imposition of burdensome duties and the protection of socially-harmful activities); id. at 3; id. at 18 (stating that like rights, social planning has its opportunity costs); Roe, supra note 6, at 231 (discussed supra note 62); Robert Skidelsky, Bears Routed, ECONOMIST, Nov. 16, 1996, insert at 9, 9 (finding that business in Russia is "tough," not because of the "mafia" but because "secure legal definition and enforcement of property rights" are lacking); supra notes 5, 49-51 and accompanying text.

66. A Matter of Title, ECONOMIST, Dec. 9, 1995, at 47; see also CONKLIN, supra note 5, at 36 (finding that people disagree about the desirability of alternative economic systems because of differences in attitudes about the changes and adjustments that accompany them); Fatton, supra note 14, at 75 (discussing "the uncertainties of a bastardized capitalist modernity"); id. at 77, 81; Podgorecki, supra note 14, at 350 (emphasizing capriciousness of a "totalitarian" law designed to create uncertainty and insecurity, through whimsical rewards and punishments); Rodriguez & Choute, supra note 59, at 340 (explaining that investors will commit capital only if they expect a premium to cover the risks of a governmental reversal of policy); id. at 358 (quoted supra note 59); A Matter of Title, supra (stating that aid donors have "produced satellite-derived maps and elaborate databases, but not many useful registries" of land in the Third World); supra notes 18-20, 29-34 and accompanying text.
also communicate a great deal of information — banks, insurance companies, stock markets, other financial intermediaries, even ordinary contracts — are particularly underdeveloped. Government bureaucrats will inevitably have to perform some risk-spreading functions in the interests of development, especially with regard to "public goods" where the benefits are so diffuse and widespread that private citizens are reluctant to invest: the retraining of workers, the acquisition of complex skills, guarantees for certain investments and ventures (deposits in financial institutions, for example), and research and development expenditures which cannot be recouped quickly. Expenditures in these areas must obviously be limited to overcoming the most strategic of developmental bottlenecks, under strict and objective cost-benefit criteria, or else they will merely amount to subsidies of elite activities.67

*Industrial policy* is the rubric under which some programs have (until recently) shown an astounding success among East Asian "Tigers" such as Taiwan and South Korea. With a superior access to information in some areas, public administrators will be able to carry out risk-return analyses which are much better than those of the private sectors in the Third World, where business planning techniques will not attain the level of sophistication seen in advanced capitalist countries for some time. Admittedly, industrial policy can have the unsavory, Stalinist image of subsidies to outmoded heavy industries, subsidies which eat up governmental resources, distort incentives, and sacrifice efficiency to ideology. But Robert Wade, a new guru of developmental economics, offers a very different and appealing view that straddles the conservatives' (especially Friedrich Hayek's) false dichotomy of plan versus market:

The "new interventionism" seeks to guide, not replace, the market. It uses price and non-price methods to channel investment away from unproductive uses, expand technological capacity, strengthen links with foreign firms and give a directional thrust to selected industries.

These interventions need to be based on a plan for the pattern of trade and industry over time, and this plan must be open to feedback from the market.68

67. See Conklin, supra note 5, at 52; Pierce et al., supra note 11, at 418-77; Brietzke, Accountability, supra note 6, at 112; Brietzke, Designing, supra note 6, at 51; Kennedy, supra note 5, at 191; Nagel, supra note 7, at 122; see also Conklin, supra note 5, at 52 (stating that unlike subsidies to low-income groups and subsidies which bail out failing enterprises, government's promotion of the sharing of uncertainty and risk does not operate to discourage entrepreneurship); Bhagwati, supra note 3, at 59 (citing Amartya Sen as stating that the relatively free press in India leads to better famine relief there than in China); DeSilva, supra note 60, at 3, 15 (explaining that self-interest leads to attempts to reduce the uncertainty of some group receiving more than yours).

68. Robert Wade, State and Market Revisited, ECONOMIST, Apr. 4, 1992, at 81; see also Robert W. Campbell, The Socialist Economies in Transition: A Primer on Semi-Reformed Systems 26-27 (1991) (stating that government can guide the direction and pace of development without a direct management); id. at 93-94 (stating that industrial policy is based on government being the only actor sharing property rights with all others, and on government's comparative advantage in producing and enforcing property rights); Conklin, supra note 5, at 11, 312; Robert Wade, Governing the Market;
This "light" planning remains a sensible policy proposal, the mistakes Asian policymakers made in other areas notwithstanding. Limited administrative capacities in the new democracies dictate that only the most important market failures in the most important industries be targeted. Given the paucity of resources in the economy, government's strategic use of small amounts of resources will have large effects. Light planning is the way East Asian countries such as Taiwan and South Korea initially made as well as picked industrial "winners," and reduced regional and socioeconomic inequalities in the process. Such efforts — undemocratic and based on an unfettered bureaucratic discretion — can be improved upon by folding them into larger reforms in administrative law: accountabilities directed towards objective performance criteria, in a "pilot" agency which directs industrial policy and perhaps administration as a whole. Such policies amount to a coordinated reregulation rather than a deregulation, hopefully supported by the public as conducive to development and slowly phased out as restructuring and marketization take hold. In other words, establish or reform markets when you can, and beat the results from fragmented or nonexistent markets when you must. Economic and political gains should be pursued and be seen to occur simultaneously, especially as positive political assessments by citizens form a valuable cushion for a painful economic restructuring. With a bit of ideological sleight-of-hand, such efforts could be sold to foreign donors and investors as their cherished deregulation.69

Privatization strategies should be an integral part of a thoughtful industrial policy, rather than the freestanding attempt to liquidate as many public assets as quickly as possible that shock therapists pursue under the conservative thesis.70

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ECONOMIC THEORY AND THE ROLE OF GOVERNMENT IN EAST ASIAN INDUSTRIALIZATION passim (Princeton, 1990); Bhagwati, supra note 3, at 62 (explaining that unlike the many "don't's" that handicapped development in India, the Asian Tigers "worked with a series of 'do's' that left considerable room for freedom to produce, innovate, and experiment"); Kennedy, supra note 5, at 205-06 (stating that in contrast to a top-heavy import substitution, small East Asian firms, supported by competent and enabling governments, fostered market opportunities through a "primitive Taylorization"); Nagel, supra note 7, at 121 (finding that conservatives now endorse a planning which amounts to a tickling rather than a replacement of markets, especially where government assumes an insurer's role); Podgorecki, supra note 14, at 356; The Myth of the Powerless State, supra note 5, at 16 ("the state simply never had the powers it is now said to have surrendered," and the "fiercer" international competition for capital is forcing a redesign of governmental policies).

East Asia is not alone in pursuing these policies:

- The French took to nationalisation, not just for socialist and nationalist reasons, but because France was . . . a capitalist country without capital. The stockmarket was tiny, savings went into property . . ., the banks were risk-averse, and most French people did not really want to be entrepreneurs. It therefore fell naturally to the state to develop industry. Plenty of conservatives, such as DeGaulle, relished this . . .


69. See CONKLIN, supra note 5, at 325; Brietzke, Accountability, supra note 6, at 116; Costello, supra note 13, at 142; Linz & Stepan, supra note 5, at 29; see also Roger Van Den Bergh, Economic Criteria for Applying the Subsidiarity Principle in the European Community: The Case for Competition Policy, 16 INT'L REV. L. & ECON. 363, 365-66, 370, 378-79 (1995); supra notes 5-7, 29-35 and accompanying text.

70. See supra notes 5-7 and accompanying text; see also CAMPBELL, supra note 68, at 205
Most of the nascent democracies in Eastern Europe and the Third World start with top-heavy economies loaded with inefficient public enterprises. Some or many of these will have to be privatized eventually, to promote development and to reduce government's economic involvement. These goals have been only partly and imperfectly realized to date, however: rates of privatization and the resulting inflow of revenues to governments are well below those expected and budgeted for in most fledgling democracies. Even inefficient and crumbling public enterprises are a public patrimony, in that they were created from citizens' forced savings — from consumption and other private opportunities citizens were forced to forego, in pursuit of failed development strategies that enriched particular elites. Theories of both a distributive and a corrective justice require that this patrimony not be dissipated, merely to gratify a conservative's passion for shrinking the public sector, and these theories will likely be reinforced by citizen demands for a democratic accountability over privatization.

The restructuring of ownership (creating private property rights which are defined as clearly as possible) in former public enterprises can take and has taken many different legal and institutional forms, the relative merits of which are ardently debated by the "experts." But the reality of most privatizations is one of a simple exchange of assets and liabilities by private and public sectors. All too often, the outcome is a "voodoo privatisation . . . short of real money and real owners," but not short of corruption and new sources of a political patronage:

("privatizing . . . is not an isolated component of reform"); CONKLIN, supra note 5, at 297 (citing Henry Pariss; ideology sometimes plays a significant role in, e.g., contractions in the public sector in Britain since 1979 and its explosive growth in France since 1981); Selling the State, Contd, ECONOMIST, Dec. 9, 1995, at 14 (stating that although privatizations occur singly, they are both part of a global trend and have different regional faci — sealing the fate of communism in Eastern Europe, exposing cozy state firms to competition in Western Europe, and sucking foreign capital into Asia and Latin America).

71. See CONKLIN, supra note 5, at 310 (stating that privatization "debate concerns a wide range of possible arrangements for the organizational structure, as well as the terms and conditions of sale"); Lal Jawarenda, Preface to OLIVIER J. BLANCHARD ET AL., REFORM IN EASTERN EUROPE viii-ix (1991) (finding that rapid sales of state capital at knockdown prices create politically-acceptable gains for the few who have the resources, but efficiency makes it desirable for a firm to have a single shareholder); Taming Monopolies, ECONOMIST, Aug. 13, 1994, at 64, 64 (theorizing that in Britain, consumers "are angry . . . because they reckon prices have risen since privatisation; and . . . because the salaries paid to top managers have soared").

Some of the ways in which the ownership of public enterprises can be restructured are: spontaneously, as a result of collaboration between workers and managers; large-scale transfers that favor foreign investors, a self-dealing by the nomenklatura, or black marketeers; transfers to holding companies, such as banks, which may issue mutual fund-like shares and which may pose serious anticompetitive dangers; the folding of public assets into a joint venture with private companies, domestic or foreign; retention of some or many of the shares by government, in a partial sell-off; giving some or all shares to the public to build support for reforms, perhaps under a voucher scheme which enables investors to choose companies or "mutual funds"; leasing or franchising public assets to private firms; or contracting out the financing and operating control to private firms. See BLANCHARD, supra, at 31, 33, 36, 44, 47; CAMPBELL, supra note 68, at 193-94; CONKLIN, supra note 5, at 300.

72. Monopoly Money, ECONOMIST, Nov. 18, 1995, Central Europe Survey at 22, 22.
[Y]ou are the boss of a state firm which makes, say, tyres. You set up a new company in your wife’s name to which you sell 50,000 tyres at cost price or below. You lend it the money to make the purchase. The new company then sells the tyres at market prices, pays off the loan . . . and makes a large profit. Repeat this several times and you are rich. Meanwhile the state firm has gone downhill [having had its assets stripped in this and other ways], so you make a rock-bottom offer for it. The government accepts, glad to get it off its hands.73

There are few if any democratic, developmental or fiscal advantages to be gained from this and other substitutions of unaccountable private enterprises for unaccountable public enterprises. This is especially true if local markets for managerial talent and for corporate control are immature, and if foreign investors, incumbents from the previous regime or mafia-style leaders use the new private enterprises: to create monopolies or cartels, to gain windfalls from the disequilibria (the economists’ polite term for the chaos) created by the transition, to create politically unacceptable levels of unemployment (conservatives call this downsizing) and unequal distributions of wealth, or to veto majoritarian political decisions. Most unplanned and unregulated privatizations merely trade market failures for governmental failures, as in the “crony capitalism” Chalfin documents in the privatization of oilseed marketing in Ghana.74

In all but the very long run, private business bureaucrats are unlikely to be markedly more efficient than the public bureaucrats they often once were. In this sense, bureaucracy is bureaucracy: the private or public problem or the solution, depending on how incentives are structured and organizations designed. Public and private bureaucrats bid for similar and often the same resources; both try to maximize wealth and power, to shirk when they can get away with it, and to be innovative when they must; both seek advancement by pleasing superiors in similar ways; and both spawn the heavy transaction (monitoring) costs involved in finding out exactly what they are doing, with the responsibilities delegated to them within a hierarchy.75

73. Id. at 22-23.
74. See Chalfin, supra note 14, at 431 (documenting that “crony capitalism,” or patronage exchanged for political support, emerged when private enterprises formed a trade association which seeks to emulate the former roles of the state marketing board). In a structural adjustment, state companies lose market share when forced to compete with private companies. See id. at 421. New forms are derived in part from old institutions. See id. at 438. Proceeds from the higher prices created by competition are invested in commodity speculation. See id. at 439; see also CONKLIN, supra note 5, at 367 (citing Nosi on the behavior of multinational corporations); Brietzke, Designing, supra note 6, at 59; Rodriguez & Choate, supra note 59, at 314-15 (stating that the benefits from privatization are not automatic, and the goal is to prevent welfare losses from anticompetitive behavior); Shapiro, supra note 17, at 605-06 (stating that some of privatization amounts to “milking public treasuries by strategically well-placed groups”); The Price of Privatization: Italian Shares, ECONOMIST, May 3, 1997, at 66, 66 (explaining that in Italy, privatization is “mainly . . . a way to raise revenue by squeezing investors” unaware of “how badly state-owned enterprises were run”); supra notes 59-60 and accompanying text.
75. See Paul H. Brietzke, Another Law and Economics, 9 RES. IN L. & ECON. 57, 72 (1986); see also CONKLIN, supra note 5, at 299 (quoting Henry Farris as observing that “the continuing tendency for
In many ways, a public bureaucratic tyranny can be more easily and directly controlled through administrative law, with its accountabilities and public defenses of the benefits conferred, than a private bureaucratic tyranny can be controlled under private law. (But some of the gaps in accountability under private law can be filled with administrative law regulations, to promote the democratizing economy that is presumably entailed by a democratizing politics.) Privatization should thus be a planned and relatively slow process, occurring when the means and ends of a disposition of the public patrimony are clearly understood as beneficial on balance. For some time to come, public enterprises will remain useful where the problems of regulating a private enterprise are intractable, while in-kind subsidies remain inevitable, and where intractable market failures such as natural monopolies or democratically mandated public goods such as a regional development are involved.26

Regulation illustrates the proposition that boundaries between the private and public sectors are blurred, hotly contested, and always shifting, in the inevitably mixed economy that is nevertheless disdained by private-sector advocates of the conservative thesis. While the dirigiste (colonial, post-independence and military-style) state begins to erode unevenly, under the paradox discussed earlier, the need

the distinction between public and private enterprise to become blurred"); Robert Millward, The Comparative Performance of Public and Private Ownership, in THE MIXED ECONOMY 58, 82-83 (Eric Roll ed., 1982) (finding that most studies are patchy and say little about responses to uncertainty, but there is no general ground for believing managerial efficiency is less in public firms"); Brietzke, Accountability, supra note 6, at 107-08 (stating that the neoclassical economics on which the conservative thesis is based was formulated in 1880-1900, just before the massive growth of private and public bureaucratization that it thus accounts for poorly); Brietzke, Designing, supra note 6, at 46 (stating that while neoclassical economists see private enterprises as intermediaries between individuals and as surrogates for their marketplace exchanges, they create layers of monitoring costs which create a loss of control and accountability when these costs are high enough); Chalfin, supra note 14, at 432 (stating that newly-privatized oilseed marketing enterprises in Ghana are owned by former employees of the public enterprises; this reduces start-up costs but reintroduces corruption); Leviathan Re-engineered, supra note 38 (finding that public and private sectors "face similar problems — notably the challenge of harnessing information technology to transform giant bureaucracies into flexible networks"). James Landis adds that the organization of a private enterprise

would scarcely follow Montesquieu's lines . . . . Yet the problems of operating a private industry resembles to a great degree those entailed by its regulation. . . . Rates, . . . wages, . . . conditions . . . and . . . adjudication . . . of employee and public claims are in fact governance. . . . [B]ecause of the rapidity and directness of their execution, the penalties that private management can impose possess a coercive force and effect that government even with its threat of incarceration cannot equal.


76. See Conklin, supra note 5, at 14, 298-99, 307, 334-35; Brietzke, Designing, supra note 6, at 39, 40; see also Conklin, supra note 5, at 293 (stating that public enterprises account for about 10% of GNP in developed capitalist economies); Richard Hemming & Ali Mansoor, PRIVATIZATION AND PUBLIC ENTERPRISE 6 (IMF Occasional Paper No. 56, 1988) (stating that private shareholders may prove no better monitors than politicians are). But see The Selling of Russia, ECONOMIST, Nov. 18, 1995, at 88, 88 (stating that Russia's privatizations have been "quick and dirty," and that the creation of "a class of super-rich insiders" was probably necessary and has produced "vested interests that will resist further political meddling").
arises for narrower and planned state controls in more focused areas. This "new" regulation seeks to decrease or postpone opportunities to obtain economic (or monopoly) rents from privatizations and other aspects of the transition to a market economy, while seeking at the same time to minimize rent-seeking through government by eliminating subsidies, price controls, and especially licensing processes from all but the most essential areas. Given limited administrative resources, developmental improvements can be achieved most quickly by narrowly restricting the public bureaucracy's ability to erect barriers to entry into fragile markets, except where entry by well-financed and rather predatory enterprises will frustrate the further development of such markets. For example, traditional practices in Malawi are perpetuated in a partly marketized economy by, among other things, favoritism in the granting of leaseholds and licenses. In Tanzania, despite painful structural adjustments, rural producers have not responded to fragile markets because of the unavailability of extension services and improved inputs, and due to the monopolistic tradition of having only one buyer of agricultural outputs per district.

77. See Pierce et al., supra note 11, at 513; see also Chalfin, supra note 14, at 440 (quoting Deepak Lal & Hla Myint); Croley, supra note 9, at 3 (stating that regulation perfects legislative corrections of market failures, described as "concentrated market power, imperfect information, externalities, undelineated property rights, collective action problems, and high transaction costs") (citing Steven Breyer); Patton, supra note 14, at 67 (finding that in a dialectical interaction, a civil society penetrates the state and the state penetrates civil society through regulations and ideological interpretations); Linz & Stepan, supra note 5, at 21 (stating that no consolidated democracy has a pure command economy or a pure market economy; there will be some regulation of private activity to curb market failures, etc.); The Hidden Costs of Red Tape, Economist, July 27, 1996, at 13, 13 (stating that government taxing and spending policies are "relatively transparent," while regulation is less transparent because it forces you to spend "on something they have decided is good for you"); More Defenestrations in Prague, Economist, May 31, 1997, at 18, 18 (stating that "[the Czech Republic's admirable macroeconomic performance] is undermined by a rushed and too-zealous deregulation, and quoting Prime Minister Klaus as admitting that "markets do not function efficiently without some rules," including an American-style securities commission); supra notes 5-7, 14, 18-20, 75 and accompanying text.

78. See Sahn & Sarris, supra note 16, at 295-99; see also Conklin, supra note 5, at 9-13 (writing on price controls and subsidies and on channeling enterprise choices); Bhagwati, supra note 3, at 57; Chalfin, supra note 14, at 421 (finding that in Ghana, state companies are forced to compete with private ones, but the outcome has been "ambivalent" since regulations have also been extended); id. at 437 (success of privatization of oilseed marketing in Ghana limited by regulations curbing access to short-term loans); id. at 439 (stating that this "combination of liberalization and regulation" has created a "controlled market environment" much like the old one, with de facto regional monopolies); On the Right Tracks, supra note 14, at 78-79 (hypothesizing that managers of Russian state enterprises took advantage of the political vacuum to enrich "themselves by manipulating price controls, export restrictions, multiple exchange rates and other regulatory distortions"). These kinds of problems are not restricted to Eastern Europe and the Third World:

Anything an entrepreneur wants to do entails getting a permit from the local authority, the region or the central government in Madrid — or all three. And getting a permit in Spain is a heroic task: you queue to get the right form, queue again to hand it in, queue yet again to get it stamped, all the while hopping between buildings — and being balked by the working hours of the Spanish bureaucrats . . . .

A certain amount of development is required before a country can bear the more burdensome regulations. Reforms of administrative laws should thus strike a careful balance between developmental and protective (environmental, social) concerns. The East Asian Tigers have shown the advantages of using as many regulatory "do"s as possible, to leave considerable room to experiment and innovate, and using regulatory "don't"s only when absolutely necessary: to curb serious pollution, for example. Some of the limitations of this technique are shown by the banking "meltdown" in Indonesia: the goal should be to channel rather than to displace individual and enterprise choices, when these choices respond to signals from markets — even fragile and imperfect ones.\(^7^9\)

Along these lines, it is frequently but mistakenly argued that a strong pro-competition policy is unwise and unaffordable because it will deter foreign and domestic investment. Yet the breakup and other restructuring of public enterprises prior to privatization will, for example, forestall anticompetitive problems that will otherwise persist far into the future. Many of the fragile markets now emerging in the Third World are also "thin" — segregated from international markets and incapable of supporting more than one or a very few producers at an efficient scale of production, given the low levels of consumer purchasing power that are likely to persist for some time to come. Once firmly entrenched, enterprises in such markets, and newly privatized mega-enterprises, will be able to erect barriers to entry by new firms pursuing entrepreneurial opportunities as the markets grow. (This is what the "Robber Barons" did in the turn-of-the-century United States, and what the Russian nomenklatura and mafiya are in the process of doing today.) The costs (inefficiencies) of such behavior are borne by consumers in the form of higher-priced and less innovative products, the contrived scarcity of which retards development and the growth of employment. Contra the conservative thesis, all of this argues for a light and generic regulation of the worst aspects of cartels, monopolies, and mergers, a program which should be implemented before the new enterprises grow strong enough to veto it politically.\(^8^0\) One effective tactic is to

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79. See CONKLIN, supra note 5, at 13; Bhagwati, supra note 3, at 62; Waelde & Gunderson, supra note 6, at 365; see also Nagel, supra note 7, at 121 (discussed supra note 69); The Myth of the Powerless State, supra note 5, at 16 ("No government of anything resembling a market economy ever controlled output or unemployment ").

80. See Brietke, Accountability, supra note 6, at 111; Taming Monopolies, supra note 71, at 64; see also Patton, supra note 14, at 82 (asserting that a civil society can become a watchdog, curbing monopolistic excesses of government); Rodriguez & Choute, supra note 59, at 312 (theorizing that vigorous antitrust or competition policy enforcement may curb growth in reforming economies by decreasing incentives to invest and the ability to enter into long-term contracts); id. at 319, 326 (finding that many countries have no antitrust tradition and, for example, in some Latin American countries, longstanding antitrust rules have not been enforced until recently); id. at 321 (citing Paul Golek; many reforming economies are relatively small but the relevant markets sometimes cross national boundaries); id. at 345 (affirming that the detrimental effect of antitrust enforcement on investment is small, compared to the effect of other macroeconomic policies); id. at 357 (explaining that antitrust policies must be kept focused on the problem of monopoly pricing); Van Den Bergh, supra note 69, at 366, 371 (viewing competition and competition policy as learning processes, involving trial-and-error and learning-by-doing); id. at 378 (foreseeing the danger that the regulated will capture the regulator over competition.
retain (not privatize) a small public enterprise (or part of a larger one), and use it to regulate from within: many cartel practices cannot be implemented effectively without the consent of all significant firms in the industry, so that a nonconsenting public enterprise will frustrate the operation of a cartel.

The "long-term implications" of this kind of "planning and regulation are relatively uncertain. Consequently, the [hopefully democratic] choice of economic system involves experimentation, together with some degree of willingness to alter the economic system based on the evaluation of outcomes." This wisely pragmatic approach to reform drives home the need for an administrative law planning that is stressed throughout this article, to minimize the disruptions and uncertainties from inevitable shifts in governmental policies. Nowhere is this clearer than in the balance of a regulatory "package" under administrative laws: programs for stimulating the flow of domestic and foreign investment, and the related promotion of relatively safe banks, stock exchanges, and other financial intermediaries; price and trade liberalization; the institutionalization of sensible monetary and fiscal policies; land and natural resource management; environmental protections and other means of controlling the undesirable consequences of public and private policies; and affordable but effective educational, health care, and agricultural service programs.

In a general and already lengthy article, these important reforms will not be detailed for two reasons: most of the relevant recommendations are country- and situation-specific, and important decisions are partly or largely beyond the control of administrators in the new democracies. Key elements in such decisions are taken by the multinational corporations and the international markets and donors that are themselves prone to failure. Some commentators would thus hope for

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81. CONKLIN, supra note 5, at 54-55.

82. See id. at 364-66; Kennedy, supra note 5, at 213; see also CONKLIN, supra note 5, at 9-10 (declaring that price controls should attempt to maintain incentives and efficiencies, while subsidizing the poor or stimulating certain sectors, but black markets, rationing, and the tendency for innovativeness and product quality to deteriorate should be controlled); id. at 367 (discussing JORGE NIOMI, CANADIAN MULTINATIONALS 28-35 (1985) (articulating that capital travels primarily among countries where it is most plentiful, and the power of MNCs tends to arise in uncompetitive markets where technological barriers to entry can be erected)); id. at 368 (finding a need for MNCs and others to adapt foreign technology to smaller markets and a more labor-intensive production); Jayasuriya, supra note 5, at 120-21 (observing that newly industrialized countries were able to treat the Bretton Woods system — that is, IMF, World Bank, and WTO — like free riders, so long as they lack costly welfare safety nets and can maintain a devalued exchange rate — but that this arrangement collapsed over, for example, consumer electronics); Sachs, supra note 7, at 24 ("The basic fiscal problem is often as much one of public confidence in future policies as it is the size of a budget deficit per se"); id. ("[W]orld capital markets are mobilizing project finance of a kind that was unthinkable a few years ago."); id. at 27 ("Surprisingly, international law governing financial flows has evolved less quickly than the rules governing trade."); Watkins, supra note 7 (recognizing that multilateral creditors now account for half
an inspired ad hoc-ery from local administrators responding to external events, under administrative laws that necessarily confer a great deal of discretion. More discretion is obviously needed in these areas, but the absence of legal efforts to channel this discretion towards planned outcomes amounts to a surrender of sovereignty and a democratic accountability over development policy.

Social welfare policies round out this traversal of more specific reform topics. Such policies are as staunchly opposed by advocates of the conservative thesis as they are deemed necessary by most leaders in the new democracies. Having risked what amounts to a revolution, these leaders are averse to the risk of losing office by proving out the incumbents' strongest argument: democratization and privatization will accomplish what socialism and/or traditional practices were designed to prevent, by abandoning the lower strata of society to the mercies of the marketplace. Many "ordinary" citizens, similarly uncertain of their future under a very different political system and economy, will pursue both limbs of the intransitive preference discussed earlier, and thus demand safety nets for those who fall into the many cracks that will emerge during the transition. The poor and powerless will wield their main asset — an active or passive discontent — as best they can, to claim "property" rights in these safety nets and in opportunities to enter the rich people's institutions. A new democracy which defends imperfect markets at all costs is thus in deep trouble, but no Third World or East European government can possibly afford safety nets such as are in place in West European democracies. The likely outcome is thus minimal and poorly funded welfare "rights": to food (dealing with famines effectively, for example), shelter

of the debt repayments from the poorest countries, and the IMF is using "debt distress" to extend its influence; All Free Traders Now?, ECONOMIST, Dec. 17, 1996, at 21 (noting that trade is booming, tariffs average only 3.8% in rich countries, and membership in the WTO is set to grow rapidly); id. at 22-23 (forecasting that future trade problems include liberalizing trade in agriculture and services; harmonizing foreign investment criteria, competition policies, and labor standards; and how to integrate regional trading agreements and China into the WTO); id. at 23 (observing that India, Malaysia, Tanzania, etc. "are eager for foreign investment but want to keep the right to set the terms of entry"); And For Our Next Crisis, ECONOMIST, Apr. 20, 1996, at 65 (collecting articles on Brazil, Russia, and Bulgaria to show that international agencies like the World Bank should do more to assist in the reform of banks and financial systems generally); Emerging Asia's Sombre Era, ECONOMIST, Aug. 24, 1996, at 55, 55 (describing Mexico just before its 1994 "financial melt-down," this analysis characterizes some other countries quite well — "A massive current-account deficit, a crippling foreign-debt burden and excessive monetary growth encouraged speculators"); A Land of Potential, supra note 7 (propounding that the previous President of Tanzania "began to free the economy but lost control of government spending and broke with the IMF and the World Bank two years ago"); The Myth of the Powerless State, supra note 5, at 15-16 (quoted supra notes 5, 68, and 79).

Rohatyn summarizes several interrelated phenomena:

there will be a fierce competition for the capital necessary for economic growth; and capital investors will become more and more choosy and will insist on modern legal and credit systems, political stability, and independent central banks to manage currency. Capital is both nervous and greedy. India attracts investors because of its relative stability and its affinities with Western political and economic institutions. Its stock markets have been booming. However, the huge speculative increases . . . do not mean there will be comparable increases in direct investment necessary to sustain economic growth.

Rohatyn, supra note 22, at 30.
(improving squatter settlements, for example), some health care, and perhaps some unemployment compensation. The goal is to maintain broad citizen support for democratization and development, by giving the credible appearance of concern about citizen welfare.  

V. Rather Social Democratic Conclusions

The conservative thesis is wrong: extrapolating from Adam Smith, the quality of development is deeply dependent on the quality of democracy, as well as vice versa. Yet politics is different from economics. Everyone can be a producer as well as a consumer in a democracy. The hope is that most citizens will learn to exercise a power and responsibility they may not have in their economic lives, to help solve the problems of collective action: to implement thoughtful public policies rather than merely to adjust competing private interests. As David Conklin puts it, "social justice is not incompatible with economic growth, but essential to it. A social organization premised on equity, security, and participation will generate greater productivity than one premised on greed and fear. Collaboration and collective adaptation are coming to be more important ... than are personal daring and ambition." Such a society emerges most readily under careful planning for new organizations and incentives which effectively displace the older, failed ones — through a state which is rather stronger than the liberal democratic

83. See Bietzke, Accountability, supra note 6, at 104, 119, 124; see also CONKLIN, supra note 5, at 54 (arguing that special payments may be necessary in a democracy, to purchase acquiescence by those most hurt by economic changes); TED GURR, WHY MEN REBEL 13 (1980) (suggesting that rebellion is caused by a relative deprivation) ("Societal conditions that increase the average level or intensity of expectations without increasing capabilities increase the intensity of discontent."); WILLIAMSON, supra note 23, at 150; id. at 271 ("Capitalism is prone to undervalue dignity and . . . institutional safeguards can sometimes be forged to help to correct the conditions."); Linz & Stepan, supra note 5, at 22 (discussed supra note 59); supra notes 5-7 and accompanying text; Roe, supra note 6, at 217, 221-26, 240; Michael Wyzan, Increased Inequality, Poverty Accompany Economic Transitions, TRANSITION (online ed.), vol. 2, no. 20 (Oct. 4, 1996) <http://www.ijt.cz/publications/Transition/Features/Feature.V02N20-Wyzan.html> (finding that growth of economic inequality during transitions "may not be as universal or dramatic as often imagined," although the increased visibility of a conspicuous wealth creates a sense of relative deprivation); id. (arguing that the growth in poverty is significant, however, and remedial policies decrease the ability to function under market conditions); supra notes 29-35, 69 and accompanying text. But see CONKLIN, supra note 5, at 87 (arguing that apart from dealing with the effects of discrimination, harshness is best for the poor in the long run; institutionalizing welfare makes poverty an unacceptable way of life, and people abandon the search for work and for improvements in their skills and education) (citing Charles Murray).

84. CONKLIN, supra note 5, at 337; see also DeSilva, supra note 60; Prosser, supra note 10, at 65; Jayasuriya, supra note 5, at 132 (stating that in the 1930s, the "Keynesian revolution allowed social democrats to claim a greater interventionist role for the state while justifying their retreat from struggles over production as such," in a "nationalizing of consumption rather than a socializing of production") (quoting Presawarski); Bhagwati, supra note 3, at 59; Linz & Stepan, supra note 5, at 21 (discussed supra note 77); Roe, supra note 6, at 217, 221-26, 240; Waelde & Gunderson, supra note 6, at 374; The End of a Dividing Line, ECONOMIST, Dec. 21, 1996, Full Democracy Survey at 9, 13; supra notes 3-7 and accompanying text. But see Fatton, supra note 14, at 85 (finding that structural adjustments, dismantling welfare systems, and strengthening property rights and a market rationality often require an authoritarianism to impose).
one countenanced by the conservative thesis. The legal system of a new democracy may thus come to resemble a German *Sozialrechtstaat* over time.85

Mixed private and public economies will persist in the new democracies because privatization will be (and should be) much slower and less complete than the shock therapists hoped, and because liberalization, marketization, and the other aspects of a capitalist development will continue to require some regulatory interventions — of a "lighter" variety than was typically used in the past. Government institutions will remain strong in relation to those of a civil society for some time to come, and citizens in many fledgling democracies will retain a fairly strong egalitarian bias. These factors make social democracy appear as the quickest way forward, from where a country finds itself to where it democratically wants to go. Many officials in nascent democracies share a fear with theorists of the conservative thesis, of the pluralistic, rent-seeking gridlock that prevails under the liberal democratic politics of the special interests seen in the United States. These officials are looking for something very different, and Robert Dahl, a sophisticated commentator on the American scene and certainly no leftist, recommends that they consider adopting the democratic (or social) corporatism found in Scandinavia, Germany, Austria, and Holland.86

85. *See* German Basic Law art. 1 (setting goal of "human dignity," without setting priorities among individual and collective political and economic rights, and treating freedom from the state and freedom through the state as complementary rather than contradictory); Ewald, *supra* note 21, at 2060, 2064; *id.* at 2073 (stating that German legal and political integrity involves treating citizens equally and with respect); Hiatt, *supra* note 2.

86. *See* Robert Dahl, *Social Reality and "Free Markets": A Letter to Friends in Eastern Europe, Dissent*, Spring 1990, at 224, 227; *see also* Richard L. Carson, *Comparative Economic Systems* 26 (1990); *id.* at 83 (arguing that in a mixed economy, markets fill in most of the details and information pooling reduces information costs); *id.* at 547-48 (stating that formerly pursuing a democratic socialism, social democrats are now less interested in nationalizing the means of production because they realize that who owns assets is less important than how they are used); John R. Freeman, *Democracy and Markets: The Politics of Mixed Economies* x (1989) (finding that different blends of collective gain and distributive equity are "determined by the character of state administration, the development and workings of capital markets, the degree of societal disensus over . . . governmental market intervention, and the citizens' willingness and ability to exercise certain public ownership rights through certain political institutions"); Los, *supra* note 14, at 276 (stating that "welfare states" seek to mediate all contracts and to be responsive to all interests); Prosser, *supra* note 10, at 67 (discussed *supra* note 49); Charles Collier, *The Descent of Political Theory and the Limitations of Legal Tolerance* 44 J. Legal Educ. 273, 280 (1994) (stating that "[i]nstead of saying 'Come, let us reason together,'" the pluralism of liberal democracy "says: 'Come, let us bargain together,'" with the implication "that we will never be able to persuade each other"); Edward N. Muller, *Democracy, Economic Development, and Income Inequality*, 53 Am. Soc. Rev. 50 (1988) (finding that a 55-country sample shows that "years of democratic experience . . . have a significant negative impact on income inequality . . . independent of economic development"); *id.* at 65-66 (stating that from 1980 to 1980, 80% of democracies broke down, typically by coup, where income inequality was high, but "only" 34% where inequality was "intermediate," as carefully defined); A Land of Potential, *supra* note 7, at 46 (quoted *supra* note 56).

But see Vaclav Thacher, *The Czech Republic, Economist*, Aug. 6, 1994, at 42, 42 (stating that Czech Prime Minister Vaclav Klaus shows that a fine dividing line exists between a "closet social democrat" and a "consensus-seeking conservative").
No such system is or will be perfect of course, but it offers opportunities to strengthen the institutions of a civil society that were repressed under previous regimes. These institutions could then force government to be more responsive, especially to those citizens who have not acquired an adequate representation through wealth gained in the marketplace. Governance would then proceed through open and formalized consultations, among representatives of governmental and nongovernmental organizations, that aim at long-term agreements over policy priorities. The pressures to achieve a series of agreements brokered by government are fairly strong under such a system. As happened in Japan in a less democratic fashion, short-term pressures would thus be integrated into longer-term structures, although the means of avoiding a Japanese rigidity would also have to be found. Government would act pragmatically to reduce opportunities for conflict and exploitation, and subsequently to guarantee the agreements.\(^{87}\) The main guarantees would be an implementation strategy planned through reforms in administrative law, especially by creating a sensible industrial policy, and through a taming of the citizens' intransitive preference over property.\(^{88}\) The only viable escape from this intransitivity involves democratically agreed-upon restrictions on property rights, restrictions which alter the distribution of wealth to the minimum extent necessary to secure social peace. In other words, a public interest is democratically recognized in some, ostensibly private transactions, and the transactions are limited accordingly.

Obviously, even democratic governments are not always wise, consistent, and detached brokers. Particular groups will sometimes dominate parts of the

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87. See Freeman, supra note 86, at 32; Guillermo O'Donnell & Philippe Schmitter, Transitions from Authoritarianism: Tentative Conclusions about Uncertain Democracies 12, 45 (1986); Wade, supra note 68, at 275, 295, 372, 378; Battling On, Economist, Apr. 18, 1992, at 46; see also Freeman, supra note 86, at 23; O'Donnell & Schmitter, supra, at 46-47 (stating that "a compromise among class interests," based on "the institutionalization of representation rights and bargaining mechanisms," is "crucial . . . to reassure the bourgeoisie that its property rights will not be jeopardized . . . and to satisfy 'others' that their demands for compensation and social justice will eventually be met"); Claus Offe, Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe, 58 Soc. Res. 865, 891-92 (1991) (stating that under a social corporatism, associations, unions, parties, and local authorities should protect each person's representation and negotiating capacity, under a constitution, and, I would add, an administrative law, that renders impossible "exploitative coalitions" or "clans" benefiting at the expense of excluded third parties); id. (finding that people will then adopt cooperative strategies without fear of being played for a "sucker," since "mediating bodies" are "relatively unavailable to opportunistic strategies"). But see Roc, supra note 6, at 235-36 (arguing that such policies make it difficult to fire employees in Japan and Western Europe, and employers are thus reluctant to hire them in the first place).

88. See supra notes 62-65, 68-69 and accompanying text; see also Conklin, supra note 5, at 20 (stating that "all societies are wrestling with the optimal role for collective decision making" by "continually adopting, rejecting, and modifying"); id. at 36 (quoted supra note 66); id. at 264 ("A major issue is how the public interest can best be ascertained, expressed, and included in the decision-making process concerning regulation and regulatory reform."); Pierce et al., supra note 11, at 11 (stating that regulation serves the public interest by curbing market failures and creating a more acceptable distribution of wealth). But see Sunstein, supra note 5, at 93 (finding that the developed countries with weak property rights also have well-developed civil societies, markets, and notions of property).
policymaking process and thus exploit others, and organizations and incentives will sometimes get distorted. Above all, democratic procedures must be zealously safeguarded, so as to forestall an authoritarian corporatism (fascism), where a political leader comes to dominate civil society institutions. There are other, more probable ways for authoritarianism to return to the new democracies, however. Social democracy seems the "least-worst" solution in the real world, particularly for moderating the ethnic and religious tensions that most new democracies face.\(^9\)

Perhaps the most telling criticism of the ambitious kinds of reform I suggest comes from Richard Posner: "asked to do too much," the legal system "fails at everything, including the protection of negative liberties"\(^9\) that is the focus of the conservative thesis. But everything fails if it is pushed hard enough, and reforming too much, too quickly, often leads to the simplistic, poorly thought-out, and rapidly-changing policies that conservatives typically recommend. Like a military campaign, a program of administrative reform can become overextended and vulnerable to attack at its weakest points. I have tried to minimize this possibility by arguing for piecemeal (opportunistic as well as phased) but carefully planned reforms. Such a program will admittedly fail without a great deal of creative thought and a continued commitment to democracy and development, but so will any other means of consolidating democracy. John F. Kennedy observed "that when things are non-controversial, beautifully coordinated and all the rest, it must be that there is not much going on" in government.\(^9\) The vagueness, excessive discretion, and "slack" between stated legal goals and actual administrative behavior, attributed to Eastern European and Third World counties in this article, are also found in much of American administrative law. Reforms similar to those discussed in this article could profitably begin at home.

Democratization is much too complex for the simple and neat formulae of the conservative thesis to have much relevance. Either the leaders in the new democracies must actively improve the "fit" among evolving institutions, rules, and

\(^89\). \textit{See} Freeman, supra note 86, at 80; \textit{see also} Los, supra note 14, at 279 (stating that in addition to guaranteed constitutional rights, social/distributive "rights" are protected as relative entitlements which authorize state intervention); Nino, supra note 29, at 29 ("The contemporary world reveals a sad plurality of failed experiments, as well as some considerable successes, all well short of perfection.") (quoting Neil MacCormick on the "historical constitution"); \textit{id.} at 35, 38 (discussing a "second best" rationality, "a progressive retreat from the ideal model in the hope of bettering the . . . work as a whole," which nonetheless goes beyond Karl Popper's use of "traditions as conditioning factors in gradual social engineering"); Zeev Sternhild \textit{et al., The Birth of Fascist Ideology: From Cultural Rebellion to Political Revolution} (1994); Collier, \textit{supra} note 86 (stating that corporatism opens the door to fascism by passing political power on to "subpolitical groups"); Robert O. Paxton, \textit{Radicals}, N.Y. Rev. Books, June 23, 1994, at 51 (finding that fascists hate "progressive reform efforts" and a "democratic individualism," as destructive of a "heroic grandeur"); \textit{id.} at 52 (stating that room for fascism is limited where conservative elites feel "firmly enough in control"). \textit{But see} Jayasuriya, supra note 5, at 115, 124, 132 (finding that in contrast to the "more inclusionary" model in Thailand, corporatism elsewhere in East Asia excludes labor, is compulsory, noncompetitive, hierarchical, and licensed by the state, in what I would call a proto-fascism). My approach is similar to the new public interest theory described in Croley, \textit{supra} note 9, at 66-75, 105.

\(^90\). Posner, supra note 5, at 5.

\(^91\). \textit{The Kennedy Wit} 52 (Bill Adler ed., 1964); \textit{see also} Huntington, \textit{supra} note 1, at 5.
values as best they can, and fix as many failures as possible, or else they must wait for the possibly inappropriate ("invisible hand") outcomes that will emerge in the long run from doing nothing. The desire for survival in political office and for "a place in history" makes this leisurely option untenable. J.H. Gray argues that "once the fundamental concepts of administrative law . . . are established, many of the complexities of the subject evaporate."92 I have tried to gloss these fundamental concepts, as an alternative to doing little or nothing about democratization and development. The value of this analysis turns on its contributions to a clearer thinking about diverse local circumstances, and about enhancing the capacity to deal with perceived crises in democratic ways.

92. Gray, supra note 32, at 310; see also WILLIAMSON, supra note 23, at 149 (stating that problems are more complex and competence more limited than conservative economists think in public and private sector management); Brietzke, Accountability, supra note 6, at 122; Brietzke, Administrative, supra note 9, at 646; Tiller & Spiller, supra note 27, at 29 (taking an approach somewhat similar to mine, "a first approximation to a complex game").