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The Limits of Globalization and the Future of Administrative Law: From Government to Governance

ALFRED C. AMAN, JR.*

INTRODUCTION

Global processes—be they economic, social, or cultural—affect the roles states play in key regulatory settings at home and abroad. The future of domestic administrative law will be closely tied to the ways in which lawmakers succeed or fail to understand the dynamics of globalization. Global processes are integral to the basic frameworks of politics and markets within which regulatory reforms have developed in the United States since the 1970s and will continue to develop in the future. Such frameworks provide the pragmatic structure within which administrative law now evolves, opening the way to new theories of governance that combine elements of both the domestic and the international.

One of the hallmarks of regulation in the global era has been the shift from state-centered, command-control approaches to market forms of regulation. This trend goes well beyond the use of market incentives in rules issued by administrative agencies. It also includes partial and sometimes wholesale delegation of certain public functions and responsibilities to the private sector. Prisons, welfare, healthcare, and education, as well as

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1. I mark the beginning of the global era of regulation with the advent of various deregulatory reforms in the 1970s and early 1980s. See ALFRED C. AMAN, JR., ADMINISTRATIVE LAW IN A GLOBAL ERA 4, 125-130 (1992) (setting forth three overlapping, yet distinct eras of regulation in the United States).


4. In Carter v. Carter Coal Co., 298 U.S. 238 (1936), the Supreme Court invalidated the Bituminous
municipal services such as snow removal and garbage collection, now often involve the private sector directly in a variety of public/private partnerships.\footnote{See generally Hon. Patricia M. Wald, \textit{Looking Forward to the Next Millennium: Social Previews to Legal Change}, 70 TEMP. L. REV. 1085 (1997).}

Delegation to the private sector represents an important aspect of more general ways in which global processes encourage and accelerate what has been called "third party government"\footnote{See Dr. Lester M. Salamon, \textit{The New Governance and the Tools of Public Action: An Introduction}, FORDHAM URB. L.J. (forthcoming June 2001).} whereby "crucial elements of public authority are shared with a host of nongovernmental or other governmental actors."\footnote{See Symposium, \textit{Redefining the Public Sector: Accountability and Democracy in the Era of Privatization}, FORDHAM URB. L.J. (forthcoming June 2001).} The seemingly borderless nature of telecommunications and intellectual exchange, and the relatively easy flow of goods, capital, pollution, and disease across jurisdictional lines, increasingly requires a global conception of both problems and opportunities. The same fluidity with which borders can be crossed expands the need for cooperation, but also the intensity of the competition likely to occur among governmental entities that are territorially based. For example, private entities, in deciding where to locate their businesses or where to make their investments, can choose among many locations, generating competition among various localities for the jobs and

Coal Conservation Act as an unconditional delegation of legislative power to private parties, specifically large coal producers. The Court stated:

\begin{quote}
The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business...[I]n the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a state which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property.
\end{quote}

\textit{Id. at 311.} As one commentator has noted, the Supreme Court has not invalidated legislation on delegation grounds since Carter Coal, and the private exercise of governmental power delegated by state or local governments has not been a federal constitutional issue since the 1920s. \textit{See David M. Lawrence, \textit{Private Exercise of Governmental Power}, 61 IND. L.J. 647, 649 (1986). See also Whitman v. American Trucking Ass'ns, 531 U.S. 457 (2001) (upholding delegations of authority to EPA). But see Lisa Schultz Bressman, \textit{Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State}, 109 YALE L.J. 1399 (2000); Jody Freeman, \textit{The Private Role in Public Governance}, 75 N.Y.U. L. REV. 543, 584 (2000) ("While the federal judiciary may decline to resurrect the nondelegation doctrine to invalidate delegations to administrative agencies, ... it might still invalidate private delegations in future cases, especially if the delegated authority implicates "core" public powers. A delegation could prove so sweeping that it deprives the executive of its Article II powers, thereby raising a separation of powers concern."). See also Harold J. Krant, \textit{Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government}, 85 NW. U. L. REV. 62 (1990); Whitman, 531 U.S. 457 (Thomas, J., concurring).}

\addcontentsline{toc}{section}{Footnotes}


\footnote{See Symposium, \textit{Redefining the Public Sector: Accountability and Democracy in the Era of Privatization}, FORDHAM URB. L.J. (forthcoming June 2001).}
opportunities for economic growth that certain private actors can help provide. Such problems often require multi-jurisdictional responses.

For state entities to conceptualize problems on a global basis, or to contemplate solutions or actions across domestic and international borders, they must often cooperate with other governmental units or form partnerships with nongovernmental actors that are not similarly tied to any fixed place. The end result of such collaborations is a growing body of international law that seeks to further both mutually beneficial cooperation among states and new forms of domestic and international governance that rely extensively on nongovernmental (private) actors to carry out public responsibilities.

In short, the effects of globalization are not limited to the international level of policymaking and law. The same forces that make cooperation necessary and fuel competition at the international level are at work at all levels of domestic governance. Administrative agencies share issues and approaches through increased contact and involvement. States, municipalities, and local governing units also compete for investments of various kinds in their jurisdictions. They, too, are limited in their extraterritorial powers and must cooperate with various entities—governmental and nongovernmental. The importance of the role that nongovernmental organizations now play at the international level is matched by private actors at the local level. The need to extend international law to some nongovernmental actors is linked to a similar need to understand and, in many instances, reconceptualize the role of administrative law at the domestic level. Private actors can more easily conceptualize and implement solutions for problems without regard to any single territory. This creates an important incentive for cooperation between private actors and states that are eager to solve their problems in an effective and efficient fashion.

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13. For a discussion of how private actors may provide municipal services more efficiently than governments can, due to advantages of scale, see Alfred C. Aman, Jr., Privatization and the Democracy
How one reconceptualizes domestic administrative law significantly depends on how one regards the effects of globalization on law and markets. Public/private partnerships are seen mainly in two ways. One way of seeing such partnerships is as a step away from the state. Increased reliance on markets and the private sector provides opportunities to minimize the role of the state, by emphasizing bright-line distinctions between the public and the private—and by casting the market as essentially voluntary in nature and an end in itself. This is a laissez-faire approach, one that underscores a long-standing debate in administrative law between those who see the role of administrative law as protecting the individual from the state and those who see its role instead as facilitating legislative policies and goals. Another way of viewing public/private partnerships, however, is as an extension of the state. Rather than directly resisting global processes, the delegation of public functions to private actors represents new ways for states to carry out their responsibilities. From this perspective, markets are a form of regulation and not simply the substitution of a wholly private regime for what once was public. Public law values such as transparency, participation, and fairness remain relevant, even though private actors now carry out various tasks that can be appropriately called governmental.

This Article argues that it is important to understand deregulation and privatization as often being extensions of the state, thereby requiring new ways of assuring transparency and public participation. To the extent one views the market, market processes, and private actors more as a means to achieve public goals than as ends unto themselves, a reconceptualization of both how we think about administrative law and how we think about markets and market discourse is required. Administrative law, traditionally conceptualized, deals primarily with the way in which state entities exercise and explain the use of their discretion. It focuses on the means by which executive, legislative, and judicial powers, and various combinations thereof, are allocated to and then exercised by various governmental entities called administrative agencies. Administrative law, like international law, is state-
Markets, on the other hand, involve voluntary arrangements and the private sector. In contrast, globalization processes encourage forms of governance involving new uses of the private sector to achieve public ends. Depending upon how the uses of the market are conceptualized, globalization processes can complicate both the form and the content of democracy. They rearrange the lines between public and private entities and can appear to enlarge the private sector by delegating functions to private forums. They can also insert the state into the private sector in new ways. Globalization thus yields intended and unintended effects on the scenarios in which democratic participation has been traditionally relevant (at least theoretically) within and between nation-states.

Thus, the shift in focus from states to markets and from government to governance is significant. It places in stark relief some of the externalities of globalization, perhaps the foremost of which is the "democracy deficit," sometimes called the "accountability problem." The democracy deficit in globalization arises from a number of factors, most notably the state-centered nature of our domestic public law and a conception of markets that assumes a bright line between the public and the private or, in effect, states and markets. The state-action doctrine, the Due Process clauses coupled with the statutory requirements of the Administrative Procedures Act (APA) and the Freedom of Information Act, the Privacy Act, and other state-oriented statutes, all focus legal attention on actions taken by states and their agencies. The traditional line between public and private, or markets and government, reinforces treatment of these activities as if two very different systems were involved. The procedural and informational requirements of these statutes are largely confined to state actors.

18. Id.
19. See Aman, Privatization and the Democracy Problem, supra note 13 (discussing privatized prisons and the privatization of other traditional governmental services).
20. For an excellent discussion of the various externalities of globalization, see JAN AART SCHOLTE, GLOBALIZATION: A CRITICAL INTRODUCTION 207 (2000).
21. See Alfred C. Aman, Jr., Privatization and the Democracy Problem, supra note 13. See also SCHOLTE, supra note 20, at 261.
The delegation of public functions to private actors bypasses the transparency provided for in these statutes, thereby producing a democracy deficit.\(^\text{27}\) When public functions are carried out by private actors, transparency and participation—the keystones of administrative democracy—often diminish in importance or prominence, as if all markets and private activities were the same. But even if this is not the case, and the state action doctrine is able to reach certain private entities in some contexts,\(^\text{28}\) the public law remedies that apply may not always be appropriate for the governance needs of public/private partnerships.\(^\text{29}\) The mixtures of power that result require new conceptions of the state and administrative procedure, conceptions unlikely to emerge in the context of a judicial proceeding focused on the rights of an individual.

Just as the processes of globalization and the new governance structures that result from them may in some contexts require the extension of international law to nongovernmental entities,\(^\text{30}\) there is also a need for the legislature to “privatize” the APA.\(^\text{31}\) By referring to privatization of the APA, however, I do not mean procedural deregulation for state actors, but the inverse—the extension of various procedural approaches developed for the public sector to the private sector, albeit in new forms, so as to provide greater transparency and accountability by private actors who carry out the public’s business.

I use the APA in large part as a heuristic device—a set of generic procedural principles designed to provide a procedural paradigm applicable to the essential aspects of the governance structures now emerging. Thus, privatizing the APA does not mean we should simply extend the procedural requirement of the old APA in a mechanical fashion. That statute was designed for certain kinds of governmental agencies engaged primarily in

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\(^{27}\) See Alfred C. Aman, Jr., Information, Privacy and Technology: Citizens, Clients, or Consumers?, in FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION 325 (Jack Beatson & Yvonne Cripps eds., 2000).


\(^{29}\) See, e.g., Richardson v. McKnight, 521 U.S. 399 (1997). The Court held that the immunity doctrine should not be extended to private prison guards because “marketplace pressures provide the private firm with strong incentives to avoid overly timid, insufficiently vigorous, unduly fearful, or ‘non-arduous’ employee job performance.” Id. at 410.

\(^{30}\) See Hobe, supra note 10, at 193. See also Karsten Nowrot, Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law, 6 IND. J. GLOBAL LEGAL STUD. 579 (1999).

economic regulation. The effects of globalization, especially the democracy deficit referenced above, necessitate new ways of understanding state sovereignty, and require a reconceptualization of administrative law if such basic features as public participation, fairness, and transparency are to be maintained.

The new administrative law will be more market-oriented, flexible, cooperative, and informational in nature than the adversarial nature of various aspects of the APA. To conceptualize the procedural approaches that are necessary for governance rather than government structures, it is useful to consult some aspects of international law. The various informal ways in which norms are created and enforced at the international level is a useful analogy for the ways in which procedures might apply at the private, domestic level. At the heart of such an approach is information. An information-based approach to administrative law, particularly when extended to the private sector, could help provide transparency without smothering the efficiencies that market approaches to issues might produce.

In short, how policymakers conceptualize globalization will have much to do with how we reconceptualize administrative law. The primary purpose of this Article is to articulate various relationships of the market and administrative law to globalization, with a view towards developing a rationale for a new administrative law that makes it possible to extend public law values to private governance structures. The new administrative law should be one that focuses more on the functions and effects of the power exercised over citizens and less on the definitional criteria by which one might distinguish the public and private nature of the entities that actually exercise that power.

33. See text accompanying note 21, *supra*.
34. Indeed, the judicialization of the APA, especially in the ways in which hybrid rulemaking has evolved as well as various approaches to risk assessment, has led to what some commentators have called "rule ossification." See, e.g., Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59 (1995); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992) (discussing effects of additional required procedures, analytical requirements, and external review mechanisms that impede agencies' ability to implement efficient formal rulemaking). These kinds of approaches and outcomes would not be appropriate for the needs of the more global, flexible approach to procedure envisioned in this essay.
36. Id.
37. An instructive approach to the public/private distinction can be found in Regina v. Panel on Takeovers and Mergers, *ex parte* Datafin, Plc., 1987 Q.B. 815, 846-49 (Eng. C.A.) (rejecting a formalistic
I. GLOBALIZATION AND THE MARKET

Globalization is often confused with homogenization—conceptualized not unlike the Sherwin-Williams paint logo showing paint pouring over the entire globe. There may be some aspects of globalization that do or can reach the entire globe, but this conception of globalization is far too overstated to be of analytical use for purposes of this Article. As I use the term, globalization refers to a multiplicity of extraterritorial activities and their local effects. These effects need not be global in the sense of achieving universal impact. Rather, global processes refer to complex, dynamic, legal, economic, and social processes that operate within an integrated whole, in a manner that ignores territorial boundaries. The integrated whole may be a region or just a part of various jurisdictions that may or may not be contiguous. The scale of the problem or the operation involved is determined not by territorial boundary lines, but by factors such as cost, the scope of the problem involved, or the reach of a particular technology or an economic opportunity envisioned. Factors such as these take precedence over arbitrary jurisdictional boundary lines for decisionmakers—public and private—when it comes to conceptualizing how best to deal with certain problems or how to maximize the potential for new opportunities.

Another aspect of globalization processes is that they involve various multidirectional flows—flows of ideas, images, goods, services, and people, and the communications networks necessary to sustain them. What drives these flows of ideas, goods, and capital, however, may have little to do with states directly. This is because it is difficult for states to exercise power beyond their borders. As a result, the social and economic forces that determine, for example, where and how capital might flow, or labor markets develop, are increasingly denationalized. The end result is a larger role for

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38. See Arran, The Globalizing State, supra note 2, at 780 n.32.
39. Id. at 780-83.
40. Id.
41. See generally ARJUN APPADURAI, MODERNITY AT LARGE 237 (1996). As Professor Slaughter's paper in this symposium shows, these flows also involve governmental actors. See Slaughter, supra note 11.
markets and private actors in dealing with borderless problems and opportunities.

This does not mean that states have no regulatory role to play; but even when they are involved, they are rarely in a position of autonomous power. They usually seek to cooperate with other states and, increasingly, nonstate actors as well, in order to affect policy outcomes within and beyond their own borders. Such collaborations, when applied to problems such as global pollution or human rights, help create a more cosmopolitan body of international law at the global level, one defined by problems and solutions that transcend traditional nation-state interests. The economic and competitive aspects of globalization, however, can also encourage a more state-focused competition to ensure continued or new investment in a particular place. As a result, markets and market processes now play a major role in governance at all levels of government. Markets can be viewed as regulatory tools in environmental contexts, but also as the primary means of winning the global competition for investment and economic growth in a particular place. Indeed, while issues involving ozone depletion or human rights encourage a more cosmopolitan, cooperative approach to law, issues involving the economic growth that comes from the development of new technologies, or the availability of an educated workforce, tend to fuel a more intense and locally-based form of competition between and among various state jurisdictions.

The multidirectionality of the flows of problems and opportunities that characterize globalization requires multilevels of coordinated governance, as all levels of domestic government enter into new relationships. The global nature of some problems necessitates coordinated state, federal, and international approaches to issues, as well as the use of private or nongovernmental actors. Local governmental units also seek to minimize costs by cooperating with other local units or making use of the private sector through privatization of traditional governmental services. How one conceptualizes the relationship of globalization to markets, and their relationship to government, can greatly affect the legal approaches that are available for providing transparency and participation in governance, whether

44. See SCHOLTE, supra note 20, at 143. ("[M]ultilateral policies have arisen in response to civil strife, labor policies, technology standards, industrial subsidies, local environmental protection schemes, and much more. Through multilateralism, as through so much else, globalization has dissolved the distinctions between ‘domestic’ and ‘foreign’ affairs . . .").
45. See Symposium, supra note 7.
it occurs on the local, state, national, or international levels. These relationships of globalization to markets vary from laissez faire at one end of the spectrum to more activist approaches to regulation on the other, where the market is used primarily as a means of accomplishing public-oriented goals, rather than being an end in itself.

A. Laissez Faire and Market Populism

Some commentators and policymakers view markets as the dominant force fueling a new global capitalism.\(^46\) Used in this sense, globalization implies uniformity, or homogeneity, of laws and markets.\(^47\) It suggests, for example, that there are certain products, ideas, or legal provisions that can be marketed or adapted on a global basis. This has a one-size-fits-all premise built into it.\(^48\) This view of globalization sometimes includes the argument that globalization is, in effect, a form of “Americanization” or “Westernization.”\(^49\) Most importantly, this view of globalization often implies a concept of linearity—i.e., these processes are progressing almost relentlessly toward a global market and a high degree of uniformity in laws, culture, and the economy.\(^50\) With such a conception of globalization, the role of the state often merges with markets, making it difficult to distinguish among those situations where the market is truly private and where it is, in effect, a pragmatic means for achieving public ends.\(^51\)

Neoliberal regulatory reforms are very much of a piece with the economic competition this view of globalization promotes.\(^52\) Policies that further market

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47. See HELD ET AL., supra note 43, at 3-5. Held describes this as the hyperglobalist thesis. “For the hyperglobalizers . . . contemporary globalization defines a new era in which peoples everywhere are increasingly subject to the disciplines of the global marketplace[.]” Id. at 2. See also Kalman Applbaum, Crossing Borders: Globalization as Myth and Charter in American Transnational Consumer Marketing, 27 AM. ETHNOLOGIST 257 (2000).
48. Held, supra note 43, at 4 (“For those who are currently marginalized, the worldwide diffusion of a consumerist ideology also imposes a new sense of identity, displacing traditional cultures and ways of life. The global spread of liberal democracy further reinforces a sense of an emerging global civilization defined by universal standards of economic and political organization.”).
50. HELD ET AL., supra note 43, at 4. See also, e.g., GREIDER, supra note 46, at 12 (describing globalization as “a wondrous machine . . . running out of control toward some sort of abyss”).
51. Id. See also THOMAS FRANK, ONE MARKET UNDER GOD 47 (2000).
52. Id. Frank argues that the Republican congressional victory in 1994 was a clarifying intersection of government regulation and economic competition, stating that “democracy was closely related to the holy acts of buying and selling, and that those who try to control the market are therefore setting themselves
goals are affirmatively sought by states, either in an attempt to extend the markets of their own constituents or to attract more investment to their respective jurisdictions. There is often a sense of inevitability attached to such views of globalization, as if the inexorable process of the market cannot be averted. At the extreme, such views of globalization suggest a substantial diminishment of the role of states and state sovereignty in particular. Indeed, some commentators have gone so far as to decree globalization "the end of history."

For many who hold such views, laissez-faire economics and governance inevitably coincide. Markets are given preference to states and the state's primary role is to ensure that markets can develop and thrive. This view of markets and their relationship to globalization emphasizes the competitive aspects of globalization, including a view of law that is skeptical at best. For what some call "the hyperglobalists," markets and the competition they engender, rather than cooperation, are at the basis of approaches to governance at all levels.

Deferring to the market so completely would, in my view, exacerbate the democracy deficit, as public, state-oriented processes of governance give way to laissez-faire economics. But markets also can be seen as substituting for democracy, too, by furthering what Thomas Frank characterizes as market populism. This is a view that sees markets, in addition to being mediums of exchange, as mediums of consent as well. Recalling the 1980s and 1990s, Frank critically describes this approach as one in which

Markets expressed the popular will more articulately and more meaningfully than did mere elections. Markets conferred democratic legitimacy; markets were a friend of the
little guy; markets brought down the pompous and snooty; markets gave us what we wanted; markets looked out for our interests.  

A view of markets as a substitute for democracy makes the public/private distinction meaningless from a procedural point of view. If markets and market choices are equated with political choice, the enlargement of the private sector brought about by denationalization, privatization, and deregulation need not be viewed as a problem. One way of dealing with the public/private distinction is, essentially, to abolish it, making the private sector and the voluntary bases of the market the dominant form of governance.

B. Resistance and Transformation—Markets as Regulatory Regimes

Other perspectives on globalization, however, focus on resistance to global processes. Such approaches assume that global processes can be shaped or influenced by domestic law, if not stopped completely. At one end of the spectrum, such views of government power are almost on a par with beliefs in a laissez-faire market. They assume that, if there is the political will, states can block those aspects of globalization they wish to eliminate. The public/private distinction is best dealt with by extending our view of what is public, to the point that it is almost all encompassing. Some forms of protectionist legislation and anti-immigration legislation reflect such views of globalization and the power of the state.

As noted above, another view of the relationship of globalization to markets and law is premised on the idea that markets are not ends in themselves, but means for carrying out public goals. Markets are not, thus, in opposition to the state, nor are they a substitute for democracy; decisions by

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59. FRANK, supra note 51, at xiv.
61. See Aman, The Globalizing State, supra note 2, at 806-08. See also HELD ET AL., supra note 43, at 5-7. Held describes this view of globalization as "the skeptical thesis." Id. According to Held, "the sceptics consider the hyperglobalist thesis as fundamentally flawed and also politically naive since it underestimates the enduring power of national governments to regulate international economic activity. Rather than being out of control, the forces of internationalization themselves depend on the regulatory power of national governments to ensure continuing economic liberalization." Id. at 5.
62. Id. See also Walter Bagehot, Pat Buchanan's Happy Days, ECONOMIST, Sept. 9, 1995, at 37 (discussing how Buchanan wishes to put a "freeze on immigration"); Marc Sandalow, GOP's Immigration Package Calls for More Fences, Guards, SAN FRANCISCO CHRON., Feb. 11, 1994, at A3 (stating that more than 200 bills were before Congress on anti-immigration stances).
lawmakers to opt for the market need not be equated with laissez-faire economics.\textsuperscript{63} The market can be a powerful regulatory tool. Market approaches to problems create incentives that can lower regulatory costs and, at the same time, encourage public interest outcomes. Markets take on a greater prominence at both international and domestic levels of government, but not because of a philosophical decision to cede power to the private sector, as if this were a zero-sum game between “the public” and “the private.” Rather, the market and private actors are more prominent because they can approach problems without the limitations of arbitrary, territorial boundaries imposed on them. Market discourses represent a pragmatic language that is easily understood by many actors within and outside various jurisdictions, precisely because they can blur the differences between such opposed positions.

For similar reasons, denationalization often results in privatization or varying degrees of deregulation at state and local levels of government. The intensity of the global competition associated with the now borderless nature of many industries, or components of those industries, increases the closer one comes to the actual sites of these plants or operations. This is because these are the locations where taxes are paid and local residents employed, thereby bolstering local economies. The competitive edge, or what I have elsewhere called the global currencies\textsuperscript{64} used to compete effectively in a global economy, often consists of the cost-effectiveness and the competency of the services provided by government. Privatization of some of these services may save money and increase the level of service. What may appear to be a choice of the market over the government is, in many circumstances, a choice that reflects the economies of scale that a private actor, not bounded by territory, can realize when providing the service in question. The more cost-effective government is in providing services, the more competitive it will be in attracting new investment to that particular jurisdiction.

Contrary to the claims of some skeptics who wish to wall out global forces entirely, globalization simply does not involve the kinds of externalities that domestic law can directly control. Still, this does not mean that global forces cannot be shaped to enhance local goals. There is nothing inevitable about global processes and their outcomes.\textsuperscript{65} Global processes can create

\begin{itemize}
\item \textsuperscript{63} See Aman, The Globalizing State, supra note 2, at 808-12.
\item \textsuperscript{64} See Aman, Privatization and the Democracy Problem, supra note 13.
\item \textsuperscript{65} See HELD ET AL., supra note 43, at 7-10. Held describes this point of view as ‘transformationalist.’ According to Held, transformationalists make no claims about the future trajectory of globalization; nor do they
\end{itemize}
transformative opportunities for domestic law. Global forces merge the global and the local into one complex modality through various communities—legal and civil society—and their reactions to new possibilities and challenges. Equating globalization and homogenization similarly misses the point. As public functions move to the private sector and jurisdictions compete for investment, jobs, and economic development, globalization is the net effect of the responses of individual legal regimes. Further, globalization is not a simple one-way process, but is rather a rubric for the many sites where public/private partnerships are encouraged, modified, or transformed. The future of administrative law is, I believe, inextricably tied to the ways in which our legal system reacts to such global forces; in sum, globalization is not a linear process.

In Part II, I examine administrative law and its future in light of these different approaches to globalization, especially a transformative approach to global processes. I argue that the primary purpose of a new administrative law is to mitigate the externalities of globalization, in particular, the democracy deficit, by facilitating the flow of information from the public and the private sectors. Information can help create an informed citizenry and more effective governance. This is best accomplished by an approach to the public/private distinction that focuses primarily on the nature and function of the power relationships between public and private actors.

II. GLOBALIZATION AND ADMINISTRATIVE LAW

Administrative law has long involved a debate involving the appropriate governmental role in the market. The basic questions of when and how the government should intervene in the market have traditionally been at the heart of differing conceptions of administrative law. One traditional conception of administrative law has, as its primary purpose, the protection of the individual from the state; another involves a more facilitative role, one that sees the role of administrative law as implementing various governmental programs. The seek to evaluate the present in relation to some single, fixed ideal-type globalized world, whether a global market or a global civilization. Rather, transformationalists emphasize globalization as a long-term historical process which is inscribed with contradictions and which is significantly shaped by conjunctural factors.

Id. at 7.
66. Id.
more one distrusts governmental intervention, the more procedure may be used or overused to protect individuals—the so-called "red light" approaches to administrative law. The more political support there is for the substance of democratically enacted legislation, the more the procedure focuses on implementation (and less on the protection of individual rights). 68 Notwithstanding a large middle ground between these two conceptions of administrative law, laissez-faire markets and market values are closely tied to red light approaches to administrative law.

Quite apart from philosophical differences over the appropriate role of governmental intervention, the APA itself embodies two distinct procedural approaches that reflect these very different starting points on the role of government—the provisions for adjudication 69 and those for informal rulemaking. 70 The adjudicatory provisions of the APA, when properly triggered, provide the individual many of the procedural protections historically found in federal and state courts; informal rulemaking proceedings, however, were clearly designed to implement legislation in ways that were not unduly complex or burdensome. Indeed, section 553 rulemaking was once described by Professor K.C. Davis as "one of the greatest legal inventions of modern government." 71

The judicialization of administrative procedure has been a persistent trend in administrative law over the years. 72 Judicialization has gone well beyond the development of adjudicatory procedures and their use when informal rulemaking would suffice. Informal rulemaking itself has become so proceduralized as to spawn a literature that refers to such issues as rule ossification. 73 Various forms of risk-benefit assessments have been imposed, often in such demanding and complex ways as to justify criticism of the administrative process as a form of "paralysis by analysis." 74 Indeed, given the complex and excessive costs that over-proceduralization can cause, deregulation takes on added force as a regulatory reform. If substantive results are impossible in any event, why not give the market a chance? But the complexity of procedural approaches to various regulatory issues is often a

68.  Id.
70.  5 U.S.C. § 553 (2001). See also Shapiro, supra note 32, at 453.
73.  See Pierce, supra note 34, at 60-66.
sign of fundamental disagreement over whether there should be any regulation at all. If there is no political consensus in favor of eliminating certain substantive regulations, for example, laissez-faire procedures can prevent their future effectiveness without repeal. This kind of procedural approach to administrative law is of a piece with a conception of globalization based primarily on markets as being ends in themselves.

A more pragmatic view of globalization as a series of transformative public/private partnerships, however, provides the scope to broaden the purposes of administrative law by moving past long-standing, state-centered debates between government and the market. Rather than the either/or debates of the market versus the state, coded as private versus public, I advocate approaching globalization from a standpoint that regards markets and market forces as forms of regulation. Thus, possibilities for transformation turn very much on how markets are produced under globalization and how globalization yields new law. As I argue in the following sections, neither the laissez-faire nor the resistance models of globalization do much to advance the traditional debate in administrative law between government and the market. Understanding globalization in a transformative way, however, suggests that states, because of their own territorial limits, must operate in new ways, partnering with private and public entities alike. Such a conception of globalization can help us understand the uses of the market as an integral part of governance, not as an abdication of the public's role. This approach raises questions about the purposes of administrative law, creates opportunities to broaden its scope, and deepens the debates about its role beyond the either/or notions of market versus state that have been so prevalent in the past.

A. Laissez Faire, Resistance, and Administrative Law

A minimalist regulatory approach is one way of leveling the playing field, thereby minimizing regulatory competition and maximizing economic efficiency. Even a pure laissez-faire market approach, however, would recognize a place for law on both the international and domestic levels of governance, but this would be largely in the creation of the property rights that are necessary for markets to operate freely. From an administrative law

75. Both models may be appropriate for some issues and I do not wish to suggest that state centered administrative law is not or should not be important; nor do I wish to suggest that sometimes pure market approaches may not be appropriate.

perspective, the best kind of procedure would be no procedure at all, except, perhaps, for that provided by the common law. Private markets would rule. True deregulation, in the form of privatization as opposed to simply less regulation, would be in order. Deregulation at the agency level requires processes to achieve this outcome; however, once markets are substituted for regulatory regimes, there should be little or no need for the kinds of processes that are associated, for example, with the APA. Market incentives and disincentives would be paramount. If substantive regulation is necessary, it would be limited to antitrust.

An administrative law tied to this kind of across-the-board market approach to governance would emphasize bright-line distinctions between public and private law and between public and private sectors, while striving to enlarge the private sector and shrink the public sector. Market populism would fit easily within this model and privatization of all kinds could be seen as establishing markets and market approaches as ends in themselves, rather than as part of an ongoing governance process designed to achieve common public interest goals.

On the other hand, an administrative law premised largely on a globally skeptical point of view would essentially be status quo ante in its orientation. This is especially true if state-centered resistance legislation is enacted or contemplated. As for the hyperglobalists, a bright line would exist between the public and the private for those wishing to resist global forces, but the public sector would be expected to continue to play an active, regulatory role and to expand, if possible. At one end of the skeptical or resistance to globalization spectrum is the firm belief of some advocates that the state can resist global forces and the changes that derive, for example, from free trade.

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77. *Id.* at 605-10. There may be some contexts, however, in which the common law is not enough. *See id.* at 367 ("Pollution, for example, would not be considered a serious problem if the common law remedies, such as nuisance and trespass, were efficient methods of minimizing the costs of pollution.").


80. This is what was lacking in airlines. *See Alfred E. Kahn, Deregulatory Schizophrenia*, 75 CAL. L. REV. 1059 (1987).

81. *See, e.g.*, Steel Revitalization Act, H.R. 808, 107th Cong. (2001) ("A bill to provide certain safeguards with respect to the domestic steel industry."); H.R. Res. 16, 107th Cong. (2001) ("Calling on the President to take all necessary measures to respond to the surge of steel imports resulting from the financial crises in Asia, Russia, and other regions, and for other purposes.").

82. *See Uruguay Round Agreements of the Gen. Agreements on Tariffs and Trade: Hearing Before
or relatively open borders when it comes to immigration. At the other end of the spectrum, a skeptic may accept globalization, but resist free trade agreements that do not forcefully require a leveling up of environmental protection and wages. Skeptics might also resist so-called fast-track legislation on the grounds that free trade treaties need more, not less, political scrutiny to ensure the inclusion of fundamental political values such as fair wages and a clean environment.

In short, global skeptics have a strong-state view of globalization. They believe globalization can be resisted if there is the political will to do so, but process remains crucial in all attempts to harmonize or coordinate regulatory approaches across the board. It is also important when market proponents seek to deregulate or privatize segments of the economy. The administrative law that results under conceptions of resistance will likely be similar in focus to the roles administrative law has always played. In various deregulatory settings, for example, administrative law would emphasize the kind of procedural role usually reserved for the protection of individuals from the state, by making it as procedurally complex to deregulate as the pro-market forces make it to regulate in the first place. In short, such a conception of administrative law would seek, at a minimum, to maintain, if not expand, the public side of the public/private distinction.

B. Transformative Administrative Law

A third approach to understanding the relationship of globalization and law discussed above focuses on the transformative nature of globalization. Global forces and processes leave considerable room for domestic legislation. An approach to administrative law that focuses on the interchanges between domestic and external actors, as well as public/private partnerships, should concentrate on the need for transparency and participation. For example, the public and private aspect of the partnerships between the government and the private sector place a premium on the law's ability to provide for participation in, and accountability with respect to, some of the decisions made by the private sector. A transformative sense of globalization would not necessarily

83. See Bagehot, supra note 62.
84. See Nader, supra note 82. Nader argues adamantly that free trade agreements will stand in opposition to the environmental protectionist goals of the American citizen. Id.
85. See Aman, The Globalizing State, supra note 2, at 803-08.
view the privatization of public services such as prisons or the determination of welfare eligibility as a return of those activities to the market. By focusing on the public functions of the enterprises plus the power relationships between the companies and the individuals involved, public law protections may be extended to these private entities.86

The new administrative law will often deal with technologies that are global in nature, such as various forms of information technology. The issues involved—whether they be privacy and data protection or global climate change—are transnational in scope, particularly with regard to the so-called line between public and private and to the need for transparency and participation.

A transformative approach sees the transjurisdictional possibilities at the state and local level in terms similar to those at the international level, whether we are dealing with global technologies or the privatization of local services. For example, decisions to opt for privatization of prisons or snow removal are part of the same kind of global framework that exists at the international level. The markets for such services need not be seen as private, but rather as a means of carrying out a public responsibility.87 Issues of scale drive economic competitions between and among jurisdictions within a single country or region, and necessitate the ability to think across jurisdictional lines, even though such issues are local and not transnational. This, however, does not minimize the need for public input. The public/private nature of the partnerships involved, and the global, transjurisdictional aspects of many of the technologies, problems, and opportunities involved, necessitate flexible, efficient, procedural approaches premised on the need to provide information to citizens.

Still another legal aspect involved in a transformative approach to administrative law is the fact that many legal forums of governance operate at the same time. Various levels of government must interact and cooperate with each other in order to grasp new understandings of the market, the role of the private sector, and the degree to and ways in which the state might be involved. For example, effective environmental law regulation often requires coordination and cooperation at the local, state, federal, and international levels.88 The basic principles of the APA remain relevant for these emerging

86. For a more detailed discussion of how the APA could be changed to reflect such developments, and of the role that some approaches to international law might play, see Aman, Privatization and the Democracy Problem, supra note 13.
87. Id.
88. See, e.g., Margaret Brusasco MacKenzie, European Community Law and the Environment, in
multilevel governmental and multi-market paradigms; however, the procedural questions involved can no longer be answered solely by the classic green light/red light approaches to administrative law.\textsuperscript{89} The role of law must now be constructed in a way that is not focused on the state alone—either protecting citizens from it or furthering its direct purposes. Given the fact that public/private global issues can often be hidden from view,\textsuperscript{90} a primary purpose of the new administrative law is to provide the information necessary for citizens to hold both the government \textit{and} the private sector responsible for their respective actions.\textsuperscript{91}

Understanding the need for transparency and participation, and the role that administrative law can play in that regard, is important because the use of some markets should not be viewed simplistically as a return to the private sector. Globalization means that market failure and success travel the same routes. For example, privatization of social services is different than the deregulation of communications.\textsuperscript{92} Advances in technology may now make competition possible in cable television, whereas privatization of services such as prisons is based more on the high cost of those obligatory public responsibilities. As already noted, markets do not substitute for or displace regulation, but rather achieve public interest ends in their new so-called private settings.

To emphasize the public character of privately run institutions such as prisons is not to suggest that the kinds of procedures developed in the APA or applicable under the Due Process clauses are necessarily appropriate or sufficient.\textsuperscript{93} The fact that a private entity is more public than private (thereby, perhaps, justifying the extension of the Constitution), is not by itself procedurally sufficient for the new public/private paradigms that are now emerging. This is particularly the case when our focus is on democracy, transparency, and public participation as well as individual fairness. For citizens to have the information that is necessary to make public participation

\begin{itemize}
\item \textsuperscript{89} See Harlow & Rawlings, supra note 15.
\item \textsuperscript{90} For example, the privatization of traditional governmental services is often based on the premise that, in the implementation of such a contract, administration and policy making are separate. This is seldom the case. See Mark Aronson, A Public Lawyer's Responses to Privatisation and Outsourcing, in \textit{The Province of Administrative Law} 40, 56-58 (Michael Taggart ed., 1997).
\item \textsuperscript{91} Increasingly, this must mean new conceptions of citizenship, including global citizenship. For a collection of articles concerning this subject, see generally Symposium, \textit{The State of Citizenship}, \textit{7 Ind. J. Global Legal Stud.} 447 (2000).
\item \textsuperscript{92} See Aman, \textit{Privatization and the Democracy Problem}, supra note 13.
\item \textsuperscript{93} Id.
\end{itemize}
meaningful, transparent decisionmaking is necessary. Whether the
governing unit is public or private is not as important as the power
relationships involved and the nature of the tasks being performed.

A transformative sense of globalization requires that we imagine a new,
fundamental purpose for administrative law, one that goes beyond the market
or the government. That new purpose will include, at a minimum, the need to
facilitate the flow of information that is necessary to create the kind of politics
that will make effective governance and government possible, whether the
actors involved are public or private. The relationship of the citizen to the
state has long been a central tenet of administrative law. For that relationship
to be meaningful, the citizenry must be informed and active and public/private
relationships must be included.

In short, the various relationships of globalization to markets set forth
above imply very different views on the question of what the role of
administrative law can and should be. With a transformative approach to
administrative law, the line between the public and the private is blurred at
best. Public/private partnerships, new forms of collective action, and
imaginative ways of solving community-wide issues are embraced. Rather
than take the public or, especially, the private sector as a given, a
transformative approach looks to the functions being performed to determine
the public or private nature of the actions involved. As a result, one of the
principal aspects of an approach tied to this conception of globalization is the
recognition of the need to extend administrative law protections, albeit
creatively conceived, to what was once seen as the private sector.

Other key aspects of the new administrative law that can emerge from this
perspective are coordination and flexibility. They stem from the
transjurisdictional nature of the problems involved. These procedural
attributes are necessary because much of the relevant regulation is based on
markets, but the markets are themselves a means to achieve public goals. They
are regulatory devices, part of the repertoire that policymakers, both
public and private, now employ. As such, markets and the discipline and
incentives they entail should be subject to techniques that encourage

94. For an in-depth discussion of the history of public participation, or the lack thereof, in trade
negotiations, see Brian J. Schoenborn, Public Participation in Trade Negotiations: Open Agreements,
Openly Arrived At?, 4 MINN. J. GLOBAL TRADE 103 (1995). See also Kal Raustiala, The "Participatory
95. For a discussion of different kinds of markets and matching forms of democracies, see Aman,
Privatization and the Democracy Problem, supra note 13.
accountability and participation. At the same time, the flexibility and efficiency they promote must, to the extent possible, be preserved.

CONCLUSION

All three of these conceptions of globalization—the market, the state, and a more transformative combination of the two—can and often do overlap in various ways. The development of domestic administrative law may embody more than one conception and, at times, all of them. But the more we mix public and private and create various hybrid entities that rely on private structures, private ordering, and private groups to carry out public goals, the more we move from an administrative law focused on government to one that seeks to facilitate governance, whether in the public, private, or public/private sectors.

Though the private sector has long played an important role in conceiving and carrying out governmental policies, the processes of globalization now require new ways of understanding its role and the new role that administrative law must play if such basic values as participation and transparency are to remain significant in the future. The days in which administrative law was focused solely on the government are over. The interplay of markets, rules, and private and public actors requires not only less regulation of some markets and industries, but more accountability of and public participation in the policy outcomes that are presently delegated to markets. For this to occur, administrative law must now adopt as one of its primary purposes the creation of the information flow that is necessary to hold both governments and private actors accountable. In so doing, we must transcend outmoded analyses that seek to label entities as either public or private and focus instead on their functions and the procedures that are necessary to ensure a vibrant democracy.