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GETTING FROM HERE TO THERE

CYNTHIA R. FARINA*

The final lines of *Paradise Lost* describe Adam and Eve finding themselves, for the first time, in the world that lay beyond the bounds of Paradise:

> They looking back, all th' eastern side beheld
> Of Paradise, so late their happy seat . . .
> Some natural tears they dropped, but wiped them soon;
> The world was all before them, where to choose
> Their place of rest, and Providence their guide:
> They hand in hand with wand'ring steps and slow,
> Through Eden took their solitary way.[1]

After reading Professor Edley's and Professor Sunstein's Articles against the backdrop of their recent books,[2] I know how Adam and Eve must have felt. Closed forever behind us is what we legal thinkers are wont to regard as paradise: the familiar realm of detached objectivity, abstract reasoning and neutral principles, the comfortable regions of procedure rather than substance, courts rather than legislators or bureaucrats, and law rather than politics. Ahead lies a wild unknown world that demands of us explicit choices among values, an understanding—obtained through the labor of our hands—of the way things "really" are, and a wrestling—by the sweat of our brow—to make them what we want them to be.

Milton's genius in *Paradise Lost* was in urging us to reconceptualize what had traditionally been understood as a tragic fall from grace, and to view it instead as a challenge needful to, and worthy of, the human spirit. The genius of the scholars of the "new public law"[3] is that they urge upon us a similar conceptual shift. At a time when much of administrative law, as traditionally understood, threatens to become at best irrelevant and misguided, and perhaps affirmatively harmful, they invite us to rethink the nature of the enterprise as well as our ability to contribute to

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1. J. MILTON, PARADISE LOST 280-81 (S. Elledge ed. 1975).

2. C. EDLEY, ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY (1990); C. SUNSTEIN, AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE (1990).

3. Affirming the existence of the "new public law" is easier than describing its contours. *See Symposium: The New Public Law*, 89 MICH. L. REV. 707 (1991) [hereinafter *Symposium*]. The creation of a canon of "new public law scholars" is a disputatious enterprise, *see* Eskridge & Peller, *The New Public Law Movement: Moderation as a Postmodern Cultural Form*, 89 MICH. L. REV. 707, 737-38 (1991), but Sunstein and Edley would surely appear on any such list.

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it. They tantalize us with a vision in which law, lawyers, and legal scholars can play a central role in defining and achieving what we as a society want to be. Like Milton's protagonists, we find the world all before us, and we are at once exhilarated and afraid.

I wholeheartedly embrace the project that Professor Sunstein calls the study of administrative substance[4] and Professor Edley describes as "the elaboration and application of principles of sound governance."[5] In this Comment, I focus on several aspects of how this project is to proceed. Specifically, I consider four general questions that encompass a miscellany of hopes and concerns about getting from where we are to where we want to be:

How are we going to do this?

Who is going to be our audience?

What must we be prepared to supply?

Where should we look for guidance and inspiration?

I. How Are We Going To Do This?

By any measure, the task before us is a formidable one. Professor Sunstein argues that we must "explore the real-world consequences of regulatory programs, the values and commitments that do or should underlie those programs, and alternative mechanisms to promote the goals of regulation while minimizing the risk of regulatory failure."[6] Professor Edley perceives the following as symptoms of the crisis in governance: slothful or misguided public institutions; a lack (or even loss) of progress in education, crime, poverty, and discrimination; a decline in electoral participation; and a loss of faith in democratic institutions.[7] Both Articles set forth a wide-ranging descriptive and normative agenda that begins with extensive empirical observations, proceeds through analysis both closely reasoned and broadly informed, and aspires toward values self-consciously selected and justified.[8]

The scope and ambition of the project is breathtaking—so much so that I worry whether lawyers (or even legal academics) can hope to do such things. How does our training prepare us to understand, let alone

4. *See* Sunstein, *Administrative Substance*, 1991 DUKE L.J. 607, 607-11.

5. Edley, *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 562; *see also* C. EDLEY, *supra* note 2, at 213-64.

6. Sunstein, *supra* note 4, at 645-46.

7. *See* Edley, *supra* note 5, at 564-65.

8. The emphasis on empirical exploration and the explicit focus upon questions of values are hallmarks of the new public law scholarship. *See generally Symposium*, *supra* note 3 (describing "new public law" scholars' rejection of "positivist" or "objectivist" epistemology, to embrace instead the view of law as socially constructed).

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unsnarl, these factual and theoretical complexities? The descriptive part of the undertaking calls for a competence in data collection and interpretation that we associate with the psychologist, the anthropologist, the sociologist, or the political scientist; the normative part enters into the province of the philosopher, the economist, and the historian. Yet the only one of these disciplines in which any appreciable number of legal academics have any training is economics. I am apprehensive that, in this circumstance, we will come to believe that economics is the only tool we need. The temptation is, in part, that it is often the only tool at hand; but the pull is deeper than mere expediency. Self-confidently bridging the gap between the "soft" and the "hard" sciences, economics holds out the promise of imposing upon the unruly mass of human behavior the rigor of a scientific system. Plotting out the path of rationality, efficiency, and welfare maximization, it finesses the line between description and prescription. In its neutral, detached, and technocratic certainty, economics lures legal thinkers in a way few other disciplines can.

Yet we have good reason to suspect that economics (at least when pressed into service as an aid to reform legal and political institutions) is not neutral. In his sympathy for the goals of much social regulation, Professor Sunstein is unusual among legal scholars of the economic bent. The charges that he so painstakingly sets out to answer—that such regulation "amounts to unjustified paternalism or public meddling in private affairs"[9]—are leveled principally by his fellow law-and-economists. The link between economics and the libertarian vision of the night watchman state may not be inevitable, but any world-view peopled with *Homo economicus*—the egotistic, rational preference-maximizing actor—will find it hard to admit the possibility of public-regarding political action.

I do not mean to deny the role of economics in the project of creating the new public law. If we are to make real progress in combating poverty, pollution, crime, housing shortages, and the host of other pressing social problems, we must understand the economic implications of governmental action. And I surely do not mean to denigrate Professor Sunstein's work in justifying regulatory programs in market terms.[10] The market is, for better or worse, a powerful component of our current ideological framework; if mandatory recycling,[11] or protection of endangered species,[12] can be defended in terms responsive to this ideology, one fewer progressive social program will require defense in some other fashion. The problem arises from allowing the ideal of the market and the

9. Sunstein, *supra* note 4, at 609.
10. *See id.* at 631-42; C. SUNSTEIN, *supra* note 2, at 48-55.
11. *See* Sunstein, *supra* note 4, at 620.
12. *See id.*

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rhetoric of efficiency to become our exclusive (or even our principal) way of defining, or defending, our value choices. I see three principal dangers here.

First, the power of economic justifications for regulation diminishes as those explanations proliferate. If "market failure" comes to seem the rule rather than the exception[13]—because of collective action problems, prisoners' dilemmas,[14] the adaptive quality of preferences, or the underproduction of information or opportunities—adherents of the market will begin to experience considerable cognitive dissonance. Is there really a "there" there? The easiest resolution of this crisis of faith will be to reject, or at least heavily discount, assertions of failure.

Second, many core progressive programs are difficult for even the most sympathetic and sophisticated theorist to justify in market terms. Despite Professor Sunstein's assurances, wealth redistributive programs such as Aid to Families with Dependent Children (AFDC)[15] are *not* "easily defended"[16] in a "system that prizes (as all systems should) private property, freedom of contract, and other voluntary arrangements."[17] Professor Sunstein is not blind to these problems. His defense of regulation draws upon democratic aspiration as well as market remediation.[18] But because this alternative mode of justification also rests upon the ideal of autonomous actors realizing themselves through unforced choices,[19] there remains a real and unresolved tension. The new property that is being redistributed through social welfare programs to *some* citizens was formerly the private property of *other* citizens; the line of consent to this transformation is often so attenuated as to be mythic.

Finally, even in areas in which market justifications for regulation seem strongest and most adequate, the economic cast of mind can lead the most sensitive economic theorist to skew the assessment of the interests at stake. Consider, for example, the proposition that anyone who

13. *See* Edley, *supra* note 5, at 599.

14. A "prisoners' dilemma" is a game theory situation in which two prisoners find it rational to "rat" on each other, although they would both be better off if they could trust each other to remain silent—that is, "choices that are individually rational become collectively disastrous." D. FARBER & P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 36 (1991).

15. 42 U.S.C. §§ 601-615 (1988).

16. C. SUNSTEIN, *supra* note 2, at 55.

17. Sunstein, *supra* note 4, at 622. Such programs have been attacked by several prominent market-theory libertarians. *See, e.g.*, J. BUCHANAN, LIBERTY, MARKET AND STATE: POLITICAL ECONOMY IN THE 1980S, at 178-85 (1986); R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 306-29 (1985).

18. Sunstein, *supra* note 4, at 620.

19. *See, e.g., id.* at 620 & n.56; *see also id.* at 620 (defending regulation as facilitating choice).

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wishes to pollute ought to pay to do so.[20] Forcing someone who proposes to inflict harm to internalize the full costs of that harm seems unexceptionable as a general regulatory principle. Nevertheless, even if we were completely confident of our ability to set the right price for licenses to pollute, there may be good reasons why we should hesitate to adopt this as our standard regulatory paradigm. Consider, for example, two hypothetical statutes:

> A: "You are forbidden to poison your neighbor's drinking water. If you do so, you are subject to criminal prosecution and a fine of $50,000."
>
> B: "If you want to poison your neighbor's drinking water, you may buy the right to do so for $50,000."

To the economist, these statutes might be effectively identical (or could be made so if the fine in Statute A is enhanced to account for the costs of undergoing prosecution and discounted to reflect the likelihood of being caught and convicted). But a society that adopts Statute A as the expression of its public policy is likely to be a very different place from the society that expresses its values in the form of Statute B—just as the society that justifies its rape laws on the ground that the subordination of women is unacceptable is very different from the society that punishes rape to protect the marriage market.[21] Until the day on which most citizens think about their world in economic terms, Statute B may well stand as the normative statement: "It is acceptable for one person to harm his neighbor as long as he's willing to pay for it." It may well seem the ultimate commodification of human life, the public codification of one morality for the rich and another morality for everyone else.[22] A way of thinking that overlooks the real (even if intangible) "costs" of such a regulatory strategy dangerously skews our search for values from the outset.[23]

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20. *See id.* at 634.

21. *See* Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1862-63, 1879-81 (1987).

22. *See generally* S. KELMAN, WHAT PRICE INCENTIVES?: ECONOMISTS AND THE ENVIRONMENT (1981) (critiquing the use of economic incentives in environmental policy).

23. Professor Sunstein acknowledges these concerns by suggesting that the pay-for-permission strategy should not be used when the "right level" of the harmful conduct is zero. *See* Sunstein, *supra* note 4, at 635. This is a helpful start, but I believe his suggestion needs to be carried further, and in a different direction.

If a permit scheme is inappropriate in such circumstances, the reason is not the instrumental argument that "[s]uch a strategy would be inconsistent with the underlying goal of eliminating the conduct altogether." *Id.* The goal of eliminating conduct requires (as a matter of instrumental rationality) only that the license fee be set high enough to be prohibitive and that the permit requirement be vigorously enforced. By the same token, the strategy of an outright statutory ban is not instrumentally irrational whenever the right level is "well above zero," *id.*; statutes can (and do) ban greater than a specified level of conduct.

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If we are going to succeed in discovering the societal values through which all citizens can flourish, and the public institutions through which power can be directed wisely and responsibly towards those ends, we must resist the mesmerizing, reductionist power of the economic model. In our efforts to understand "the incentive effects of regulatory initiatives,"[24] economics must take its place beside, not ahead of, psychology, anthropology, sociology, and history. In our attempt to use "government to promote democratic aspirations and economic welfare,"[25] economics must share the stage with moral philosophy, political theory, ethics, and literature.

This brings me back to my apprehension about whether we who are trained in law can do what is necessary to create the new administrative law. If we are going to draw, as we now must, on the full range of human knowledge about ourselves and our world, we will have to develop very different habits of mind. We think we have escaped the Langdellian elitism of law as an autonomous discipline. However, our engagements with other disciplines remain, at the core, imperialistic. We invade other fields of knowledge, expropriating bits of wisdom we fancy;

If the "right level of conduct" *is* relevant in deciding whether to use a pay-for-permission strategy, the reason is that our judgment about how much of the harm is tolerable might reflect our judgment about the nature and significance of the values at stake. For example, we may judge the right level of assault to be zero because we are (or want to be) a society that holds life and physical integrity very dear. If so, then a regulatory strategy that controls the incidence of assault through a license requirement would be inappropriate *even if the result were a lower assault rate* (because the fee were astronomical and the enforcement draconian) *than that obtainable through a conventionally enforced criminal law.* The problem is not instrumental irrationality; the problem is the disjunction between the initial social value judgment ("injuring another person is wrong") and the ultimate codification as public policy ("failing to pay before you injure another person is wrong").

But even this explanation does not fully get at the problem because it falsely implies that meaning is independent of expression. The *way* in which a society formally articulates its values determines (at least in part) the *content* of those values. To prohibit *failing to pay* before assaulting is to redefine the wrong—and thus to reformulate what it is that we value. Consider Professor Sunstein's response to my hypothetical statutes. He apparently would consider Statute B, allowing "those who assault or poison others . . . to do so merely by paying a fee," *id.* at 635, as inappropriate. Yet why does that statute seem so obviously unacceptable when he apparently would approve another statute that allows a glass manufacturer to discharge lead and chromium into the water supply as long as it first buys a license? Perhaps because the presence of the heavily value-laden word "poison" enables us to recognize immediately the normative redefinition that occurs in Statute B—a recognition that comes harder in the case of the less highly charged label "discharge of pollutants."

The normative question entailed in pay-for-permission strategies is: Should we allow this sort of redefinition to occur? I do not suggest that overt commodification is inevitably an inappropriate regulatory strategy. (I say "overt" to acknowledge that, for those who have internalized the economic way of thinking, even the form of an outright statutory ban may be understood as commodifying the conduct, if the sanction—read as "price"—for noncompliance is a monetary fine.) Rather, my concern is that, because the economic way of thinking is insensitive to the "costs" of commodification, we may not even ask the question.

24. *Id.* at 645.

25. *Id.*

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we hire their sages to be our expert witnesses or our adjunct lecturers. We are careful to retain control; when we do implicate law with other disciplines, we emphasize the law, and deemphasize, for example, economics or sociology. Thus, the result is LAW and economics, or LAW and sociology. We have not yet managed, for the most part, to achieve truly collaborative intellectual relationships with other disciplines.[26] If we are going to succeed in this new public law enterprise, we must somehow learn to share the power of problem solving—in our classrooms, in our research, in our scholarship, in our litigating, and in our judging.

II. WHO IS GOING TO BE OUR AUDIENCE?

This brings me to the question of whom we understand our audience to be. Professor Sunstein's insistence (with which, I gather, Professor Edley generally agrees) that we must direct our work to lawmakers and bureaucrats is an admonition we cannot hear too often.[27] Nonetheless, I would like to advocate attention to two other equally crucial groups.

The first group that both principal Articles explicitly consider is judges. Professor Sunstein bluntly argues for devaluing the place of the judiciary in the discourse of the new public law.[28] Before I disagree too strenuously with him on this point, I want to acknowledge that his position may be largely tactical. Professor Sunstein has himself devoted much time and energy to considering how judges should approach administrative action; his thoughtful work on statutory interpretation, for example, presupposes an involved, even activist, judiciary.[29] His dismissal of the judicial audience may be a strategic effort to counterbalance our traditional obsession with courts. So, as I make my case that new public law scholars should unapologetically talk to judges, I recognize that Professor Sunstein may be with me in his heart-of-hearts.

Why is it appropriate (indeed essential) that we see the judiciary as part of our audience? The first reason is purely defensive: Whatever we

26. There are notable and encouraging exceptions. *See, e.g.*, R. MNOOKIN & E. MACCOBY, DIVIDING THE CHILD: THE LEGAL AND SOCIAL DILEMMAS OF CUSTODY (forthcoming 1991) (collaborative empirical study of divorce and child custody by legal scholar and developmental psychologist).

27. *See* Sunstein, *supra* note 4, at 645; Edley, *supra* note 5, at 562. I would add that, if we wish to be *listened to*, we must attempt to break the professional habit of dispensing solutions from on high. To be sure, organizations such as the Administrative Conference of the United States and the Administrative Law Section of the American Bar Association have enabled administrative law scholars to do better than many of our law school colleagues in maintaining relationships with public officials and practitioners. Still, the academic culture in which most of us work does not encourage us to go out into the field and develop prescriptions in collaboration with those who would actually apply them.

28. *See* Sunstein, *supra* note 4, at 642.

29. *See id.* at 642-44; C. SUNSTEIN, *supra* note 2, at 111-92.

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succeed in accomplishing with legislators and agency officials can be undone by judges. I am not here suggesting a deliberate campaign of judicial sabotage rooted in hostility to the regnlatory enterprise or in antimajoritarianism. Rather, I am acknowledging a powerful institution whose understanding of its mission must evolve in relation to changing understandings of the goals and methods of the regnlatory enterprise. For a long time, we have placed upon our courts the heavy burden of rendering safe (and hence legitimate) the power of administrative agencies. If administrative law has been largely "the antidiscretion project,"[30] judges have been the designated project engineers. As a culture with a strong disposition to bring difficult social problems into our courts for discussion and resolution, we have been especially demanding with respect to the ideological and practical dilemmas posed by the regulatory state. Judicial review has been the principal avenue through which we have sought conformity with the legislative mandate, rationality in process and outcome, and at least some degree of individual fairness and systemic equity. Given this history, we cannot reasonably expect judges suddenly to intuit that the rules of the game have fundamentally changed. Habits that are so thoroughly ingrained will die hard, unless the new administrative law sees as an important part of its mission the goal of redirecting the power of courts.[31]

Consider, for example, rulemaking. Administrative law professors can readily produce a string of judicial decisions over the last thirty years that have shaped whether and how agencies employ rulemaking as a means of promulgating regulatory policy. Although we may vigorously debate the wisdom of the particular twists and turns accomplished by *Florida East Coast Railway,*[32] *Vermont Yankee,*[33] or *State Farm,*[34] we cannot deny their impact on agency behavior. Indeed, the effect of the (judge-made) "law" of rulemaking on the behavior of regulating and regulated entities was one of the principal justifications for the recent amendments to the Administrative Procedure Act (APA).[35] The Negoti-

30. Edley, *supra* note 5, at 566; *see also* Sunstein, *supra* note 4, at 607-08.

31. Of course, we could crudely solve the problem by abolishing or radically restricting judicial review. However, this would be so counter to our settled cultural expectations about the availability of courts as a forum for questioning official action that the remedy would likely prove more traumatic than the disease. *See infra* note 39.

32. United States v. Florida E. Coast Ry., 410 U.S. 224 (1973) (restricting required use of formal rulemaking).

33. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519 (1978) (forbidding courts from imposing extra-statutory procedural requirements on informal rulemaking).

34. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983) (requiring considerable and nonpolitical justification for agency change in policy).

35. 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372 (1988).

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ated Rulemaking Act of 1990[36] inaugurates a new policymaking paradigm: "reg neg,"[37] an experiment embarked upon to produce rules that are sounder as a matter of regulatory policy, less expensive to implement and enforce, and more acceptable to both regulated and beneficiary populations.[38]

What are judges to do with the products of this grand experiment?[39] They are accustomed to agencies playing the role of impartial adjudicator, executive expert, or partisan policymaker.[40] Now, an agency will stand before them in the bald-faced role of deal broker. The judiciary has, since 1937, accepted the growth of the regulatory state on the strength of the legislature's insistence that private ordering cannot be trusted to produce the public interest in a complex society.[41] Now, courts will be asked to see the public interest in governmental facilitation of private consensus. Therefore, is it any wonder that even judges who are the most open-minded, sympathetic to the regulatory enterprise, and concerned about the real-world effects of legal decisions have voiced grave reservations about the grand experiment?[42] Negotiated rulemaking is at least a plausible response to Professor Sunstein's call for institutional arrangements that allow flexible, privately orchestrated solutions and provide incentives for industry to seek, rather than to combat, the issu-

36. Pub. L. No. 101-648, 104 Stat. 4969 (1990) (to be codified at 5 U.S.C. §§ 581-590); *see* ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, NEGOTIATED RULEMAKING SOURCEBOOK 2 (1990) [hereinafter SOURCEBOOK].

37. Negotiated rulemaking, or "reg neg," allows private interests to participate directly in the conception of agency regulations. Interested parties negotiate and agree on a proposed rule, which is then submitted to the agency concerned. This recommendation forms the basis of the regulation in its final form. *See generally* Perritt, *Negotiated Rulemaking Before Federal Agencies: Evaluation of Recommendations by the Administrative Conference of the United States*, 74 GEO. L.J. 1625 (1986).

38. *See* Negotiated Rulemaking Act § 2 ("Findings") (to be codified at 5 U.S.C. § 581); SOURCEBOOK, *supra* note 36, at 3-5, 23, 27-29.

39. Despite the advice of some experts, *e.g.*, Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 102-07 (1982), Congress refused to preclude, or even limit, judicial review of negotiated rules. Indeed, the Negotiated Rulemaking Act goes so far as to specify that such rules "shall not be accorded any greater deference by a court than a rule which is the product of other rulemaking procedures." Negotiated Rulemaking Act § 3 (to be codified at 5 U.S.C. § 590). This strong legislative affirmation of judicial involvement, coming even as Congress endorsed a major regulatory innovation, underscores how difficult it would be to disengage the courts from the new administrative law.

40. The three paradigms are, of course, taken from Professor Edley. *See* Edley, *supra* note 5, at 568-69; C. EDLEY, *supra* note 2, at 13-29.

41. *See* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (affirming the constitutionality of the National Labor Relations Act, thereby marking the end of judicial resistance to the course of socio-economic regulation).

42. *See, e.g.*, Wald, *Negotiation of Environmental Disputes: A New Role for the Courts?*, 10 COLUM. J. ENVTL. L. 1 (1985) (expressing concern about end-product of reg neg, especially if judicial review is diluted).

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ance of regulations.[43] Surely, however, whatever promise reg neg holds will be cutailed, or at least badly distorted, *unless* we help judges develop a conceptual framework and a real-world understanding within which the rules that emerge from this new process can be productively evaluated.[44]

Let me give another example. Professor Edley urges[45]—and I take it Professor Sunstein would agree—that agencies (like the rest of us in the new administrative law) should be explicit about the value choices that they make, rather than masking their ideological stance beneath the legalism of statutory interpretation or the mystique of expertise. By flagging their political choices, agencies would achieve the salutary goal of "sigualling to the public and Congress that the decision, for which the administration expects to be accountable, reflects the workings of the electoral process."[46] There is, of course, good reason why agencies do not do this at present: The strategies of interpretation and expertise often work in court; political candor (at least until Chief Justice Relinquist collects an additional vote) does not.[47]

If we want agencies to talk openly about political ideology, then judges need to know what to do with politics served up as regulatory justification. Indeed, this issue requires our attention whether or not the language of agency explanation shifts to the explicitly ideological. If courts are to move past the position of deference by default (a position that only *appears* apolitical[48]), then judges must have some direction for negotiating a world in which the Republican Chief Executive systematically attempts to pull agencies in different directions than does the Democratic Congress. If courts are to proceed from a more satisfying account of presidential power than *Chevron*'s facile equation of presidential control with democratic legitimacy,[49] then judges require some framework through which to understand what it means for a president to

43. *See* Sunstein, *supra* note 4, at 631-34.

44. This work has begun, *see* articles collected in SOURCEBOOK, *supra* note 36, at 431-912, but must continue iu earnest as reg neg moves out of the realm of experimentation by a few, select agencies and into more general administrative currency.

45. *See* Edley, *supra* note 5, at 577.

46. *Id.*

47. Although the Court in Chevrou U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837 (1984), relied in part on the Chief Executive's political accountability to justify deference to administrative views on statutory meaning, *see id.* at 865-66, then-Justice Rehnquist could persuade only three other justices that a change in Administration was a sufficient rational basis for an ageucy's change in regulatory policy. *See* Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 57-59 (1983) (Rehnquist, J., concurring in part and dissenting in part).

48. My agreement with Professor Edley on this point, *see* Edley, *supra* note 5, at 570, is explained further in Farina, *Statutory Interpretation and the Balance of Power in the Administrative State,* 89 COLUM. L. REV. 452 (1989).

49. *See* Farina, *supra* note 48, at 502-26; discussion *supra* note 47.

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be reelected because popular approval of his foreign policy overshadows popular disapproval of his position on mandatory family leave, civil rights, or the environment. In sum, judges need the ideological identification of the "principles of sound governance" or "better substantive regulation," as well as the empirical identification of the structures and strategies for attaining those ends.

This last point may reveal my own conviction that the reasons why we should continue to speak to judges extend beyond merely the defensive concern with protecting the fledgling programs and processes of the new administrative law. The courts may be able to contribute affirmatively to the articulation and accomplishment of "better" regulation and, more broadly, "better" governance. I understand Professor Sunstein to be making this claim (although in a circumspect fashion) when he argues for using "the process of [statutory] interpretation as a corrective, albeit a partial one, against the occasional pathologies of regulatory legislation."[50] We need not repeat the mistake of thinking that courts are the only institution worthy of our attention in order to explore the possibility that the judiciary can make unique contributions to the enterprise of the new public law. If lawyers are the *professionals* best suited to achieve the melding of theory and practice that Professor Edley calls "the duality of 'groundedness while removed,' "[51] might not the judiciary be the public *institution* most susceptible of achieving that perspective?

The second group to whom we must quite deliberately speak occupies a central role in both Edley's and Sunstein's Articles, although not as a potential *audience*: the public. Both authors envision that strong democracy will be an important part of the new administrative law. For Professor Edley, reversing the disaffection with the electoral process is both sign and substance of curing the crisis in governance.[52] For Professor Sunstein, the democratic process is a (if not *the*) principal source of the values regulation should pursue.[53] I become very nervous when we begin to build ideological systems around the electoral process (particularly when its outcomes are to be accorded a privileged status as "our" value choices and policy preferences) without carefully inquiring into the factors that shape our public political discourse—and without confronting the extent of our responsibility, as lawyers and legal scholars, for the quality of that discourse. It is too short a step from Professor Sun-

50. C. SUNSTEIN, *supra* note 2, at 10.

51. Edley, *supra* note 5, at 584.

52. *Id.* at 564-65.

53. *See, e.g.*, Sunstein, *supra* note 4, at 633 ("An advantage of a shift in emphasis from means to ends would be that citizens and representatives would decide the central questions of how much pollution reduction there should be, and at what cost . . . ."); *cf. id.* at 640 (advocating desirability of employees making choices about workplace risk levels over a "national dictation" of those levels).

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stein's liberal-republican aspiration that "citizens and representatives would decide the central questions of how much pollution reduction there should be"[54] to Frank Easterbrook's complacent assertion that the content of actual legislation is the best evidence of what citizens value.[55]

If the new public law is to avoid the facile equation of "what we *have*" with "what (apparently) we *want*," it must begin by acknowledging the constitutive nature of social context and political discourse.[56] However, it is not enough for us to point out the adaptive quality of preferences,[57] the dependence of market (or political) outcomes upon the availability of opportunities and information,[58] and the possibility of public ideals that differ from private desires[59] if we then leave *to someone else* the job of undoing maladaptive preferences, increasing information and opportunities, and nurturing civic altruism. If we are serious about strong democracy—if we really believe in the practical possibility and ideological significance of collective self-determination—then we must commit to bringing our message not just to legislators, agency officials, and federal judges, but also, and perhaps most importantly, to the people who are "The People."

I realize that neither Professor Edley nor Professor Sunstein would quarrel with the desirability of public education on regulatory matters.[60] My concern is that speaking to citizens should be placed explicitly and prominently on our list of the ways in which we attempt to reorient the practice of administrative law.[61] Of all the tasks that appear on that list,

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54. *Id.* at 633.

55. *See* Easterbrook, *Substance and Due Process*, 1982 SUP. CT. REV. 85, 118 (reasoning, in arguing against present procedural due process doctrine, that "if people potentially eligible under the substantive terms of a statute value hearings at more than the cost of providing them, they will clamor for hearings even at the cost of lower money benefits. The contents of the legislation are the best available evidence about the value the affected people place on hearings.").

56. That is, it must thoroughly repudiate the premise that preferences are exogenous, pre-political, or fixed. Once this premise is repudiated, the whole notion of "paternalism" becomes far more complicated, both descriptively and normatively.

57. *See* Sunstein, *supra* note 4, at 621.

58. *See id.* at 622.

59. *See id.* at 620.

60. Professor Edley laments the lack of informed public discourse on issues of social policy. *See* Edley, *supra* note 5, at 562-63. Professor Sunstein lists, among the causes of regulatory failure, measures that fail to educate and benefit from involvement on the part of the citizenry. Sunstein, *supra* note 4, at 631.

61. My use of "practice" draws less on the conventional legal sense of the word than on Caroline Whitbeck's usage:

> By "practice" I mean a coherent form of cooperative activity, or "joint action," . . . that not only aims at certain ends but creates certain ways of living and develops certain characteristics (virtues) in those who participate and try to achieve the standards of excellence peculiar to that practice.

Whitbeck, *A Different Reality: Feminist Ontology*, in BEYOND DOMINATION: NEW PERSPECTIVES ON WOMEN AND PHILOSOPHY 64, 65 (C. Gould ed. 1984) (citation omitted).

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this may be the one most alien to us. A cynic would say that we lawyers (and law teachers) have made a business out of mystifying the law and its processes. To share knowledge is to share power. Even the most generous assessment of our professional culture would have to admit that we have not seen as part of "our job" the responsibility to make law and government comprehensible to citizens. Yet unless it becomes our job to translate the complexity of regulatory policy into terms that can enter into and engage public political discourse, then "democratic processes," "participation," and "civic deliberation" will remain mere rhetoric—empty slogans pressed into service to sell a brand new ideology that is really just the same old thing.

III. WHAT MUST WE BE PREPARED TO SUPPLY?

The question of whom we ought to address leads me to the question of what we ought to supply. This is the aspect of the project on which the two Articles make the most extensive and richest contribution. In particular, they share the insistence that the new administrative law must be empirical as well as theoretical.[62] I strongly concur that our agenda must be practical as well as conceptual, and that our work must take place in the dimension of facts and real-world consequences as well as in the dimension of theory and normative justification. There is, however, yet another dimension in which we must work, a dimension that is self-consciously temporal. Beyond identifying the values we think government should further and describing the structures most likely to achieve those values, we must also provide interim strategies for getting from where we are now to where we want to be. We must, in other words, confront and resolve what Christine Littleton has called, in another context, "the problem of transition": "What strategies might move us in the direction of the tentative ideal while minimizing the dangers of partial reform?"[63] Let me provide a specific example.

In discussing the pressing environmental problem of automobile pollution, Professor Sunstein notes the relative ineffectiveness (even counter-effectiveness) of our present regulatory tactics.[64] He suggests that an alternative approach—increased gasoline taxes that more fully reflect the environmental and other costs of automobile usage—would be "an especially promising strategy."[65] As with other proposals that seek to minimize the incidence of harmful but commonly engaged-in activities by

62. *See* Edley, *supra* note 5, at 583; Sunstein, *supra* note 4, at 608-09.

63. Littleton, *Women's Experience and the Problem of Transition: Perspectives on Male Battering of Women*, 1989 U. CHI. LEGAL F. 23, 31.

64. Sunstein, *supra* note 4, at 637.

65. *Id.*

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forcing the actors to internalize costs, this regulatory strategy would disproportionately burden the poor. Immediately sensitive to this objection, Professor Sunstein provides a number of reasons why the regressivity of a higher gasoline tax should not dissuade us from it: (1) If full cost internalization places an important commodity beyond the reach of many citizens, the sensible solution is to subsidize directly its purchase by those citizens; (2) command-and-control strategies are also regressive, but in a more arbitrary and less visible way; and (3) the refusal to allocate costs fully is not a sensible redistributive strategy because the class of beneficiaries will not be coextensive with the people who have a legitimate claim to government support.[66] We could concede that on the theoretical level these are completely persuasive responses, but still insist that on the practical level they are completely beside the point. On the day after the price of gasoline is doubled or tripled to force us to apprehend more accurately the costs of driving, we lawyers, judges, agency heads, and legislators may grumble a bit as we sign higher credit card bills; but, *unless a lot of other things have changed as well,* the effects on a substantial portion of our population will be immediate and devastating.[67]

Unless we are confident that changes in regulatory tactics will "naturally" be accompanied by measures to dampen the harshest effects of change (and everything we know about the episodic, uncoordinated, side-effect-insensitive nature of the political process suggests the opposite), then we cannot afford to ignore the problem of transition. We lose the very normative ground we seek to gain if the costs of regulatory reform fall disproportionately on the already disadvantaged, because we have not taken care to ensure the coordinated adoption of ameliorative measures. If such ideological considerations are not enough, there is also the pragmatic danger of neglecting interlocutory strategies. Unless we make clear the linkages between the superior regulatory approaches we seek and the inferior approaches we have—unless, for example, a new gasoline tax were not only accompanied by legislation undoing other perverse in-

66. *Id.* at 638-39.

67. In 1988, 27.3% of all U.S. households had an income of less than $15,000. Not surprisingly, minorities are disproportionately represented in this group, which includes 46.9% of African-American households and 37.2% of Hispanic households. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1990, at 444, table 716 (110th ed. 1990).

My assumption that full internalization of social costs would double or triple gasoline prices is not unadulterated speculation. One New England environmental group has estimated that, if the price of gasoline in Massachusetts were adjusted to incorporate the costs of automobile insurance (thereby forcing drivers to confront, at the pump, the costs of personal injury and property damage resulting from automobile use) this adjustment alone would add $1 per gallon to the retail price. Remarks of Douglas I. Gay, Executive Director of the Conservation Law Foundation of New England, Harvard Law School, Feb. 25, 1991.

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centives in the area[68] and cushioning the shock of change-over, but also preceded by a determined campaign of popular education—the new approach may not survive the political process. And even if it does become law, piecemeal or uncoordinated implementation may discredit the entire regulatory tactic in the eyes of politicians and the public.

In the end, my emphasis on transition strategies is simply an extension of Professor Sunstein's observation that regulation often fails because it "address[es] only part of [a] complex problem[],"[69] leads to "unanticipated systemic consequences,"[70] or ignores the fact of "complex tradeoffs among competing social goals."[71] We need to remember that regulatory reform can fail for precisely these same reasons. Which leads me to my final question:

IV. WHERE SHOULD WE LOOK FOR GUIDANCE AND INSPIRATION?

Both Articles agree that the new administrative law must be founded, deliberately and unapologetically, upon some ideological base rich enough *both* to prescribe the goals for *and* to assess the performance of public institutions.[72] I wholeheartedly share this belief.

The two Articles disagree about what this generative ideology ought to be. Professor Sunstein is fairly conservative, advocating a familiar, fundamentally liberal base.[73] To be sure, it is liberalism shorn of its harsher, Hobbesian/libertarian elements and softened by traces of civic republican virtue. Still, it is classically liberal to the core, with its exaltation of individual autonomy and rational self-determination,[74] its abiding faith in the market,[75] and its insistence on the importance of private property.[76] Professor Edley is more radical, looking beyond liberalism, possibly to Critical Legal Studies, but more likely to a civic republicanism more newly post-modern than familiarly liberal.[77] On this point, I am going to part company with both authors.

68. An example of such a perverse incentive is the imposition of pollution-control requirements only on new cars. *See* R. CRANDALL, H. GRUENSPECHT, T. KEELER & L. LAVE, REGULATING THE AUTOMOBILE 89-90 (1986); Sunstein, *supra* note 4, at 637.

69. Sunstein, *supra* note 4, at 631.

70. *Id.* at 627.

71. *Id.*

72. *See* Edley, *supra* note 5, at 562-63; Sunstein, *supra* note 4, at 608-09.

73. *See* Sunstein, *supra* note 4, at 611-22.

74. *See supra* note 19 and accompanying text.

75. Professor Sunstein's perceptive accounts of market failure take place against the background proposition that "private markets usually promote individual freedom and economic welfare." Sunstein, *supra* note 4, at 618-19.

76. *See id.* at 612 n.20.

77. *See* Edley, *supra* note 5, at 589-90.

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With respect to Professor Sunstein, my disagreement over choice of generative ideology occurs at the most fundamental level. He is trying to breathe some human spirit (with ideals and aspirations) into *Homo economicus.* As I said earlier, this is important work, for the ideological power of economic theory is so great. Someone thoroughly familiar with its rules has to challenge the law-and-economics libertarians at their own game. In the end, however, it is not enough. We need to change the game. *Homo economicus* can be made better, but he cannot be made the protagonist of the new ideology. He is not rich or complex enough; he has not the heart for it. This is where Professor Edley comes in, with his search for new, post-liberal starting points and new, post-pluralist ways to proceed. And so I do not want to disagree with Professor Edley as much as I want to push him to even greater radicalism: toward feminist theory.

Professor Edley acknowledges feminism as an important manifestation, along with Critical Legal Studies and civic republicanism, of third wave post-liberal theories."[78] He chooses, however, to focus on civic republicanism because feminist legal theory, although more extensive than the republicanism literature, has not had much to say about public law.[79] Initially, I would like to convince Professor Edley that any "edge" civic republicanism possesses is, at best, a temporary one. Then, I want to sketch out, very preliminarily, why feminism may be an especially promising source for the sort of "political ideology, legal theory, and practical invention"[80] that would recreate administrative law.

Civic republicanism may be losing its ideological steam. One of its two most influential proponents in the legal academy, Frank Michelman, is moving away from (or, perhaps, beyond) it.[81] The other, Professor Sunstein, is obviously committed to keeping it an active part of the discourse, but his republicanism is too caught up in an effort to regenerate liberalism to provide the sort of compelling post-pluralist political ideology that Professor Edley seeks. To be sure, other voices have contributed to the republican revival, but unless one of them emerges as a strong and more radical standard-bearer, we will not see the continuing conceptual and practical elaboration that must occur if civic republicanism is going to serve as a source of programmatic inspiration.

By contrast, feminist legal theory is increasingly vigorous. Rapidly expanding in quantity, it is also ever more venturesome in scope. Professor Edley is right that feminist legal theorists have not thus far concen-

78. *Id.*
79. *See id.* at 589 n.83.
80. *Id.* at 564.
81. *See* Michelman, Postmodern Constitutionalism (unpublished manuscript).

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trated on governance and the shape of public institutions.[82] But it is only a matter of time. Martha Minow's work on the family,[83] Liz Schneider's work on battered women,[84] and Judy Resnik's work on process[85] (to take just a sampling) stand on the threshold—if not actually inside the doorway—of public law. Catharine MacKinnon and others are building links among feminist legal theorists, feminist political scientists, and philosophers to develop a theory of the state.[86] Feminism *must* confront the administrative state. It is a practical necessity, for the condition of women in our society is intimately tied to the operation of many social welfare programs.[87] It is also an ideological necessity, for feminists have a strong and long-standing quarrel with the public/private distinction.[88] If Professor Edley is correct that transformative legal theory is produced by "some felt need to remake government,"[89] then, I suggest, it is the passionate conviction of feminism, rather than the scholarly cerebration of civic republicanism, that is likely to birth true innovation.[90]

What might feminist theory offer the project of the new administrative law? Let me sketch out a few possibilities.[91] For one thing, because

82. *See* Edley, *supra* note 5, at 589 n.83.

83. *See, e.g.*, Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 MICH. J.L. REFORM 933 (1985); Minow, *Legislative Approaches to Work and the Family*, 26 HARV. J. ON LEGIS. 295 (1989); Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986).

84. *See, e.g.*, Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986); Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623 (1980).

85. *See, e.g.*, Resnik, *Due Process: A Public Dimension*, 39 U. FLA. L. REV. 405 (1987); Resnik, *Judging Consent*, 1987 U. CHI. L. FORUM 43; Resnik, *On the Bias: Feminist Reconsiderations of the Aspirations for Our Judges*, 61 S. CAL. L. REV. 1877 (1988).

86. *See, e.g.*, C. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) [hereinafter C. MACKINNON, FEMINISM UNMODIFIED]; C. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989).

87. As the gap between rich and poor Americans grows greater, and as our population grows relatively older, women with children and women past retirement age increasingly constitute the class of citizens that depends upon the exercise of regulatory power. *See* Becker, *Politics, Differences and Economic Rights*, 1989 U. CHI. LEGAL F. 169; Nelson, *Women's Poverty and Women's Citizenship: Some Political Consequences of Economic Marginality*, 10 SIGNS 209, 221-23 (1984).

88. *See, e.g.*, Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 631 (1990) (boundary between state and family is problematic on descriptive, prescriptive, and normative grounds; conventional public/private dichotomies provide no useful conceptual scheme for assessing constraints on state power).

89. Edley, *supra* note 5, at 581.

90. Hence I would nurture the misgivings that Professor Edley already has about whether civic republicanism can deliver the necessary "sharp, distinctive critique within the realm of political ideology." *Id.* at 592.

91. The ideas suggested in this very abbreviated sketch are developed further in Farina, *Conceiving Due Process*, 3 YALE J.L. & FEMINISM 189 (1991). That article is itself only the beginning of my own exploration of the implications of feminist understandings and methodologies for administrative law.

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feminist theory tends to be less concerned about trenching on "liberal sensibilities" than is civic republicanism, it is less inclined to resort to what Professor Edley calls "the procedural dodge"[92]—that is, emphasizing deliberative, process goals rather than attempting to specify the content of "the public good."[93] I do not mean to suggest that feminist theory has a detailed agenda of what constitutes the public good. It is, however, more ready to engage openly in the debate over the substantive ends to which power should be directed. Or, to put it somewhat differently, feminist theorists, *because of how they typically conceptualize personhood and society,* are under no delusions that this debate can be avoided:

> Because individual identity forms within personal relationships and social networks, society must be understood as both constituted from, and constitutive of, the persons within it. Its dominant forms of activity will both reflect and create their values, needs and desires. Just as a person continually shapes and is shaped by her local environment, so a people continually makes and is made by its government and its law. Given this, it would be meaningless to charge the state to avoid privileging certain conceptions of the good over others. All exercises of government power are value-laden. The greater the reliance upon government and law as forms of activity through which a society defines the physical, economic and social conditions in which citizens live, the greater is the need to acknowledge this fact. In any but the most minimalist state, the pursuit of neutrality is not only illusory but dangerous, disguising the fact that certain conceptions of the good and certain distributions of power are being favored.[94]

The recognition that every exercise of public power reshapes, for good or ill, the public and private world compels a continual striving to identify the set of values that government ought to pursue.[95]

One consequence of the abbreviated treatment in this Comment is that I cannot adequately convey the complexity of contemporary feminist theory. There is no one feminism and no definitive canon of feminist principles. However, I believe that the basic ideas and methods described in this section would be acknowledged by many (perhaps most) feminist legal theorists. Still, there is danger that my attempt to signal diversity of viewpoint by using the convention "*typically* feminist" may in fact aggravate the problem of reductionism.

92. Edley, *supra* note 5, at 593.

93. An early and important strand of feminist legal theory did draw on the liberal tradition. *See* Ginsburg & Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s,* 1989 U. CHI. LEGAL F. 9; Williams, *Notes from a First Generation,* 1989 U. CHI. LEGAL F. 99. *See generally* A. JAGGER, FEMINIST POLITICS AND HUMAN NATURE 27-50 (1983) (describing liberal feminism). Contemporary feminist legal theory, however, tends to be suspicious of (if not openly hostile to) conventional liberal assumptions. *See generally* West, *Jurisprudence and Gender,* 55 U. CHI. L. REV. 1 (1988) (describing differences between strands of feminist theory and both liberalism and Critical Legal Studies).

94. Farina, *supra* note 91, at 260-61. Of course, the maintenance of a minimalist state would itself be a heavily value-laden distribution of power.

95. I have suggested elsewhere that feminist understandings of human nature, society, and power generate two fundamental value commitments: (1) Working toward an equitable distribution

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In this striving, feminist legal theorists are committed, *on ideological grounds,* to the interdependence of theory and practice that Professor Edley finds so essential. This commitment is rooted in a particular epistemology. Feminist theory typically understands knowledge as contextual—that is, as embedded in situation and experience, rather than derived from principle through abstract logic. Therefore, the meaning and value of rules and institutions can be discovered only by understanding how they affect the people within them.[96] Feminism typically understands knowledge as nonfinal—that is, as expanded by increasing perspective and seeking out voices on the margins. Therefore, ends and means must constantly be reassessed as new information is acquired.[97] In sum, feminist methodology is already deeply committed to Professor Edley's proposition that "[t]he theorist should test the practical inventions against experience, such that there is a continual process of ideological development, theoretical enterprise, and institutional or doctrinal reform (or revolution)."[98]

Moreover, this understanding of how knowledge is attained makes possible the kind of interactive, collaborative decisional structures that

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of resources and opportunities, so as to minimize the circumstances in which persons become victims and perpetrators of oppression; and (2) cultivating practices that affirm the connection with others, so that power will be exercised under the ethic of care and responsibility. *See id.* at 259-61. Compare these normative propositions with the substantive portion of Professor Edley's "tentative suggestions" for a post-pluralist political ideology. *See* Edley, *supra* note 5, at 594-95.

96. This emphasis upon "constructedness" and "situatedness" may suggest the complex and controversial question (far beyond the scope of this Comment to consider) of the relationship between feminism and postmodernism. Whatever that relationship, feminist theory surely could not be faulted for "rel[ying] too heavily on abstract claims of contingency and constructedness, and focus[ing] too little on developing specific substantive remedies for injustice and inefficiencies in existing systems." Sunstein, *supra* note 4, at 618 n.47.

97. This reassessment is one element of what Katharine Bartlett describes as feminist practical reasoning. *See* Bartlett, *Feminist Legal Methods,* 103 HARV. L. REV. 829, 850-51 & n.80 (1990).

The emphasis upon contingency, fluidity, and transformation may be understood not as prizing these qualities for their own sake, *see* Sunstein, *supra* note 4, at 618 n.47, but rather as valuing their power to counteract entrenched ways of thinking that have led to pain and oppression. As Professor Bartlett explains:

> Some "truths" will emerge from the ongoing process of critical reexamination in a form that seems increasingly fixed or final. . . . These truths, indeed, seem to confirm the view that truth does exist (it must; these things are true) if only I could find it. . . . The problem is the human inclination to make this list of "truths" too long, to be too uncritical of its contents, and to defend it too harshly and dogmatically.

Bartlett, *supra,* at 883-84.

98. Edley, *supra* note 5, at 583. Thus, I have suggested elsewhere that the process of developing and realizing our value commitments "will necessarily be an incremental and iterative one, in which answers are developed in context and theories are modified with experience to yield results that approximate ever more closely what we hope to become as a people." Farina, *supra* note 91, at 261-62; *see also id.* at 266, 268-70 (due process adjudication is a necessary means to reassess and reassert value commitments). Compare this with the procedural portion of Professor Edley's "tentative suggestions" for a post-pluralist political ideology. *See* Edley, *supra* note 5, at 594-95.

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Professor Edley envisions when he speaks of courts actively pursuing better public administration by inviting a dialogue with agencies and Congress over the norms of sound governance.[99] An anti-imperialistic conception of knowledge—a conception in which "truth" is continually being created from the bottom up rather than imposed once and for all from the top down—is the first essential component in weaning adjudication from its tendency to produce "ham-handed impositions binding in all circumstances for all time."[100] The next step is the recognition, previously noted,[101] of the constitutive nature of personal and social relationships. If we believe that our individual and collective identity is shaped by our dominant cultural practices, then we would acknowledge that, for a people who regnlarly bring into courts our most compelling social issues—from police brutality to disparate educational opportunities, from the provision of mental and physical health care to the use of nuclear power—adjudication can represent a critical moment in which we examine the society we are and elaborate the one we aspire to be. We would thus be led to re-create adjudication as a self-consciously value-generating activity in which the participants come together to discover what is right, rather than a battle in which winners and losers are declared, and the spoils of war are distributed.

Finally, there is the most important contribution that feminist theory can make to the project of recreating administrative law: It can help us think about power. That administrative law has, until now, been trapped in "the antidiscretion project" is not mere happenstance. We have a deeply ideologically embedded fear of power. As Professor Edley says, "the premise . . . [is] that discretion in the state is dangerous."[102] Hobbes gave us the war of all against all;[103] law and economics gave us *Homo economicus*, the self-centered, self-satisfying rational actor. Even the kinder, gentler strains of liberalism (like Professor Sunstein's) share this fear; they set out to ensure that more citizens have access to the rights, private property, and market opportunities that are thought to protect individual autonomy from the encroaching or engulfing pressure of private or governmental others. Critical Legal Studies did not ameliorate this fear; indeed, it made it worse by revealing the seamy underside of hierarchy and the multitude of subtle ways in which disparities in power consolidate oppression. Civic republicanism did try to paint a different picture—of people of good will coming together to deliberate

99. *See* Edley, *supra* note 5, at 601.

100. *Id.*

101. *See supra* note 94 and accompanying text.

102. Edley, *supra* note 5, at 566.

103. *See* T. HOBBES, LEVIATHAN 64 (1914).

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responsibly and open-mindedly upon the public good—and was promptly accused of the worst sort of naive romanticism.[104]

We have a deeply ideologically embedded fear of power. Yet, there can be no administrative state without vast disparities in the power of government officials and citizens. There can be no regulatory agenda without vast quantities of administrative discretion. The new administrative law must be about *living with power.* And this is where feminist theory can make a distinctive (perhaps even unique) contribution.

Feminism speaks about power stereophonically. One channel, sometimes called radical or dominance feminism,[105] tells of the terrible dangers of power—the exploitation, the domination, the invasion—in terms even more graphic than those used by Critical Legal Studies. The other channel, sometimes called cultural feminism,[106] tells of the nurturing, compassionate, responsible use of power. Rooted in the experience of women in our culture, feminist theory has two voices: The voice of the victim who knows the reality of power abused to ravage, to maim, to diminish, and the voice of the caretaker, who knows the reality of power extended to help, to heal, to enable.

I do not claim that feminism has succeeded in integrating these two voices into a single, richly textured harmony any more than women in our society have resolved the duality of being victim and caretaker. There is still much dissonance within feminist theory, reflecting great ambivalence about the extent to which and the means whereby power can be rendered safe. Still, because each of these experiences of power is simultaneously part of the women's experience from which feminism draws its motivating force and direction, feminist theory will have to continue to seek that integration. And it is precisely this sort of integrated understanding of power—an understanding capable *both* of eschewing the pie-in-the-sky utopianism that merely results in new (or, more likely, the same old) victims, and of sustaining the search for practices that foster the responsible use of discretion—that administrative law must achieve if it is to transcend the antidiscretion project.

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104. *See, e.g.,* Bell & Bansal, *The Republican Revival and Racial Politics,* 97 YALE L.J. 1609 (1988) (arguing that a revival of republicanism would fail to consider all viewpoints, most notably those of blacks); Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism,* 97 YALE L.J. 1651 (1987) (expressing grave doubts about the practical success of civic republicanism); Sullivan, *Rainbow Republicanism,* 97 YALE L.J. 1713 (1987) (arguing that a republican revival would institute a disadvantageously reconceived political process).

105. Its most prominent advocate among feminist legal theorists is Catharine MacKinnon. *See* C. MACKINNON, FEMINISM UNMODIFIED, *supra* note 86.

106. The works of Carol Gilligan and Robin West illustrate this aspect of feminist theory. *See* C. GILLIGAN, IN A DIFFERENT VOICE (1982); West, *Feminism, Critical Social Theory and Law,* 1989 U. CHI. LEGAL F. 59.

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To be sure, it will not be a simple, obvious task to realize—in the structures, programs, and doctrine of the new public law—the implications of feminist understandings and methodologies. But truly transformative institutional and doctrinal inventions never appear simple or obvious at their inception. The question is where we are most likely to find the will and the capacity to work a transformation. Professor Edley's own formulation[107] points directly toward feminist theory as a singularly appropriate answer: Coming to us as part of a powerful critique of something important in the world, this is an ideology whose radical potential is unlimited.

107. *See* Edley, *supra* note 5, at 594 ("[Republicanism's] radical potential is limited because it has not come to us as part of a powerful critique of anything important in the world.").

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