Introduction

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Administrative law exists at the interface between the state and society—between civil servants and state institutions, on the one hand, and citizens, business firms, organized groups, and non-citizens, on the other. Civil service law, bureaucratic organization charts, and internal rules provide an essential background. But our emphasis is on the law's role in framing the way that individuals and organizations test, challenge, and fortify the legitimacy of the modern state outside the electoral process. There are two broad tasks—first, upholding individual rights in ways that protect them against an overreaching state, and second, providing external checks and constructive input that enhance the democratic accountability and competence of the administration.

The contributors approach these normative questions from a variety of disciplinary, doctrinal, and jurisdictional perspectives. All of them, however, share a general concern with administrative law as a central institution of modern government. We build on work in economics and political science that uses the term 'institution' to refer to a set of formal or informal binding rules (see, for example, North 1990, 3–5; March and Olsen 1989, 1998, 948). The institutions of administrative law, then, include not only the positive legal rules but also the wider political, cultural, technological, and economic norms that impinge upon and shape legal doctrine. Administrative law, in this inclusive sense, is particularly amenable to comparative political and historical study. Cross-disciplinary insights show how institutions work in practice, how they evolve over time, and how they further different objectives in various social, political, and territorial contexts. Employing this broad perspective, this volume seeks to illuminate both the historical legacies and the present-day political and economic realities that continue to shape the field in the twenty-first century.

Several core themes bind together the contributions to both the first and the second editions of *Comparative Administrative Law*. The first is the relationship between administrative and constitutional law. The Germans speak of administrative law as 'concretized' constitutional law, and Americans often call it 'applied' constitutional law. The English, with no written constitution, refer to 'natural justice' and, more recently, to the European Convention on Human Rights (ECHR). Foundational constitutional norms of popular sovereignty, the separation of powers, the rule of law, and individual rights all have administrative counterparts that may have more day-to-day impact than maxims of higher law on the lives of those subject to state power. But the degree and nature of this connection between constitution and administration remains a matter of serious scholarly disagreement. At the one extreme, we might view administrative law as preoccupied with precisely the same concerns as constitutional law. At the other, we might see administrative law as a way of avoiding basic constitutional questions altogether and channeling legal, political and social conflict into a supposedly neutral domain of pragmatic management and technocratic expertise. Or, we might see administrative and constitutional systems as developing in tandem, as the evolution of administrative capacities calls forth new

constitutional concerns, or operationalizes them in novel ways. Many of the contributions to this volume attempt to address such fundamental disputes: Are administrative and constitutional orders merely two sides of the same coin, or are they independent variables that comparative study must treat separately? If administrative and constitutional norms are distinct, in what ways do they conflict? How does this conflict vary across jurisdictions, and why?

Related to but distinct from general constitutional principles is a more specific concern with democracy in administrative law. Democratic norms arise in the administrative context in three different senses: participation in the administrative process; the control that democratically elected politicians and democratically enacted laws seek to impose on administration; and the role of administrative governance in safeguarding the public sphere. Participatory forms of administration, such as ‘notice-and-comment’ rulemaking in the United States, aim to tap the knowledge and value commitments of affected persons and groups in crafting administrative policies. The administrative guardianship of the public sphere, such as through the regulation of urban space, may aim to preserve certain communal settings for deliberation that make democratic politics possible. Political control over administration, such as through at-will appointment of heads of administrative departments, aims to bind bureaucratic decision-making to the preferences of democratically elected principals.

Judicial review of administrative action can fortify (or undermine) each of these democratic objectives. Judges can incentivize agencies to consult the public more fully, bind administrative action to statutory norms, require intensive political supervision over bureaucracies, or recognize public interests in the disposition of nominally private property. Judicial doctrines concerning administrative discretion, reason-giving, and the review of questions of ‘law’ versus ‘fact’ may influence the way states handle both institutional and political friction. But judicial control can weaken democracy and the rule of law by substituting the judges’ view for those of politically accountable or expert administrators.

Democratic and political values therefore raise a series of crucial questions for the comparative study of administrative law: Is administrative law merely epiphenomenal to politics, or are there important differences in the way administrative-law regimes respond to, incorporate, dissipate, or perhaps ‘rationalize’ political pressures? What kinds of complementarities and trade-offs are there between control by elected representatives, public participation, and the bureaucratic superintendence of democratic society? How and why do different jurisdictions incorporate and balance these various combinations of representative politics, participation, and publicity? Do doctrines of judicial review account for meaningful differences in how jurisdictions implement democratic choices, or are such variations merely curiosities that conceal the fundamental commonalities in legal order?

The distinction between public and private is also essential to administrative law. Common law jurisdictions long sought to downplay the distinction, claiming that the same courts and legal principles should resolve both wholly private disputes and those involving the state. Nevertheless, even in the common law world, debates over the proper role and unique prerogatives of state actors are pervasive. Some scholars still assume that one can compartmentalize regulatory activities and actors into either a public or a private sphere. This may be analytically convenient, but it does not fit the increasingly blurred boundary between state and society. As we have passed from an age of ascendant neoliberalism and privatization to a period that has raised doubts about market-oriented

reforms, the line between public and private remains as contested as ever. The question of public-private relationships arises acutely where administrative action intervenes into a sphere that is protected by an individual right. In Europe, for example, courts regularly apply the principle of proportionality—if a policy interferes with a right, then it must be designed in the least restrictive way. As a result, courts have begun to impose standards on government policymaking, at least when rights are at stake.

The relationship between the ‘private’ market and the state raises the related issue of the role of economics and social science in administrative policymaking. Administrative law deals frequently with questions of economic regulation, and often uses tools of economic analysis to evaluate such policies. Is administrative law governed by a particular conception of the economy and the state’s role in it? In a period where there is renewed concern about economic inequality, unemployment, and the loss of national sovereignty to international free trade blocs, what resources might administrative law regimes offer to address these worries?

International and supranational legal developments are increasingly influencing domestic regulatory and administrative bodies. The project in Global Administrative Law centered at New York University (Kingsbury, Krisch, and Stewart 2005), focuses on the administrative law of international organizations, such as the World Trade Organization. Nevertheless, it often draws on domestic models of the administrative process for inspiration. Our focus here is complementary. This collection emphasizes how the practices of multi-national and regional bodies, especially the European Union, have both emerged out of and affected the administrative process in established states. More than the Global Administrative Law project, however, we emphasize the durable diversity of the structures and normative commitments of domestic and supranational regimes.

This volume, like the first edition, attempts to capture the complexity of the field while distilling certain key elements for comparative study. Part I begins by concentrating on the relationship between administrative and constitutional law—uncertain, contested, and essential. Part II focuses on a key aspect of governmental structure—administrative independence with its manifold implications for separation of powers, democratic self-government, and the boundary between law, politics, and policy. Next, Part III highlights the tensions between impartial expertise and public accountability, especially when the executive and independent agencies make general policies. Part IV discusses administrative litigation and the role of the courts in reviewing both individual decisions and secondary norms (‘rules’ in US parlance). Part V considers how administrative law is shaping and is being shaped by the changing boundaries of the state. Part V.A considers the shifting boundary between the public and the private sectors, and Part V.B concentrates explicitly on the European Union and its complex relationship with the Member States.

I. CONSTITUTIONAL STRUCTURE AND ADMINISTRATIVE LAW

Constitutional structure and administrative law interact in important ways, shaping the rights and duties of professional administrators, elected politicians, and judges. Assigning activities exclusively to the constitutional or the administrative law category, however, is a challenging and ultimately fruitless enterprise.

According to Bernardo Sordi (chapter 1), the emergence of administrative law in Europe is a modern phenomenon that was tied to the increasing ‘specificity and subjectivity’ of public administrative power since the end of the eighteenth century. Sordi’s fundamental claim is that ‘administrative power’ and ‘administrative law’ emerged contemporaneously—in other words, the new authority and its legal limitation arose together. This conjunction arguably holds true outside of Europe as well.

Sordi stresses that old regime monarchies in Europe ruled through a corporatist system of privileges and jurisdictions grounded in conceptions of right (notably ‘property’) that we would today see as private. It was precisely the progressive extrication of ‘public’ authority from this corporatist old regime, as well as the development of a distinct corps of public servants to pursue and defend these new public prerogatives, that marked the emergence of administrative modernity in the Western world.

Over the course of the nineteenth century, administrative law began to emerge as a means of setting legal limits on emergent administrative power. Owing to different institutional and conceptual starting points (most importantly, different understandings of the relationship of state to society and of justice to administration), the results of this process often differed. The substantive and procedural distinctions are now well known: *Rechtsstaat*/*Etat de droit* enforced by specialized administrative judges, on the one hand; and ‘rule of law’ enforced by the ordinary judiciary, on the other.

Which variables have driven the historical process of legal institutionalization in such particular cases? We highlight three broad dimensions: functional, political and cultural. Under the first, functional, dimension, changes in social and economic conditions put pressure on existing institutional structures and legal categories. These pressures can then generate struggles in the second, political, dimension, where interests compete over the allocation of scarce institutional and legal advantages. In the third and final dimension—the cultural—political and social actors mobilize competing conceptions of legitimacy to justify or resist changes in institutions and in the law (Lindseth 2010; see also Lindseth 2017).

The functional tasks facing the modern state and public demands for transparency and accountability pose a challenge to conventional constitutional thinking that stresses the three-fold division of the state into legislative, executive and judicial. Bruce Ackerman (chapter 2) argues that constitutional theorists need to go beyond Montesquieu’s tripartite view of the separation of powers—a line of thinking with a deep historical pedigree (see, e.g., Landis 1938). The substantive policy demands facing the modern state have led to all kinds of institutional innovations, beginning with the creation of independent regulatory agencies—for example, central banks and broadcasting commissions. The need for oversight and control to accompany policymaking delegation has led to the creation of monitoring organizations, such as supreme audit agencies, ombudsmen, and judicial review.

Peter Strauss (chapter 3) highlights the important difference between parliamentary governments and the US constitutional and administrative system, including, especially, a US judiciary that is subject to considerable political pressures. This theme informs the most recent edition of Strauss’ treatise on US administrative justice, which is intended both for domestic and international audiences (Strauss 2016). Politics and ‘the rule of law’ are in considerable tension, even for normal issues of US domestic policy. Judicial review is a constitutional requisite, but politics operates nonetheless. According to Strauss,

administrative law, not just in the US but elsewhere as well, represents ‘a continuing contest between reason and unreason, and one must continuously work to make the influence of the former substantial.’

As Tom Ginsburg points out (chapter 4), even though public administration and the bureaucracy receive little detailed treatment in the texts of most constitutions, they form the backbone of state functioning. Most people are never accused of crimes or detained for political activities that implicate constitutional rights. Rather, they much more often deal with offices that grant licenses, allocate benefits, run schools and clinics, and collect taxes. Good administration is central to the performance of these tasks. The commonplace nature of such activities should not mislead us into thinking that administration is somehow less important than constitutional law from the standpoint of the public.

One way to approach the links between constitutional structure and administrative law is through the lens of political economy, and more particularly through the work of positive political theory (PPT). Unlike explicitly normative work in constitutional law and political theory, PPT attempts to model state behavior in terms of the self-interest of the actors involved. (For a collection of articles that apply the approach to administrative law see Rose-Ackerman 2007.) Some PPT takes the basic structure of government as given—for example, a presidential democracy that elects representatives through plurality rule in single-member districts. Other work tries to explain the incentives for political actors to create or to modify the constitutional structure of government. Elizabeth Magill and Daniel Ortiz (chapter 5) take an intermediate position. They ask if PPT research on the US administrative system can be applied elsewhere. PPT explains judicial review in the US as a result of the legislature’s desire to check the executive and its inability to do this effectively on its own. Thus, the legislature is the dominant actor that can assign tasks to the courts. In a parliamentary system the same political coalition controls both branches, and so legislators from the majority coalition would not want the courts to intervene to oversee executive action. Court review of administrative action cannot lock in present political choices because statutes are quite easy to change. They claim that PPT would predict that parliamentary systems would provide for lower levels of judicial oversight of the administration than presidential systems. They show, in contrast, that courts in the UK, France and Germany are, in fact, quite active in reviewing administrative actions. The courts themselves seem to be independent actors at least insofar as they assert jurisdiction and oversee the executive.

Andreas Voßkuhle and Thomas Wischmeyer (chapter 6) outline the challenge to traditional German and continental administrative law traditions that comes from the *Neue Verwaltungswissenschaft* (the ‘new administrative law scholarship’). Voßkuhle and Wischmeyer are referring here to new perspectives on administrative law that respond to changing political and social conditions, especially the privatization of state-owned enterprises in network industries and the move from command-and-control regulation to more collaborative forms of governance. They argue that traditional German administrative law categories that emphasized hierarchy, primacy, and formality are inadequate to oversee administration in a modern welfare state. Scholars revived interdisciplinary links to the social sciences, and a new ‘regulation’ paradigm arose under which the state should engage in ‘steering’ (*Steuerung*) the private sector, not controlling it outright. As the chapters in Section V.B demonstrate, this shift in perspective was encouraged by the European Union, especially in network industries. Although a debate continues within the field of

administrative law in Germany, contributors to the new administrative law scholarship have pushed the field toward both a deeper concern with substantive policy, on the one hand, and a sharper focus on administrative procedure, on the other.

Stepping back from recent reform efforts, Marco D'Alberty's contribution (chapter 7) explores the evolution of administrative law over the last 100 years in Italy, examined from a comparative perspective. Similar to Voßkuhle and Wischmeyer but with a longer historical sweep, D'Alberty stresses how changes in the underlying functions of the state in the twentieth century influenced the development of administrative law. The rise of industries with monopoly power and the privatization of formerly state-controlled sectors produced a demand for the control of markets to which all developed states responded, albeit in different ways. D'Alberty, moreover, discusses the way administrative law has sometimes served as a check on populist or democratic demands by giving organized and powerful economic interest groups a way to challenge policy. He highlights an ongoing tension in the political and historical analysis of administrative law. Public law provisions that are justified as a check on overarching state power can also be a means of entrenching existing private interests. Legal constraints may under some conditions limit the ability of democratic governments to constrain concentrated, monopolistic economic interests.

The section closes with Kriszta Kovács and Kim Lane Scheppele's (chapter 8) reflections on the troubling recent developments in Hungary. These developments raise more general concerns, showing how autocratic trends can develop even in a constitutional system with nominally democratic forms. The dominant party has been able to make constitutional and personnel changes that undermine institutional checks and balances. The regime seems to follow its own rules, and in the process has moved the state in an authoritarian direction. Their contribution also shows the crucial complementarity between the protections of constitutional and administrative law. Although constitutional norms are required to maintain free and democratic societies, the concrete procedures and protections of administration may have more daily impact on citizens and the tenor of their collective social life.

II. ADMINISTRATIVE INDEPENDENCE

Administrative independence is enthusiastically espoused by some and roundly condemned by others. One reason for the controversy is a lack of consensus over what independence is and what it can accomplish. In the contributions in this section, independence generally means that a public entity has some degree of separation from day-to-day political pressures. Martin Shapiro (chapter 14) describes such agencies as 'fall[ing] outside any cabinet department or ministry organization chart.' This seems apt, although many such agencies are still subject to some oversight from core government departments or branches. Even in the US, with a history that goes back to the establishment of the Interstate Commerce Commission in 1887, 'independent agencies' are not completely independent. The President appoints commissioners with Senate approval, and the chair serves in that capacity at the President's pleasure. Most agencies operate with appropriated budget funds, and none has constitutional status. Furthermore, the US lacks independent oversight agencies except for the Government Accountability Office,

which reports to Congress. Nevertheless, staggered terms that exceed the terms of the President and members of Congress, party balance requirements, and removal only for cause all limit executive control compared with those agencies directly in the presidential chain of command. Independent agencies are also subject to Congressional oversight, which may be relatively stronger in this context simply because presidential oversight is more attenuated.

Administrative independence is often defended as a way to assure that decisions are made by neutral professionals with the time, technical knowledge, and practical experience to make competent, apolitical choices. The heart of the controversy over independence, however, stems from the agencies' disconnect from traditional democratic accountability that flows from voters through elected politicians to the bureaucracy. Attempts to legitimate such agencies in democratic terms often stress the importance of processes that go beyond expertise to incorporate public opinion and social and economic interests. The ideal is an expert agency that is independent of partisan politics but sensitive to the concerns of ordinary citizens and civil society groups. The risk is capture by narrow interests.

Daniel Halberstam (chapter 9) explores the question of agency legitimacy from a broad constitutional perspective, arguing that in Germany, France, and the US the turn to administrative agencies can be seen as an attempt to counterbalance perceived structural pathologies of the general branches of government. In contrast to France and the US, where administrative agencies partly reflect a desired move away from ordinary politics to better protect the public interest, in Germany certain aspects of federalism, judicial review, and parliamentary government have supported the continued belief in the capacity of the general branches of government to define and pursue rational policy respecting constitutional demands. Halberstam thus finds that, outside certain narrow, functionally specific domains, 'there are few calls for independent administrative agencies in Germany to serve as a sober counterpoint to raw politics.'

Lorne Sossin (chapter 10) considers administrative independence in common-law parliamentary jurisdictions. In such systems, there is an inherent tension between the government that is organized by the political faction controlling the legislative branch, and 'the Crown,' which is supposed to be impartial in dealing with public policy matters. Sossin focuses on what he calls 'hybrid settings where the political realities of partisanship and the legal structures of autonomy from partisan considerations create . . . a "puzzle" of independence.' Canada, he argues, is a particularly vexed case because of controversies over the political control of appointments and other dimensions of administrative independence. In contrast, other Commonwealth polities (the UK, Australia and New Zealand) have, in his view, given independent agencies a clearer and more well-articulated position in their governmental structures.

In the US, independent regulatory commissions attempt to address democratic concerns by building in partisan balance. Instead of requiring technocratic expertise or professional credentials for the commissions' leadership, most agency statutes set up a multi-member governing board and require that no more than a majority can be from a single party. As with the US judiciary, the appointment process is highly political. But with fixed, staggered terms and party balance, agencies can, in principle, respond to changing conditions as their membership changes gradually over time. This feature of US commissions, as Martin Shapiro demonstrates (chapter 14, see also Majone 2001),

has not been copied in the EU, although, as we see below, it has influenced agency design elsewhere. The European Union has substituted ‘technocratic for democratic legitimacy’ according to Shapiro, although he points out that the staff of EU agencies express ‘strong allegiance to democratic values.’ Agencies have proliferated at the EU level in recent years, but rather than seeking partisan balance based on political party affiliation, Member States are represented on agency boards. This political compromise, in practice, led to the dominance of technical experts who are appointed by Member States and interact with their respective specialized ministries. However, the emphasis on technical competence seems to be coming under increasing strain because the global financial crisis has led to more EU agencies with greater powers and hence to their growing political salience in the Member States (see the contributions in this volume from Saurer, chapter 37; Mendes, chapter 38; Ruffert, chapter 40; and Lindseth, chapter 41).

To complement the contrasts between the US and Europe, two chapters consider agencies in polities that have been influenced by both American and European legal models. For example, in Brazil with its strong president, Mariana Mota Prado (chapter 11) shows that the independent agency model, although borrowed from the US, operates quite differently. The theory of congressional dominance that comports with US reality does not describe Brazilian agencies that are clearly subordinate to the executive whatever their nominal form. Drawing on evidence over the last decade, Prado explores both how and why this has occurred. She then considers whether and to what extent institutions originally created in the global north, such as independent regulatory agencies, can have a different political valence in countries like Brazil, where recent shifts in the relationships between state and civil society remain deeply contested. Prado addresses the issue of how ideology can interact with institutional choice and political strategy: in heavily presidential systems such as Brazil, the President may interfere with administrative agencies not merely to advance narrow policy preferences within a particular domain, but rather to implement broader philosophical shifts from a neoliberal ‘regulatory state’ to a less market-oriented and more interventionist ‘developmental state.’

This contribution also highlights terminological difficulties that arise in the comparative study of administrative institutions. In the US, regulatory agencies and the regulatory state generally reflect a ‘progressive’ philosophy of the state, which aims to preserve the market economy, but to address its pathologies and to protect the ‘public interest’ against powerful private concerns. In developing countries such as Brazil or India, and in the EU, independent regulatory agencies are associated with efforts to privatize state-owned enterprises and increase the power of private economic activity vis-à-vis the state. This terminological shift shows how administrative institutions can be repurposed over time to respond to new political movements and interest-group pressures.

Jiunn-rong Yeh (chapter 12) reports on Taiwan’s effort to create an independent regulatory agency for telecommunications in the face of a ruling by the Supreme Court striking down an appointments process that gave too large a role to the legislature. The agency is now functioning under a revised mandate. Taiwan has a semi-presidential system and an administrative law structure that has been heavily influenced by German public law. Hence the creation of new regulatory agencies brings to the fore unresolved issues about the relative status of the various parts of government. In comparing the formal independence of Taiwan’s telecoms agency with the practical (but not formal) independence of the central bank, Yeh suggests that ‘legal protection or institutional design of independence

is not everything. . . . Leadership and political manipulation may influence the practice of an independent agency.’¹

Arun Kumar Thiruvengadam (chapter 13) assesses the evolution of regulatory institutions in India and their links to similar bodies in the UK and the rest of the British Commonwealth. As in Brazil, independent agencies were created as part of a push towards a more market-oriented economy, addressing perceived failures in centralized, state-led planning in areas such as telecommunications, energy, and finance. This development arose from a combination of external pressures—the post-Cold War ‘Washington Consensus’—as well as from policy entrepreneurs within the Indian government who sought to move the country away from the ‘old socialist state of the 1980s.’ This contribution explores how the adoption of independent regulatory agencies has had complex causes and results. Although motivated by internal and external calls for market-oriented reforms, independent agencies also injected sector-specific expertise, transparency, and accountability, at the same time as they heightened the risk of private interest-group dominance in the regulatory process.

III. TRANSPARENCY, PROCEDURE, AND POLICY-MAKING

The role of administrative law in mediating the potential tension between democratic accountability and technocratic expertise is the subject of the contributions to this section. Public agencies promulgate regulations for many different purposes. They seek to correct market failures, protect rights, and distribute the benefits of state actions to particular groups—ranging from the poor or disadvantaged minorities to politically powerful industries such as agriculture or oil and gas. Executive policymaking in democracies raises issues of public legitimacy and democratic accountability.

Discussions of ‘good’ policy by social scientists, risk analysts, and other specialists sometimes clash with efforts to maintain the democratic accountability of agency policymaking. This tension is especially salient under US notice-and-comment rulemaking and may be less evident in other legal systems where the law emphasizes the adjudication of individual administrative acts, not norm setting (Rose-Ackerman, chapter 15). In the systems that focus on adjudication, judicial review does not check rulemaking procedures for democratic legitimacy. Notice, public input, and reason-giving may be expedient but are seldom legally required in parliamentary systems. Public involvement in individualized capital-investment decisions is, however, spreading in many polities. Rose-Ackerman argues that in some cases such involvement does not further democratic legitimacy, even if it helps limit local opposition. Public debate over broad policy does not occur; rather, the issues at stake often only concern the distribution of the benefits and costs of already decided policies.

The US model is the subject of Jerry Mashaw’s essay (chapter 16). Mashaw provides an historical overview of reason-giving as an administrative obligation over the course of

¹ Other independent agencies police the behavior of government bodies themselves. The case for independence is particularly strong for such agencies, but so is the need for oversight to prevent either their capture by regime opponents or their lapse into inaction. See Ackerman 2010.

the nineteenth and twentieth centuries. A pivotal development in this history was adoption of the notice-and-comment provisions of the Administrative Procedures Act of 1946 (§553) dealing with so-called ‘informal’ rulemaking. These provisions require agencies to provide notice, to allow for outside participation, and to give reasons when they issue a rule. Judicial development, as Mashaw notes, has greatly expanded the robustness of these procedural demands while also expanding the scope of review to include the rational underpinnings of the rule and its consistency with the implementing statute. The US model, however, is not the only way to deal with the tension between technical competence and democratic legitimacy. Under a second model, the decisions of corporatist bodies, which include stakeholder representatives, have legal force. This model, which departs from the quasi-judicial model underlying the US APA, may freeze in place a particular pattern of interest representation in spite of changes in the underlying pattern of affected interests (Rose-Ackerman 2005, 126–62). Furthermore, some of those around the table may be good representatives but poor bargainers.

A third model is an explicitly elite process under which a select body reviews general norms and regulations with legal force. The most developed system is found in the French *Conseil d'Etat*, whose administrative sections review and comment on government drafts and also prepare background material on policy issues. The *Conseil*, however, is also an administrative court that judges the legality of administrative actions. Dominique Custos (chapter 17) outlines recent French reforms embodied in its first-ever administrative procedure code. Conventionally, administrative law in France has been understood as *jurisprudentiel* – that is, a product of the case law of the *Conseil d'Etat* in its judicial mode. Custos, however, notes several long-term trends in national, European and international legislation that have cut into the administrative judiciary's traditional predominance in defining administrative procedure. The new code builds on, and in some sense consolidates, those trends. Nonetheless, Custos suggests that the incomplete nature of the codification, combined with the well-established interpretive resourcefulness of the *Conseil d'Etat*, means that the administrative judiciary will retain a key role in the procedural dimension of French administrative law.

Javier Barnes (chapter 18) offers a typology of administrative procedures, according to different modes of governance. He distinguishes three generations of administrative procedures. Presently, third-generation procedures take place in a context of networked policymaking, which involves a greater variety of actors and voices. The third generation is based on procedural collaboration between administrations and/or private parties aiming not only to make individual decisions and regulations, but also to enable participation at different stages (for example, regulatory impact assessments or environmental permit procedures). Procedural reforms should take account of the ‘holistic, cross-sectional’ nature of many policies. Both integration and collaboration are needed, but, as Barnes realizes, striking the right balance will not be an easy task.

Many new regulatory agencies in Europe have introduced accountable procedures on their own initiative even though they were isolated from electoral politics. Dorit Rubinstein Reiss (chapter 19) provides case studies from the UK, France and Sweden. She argues that the regulators supported greater public involvement because they needed outside support to survive and could imitate established models in the US and elsewhere. More participatory and transparent processes were seen as a way of increasing their own legitimacy. However, as she demonstrates, these moves did not always have that effect.

Sometimes they simply increased the power of the regulated industry. In some cases, however, the agencies reacted to the risk of capture by taking steps to facilitate consumer input.

The executive may seek to monitor and influence agency policymaking even absent external legal control by the courts. In that regard, Jonathan Wiener and Alberto Alemanno (chapter 20) review the experiences of the US and the EU with so-called Regulatory Oversight Bodies (ROBs), carrying out regulatory impact assessments of proposed rules (ex ante RIA) and retrospective regulatory impact assessments of existing rules (ex post RIA). The key body in the US is the Office of Information and Regulatory Affairs (OIRA). In the EU, the Regulatory Scrutiny Board (RSB) (formerly called the Impact Assessment Board (IAB)) plays a similar role. The emergence of ROBs in both the US and the EU, Wiener and Alemanno suggest, ‘demonstrates the transatlantic consensus on the desirability of regulatory oversight at the center of government.’ To the extent that there are differences in approach, these flow from the contrasting US and EU constitutional contexts, leading to procedures that occur ‘at different stages in the policy cycle, with different powers and limitations.’ For example, in the US systematic regulatory review occurs in the executive branch during the implementation phase, rather than when the executive submits draft statutes to the Congress. In the EU, by contrast, the Commission conducts impact assessments for its legislative proposals, using tools of economic policy analysis to frame legislation, rather than the administrative rules that follow from them.

The contribution of Giulio Napolitano (chapter 21) flows directly from the increasing use of ROBs and RIA: governments must become ‘smarter’ to carry out policies in a world of shrinking budgets and fiscal deficits, which limit options. Napolitano’s chapter considers regulatory policymaking in the light of financial crises and the retreat from neo-liberal deregulatory policies. He argues that even if contemporary crises have reinvigorated the role of the state, the demand for ‘smarter’ government persists. Following a broad survey of trends throughout the world—importantly in the use of digital technologies—Napolitano argues that administrative law must confront the scarcity of regulatory capacity and limited budgets for social services. However, ‘a new world, based on policy management, cost-benefit analysis, and regulatory review,’ he writes, has also led ‘to the re-discovery of the traditional world of administrative law,’ notably through efforts to codify administrative procedures and to increase transparency and participation rights of the type highlighted elsewhere in this section.

As suggested by several of this section’s contributions, many participants in the debate over policy analysis privilege a particular type of expertise derived from science and economics. Others contributors urge more transparent, participatory decision-making processes. The two approaches are compatible so long as public officials recognize that they may not have all the necessary expertise. Participation and transparency can serve not just as rights but also as a means to the end of better policy outcomes. Greater public involvement may not only produce more effective policy but also increase the acceptability of the regulatory process both in representative democracies and in entities, such as the EU, that also seek public legitimacy.

Catherine Donnelly (chapter 22) elaborates the traditional tension in administrative law between technical expertise and democratic accountability in a comparative framework. Donnelly shows how this tension has played out in the US, the EU, and the UK and how

the courts have tried to manage that tension. Several important differences emerge. In the US and the EU, courts act as a counterweight to the prevailing ethos—upholding expertise in the US, and treating claims of expertise with caution in the EU. The UK courts view both public participation and expertise with caution, and they legitimate administrative action based on a Weberian understanding of a hierarchical, professional, politically neutral civil service.

For policies where a cost-benefit test seems appropriate, one response to this tension would be to combine cost-benefit analysis with transparency as a means of blocking agencies from adopting measures that benefit narrow interests. This requirement could have legal force if applied by the courts. As one of us (Rose-Ackerman 1992) argues, a judicial presumption in favor of net benefit maximization increases the political costs for narrow groups, which would have to obtain explicit statutory language in order to have their interests recognized by courts and agencies (see also Sunstein 2002: 191–228). This proposal is, of course, controversial even in the United States and would presumably garner even less support in legal regimes with little court review of rulemaking. Yet it raises an important question that animates the entire discussion of administrative litigation to which we now turn: What should be the judiciary's role in reviewing the policymaking activities of modern executive branch bodies and regulatory agencies?

IV. ADMINISTRATIVE LITIGATION AND ADMINISTRATIVE LAW

The tension between administration and justice—between the policy prerogatives of the state pursuing regulatory programs, on the one hand, and the demands of justice in individual disputes, on the other—underlies all the contributions to this section. Administrative litigation raises a set of questions familiar to any student of administrative law: Under what circumstances should we allow a private party to enlist the aid of an independent judge to rule on a dispute over administrative action? Who may seek that aid (standing)? When (timing)? On what issues (scope of review)? To what end (remedies)?

Concentrating on the UK, US, Canada, and the EU, Paul Craig (chapter 23) assesses judicial review of questions of law, ranging over issues of jurisdiction, other types of legal questions, as well as administrative rationality more generally. This provides an opportunity for a common law / civil law comparison (with the EU largely representing the latter, and the UK, US, and Canada the former). For American administrative lawyers, of course, judicial review of questions of law implicates the much-debated *Chevron* doctrine,² which Craig uses as a pivot in contrasting the frameworks developed elsewhere. US and Canadian judges have developed approaches that overtly favor deference, at least in some circumstances. UK judges at one time seemed to share the inclination of their more civilian colleagues in Europe in refusing to defer to the legal interpretations of the government

² In *Chevron, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) the Court upheld the EPA's definition of the statutory term 'stationary source' of pollution. The Court famously outlined a two-step procedure: if the statute's meaning is clear, that meaning binds the administrative agency's policy choice; however, if the statute is ambiguous, the court will defer to the agency's interpretation if it is reasonable.

and public agencies, including its administrative tribunals, at least where ‘jurisdictional’ issues were concerned. However, decisions handed down since the first volume of *Comparative Administrative Law* suggest a move toward slightly more deference, or at least a willingness to give interpretive weight to an administrative tribunal’s conclusion on an issue of law. But before one begins to think in terms of a simple common law / civil law divide (a position that Craig’s nuanced chapter would not support in any event), we should also consider the Australian case, in which judicial deference on questions of law is clearly disfavored (see Cane 2016).

In developing civilian and common law comparisons, the concept of proportionality provides one important point of entry. Jud Mathews (chapter 24) notes that, as a control on exercises of governmental discretion, the ‘global spread of proportionality is one of the worst-kept secrets in comparative law,’ moving well beyond its civilian (particularly European) origins. Much of the existing literature has, however, looked at the question in the constitutional context. Mathews’s focus is on the administrative domain, surveying a diverse range of approaches in the ‘intensity,’ ‘discursiveness,’ and ‘extensiveness’ of proportionality review around the world, and offering hypotheses about the variation that he observes. He notes, for example, that the extensiveness of proportionality analysis within a given legal system will depend on a broader set of administrative law principles, including rules on the scope of review, which may limit its application. The intensity of proportionality may be better ‘calibrated’ to the legal and factual implications of the case in systems where the doctrine has matured, rather than only recently been introduced.

The chapter from Gabriel Bocksang Hola (chapter 25) also bridges the civil law / common law divide, describing the deep philosophical issues behind the core activity of judicial review: the declaration of invalidity of administrative action (or, in civilian terms, an ‘administrative act’). The focus is on the distinction between ‘voidness’ and ‘voidability.’ The chapter suggests that certain systems operate in a ‘monist’ fashion, in which voidness and voidability are not readily distinguished, whereas others are ‘dualist,’ thus retaining the distinction to some degree. These issues, although seemingly abstract, have significant bearing on crucial practical questions, such as standing, the availability and timing of judicial review, and remedies—in short, on the capacity of private parties to enlist the aid of a judge in the task of promoting administrative legality. Where a court characterizes an administrative act as ‘void,’ the availability of review and types of remedies may be significantly greater than where the act is merely characterized as ‘voidable.’

There is a famous adage in French administrative law—*juger l’administration, c’est encore administrer*—‘to judge the administration is still to administer.’ It recognizes the difficulty, if not impossibility of separating the process of legal control from the underlying process of administration. External legal control, whether exercised by courts or court-like administrative tribunals like the French *Conseil d’Etat*, will always shape regulatory policy in a myriad of ways. Read most strongly, this French adage implies an ideal of a ‘self-regulating’ administrative sphere that is detached from traditional values of justice and guided by its own sense of policy rationality and its own estimation of the public interest in the construction and regulation of the market (Lindseth 2005: 119). This adage, moreover, underlies the French *dualité de juridiction*, in which administrative judges organically attached to the executive are primarily competent to hear challenges to administrative action. Jean Massot (chapter 26), a member of the French *Conseil d’Etat* for over four decades, notes how the French system of administrative justice ‘progressively

became both an extremely powerful judge and an institution at least as independent as its judicial counterparts.’ Despite its Napoleonic origins, the *Conseil d’Etat* eventually woke up to the fact that ‘*juger c’est juger*’—to judge is to judge—as one leading member put it in the mid-nineteenth century (Vivien 1852). In other words, French administrative judges came to realize that, despite the potential impact of their rulings on administrative policymaking in the ‘general interest,’ their office still required independence, procedural fairness, even a willingness to revisit certain aspects of the underlying administrative act in the interest of justice in the particular case.

In their contribution, Michael Asimow and Yoav Dotan (chapter 27) ask what materials a reviewing court should be allowed to consider, in terms of evidence, reasons, and arguments, even if those materials may not have been before the administrative body when it undertook the action now under challenge. Comparing the US and Israel, the authors distinguish between systems that require relatively open or closed evidentiary records, as well as those that adopt rules regarding open or closed reasons or open and closed arguments. They find that the US falls near the *closed* end of the spectrum and may have the most closed system, whereas Israel falls closer to the *open* end of the spectrum, although its practice is inconsistent. More importantly, they suggest that understanding how a system opts for closed or open review provides a window into the division of responsibilities between the administrative bodies and the judges reviewing for legality in that system. In a system like the US that is firmly committed to the separation of powers and that invests heavily in the development of an administrative record, closed review ensures a degree of administrative autonomy from judicial review. In Israel, by contrast, courts intervene much more widely in reviewing administrative decisions because the division of responsibilities is less clear, and there is less emphasis on the soundness of the initial administrative determination.

Athanasios Psygkas (chapter 28) also explores this division of responsibility in his examination of a specialist regulatory court in the UK, the Competition Appeal Tribunal (CAT). Psygkas argues that, because of the CAT’s institutional design and operation in practice, it combines the advantages of a specialist court, in terms of more in-depth substantive review, while mitigating the associated risks of specialization (insularity and the loss of broader perspective, as well as overly aggressive substitution of judgment). But Psygkas is most impressed by the capacity of the CAT to weave together review of both process and substance, which ‘enhances the robustness of the decisionmaking process by ensuring, for instance, that public consultation has been properly conducted in a way that has allowed the voices of different stakeholders to be heard or that the cost-benefit analysis demonstrates an appreciation of the complexity of the interests at stake.’

Cheng-Yi Huang (chapter 29) considers the question of deference in emerging democracies. Huang’s contribution explores recent developments in constitutional courts in Poland, Taiwan, and South Africa. He notes that the transition to democracy from a period of dictatorship or authoritarianism often can trigger profound hostility to administrative power and unchecked legislative delegation. In Huang’s account, this translates into judicial activism for constitutional courts in the early post-transition years. However, in the second decade after democratization, courts in each of these countries relaxed standards of judicial review to allow for legislative delegation to the executive. More recently, administrative law has been marked by a ‘fear of authoritarian resurgence,’ as dominant party governments expand their power. In South Africa and Taiwan, courts have responded by ‘proceduralizing’ judicial review: they refrain from questioning the

ultimate wisdom of the policy choices or determinations of administrative bodies, but nonetheless police the procedures through which those decisions are made to insure that they are transparent and fair. Poland has not followed this same trend, retaining a substantively and procedurally deferential posture towards the executive, and failing as yet to develop a ‘defensive jurisprudence’ against an emboldened executive. Kovács and Scheppele provide a particularly clear case of this latter outcome, as mentioned above.

The contributions of Narufumi Kadomatsu (chapter 30) and Thomas Perroud (chapter 31) provide comparative perspective on administrative litigation in a particular domain—the protection of public spaces. In so doing, they touch on many of the core issues of this section. Kadomatsu looks at the regulation of private property, while Perroud considers the regime to which public property is subject. Kadomatsu proposes two models in his analysis: a ‘rights-based model’ and a ‘consultation and coordination model.’ He then explores the Japanese judiciary’s traditional role as resolving only ‘legal disputes’ (along with associated justiciability doctrines familiar in other administrative law systems), which is grounded in the rights-based approach and has traditionally restricted access to the courts. Nonetheless, Kadomatsu suggests that the judiciary may be moving more toward a ‘consultation and coordination model’ that will facilitate the involvement of stakeholders in administrative decision-making in the urban context in Japan.

Perroud, for his part, notes that ‘public property law’ is a major topic of administrative law scholarship in France but receives very little attention in common law systems such as the UK and the US. Perroud is particularly interested in the managerial and proprietary powers that administrative actors possess in the context of public property that could conflict with the public character of the property itself. How do the courts respond to this challenge? Perroud discerns some common goals in the two systems, most importantly the desire to vindicate the rights of citizens as well as placing curbs on state power. Nonetheless, Perroud also locates some potentially troubling historical trends, notably the privatization of the public space (e.g., malls), with concomitant potential adverse impacts on the ‘public sphere’ that is essential for healthy democratic life.

V. ADMINISTRATIVE LAW AND THE BOUNDARIES OF THE STATE

A. Public and Private

The contributions from Kadomatsu and Perroud that close the previous section raise issues that are also essential to questions of administrative law and the boundaries of the state. Especially in countries with a civil law tradition, the distinction between public law and private law has been central to the development of administrative law. The common law tradition often obscured this boundary, but today all modern states recognize its existence in their efforts to construct a specifically public law. Given the existence of a distinctive public law everywhere, the move over the last several decades to privatize and contract out government services presents a particular challenge. What legal principles should apply to private bodies that carry out formerly public functions or that take on new tasks under contract? Will the trend toward the use of nominally private firms lead to the integration of public and private law, even in states, such as France and Germany,

where the public law/private law distinction has deep historical roots? The chapters in this section raise these questions and provide some tentative answers.

As outlined by Daphne Barak-Erez (chapter 32), privatization has many meanings, but we highlight three salient ones derived from her more detailed taxonomy. First, in its strongest form, privatization means that the state exits entirely from a sector or policy area leaving it to be governed only by the laws that regulate the actions of all private businesses and that frame private interactions. Second, a public utility may be converted into a private firm, with or without a ‘golden share’ remaining in state hands, and placed under the supervision of an independent regulatory agency. The agency itself is obviously a public law entity and may hold public hearings, comply with transparency requirements, and so forth. Thus, the private firm is essentially a private law entity that must subject itself to scrutiny by a specialized public law agency. Third, the state may decide that a nominally private firm must comply with some public law strictures in carrying out its business, even in the absence of oversight by a specific agency. Some of the proposals to resolve the financial crisis have taken that form. However, the most common examples occur when a private firm contracts with the government to provide a service—for example, in-patient care for the mentally ill, incarceration of prisoners, health care, and security services such as guard duty. Here, the state explicitly requires the contractor to act in accord with public values by, for example, providing due process guarantees to applicants, operating with a level of transparency not usual in the private sector, or, in the national security context, complying with military norms and rules of behavior. This last category raises the most direct challenge to traditional public law/private law distinctions, especially in states with a civil law tradition. They also challenge libertarian presumptions about the inherent value of private enterprise compared to public bureaucracies as service providers. Jean-Bernard Auby (chapter 33) discusses the way contracts with government can extend public values to private service-delivery firms, but he stresses the risks inherent in programs of private provision for formerly state-supplied services. These concerns have produced legal limits on contracting out in many countries, but they have also generated a range of responses—from careful contract drafting to self-regulatory mechanisms.

Laura Dickinson (chapter 34) extends this analysis to the US military, often understood as beyond the scope of administrative law. She grounds her study in organizational theory by examining the relative impact of inside socialization and sanctions versus outside incentives in influencing behavior, a contrast with broader relevance beyond the specific case she examines. Dickinson shows how the existence of ‘compliance agents’—in this case, military lawyers embedded with US troops—promotes respect for public law values through their direct contact with commanders and troops in the field. In this way, Dickinson’s chapter opens up our perspective to an important new terrain for administrative law scholarship (comparative or otherwise): the role of compliance within large-scale organizations subject to regulation. Promoting or mandating compliance systems is a way that regulators, in effect, encourage organizations to internalize enforcement functions and build mechanisms and staff to enhance conformity with regulatory demands. Concerns over regulatory compliance not only push up against the public-private boundary but also that of the law strictly speaking, in which more intangible concerns such as ‘tone at the top’ become crucial to ensuring that a culture of compliance is properly in place.

Victor Ramraj (chapter 35) closes out this section by examining the public-private

boundary in transnational regulation. As Ramraj opens his contribution, '[t]wo contemporary developments are challenging our understanding of administrative law: the privatization of regulation and its increasingly transnational nature.' Thus, his chapter straddles the issues raised here and in the next section. To him, the combination of privatization and transnational regulation falls into a 'blind-spot' in traditional administrative law. The purpose of his chapter is 'to define the contours of transnational non-state regulation and identify the assumptions of domestic administrative law that make it largely invisible, and consider how domestic law might respond to transnational non-state regulation.' This form of regulation is here to stay, and thus administrative law must begin to play 'an important complementary role in checking concentrated forms of power and facilitating good administrative practices beyond the confines of the modern state.' He considers three possible responses—*isolation*; *formal incorporation*; and *recognition, engagement, and cooperation*—as a means of exploring the nature and legitimacy of this form of regulatory power. Skeptical that isolation or incorporation are desirable or practical, Ramraj proposes that states and other public authorities consider the legitimacy of transnational non-state regulators when they engage with their normative output. The crucial factors in assessing the legitimacy of such non-state actors are: the degree to which the authority claimed by these regulators is accepted by the community they affect, the expertise of the bodies, and the quality of their regulatory product.

B. Administrative Law beyond the State: The Case of the EU

Administrative law's role beyond the state is the central focus of this final section, using the experience of the European Union as a case study. The section begins with theoretical considerations. Peter Cane (chapter 36) builds on his comparative work on Australia, England and the US (Cane 2016) to extend his reach to supranational and transnational authorities, especially the EU. Cane is concerned with the distribution of power (concentrated or diffused) and the corresponding control regimes ('accountability' and 'checks-and-balances'). Insofar as the EU is concerned, Cane seeks to break from the overarching debate about the EU's 'constitutional' versus 'administrative' character (about which more below) and instead understands EU law and governance in terms of his own conceptual framework. What he finds is a system of diffused power that, consistent with his theory, necessarily must rely on checks-and-balances as opposed to hierarchical accountability.

The remaining chapters in the section (Saurer, chapter 37; Mendes, chapter 38; Hofmann and Schneider, chapter 39; Ruffert, chapter 40; and Lindseth, chapter 41) engage either implicitly or explicitly in the 'constitutional' versus 'administrative' debate that Cane's chapter avoids. The dominant discourse understands EU public law, at least in part, as a kind of constitutional law, albeit beyond the confines of the state. As Peter Lindseth's contribution (chapter 41) summarizes: 'The implication is that the centralized rulemaking process in the EU—in which the Commission "proposes" and the Council and EP together "dispose" in various ways—is also of a "constitutional" character, serving as the EU's "legislature." In this view, the EU's "administrative" sphere begins where this "legislative" sphere ends.' All the contributions in this section, save that of Lindseth, operate within this framework.

Johannes Saurer (chapter 37) focuses on 'agencification' in the EU—that is the

creation of agencies beyond the European Commission. Saurer speaks in terms of a ‘new constitution of supranational administration,’ drawing his conclusions from an analysis of the 2014 ruling of the European Court of Justice (ECJ) in a dispute over the powers of the European Securities and Markets Authority (ESMA) in the context of the global financial crisis.³ Saurer sees this as a landmark decision that potentially marks the transition to a ‘new constitutional order’ allowing for the transfer of greater power to rules of binding application within EU agencies. Joana Mendes (chapter 38) builds on Saurer’s analysis by delving into the theoretical underpinnings of the ECJ’s approach. She provides a wide-ranging discussion of what the Court’s approach might portend for judicial review of administrative discretion more generally. Her focus is on ‘how law (i.e., legal norms and legal principles that administrative action ought to concretize and respect) may constrain and structure the substantive choices that EU administrators make within the spaces of discretion,’ rather than on how courts review an exercise of discretion. She worries that forms of deference (in particular, in ‘technical’ domains) may allow certain exercises of discretion to escape meaningful external review entirely. Consequently, she proposes that discretion be viewed as ‘a reconstruction of value judgments underlying legal norms,’ an exercise that must be ‘explicit and justified by reference to those norms. In this way, law would remain constitutive of discretion irrespective of possibilities of judicial review.’

Herwig Hofmann and Jens-Peter Schneider (chapter 39) are also deeply concerned with the exercise of administrative discretion in the EU. Their contribution reviews the proposals issued by the Research Network on EU Administrative Law (or ‘ReNEUAL’), in which they both were participants. This project, organized by a group of leading European administrative law scholars, has drafted model rules for EU administrative law informed by a comparative perspective. The backdrop is a status quo marked by ‘significant fragmentation into sector-specific and issue-specific rules and procedures.’ Although the ReNEUAL participants do not object to this diversity in itself, they also argue that it is time to develop ‘procedures in which actors from various jurisdictions, both national and European, contribute to one single administrative procedure.’ Consequently, the ReNEUAL project not only covers the administrative activities of EU bodies strictly speaking, but also those of national bodies implementing EU law. The project also includes the EU’s participation in a variety of international regulatory and enforcement schemes that can also be understood in administrative law terms.

The final contributions to this section, by Matthias Ruffert (chapter 40) and Peter Lindseth (chapter 41), return to the question of the constitutional and administrative character of EU public law. Ruffert focuses on the question of the constitutional *basis* of EU administrative law rather than the character of EU law *per se*. He acknowledges the debate over that issue, as well as that over whether the EU actually has or needs a constitution. But he suggests that the debate can now be put by the wayside because ‘the hierarchical nature of the Union’s legal order’ is now generally accepted. The real challenge is dealing with the extraordinary complexity of EU administrative governance, which he summarizes in some detail. Lindseth would generally agree as to hierarchy and

³ Case C-270/12, *United Kingdom v. European Parliament and Council (ESMA)*, [2014] 2 CMLR 44.

complexity but with one important caveat on the question of legal character. If the EU is, as Lindseth maintains, of an ultimately administrative character, then the primacy (or, in constitutionalist language, the ‘supremacy’) of EU law is not an absolute, certainly not as interpreted by the ECJ. Rather, the hierarchical character of the EU legal order should be understood only as a kind of functional ‘pre-commitment’ that is governed by ‘strong deference.’ This still allows national high courts, in extremis, to override the ECJ in the interest of the superior democratic and constitutional legitimacy on the national level.

CONCLUSIONS

We have aimed for a broad coverage of contemporary themes in administrative law, especially those that raise similar issues in legal systems across the globe. We were pleased with the reception of the first edition of *Comparative Administrative Law* and hope that our new volume will have a similar impact. We have included both researchers at an early stage in their careers and more established scholars, and we have tried for coverage of a number of important legal systems. We hope that the questions that are posed here will help the field continue to grow in depth and coverage, and we urge others to further develop the important themes we introduce here in other contexts throughout the world.

NOTE

The views expressed in this Introduction do not represent those of the Administrative Conference of the United States or the federal government of the United States.

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