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**From Expert Administration to Accountability Network:  
A New Paradigm for Comparative Administrative Law**

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**FROM EXPERT ADMINISTRATION TO ACCOUNTABILITY NETWORK:  
A NEW PARADIGM FOR COMPARATIVE ADMINISTRATIVE LAW**

By Francesca Bignami\*

**Abstract**

Notwithstanding recent scholarly interest in comparative administrative law, the categories and concepts that structure comparisons and that facilitate communication among different legal systems have not changed much since the late 1800s. They are rooted in confidence in expert bureaucracy to accomplish public purposes and are twofold—administrative organization and judicial review. This outdated view of administrative law has limited the ability of the field to engage with contemporary debates on administrative governance, which instead are deeply skeptical of public administration and are premised on achieving the public good through a plural accountability network of public and private actors. This paper seeks to correct the anachronism by reframing administrative law as a set of rules designed to embed public administration and civil servants in their democratic societies: accountability to elected officials, organized interests, the courts, and the general public. Based on this new paradigm, the paper compares American and European administrative law, with reference to other parts of the world too. It concludes with a number of suggestions for how comparative law can speak to current debates on reforming administrative governance.

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## I. Introduction

Comparative administrative law has experienced a renaissance over the past decade. In the American academy, the growing importance of international trade and transnational administrative bodies has spurred lawyers and scholars to master the administrative law of the many foreign jurisdictions in which American corporations do business and to engage with the rules and procedures of international organizations.<sup>1</sup> European scholars, prompted by the remarkable pace of European integration, have conducted numerous cross-national studies designed to find the common ground necessary for a single, transnational European law of administration.<sup>2</sup> The international diffusion of regulatory phenomena such as independent agencies, the privatization of public services, self-regulation, and cost-benefit analysis has spurred countless cross-national investigations into the fate of old patterns of administrative law in the face of these new reforms.<sup>3</sup> Taken together, these projects represent an impressive advance in our understanding of the diverse legal frameworks that guide administration and public policymaking across the world today.

Yet strangely, notwithstanding this newfound enthusiasm, the categories and concepts that structure comparisons of administrative law systems and that enable communication among lawyers and scholars in different legal systems have not changed much since the beginning of the field, back in the late 1800s. These categories are essentially twofold: the organization of public administration and the judicial review of administrative action. This intellectual framework is rooted in the historical origins of the field, which was marked by a spectacular confidence in the ability of professional bureaucracy to fulfill the purposes of democratic societies. Administrative law was cast as a set of rules and procedures designed to promote effective administrative action and a series of remedies, afforded by the courts, should public administration exceed the limits of the rules and procedures. But bureaucracy has long since lost its shiny luster. The capacity of the state has dwindled at the same time as new forms of democratic expression have multiplied. To overcome the many frustrations that have emerged with the administrative form of organization, a variety of public and private actors have been injected into the administrative

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<sup>1</sup> See, e.g., ADMINISTRATIVE LAW OF THE EUROPEAN UNION (George A. Bermann, Charles H. Koch, Jr. & James T. O'Reilly eds., 2008); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15 (2005).

<sup>2</sup> See, e.g., MICHEL FROMONT, DROIT ADMINISTRATIF DES ÉTATS EUROPÉENS (2006); JÜRGEN SCHWARZE, EUROPEAN ADMINISTRATIVE LAW (1992).

<sup>3</sup> See, e.g., COMPARATIVE ADMINISTRATIVE LAW (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010).

process with the hope of achieving a more accountable and workable set of policy outcomes. Fittingly, in the work of domestic legal scholars, the old notion of an expert bureaucracy swiftly carrying out the democratic will has been replaced by a networked understanding of how public and private actors combine to accomplish public purposes in areas too complex or labor-intensive to be entrusted to legislatures and courts alone.<sup>4</sup>

In this paper, I seek to develop a comparative framework that can speak to the new universe of administrative governance.<sup>5</sup> I do so by setting aside the old functional problem of effective bureaucracy and by recasting administrative law as the rules and procedures through which civil servants are embedded in liberal democratic societies. I identify four sets of accountability relationships between democratic actors and public administration that are essential to administrative governance: the powers of elected officials, the involvement of organized interests in policymaking and self-regulation, the contestation of administrative action before the courts, and informal accountability to the general public through parliamentary ombudsmen and transparency guarantees. Within each of these categories, which underscore the similarity among legal systems that is the essential prerequisite to any kind of comparison, I focus on differences in legal rules that have been identified as important in the law and political science: presidential versus parliamentary regimes, neo-corporatist versus pluralist systems of interest representation, fundamental rights versus rationality review, and more. By shifting the focus of comparison away from an antiquated, hierarchical public administration and towards a multi-faceted accountability network, this conceptual scheme better captures the empirical realities and normative self-understandings of the contemporary administrative state and enables comparative law to contribute to current debates on administrative governance.

The rest of this paper proceeds as follows. The first section presents the blueprint of administrative organization and courts that has traditionally served to structure administrative law comparisons, going as far back as 1893 with the monumental study authored by the American legal scholar, Frank Goodnow. It also explores the developments in state capacity and public attitudes that necessitate a shift away from the old focus. In section two, I explain my

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<sup>4</sup> See, e.g., Philip J. Harter, *Collaboration: The Future of Governance*, 2009 J. DISP. RESOL. 411, 440-41; Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004).

<sup>5</sup> For a discussion of the functional method used in this paper, see Ralf Michaels, *The Functional Method of Comparative Law* in THE OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reimann & Reinhard Zimmerman eds., 2006).

alternative theoretical framework. In section three, the heart of the paper, I discuss the legal similarities and differences that fill the conceptual containers, with the primary geographic focus being the United States and Western Europe. The conclusion raises additional research questions and discusses how my paradigm can inform contemporary policy debates on reforming administrative governance.

## **II. The Traditional Canon of Comparative Administrative Law**

The birth of administrative law as an academic discipline is inextricably tied to the rise of large state bureaucracies in the late nineteenth century. This was a period of great optimism in the ability of public servants and the bureaucratic form of organization to pursue the common good and advance the interests of society as a whole. This era is nicely captured by the intellectual historian Pierre Rosanvallon in his analysis of changing understandings of democratic legitimacy from the French Revolution to the present day.<sup>6</sup> As he explains, for most of the nineteenth century, the ideal of government by the people was largely conceived as the political practice of universal suffrage, elections, and majority rule. Yet in both France and the United States, the pathologies of party politics—government instability and the corruption of elected officials—led many thinkers to sour on the idea of majoritarian politics and to seek complementary forms of government that would guarantee sound public ordering. Public administration emerged as this complementary form of organization in both France and the United States and, one might add, most of the Western world.

The many ways in which government by bureaucrats was conceptualized as government for the people are critical to appreciating how thoroughly entrenched public administration was in the democratic theory of the time. In France, the pioneering work of the first generation of social scientists portrayed society as composed of multiple groups, organized by economic function, territorial allegiance, religious affiliation, and other attributes, and organically interwoven to constitute a single social whole. This vision of society prompted the great legal thinkers Léon Duguit and Maurice Hauriou to develop a theory of administration in which government officials would direct state resources to integrating the different parts into a coherent whole and nurturing the many forms of solidarity through which individuals became members of

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<sup>6</sup> PIERRE ROSANVALLON, *LA LÉGITIMITÉ DÉMOCRATIQUE: IMPARTIALITÉ, RÉFLEXIVITÉ, PROXIMITÉ* 59-99 (2008).

society.<sup>7</sup> This theory of administration as provider of the “public services” objectively needed by society called for an enlightened cadre of public officials, capable of discerning what these public services might be and adept at putting them into action. Indeed, according to the theory, civil servants themselves formed a distinct social group, essential to the constitution of society.

In the United States, democratic faith in public administration took on a somewhat different shape. Progressives like Woodrow Wilson and Frank Goodnow, and later on, New Dealers like James Landis, campaigned for an independent, career civil service based on the values of the scientific managerialism of the age: administration, like many other spheres of human activity, was a science and only a cadre of devoted public servants could master the theories and techniques of that science. As Goodnow put it in justifying the separation of administration from party politics:

[T]here is a large part of administration which is unconnected with politics, which should therefore be relieved very largely, if not altogether, from the control of political bodies. It is unconnected with politics because it embraces fields of semi-scientific, *quasi-judicial*, and *quasi-* business or commercial activity . . . For the most advantageous discharge of this branch of the function of administration there should be organized a force of governmental agents absolutely free from the influence of politics. Such a force should be free from the influence of politics because of the fact that their mission is the exercise of foresight and discretion, the pursuit of truth, the gathering of information, the maintenance of a strictly impartial attitude towards the individuals with whom they have dealings, and the provision of the most efficient possible administrative organization.<sup>8</sup>

Notwithstanding these national permutations, faith in public administration was broadly shared and was reflected in the study of administrative law. The treatises of Frank Goodnow, Maurice Hauriou, and Léon Duguit all placed the efficient action of administrative officials at the center of their analysis.<sup>9</sup> For our purposes, it is enough to focus on the work of Frank Goodnow, who was not only a scholar of American administrative law but also authored one of the first, comprehensive English-language studies on comparative administrative law. His exposition of the administrative law of the United States, France, England, and Germany

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<sup>7</sup> H.S. JONES, *THE FRENCH STATE IN QUESTION: PUBLIC LAW AND POLITICAL ARGUMENT IN THE THIRD REPUBLIC 60-195* (1993).

<sup>8</sup> FRANK J. GOODNOW, *POLITICS AND ADMINISTRATION* 85 (1914).

<sup>9</sup> FRANK J. GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW: AN ANALYSIS OF THE ADMINISTRATIVE SYSTEMS, NATIONAL AND LOCAL, OF THE UNITED STATES, ENGLAND, FRANCE AND GERMANY* (1893); MAURICE HAURIOU, *PRÉCIS DE DROIT ADMINISTRATIVE ET DE DROIT PUBLIC GENERAL* (3d ed., 1897); LÉON DUGUIT, *L'ÉTAT LES GOUVERNANTS ET LES AGENTS* (1903).



revolved around the organization, powers, and procedures of public administration: the hierarchical lines of control extending from central to local government offices, the relationship between elected and career officials, the different types of acts promulgated by administration, and the various ways of giving effect to administrative orders. To ensure that these powers would be used for their intended purpose, administrative officials were placed under the watchful eye of executive-branch superiors, the courts of law, and the legislature. In his account, each body was charged with a different form of oversight: executive-branch superiors with efficiency, courts with rights, and the legislature with societal welfare.<sup>10</sup> And even though it is evident from this tri-partite scheme that Goodnow had a broad understanding of oversight, his analysis was mainly devoted to the courts: tort suits against government officials, criminal prosecutions of renegade public officers, and law suits against administrative acts in those instances where a tort or criminal action would be inadequate. In sum, administrative law was cast as the set of rules that served as the backbone of state bureaucracy, designed to allow public administration to pursue vigorously the common good without trampling on rights. When all was said and done, administrative law boiled down to two components: administrative organization and judicial review.

Since Goodnow wrote, trust in public administration has declined dramatically and the model of public well-being achieved through the lone efforts of enlightened government bureaucrats has all but disappeared. The challenge to administrative legitimacy has come both from the public and the market, the left and the right.<sup>11</sup> Citizens concerned with environmental safety, consumer protection, and public welfare have come to distrust technocratic expertise and the close relations that link the business community and public administration. They have sought, and obtained, various forms of transparency and direct participation in public decisionmaking. Champions of deregulation have forced public administration to withdraw from many areas of goods and services provision and have introduced a series of market-based reforms of the public sector. The effect of this combined attack on the bureaucratic guardians of the public interest has been both ideological and practical: the public today is more reluctant than ever to concede that professionalized public administration is essential to good government and the administrative techniques of the past have been supplemented by a wide array of new

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<sup>10</sup> GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 9, at 135-37.

<sup>11</sup> See ROSANVALLON, *LA LÉGITIMITÉ DÉMOCRATIQUE*, *supra* note 6, at 14-15; Richard B. Stewart, *Administrative Law in the Twenty-First Century*, 78 N.Y.U. L. Rev. 437, 440-44 (2003).

procedures and standards, designed to achieve good government through alternative routes. In keeping with these developments, scholarship in the law and public policy has put forward alternative understandings of how the tasks of public administration are best accomplished.<sup>12</sup> The old image of a hierarchical public administration single-handedly implementing well-defined policy goals set out by legislators has been replaced by a vision of the administrative process as open-ended, collaborative, and networked. The key to success is to enlist stakeholders—private firms, workers, consumers, and all those affected by regulation—in devising, implementing, and enforcing regulatory norms in the many the arenas in which the government is called upon to act. In these accounts, the role of public administration has been scaled back considerably—from commanding to persuading and steering—and other actors, including the private sector, citizen organizations, and industry groups, have come to assume enormous importance.

Yet strikingly, notwithstanding this revolution in our thinking on the administrative state, comparative administrative law remains largely unchanged. The central functional problem of administrative law remains the effective action of government bureaucrats. Which organizational structures, policy instruments, and legal procedures are in place to assist government officials in accomplishing public purposes? And what judicial remedies are available to individuals should civil servants fail to abide by their mandate?

There are many examples of the persistence of this two-fold scheme of administration organization and judicial review. In his overview of the field of comparative administrative law, the prominent English legal scholar, John Bell, writes that

administrative law establishes both primary rules governing how the administration is authorized to work (its organization, powers, and procedures), as well as the secondary rules governing the remedies (judicial or other) available in cases of a failure to observe the primary rules.<sup>13</sup>

Jacques Ziller, a leading French scholar, sets out the field and his sweeping overview of European systems in these terms:

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<sup>12</sup> See, e.g., R.A. W. Rhodes, *Policy Network Analysis*, in THE OXFORD HANDBOOK OF PUBLIC POLICY 425 (Michael Moran et al. eds., 2006); Robert E. Goodin et al., *The Public and Its Policies*, in THE OXFORD HANDBOOK OF PUBLIC POLICY 3 (Michael Moran et al. eds., 2006); CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE* 135-38 (2010).

<sup>13</sup> John S. Bell, *Comparative Administrative Law* in THE OXFORD HANDBOOK OF COMPARATIVE LAW 1259, 1261 (Mathias Reimann & Reinhard Zimmerman eds., 2008).

Administrative law is therefore the theoretical framework for the action of administrative bodies [*appareils administratifs*], which conditions not only their action but also their administrative organization strictly speaking.... Administrative bodies ... require control .... political, hierarchical, and judicial.<sup>14</sup>

Michel Fromont, in his illuminating and masterful exploration of twelve different European administrative law systems, divides his work into two parts: the fundamentals of administrative law, by which he means primarily the organization of administration and judicial review, and litigation against public administration, divided by type of administrative action. These various attempts to define the field and set out the categories for comparison all bear striking similarity to the work of the early pioneers of administrative law. To bring home the point, it is worthwhile returning again to Frank Goodnow. In the preface to his treatise on comparative administrative law, he tells us:

[The author's] intention has been . . . to set forth, in the first place, the methods of administrative organization in the four countries whose law is considered, namely the United States, England, France, and Germany, and to state in the second place, somewhat in detail, the means of holding this organization up to its work, and of preventing it from encroaching on those rights which have been guaranteed to the individual by the constitution or laws.<sup>15</sup>

In sum, not much has changed conceptually over the past century of comparative administrative law scholarship.

In other areas of comparative law, continuity might not be troubling. Take a classic private law topic like contracts. The recent survey by the leading contract lawyer, E. Allan Farnsworth, covers a number of functional problems that serve to bring into focus the differences and similarities between common law and civil law systems: the basis for making promises enforceable, determining whether the parties have reached an agreement, understanding the scope of the obligations imposed by the contract, determining whether a breach has occurred and the remedies for breach, the effect of changed circumstances on the parties' obligations, and the rights of third parties.<sup>16</sup> The subject of enforceable promises in the law is so fundamental and enduring that it seems that this set of problems is equally appropriate today as it was in the time

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<sup>14</sup> JACQUES ZILLER, *ADMINISTRATIONS COMPARÉES: LES SYSTEMS POLITICO-ADMINISTRATIFS DE L'EUROPE DES DOUZE* 270-71 (1993).

<sup>15</sup> GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW*, *supra* note 9, at iii.

<sup>16</sup> E. Allan Farnsworth, *Comparative Contract Law*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 899, 906 (Mathias Reimann & Reinhard Zimmerman eds., 2008).

of Langdell. But the same is not true in administrative law. Here the question of how to promote the common good in areas that are considered too detailed, technical, or voluminous for the legislature or the courts to handle has been the subject of a dramatic shift in thinking over the past century. The archetype of a hierarchically organized, expert administration, under the control of courts that ensure that bureaucrats stay within the limits of their powers, is a profoundly outdated mode of conceiving the administrative process.

### **III. Towards a New Paradigm: Administrative Law as Accountability Network**

Today it is common to paint administration as a network in which civil servants interact with other public officials, citizens, organized interests, and private firms to accomplish the goals of public policy. To be able to speak to current debates, comparative administrative law should seek to develop categories and concepts that reflect contemporary understandings of legitimate administrative governance. Thus I propose that administrative law be framed not, as in the past, as a set of rules designed to ensure effective bureaucracy, but as an accountability network through which civil servants are embedded in their liberal democratic social orders. That is, I propose to organize the analysis around the central paradox that has emerged with the delegitimization of bureaucracy in contemporary societies: on the one hand, the (grudging) recognition that the attainment of public purposes requires a cadre of full-time employees, paid by the public purse and loyal to the state and, on the other hand, the belief that administrative action is legitimate and effective only if rooted in democratic politics and liberal societies. This general problem of administrative law is broken down to reflect the different types of actors, incentives, and institutional logics that shape administrative outcomes. More concretely, this is the law that applies to four major accountability relations in administrative governance: relations between public administration, on the one hand, and elected politicians, organized interests, the courts of law, and the general public on the other hand. These are the four functional problems that I claim are common to administrative law in liberal democratic societies and that can serve as a springboard for comparing the similarities and differences of administrative law systems worldwide.

The conceptual shift from a vertically organized public administration to a plural accountability network of government bureaucrats and public and private actors certainly does not require that previous research in the field be jettisoned. Political oversight by elected representatives and control by the courts are important subjects of virtually all comparative law

scholarship. But notwithstanding the parallels in subject matter, the centrality of expert public administration to conventional comparative analysis has produced an artificially limited understanding of the role played by elected officials and judicial bodies in the administrative process. To illustrate once more with Goodnow's scholarship, he lauded the American system of presidential power over heads of department not because the President was directly elected and therefore could inject various political priorities into the administrative process, but because of the vigorous administrative action that would be promoted by such a clear chain-of-command:

[I]n the national administration the heads of the departments are completely subordinate to and dependent upon the chief executive authority as a result of the precariousness of their tenure and will be in harmony one with the other and with the President . . . . We find therefore in the national administration complete guaranties for an efficient and harmonious administration under the direction of the President.<sup>17</sup>

Similarly, judicial review was cast primarily as a means of ensuring that administration would stick within the four corners of the law:

It may be of vital importance to the individual or to the public that a thing be done which the law says shall be done. It is not just to tell an individual that he must wait until his right has been violated and then sue the proper official for damages, or even prosecute him criminally.<sup>18</sup>

If, instead, elected officials and courts are treated as independent sites of political and social contention, with their distinct logics of action and incentive structures, then it is possible to admit a more complex set of priorities and legal standards that shape and constrain the work of government bureaucrats. Thus, as will be explained below, the competing political agendas of elected officials can affect public administration in unexpected ways and the judicial branch, in reviewing administrative action, can impose standards of procedure, rationality, and fundamental rights that go well beyond mechanical policing for fidelity to authorizing legislation.

The networked understanding of administrative action that I propose also introduces two new sets of actors to the field of comparative administrative law, together with their distinct legal rules and procedures: organized social and economic groups and members of the public with an interest in good administration. Diffuse accountability and organized interests are not new to public administration, but the old paradigm of expert bureaucracy has long obscured their

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<sup>17</sup> *Id.* at 136.

<sup>18</sup> *Id.* at 191.

importance.<sup>19</sup> The scheme presented here elevates direct citizen engagement and organized interests to the same status as courts and elected officials and thus recognizes the plural universe of administrative action for what it is.

Before going any further, I should address an obvious objection to my four-part scheme. How can any one set of legal standards and procedures be identified with any one set of relations in administrative governance? Elected officials, organized interests, courts, and members of the public are simultaneously involved in almost every form of legal rule and procedure that governs the administrative process. Elected officials use their powers in response to demands from individual constituents and lobbying groups; the procedures that enable organized interests to shape administrative policymaking also benefit elected representatives and the general public; adjudication in the courts is triggered by individuals and organizations adversely affected by bureaucratic decisionmaking; and transparency empowers not only individual citizens but also reinforces judicial oversight and increases the influence of organized interests. But even though democratic politics are complex, in most cases it is possible to identify one set of actors, with their distinctive priorities and logics of action, that benefit from the rules of administrative law. The constitutional powers of elected officials are exercised primarily with a view to re-election; the procedures that call for public participation in regulatory policymaking are used most effectively by organized interests; the legal standards that historically have been developed by the courts reflect judicial notions of fair play and individual rights; and transparency guarantees and ombudsman procedures allow individual members of the public, who otherwise might be cut out of the administrative process, to understand government decisions and put pressure on public officials. Another way of understanding the distinction between the four types of accountability is to view them from the perspective of public administration: does a particular set of rules constrain decisionmaking because bureaucrats fear the loss of their legal powers at the hands of elected officials, opposition from organized members of the regulatory community, reversal based on judicial standards of fair play, or public embarrassment through revelations in the press and the public statements of parliamentary ombudsmen? Each type of accountability rule disciplines the work of civil servants in distinct ways, precisely because each type empowers a different set of actors in the administrative process.

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<sup>19</sup> On this mismatch between the theory and practice of democracy, see PIERRE ROSANVALLON, *THE DEMANDS OF LIBERTY: CIVIL SOCIETY IN FRANCE SINCE THE REVOLUTION* 253-65 (Arthur Goldhammer trans., 2007).

Without question, in seeking to reconstruct the many rules and procedures of administrative law so that they promote these four different types of accountability, I have made countless judgment calls. They are based, in equal measure, on the historical origins of the rules and an appreciation of how they have come to work in practice. I do not claim scientific precision. The objective is simply to move beyond the outmoded understanding of administrative law as a device for “an efficient and harmonious administration” and to construct an alternative conceptual framework that can overcome the particularities of single administrative law systems and fruitfully bring their many institutions and legal doctrines into contact with one another, thus laying the ground for comparison.

Another contribution of my comparative framework is that it draws on the extensive research in the social sciences on the administrative state to understand which legal similarities and differences merit discussion. In contrast with other areas of comparative law like contracts and torts, which are typically perceived as highly technical and therefore of little interest outside the law, the legal regulation of administration has attracted considerable attention from scholars interested in the history of the state and comparative politics. For the most part, however, comparative administrative law scholarship has failed to look to this wealth of empirical material. Rather, it adopts what H.L.A. Hart would call an “internal point of view”: it uses the status of a rule in the national hierarchy of norms as a signal of what is truly important and therefore deserves to be included in a comparative overview.<sup>20</sup> Whether a legal rule is written in a constitution, is set down in a foundational law like an administrative procedure act, or is pronounced by a high court is certainly an indicator of how powerful that rule is in setting the legal parameters of administrative governance. I too discuss many of these high-level limitations on administrative action. However, even legal rules without the status of a constitutional article or a supreme court decision can be important because of their pervasive quality and to understand what they are, empirical research on the administrative state can be of assistance. The principal example of this form of interdisciplinary analysis is my discussion of organized interests: the government commissions, public-sector management committees, and self-regulatory powers that enable organized interests to influence the administrative process are generally ignored in legal scholarship but are recognized as central to national systems of interest representation in the political science literature.

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<sup>20</sup> See, e.g. FROMONT, DROIT ADMINISTRATIF DES ÉTATS EUROPÉENS, *supra* note 2, at 8.

Empirical research can also bring to light important consequences of law that are difficult to discern from a purely legal analysis of the rules. In discussing administrative accountability to elected officials, I dwell on the difference between presidential and parliamentary regimes. A strictly legal reading of the constitutional powers of prime ministers and presidents would probably not warrant my extensive treatment of the topic since, at first blush, their powers over bureaucracy appear to be largely identical. However, empirical research suggests that these legal powers, when exercised in the broader institutional context of presidential and parliamentary government, operate quite differently, with a significant impact on the nature of administrative decisionmaking.

Having explained the conceptual apparatus, I now turn to the work of comparison. A word of warning. Although I argue that the functional problem of accountability is common to the administrative law all liberal democracies, the analysis here is focused mostly on the United States and Western Europe. Limited geographical scope is, unfortunately, a problem for most comparative research given the considerable linguistic and legal skills necessary to understand different legal systems, and is particularly acute in administrative law, which has historically been considered peripheral to the discipline and therefore has not generated a substantial secondary literature. In the conclusion, I discuss further the difficulties posed for my comparative framework and I suggest future lines of research to fill the gaps left by the analysis here.

#### **IV. The Four Accountability Relationships of Public Administration**

Before exploring the legal rules and procedures that bind government bureaucracies to their democratic societies, it is necessary to focus briefly on the concept of public administration. What are the essential attributes and characteristics of public administration and how does it differ from private organizations and other types of public institutions? The answer to this question is to be found in the system of civil service employment that arose in the late nineteenth century and that still lies at the core of public administration: the selection and promotion of public officials based on merit and insulated from political influence through tenured employment.<sup>21</sup> The legal guarantees of civil service employment emerged to serve multiple

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<sup>21</sup> On the history and development of the civil service in the United States, see STEPHEN SKOWRONEK, *BUILDING A NEW AMERICAN STATE: THE EXPANSION OF ADMINISTRATIVE CAPACITIES, 1877-1920* (1982). On the history of the civil service in Europe, see *CIVIL SERVICE SYSTEMS IN WESTERN EUROPE* (Hans A.G.M. Bekke & Frits M. van der



ends: autocratic rulers seeking to consolidate their authority (Prussia), political elites adapting the instruments of government to the demands of industrialization and urbanization (Britain), and government reformers intent on shielding government from the instability and incompetence of appointments based on party patronage (United States and France). In Europe, Japan, and North America, civil service safeguards were introduced over the course of the nineteenth century: beginning in the 1840s in France, 1870 in Britain, 1873 in Prussia, 1882 in Canada, 1887 in Japan, and 1883 in the United States.

Modern civil service laws are designed to render public employees independent of partisan politics and competent to perform the business of the nation. Some legal systems go so far as to constitutionalize this ambition, including the Italian Constitution (Article 97) and the German Constitution (Article 33). The core features of civil service employment are: (1) life tenure absent grave misconduct; (2) merit-based recruitment; (3) promotion based on a mixture of seniority and merit (often accompanied by independent civil service commissions); (4) pay scales and benefits that are more standardized than in private enterprise; and (5) limitations on political campaigning, freedom of expression, and union activities, although these restrictions are far less common now than in the past.

One important difference in the organization of the civil service is the avenue through which public employees are recruited. Beginning with the *École des Ponts et Chaussées*, founded in 1747 to train civil engineers, France has developed a system of prestigious state-sponsored schools, designed to educate the future elites of the civil service. The most famous of these is the highly selective *École Nationale d'Administration*, which funnels its graduates into the top echelons of the public administration based on a ranking system that gives the highest-ranked graduates their first choice of sought-after positions in government ministries, public enterprises, and the highest administrative court, the Council of State. Other countries, by contrast, have relied on the existing system of higher education to supply the recruits for the upper ranks of the civil service: in Germany, the law faculties of the public university system, in Britain, Oxford, Cambridge, and, today, numerous other universities, and in the United States, the extensive network of public and private universities. Some countries, notably Italy and Argentina, have sought to copy the French model, by establishing their own state-sponsored civil

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Meer eds., 2000); JACQUES ZILLER, *ADMINISTRATIONS COMPARÉES: LES SYSTÈMES POLITICO-ADMINISTRATIF DE L'EUROPE DES DOUZE* (1993).

service schools, but with mixed success due to a lack of support from those political actors that benefit from a patronage-driven model of recruitment.<sup>22</sup>

Notwithstanding the common impulse to develop a professionalized public administration, there remain significant differences in the degree to which recruitment is professional or political. At the top echelons of the bureaucracy, political appointments by electoral winners are more extensive in the United States than in other countries.<sup>23</sup> There are also significant differences at the lower levels of the bureaucracy, where political appointments are more about the corrupt exchange relationships of patronage politics than about the democratically legitimated desire of elected officials to give direction to the work of public administration. Some countries appear to be particularly vulnerable to party-based infiltration of public administration, notwithstanding a legal commitment to an independent, professionally competent civil service. Italy represents but one example of this phenomenon. There a number of mechanisms, related to Italy's multi-party system and the weak nature of party competition, have enabled political parties and party-affiliated trade unions to circumvent the civil service system and carve out the public administration among themselves.<sup>24</sup>

As many have observed, the past twenty years or so have witnessed a number of challenges worldwide to the traditional model of civil service employment.<sup>25</sup> First and foremost is the wave of New Public Management reforms that hit most democracies the 1980s. Reformers in this vein have sought to render the public sector more efficient by making the terms of public sector employment—pay, benefits, and promotion—more flexible and by tying them more closely to performance indicators. Another strategy for improving efficiency has been to remove service-delivery functions from public administration and to contract them out to firms operating in the private sector. The magnitude of New Public Management reforms, however, varies dramatically among countries and tracks the extent to which the civil service model has historically permeated national bureaucracy: for instance, the contracting-out phenomenon is far

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<sup>22</sup> See Lorenzo Saltari, *Formazione e selezione dei dirigenti pubblici nell'ordinamento statale, negli ordinamenti regionali e negli altri stati*, in LA DIRIGENZA DELLO STATO ED IL RUOLO DELLA SCUOLA SUPERIORE DI PUBBLICA AMMINISTRAZIONE 29 (Bernardo G. Mattarella ed., 2009), available at <http://www.sspa.it>.

<sup>23</sup> See Richard Rose, *Giving Direction to Government in Comparative Perspective*, in THE EXECUTIVE BRANCH 72 (Joel D. Aberbach & Mark A. Peterson eds., 2005); Barbara Nunberg, *Ready for Europe: Public Administration Reform and European Union Accession in Central and Eastern Europe*, World Bank Technical Paper No. 466, at 40 (2000).

<sup>24</sup> See Stefano Battini, *Il Personale*, in IL SISTEMA AMMINISTRATIVO ITALIANO 279 (Luisa Torchia ed., 2009); Sabino Cassese, *Hypotheses on the Italian Administrative System*, 16 WEST EUROPEAN POL. 325 (1993).

<sup>25</sup> See EZRA SULEIMAN, *DISMANTLING DEMOCRATIC STATES* (2003).

less pervasive in Europe than in the United States, where even core state functions like running prisons and conducting military operations have been out-sourced to private contractors.<sup>26</sup> A second challenge to the traditional model is the growing importance of party affiliation in obtaining top-ranking civil service positions in European parliamentary democracies. The number of political appointments, however, still lags far behind the United States and the nature of these appointments is different since they generally must be made from the ranks of the civil service, namely by selecting those who have both cultivated party ties *and* made their career within the bureaucracy. In sum, the legal guarantees of meritocracy and tenured employment, along with the many variations that have been canvassed here, are still central to the notion of public administration across the globe.

### **A. Administration and Elected Officials**

Max Weber famously depicted bureaucracy and the hierarchical, rule-bound nature of bureaucratic action, what he called legal-rational authority, as the hallmark of the modern state and the persistence of this model in comparative administrative law is a testament to the power of his theory. But Weber left unanswered a fundamental puzzle of bureaucratic authority: what would render the higher-level rules, at the source of bureaucratic action, themselves legitimate? Democracy was not part of the theory. In the hundred or so years since Weber wrote, however, competitive elections and representative governing bodies have become the norm and it has become commonplace to conceive of the rational authority exercised by bureaucracy as necessarily placed at the service of elected politicians.<sup>27</sup>

Bureaucracy, situated in this democratic context, has given rise to a number of common constitutional problems and doctrinal developments. One that should be mentioned here is the concern that the prerogatives of the legislative branch, the branch of government generally considered to be the most directly connected to the democratic will, will be lost to the growing domain of public administration. The trend has been for government administration to amass substantial powers, in the face of both increasing scientific and social complexity and the

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<sup>26</sup> See GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY (Jody Freeman & Martha Minow eds., 2009).

<sup>27</sup> In the legal literature, this has been called the “transmission-belt” theory of administration. See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975). In the political science literature it is known as the “principal-agent” theory of administration. See McNollgast, *The Political Origins of the Administrative Procedure Act*, 15 J.L. ECON. & ORG. 180 (1999); Kaare Strøm, *Parliamentary Democracy and Delegation*, in DELEGATION AND ACCOUNTABILITY IN PARLIAMENTARY DEMOCRACIES 55-106 (Kaare Strøm, Wolfgang Müller & Torbjörn Bergman eds., 2003).

internationalization of policymaking. Courts have sought to limit legislative delegations of policymaking power by developing doctrines that specify a core area of legislative action, which, as a matter of constitutional law, may not be ceded to public administration. For instance, in the United States, pursuant to the non-delegation doctrine, authorizing legislation must contain an “intelligible principle” capable of guiding bureaucrats and in Germany, under Article 80 of the Basic Law, parliamentary laws must specify the “content, purpose, and scope” of the authority conferred.<sup>28</sup> Most commentators have concluded that these constitutional principles have done little to stem the tide of executive dominance but they are nonetheless an important part of the doctrinal apparatus that has served to legitimate the administrative state.

Notwithstanding the widespread adoption of the common democratic institutions of universal suffrage, competitive elections, and representative government bodies, the design of democracy varies considerably from one country to the next. One of the major legal differences that separates political systems and that affects the relationship between elected officials and the bureaucracy is the difference between parliamentary and presidential regimes.<sup>29</sup> In parliamentary systems, the executive branch is dependent on the legislative branch: the governing cabinet is selected by the parliament and can survive only as long as it enjoys the confidence of the parliament.<sup>30</sup> By contrast, in presidential systems, the executive branch is independent of the legislature: the chief executive (the president) is selected by popular election, the terms of office of the executive and the legislature are fixed, the members of the government are chosen by the president, and the president exercises constitutionally independent lawmaking powers, the extent and scope of which vary significantly among presidential regimes. While parliamentarism, as a regime type, is the most common one worldwide, the United States, a number of Latin American countries, and other political systems are presidential regimes.

This democratic design choice makes a difference for the law of public administration. In the constitutional law of parliamentary systems, the rise of the administrative state has created fewer problems because the bureaucracy can be depicted as part of a clear chain-of-command extending from the people, to parliament, to government, to bureaucracy. At least as a matter of legal theory, the government’s command powers over the bureaucracy are exclusive and public

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<sup>28</sup> See Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s-1950s*, 113 YALE L.J. 1341 (2004).

<sup>29</sup> See Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633 (2000).

<sup>30</sup> MATTHEW SOBERG SHUGART & JOHN M. CAREY, PRESIDENTS AND ASSEMBLIES: CONSTITUTIONAL DESIGN AND ELECTORAL DYNAMICS 19 (1992).

administration is legitimate because of its place in the chain-of-command. This understanding is expressed in theories of ministerial responsibility, which cast government ministers as a conduit between democratically elected parliaments and public administration: ministers are responsible for the actions taken by their ministries before parliament and have the power to direct and control the work of their ministries.<sup>31</sup> By contrast, in the United States, both Congress and the President independently claim the power to direct public administration. The federal bureaucracy was famously denigrated as the “headless fourth branch” in the 1930s and the question of where administrative agencies fit in the Constitution’s tripartite system of government persists today.<sup>32</sup> Is public administration a tool of Congress or the President? And, generally speaking, the answer is both.

In another contrast with American law, the parliamentarian understanding of bureaucracy as the tool of the executive, not the legislative branch, has given rise to varying degrees of constitutional resistance in Europe to the independent regulatory agencies that have been created over the past decades to supervise newly liberalized markets.<sup>33</sup> These agencies are designed to be independent from the executive largely by limiting government control over the appointment and removal of top agency officials and by cutting off ministerial powers to review and revise the decisions made by agency officials. This was perceived as necessary to reassure investors and markets that public regulators would be impartial, in the context of newly liberalized markets in which some of the largest players were recently privatized state firms. However, because public administration belongs to the executive branch in constitutional law, the result was relatively few independent agencies (Germany) or independent agencies with relatively few powers—prosecutorial and adjudicatory, but not rule-making, which were retained by government ministries (France, Germany, the United Kingdom).<sup>34</sup> This stands in marked contrast with the United States, where administrative agencies independent of the President and entrusted with all three powers were among the first created during the Progressive Era and the

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<sup>31</sup> See ZILLER, ADMINISTRATIONS COMPARÉES, *supra* note 14, at 115, 434.

<sup>32</sup> See, e.g., Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007); Keith E. Whittington & Daniel P. Carpenter, *Executive Power in American Institutional Development*, 1 PERSPECTIVES ON POLITICS 495 (2003).

<sup>33</sup> See FABRIZIO GILARDI, DELEGATION IN THE REGULATORY STATE: INDEPENDENT REGULATORY AGENCIES IN WESTERN EUROPE (2008).

<sup>34</sup> See Jens-Peter Schneider, *Regulation and Europeanisation as Key Patterns of Change in Administrative Law* in THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE 309 (Matthias Ruffert ed., 2007).

New Deal.<sup>35</sup> Although these independent agencies were challenged at the time, the Supreme Court has consistently allowed them on condition that Congress does not directly decide on the appointment and removal of agency officials and that it does not assign core executive prerogatives such as the foreign affairs power to such agencies.<sup>36</sup>

The parliamentary versus presidential design choice affects not only the constitutional law of administration but also the politics of administrative action. The critical difference between the regime types for this purpose is the possibility of divided government in presidential systems: because the legislature and the chief executive are selected independently, for fixed terms, the legislature and the executive branch can be led by different political parties.<sup>37</sup> Political scientists have observed two particularities of American administration which they ascribe to the competition between Congress and the President during periods of divided government: the simultaneous politicization and legalization of administrative action.

In American presidentialism and European parliamentarism, the instruments of political control are broadly similar: the political appointment and removal of top officials, instructions contained in everything from formal laws to informal departmental circulars, and decisions on appropriations and program funding.<sup>38</sup> However, in the American presidential system, these control tools are shared between the legislative and executive branches, with significant competition between the two branches in seeking to direct the bureaucracy during periods of divided government. In contrast, by virtue of the pivotal role of governing cabinets in parliamentary systems, political control of administration is exercised primarily by the executive, with little competition from a legislature seeking to interject an alternative set of priorities.

As a result of the American system of divided control, a number of studies have demonstrated that even career bureaucrats are forced to engage in broad coalition-building, among the multiple political forces that exercise influence through Congress and the President, to promote and defend their programs.<sup>39</sup> Their work is permeated by politics. By contrast, in

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<sup>35</sup> See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

<sup>36</sup> See STEPHEN G. BREYER ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY* 76-102 (6<sup>th</sup> ed., 2006).

<sup>37</sup> For this reason, many consider France's semi-presidential system to be closer to a classic parliamentary regime than to American presidentialism. If the party that controls the legislature is different from the one that wins the presidency, executive power rests largely with the prime minister, not the president. Only if the president and the parliament are of the same party, can the president exercise sweeping prerogatives over the government cabinet and the executive branch. In other words, the French constitution avoids divided government.

<sup>38</sup> See Rose, *Giving Direction to Government in Comparative Perspective*, *supra* note 23, at 78-90.

<sup>39</sup> See Ackerman, *The New Separation of Powers*, *supra* note 29.

parliamentary systems, the role of politics is at one and the same time more direct and less omnipresent. Bureaucrats are not expected to promote their pet initiatives and defend existing programs from budget cuts. That is the domain of the government cabinet and ministerial offices that give them instructions and is the subject of negotiation and compromise among the elected politicians that constitute the government.

Somewhat counterintuitively, the same presidentialism has been blamed for the greater legalization of the American administrative process. In the United States, statutes designed to save the environment, protect consumers, and accomplish a variety of other public aims are thought to be more detailed and to require more extensive administrative procedures than elsewhere.<sup>40</sup> This regulatory style both denies bureaucrats flexibility and empowers lawyers and courts, by creating the right to participate in the administrative process and by making legal challenges easier to bring. According to public choice scholars, this difference can be explained by the competitive relationship between Congress and the President: detailed laws and elaborate procedures are designed to protect the political bargain struck in Congress once policy implementation is put in the hands of the bureaucracy and subject to the potentially very different political agenda of the President.<sup>41</sup> In a parliamentary system, this legalization strategy is neither possible nor attractive: not possible because any restrictions enacted by the legislature can be undone the moment that a new government is elected into office and not attractive because the efficiency costs of legalization far outweigh the possible benefits.<sup>42</sup>

## **B. Administration and Organized Interests**

Liberal states cannot govern without society. Social and economic actors like organized religions, employer and labor groups, environmental associations, large firms, and farmer organizations command extensive material and ideational resources and mobilize large numbers of citizens. They are centers of power and authority in their own right. Therefore, even though legal analysis has been reluctant to admit it, societal actors and bureaucracy have long combined to make public policy and one important aspect of administrative law seeks to regulate this dimension of administrative governance. Administrative law does so in two, related ways: it

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<sup>40</sup> See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 3 (2001).

<sup>41</sup> See DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* (1999).

<sup>42</sup> See Terry Moe & Michael Caldwell, *The Institutional Foundations of Democratic Government: A Comparison of Presidential and Parliamentary Systems*, 150 *JOURNAL OF INSTITUTIONAL AND THEORETICAL ECONOMICS* 171 (1994).

creates opportunities for organized interests to participate in the decisionmaking of public administration and it allows for self-regulation by social and economic actors, thus limiting state intervention and promoting private governance in various policy areas.

Interest organizations participate in public life by advising on government policymaking and engaging in self-regulation in most administrative law systems. Take the law of land-use planning and environmental permitting. In countries as diverse as Britain, Brazil, Mexico, Canada, France, Italy, Japan, and the United States, public administration is required, by law, to give notice of any planned decision to the local community, to receive written comments, and to hold a public hearing.<sup>43</sup> This enables residents, business interests, and environmental groups to mobilize for and against administrative decisions at the local level. Lawyers are a good example of the self-regulation strand of group participation. In the United States, Europe, and elsewhere, the right to practice law depends upon membership in a professional association, recognized by the state.<sup>44</sup> This association sets the terms of entry into the profession, determines the rules that govern professional practice, and administers the disciplinary proceedings designed to punish lawyers who transgress the rules. The disciplinary decisions of lawyer associations are generally subject to judicial review by the courts and their proposed rules must often be approved by government ministries or supreme courts before they can take effect, but on the whole public oversight is minimal. Associations of accountants, engineers, and architects are other common examples of organized interests that are empowered by administrative law to self-regulate and, therefore, to occupy policy spaces largely free from the intervention of bureaucracy.

Notwithstanding these commonalities, a number of broad-brush differences can be observed between what are known in the political science literature as the American pluralist and European neo-corporatist systems of interest representation.<sup>45</sup> Although for many neo-

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<sup>43</sup> See MICHEL PRIEUR, *DROIT DE L'ENVIRONNEMENT* (5<sup>th</sup> ed. 2004) (France); Lei 9.985/2000 (Brazil); CAROL HARLOW & RICHARD RAWLINGS, *LAW AND ADMINISTRATION* 573-74, 582-88 (3d ed., 2009) (England); Gabriella Pavon & Jose Juan Gonzalez, *Land Use Planning in Mexico: As Framed by Social Development and Environmental Policies*, in *LAND USE LAW FOR SUSTAINABLE DEVELOPMENT* 484-502 (Nathalie J. Chalifour et al. eds., 2007); Canadian Environmental Protection Act §§ 73,74; Aldo Sandulli, *Il Procedimento* in *TRATTATO DI DIRITTO AMMINISTRATIVO* 1035-1342 (Sabino Cassese et al. eds., 2d ed. 2003) (Italy); HO CHIN SIONG, *AN INTRODUCTION TO JAPANESE CITY PLANNING* 65 (2003).

<sup>44</sup> See, e.g., DEBORAH L RHODE & DAVID LUBAN, *LEGAL ETHICS* 113-129 (5<sup>th</sup> ed. 2009) (United States); JOËL MORET-BAILLY, *LES DÉONTOLOGIES* 102-110 (2001) (France); Maria da Gloria Bonelli, *Lawyers' Associations and the Brazilian State, 1843-1997*, 28 *LAW & SOC. INQUIRY* 1045 (2003).

<sup>45</sup> Philippe C. Schmitter, *Still the Century of Corporatism?* in *TRENDS TOWARD CORPORATIST INTERMEDIATION* 13, 15, 27-28 (Philippe C. Schmitter & Gerhard Lehmbruch eds., 1979); Gerhard Lehmbruch, *Introduction: Neo-Corporatism in Comparative Perspective*, in *PATTERNS OF CORPORATIST POLICY-MAKING* 1,16-23 (Gerhard



corporatism connotes the grand, tri-partite European wage agreements that were entered into by governments, labor, and industry in the 1970s and early 1980s, this form of interest representation, as well as the pluralist alternative, reaches all the way down into the lower strata of administrative policymaking and program implementation. There are two important differences that separate pluralism from neo-corporatism, one of which turns on the organizational capacity of intermediate associations and the other of which goes to the extent to which the state and civil society are intermingled and private groups are given public powers. In many (neo-corporatist) European legal systems, producer groups such as workers and employers are organized into a few, all-encompassing and broadly representative labor unions and employer associations. These organizations are given privileged access to the process of making and implementing public policy and are conferred significant self-regulatory powers. These latter powers, even though of the self-regulatory variety, are constrained by government supervision and the duty to consult outside interests. As politics have changed and non-material interests have become more prominent, the neo-corporatist model has been extended to environmental and consumer protection groups, human rights organizations, and other types of associations.

By contrast, in the (pluralist) American legal system, industry associations and trade unions can rarely claim to represent all firms or workers operating in a particular industry and, as result, it is highly unusual to give a particular association or set of associations an official role in the policymaking process. Rather, administrative policymaking is left wide open to influence from multiple, competing interest groups, often seeking to speak for the very same constituents, and the implementation of government policies rarely depends upon official collaboration with specific interest organizations. Moreover, compared with Europe, private associations less frequently exercise self-regulatory powers. Indeed, in American administrative law, the agents of self-regulation are generally individual firms, not industry associations, and therefore, in contrast to Europe, the type of authority wielded does not occupy an intermediate space between state and market: firms are prompted to self-regulate either by the incentives of the market, for instance a better brand name, or by the threat of state action, for instance a possible enforcement action, but not by virtue of institutionalized pressure from other firms or countervailing labor groups. Moreover, even when private associations do self-regulate, it is less common for them to

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Lehmbruch & Philippe C. Schmitter eds., 1982); Wolfgang Streeck, *The study of organized interests: before 'The Century' and after* in THE DIVERSITY OF DEMOCRACY 3, 17-18, 29-30 (Colin Crouch & Wolfgang Streeck eds., 2006)

obtain a legal monopoly on their activities or to be subject to state-imposed requirements. In other words, the American legal system is hostile towards the mixing of private and public powers that is characteristic of organizational life in Europe.

The corporatist-pluralist difference has both long-standing and more recent causes. The pre-modern guild system was, for obvious reasons, stronger in European countries than in the United States and has survived the vicissitudes of democratization better than in the United States. In the twentieth century, the European labor movement was considerably more successful than the American one in organizing workers, influencing politics, and obtaining institutional representation.<sup>46</sup> These successes not only led to counter-mobilization by industry and the formation of powerful business associations but also to the extension of the mixed public-private model to other civil society actors such as environmental and human rights groups. Over the past two decades, as everywhere else, trade union membership in European countries has declined and the power of industry associations over their member firms, especially the giants of the global marketplace, has diminished. Moreover, a number of governments have curtailed the official role for intermediate associations in policymaking, in an effort to remove institutional obstacles to their privatization and liberalization agendas of the 1990s and 2000s. However, compared to the United States, the organizational capacity of European labor and industry continues to be greater and the mixed system of public-private governance permitted by administrative law still stands out when contrasted with the public-private divide in American administrative law.

The different legal practices are also linked to different political theories of the state and society. In Europe, the idea of the state placed at the service of society has long been popular. This intellectual current is well represented by the French theory of public services explored earlier: the purpose of public administration was to support and bind together the various social and economic groups that constituted the complex social whole. These ideas were developed in the law by thinkers such as Laski in England, von Gierke in Germany, Duguit and Hauriou in France, and Santi Romano in Italy but were notably absent from the debates of the American legal realists.<sup>47</sup> By contrast, the United States is the land of James Madison, Arthur Bentley, and

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<sup>46</sup> See Graham K. Wilson, *Why Is There No Corporatism in the United States?* in PATTERNS OF CORPORATIST POLICY-MAKING 219, 232 (Gerhard Lehmbruch & Philippe C. Schmitter eds., 1982).

<sup>47</sup> This literature is far too vast to canvass here. For an excellent introduction to this strand of French intellectual history, see J.E.S. Hayward, *Solidarist syndicalism: Durkheim and Duguit*, 8 SOCIOLOGICAL REVIEW 17 (1960).

David Truman.<sup>48</sup> In their pluralist theories of interest group politics, theories which, as Richard Stewart astutely observed over thirty years ago, have directly shaped American administrative law, society was cast as a never-ending array of self-serving interests constantly in competition with one another.<sup>49</sup> The role of government was fairly passive: a set of neutral rules that would impartially arbitrate among the different demands put forward by competing interests and thereby enable state officials to forge policies in the public interest. One way of summarizing these American and European differences is with the contrasting metaphors of interconnected solidarities and vigorous competition. While limitations on private access to public policymaking, the conferral of public powers upon private organizations, and public regulation of private ordering have traditionally been viewed with suspicion in American legal circles, as unfairly meddling with the competitive process necessary to achieve public well-being, they are accepted tools of social integration and the public interest in European law.

Examples of the comparative law difference between managed neo-corporatism and competitive pluralism abound. An emblematic feature of the pluralist American system of interest representation is notice-and-comment rulemaking.<sup>50</sup> Under this procedure, the public has a right to receive advance notice of all rules promulgated by the bureaucracy, give their views on such rules, and receive a detailed response to their objections from the administration.<sup>51</sup> With this procedure, all competing interests with the necessary resources have access to the policymaking process. Contrast this with the favorite method of obtaining outside input on regulatory initiatives in France, Italy and many other European systems: policy-specific advisory committees created by law, selected by the government, and composed of representatives of the major interest group organizations active in the policy area.<sup>52</sup> In national

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<sup>48</sup> See Daniel J. Tichenor & Richard A. Harris, *The Development of Interest Group Politics in America: Beyond the Conceits of Modern Times*, 8 ANNU. REV. POL. SCI. 251, 251-52 (2005).

<sup>49</sup> Stewart, *The Reformation of American Administrative Law*, *supra* note 27, at 1712.

<sup>50</sup> *Id.* at 1775-1777.

<sup>51</sup> There have been attempts to devise alternatives to notice-and-comment rulemaking, which has been criticized as conflictual and time-consuming, but they have had only limited success. See, e.g., Harter, *Collaboration*, *supra* note 4.

<sup>52</sup> See, e.g., JEAN CALAIS-AULOY & FRANK STEINMETZ, *DROIT DE LA CONSOMMATION* 26-27 (5<sup>th</sup> ed., 2000); Sabino Cassese, *Amministrazione pubblica e interessi in Italia*, *DIRITTO E SOCIETÀ* 223 (1992). Perhaps the paradigmatic example of neo-corporatist interest representation is the institution of the Social and Economic Council. This institution exists in Italy, France, the Netherlands, and the European Union, and is tasked with advising the government and parliament on legislative initiatives. See J.E.S. HAYWARD, *PRIVATE INTERESTS AND PUBLIC POLICY: THE EXPERIENCE OF THE FRENCH ECONOMIC AND SOCIAL COUNCIL* (1966). Today, however, most agree that their influence over lawmaking is minimal, whereas the policy-specific committees discussed in the text continue to serve an important fact-finding and advisory function.

systems, as well as the European Union, there are hundreds of these committees in areas as diverse as welfare and industrial policy, consumer policy, environmental policy, and equal protection. It is certainly true that, today, European regulators also stage broad-based consultations, using the possibilities afforded by the internet to make their policy proposals widely known and to solicit the reactions of all those organizations that care to comment, and therefore the privileged access of the past has been attenuated somewhat through the use of new technologies.<sup>53</sup> However, in contrast with American notice-and-comment rulemaking, these consultations are permeated by administrative discretion, both in the decision to call them in the first place and subsequently, in the decision on what kind of response, if any, to give to public opposition and, therefore, regulators are still in a strong position to control access to the policymaking process.

Moving from policymaking to policy implementation, in much of continental Europe, labor, employer and professional groups are entrusted, by law, with the day-to-day administration of the welfare state, something that in the United States is left either to the bureaucracy or, increasingly, to the market. For instance, in France, members of the management boards of public entities responsible for various forms of social assistance are selected by the major labor unions and employer organizations.<sup>54</sup> In Germany, tri-partite governing boards composed of employer, labor, and government representatives manage the social security agencies responsible for health insurance, pensions, and unemployment insurance.<sup>55</sup> Historically, tri-partite management boards and consultative committees were particularly omnipresent in Sweden and the Netherlands, although it is also true that since the 1990s, they have been scaled back.<sup>56</sup> Looking beyond social assistance programs to the implementation of other types of government policy, intermediate associations are given an official role there too. In Sweden, Denmark, and the Netherlands, appeals from all types of administrative decisions have traditionally been through a system of specialized government

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<sup>53</sup> See, e.g., Dorit Rubinstein Reiss, *Participation in Governance from a Comparative Perspective: Citizens Involvement in Telecommunications and Electricity in the United Kingdom, France and Sweden*, 2009 J. DISP. RESOL. 381.

<sup>54</sup> See JEAN-JACQUES DUPEYROUX, *DROIT DE LA SÉCURITÉ SOCIALE* (14th ed., 2001).

<sup>55</sup> See MANFRED WEISS AND MARLENE SCHMIDT, *LABOUR LAW AND INDUSTRIAL RELATIONS IN GERMANY* (4<sup>th</sup> ed., 2008).

<sup>56</sup> See R.B. ANDEWEG & GALEN A. IRWIN, *GOVERNANCE AND POLITICS OF THE NETHERLANDS* 145 (2002); JELLE VISSER & ANTON HEMERIJCK, *A DUTCH MIRACLE: JOB GROWTH, WELFARE REFORM AND CORPORATISM IN THE NETHERLANDS* 169, 172 (1997).

boards, many of which have interest group representation. For instance, in Denmark, the denial of an environmental permit can be appealed to a government board consisting of a member of the judiciary, representatives of industry, and environmental advocates appointed by the Environmental Protection Agency.<sup>57</sup>

Last, let us consider the corporatist-pluralist difference on the question of self-regulation. In France, dozens of professional associations, ranging from doctors, to veterinarians, to ski instructors, produce codes of conduct (*codes de déontologie*), subject to varying degrees of state supervision, and then are charged with enforcing these codes through a system of layman justice that is subject to review by the highest courts.<sup>58</sup> The same phenomenon can be observed in Germany, Italy, and many other countries. Likewise, local chambers of commerce exercise significant, state-sanctioned power over their members. In Germany, for instance, local businesses and tradesmen are required by law to join their local chambers of commerce. These chambers represent their members before the government, run vocational training programs and apprenticeships, and, in the case of the tradesmen chambers, devise quality-related regulations which, if breached, can result in the loss of the right to exercise the trade.<sup>59</sup> This stands in contrast with the United States, where comparatively few professions are granted licensing privileges and local chambers of commerce are purely voluntary organizations, with mostly social and representational functions, not regulatory ones.<sup>60</sup>

Another difference in the self-regulatory space carved out by administrative law lies in the degree of state supervision of private associations—higher in neo-corporatist systems, lower in pluralist systems. Industry-sponsored standard-setting is a good example of the contrast. In the United States, there are hundreds of industry organizations, which operate unregulated by the state and which commonly produce competing standards from which manufacturers can

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<sup>57</sup> Danish Environmental Protection Act, Chapter 12.

<sup>58</sup> See MORET-BAILLY, *LES DÉONTOLOGIES*, *supra* note 44. In the political science literature, many do not consider France to be a neo-corporatist system because labor and employer groups are poorly organized and because of the hostility of republican theory to particularistic interests. However, the mixing of public and private powers that is characteristic of neo-corporatism is present in the French case too. See John T. S. Keeler, *Corporatism and official union hegemony*, in *ORGANIZING INTERESTS IN WESTERN EUROPE* 185 (Suzanne Berger ed., 1981). Moreover, as Pierre Rosanvallon has pointed out, the institutional practice of French democracy creates significant space for organized interests and therefore the standard republican image of French politics is highly misleading. The law and practice of French administrative governance is a good illustration of the mismatch between what Rosanvallon calls “the representation and the reality.” ROSANVALLON, *THE DEMANDS OF LIBERTY*, *supra* note 19, at 3.

<sup>59</sup> See JIM SWEENEY, *EMPLOYER AND EMPLOYEE CHAMBERS IN GERMAN SPEAKING COUNTRIES* (1996).

<sup>60</sup> See, e.g., Jörg Finsinger, *Doctors: Summary of the Cross National Comparison* in *REGULATION OF PROFESSIONS* 377, 389, 391, 392 (Michael Faure et al. eds., 1993) (demonstrating that in the United States the medical profession enjoys fewer self-regulatory powers than in Germany, Belgium, the Netherlands, and the United Kingdom).

choose.<sup>61</sup> By contrast, in Germany, there is one peak industry association, the Deutscher Normenausschuss (DIN), composed of many different sections, each devoted to a particular economic sector and technology.<sup>62</sup> DIN's powers stem from an industry-government agreement, under which DIN was given a legal monopoly over standard-setting but, in return, was required to establish a five-member Consumer Council and was directed to take into consideration public interest goals. This tightly woven fabric of private powers and public control is characteristic of industry standard-setting throughout Europe.

### C. Administration and the Courts

#### 1. Systems of judicial review

The emergence of bureaucratic power in the late-nineteenth and early-twentieth centuries was closely tied to the question of justice. What was to be the relationship between the old mode of exercising public authority, through trials and courts, and this new form of state power, designed to expeditiously raise taxes, undertake public works, protect public health, and more? The right to contest administrative decisions in a trial before a state official removed from the original determination emerged as a key element of bureaucratic authority in both civil law and common law systems. It was thought to be critical to the fairness and legitimacy of public administration. At the same time, there also emerged what has conventionally been portrayed as the major dividing line separating national legal systems: judicial review powers vested in the ordinary courts of law in England versus litigation before a specialized body connected to the executive branch in France. In other words, the difference between the English common law and French administrative law (*droit administratif*) was born.

The origins of this institutional divide are extremely complex and have been the object of numerous distinguished historical studies.<sup>63</sup> For our purposes, it is enough to recall the very different political circumstances surrounding the rise of bureaucracy in France and England, which necessarily shaped the practice of administrative law. In France, the consolidation of state

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<sup>61</sup> See Walter Mattli & Tim Buthe, *Setting International Standards: Technological Rationality or Primacy of Power*, 56 WORLD POLITICS 1, 23-25 (2003).

<sup>62</sup> See JOSEF FALKE, 3 RECHTLICHE ASPEKTE DER NORMUNG IN DEN EG-MITGLIEDSTAATEN: DEUTSCHLAND 22, 183 (2000); HARM SCHEPEL & JOSEF FALKE, 1 LEGAL ASPECTS OF STANDARDISATION IN THE MEMBER STATES OF THE EC AND EFTA: COMPARATIVE REPORT 76 (2000).

<sup>63</sup> See, e.g., J.W.F. ALLISON, A CONTINENTAL DISTINCTION IN THE COMMON LAW: A HISTORICAL AND COMPARATIVE PERSPECTIVE ON ENGLISH PUBLIC LAW (2003); Sabino Cassese, *La costruzione del diritto amministrativo*, in TRATTATO DI DIRITTO AMMINISTRATIVO 1-93 (Sabino Cassese, ed., 2d ed., 2003); MARCO D'ALBERTI, DIRITTO AMMINISTRATIVO COMPARATO (1992).

power in the 1600s and 1700s was marked by intense conflict between the royal officials charged with administering the provinces (*intendants*) and local elites, who occupied the vast majority of financial and judicial offices. Insulating the activities of royal officials from interference by the local elites sitting on regional courts (*Parlements*) and creating an alternative, separate system of administrative justice controlled by the king, was a critical part of the drive to establish central power and absolute monarchy. This impulse in favor of a specialized jurisdiction, separate from the ordinary courts, was carried into the French Revolution and beyond, albeit motivated by a very different political theory of republican self-government, according to which state administration in the name of the people had to be protected from the special privileges and particularistic interests of the entrenched elites of the *Ancien Regime*. By contrast, in England, the Anglo-Saxons established a system of local self-governing units (shires, hundreds, and boroughs), all united under a single ruler and overseen by officers loyal to the king.<sup>64</sup> This harmonious arrangement of local self-government and royal oversight was taken over by William the Conqueror and changed only in the 1800s, when a more highly centralized administration emerged to handle the public policy needs of industrialization. The common law courts, at the local level and in London, were intimately involved in government administration, both as the bodies entrusted with deciding administrative matters such as road tolls and as the bodies to which appeals could be brought against unfavorable government decisions. Although the past hundred years have witnessed several bouts of judicial reform, the common law continues to be viewed as an essential part of the institutional fabric of public administration.

What then is the common law-*droit administratif* difference? Even though much has changed since 1885, when the English legal scholar Albert Venn Dicey famously proclaimed that England had no such thing as a special branch of law called “administrative law,” two important differences remain.<sup>65</sup> The first is institutional. In England and other common law countries, generalist judges retain the power to hear challenges to the acts and decisions of government administration. By contrast, in France, the body authorized to hear challenges—the Council of State—is considered part of the executive branch.<sup>66</sup> The Council of State’s system of recruitment, promotion, and management of personnel is entirely different from that of the

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<sup>64</sup> THOMAS ERTMAN, *BIRTH OF THE LEVIATHAN* 158-66 (1997).

<sup>65</sup> *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* (1885).

<sup>66</sup> This discussion of the Council of State is drawn largely from FROMONT, *DROIT ADMINISTRATIF DES ÉTATS EUROPÉENS*, *supra* note 2.

judicial branch and gives rise to pronounced cultural and sociological affinities between public administration and the Council of State. Members are selected from graduates of the *École Nationale d'Administration*, the elite, state-run school designed to train the uppermost echelons of the civil service, and from the ranks of experienced individuals already serving in administration, either in the lower administrative courts or in the upper ranks of the civil service. Moreover, at any given point in time, about one-third of the members of the Council of State serve elsewhere in public administration, in ministerial cabinets, public enterprises, and other government offices. The last distinguishing feature of the Council of State as compared to the judicial branch is that it has the dual function of regulating and adjudicating: it is composed of five administrative sections, responsible for giving technical advice on legislation and regulation, and one adjudicatory section, which hears administrative law cases. It is extremely common for Council members to be assigned simultaneously to both an administrative section and the adjudicatory section.<sup>67</sup>

The second major common law-*droit administratif* difference is doctrinal. Although common law jurisdictions operate with legal principles that are informed by the special circumstances of public administration, there is no clearly articulated conceptual divide separating public law from private law. By contrast, administrative law in France has evolved as a theoretically free-standing area of legal doctrine that is defined by a number of core principles that set it sharply apart from private law. In classic French theory, the state is granted extraordinary powers (the prerogatives of the *puissance publique*) at the same as it is subject to extensive duties designed to safeguard the public liberties of French citizens.<sup>68</sup> One clear illustration of this reciprocal relationship is the important notion of public service: once a government activity is classified as a “public service,” the state is empowered to take whatever measures are necessary to ensure the continuity of that service and adaptation to changing circumstances, but it is also under a duty to treat the users of the public service equally and neutrally. This theoretical apparatus of powers and duties extends to all areas of administrative activity and thus, in French law, government liability and public contracts are treated as integral

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<sup>67</sup> Unlike members of the judiciary, members of the Council of State do not enjoy a formal guarantee of permanence in office (*inamovibilité*), meaning that, in theory, they can be transferred from one post to another for any reason, not only in the case of disciplinary sanctions. In practice, however, the government does not use these powers and members of the Council of State effectively enjoy the same independence and permanence in office as members of the judiciary.

<sup>68</sup> See generally ELIZABETH ZOLLER, INTRODUCTION TO PUBLIC LAW: A COMPARATIVE STUDY 250-260 (2008).



to the field of administrative law, unlike common law systems where they are considered closer to the private law of contract and torts.

The French divide between public law and private law is also apparent in the system of administrative litigation. Litigation against public administration is conceived in markedly different terms from private law litigation: it is designed primarily to ensure the (objective) legality of government action in a republican system faithful to the rule of law, not to vindicate (subjective) individual rights.<sup>69</sup> This understanding of administrative law litigation has had numerous consequences. In contrast with the English common law, individuals are easily afforded standing to challenge generally applicable rules because even though they cannot claim the violation of a particularized right, they are thought to have an interest in the objective correctness of the rule. Another particularity was, until recently, an undeveloped system of judicial remedies that failed to protect fully individual rights: before 1980, the Council of State could annul offending administrative acts but it did not have the injunctive powers necessary to force administration to comply with its judgments.<sup>70</sup>

In many ways, the self-contained doctrinal apparatus of *droit administratif* is coming apart: less of what public administration does is afforded the special treatment of “public services,”<sup>71</sup> the rules on public contracts and government liability are borrowing more and more from private law,<sup>72</sup> and the subjective rights dimension of administrative law litigation has assumed enormous importance.<sup>73</sup> Nevertheless, it is impossible to understand the reasoning deployed by French courts and legal scholars without some appreciation of the doctrinal uniqueness of administrative law.

An alternative that has emerged to the English and French models of judicial review is that of a specialized branch of the judiciary dedicated to hearing administrative law cases. The

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<sup>69</sup> See FROMONT, DROIT ADMINISTRATIF DES ÉTATS EUROPÉENS, *supra* note 2, at 164.

<sup>70</sup> Since 1980s, however, the Council of State has gradually acquired better remedial powers, first with the power to fine non-compliant administration (*astreinte*), then with the power to issue injunctions (*injonction*), and finally with the power to grant temporary injunctions (*référé*). See FROMONT, DROIT ADMINISTRATIF DES ÉTATS EUROPÉENS, *supra* note 2, at 168.

<sup>71</sup> See Etienne Picard, *The Public-Private Divide in French Law Through the History and Destiny of French Administrative Law* in THE PUBLIC-PRIVATE LAW DIVIDE: POTENTIAL FOR TRANSFORMATION? 17, 79 (Matthias Ruffert ed., 2009).

<sup>72</sup> See, e.g., Jacques Petit, *A Reappraisal of the Distinction Between Administrative Contracts and Private Legal Contracts in French Law* in THE PUBLIC-PRIVATE LAW DIVIDE: POTENTIAL FOR TRANSFORMATION? 283, 283 (Matthias Ruffert ed., 2009).

<sup>73</sup> See FROMONT, DROIT ADMINISTRATIF DES ÉTATS EUROPÉENS, *supra* note 2, at 18.

first example is generally taken to be Germany under the Basic Law of 1949.<sup>74</sup> There the judicial branch is composed of the Federal Constitutional Court and five discrete judicial hierarchies, one for civil and criminal law, one for labor disputes, one for tax disputes, one for social security disputes, and one for administrative law disputes. The latter three all handle variants of what would be called administrative law cases in other countries. The judges that serve on the tax, social security, and administrative law courts are recruited based on the same system of university study, exams, and traineeships as their counterparts on other courts and share the same, identical guarantee of independence. The only difference is the degree of specialization and familiarity that the members of these three branches acquire with administrative law disputes. This form of judicial review operates closer to the common law model than the French one. In Germany, public contracts and government liability cases are heard by the civil courts, not administrative courts, and the legal doctrine tracks the private law of contract and tort. Moreover, administrative litigation is designed to protect the same subjective rights as private litigation and therefore individual standing is more limited than in France while, at the same time, the remedial powers of courts are broader.

Most legal systems have adopted one of these three institutional models. Histories of colonial rule can go some way in explaining the patterns that we see today. The systems that were part of the British Empire and that adopted the common law have entrusted generalist courts with hearing disputes between individuals and the public administration. These include Australia, New Zealand, India, Ireland, and the United States. With the influence of American law after World War Two, a number of other countries have also adopted the generalist court model, including Japan and South Korea. Countries that came under the French sphere of influence in the 1800s and the first half of the 1900s today have Councils of State that operate separate from the ordinary judiciary. These include Belgium, Netherlands, Luxembourg, Italy, Greece, Turkey, Lebanon, Egypt, Colombia, Morocco, Algeria, and Senegal.<sup>75</sup> However, the label can be deceptive, since some of these Councils of State only have policymaking powers (*e.g.*, Luxembourg) and some only have powers of adjudication and are housed within the generalist court of last resort for civil and penal disputes (*e.g.*, Morocco, Algeria, Senegal). Moreover, unlike the French model, jurisdiction over government liability cases in Belgium,

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<sup>74</sup> See FROMONT, *DROIT ADMINISTRATIF DES ÉTATS EUROPÉENS*, *supra* note 2, at 128.

<sup>75</sup> Yves Gaudemet, *L'exportation du droit administratif français: Breves remarques en forme de paradoxe* in MÉLANGES PHILIPPE ARDANT: DROIT ET POLITIQUE À LA CROISÉE DES CULTURES 431, 438 (1999).

Italy, and the Netherlands is vested in the ordinary courts, not the Council of State, on the liberal theory that ordinary courts are best placed to protect individual rights against harmful state action. It appears that the third form of judicial review, conducted by a specialized branch of the judiciary, is even more widespread than the other two models: it has been adopted in Austria, Portugal, Luxembourg, Sweden, Finland, the Czech Republic, Poland, Spain, Switzerland, Hungary, Slovenia, Romania, Estonia, Lithuania, and most of Latin America.

## 2. Principles of administrative action

### i. Procedural principles

One of the important features that traditionally set the common law apart from continental systems of administrative law was its reliance on procedural principles of fair play in judging the correctness of administrative determinations.<sup>76</sup> The common law tended to equate broad categories of administrative action with the adjudication of courts and to require analogous procedural safeguards.<sup>77</sup> By contrast, the administrative law of continental Europe was more focused on the substantive correctness of administrative determinations in deciding whether or not to let them stand. Doctrinally, the English insistence on administrative procedure was expressed by the principle of natural justice, which included the right to be heard and the rule against bias. The French equivalent, known as rights of the defense (*droits de la défense*), included fewer rights to an oral hearing and the disclosure of documents, and applied only to those administrative determinations that were considered sanctions.

Since the 1970s, however, this common law-continental law difference has faded. A number of national laws guarantee individuals, in the context of individualized administrative determinations, the right to receive notice of the proposed decision, to respond in writing, and to receive a statement of reasons with the final decision. These include the French laws of July 11, 1979 and April 12, 2000, the Italian law of August 7, 1990, the Swedish Administrative Procedure Act of 1986, and the Danish Public Administration Act of 1985. The German case is somewhat exceptional in that the proceduralization of individual decisionmaking began immediately in the post-war period, under the heavy influence of constitutional law, and was

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<sup>76</sup> This discussion only covers the procedure of individualized administrative determinations. For a discussion of the comparative procedure of administrative rulemaking, see the discussion in Part IV.B of this paper.

<sup>77</sup> See Dominique Custos, *Droits administratifs: américain et français*, 2 REVUE INTERNATIONALE DE DROIT COMPARÉ 285, 295-96 (2007); J.D.B. Mitchell, *The United Kingdom*, in FEDERATION INTERNATIONALE POUR LE DROIT EUROPEEN (FIDE), DUE PROCESS IN THE ADMINISTRATIVE PROCEDURE, Reports from the 8<sup>th</sup> Congress, 22-24 June 1978.

eventually codified with the Federal Administrative Procedure Act of 1976. Spain is another interesting case: early on, notice and hearing procedures for licensing, procurement, and other types of decisions were set down in the Administrative Procedure Act of 1889. Many Latin American countries have adopted administrative procedure laws: Peru in 1972, Argentina in 1973, Costa Rica in 1978, and Colombia in 1984.<sup>78</sup> The trend toward the proceduralization of individualized administrative determinations can also be observed in East Asia: Japan adopted an Administrative Procedure Act in 1993 and South Korea adopted one in 1995.<sup>79</sup>

Notwithstanding this common procedural trajectory, there continue to be differences and one in particular bears mentioning. Common law countries have institutionalized the judicial model within the bureaucracy to a greater extent than other legal systems. In Britain and Australia this takes the shape of administrative tribunals, while in the United States, it comes under the heading of formal adjudication, governed by the Administrative Procedure Act and handled by administrative law judges.<sup>80</sup> Administrative tribunals and administrative law judges are part of government administration and are responsible for hearing appeals from social security determinations, immigration decisions, and other high-volume regulatory areas. They enjoy significant statutory guarantees of independence, their decisionmaking procedure is modeled after the courtroom, and their determinations are subject to judicial review before the courts on points of law. By contrast, even though individuals in continental systems are entitled to appeal administrative determinations up the bureaucratic chain-of-command, their only opportunity for an independent hearing is in judicial review before a full-fledged court.

## ii. Substantive principles

In reviewing the substance of an administrative decision to ban a product on safety grounds, turn down a building permit for a supermarket, deny reimbursement for medical services, or accomplish one of the thousands of other purposes of bureaucracy, what criteria do courts use?<sup>81</sup> A multitude of doctrinal headings are used by courts to examine the work of bureaucracy and decide whether or not to let it stand. Nevertheless, the role of courts in the domain of administrative governance can be seen to fall under three distinct headings: the rule of

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<sup>78</sup> See ALAN R. BREWER-CARIAS, *ETUDES DE DROIT PUBLIC COMPARÉ* (2001).

<sup>79</sup> See Tom Ginsburg, *Dismantling the "Developmental State"? Administrative Procedure Reform in Japan and Korea*, 48 AM. J. COMP. L. 585 (2001).

<sup>80</sup> See Peter Cane, *Judicial Review in the Age of Tribunals*, PUBLIC LAW 479 (2009).

<sup>81</sup> Due to space constraints, the principles of government torts and public contracts are omitted from this discussion.

law, individual rights, and policy rationality. In the section below, I explore the local expressions of these judicial review practices and discuss the important variations in how and the extent to which these powers are exercised.

Much judicial review is geared towards furthering the rule of law, understood as the principle of a government of laws and not of men.<sup>82</sup> The activity of public administration must respect the purposes and limits set down in laws—generally passed by parliaments, but also, in some places executive decrees—or turn into the arbitrary action of tyrannical despots. The task of courts is to enforce those limits. To appreciate the pervasiveness of this understanding of the relationship between courts and bureaucracy, it suffices to peruse the main types of challenges contemplated in the administrative law of France, the United States, and England: administrative determinations can be overturned in France in the case of a “violation of the law,”<sup>83</sup> in the United States if administrative action is “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,”<sup>84</sup> and in England in the event of “illegality,” traditionally understood as part of “ultra vires” review.<sup>85</sup>

A second type of substantive review of administrative action is the protection of basic liberties against government action. This was true even in the absence of written constitutions enforceable by the courts, given the importance of liberal property rights in both the common law writ system and continental civil codes. With the spread of written constitutions in the twentieth century, as well as international human rights instruments, in particular the European Convention of Human Rights, the rights that courts are expected to protect in the face of administrative action have expanded considerably: freedom of expression and association, the right to privacy and human dignity, personal liberty, the right to exercise various forms of economic activity, and more.

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<sup>82</sup> I take this as the minimalist, lowest-common-denominator definition of rule of law. However, it is also important to note that the definition of rule of law varies considerably from one legal system to the next. Among the most comprehensive conceptions is probably the Germany one, which includes substantive principles of fundamental rights and social justice as part of the definition of “law” and which requires that all administrative action be authorized by parliamentary law, with very little role for inherent executive powers as in the French and the English systems. See Bell, *Comparative Administrative Law*, *supra* note 13, at 1272.

<sup>83</sup> FROMONT, *DROIT ADMINISTRATIF DES ÉTATS EUROPÉENS*, *supra* note 2, at 167. This is one of four grounds of review under the general action for “excess of power” (*excès de pouvoir*).

<sup>84</sup> Administrative Procedure Act § 706(2)(C). In practice, however, most litigation alleging that government administration exceeded its statutory powers is brought under the provision permitting challenges to be brought against administrative decisions that are “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” Administrative Procedure Act § 706(2)(A).

<sup>85</sup> PAUL CRAIG, *ADMINISTRATIVE LAW* 5-18, 531-549 (6<sup>th</sup> ed., 2008).

The role of courts in safeguarding fundamental rights in the administrative process is most spectacular in Germany.<sup>86</sup> There administrative law has been thoroughly constitutionalized, more so than elsewhere in Europe and the United States. As the President of the Federal Administrative Court declared in 1959, administrative law is “concretised constitutional law” (*konkretisiertes Verfassungsrecht*).<sup>87</sup> The result has been extensive judicial review of administrative action in the name of rights and a number of German doctrines have since gone on to influence the rest of Europe through the European Court of Justice, the European Court of Human Rights, and the intense transnational networks that exist among European legal elites.<sup>88</sup> Three in particular bear mentioning: proportionality, equality, and legitimate expectations.

Under German law, any measure that interferes with a right must survive a proportionality inquiry, meaning that public administration must satisfy a sequential inquiry: (1) the measure is capable of achieving the declared public ends; (2) the measure is necessary for achieving those ends and no other, equally effective and less rights-restrictive measures are available to accomplish the same ends; and (3) the public purpose of the measure outweighs the burden to the individual right. To illustrate: In 1958, the Constitutional Court declared an administrative restriction on the number of pharmacies in operation to be a disproportionate interference with the right to freely choose one’s profession. The German courts engage in a similar inquiry when administrative programs are challenged due to alleged discrimination based on economic or other characteristics: under the equality principle “[d]ifferences must be of such a kind and weight so as to justify a differentiation.”<sup>89</sup> And the principle of legitimate expectations, the rough equivalent of the duty of non-retroactivity in the United States, significantly limits the ability of public administration to reverse benefit-conferring determinations. As a result of this doctrine, recipients of agricultural subsidies, housing benefits, and other forms of government largess have a right to compensation or considerable notice (generally one year) if the government decides to reduce the amount of the benefit or to

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<sup>86</sup> For this discussion of constitutional principles in German administrative law, see George Nolte, *General Principles of German and European Administrative Law—A Comparison in Historical Perspective*, 57 THE MODERN LAW REVIEW 191 (1994).

<sup>87</sup> *Id.* at 201.

<sup>88</sup> FROMONT, DROIT ADMINISTRATIF DES ÉTATS EUROPÉENS, *supra* note 2, at 255, 256, 262.

<sup>89</sup> 85 BVerfGE 191, 210 (1992).

withdraw a benefit improperly granted.<sup>90</sup> The rights dimension of German administrative governance stands in marked contrast with the United States, where the Supreme Court has long given up on reviewing government action that burdens economic rights, the very rights generally at stake in administrative decisionmaking.<sup>91</sup>

The last form of judicial oversight of administrative governance is review for policy rationality. Doctrinally, rationality review picks up where rule-of-law review leaves off: even though legislation might not contain standards to guide administrative action and therefore effectively leaves decisionmaking to the discretion of bureaucrats, the courts nonetheless can evaluate administrative action based on criteria related to sound policymaking. Doctrinal expressions of this form of review give the impression that only acts of confirmed insanity will be struck by the courts: review for “arbitrary and capricious” decisionmaking in the United States<sup>92</sup> and review for “manifest error of assessment” (*erreur manifeste d’appréciation*) in France.<sup>93</sup> Even better is the articulation of the principle in English law:

By “irrationality” I mean what can now be succinctly referred to as “Wednesbury unreasonableness” . . . . It applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it . . . .<sup>94</sup>

However, in the United States in particular, rationality review has become an extremely demanding test, and has come to represent a distinctive feature of its administrative law system.<sup>95</sup>

It became common judicial practice in the late 1960s and the 1970s and was associated with the fall of the post-war consensus on economic growth, growing distrust in government, new social movements, and the spread of public-interest lawyering. As the Supreme Court said in *State Farm*:

the agency must examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’ . . . Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that

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<sup>90</sup> See Edward J. Eberle, *The West German Administrative Procedure Act: A Study in Administrative Decision Making*, 3 DICKINSON J. INT’L L. 67 (1984).

<sup>91</sup> I am referring to rationality review under the Fourteenth Amendment of the U.S. Constitution. See BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998).

<sup>92</sup> Administrative Procedure Act § 706(2)(A).

<sup>93</sup> See FROMONT, *DROIT ADMINISTRATIF DES ÉTATS EUROPÉENS*, *supra* note 2, at 238.

<sup>94</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock.

<sup>95</sup> See KAGAN, *ADVERSARIAL LEGALISM*, *supra* note 40.

runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. . . .<sup>96</sup>

Although European rights-based proportionality review and American rationality review overlap in some respects, their essence is fundamentally different. In the former, the focus is on the individual right and the decision to reverse an administrative act turns on an assessment of the importance of the right as compared to the public purpose as well as the ability of the administration to articulate a close connection between the government measure and the public purpose. In the latter, the focus is on the quality of the science and policy assessments behind the administrative decision, with a considerable burden placed on the government to refute the alternative scientific evidence and policy options put forward by opponents of the decision.

#### **D. Administration and the Public**

Over the past forty years or so, informal, broad-ranging public oversight has become critical to the legitimacy of bureaucracy. Although this form of diffuse public accountability is achieved by virtue of a wide array of legal tools and institutional arrangements, two are particularly prominent: ombudsmen appointed by parliaments with oversight and complaint-resolution functions and laws guaranteeing all citizens a right of access to government documents. Sweden is generally believed to be the first Western legal system to have established an ombudsman and freedom of information. There the early expansion of parliamentary power at the expense of the king led to a right of access to government documents (Law on Liberty of the Press, enacted in 1766 and re-enacted in 1809) and the establishment of a parliamentary ombudsman (1809).<sup>97</sup> For a long time, Sweden stood out as an anomaly, but beginning in the 1970s, momentum got underway in a number of countries for broader public accountability in government administration and today a vast array of countries have freedom-of-information laws and ombudsmen.<sup>98</sup>

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<sup>96</sup> *Motor Vehicle Manufacturers Ass'n v. State Farm*, 463 U.S. 29, 43 (1983).

<sup>97</sup> See BENGT WIESLANDER, *THE PARLIAMENTARY OMBUDSMAN IN SWEDEN* 11-16 (1994) (ombudsman); Donald C. Rowat, *Rapport General*, in *LE SECRET ADMINISTRATIF DANS LES PAYS DÉVELOPPÉS* 21, 27-29 (1977) (access to documents).

<sup>98</sup> See Rowat, *Rapport General*, *supra* note 97, at 21-25.



Ombudsmen share a number of characteristics.<sup>99</sup> They are institutionally linked to parliaments, not the executive branch, by virtue of the fact that they are appointed by parliament, generally for a fixed term, and are legally obligated to report periodically on their activities. The principal function of ombudsmen is to settle complaints filed by members of the public against the bureaucracy. The process is informal: a simple letter or online complaint form is sufficient to trigger an investigation and the grounds for complaining are extremely broad and do not need to be styled as one of the grounds for obtaining legal redress in the courts. “The officer was extremely rude” or “I never received an answer to the query that I filed with the tax office” is enough to warrant a response from the ombudsman.<sup>100</sup> The ombudsman system, therefore, offers the promise of redress to individuals without the resources to go to court and in circumstances that fail to meet the stringent legal criteria that have been developed by courts to make a successful claim against the administration.

Once the ombudsman comes to a decision on a complaint, the powers of the office are limited compared to courts. The ombudsman cannot order the administration or civil servant to comply but rather must rely on the threat of bad press, public embarrassment, and parliamentary pressure to induce compliance.<sup>101</sup> This triangular relationship between ombudsman, press, and parliament is critical to the effectiveness of the institution.<sup>102</sup> The threat of public censure and hostile parliamentary questions is the main tool in the ombudsman’s arsenal and underscores the diffuse public accountability inherent in this area of administrative law. Ombudsmen in Sweden, France, Denmark and many other countries are also involved in policymaking and regularly recommend changes to administrative law and practice to bring administration into line with rule-of-law ideals and fundamental rights guarantees.

Laws on the right of access to public documents also broaden public oversight of administration.<sup>103</sup> The right to government documents can be understood as expanding public

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<sup>99</sup> The literature on ombudsmen is vast. Good examples are KATYA HEEDE, EUROPEAN OMBUDSMAN: REDRESS AND CONTROL AT THE UNION LEVEL (2000) and WIESLANDER, THE PARLIAMENTARY OMBUDSMAN IN SWEDEN, *supra* note 97.

<sup>100</sup> See, e.g., The European Ombudsman, The European Code of Good Administrative Behavior, art. 12.

<sup>101</sup> On the enforcement dimension, the powers of the Swedish ombudsman are exceptional because it can initiate disciplinary proceedings and bring criminal prosecutions against individual civil servants and therefore it is more powerful than most of its peers.

<sup>102</sup> See Rowat, *Rapport General*, *supra* note 97, at 34-39.

<sup>103</sup> See BREYER ET AL., ADMINISTRATIVE LAW, *supra* note 36, at 681-90 (U.S. law); Francesca Bignami, *Creating European Rights: National Values and Supranational Interests*, 11 COLUM. J. EUR. L. 243, 292 (2005) (European law).

scrutiny by giving individuals a right to examine the decisions of government even absent a claim of having been wronged or having a particular interest in the matter. Simply by virtue of being a citizen, individuals are assumed to have a stake in the correct workings of their public administration and, therefore, to have a right to government documents. Freedom-of-information laws, however, also restrict the types of documents that are accessible. For instance, industry documents that contain commercial secrets and documents related to national security are either excluded from the right of access or subject to extensive redaction before they may be released to the public. Preliminary drafts, notes, and memoranda are entirely exempted from disclosure in Sweden and Denmark if they are never circulated outside the responsible government agency and are exempted until the relevant government decision becomes final in Finland and the United States. These laws also differ in how they organize access to documents: in Sweden, Finland, and the European Union, there are official registers of government documents that are open to the public and that assist the public with formulating their access requests, while in Denmark, the Netherlands, and the United States, no such registers exist and individuals proceed by specifying the issue of interest and leaving it to public administration to locate the relevant documents.

Both ombudsmen and freedom-of-information laws have been popular over the past decades. In Europe, Finland (1919), Denmark (1954), Britain (1967), France (1973), Spain (1981), the Netherlands (1984), Ireland (1984), Portugal (1991), and Romania (1991) have established ombudsmen at the national level, and other countries, like Germany and Italy, have established them at the regional level.<sup>104</sup> New Zealand (1962), Hong Kong (1989), and Korea (1994) are examples of other countries with parliamentary ombudsmen. As for freedom of information, according to one study, almost seventy countries throughout the world have adopted the necessary legislation.<sup>105</sup>

This country overview gives an idea not only of the extent of diffuse public accountability as a feature of administrative law, but also of the differences that remain among legal systems. The degree to which individuals seek formal recognition of their grievances through the courts or rely mostly on informal avenues of redress through ombudsmen is still a source of comparative variation. In some countries, parliamentary ombudsmen are absent, as in

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<sup>104</sup> For a partial list, *see* ZILLER, ADMINISTRATIONS COMPARÉES, *supra* note 14, at 447.

<sup>105</sup> PRIVACY INTERNATIONAL (DAVID BANISAR), FREEDOM OF INFORMATION AROUND THE WORLD 2006: A GLOBAL SURVEY OF ACCESS TO GOVERNMENT INFORMATION LAWS (2006).

the United States and Germany (at the federal level), and in other countries, parliamentary ombudsmen have a reputation for being ineffective. By contrast, in systems like Sweden and Denmark, the informal dispute settlement and accountability offered by ombudsmen is immensely popular and tends to function as a substitute for courts. Freedom-of-information laws also have not taken root everywhere. Just in Europe, Italy and Greece are notable exceptions to the trend. Viewed positively, this might be a collective choice in favor of representative democracy over direct democracy or a vote of confidence in a expert bureaucracy, but less charitably, the absence of a right of access is an indicator of a powerful bureaucracy resistant to change and outside scrutiny.

## **V. Conclusion**

The ambition of this paper has been to develop a conceptual framework for comparative administrative law that is attune to the realities of administrative governance in liberal democracies today. Administrative law can no longer be understood as simply a set of rules that enable effective public administration and that afford individuals judicial redress should the boundaries of authorizing legislation be overstepped by government bureaucrats. The era in which bureaucracy was thought capable of single-handedly accomplishing the democratic will has long gone. Today, most observers recognize that civil servants are embedded in a dense accountability network of public and private actors and that administrative outcomes are driven by the complex set of legal relations that constitute the network. The novelty is part representation and part reality: the delegitimization of bureaucracy has brought to light rules, procedures and actors that have always existed but were previously obscured by the dominant paradigm of expert administration, while, simultaneously, the loss of confidence in public administration has given rise to legal innovations that have further empowered a variety of public and private actors. This is the changed administrative universe that my comparative framework seeks to capture and that serves to structure my comparison of European legal systems and the United States.

With this new paradigm in hand, comparative law is better equipped to speak to contemporary debates on administrative governance.<sup>106</sup> In the literature on administrative

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<sup>106</sup> The legal literature on reforming administrative governance is vast. Examples include Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1 (1997) (United States), LAW AND NEW

reform, the tendency is to stereotype what came before: administration was hierarchical and technocratic, closed to outside scrutiny, and reliant on command-and-control techniques. The way forward, the reformers argue, is to bring in public transparency, political accountability, and administrative collaboration with private industry and other stakeholders. Yet, as the comparative analysis demonstrates, once we get beyond the old intellectual paradigm of administrative organization and judicial review, not all public administration fits the stereotype, not even in the early days of administrative law and certainly not today. An appreciation of this great diversity and wealth of legal possibilities can assist in devising reform, as well as understanding the consequences of reform across different administrative law settings.

What might be some of these possibilities and consequences? The European technique of managed self-regulation might be appropriate for concentrated market sectors in the United States, in which competition between industry actors, not to mention their self-regulating industry associations, is absent and therefore pluralist rivalry between overlapping interest groups cannot be relied upon to produce public-regarding outcomes. Vice versa, pluralist notice-and-comment rulemaking could be adopted by European systems in areas such as anti-discrimination law in which the policy question—minority rights—appears to call for a variety of perspectives that are not easily represented by a few, all-encompassing interest organizations. More searching constitutional scrutiny of administrative decisionmaking could be considered by American courts, while at the same time, rigorous rationality review might be warranted in European courts. The United States should give more thought to establishing independent watchdogs akin to parliamentary ombudsmen, especially now that digital technologies have made it so easy for individual citizens to voice their grievances to these trusted intermediaries. And these possibilities apply not only to domestic administrative law, but also extend to international and transnational systems of administrative governance. How should political accountability, interest group representation, judicial review, and diffuse accountability be organized in the European Union, the World Trade Organization, transnational networks of banking regulators, and other sites of global governance? A natural first place to look is to domestic systems of administrative law, with their long histories and their numerous government institutions and legal variations.

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GOVERNANCE IN THE EU AND THE US (Gráinne de Búrca & Joanne Scott eds., 2006) (European Union), and THE TRANSFORMATION OF ADMINISTRATIVE LAW IN EUROPE (Matthias Ruffert ed., 2007) (national European systems).

By the same token, an appreciation of comparative law difference suggests the limits of universal reform ambitions in their national settings and fosters a better understanding of the legal and institutional constraints that shape the path of administrative governance. As I hint to earlier, it appears that New Public Management reforms have been less extensive in Europe compared to the United States because of the greater importance of the civil service tradition in European legal systems. In Europe, independent regulatory agencies have proliferated over the past twenty years, but their powers and numbers still lag behind those of their American cousins at least in part because of the different constitutional constraints of parliamentary government. It seems that the empowerment of the private sector through collaborative governance and self-regulation can be expected to operate quite differently in neo-corporatist and pluralist regimes: while European systems have highly organized labor and employer groups and a tradition of public management of private governance, in the United States, trade unions and industry associations are weak and legal barriers insulate private ordering from public interference.

Another area of inquiry suggested by my comparative framework is perhaps the most elementary, but also the most essential. Do concepts and comparisons that are largely based on European legal systems and the United States travel to liberal democracies elsewhere in the world? To take but one example, do the comparative observations on the differences between presidential and parliamentary regimes, drawn mostly based on the contrast between the United States and Britain, hold for other systems? In Latin America, Russia, and other presidential systems, the executive decree powers of the directly elected president are stronger than the powers of the American president.<sup>107</sup> Therefore, in contrast with the American system, presidents in Latin American and Russia might very well dominate public administration, without much competition from the legislative branch, and these systems might resemble more closely parliamentary systems in the extent to which political control of bureaucracy is one-dimensional.

Not only does the geographic coverage of the framework deserve to be extended, but so too does the legal and empirical content. Relations between courts and public administration are the most developed part of my analysis. This is a reflection of the concerns that have traditionally dominated comparative administrative law and demonstrates the importance of more primary research on the dimensions of administrative governance designed to foster

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<sup>107</sup> See EXECUTIVE DECREE AUTHORITY (John M. Carey & Matthew Soberg Shugart eds., 1998).

electoral oversight, diffuse accountability, and the participation of social and economic groups. In short, shifting the focus from the expert administration of legislative directives to a complex accountability network of public and private actors generates a host of new research opportunities going forward and dramatically expands the potential insights of comparative administrative law.