

# Administrative Law, Public Administration, and the Administrative Conference of the United States

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## ABSTRACT

*From its birth, administrative law has claimed a close connection to governmental practice. Yet as administrative law has grown and matured it has moved further away from how agencies actually function. The causes of administrative law's disconnect from actual administration are complex and the divide is now longstanding, but it is also a source of concern given the increasing importance of internal administration for ensuring accountable government. This Article analyzes the contemporary manifestations and historical origins of administrative law's divide from public administration, as well as the growing costs of this disconnect. It also describes the Administrative Conference of the United States ("ACUS")'s exceptional status as the rare forum spanning the worlds of both administrative law and public administration, and the critical role ACUS can play in reasserting linkages between these two critical dimensions of government.*

## TABLE OF CONTENTS

INTRODUCTION .....	1517
I. THE ADMINISTRATIVE LAW AND PUBLIC ADMINISTRATION DIVIDE .....	1520
A. <i>Manifestations of the Administrative Law-Public Administration Divide</i> .....	1520
B. <i>Historical Antecedents</i> .....	1524
C. <i>Contemporary Contributing Forces</i> .....	1531
II. BRIDGING THE DIVIDE: THE ROLE OF THE ADMINISTRATIVE CONFERENCE .....	1534
A. <i>The Arguments for Closer Linkage</i> .....	1534
B. <i>ACUS's Bridging Function</i> .....	1536

## INTRODUCTION

A funny thing happened to administrative law in the United States over the course of the twentieth century. Administrative law

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emerged as a field at the century's beginning, in response to the growth in national administrative government.<sup>1</sup> The 1946 enactment of the Administrative Procedure Act<sup>2</sup> ("APA"), following an intensive study of different federal agencies' practices, represented an acknowledgement that the administrative state was here to stay.<sup>3</sup> Subsequent administrative law transformations have also been tied to changes in how agencies operate. For example, the expansion in the procedural requirements for notice-and-comment rulemaking followed agencies' increased use of such rulemaking.<sup>4</sup> Centralized regulatory review and other forms of presidential direction, perhaps the most significant administrative developments of the last few decades, are a core part of administrative law casebooks and scholarship.<sup>5</sup>

In short, from its birth, administrative law has claimed a close connection to governmental practice.<sup>6</sup> But, in fact, as administrative law has grown and matured, it has moved further away from critical aspects of how agencies function.<sup>7</sup> As many have noted, administrative law focuses almost entirely on external dimensions of administrative action, and the external dimensions it targets are increasingly not the main drivers of administrative action.<sup>8</sup> To be sure, courts police

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1 See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1671–72 (1975); see also JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 3–17 (2012) (noting the conventional view that administrative organization and administrative law came into being at the national level in the late nineteenth century, but arguing that both have actually existed since the nation's founding).

2 Administrative Procedure Act, Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified at 5 U.S.C. §§ 551–559, 701–706 (2012)).

3 For a detailed history of the APA's enactment, see George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557 (1996). See also Walter Gellhorn, *The Administrative Procedure Act: The Beginnings*, 72 VA. L. REV. 219, 224–29 (1986) (describing the work of the Attorney General's Committee on Administrative Procedure).

4 See Gillian E. Metzger, *Foreword: Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1300 & n.26 (2012). New statutes mandating use of rulemaking and imposing new procedural requirements, such as the Clean Air Act, also played a significant role.

5 See Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 485–91 (2003) (describing the presidential control model in administrative and constitutional law scholarship); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2281–319 (2001) (describing different forms of presidential administration and their increasing importance); see also Don Bradford Hardin, Jr., Comment, *Why Cost-Benefit Analysis? A Question (and Some Answers) About the Legal Academy*, 59 ALA. L. REV. 1135, 1136–37 (2008) (documenting a dramatic rise in legal scholarship related to cost-benefit analysis, the key component of centralized regulatory review).

6 See *infra* Part I.B.

7 *Id.*

8 See *infra* notes 24–32 and accompanying text.

agency conformity with procedural requirements imposed by the APA, other statutes and regulations, and constitutional due process, but these legal mandates govern only a small part of agency operations.<sup>9</sup> Courts insistently exclude more systemic aspects of agency functioning from their purview and from administrative law doctrines.<sup>10</sup> Key internal agency dynamics—such as planning, assessment, oversight mechanisms and managerial methods, budgeting, personnel practices, reliance on private contractors, and the like—are left instead to public administration. As a result, despite their common concern with administrative agencies, the fields of administrative law and public administration interact largely as passing strangers, acknowledging each other's existence but almost never engaging in any sustained interchange.

The causes of administrative law's separation from public administration are complex and rooted in historical field development, ideological commitments, institutional role, constitutional principle, and good old-fashioned turf protection. This separation reflects administrative law's traditional court-centric focus, and much can be said for keeping the courts out of the internal world of agency functioning. Yet administrative law's growing disconnect from actual government practices is cause for concern. This disconnect perpetuates a false image of how agencies operate and the role of internal administration. In a number of contexts internal administration is the linchpin for ensuring accountable government, particularly given the obstacles to external constraint through congressional oversight or judicial review.<sup>11</sup> Moreover, whether intentional or not, administrative law affects internal agency operations in significant ways. Hence, administrative law's inattention to public administration risks impeding development of good administrative practices and worse, incentivizes agencies to adopt bad ones, at a time when the importance of strong internal administration is only growing.

Enter ACUS. Although the separation of administrative law from public administration is longstanding, there have been rare instances of linkage between the two. ACUS represents one such instance. Not only does its membership bridge the internal-external

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<sup>9</sup> See Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 96–97, 105–11 (2003); see also William H. Simon, *The Organizational Premises of Administrative Law*, 78 LAW & CONTEMP. PROBS. 61, 61–63, 70–74 (2015).

<sup>10</sup> See Gillian E. Metzger, *The Constitutional Duty to Supervise*, 124 YALE L.J. 1836, 1859–73 (2015).

<sup>11</sup> See *id.* at 1849–59.

divide, consisting of agency officials and public members from outside of government, but the projects it undertakes also span the worlds of administrative law and public administration. ACUS is thus ideally situated to address the growing disconnect between these two fields, studying how administrative law affects internal agency operations and assessing whether—and how—administrative law might be used to improve public administration.

## I. THE ADMINISTRATIVE LAW AND PUBLIC ADMINISTRATION DIVIDE

Administrative law and public administration scholars both bemoan the disconnect between their fields, a disconnect evident through a comparison of key agency internal practices and administrative law doctrines. The historical roots of this divide trace back to both fields' origins in the United States at the outset of the twentieth century. But over time the divide has expanded and become entrenched, based today more expressly on separation of powers principles, concerns about the impact of judicial review on agency functioning, and the dominance of managerialist approaches to public administration.

### A. *Manifestations of the Administrative Law-Public Administration Divide*

At first glance, the claim that administrative law is divorced from how agencies actually function seems patently false. After all, a core focus of the APA—the nation's most foundational administrative law enactment—is agency process, setting out basic procedural requirements for agencies to follow.<sup>12</sup> Federal courts in turn have penned an endless number of administrative law decisions interpreting those requirements, and learning the details of the resultant doctrines is one of the joys experienced by many a student of administrative law. Moreover, study of centralized White House regulatory review, implemented through the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (OMB) and a central factor today in major rulemaking, is another administrative law staple.<sup>13</sup> In addition, administrative law scholars increasingly are turning their attention to important internal dynamics that shape how

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<sup>12</sup> See, e.g., 5 U.S.C. §§ 553–557 (2012).

<sup>13</sup> See, e.g., PETER L. STRAUSS ET AL., GELLHORN & BYSE'S ADMINISTRATIVE LAW: CASES AND COMMENTS 213–41, 685–89 (11th ed. 2011) (detailing instances of presidential direction and review as well as connected scholarship); see also Kagan, *supra* note 5.

agencies operate, such as an agency's internal organization and design or the use of multiple agencies to implement a regulatory scheme.<sup>14</sup>

Yet, appearances can be deceiving. A key feature of the APA is that it represents external controls, imposed by statute and elaborated on by courts. Process requirements developed by agencies themselves rarely rise to the fore in administrative law, except with respect to whether those requirements are judicially enforceable.<sup>15</sup> Despite their central importance to how federal agencies function today, centralized regulatory review and presidential direction remain remarkably absent from administrative law decisions.<sup>16</sup> The same is true of other significant internal agency features, such as priority-setting and planning processes or the role of career officials in agency decisionmaking.<sup>17</sup> Perhaps the clearest evidence of this doctrinal absence is offered by *Lujan v. National Wildlife Federation*,<sup>18</sup> where the Supreme Court ruled it lacked jurisdiction over a challenge to the Bureau of Land Management's failure to undertake programmatic and planning activities with respect to public lands.<sup>19</sup> According to the Court, such activities were too "wholesale" or systematic to come within the scope of judicial review, which it deemed limited to discrete agency actions.<sup>20</sup> In a subsequent decision the Court tied this exclusion even more firmly to the terms of the APA's grant of jurisdiction,<sup>21</sup> but it has also sometimes held that general or programmatic challenges are barred on constitutional standing grounds.<sup>22</sup>

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<sup>14</sup> See, e.g., Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012) (detailing and analyzing interagency coordination); Jacob E. Gersen, *Designing Agencies*, in RESEARCH HANDBOOK ON PUBLIC CHOICE AND PUBLIC LAW 333 (Daniel A. Farber & Anne Joseph O'Connell eds., 2010) (discussing public choice theory and issues of agency design); Matthew C. Stephenson, *Information Acquisition and Institutional Design*, 124 HARV. L. REV. 1422 (2011) (discussing the effects of legal-institutional design choices on government decisionmakers' incentives to invest in information).

<sup>15</sup> See Elizabeth Magill, *Foreword: Agency Self-Regulation*, 77 GEO. WASH. L. REV. 859, 860–61, 873–91 (2009); see also STRAUSS ET AL., *supra* note 13, at 203–07, 926–34 (describing internal agency processes connected to rulemaking and with respect to judicial review).

<sup>16</sup> See Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1138–39, 1155–57 (2014); Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 7, 18–23 (2009).

<sup>17</sup> See Rubin, *supra* note 9, at 97; Sidney A. Shapiro, *Why Administrative Law Misunderstands How Government Works: The Missing Institutional Analysis*, 53 WASHBURN L.J. 1, 10–13, 23–24 (2013); Simon, *supra* note 9, at 74–79.

<sup>18</sup> *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1990).

<sup>19</sup> *Id.* at 891–94.

<sup>20</sup> *Id.*

<sup>21</sup> See *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61–67 (2004).

<sup>22</sup> See, e.g., *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *Allen v. Wright*, 468 U.S. 737, 759–60 (1984).

Increasingly administrative law scholars are arguing that exclusion of these systemic internal features is separating administrative law from the main drivers of agency functioning. According to these scholars, classical or canonical administrative law—defined generally as “the text and judicial interpretations of the APA and associated constitutional doctrine. . . does not reach some of the most practically important official conduct”<sup>23</sup> and “can seem like a minor presence in the modern regulatory process.”<sup>24</sup> William Simon argues that administrative law traditionally emphasizes top-down, bureaucratic delegations and specific acts of rulemaking.<sup>25</sup> Simon further contends that this approach not only leaves vast areas of agency discretion unregulated, but also is at odds with contemporary models of administration, which focus on overall planning and monitoring and derive legitimacy from transparency and processes for continuous revision.<sup>26</sup> Dan Farber and Anne O’Connell agree that current administrative law is premised on a “lost world,” one in which a statutorily authorized agency implements statutory requirements, following mandated procedures and undertaking reasoned consideration of both the requirements and evidence before the agency, with the agency’s determination subsequently reviewable by courts.<sup>27</sup> “The reality of the modern administrative state,” however, is quite different: executive directives as well as statutory requirements are in play; multiple agencies (often lacking confirmed leaders) are charged with implementation, yet in practice authority may rest elsewhere, in particular in the hands of OIRA and White House staff; mandated procedures are avoided; political, as opposed to statutory, factors drive decisionmaking; and little judicial oversight is available.<sup>28</sup>

Edward Rubin takes the argument even further, contending that “the APA was out of date at the time it was enacted” because its requirements “are derived from an essentially judicial concept of governance in which laws are discovered rather than invented and policy making is always incremental,” thereby ignoring the distinctive features of the administrative process and leaving key activities “such as priority setting, resource allocation, research, planning, targeting, guidance, and strategic enforcement” either “essentially unregulated or

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<sup>23</sup> Simon, *supra* note 9, at 62, 64.

<sup>24</sup> Farber & O’Connell, *supra* note 16, at 1138.

<sup>25</sup> See Simon, *supra* note 9, at 63–92.

<sup>26</sup> *Id.*

<sup>27</sup> Farber & O’Connell, *supra* note 16, at 1154.

<sup>28</sup> *Id.* at 1154–73.

subject[ed] . . . to inappropriate procedural rigidities.”<sup>29</sup> Like Rubin, Sidney Shapiro faults administrative law for failing to heed the insights of public administration.<sup>30</sup> In Shapiro’s view, administrative law is excessively focused on “outside-in accountability,” specifically political and legal controls external to an agency, and ignores the ways that “hierarchy . . . institutional norms, and professionalism promote accountability from inside an agency.”<sup>31</sup> Jerry Mashaw puts the point particularly well:

[W]e tend to think of our administrative constitution as a set of external constraints on agencies. . . . [and] relentlessly analyze these external constraints as if they were the major determinants of agency efficiency, procedural fairness, and legal legitimacy. Yet in many ways it is the internal law of administration—the memoranda, guidelines, circulars, and customs within agencies that most powerfully mold the behavior of administrative officials.<sup>32</sup>

Strikingly, some public administration scholars also critique the disconnect between administrative law and public administration. But, they approach this disconnect from the opposite direction, faulting their field for its refusal to take seriously the central role of public law in public administration. Thus, Laurence Lynn critiques public administration’s “anti-legal temper,”<sup>33</sup> arguing that “a broad consensus within public administration appears to hold that law is one of many environmental constraints on administrative discretion rather

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<sup>29</sup> Rubin, *supra* note 9, at 96–97.

<sup>30</sup> Shapiro, *supra* note 17, at 1.

<sup>31</sup> *Id.* Note that although these scholars agree that administrative law fails to encompass key dimensions of modern administration, they take somewhat different stances on the specific features of this mismatch. In particular, whereas Simon argues that current administrative law is too bureaucratic and hierarchical in its focus and Farber and O’Connell describe it as failing to acknowledge the role of presidential and executive branch directives, Shapiro’s complaint is that administrative law does not give hierarchy enough weight and is too focused on presidential oversight. Compare Simon, *supra* note 9, at 67–74, and Farber & O’Connell, *supra* note 16, at 1154–60, with Shapiro, *supra* note 17, at 11–25. See also Sidney A. Shapiro & Ronald F. Wright, *The Future of the Administrative Presidency: Turning Administrative Law Inside-Out*, 65 U. MIAMI L. REV. 577, 585–87 (2011) (detailing the benefits of bureaucratic control). This discrepancy may result from the fact that Shapiro is targeting administrative law scholarship somewhat more than administrative law’s statutory and doctrinal manifestations, but in any event these differences do not take away from their shared agreement that administrative law fails to acknowledge important internal administrative features that drive agency behavior.

<sup>32</sup> MASHAW, *supra* note 1, at 313.

<sup>33</sup> The phrase originated with DWIGHT WALDO, *THE ADMINISTRATIVE STATE: A STUDY OF THE POLITICAL THEORY OF AMERICAN PUBLIC ADMINISTRATION* 79 (1948). See Laurence E. Lynn, Jr., *Restoring the Rule of Law to Public Administration: What Frank Goodnow Got Right and Leonard White Didn’t*, 69 PUB. ADMIN. REV. 803, 803 (2009).

than its source” and gives “short shrift to the relationship between law and administration.”<sup>34</sup> Such dismissals of law are misguided not just because of the myriad ways that law impinges on administration, but also because “public administrators necessarily play an essential role in defining what the rule of law means in practice.”<sup>35</sup> Other public administration scholars similarly contend that “the basic theory guiding governmental organization and management . . . is to be found in public law” and bemoan that public administration orients itself around management principles instead of public law.<sup>36</sup>

### B. *Historical Antecedents*

The current divide between administrative law and public administration is not a new phenomenon, but dates back to when both fields emerged as areas of academic study and practice at the beginning of the twentieth century. Early scholars of administrative law disagreed in fundamental ways about how the field should develop. Some, in particular Frank Goodnow and Ernest Freund—both political scientists as well as legal academics—saw features of internal administration as a core part of administrative law’s ambit.<sup>37</sup> Goodnow began his 1905 treatise on administrative law with a disquisition on the meaning of administration, along with an insistence on paying attention to how government actually operates:

Since administration and administrative law have to do with the governmental system in operation, or, in other words, with the actual operations of political life, it is absolutely necessary that the study of these subjects take into account not merely the formal governmental system as it is outlined in charters of government and legal rules, but, as well, those extralegal conditions and practices which, it has been shown,

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<sup>34</sup> Lynn, *supra* note 33, at 803.

<sup>35</sup> *Id.* at 805, 808–09; see also ANTHONY M. BERTELLI & LAURENCE E. LYNN JR., *MADISON’S MANAGERS: PUBLIC ADMINISTRATION AND THE CONSTITUTION* 73 (2006) (“By ignoring [law], public administration contributes to its own powerlessness.”).

<sup>36</sup> See Ronald C. Moe & Robert S. Gilmour, *Rediscovering Principles of Public Administration: The Neglected Foundation of Public Law*, 55 *PUB. ADMIN. REV.* 135, 135–36 (1995); see also Lynn, *supra* note 33, at 805–06 (quoting public administration scholars who emphasize public law).

<sup>37</sup> See WILLIAM C. CHASE, *THE AMERICAN LAW SCHOOL AND THE RISE OF ADMINISTRATIVE GOVERNMENT* 47–59 (1982); Thomas W. Merrill, *Article III, Agency Adjudication, and the Origins of the Appellate Review Model of Administrative Law*, 111 *COLUM. L. REV.* 939, 973 (2011).

have such an important influence on the real character of governmental systems.<sup>38</sup>

Goodnow followed this introduction with a detailed review of the organization of administration, including the organization of executive departments and chief executive authority, turning to judicial control of administration only at the end.<sup>39</sup> Freund, in turn, “sought to bridge what he saw as the differentiated study of administrative organization and administrative powers, the former of which focused on optimizing internal public administration and the latter of which performed the ‘more strictly legal’ task of protecting ‘right and justice.’”<sup>40</sup> Freund was an advocate of greater external constraints on administrative discretion, in particular more detailed legislative specification to guide agency decisionmaking. But he also expressly highlighted the potential benefits of internal administrative systems of control, which he emphasized operate constantly on subordinate officers and—unlike courts—can fully address questions of the wisdom and expediency of discretionary action.<sup>41</sup> Acknowledging the tendency to see “administrative law . . . [as] primarily judicial law controlling the administration,” he urged also applying the term “to a body of principles produced by the administration” on the grounds that longstanding “administrative practise [sic] has many of the characteristics of law.”<sup>42</sup>

Goodnow and Freund were not alone. Another leading early administrative law scholar, Bruce Wyman, framed his 1903 treatise around a distinction between internal and external administrative law. According to Wyman, “[e]xternal administrative law deals with the relations of the administration or officers with citizens,” while “[i]nternal administrative law is concerned with the relations of officers with each other, or with the administration.”<sup>43</sup> Such a clear external-internal distinction could set the groundwork for downplaying

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<sup>38</sup> FRANK J. GOODNOW, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES* 5 (1905).

<sup>39</sup> See generally *id.*; see also Mark Fenster, *The Birth of a “Logical System”: Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69, 77 (2005) (describing Goodnow’s approach as “largely an internal one” that “focused less on common law development by the judiciary”).

<sup>40</sup> Fenster, *supra* note 39, at 78 (quoting Ernst Freund, *Administrative Law*, in 1 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 452, 455 (Edwin R. A. Seligman ed., 1930)).

<sup>41</sup> Ernst Freund, *The Law of the Administration in America*, 9 POL. SCI. Q. 403, 414–15, 419 (1894); see also Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894–1932*, 23 STUD. AM. POL. DEV. 171, 175, 179 (2009).

<sup>42</sup> Freund, *supra* note 40, at 454–55.

<sup>43</sup> BRUCE WYMAN, *THE PRINCIPLES OF THE ADMINISTRATIVE LAW GOVERNING THE RELATIONS OF PUBLIC OFFICERS* 4 (1903).

the internal dimension—more hidden to begin with and less familiar to lawyers than courts—in favor of the external.<sup>44</sup> But Wyman expressly acknowledged the internal aspects of administration as part of administrative law, insisting that “[t]ogether, the external law and the internal law make up the law of administration.”<sup>45</sup>

By the late 1920s and early 1930s, when John Dickinson, Felix Frankfurter, and John Davison penned their takes on administrative law, this acknowledgement of internal administration as part of administrative law had largely disappeared.<sup>46</sup> Courts were now ascendant. Dickinson’s volume, for example, contained detailed accounts of the nature and importance of the courts in administrative action with no discussion of topics unrelated to judicial review.<sup>47</sup> According to Thomas Merrill, Dickinson’s approach marked the adoption of a new appellate model of judicial review, which extended the reach of the courts into areas previously left to agency discretion.<sup>48</sup> But it also represented the seeming removal of questions that did not lend themselves to judicial involvement from administrative law’s ken—and thus the internal organizational issues that engaged Goodnow, Freund, and Wyman are notably absent.<sup>49</sup> Frankfurter’s approach was broader. He underscored the importance of internal administrative features, such as “a highly professionalized civil service, an adequate technique of administrative application of legal standards, [and] a flexible, appropriate and economical procedure.”<sup>50</sup> Frankfurter also defined administrative law in encompassing terms: “administrative law deals with the field of legal control exercised by law-administering

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<sup>44</sup> See CHASE, *supra* note 37, at 61–71.

<sup>45</sup> WYMAN, *supra* note 43, at 4. Moreover, Wyman emphasized that the focus of internal administrative law is administration, or the process and methods by which an administration acts and its officers engage in common action. *Id.* at 14–15 (“The purpose of the law of administration . . . is the science of common action.”).

<sup>46</sup> Jerry Mashaw has written eloquently about the importance of internal administrative law and the limitations of a court-centered perspective. See, e.g., MASHAW, *supra* note 1.

<sup>47</sup> See generally JOHN DICKINSON, *ADMINISTRATIVE JUSTICE AND THE SUPREMACY OF LAW IN THE UNITED STATES* (1927).

<sup>48</sup> See Merrill, *supra* note 37, at 972–79.

<sup>49</sup> *Id.* at 973. Merrill notes that despite Dickinson’s sole focus on the court-agency relationship “[q]uite likely, [he] had no intention of suggesting that there is nothing else to administrative law besides the issue of judicial review—this was simply what he chose to write about.” *Id.*

<sup>50</sup> Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614, 618 (1927); see also *id.* at 620–21 (arguing that in-depth scientific study of how different agencies operate is a central precondition for development of administrative law); Ernst, *supra* note 41, at 180–82 (describing series of “intensive studies” of federal agencies undertaken under Frankfurter’s supervision and supported by the Commonwealth Fund).

agencies other than courts, and the field of control exercised by courts over such agencies.”<sup>51</sup> Yet, his and Davison’s casebook similarly excludes discussion of internal agency features in favor of an extensive analysis of judicial controls on an agency-by-agency basis and materials on separation of powers.<sup>52</sup>

A few decades later, the identification of administrative law with judicial review had intensified. To be sure, attention to internal administrative practice remained an important theme during the New Deal period. James Landis famously defended the New Deal administrative state with an emphasis on administrative process and an argument for how agencies’ internal combination of different functions made them far better equipped than the courts to address the major problems of the day.<sup>53</sup> The intensive study of agencies’ actual practices, which led to the enactment of the APA, demonstrated continued concern with internal administrative operations.<sup>54</sup> Moreover, the post-New Deal period was one of significant deference to agencies and restrained judicial scrutiny.<sup>55</sup> Still, these developments did not undermine the increasing identification of administrative law in terms of external and, particularly, judicial controls.<sup>56</sup> This is perhaps best captured by the title of Louis Jaffe’s dominant treatise, *Judicial Con-*

<sup>51</sup> Frankfurter, *supra* note 50, at 615.

<sup>52</sup> See FELIX FRANKFURTER & J. FORRESTER DAVISON, *CASES AND OTHER MATERIALS ON ADMINISTRATIVE LAW* ix (1932); see also CHASE, *supra* note 37, at 14–17 (describing Frankfurter’s definition of administrative law as “refer[ing] to what courts do in relation to administrative action”); J. F. Davison, *Administration and Judicial Self-Limitation*, 4 GEO. WASH. L. REV. 291, 296–99 (1936) (defining administrative law as “a body of principles followed by the regular courts of law in deciding disputes as to the proper relationship between the three powers of government or between an agency or bureau of the government and individual[s]” and arguing that similar rules and principles were not yet available from agencies in formulating their decisions); Oliver P. Field, *The Study of Administrative Law: A Review and a Proposal*, 18 IOWA L. REV. 233, 236 (1933) (“[Frankfurter and Davison’s casebook] is not a casebook on administrative law. . . . [I]t is a fine collection of cases on the separation and delegation of powers, and judicial review of administrative action.”).

<sup>53</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 10–12, 24–46 (1938).

<sup>54</sup> MASHAW, *supra* note 1, at 279.

<sup>55</sup> See generally Reuel E. Schiller, *The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law*, 106 MICH. L. REV. 399, 429–40 (2007).

<sup>56</sup> Merrill, *supra* note 37, at 973; see Fenster, *supra* note 39, at 82–84 (identifying the view “that legal academic research and teaching should focus on the traditional study of the judicial role in the administrative process—that is, on the limited judicial review of administrative agencies rather than on the bureaucratic operations and [decisionmaking] of the agencies themselves” as a “core assumption of early administrative law scholars” such as Dickinson, Frankfurter, and Landis). Fenster identifies Thurman Arnold as an administrative law theorist of this period who offered a model of administrative law that emphasized greater partnership between administrators and courts. See *id.* at 103–11.

*trol of Administrative Action*.<sup>57</sup> Indeed, the APA arguably reinforced this trend, with its imposition of trans-substantive procedural requirements that applied to all agencies and were to be enforced by courts.

Why the internal dimensions of administration were initially dropped from administrative law is a complicated question, and one that implicates forces that go beyond the field of administrative law. William Chase traces early resistance to incorporating administration to broader efforts by legal academia to systematize law teaching, particularly in the form of the Langdellian case method. According to Chase, this case method “model was intensely committed to the study and teaching of the work product of the traditional courts, and it was just as intensely biased against the teaching of a topic like administrative law and . . . the study of the noncourt decisions which that topic’s full scholarly development would require.”<sup>58</sup> The valorization of courts over administration also reflected a traditional common law identification of the rule of law with judicial control. This identification and understanding of administrative law as exempting government officials from “the ordinary law of the land . . . [and] the jurisdiction of ordinary tribunals” led A.V. Dicey to famously renounce administrative law as opposed to all English ideas and “unknown to English judges and counsel.”<sup>59</sup> Defending administrative law’s legitimacy against Dicey’s attack underlay Wyman’s distinction of external administrative law—the law of the land, applicable to government officers as well as private citizens—from internal administrative law, as well as his insistence that external administrative law trumped when in conflict with internal law.<sup>60</sup> Indeed, the legitimacy not just of administrative law but also of administrative governance was at issue. Emphasizing the role of judicial review helped to portray the expanding administrative state as compatible with constitutional principles of checks and balances and divided government.<sup>61</sup>

Equally important were broader ideological commitments of the time, in particular the Progressives’ deep skepticism of the courts and

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57 LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* (1965).

58 CHASE, *supra* note 37, at 20.

59 A.V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 193, 330 (10th ed. 1959).

60 WYMAN, *supra* note 43, at 4–13.

61 See JAFFE, *supra* note 57, at 320 (“The availability of judicial review is the necessary condition, psychologically if not logically, of a system of administrative power which purports to be legitimate, or legally valid.”). As Merrill has noted, however, judicial review could be seen to raise concerns of excessive judicial entanglement with the proper work of the political branches, a concern alleviated by development of the appellate review model in this period. See Merrill, *supra* note 37, at 992–1000.

commitment to making professional expertise the basis of governmental decisionmaking rather than politics.<sup>62</sup> This skepticism underlay enactment of administrative systems to replace common law rules and was further reinforced by the ways courts impeded new administrative regulation.<sup>63</sup> The experience of the *Lochner* era made Frankfurter and his fellow New Deal sympathizers deeply suspicious of the courts and intent on curtailing their involvement in administrative policy choices.<sup>64</sup> Distinguishing internal administration from administrative law served as a means of precluding judicial involvement in the former, even if it also served to reinforce the identification of administrative law with judicially enforced constraints. Emphasis on the need for expert exercise of discretion for successful completion of governmental tasks, meanwhile, reinforced the inclination to limit judicial involvement in the substance of administration.<sup>65</sup> Early administrative law scholars disagreed fundamentally over whether administrative discretion was a bane or a benefit: Freund viewed development of precise substantive rules, whether by legislatures or administrative superiors, to be inevitable and critical to preventing administrative abuse, whereas Frankfurter embraced discretion as essential for effective administrative government.<sup>66</sup> But, as even Freund acknowledged, courts were ill-equipped to review questions of propriety, and thus an embrace of administrative discretion served to immunize areas of administrative action from judicial scrutiny.<sup>67</sup>

The progressive commitment to expert administration separate from politics also led to the birth of the field of public administration. Woodrow Wilson's founding essay, *The Study of Administration*, insisted on the need to develop "the eminently practical science of ad-

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<sup>62</sup> See FELIX FRANKFURTER, *THE PUBLIC & ITS GOVERNMENT* 157–58 (1930); Fenster, *supra* note 39, at 80–86; Shapiro & Wright, *supra* note 31, at 597–98.

<sup>63</sup> See, e.g., Schiller, *supra* note 55, at 403–04.

<sup>64</sup> See CHASE, *supra* note 37, at 141–44; Schiller, *supra* note 55, at 407–14; Mark Tushnet, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 *DUKE L.J.* 1565, 1591–92 (2011).

<sup>65</sup> CHASE, *supra* note 37, at 12–17; Fenster, *supra* note 39, at 80–84; Schiller, *supra* note 55, at 417–21; Tushnet, *supra* note 64, at 1571–73, 1584–86.

<sup>66</sup> See FRANKFURTER, *supra* note 62, at 150–62; Ernst, *supra* note 41, at 173, 178–79, 185, 187.

<sup>67</sup> See Freund, *supra* note 41, at 419; see also MASHAW, *supra* note 1, at 301–08 (describing the lack of judicial review of discretionary action as the longstanding norm before the twentieth century); WYMAN, *supra* note 42, at 11, 16 (arguing discretion is not for judicial control). The exception here is John Dickinson, who advocated the appellate review model, which allowed courts to review even discretionary agency decisionmaking, albeit under a deferential standard of review. Merrill, *supra* note 37, at 963, 971–76, 994–95, 997–1000, 1002.

ministration.”<sup>68</sup> Although Wilson is famous for insisting on a distinction between administration and politics, he also distinguished administration and law, bemoaning undue attention to the questions of lawmaking and constitutional framing at the expense of law implementation.<sup>69</sup> And, he defined the object of administration in decidedly nonlegal, policy laden terms—as being “to discover, first, what government can properly and successfully do, and, secondly, how it can do these proper things with the utmost possible efficiency and at the least possible cost either of money or of energy.”<sup>70</sup> Leonard White, author of the first public administration textbook in 1926, argued that “the study of administration should start from the base of management rather than the foundation of law.”<sup>71</sup> Here, too, exclusion of law was intended to protect administrative exercise of discretion from judicial interference and the restrictions of a rule-bound approach.<sup>72</sup>

Public administration’s efforts to differentiate itself from law underscores yet another force behind the exclusion of administration from administrative law: good old-fashioned turf protection, on the part of lawyers and public administration scholars alike. Defining administrative law in terms of external judicial controls made it centrally an arena for those with legal training and expertise, and thus preserved a new field for legal dominance.<sup>73</sup> At the same time, pulling administration out of law’s ambit was central to justifying the existence of new schools of public administration and of public administration as a distinct field of inquiry.<sup>74</sup> Yet it merits emphasis that some founding figures in the field of public administration took an opposite approach and underscored its connection to administrative law.<sup>75</sup> Perhaps not surprisingly, two leading examples were Frank Goodnow and

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<sup>68</sup> Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 197 (1887).

<sup>69</sup> *Id.* at 198–200, 205–06, 211–12.

<sup>70</sup> *Id.* at 197.

<sup>71</sup> LEONARD D. WHITE, INTRODUCTION TO THE STUDY OF PUBLIC ADMINISTRATION vii (1926); Lynn, *supra* note 33, at 806.

<sup>72</sup> See, e.g., JOHN M. PFIFFNER, PUBLIC ADMINISTRATION 18 (1935); Marshall E. Dimock, *The Meaning and Scope of Public Administration*, in JOHN M. GAUS ET AL., THE FRONTIERS OF PUBLIC ADMINISTRATION 1, 6–7 (1936); Lynn, *supra* note 33, at 806.

<sup>73</sup> CHASE, *supra* note 37, at 112–15, 134–35; Fenster, *supra* note 39, at 84–85.

<sup>74</sup> CHASE, *supra* note 37, at 124–26; Lynn, *supra* note 33, at 808.

<sup>75</sup> See Lynn, *supra* note 33, at 805 (identifying Goodnow and Freund as leading progenitors of public administration who recognized law’s importance to the field); see also Dimock, *supra* note 72, at 6–12 (arguing for a synthesis between legal, institutional, and pragmatic or experience-based approaches to public administration).

Ernst Freund.<sup>76</sup> They were joined by Marshall Dimock, who argued for a closer association between administrative law, public administration, and political science, stating that “[p]ublic administration and administrative law are as inseparable as cause and effect.”<sup>77</sup>

By the public interest era of the 1960s and 1970s, progressive faith in expert administration and broad discretion had become a relic of the past, replaced by growing skepticism of agencies as captured by regulated interests, unwilling to take seriously new public interest legislation, and ineffectual regulators to boot. On this skeptical view, court oversight emerged as a critical check on unaccountable and arbitrary administration. Prime evidence of the courts’ centrality was their expansion of the APA’s rulemaking requirements and development of searching “hard look review” to replace the deferential “arbitrary and capricious scrutiny” of the APA’s early years. The identification of administrative law with judicial review was then complete.

### C. Contemporary Contributing Forces

This history explains why administrative law and internal administration initially diverged, but not why that divergence continues today. This ongoing divide is perplexing given the resultant contemporary criticisms of administrative law as out of touch with actual administrative practice.<sup>78</sup> Even more pointed are efforts by scholars to demonstrate the existence and significance of internal administrative law. A seminal force here is Jerry Mashaw, whose recent book *Creating the Administrative Constitution* demonstrates internal administrative law’s longstanding pedigree.<sup>79</sup> Others have analyzed the importance of institutional design to how agencies operate, and for decades both constitutional and administrative scholars have emphasized the centrality of internal executive branch oversight for agency accountability.<sup>80</sup> Events in the world have reinforced this emphasis on internal administration. Perhaps no sphere demonstrates

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<sup>76</sup> Lynn, *supra* note 33, at 805.

<sup>77</sup> Marshall E. Dimock, *The Development of American Administrative Law*, 15 J. COMP. LEGIS. & INT’L L., no. 3, 1933, at 35, 35. Dimock also cautioned against only approaching public administration through a legal lens, arguing that such a lens had ignored “methods, concrete experiences, and, generally speaking, the human side of administration” in favor of a focus on “judicial rules and decisions” as well as “statutory and constitutional limitations and requirements.” Dimock, *supra* note 72, at 6.

<sup>78</sup> See *supra* text accompanying notes 23–32.

<sup>79</sup> See MASHAW, *supra* note 1, at 4–5, 12.

<sup>80</sup> See *supra* notes 5, 13–14 and accompanying text.

the centrality of internal administration more than national security, where limited judicial review combined with substantially expanded governmental activity after 9/11 has brought public attention repeatedly to the role of internal controls.<sup>81</sup>

To some extent, the continuing divide between administrative law and internal administration stems from the same forces that underlay the divide's initial creation. One major factor is skepticism about the value of judicial review. This skepticism reflects concerns about the courts' ability to understand the complexity involved in regulatory choices, as well as about judicial political biases, and is further fueled by claims that the heightened judicial scrutiny born during the public interest era has severely hampered agencies' ability to function.<sup>82</sup> The shift in emphasis to centralized oversight and accountability through the President stems in part from this judicial skepticism,<sup>83</sup> and thus it is perhaps not surprising that such internal executive branch controls do not surface in judicial decisions. Nor, moreover, has the executive branch encouraged a melding of presidential oversight with judicial review, prominently declaring that key executive branch constraints such as the requirements for centralized regulatory review are not judicially enforceable.<sup>84</sup>

Another contributing factor is the continued image of law as rules and constraints that are externally imposed. There is a circularity here—internal administration is excluded from the ambit of administrative law because internal administrative features and processes are not seen as law. But nonetheless this image of law as externally binding rules—an image reinforced by the now lengthy period during which internal administration and administrative law have been separated—continues to stand as an obstacle to bringing internal adminis-

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<sup>81</sup> See, e.g., Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2322 & n.21, 2333 (2006); Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027, 1046–47 (2013).

<sup>82</sup> See, e.g., Frank B. Cross, *Pragmatic Pathologies of Judicial Review of Administrative Rulemaking*, 78 N.C. L. REV. 1013, 1019–57 (2000); Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. CHI. L. REV. 761, 765–69 (2008); Richard J. Pierce, Jr., *Judicial Review of Agency Actions in a Period of Diminishing Agency Resources*, 49 ADMIN. L. REV. 61, 63–64, 70–84 (1997); Wendy Wagner, *Revisiting the Impact of Judicial Review on Agency Rulemakings: An Empirical Investigation*, 53 WM. & MARY L. REV. 1717, 1752–56, 1771–73 (2012).

<sup>83</sup> See Thomas W. Merrill, *Capture Theory and the Courts: 1967-1983*, 72 CHI.-KENT L. REV. 1039, 1074–83 (1997).

<sup>84</sup> See Exec. Order No. 12,866, § 10, 3 C.F.R. 638, 649 (1994), *reprinted as amended in* 5 U.S.C. § 601 app. at 88–92 (2012).

tration within administrative law's ambit.<sup>85</sup> Both characteristics—law as external constraints and law as rules—also explain the resistance to seeing centralized executive branch controls or congressional oversight processes other than statutes as law instead of politics.<sup>86</sup> Meanwhile, public administration's turn towards greater managerialism, relying on general management and organizational principles drawn from fields of business and private organizations, makes efforts to inject the distinctly public accountability concerns of administrative law appear anachronistic.<sup>87</sup>

Constitutional separation of powers concerns represent a final—and today perhaps most significant—force behind preserving the administrative law and public administration divide.<sup>88</sup> The Supreme Court often justifies its refusal to address systematic administrative features and processes on the grounds that to do so would be to overstep the judicial role.<sup>89</sup> As Justice Scalia put the point in *National Wildlife Foundation*, individuals “cannot seek *wholesale* improvement of [a] program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made.”<sup>90</sup> In institutional reform cases the Court has sung a similar refrain, insisting that “it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution.”<sup>91</sup> Separation of powers also animated the early reluctance to bring internal agency operations within administrative law's embrace.<sup>92</sup> But the concerns then went more to the constitutional propriety of having courts regularly review administrative actions on direct appeal, as opposed to only through the narrow prerogative writs or common law

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<sup>85</sup> See MASHAW, *supra* note 1, at 280–81.

<sup>86</sup> Compare ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 14–15 (2010) (arguing that constraints come from politics and public opinion, not law), with Richard H. Pildes, *Law and the President*, 125 HARV. L. REV. 1381, 1406–08 (2012) (reviewing POSNER & VERMEULE, *supra*) (arguing that Presidents have strategic reasons for complying with law other than merely being constrained by politics and public opinion). See also Curtis A. Bradley & Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1112–28 (2013) (describing skepticism about whether presidential constraints represent law and analyzing the meaning of legal constraint).

<sup>87</sup> See Lynn, *supra* note 33, at 806–07; see also Moe & Gilmour, *supra* note 36, at 136, 142–43.

<sup>88</sup> See MASHAW, *supra* note 1, at 303.

<sup>89</sup> See, e.g., *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891, 894 (1990).

<sup>90</sup> *Id.* at 891.

<sup>91</sup> *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

<sup>92</sup> See Merrill, *supra* note 37, at 945.

actions.<sup>93</sup> Moreover, as Tom Merrill has noted, the constitutionality of such appellate review was generally accepted during the early decades of the twentieth century, leaving pragmatic and political concerns to animate resistance to judicial interference in areas of administrative deference.<sup>94</sup>

## II. BRIDGING THE DIVIDE: THE ROLE OF THE ADMINISTRATIVE CONFERENCE

Identifying the disconnect between administrative law and public administration raises two difficult questions. The first is a normative one: Should administrative law and public administration be more closely linked, or would it be preferable to preserve the current divide? The second follows on the first: If closer linkage is desirable, how is it best achieved?

### A. *The Arguments for Closer Linkage*

Whether to bridge the current divide between administrative law and public administration is a close question. The divide's longstanding character suggests caution before casting it aside.<sup>95</sup> In particular, good reason exists to resist greater judicial involvement in administration, given concerns that judicial review already inhibits effective administration and creates poor incentives for agencies. Nonetheless, as I have argued at length elsewhere, strong arguments exist for tying administrative law and public administration more closely together.<sup>96</sup>

Perhaps the most basic argument in favor derives from the purpose of administrative law. Administrative law aims both to empower and constrain agencies, to ensure effective government as well as preserve accountability and prevent arbitrary rule through requirements of authorization, participation, transparency, and reasoned decision-making.<sup>97</sup> If administrative law is increasingly divorced from the realities of governmental functioning, it is less able to perform either role. For example, the risk that courts will intrude excessively into agencies' operations if they consider broader, systemic processes needs to be

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<sup>93</sup> See MASHAW, *supra* note 1, at 302–03; see also Merrill, *supra* note 37, at 996–98.

<sup>94</sup> See Merrill, *supra* note 37, at 965.

<sup>95</sup> See *supra* Part I.A–B (discussing history of divide between administrative law and public administration).

<sup>96</sup> See generally Metzger, *supra* note 10.

<sup>97</sup> See MASHAW, *supra* note 1, at 280–81; Farber & O'Connell, *supra* note 16, at 1140. Frankfurter put well this dual responsibility of administrative law: “Nothing less is our task than fashioning instruments and processes at once adequate for social needs and the protection of individual freedom.” Frankfurter, *supra* note 50, at 617.

balanced against the ways that courts may impede agencies' operations by not considering those processes. Having a court review the legality of a proposed plan or planning process may prove less burdensome for the agency than waiting until the agency has adopted the plan and implemented it, when reversal entails opening up a number of specific applications.<sup>98</sup> Moreover, that the main drivers of administrative action fall outside of administrative law's ambit undermines the legitimacy of administrative decisionmaking.<sup>99</sup> Farber and O'Connell put this point well: "The risk is that administrative law will serve a primarily ceremonial purpose, providing the appearance, but not the reality, of public participation and accountability in policymaking. In our view, the goals of transparency, participation, and accountability are worth continued effort to strengthen them . . . ."<sup>100</sup>

The danger is not simply that the core aims of administrative law will not be realized, but also that the actual ways in which administrative government is constrained and strengthened will not be recognized. This raises the danger that an effective source of administrative reform will be ignored. As Mashaw argues,

[t]o the extent that we are interested in the reform of administrative law in the United States, we might do better to operate on the internal law of administration than by ceaselessly tweaking the external law. For many, if not most, agency functions remain structured primarily by agency regulations and internal directives.<sup>101</sup>

Worse, such lack of recognition may lead to evisceration of those features that may be critical to effective and accountable administration. Shapiro makes this point with respect to expertise, arguing that administrative law's failure to understand administration has led to a displacement and deterioration of expertise and a crowding out of civil servants' public service and professional instincts.<sup>102</sup> Moreover, the evisceration of internal administration also debilitates external controls, for as Mashaw notes, "[w]ithout internal administrative law, contemporary external accountability via political oversight and direction and judicial review could not operate."<sup>103</sup> It is internal administration—systemic mechanisms for planning, priority-setting,

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<sup>98</sup> See Cross, *supra* note 82, at 1022–25.

<sup>99</sup> See Farber & O'Connell, *supra* note 16, at 1178–79.

<sup>100</sup> *Id.* at 1178.

<sup>101</sup> MASHAW, *supra* note 1, at 313.

<sup>102</sup> See Shapiro, *supra* note 17, at 11; Shapiro & Wright, *supra* note 31, at 578, 609–17.

<sup>103</sup> MASHAW, *supra* note 1, at 281–82.

policymaking, resource allocation, and managerial oversight and supervision—that ensures agencies implement the statutes and instructions that their political and legal overseers give them and allows those overseers to hold agencies to account when they fail to do so.<sup>104</sup>

Recognition of the central role internal administration plays in achieving effective and accountable exercise of governmental power also reveals the weakness in the separation of powers insistence on excluding administration from constitutional and administrative law. As I have argued, built into our constitutional system is an emphasis on internal supervision of delegated governmental power. This means that separation of powers analysis cannot be limited to ensuring that courts do not exceed their proper purview. It also must include ensuring that the executive branch adheres to the constitutional duty to supervise, which in turn requires consideration of internal administration. Significantly, this does not necessitate judicial policing of internal policing so much as an acknowledgement of the constitutional and legal role that internal administration plays.<sup>105</sup>

### *B. ACUS's Bridging Function*

An important variable to consider is the means by which administrative law and administration could be more closely linked. One option would be to have courts take administration more into account in undertaking judicial review and framing administrative law doctrines. Although such a judicial approach has potential, it also risks the kind of significant judicial limitation of administrative operational discretion that progressive and New Deal administrative lawyers most feared.<sup>106</sup>

Enter the Administrative Conference. ACUS is often praised for the way that it combines governmental and private perspectives, with a membership that spans agency officials, leading representatives of the private and nonprofit regulatory bar, and administrative law scholars.<sup>107</sup> Less appreciated is the way that ACUS simultaneously brings

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<sup>104</sup> See *id.*; Metzger, *supra* note 10, at 1892–94.

<sup>105</sup> See Metzger, *supra* note 10, at 1843–44.

<sup>106</sup> See *id.* at 1917–32.

<sup>107</sup> ACUS's authorizing statute specifies that ACUS will consist of 75–101 members, including a representative from each independent and executive agency and up to 40 public members chosen by the Chair, with the requirement that public members “may at no time be less than one-third nor more than two-fifths of the total number of members.” 5 U.S.C. § 593(a), (b)(2)–(3), (b)(6) (2012). Public members are to be “members of the practicing bar, scholars in the field of administrative law or government, or others specially informed by knowledge and experience with respect to Federal administrative procedure.” *Id.* § 593(b)(6); see also Gary J.

together the worlds of administration and administrative law. The governmental members of ACUS are often top agency lawyers, but they are also high-level agency officials who are intimately involved with the wholly internal life of agencies. By contrast, ACUS's non-governmental members (perhaps confusingly denominated public members) overwhelmingly come from administrative law backgrounds and are deeply engaged with the external dimensions of the administrative state.<sup>108</sup>

ACUS's projects also span the administrative law-public administration divide and stand out in particular for their emphasis on internal agency functioning.<sup>109</sup> One manifestation of this emphasis is the effort of ACUS to develop agency best practices, which aim to encourage administrative self-regulation and internal controls.<sup>110</sup> This emphasis is also clear from the subject matter of ACUS reports, statements, and recommendations, which in recent years have addressed issues such as how agencies consider science, interagency coordination, governmental performance assessment, and the practice of centralized regulatory review.<sup>111</sup> The net effect of ACUS's membership and committee structure is to yield a number of opportunities for agency administrators and external administrative law experts to closely debate specific features of internal agency operations.<sup>112</sup> Al-

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Edles, *The Continuing Need for an Administrative Conference*, 50 ADMIN. L. REV. 101, 111–14 (1998) (describing ACUS membership and describing ACUS “as a partnership of the public and private sectors, but with a distinctly governmental flavor”).

<sup>108</sup> See Edles, *supra* note 107, at 113–14 (“Economists, public administrators, and other non-lawyers were occasionally named as members, but lawyers clearly dominated the membership.”); Gary J. Edles, *The Revival of the Administrative Conference of the United States*, 12 TEX. TECH. ADMIN. L.J. 281, 289–90 (2011) (stating that most ACUS public members are lawyers but noting then-existing exceptions). A list of ACUS's public members is available at *Public Members Roster*, ADMIN. CONF. U.S., <http://www.acus.gov/directory/public-member> (last visited June 10, 2015).

<sup>109</sup> See ACUS Recommendation 2013-3: Science in the Administrative Process, 78 Fed. Reg. 41,357, 41,357–58 (July 10, 2013) (identifying internal practices that agencies may adopt to promote transparency in the use of scientific techniques).

<sup>110</sup> See *id.* (encouraging agencies to share best practices with other agencies to aid in development of the overall goal of transparency in scientific decisions).

<sup>111</sup> See, e.g., *id.* ACUS Recommendation 2013-7: GPRa Modernization Act of 2010: Examining Constraints To, and Providing Tools For, Cross-Agency Collaboration, 78 Fed. Reg. 76,273 (Dec. 17, 2013); ACUS Statement 18: Improving the Timeliness of OIRA Regulatory Review, 78 Fed. Reg. 76,275 (Dec. 17, 2013); ACUS Recommendation 2012-5: Improving Coordination of Related Agency Responsibilities, 77 Fed. Reg. 47,810 (Aug. 10, 2012).

<sup>112</sup> See Edles, *supra* note 108, at 292 (recognizing the existing ACUS statute allows for membership and structure to deal with management issues within agencies).

though ACUS also considers issues relating to judicial review, internal administration and agency processes are its dominant concerns.<sup>113</sup>

ACUS's focus on agency administration and process is hardly coincidental. ACUS is the modern incarnation of the famous Attorney General's Committee whose detailed study of actual agency processes underlies the development of the APA.<sup>114</sup> The APA did not create a permanent body to undertake ongoing study of administrative procedure,<sup>115</sup> but regular calls were made for such an entity, and presidents periodically convened committees to study administrative process on an ad hoc basis.<sup>116</sup> These efforts culminated in the birth of ACUS in the Administrative Conference Act of 1964.<sup>117</sup> That ACUS inherited the Attorney General's Committee's mantle and focus on how agencies operate is evident from its leading statutory mandate:

[T]o provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action . . . to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest.<sup>118</sup>

But ACUS's statutory mandate also makes clear its bridging function, as it also instructs ACUS to focus on the more external dimensions of the administrative state by improving the effectiveness and efficiency of public participation in, and the laws governing, the regulatory process, as well as reducing unnecessary litigation.<sup>119</sup>

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<sup>113</sup> See *id.* (describing ACUS as a "Conference plus" organization that combines legal and management issues).

<sup>114</sup> See Gellhorn, *supra* note 3, at 226 ("The Final Report of the Attorney General's Committee on Administrative Procedure and the investigations that preceded it set the stage for the federal Administrative Procedure Act of 1946 . . .").

<sup>115</sup> See Marshall J. Breger, *The Administrative Conference of the United States: A Quarter Century Perspective*, 53 U. PITT. L. REV. 813, 814 (1992) ("[I]t soon became apparent that the APA had not settled all outstanding issues in administrative procedure.").

<sup>116</sup> *Id.* ("[T]wo Presidents as well as the Judicial Conference appointed temporary entities to perform this function [of reviewing and recommending improvements in agency procedures].").

<sup>117</sup> See *id.* at 814–18.

<sup>118</sup> 5 U.S.C. § 591(1) (2012); see also *id.* § 591(4) (listing improving agency use of science in regulatory process as an additional purpose of the statute); *id.* § 594(1) (authorizing ACUS to carry out these purposes by "study[ing] the efficiency, adequacy, and fairness of the administrative procedure used by administrative agencies in carrying out administrative programs, and mak[ing] recommendations . . .").

<sup>119</sup> *Id.* § 591(2)–(3), (5); see also Edles, *supra* note 108, at 292 (arguing that public management concerns fit within the revived ACUS's statutory mandate).

ACUS thus is already a rare and important exception to the separation of administrative law and public administration. Yet ACUS could also do more to link these fields together. ACUS should study more directly how the worlds of administrative law and public administration interact. ACUS should also undertake projects that target aspects of administrative operation more familiar to public administration scholars than administrative lawyers—such as federal personnel systems, agency mechanisms for priority-setting, or internal administrative supervision and management structures. Although less immediately tied to specific agency regulatory processes, such background features profoundly impact how successful these processes ultimately are. ACUS could also become a venue for suggesting ways to incorporate public administration more into administrative law doctrines and judicial review, drawing on its membership’s expertise to identify ways that courts could take internal organizational features into account while still preserving agency discretion and managerial flexibility. Finally, ACUS could include more policy and public administration experts to complement the administrative law emphasis among its public members.<sup>120</sup>

Happily, a basis exists to think that ACUS may move more in this direction. As part of a 1998 symposium, a leading administrative law scholar envisioned a broader role for a revived ACUS, one that would link administrative law and public administration: “The ‘new’ Conference . . . could become a mechanism to connect legal procedures to the management issues that underlie them. The artificial distinction between legal and management process should give way to a unified concept of public management.”<sup>121</sup> That scholar was the first chair of the revived ACUS, Paul Verkuil.

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<sup>120</sup> See Edles, *supra* note 108, at 288–90, 293 (listing current members who specialize in public administration and arguing that such individuals fit the statutory criteria for public members); Paul R. Verkuil, *Speculating About the Next “Administrative Conference”: Connecting Public Management to the Legal Process*, 30 ARIZ. ST. L.J. 187, 200–01 (1998) (urging that a new entity focused not just on agency legal procedures but more broadly on management should be dominated by policy analysts rather than lawyers).

<sup>121</sup> Verkuil, *supra* note 120, at 187. Others also faulted the original ACUS for failing “to develop well-planned programs for the *systematic* in-depth study of, and important improvement in, the federal bureaucracy” or undertake “detailed studies of how, or how well, these agencies perform their respective functions in general.” Glen O. Robinson, *The Administrative Conference and Administrative Law Scholarship*, 26 ADMIN. L. REV. 269, 270, 272 (1974); see also Breger, *supra* note 117, at 840 (agreeing with Robinson that the ACUS should undertake detailed studies of agency performance).