Western Administrative Law in Northeast Asia:
A Comparativist's History

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by
John K.M. Ohnesorge
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Chapter One

I. Introduction

This study sets out to develop and test a series of arguments about relationships between state, law, and economy in Northeast Asia. The doctrinal focus is on administrative law, broadly defined, while the substantive focus is on economic governance, in particular the means by which three states in the region used public authority to shape industries and industrialization trajectories. The historical scope will be broad, tracing the development of administrative law in Japan, South Korea and Taiwan, from the initial importation of Western public law models in the late nineteenth century until today. The final chapter discusses the People’s Republic of China, and the possibilities for administrative law in that society.

The basic claim is that administrative law in Northeast Asia, both in form and in practice, is moving toward what will be termed “pluralist” administrative law. This process has been shaped and driven by multiple factors, including i) the broader legal/political cultures within which administrative law is embedded, ii) the law’s internal logic, derived from its formal structure (legal materials and institutions), and iii) the instrumental aims of those in society who have the power to influence the shape of administrative law. Until the 1980s these instrumental aims were dominated by concerns of economic growth and political control, but
the situation has now become more complex as the number of actors able to influence the development of administrative law has increased.

As liberal legality and pluralist models of politics are associated with the West, so is the development of pluralist administrative law, so that this historical development must be seen as an example of Westernization in a limited but non-trivial sense. As will be shown, however, the model of pluralist administrative law towards which these systems are converging is not a single endpoint or stable equilibrium, but rather represents a framework of institutions and doctrinal positions or arguments within which administrative law systems fluctuate over time. Charting the course of this development will make it possible to address several specific arguments concerning the relationships between economic, legal and political change.

It is hoped that administrative law will provide a more useful vehicle for such a comparative study of law and economic development than the more commonly studied areas of constitutional and private law, both of which tend to inspire abstract, conceptualist analyses. Comparative constitutional law scholarship, particularly that which has arisen to meet the demand for new constitutions in formerly socialist "transition" countries, tends toward abstract, deductive functionalism since the goal is to remake existing social and economic orders in line with some normative agenda, usually limiting the state's ability to regulate private property, by changing their constitutional orders. Such a project invariably requires reducing complex, nationally situated legal practices to
linguistic concepts which can be written into a new constitution, with the
assumption being that the transplanted concept will carry within it the desired
function (and usually only that desired function) that it performed in the society of
origin. Private law is also now the subject of a great deal of attention as a tool
for remaking societies, but the emphasis is again conceptual and functional, with
the issue being the role of private contract law in protecting and enforcing the
results of private bargaining, seen as a prerequisite to a successful market
economy.¹

For purposes of this project, administrative law will be defined broadly, to
encompass the organization of the executive/administrative arms of government,
the substantive law those arms of government enforce, and the body of sub-
constitutional law that controls the exercise of power by the executive, whether
that law is internal or external to the bureaucracy. The goal is to employ the lens
of administrative law to achieve a view of the state, with the hope that this will
help bridge a gap that currently exists between social science and legal
literatures on Northeast Asia. The goal is to thereby enrich both literatures, while
at the same time contributing an historically and empirically-based perspective to
current debates over the role of law in economic development.

The broad view of administrative law adopted here has its limitations; in

¹ For a more detailed discussion, see John K.M. Ohnesorge, The Rule of Law,
Economic Development, and the Developmental States of Northeast Asia, in LAW AND
DEVELOPMENT IN EAST AND SOUTH-EAST ASIA (Christoph Antons, ed., forthcoming 2002).

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particular it will be necessary to slight traditional doctrinal analysis in favor of a more external approach. This is an acknowledged limitation of the approach, but several justifications can be offered. First, although this study does not focus on doctrinal analysis, the inquiry will be much more law-centered that the social science literature that will be engaged. "Bringing the state back in" to social science generally, which has strongly affected analyses of Northeast Asian political economy, has generally not meant bringing public law back in.² Second, the traditions of legal scholarship in Northeast Asia already focus heavily on traditional doctrinal analysis, and tend to be fairly strictly segmented, in the manner of European legal scholarship, along doctrinal lines, so there seems to be less opportunity for a foreign observer to "add value" through engaging in that style of scholarship. Finally, the comparative work that does discuss Northeast Asian administrative law tends to compare individual legal systems in the region with Western systems, primarily the German, and tends to look at law in isolation from history or society. There would then seem to be a place for a relatively external, inter-Asian comparison of administrative law systems as they have developed against the backdrop of broader social and political changes.

Finally, one of the general issues this paper seeks to address concerns the relationship between law and economic development. It has been pointed

² For a discussion of the revival of the state as a variable in social science research see, Theda Skocpol, Bringing the State Back In: Strategies of Analysis in Current Research, in BRINGING THE STATE BACK IN 3 (Peter B. Evans, et al., eds. 1985).
out more than once that high-growth Northeast Asia's legal systems did not function in the Rule of Law manner often posited as crucial for economic development. While this is easily established in many areas of legality, making falsification of exaggerated Rule of Law claims easy, the next step beyond falsification is to try to understand how law actually did function, an impossibly broad task unless individual fields of law are studied intensively, and unless the region is broken down into particular countries in an intelligible way. To facilitate this inquiry this study will focus on administrative law in Japan, South Korea and Taiwan, three countries that share important characteristics of political culture, which have imported similar administrative law regimes, and which have followed broadly similar approaches to economic governance.

Following this Introduction, Chapter One will present a definition of administrative law (Part II), and an exploration comparative administrative law (Part III). Chapter Two begins with a proposed approach to comparing administrative law systems (Part II), followed by an argument for why Japan, South Korea and Taiwan provide an appropriate focus for an exercise in comparative administrative law (Part III). Chapter Two then addresses the formative period during which Western administrative law forms and ideas were

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adopted in Northeast Asia, focusing on Japan and pre-1949 China (Part IV).

Chapter Three examines administrative law and economic governance in the era of the Northeast Asian "developmental state," a period extending from roughly the mid-1950s until the mid-1980s (Part II), then discusses the process by which the style of administrative law characteristic of the developmental state is being transformed toward a "pluralist" model, and the forces driving that change and its likely prospects (Part III). Finally, Chapter Four applies the ideas and insights developed in the first three chapters to the problematic of administrative law in the People's Republic of China (Parts I to V), and closes with a review of the entire work (Part VI).

II. Administrative Law Defined

A typical view of pre-modern Northeast Asian, particularly Chinese, law is that it was entirely penal and "administrative."4 This is often cited as a great

4 LIU YONGPING, ORIGINS OF CHINESE LAW: PENAL AND ADMINISTRATIVE LAW IN ITS EARLY DEVELOPMENT (1998); Geoffrey MacCormack, THE SPIRIT OF TRADITIONAL CHINESE LAW (1996); Karen Turner, Sage Kings and Laws in the Chinese and Greek Traditions, in HERITAGE OF CHINA: CONTEMPORARY PERSPECTIVES ON CHINESE CIVILIZATION 86, 88 (Paul S. Ropp, ed., 1990) ("Even today, the standard textbook view of Chinese history describes law in China as a simple administrative tool used by the ruler and his magistrates to control an unruly populace."); Byoung-ho Park, The Role and Function of the Yangban in the Development of the Legal Culture in Korea, 24(4) SEOUL L.J. 48, 51 (1983). This is another way of stating the conventional wisdom that traditional Northeast Asian law did not contain private law in the modern Western sense of law to coordinate private rights among individuals, and which is applied by courts when activated by private parties. This view is subject of debate. See, Philip C.C. Huang,
distinction between modern Western law, with its expansive body of private law defining relations between individuals, and traditional Northeast Asian law. But what is meant by "administrative" in such comparisons is not always clear, as the term has had a lively history in the West, and as even students of public law use it to cover different issues. In addition, as will be shown below, "administrative" as applied to legality carries a derogatory connotation in certain quarters, giving its use as a label for foreign systems a political edge. Finally, aspects of Northeast Asian administrative law practice, like broader issues of bureaucratic performance, are often linked to traditional practices and institutions, for good or ill.\footnote{For example, traditions of deference to authority, of meritocratic bureaucracies, and of Samurai ethics appear with some regularity in discussions of Northeast Asian governance.} In order to lay a foundation for later arguments, this section explores the various senses in which the term administrative law has been used in the West, particularly in England and the United States. From a current perspective, what was particularly striking about traditional Northeast Asia was that administrative law in one of its primary modern senses was entirely lacking, while administrative law in a broader sense was highly developed. This may well be one of the pre-modern legacies that contributed to Northeast Asia's economic development,
during decades when some aspects of "modern" law seemingly didn’t function.⁶

A. Administrative Law in Anglo-American Legal Consciousness

The term "administrative law" did not appear in Anglo-American legal discourse until the mid-to-late nineteenth century,⁷ though the reasons for this were historical and ideological rather than functional. The governance issues addressed by what we now term administrative law arose and were addressed by law and the courts in the Anglo-American polities,⁸ but as Frank Goodnow noted in his path-breaking 1883 work Comparative Administrative Law, "[i]n this country and in England, . . . , the term administrative law is almost meaningless."⁹ Goodnow attributed this to the fact that the Anglo-American legal tradition did not classify law according to the social relations that it governed,¹⁰ and warned readers that a "foreign point of view" would often be apparent in his

⁶ See Chapter Three, infra, notes 48 to 70 and accompanying text.

⁷ F.W. Maitland, The Constitutional History of England 535 (1908) ("We shall look in vain for any such term as Administrative law in our orthodox English textbooks.").


¹⁰ Goodnow, supra note 9, at 6.
work because, as he put it, "in the present stage of the study it is to foreign writers that we must look for all scientific presentations" of administrative law.\footnote{Id. at Preface, p.v.}

Goodnow was certainly referring in part to his teacher in Berlin, Rudolph von Gneist, who was responsible for perhaps the first application of the term "administrative law" to Anglo-American legal practices. As early as the 1850s, Gneist wrote admiringly of "englisches Verwaltungsrecht" ("English administrative law"),\footnote{The first part of Gneist's Das Heutige Englische Verfassungs- und Verwaltungsrecht [Modern English Constitutional and Administrative Law] appeared in 1857. ERICH J.C. HAHN, RUDOLF VON GNEIST (1816-1895): THE POLITICAL IDEAS AND POLITICAL ACTIVITY OF A PRUSSIAN LIBERAL IN THE BISMARCK PERIOD 63-64 (1971)(unpublished Ph.D. dissertation, Yale University).} by which he meant primarily the body of rules and practices through which the English courts policed the legality of local government actions involving such things as local public works.\footnote{Id. at 74-75.}

Gneist's work was cited approvingly by A.V. Dicey in his classic Law of the Constitution,\footnote{ALBERT VENN DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 87; 183 n.2; and 184 & n.1 (E.C.S. Wade ed., 9th ed. 3rd prtg. 1945). Unless otherwise noted, references to Dicey's work are to this edition.} though in that work Dicey claimed that "in England and in countries which, like the United States, derive their civilization from English sources, the system of administrative law and the very principles on which it rests are unknown."\footnote{Id. at 304-06.} Dicey's work became notorious among later public law
scholars for its denial that administrative law existed in the Anglo-American legal
tradition, and its dubious comparison between despotic French *droit administratif*
and the English Rule of Law.\textsuperscript{16} Dicey's tactic was to define administrative law as
a special body of norms, enforced by extra-ordinary courts, that governed
relations between citizens and the state, and which, in his view, systematically
favored the latter.\textsuperscript{17} Thus, although he had translated into English the French
term *droit administratif*, the content of Dicey's "administrative law" was equivalent
to what the French call *contentieux administratif*, a single aspect of *droit
administratif*.\textsuperscript{18} In addition, in support of his negative views on the functioning of
this body of law for personal liberty in France, Dicey relied upon secondary
sources such as de Tocqueville,\textsuperscript{19} which were already decades out of date when
Dicey wrote.

Dicey has long been criticized on a variety of grounds, but given his
knowledge of Gneist's work, which extolled the virtues of English administrative
law and sought to create a functionally similar system in Prussia to achieve the
*Rechtsstaat* ideal of controlling the bureaucratic state through law, Dicey's

\textsuperscript{16} For a thoughtful discussion of Dicey's treatment of administrative law, see
E.C.S. Wade's *Appendix* to Dicey, *Id.* at 475. This same edition of Dicey's work also
contains an essay by French comparativist René David on *droit administratif*. *Id.* at
495-516.

\textsuperscript{17} Dicey, *supra* note 14, at 387-88.

\textsuperscript{18} See Wade's *Preface* to Dicey, *Id.* at xvi-xvii.

\textsuperscript{19} Wade, *Appendix*, Section I, to Dicey, *Id.* at 475.
definition of administrative law was clearly tactical, an attempt to rule out practices of which he disapproved on political grounds by declaring them incompatible with his idealized vision of the English common law and the Rule of Law.\textsuperscript{20} Goodnow, for one, immediately pointed out the irony of Dicey borrowing the term "administrative law" from Continental jurisprudence, then misstating the way the term was understood on the Continent in order to claim that the "very principles on which it rests are unknown" to the Anglo-American lawyer.\textsuperscript{21} In his opposition to Dicey, Goodnow went so far as to claim that "not only has there always existed in England, as well as in this country, an administrative law, in the true continental sense of the word, but this law has exercised on Anglo-Saxon political development an influence perhaps greater than that exerted by any other part of the English law."\textsuperscript{22}

Despite differing views on whether England had "administrative law," Dicey and the Prussian Gneist actually shared a similar political vision, though they pursued it in different ways. Although he decried such developments,

\textsuperscript{20} cf. MARTIN SHAPIRO, THE SUPREME COURT AND ADMINISTRATIVE AGENCIES 105 (1968) ("[I]t was not uncommon at the beginning of the twentieth century in Anglo-American legal circles to deny that such a thing as "administrative law" existed in English-speaking countries and to claim that it was a purely continental European phenomenon. What was really meant was not that administrative law did not exist, but that some lawyers wished that administrative agencies would not be allowed to make law the way courts did.").

\textsuperscript{21} Goodnow, supra note 9, at 6 (quoting DICEY, THE LAW OF THE CONSTITUTION, 3\textsuperscript{rd} Ed., 304-306).

\textsuperscript{22} id. at 7.
Gneist acknowledged that at the time he wrote, English legislation in the areas of public health and local government had already created elected local boards empowered to enact as well as enforce statutes and bylaws, and against whose actions appeals were not the to ordinary courts, but to the general board of health, or the ministry of the interior. 23 Likewise Frederick Maitland, when he surveyed the landscape of English public law in 1887, noted and discussed similar developments. 24 Dicey's tactic, on the other hand, was to ignore such developments, in the hopes of convincing his readers that, by definition, such things had no place in English law. 25 Dicey later admitted his abuse of French droit administratif, 26 and abandoned his argument as a description of English law.

23 Hahn, supra note 12, at 82-83.

24 Maitland, supra note 7, at 492-506. Maitland advised his students in 1887, "We are becoming a much governed nation, governed by all manner of councils and boards and officers, central and local, high and low, exercising the powers which have been committed to them by modern statutes." Id. at 501. Maitland warned his students that although they would not study such matters in their law courses, which focused on traditional legal doctrine, if they failed to appreciate the importance of this new "administrative law" they would be left with a "partial one-sided obsolete sketch" of the English constitution. Id. at 505-06.

25 Dicey's definition of the Rule of Law, by which he meant in a real sense the absence of what he termed "administrative law," thus shared much with the Rule of Law rhetoric now being employed by the international financial institutions and the academics who assist them in their efforts to remake national political and economic systems. See generally, Ohnesorge, supra note 1. In particular, at the preliminary stage of defining the concept the political inclinations of the framer are built into the concept.

26 A.V. Dicey, Droit Administratif in Modern French Law, 17 L. Q. Rev. 302-318 (1901).
in 1915, but by that time his dichotomy between Continental despotism, regulatory government, and administrative law, on the one hand, and the Rule of Law, common law, and individual liberty, on the other, had struck a powerful chord in English and American legal and political debates. These late nineteenth and early twentieth century English and American debates about administrative law reflect a generation of Anglo-American public law scholars trying to reconcile their field with great changes in political organization and governance, particularly economic governance, which were well underway in the wider world around them. During the course of the nineteenth century the mode of economic and social governance in England and the United States had changed dramatically, as government bodies were gradually created to regulate fields of economic and social life that had previously been regulated in other ways. A prime example is the creation in the United States of government bodies, first state railroad commissions, and then eventually the federal Interstate Commerce Commission (ICC), to regulate the railroad industry by setting freight rates and other terms and conditions of doing business. Prior to the creation of these bodies the railroad industry had not been


28 To this day the conservative Liberty Press, which publishes low-cost versions of classical Liberal and libertarian tracts, reprints the eighth edition of *Law of the Constitution*, the last volume edited by Dicey himself, despite the fact that later editions did not alter his basic text, but only added appendices containing valuable commentary on Dicey's scholarship.
unregulated, but had been regulated primarily by the legislatures and the courts. Legislatures held the exclusive power to grant railroad corporate charters, and used this power to insert specific terms into the charters they granted, and to allow further market entry by new competitors. The chartering power was not normally used to regulate rates, however. Many charters specifically granted to the railroads the right to set rates, and as late as the 1860s and 1870s, well after the movement for public regulation of railroad rates had begun, state legislatures still granted railroad charters containing no rate restrictions. Rate regulation, such as it was, was left to the courts, where the common law recognized causes of action challenging rates charged by common carriers, such as railroads, two of the relevant standards being that rates had to be reasonable, and to provide the road with a fair rate of return on the current market value of its investment.

This was an example of economic regulation in the American scheme of governance that Stephen Skowronek has described as the "state of courts and parties," and in the case of the railroad industry it came under attack by the middle of the nineteenth century, first with the creation of state railroad commissions, then later with the creation of the ICC. This period marks the

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30 Id. at 126.

31 Id. at 34.

beginning of the American regulatory state, and although different regulatory schemes varied in their details, many of them sought to remove certain categories of disputes from the courts, giving investigatory, prosecutorial and adjudicatory authority to a single administrative body.\textsuperscript{33} Opponents of these developments could obviously benefit from Dicey's critique of administrative law, as the new regulatory bodies and the law that grew up around them clearly bore some resemblance to his caricature of French administrative law and practices.

The positions staked out by Goodnow and Dicey on administrative law, which mirrored broader political debates concerning the rise of positive, regulatory government, continued in surprisingly similar terms for decades. Thus looking back from 1946 an informed observer could write,

"[i]n both Great Britain and the United States the expansion of public activity in the past twenty years has inevitably been opposed by many who seize upon weapons from the armory of judicial review manufactured for purposes of insuring fair procedure and use them to defeat or postpone the application of substantive policies."\textsuperscript{34}

Dicey's invocation of the Rule of Law remained particularly powerful because it resonated not only with the general political culture, but also provided a rallying point for the material interests of those such as judges and the private bar, who feared, wrongly it turned out, that they would not benefit in the emerging


\textsuperscript{34} JOHN MERRIMAN GAUS, REFLECTIONS ON PUBLIC ADMINISTRATION 104 (1947).
regulatory state. For example, the 1941 report of the American Bar Association's Special Committee on Administrative Law\textsuperscript{35} takes Dicey's basic argument and expands it into a heated polemic against the autonomy of New Deal and earlier federal agencies, comparing its campaign for greater judicial control over agency actions to the war against totalitarianism in Europe. The Committee, which had been headed by Roscoe Pound in the late 1930s, used the rise of Nazism and Communism in Europe to mount a direct counterattack against Goodnow and others of the Progressive era, claiming that

"[t]he weakening of our traditional constitutional form of government commenced in the 1880's, a period roughly parallel with the return to lectureships and professorships in American colleges of a steady stream of students who had gone to continental universities for their postgraduate degrees. Some of these men made a specialty of 'Administrative Law' and a number of them began to teach the subject in American colleges, particularly in the schools of Political Science."\textsuperscript{36}

Further, for the authors of the Report it was no mere coincidence that the teaching of administrative law in schools of political science, together with the popular election of the Senate and the creation of the federal income tax, coincided with the period of "tremendous accretions to the executive prerogative."\textsuperscript{37}

The Report, while naming neither Goodnow nor Dicey, essentially adopts

\textsuperscript{35} Report of the Special Committee on Administrative Law, 1941 A.B.A. ANN. REP. 439 (1941).

\textsuperscript{36} \textit{Id.} at 442.

\textsuperscript{37} \textit{Id.} at 444.
the Diceyan position on the common law versus the Continent’s executive despotism, with an ugly overlay of wartime histrionics and nativist isolationism.\textsuperscript{38} Modern continental legal systems were products of a lineage that began in ancient Greece, Asia Minor and Egypt, the legal systems of which “were totalitarian and absolutionist in character.”\textsuperscript{39} The statutes that had created America’s numerous administrative bodies established procedures that were based upon an “alien theory of government – the theory of the continental systems of administration[,]” which Goodnow and his cadre had learned at the feet of continental writers, “including Karl Marx,” for whom efficiency was everything, and liberty was not a consideration.\textsuperscript{40}

Individual liberty was of course a concern for Goodnow, as it was for

\textsuperscript{38} One could also add anti-Semitism depending upon how one interprets the Report’s aside concerning “those alien born [who] have brought with them to these shores their bitterness and seek to use our government to avenge that bitterness on the countries from whence they came[,]” \textit{ld.} at 442.

\textsuperscript{39} \textit{Id.} at 442.

\textsuperscript{40} \textit{Id.} at 443. For the views of the Report’s author, see O.K. McGuire, \textit{The American Bar Association’s Administrative Law Bill}, 1 \textit{La. L. Rev.} 550 (1939). Though focused on administrative law, the Report should also be understood as part of the broader conservative backlash in legal circles against Legal Realism, in particular because Roscoe Pound was intimately involved in both. On the conservative backlash, see Edward A. Purcell, Jr., \textit{The Crisis of Democratic Theory} (1973). Dicey’s continuing importance for the opponents of the administrative state is demonstrated by the fact that in a 1953 lecture, dedicated to Roscoe Pound, Arthur Vanderbilt quoted Dicey on the constitutional ineffectiveness of the French judiciary, though in the same piece Vanderbilt repudiated Dicey’s more famous argument by acknowledging that the \textit{Conseil d’Etat} had long since evolved into an essentially judicial forum for reviewing administrative action. Arthur T. Vanderbilt, \textit{The Doctrine of the Separation of Powers and Its Present-Day Significance} 20, 22 (1953).
nineteenth century German Rechtsstaat liberals such as his teacher Gneist. But Goodnow felt that the expansion of regulatory government ("social control" in his terms) was both inevitable and desirable as a result of the growing complexity of American society. The efficiency of this regulatory government therefore became an imperative, and expansive judicial oversight of administrative action, which Goodnow viewed as antithetical to efficiency, had to be curtailed.

Goodnow admitted that as "we have enlarged the sphere of administrative action and curtailed the judicial control of that action, ... we have seriously curtailed the sphere of individual freedom," and that "[i]t may, perhaps, be the case that the curtailment has been greater than is either desirable or necessary." The answer, though, was not to return to enhanced judicial control, but to create a professionalized civil service, insulated from politics. Such a bureaucracy would not only achieve greater efficiency in carrying out its governance tasks, but would be more cognizant of private rights than the politicized, patronage structures Goodnow was fighting against. Goodnow's "European-ness" thus manifested itself in his Weber-like stance that regulatory, bureaucratized government was a sociological fact and that its effect on classical individual liberty was basically negative, but that the way forward was to perfect the

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41 On the origins of the American "spoils system," and the civil service reform movement of the late nineteenth century, which parallels the history recounted here, see CARL RUSSELL FISH, THE CIVIL SERVICE AND THE PATRONAGE (1904).
administrative state, not to subject it to intensive review by common law courts.\textsuperscript{42}

Ernst Freund, who with Goodnow largely founded administrative law studies in this country, pointed out in responding to Diceyan attacks that the effect of the movement toward regulatory government was not to substitute broad administrative discretion for judicial resolution according to fixed principles, but viewed more realistically constituted a step in the opposite direction. In Freund's view, when regulation of economic activity had been handled by the courts deciding private suits, the important questions of fact, and of applying broad statutory standards to the particular facts, were generally delegated to the jury.\textsuperscript{43} Freund's commitment to the ideal that "the progress of law should be away from discretion toward definite rule," did not lead him to glorify the common law courts and processes ala Dicey and the 1946 ABA Committee Report, which likely directed its invective in part at him as a European-trained lawyer. Rather, he felt that the rising regulatory state, characterized by the creation of administrative bodies with regulatory authority to enforce broadly worded

\textsuperscript{42} Goodnow summarized his views in a 1905 presidential address to the American Political Science Association, which appears under the title "The Growth of Executive Discretion," 2 PROCEEDINGS OF THE AMERICAN POLITICAL SCIENCE ASSOCIATION 29 (1905). A statement of Weber's basic view can be found in MAX WEBER: THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION 337-341 (A.M. Henderson and Talcott Parsons, eds., 1947). It is perhaps noteworthy that Weber also studied Prussian administrative law under Gneist in the early 1880s. Harold J. Berman and Charles J. Reid, Jr., Max Weber as Legal Historian, in THE CAMBRIDGE COMPANION TO MAX WEBER 223, 224 (2000).

\textsuperscript{43} Ernst Freund, The Substitution of Rule for Discretion in Public Law, 9 AM. POL. SCI. REV. 666, 666-67 (1915).
legislative standards, "substitutes for the more or less arbitrary judicial action – arbitrary because delegated to a jury – a fixed and responsible rule."44 Freund was fundamentally committed to reigning in administrative discretion, not to justify it, but his solution was increasing refinement and specificity in the legislature's statutory enactments, rather than heightened oversight of administrative action by common law courts.45

What becomes clear from reading the writings on administrative law from this period, both in England46 and in the U.S., is that important opponents of regulatory government sought to ground their objections in notions such as the Rule of Law, or the separation of powers, while proponents of the regulatory state, the Progressives and later the New Dealers, sought to either redefine these concepts, or, perhaps concurrently, to argue that they were not essentially incompatible with administrative government.47 Administrative law thus became a key concept in a broad political struggle over the role of the state in governance, and the modes by which the state would be allowed to govern. In

44 Id.

45 See generally, John Dickinson, Review of ERNST FREUND, ADMINISTRATIVE POWERS OVER PERSONS AND PROPERTY (1928), 22 AM. POL. SCI. REV. 981 (1928).

46 Good sources on contemporaneous debates in England are the ninth edition of Dicey's Law of the Constitution, supra note 14; WILLIAM A. ROBSON, JUSTICE AND ADMINISTRATIVE LAW (1928), and JOHN WILLIS, THE PARLIAMENT POWERS OF ENGLISH GOVERNMENT DEPARTMENTS (1933).

47 White, supra note 33. For a contemporary summary, see Charles Grove Haines, Effects of the Growth of Administrative Law upon Traditional Anglo-American Legal Theories and Practices, 26 AM. POL. SCI. REV. 875 (1932).
his intellectual history of the Progressive-New Deal period, Henry Steele Commager argued that Goodnow and like-minded Progressive scholars “reconsidered the whole problem of the separation of powers, not with a view to pressing actual government into the mold contrived by the Framers but of adapting that mold to the felt needs of government.”48 They rejected not only a “Newtonian” model of the constitutional order as a factual description, but also the idea that their role as scholars was to engage in formal elaboration and exposition of the model. The former stance was likely related to the influence of various intellectual traditions, including German legal and economic historicism, Darwinism, and philosophical pragmatism.49 Historicism, though capable of supporting conservative opposition to legal innovation through statutory enactment, could also support radical change by insisting that legal institutions exist only within specific societies, which suggests that as societies change it is necessary and entirely appropriate that their legal institutions change accordingly. Such a historically-contingent approach to separation of powers was important for the pro-regulation agenda of the Progressives, as it not only informed their own understanding of things, but could also be used against their political opponents to the extent that they could show “the expansion of governmental activities was not a violation of the moral code . . . but a logical


49 Id. at 320-335.
shift in the use of the Constitution from symbol to instrument, a logical response to the conclusion that government was made for man, not man for government.  

Goodnow, for example, wrote in 1911 that political developments suggested that the separation of powers doctrine was losing its grip on the popular imagination, and that jurisprudential developments suggested it was also losing its grip over the judiciary.  

"'commission form of city government,' which abandons completely the distinction between the legislative and executive authorities in city government, is also evidence of the belief of a large portion of our people that the principle of the separation of powers is inapplicable to the conditions existing in our municipalities."

Developments in case law suggested that at least the federal courts were becoming more willing to allow legislative delegation of rulemaking authority to administrative agencies, though adopting the fiction that this rulemaking was a matter of "filling in the details," rather than making law.

This accommodation of law and legal theory to the rising regulatory state was lauded by Goodnow, the comparativist, as "bringing our law into accord with

50 Id. at 321.

51 FRANK J. GOODNOW, SOCIAL REFORM AND THE CONSTITUTION 214-223 (1911). Goodnow's intellectual debt to Gneist, the student of German Historical School founder Savigny, has already been noted. Likewise, German historical political economy of the nineteenth century proclaimed that it was an ethical science, the work of which was "largely to point out the way of reform." Edwin R.A. Seligman, Book Review, 1 Pol. Sci. Q. 143, 145 (1886) (reviewing GUSTAV COHN, SYSTEM DER NATIONALÖKONOMIE (1885)).

52 Goodnow, supra note 51, at 214.

53 Id. at 216 (citing Boske v. Comingore, 177 U.S. 459 (1900); In re Kolloch, 165 U.S. 526 (1897); Buttfeld v. Stranahan, 192 U.S. 470 (1904).
that of foreign countries, where such ordinance powers have for a long time been regarded as a necessary adjunct of executive or administrative authority."\(^{54}\) He was much less sanguine about what he saw as a parallel trend among courts to relax their scrutiny over administrative discretion in the performance of "acts of special individual application which have an important effect on individual rights,"\(^{55}\) citing United States v. Ju Toy, 198 U.S. 253 (1905) as a case upholding "very arbitrary action upon the part of federal administrative officers when authorized thereto by Congress.\(^{56}\)

Edward Purcell argues that Goodnow and others "joined in bringing an increasingly pragmatic and empirical tone to political science, and in replacing the older structural and juristic emphasis with a new focus on process and conflict,"\(^{57}\) but at least with Goodnow a commitment to traditional juristic values was central to his approach to politics. His first major work, after all, had been Comparative Administrative Law, and throughout his career he maintained a focus on law and legal institutions that is remarkable when compared to later

\(^{54}\) Id. at 217-18.

\(^{55}\) Id. at 218.

\(^{56}\) Id. at 218. In Ju Toy the Supreme Court upheld the authority of immigration officials to make a final determination, not subject to federal habeas corpus review, of a claim by a person of Chinese descent to have been born in the United States, and thus a U.S. citizen not subject to Chinese exclusion laws.

\(^{57}\) Purcell, supra note 40, at 17.
generations of political scientists.\textsuperscript{58} He did, however, propound early-on a vision of the relationship between courts, administrative law, and the regulatory process that remains quite "modern." In this view, courts and administrative bodies are not adversaries but are partners in a shared governance project, and administrative law doctrine must be simultaneously concerned with i) protecting rights of citizens against the state, ii) enabling efficient goal-oriented action by the state, and also iii) ensuring that in their substance the policies pursued by the state promote general social well-being.\textsuperscript{59} Without wishing to oversimplify, this view is not so different from that put forth by Louis Jaffe in the 1950s and 1960s,\textsuperscript{60} or from that put forth by Christopher Edley in the 1990s.\textsuperscript{61} It is a view that reflects simultaneous commitments to an active democratic state, to individual rights, and to a substantive vision of the ends the state should pursue, and that makes the judge and the court the indispensable reconciler to these sometimes conflicting ends.

The foregoing discussion is intended as an example, from the West rather than from Northeast Asia, of how administrative law, even the seemingly simple

\textsuperscript{58} In spite of Goodnow's exceptional emphasis on process and conflict over formal structure at home, when he advised China's Yuan Shi-Kai government on drafting a constitution he exhibited a faith, shared by many of today's erstwhile exporters of legal rules and institutions, that his ideas on structural, institutional design had value for a society about which he knew very little.

\textsuperscript{59} \textbf{GOODNOW, COMPARATIVE ADMINISTRATIVE LAW}, \textit{supra} note 9, at 137-143.

\textsuperscript{60} See, \textbf{LOUIS L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION} (1965).

\textsuperscript{61} See, \textbf{CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW} (1990).
task of defining the term, is intertwined with fundamental issues of politics, and
with competing visions of the role of the state in society. This vision of
administrative law as a vehicle for competing visions of law and the state will be
a central theme of this study. Second, the foregoing was intended to
demonstrate the extent to which, in the Anglo-American tradition especially,
aspects of administrative law have been seen as incompatible with deeply held
legal/political values. Although these values, and the material interests of those
who invoked such values, shaped the developing administrative law, the trend
toward regulatory government did not abate. Overcoming Dicey's early attitude
of denial, by the end of the nineteenth century commentators in both England
and the U.S. were writing about the new administrative law, and in 1911 West
Publishing published Freund's *Cases on Administrative Law*, the first American
casebook to address the subject. An exploration of how administrative law has
been defined will help illuminate the preoccupations of Anglo-Americans as they
grappled with the challenges that regulatory government posed for their
discipline, as well as illuminate what modern commentators have seen in
traditional Northeast Asian legal systems that caused them to classify these as in
large part "administrative."

B. Defining Administrative Law and Legality

This section examines in a schematic way different types of law or legal
phenomena to which the term administrative has been applied, with the goal being to facilitate a better understanding of to what extent traditional Northeast Asian legal systems were "administrative."

1. Administrative law as the internal law of regulatory bodies: Organic and Internal Disciplinary Norms

In one sense of the term, administrative law "proceeds to organize the various executive departments through which the executive authority acts." Absent a constitution that completely and exclusively organizes all governmental authority, a politically organized society requires a body of law to create and define government bodies at the sub-constitutional level. The existence of this body of administrative law as "organic norms" may seem so obvious as to be trivial, yet it is important to realize that such organic norms can exist in the absence of any mechanism by which a private party might invoke them, and that even where they cannot be invoked by private parties, such norms may serve important purposes.

A sub-set of these internal norms consists of internal disciplinary norms,

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62 FRANK J. GOODNOW, THE PRINCIPLES OF THE ADMINISTRATIVE LAW OF THE UNITED STATES 16 (1905). Austin too included within the scope of administrative law the law determining whether sovereign powers were to be exercised directly by the sovereign, or were to be exercised by the "subordinate political superiors to whom portions of those powers are delegated or committed in trust." JOHN AUSTIN, JURISPRUDENCE, vol. I, p. 73 (1873 ed.), quoted in Maitland, supra note 7, at 528.
subject to being invoked by upper against lower-level administrative
functionaries. These may be found together with the organic norms, or with the
substantive law the administrative body is charged with applying, but they are
analytically distinct. It may be possible for private parties to trigger the
application of these disciplinary norms, in effect harnessing private interests to
the task of disciplining lower level functionaries, but this need not occur.

2. Administrative Law as the Law Enforced by Administrative
   Agencies: Substantive Governance Norms and Delegated
   Rulemaking Powers

In addition to creating regulatory bodies and policing the behavior of their
staffs, regulatory government entails giving tasks to these bodies, and giving
them powers with which to pursue those tasks. A broad view of administrative
law covers these phenomena: Goodnow, for example, included within
administrative law the rules of law which administrative bodies have to apply,
which he divided into clear statutory commands which the administration simply
enforces, and incomplete commands requiring additional interpretation and
which can be enforced by the administration only under certain conditions.63 For

63 GOODNOW, COMPARATIVE ADMINISTRATIVE LAW, supra note 9, at 106-118. See
also, HANS KELSEN, GENERAL THEORY OF LAW AND THE STATE 274 (Anders Wedberg,
trans. Twentieth Century Legal Philosophy Series, 1945) ("Public administration is
based upon administrative law, as the jurisdiction of courts is based upon civil and
criminal law. . . . Like civil and criminal law, administrative law tries to bring about a
certain behavior by attaching a coercive act, administrative sanction, to the opposite
Austin, too, administrative law encompassed not only the question of whether, and to whom, sovereign powers were delegated, but also defined the "ends and modes to and in which the sovereign powers shall be exercised."64 Holland, likewise, defined administrative law as the branch of public law treating the organs of sovereign power in motion, a dynamic rather than a static view, and prescribing in detail the manner of their activity.65

In addition to enforcing commands from the legislature, agencies commonly develop new rules and policies through adjudication, as well as through the exercise of delegated legislative authority.66 It is quite common to see early writers on administrative law describe these rules developed by administrative bodies as "administrative law," sometimes in a derogatory way to distinguish it from what might be thought of as Law with a capital "L." This usage was not limited to critics, however, so that in his classic 1938 defense of agency governance, The Administrative Process, James Landis wrote that

behavior, the administrative delict. . . . The administrative authorities alone are competent to enforce these laws, they alone have to establish whether an administrative delict has been committed, and they alone have to inflict the administrative sanction. This function of the administrative organs is exactly the same as the function of the courts, although the latter is called 'judicial,' and the former 'executive' or 'administrative.'"5)

64 Austin, supra note 62, at 73.


66 The extent to which administrative bodies may simply legislate, under some general ordinance power, or must simply fill in gaps left by legislatures, is one of the classic fault lines along which administrative law battles are fought.
"administrative law" was the term given to "[t]he law the courts permitted
[agencies, tribunals and rulemaking bodies] to make." 67

As we have seen, as the Anglo-American world encountered the rise of
the regulatory state, this use of law to delegate governance tasks, in fact
centuries old, became one of the attack points for those opposed to regulatory
governance. 68 Although Parliament had for centuries delegated broad authority
to administrative bodies, either to so-called statutory commissions or to the Privy
Council, 69 when the practice became widespread in the mid-to-late nineteenth
century it appeared as a stark contrast to the ordinary way of governing.

"This growth of ‘administrative law’ – that is, law made and applied by
administrative agencies – was naturally viewed with great disfavor by the
adherents of laissez faire and more generally by the champions of courts
who quite accurately saw that administrative agencies were displacing
courts from many areas of policy making that had previously been left to
judges." 70

The norms contained in such agency regulations are typically directed
from the state to private actors, and are enforced largely at state rather than

67 JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS 2 (1938). This work, delivered
as the 1938 Yale Law School Storrs Lectures on Jurisprudence, has become the
classic statement of the Progressive/New Deal vision of law’s place in modern,
regulatory state. Cf. White, supra note 33, at 114-116. For the conservative response
to Landis’ critique of separation of powers formalism, see Vanderbilt, supra note 40, at
3-6.

68 See, e.g., HEWART, THE NEW DESPOTISM (1929).

69 John Archibald Fairlie, Administrative Procedure in Connection with Statutory
Rules and Orders in Great Britain, 13(3) U. ILL. STUD. SOC. SCI. 13-22, 49-56 (1925);
Willis, supra note 46, at 15-20.

70 Shapiro, supra note 20, at 105.
private initiative, so that regulatory and penal law tend to merge in a sense, as Kelsen noted.\(^71\) To the extent administrative law delegates to administrative bodies the power to fine or otherwise to sanction private individuals, the distinction on the level of principle becomes very thin. As will be discussed in Chapter Two, below, the classic description of Northeast Asian traditional law as penal and administrative uses administrative in this sense, as norms of a fundamentally instrumental nature, directed from the sovereign to the bureaucracy, instructing it in how to govern society.\(^72\)

3. Administrative Law as External Controls on Government: Administrative Law Proper

A third use of "administrative law" has been to describe the body of legal doctrine governing administrative action and which can be invoked by private parties before the courts.\(^73\) One aspect of this set of norms, which tends to blend into constitutional law, consists of certain core rights or areas of autonomy which

\(^{71}\) See, Kelsen, *supra* note 63.

\(^{72}\) See, e.g., Turner, *supra* note 4.

\(^{73}\) Martin Shapiro argues that in the U.S. this definition of administrative law, as the "rules that governed when, where, and how courts would review agency findings and the rules governing the procedures of agencies[,]" became dominant because it appealed to both administrative law scholars, and to those who opposed regulatory government, but who had come to realize that Diceyan denial of administrative law was untenable. Shapiro, *supra* note 20, at 105.
may be exempt from public regulation regardless of the procedures the state follows. A second type of norm regulating agency action prescribes the procedures that the agency must follow in taking action, regardless of the substance of that action. Such procedural requirements also find their basis in constitutions, as well as in general administrative procedure laws, or particular regulatory statutes. A third subset of law encompassed in this general area consists of the doctrines controlling to what extent the organic norms or other internal norms discussed above, may be reached by private parties and enforced against a bureaucratic body. Disciplinary norms, discussed above, may also be external to the bureaucracy, in the form of actions for compensation for harm caused to a private party by the bureaucracy or its agents. This could be a tort action against an individual government actor, or against a government body. This was the essence of Dicey's Rule of Law, the particular Anglo-American genius for controlling the bureaucracy: that government agents could be hauled into the ordinary courts, subject to private damages actions.74

There are three great historical traditions of administrative law in this sense: the Anglo-American, the Germanic and the French. These three

74 Applying basic agency law principles would suggest that the government would be liable for wrongs committed by its employees if acting within the scope of their legal authority. The Anglo-American tradition's attachment to the doctrine of sovereign immunity generally precluded a straight-forward attribution of liability, however, so an early reply to Dicey was that individual state officers might not have the assets to satisfy judgments against them, and that in any case the threat of individual liability created perverse incentives for the public servant.
traditions differ from each other along two dimensions: the source of the norms allowing review of administrative action, and the type of body given authority to adjudicate claims arising under these norms. Traditional Anglo-American administrative law was the least differentiated from the ordinary civil justice system along both of these dimensions. The causes of action allowing private parties to obtain judicial review of administrative action were common law prerogative writs, mainly those of certiorari and mandamus,\textsuperscript{75} and they were heard in the main by the ordinary common law courts. In response to the rise of regulatory government, however, the Anglo-American tradition developed special bodies of law creating new tools for private parties to invoke versus administrative actors, the U.S. Administrative Procedure Act (APA) of 1946 being the leading example.

The German tradition is more differentiated than the Anglo-American along both dimensions, but most noticeably by virtue of the fact that jurisdiction over most challenges to administrative action is vested in specialized administrative courts.\textsuperscript{76} Though these administrative courts have never been ordinary courts, their creation, beginning in the nineteenth century, was an effort to vest jurisdiction to review administrative actions in a system of courts insulated from the bureaucracy, thus vindicating separation of powers concerns, not an

\textsuperscript{75} HENDERSON, FOUNDATIONS OF ENGLISH ADMINISTRATIVE LAW, supra note 8.

\textsuperscript{76} Such causes of action are also in the main created by statute.
effort to place administrative action beyond the reach of the law.

The French system has been the most differentiated from the ordinary justice system along both dimensions, but most famously with regard to the latter dimension: the body which adjudicates private claims arising under administrative law norms. In the French system the ordinary courts do not adjudicate challenges to administrative acts, which instead are heard, upon final appeal, by judicial panels made up of members of the Conseil d'Etat. This adjudication of private challenges to administrative action by the Conseil d'Etat, which in important senses is a part of France's executive branch, was seen by Dicey as the essentially alien and despotic characteristic of droit administratif. As was noted above, Dicey failed to understand that even at the time he wrote the French had moved to insulate the Conseil d'Etat's adjudicatory from its other functions, though without taking the German step of creating a separate hierarchy of administrative courts.

4. Administrative Law as “Administrative Justice”

Finally, administrative law has often been discussed in connection with the concept of "administrative justice," which generally refers to the delegation to administrative bodies, rather than courts, of the authority to adjudicate certain classes of disputes, as well as the delegation to such bodies of legislative
authority. The counterpart to administrative justice is "administered law," that is, law "originating in a statute which delegates the authority to carry out law, and to make further law, to an administrative agency given charge of the sector in question." In the modern American sphere of administered law, "while private rights of action in court are not unknown, and judicial review is the norm, agencies usually have exclusive initial jurisdiction to adjudicate regulatory infractions, and, even more importantly, generally can control regulation in the sector through binding rulemaking proceedings." Like the practice of granting administrative bodies the power to make rules which they were then charged with enforcing, tasking administrative bodies with the adjudication of disputes arising under the rules they enforced, and in some cases created, ran directly into concerns for separation of powers, and for the ability of citizens to have recourse to a neutral decision maker. In order to carry out their functions, regulatory bodies had to be given powers to compel testimony and other types of evidence, another controversial intrusion into traditionally judicial terrain. Critics compared this to England's notorious Star


79 Id.

Chamber, in which

"[t]he same body which issues ordinances, which controls the execution of the law and the administration of the state, acts also as a court of justice with a comprehensive penal jurisdiction — one day it can make an ordinance, and the next punish men for not obeying it. Its jurisdiction it exercises without any lengthy formalities — there is no trial by jury before it — the accused person is examined on his oath, a procedure quite strange to the courts of common law, in which . . . no-one can be compelled to accuse himself.\textsuperscript{81}

Maitland made two additional comments with respect to the Star Chamber that remain important. First, he noted that it provided the English monarchs with "a most efficient engine of government,"\textsuperscript{82} and second, he noted that the Star Chamber used torture, unlike the ordinary courts.\textsuperscript{83}

These twin themes of efficiency versus respect for individual rights appear and reappear throughout the debates on administrative law, with proponents of the regulatory state championing the former, and opponents decrying administrative justice as a threat to the latter. Likewise, the distinction between judicial adjudication and "administrative justice" often parallels distinctions between limited, reactive government and "administrative government," and between government by legislation, enforced by courts, and government by administration. The distinction between the two is key for understanding Western attitudes to Northeast Asian law, as well as for understanding the

\textsuperscript{81} Maitland, \textit{supra} note 7, at 220-221.

\textsuperscript{82} \textit{Id.} at 220.

\textsuperscript{83} \textit{Id.} at 221.
history of administrative law in the twentieth century West. In an important sense, the Diceyean championing of common law courts and adjudication as both necessary and sufficient, in fact the ideal, for protecting private rights and achieving justice worked against Northeast Asia and against the Anglo-American regulatory state in similar ways. With respect to the former, it provided the intellectual underpinning for the view that the office of the classic Confucian magistrate was, by definition, incapable of doing justice for the individuals involved, a critique that emphasized the formal structure of institutions and authority, rather than on substantive legal rules, or on actual results. John Chipman Gray's observation that "[i]n some primitive communities, the legislative, judicial, and administrative powers are united in the same persons or in a single individual,"64 expresses the mind-set of generations of Western observers of traditional Northeast Asian law. And as the debates between the Diceyean and what might be called the Goodnow view demonstrated, the same basic argument was used against the delegation of legislative, adjudicatory and executive powers to boards and commissions that has been a hallmark of the modern regulatory state in the West.

To summarize, this study adopts a broad definition of administrative law to include the law organizing and controlling the administration internally, the substantive law enforced by administrative bodies and the powers given them to

do so, and finally, the law that allows and structures external challenges to and controls on administrative actions. The growth of this body of law has been associated, particularly in the Anglo-American literature, with the rise of "administrative justice," another important concept. The purposes of this broad definition are two-fold. First, this study seeks to shed light on how changes in administrative law relate to changes in the way power is distributed and exercised in a group of societies. Focusing on a single aspect of administrative law, such as the availability and scope of judicial review of administrative action, would tend to exclude issues of institutional design and institutional competence, which relate directly to how power is exercised. In addition, as will be discussed below, Northeast Asia's pre-modern legal systems lacked certain attributes of modern administrative law, and any definition that included only such attributes would make comparison more difficult than it need be, when we possess sufficiently broad definitions to include elements that Northeast Asia did display. Discussing how these traditional aspects of Northeast Asian legality influenced, or did not influence, Northeast's Asia's subsequent adoption of modern administrative law will be facilitated by a common vocabulary, keeping in mind of course the danger of common labels obscuring differing realities. Looking at administrative law as consisting of several related yet distinct elements provides a basis for comparing administrative law across legal systems that share some but not all aspects in common. This is important for comparing across national systems, as well as across time within a single nation, a necessity if traditional
and modern are to be discussed using a common vocabulary.

C. Pluralist Administrative Law

As stated at the outset, part of the argument presented here is that administrative law in Northeast Asia is in a broad sense moving toward what could be called "pluralist" administrative law, and that this is part of a global trend. What follows is an identification of the formal characteristics of the pluralist administrative law ideal type, followed by a discussion of the role of law in the ideal type. Last to be addressed will be the state theory, the theory of political prerequisites and functions, that corresponds to the pluralist administrative law ideal type.\textsuperscript{65}

Proving this sort of argument is probably impossible in a strict sense, because even if one could count how many countries around the world are adopting which particular legal norms, the fact remains that legal rules and institutions have different functions and meanings in different societies. On the other hand, a convergence of forms is important in its own right, as evidence of interests and power relations operating transnationally, and as evidence of the

extent to which administrative law reform, in particular, has become a battlefield. And for exactly the same reason that instrumental law reformers are often disappointed by the fruits which their transplants produce in new soil, so it seems wrong as a matter of logic to deny that such reforms can be associated with important social changes, and that even if the reforms are at first only the signals, or results, of political change, they may then contribute to further change. It seems likewise wrong to assume that the affects, and after-effects, of these reforms are entirely unpredictable, though the more such predictions take into account the local context, the more plausible they will be. Further evidence of the global trend toward pluralist administrative law will be presented in Chapter Three, discussing recent administrative law initiatives in Japan, South Korea and Taiwan, and in Chapter Four, discussing China and the impact of its WTO accession.

1. Formal Elements of Pluralist Administrative Law

Many elements of pluralist administrative law track the basic schema of administrative law developed above. At the most basic level, the state apparatus itself must be organized according to law. Administrative bodies must be legally constituted - created by law - and given legally formulated mandates to regulate certain areas of social life. Administrative bodies regulate their staffs by internal disciplinary norms, and avenues exist by which private parties may obtain review
within the administrative hierarchy of lower-level decisions.

In applying law to individual fact situations, there is a presumption that basic judicial procedure rights apply, such as a right to notice and a hearing, to a neutral decision maker, to present evidence, and to contest contrary evidence. In addition, relevancy norms attempt to force administrative decisions to be based on proper motives, so that official actions may only be used to achieve authorized, predetermined ends set for them by the political process. With respect to many decisions, administrative bodies are required to hold public hearings at which members of the public can present their views. This is especially important when the administrative body is itself elected, as the public hearing provides an important avenue for the electorate to evaluate the membership.

Administrative law in the sense of legal norms created by administrative bodies can be developed through adjudication, like common law, or through quasi-legislative administrative rulemaking. Agencies can legislate within their areas of competence based on authority delegated from the legislative branch, and at least in theory the resulting norms are specifications of general rules adopted by legislature.

“Administrative law” in the sense of private causes of action to challenge administrative action is available to overturn government actions that are ultra vires, that violate substantive law, that are procedurally invalid, and to compensate for harms committed by the government. Whether the courts
enforcing legality on the administration are ordinary courts, or administrative
courts on the German or French model, modern administrative law requires that
they be institutionally separate from the agencies whose actions they police.
Private rights of action must exist to allow judicial vindication not only of
substantive rights to be free from illegal government action, but also to enforce
procedural regularity upon government action, whether in adjudication or in
rulemaking. Review is available both of factual determinations, and of
interpretations of law to ensure compliance with substantive law and with the
administrative body's internal rules, but in theory not for "policy" decisions.

To this foundation of basic administrative legality,\(^{86}\) pluralist administrative
law adds several elements that fundamentally alter the role that administrative
law plays in a society. First, broadly speaking there is a tendency toward public
participation in this process of delegated rule making, as in the "notice and
comment rulemaking" as enshrined in the U.S. APA. Although the U.S. may be
an outlier in the extent to which it treats public participation in delegated rule
making as creating private rights enforceable against the acting government
body, the basic model dates back at least to Britain's Rules Publication Act of
1893,\(^{87}\) though even that act basically put in general form requirements that had

\(^{86}\) "Legality of the administration" [rechtsmaßigkeit der Verwaltung] is a German
phrase that captures the essence.

\(^{87}\) 56 & 57 Vict., ch. 66.
already appeared in specific regulatory statutes such as the Factory Acts.\textsuperscript{88} Pluralist administrative law questions the premise that the democratic legitimacy of rules promulgated by administrative agencies is ensured by the fact that the agencies are acting pursuant to authority delegated from the elected branches. Thus it is not enough that private parties be consulted during the drafting of regulations so that the drafting authority can benefit from their expertise, when participation in rulemaking comes to serve as a device for democratic legitimation, then participation must be seen as a right. In addition, standing doctrines are interpreted broadly in the ideal type, to broaden the field of interests with de jure, legally protected rights to participate in administrative activity.

Facilitating legal challenges both to agency output and to internal agency processes and procedures are information disclosure statutes such as the U.S. Freedom of Information Act, which have become a part of the emerging global administrative law culture. Open meeting requirements are a third element of the pluralist administrative law model, designed to allow public scrutiny of the state-private sector interface.\textsuperscript{89} Complementing open meeting requirements are limitations on ex parte contacts between government actors and interested private parties, and in the U.S., the requirements of the Federal Advisory

\textsuperscript{88} Willis, \textit{supra} note 46, at 26-27.

\textsuperscript{89} An example is the U.S. Government in the Sunshine Act of 1976, 5 U.S.C. § 552b.
Committee Act, which represent another attempt to legalize and make more politically representative government-private sector interactions.

A final element of pluralist administrative law, and the element that may ultimately prove to be so closely tied to U.S. legal culture that it will doom the ideal type to being simply a caricature of late twentieth century U.S. administrative law, is a judiciary with the institutional autonomy, and the legal and political orientation, necessary to insert itself directly into the center of a society's relationships of power and governance.

2. Law and Policy in the Pluralist Image: the Headless Fifth Branch

The ideology of pluralist administrative law includes a truly unique understanding of the relationship between administrative law and state policy that is seldom addressed directly. The independent regulatory agencies in the United States have been described as the "headless fourth branch" of government, highlighting, critically, the extent to which their existence and central governance role violated American separation of powers ideology. The image of law as policy outcome implicit in the model of pluralist administrative law can be described as a headless fifth branch, headless not because it is independent, but because none of the four "institutional" branches that could potentially control it can actually prevail for long. Administrative law occupies a role that is absolutely
central to the pluralist model as providing the battlefield upon which the battles
over policy are fought, and as the trump that can undo practically any result
imposed by one of the four institutional branches. Law as policy outcome in the
pluralist image is not "headless" by virtue of being autonomous (or "semi-
autonomous"); rather, law is "headless" because it represents the constantly
shifting outcome of a struggle between the institutional branches of government,
none of which controls it. The institutional branches pursue their own
institutional goals in this struggle, as well as the goals of their political or
economic constituents ("civil society"), resulting in a situation in which legal
document is constantly changing, shifting the balances of power and authority in
society, yet responding to no single vision of the goals it should serve. Each of
the institutional branches has power to shape legal doctrine, both as it affects
private parties and as it affects the powers of the other branches, and it is
accepted that this multi-front battle for control of legal doctrine is symptomatic of
the modern state.

That this could become a normative vision of the proper role for
administrative law in public governance reflects a deep skepticism that, as a
descriptive matter, administrative agencies are insulated from civil society and
effectively controlled by the elected branches, so that one pursuing a particular
outcome would, or could, simply pursue political channels. If agencies are not in
fact experts implementing in relative isolation the commands of their political
masters, and if one believes that it would be hopelessly utopian to ever believe
that they could be so, then it follows that there will be no normative commitment that they should be. This view of administrative law's role in governance is partly a result, as well, of the great extent to which the judiciary in the West has become independent of the other legislative and executive branches, as well as an abandonment in legal thought of the idea that courts and judges are not central players in the formation of social and economic policy. A private interest that fails in the elected branches and before the administrative agency will resort as a matter of course to the courts, and will be correct in assuming that in the regulatory state a "conservative" judge is just as likely to overturn a regulatory decision as a "liberal" judge, since neither liberal nor conservative ideology is committed in principle to respecting administrative expertise or decision-making authority.

Perhaps not coincidentally to the pervasive acceptance of the model is the elevated role it holds out for judges, and less directly, for legal academics. The "due process revolution" in U.S. law consisted in part of new-style regulatory statutes that thrust judges into the role of enforcing against the agencies detailed action-forcing and procedural requirements. The judges themselves created other principal aspects of the "due process revolution," such as liberalized standing doctrines, "hard look" scrutiny of agency reasoning processes, and judicially-imposed procedural requirements. Having judges play this active role

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90 Sunstein, supra note 85, at 29-30.
in governance allows legal academics to aspire to a much greater role than simply teaching and research, a role in which they team with like-minded judges to not only serve as the neutral referees of the pluralist process, but to become active players themselves, though without having to participate in the political process.

3. The State of Pluralist Administrative Law

The ideal type developed above clearly abstracts from administrative law as it has developed in the Western democracies, particularly the U.S., in the latter part of the twentieth century. During those decades the societies from which the model is drawn underwent dramatic political change, which both allowed, and fed upon, the specific developments in administrative law. The model of the state presupposed by pluralist administrative law is the pluralist political order, in which “the state is interpreted as a ‘governmental process,’ a project of inclusion aimed at striking a responsive balance between competing interests and demands.”91 Metaphors for the state in a pluralist political order have included “a weathervane, a switchboard, a broker, an arbitrator, and a

91 GREGOR McLENNAN, PLURALISM 35 (1995). Chapters four and five of McLennan’s volume provide a good historical summary of pluralist political thought. For longer discussions of early twentieth century political pluralism, see DAVID NICHOLLS, THE PLURALIST STATE (1975); KUNG CHUAN HSIAO, POLITICAL PLURALISM (1927). For a modern reappraisal of political pluralism, see AVIGAIL I. EISENBERG, RECONSTRUCTING POLITICAL PLURALISM (1995).
general manager."

What sets apart a political order characterized by pluralist administrative law is not that pluralism exists as a matter of fact, but that pluralist representation of competing interest groups has become one of the instrumental goals of administrative law. De facto social and political pluralism leads to basic mechanisms of pluralist influence being recognized and formalized in law and the legal process, a result which receives support from normative arguments that pluralist political processes yield policy outcomes that basically approximate the public interest, while also being politically legitimate. Yet pluralist administrative law also represents a rejection of any comfortable assumption that, left to its own devices, society will spontaneously organize into pressure groups fairly representing the interests of their members, the give and take among which will yield administrative policy outcomes approximating the public interest. Such optimistic pluralist thinking could justify a hands-off approach toward agency activities even after the decline of expertise theory and the recognition of agency capture or industry orientation, problems that were recognized early in the history of regulatory government, as even if agencies are not insulated from the private

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92 McLennan, supra note 91, at 35.

interests they are charged with regulating, the sum of influences on a particular agency would itself approximate the public interest. Pluralist administrative law instead reflects the view that mere de facto pluralism fails to yield administrative agency outcomes that reflect the public interest, and that what is required is a legally created and enforced pluralism, in which administrative law provides an array of channels or mechanisms by which contending interests seek to influence state outcomes, with law and the courts providing the forum in which the battle is fought.

Historically, pluralist administrative law should be understood as the administrative law of societies simultaneously committed to regulated market economies, democratic participation in legislation and public oversight of government activity, as well as the virtues of separated powers, checks and balances, and liberal legality. To say that a society is committed to this broad and perhaps irreconcilable set of values does not refer primarily to ideological or psychological commitments, but is rather to say that there are effective social forces willing and able to advocate these values, and to invoke them in pursuing their goals. This way of conceptualizing a society’s commitment to an ideal or set of ideals seeks to avoid any strict dichotomy between ideology and material interests, admitting that both are likely at play in any substantial political development, and that focusing exclusively on either result in a partial picture.94

94 I am indebted here to Judith Goldstein’s IDEAS, INTERESTS AND AMERICAN TRADE POLICY (1993).
If one considers the political developments that have corresponded historically the evolution of pluralist administrative law it becomes apparent that the political values it serves encompass both classical Liberal values – the protection of private property and liberty from state interference, as well as the values of progressive Left liberalism. At issue is always the problem of how extensively to protect Liberal rights to individual autonomy and private property, yet without burdening Left liberal regulatory initiatives to the point of paralysis, and without reducing to the point of futility the sphere of regulatory governance subject to public participation. There exists, then, a level of inconsistency and instability in the heart of the model, where the positive political agenda meets Liberal legality meets public participation.\(^5\)

III. Comparative Administrative Law

Part II, above, outlined the politically and ideologically charged admission of administrative law into Anglo-American legal thought and practice (II.A.), and have outlined the various forms and practices that have fallen within various definitions of administrative law (II.B.). Part II also introduced the concept of pluralist administrative law, including its form, and the roles that pluralist administrative law implies for law, and for the state (II.C.). Part III, below,

\(^5\) Cf. Edley, supra note 61.
discusses comparative administrative law as a scholarly endeavor, highlighting its historical and theoretical relationship to political science and state theory (III.A.). This is followed by a discussion of "legal family" scholarship in comparative law (III.B).

A. Comparative Administrative Law: the Centrality of State theory

This study is an exercise in comparative law, and as such it confronts, consciously or not, the history and preoccupations of comparative law. Addressing the field directly will have the virtue of allowing the reader a better idea of the author's sense of the field and orientation to it, and in addition, it is hoped that this study may contribute something of methodological interest to a field that seems to be in a perpetual state of self-examination and to be the target of unending methodological scrutiny.

A survey of American administrative law scholarship at the close of the twentieth century reveals a field in apparent national isolation, dominated by American formal law, American political theory, and American external approaches to law. With respect to the formal law the reasons seem quite clear: statutes such as the federal APA and its state-level equivalents play a central role as sources of American administrative law, and much of administrative law practice involves the interpretation of these statutes, or of particular regulatory statutes. Case law that develops around specific statutory provisions, whether of
the APA or of a particular regulatory statute, tends naturally to refer primarily to that provision and prior decisions interpreting it. In addition, that body of administrative law based directly on interpretation of the Due Process clauses of the federal constitution, or on similar provisions in the state constitutions, seems equally closed to outside influences, whether from foreign or from international law. Although the English law concept of Natural Justice has much in common with procedural due process, and would be easily accessible to American lawyers, it receives little attention in mainstream administrative law scholarship.

The political theory that dominates American administrative law theorizing at the end of the century is perhaps marginally less inward-focused, given the sustained reliance on Montesquieu, Hobbes, Locke, and other non-American mainstays of the Liberal tradition, and some influence from post-World War II European critical theory. But for many academics Madison's Federalist #10 seems to have become the primary political text, and where the non-Americans have influence it often seems that their ideas have been abstracted out of their own context, universalized, and then re-nationalized by their American devotees. In other words, what Montesquieu wrote about the general concept of separated powers is thought to teach something valuable, but we almost never inquire into the practical problems of French law and society that he sought to address with his writings. With more current European theory we tend to assume that there is something called "modern society," and that we and the Europeans are both (and really the only) exemplars of it, which encourages us to incorporate the
ideas of our favorite European theorists without feeling that we could gain much from looking at those European ideas in their own context. It is obviously the case that ideas can be universalized in this way and then re-deployed in various national contexts, but the fact that ideas can be imported and deployed in this way does not make them universally true, nor does it mean that there might not be much to learn from looking at such ideas in the context in which they were developed and originally deployed. Ideas are not meaningless taken out of context, but seeing them in context might provide a wholly different set of insights.

In the realm of non-legal methodologies and bodies of knowledge that inform current American administrative law scholarship, the dominant approach is clearly the public choice/rational choice approach, which seeks to apply the individualist, rational actor assumptions of microeconomics to analyses of politics.\textsuperscript{96} This approach has reached administrative law scholarship mainly through its dramatic rise in political science, where it seems to dominate studies of bureaucratic behavior and the relationships between the branches of government. This tradition has at its core the universalist assumption of the rational actor, and while its methodology aspires to universal validity, its


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application to law seems centered in American academe.

Yet while American administrative law scholarship is looking inward, American legal scholars and others are engaged in an effort to share the virtues of American administrative law and practice with the rest of the world. This effort can be seen on many fronts: in efforts to include provisions allowing judicial review of trade actions and public participation in rulemaking in the WTO agreements, in the Strategic Impediments Initiative (SII) and similar bilateral talks with Japan and other trading partners, and in many "law and development" initiatives of the World Bank, IMF, Asian Development Bank, USAID, and others. 97 Seeing these two phenomena together could trigger various reactions. An optimist might hope that we in the U.S. have achieved enlightenment through introspection, so that we have indeed achieved the elusive "best practices" worthy of export. Another kind of optimist might hope that this encounter with other legal systems could inadvertently fertilize our own thinking, with the unintended consequence of helping us solve our problems. A cynic might suggest that only an introverted tradition could be so naive as to believe that its norms and practices could be usefully transplanted abroad, while another kind of cynic might see the concurrence of an inward-looking academic tradition and an "export oriented" practice as just another example of academia's irrelevance, proof that academics are simply not where the action is.

97 For further elaboration, see Chapters Three and Four, infra.
Leaving this all aside for a moment, for American administrative law scholarship to develop into an inward-looking, non-comparative enterprise required a substantial change, because as the earlier discussion of Goodnow, Freund and their contemporaries suggested, the study of administrative law as a self-conscious exercise in this country began as a comparative endeavor. Indeed, one could argue that the very idea of administrative law as a recognized area of law in this country owes its existence to American comparativists and their study of European law, and a survey of early administrative law scholarship in this country leads inevitably to the work of Goodnow and Freund, as well as to Roscoe Pound and others who followed British and European developments closely.

One reason administrative law scholarship in the United States began as a comparative exercise is that it was a field of law that was also very much underdeveloped and under-systematized in England. Thus even in an era in which American lawyers and legal scholars were much more closely tied to the English common law in private law matters than they are today, English law provided little useful guidance in administrative law. Perhaps for the same reason that Asian law reformers were drawn to the highly systematized European codes rather than the Anglo-American common law, the early developers of administrative law in the United States were drawn to France and Germany, which possessed bodies of administrative law that were institutionalized, systematized, and highly explicated, giving the impression of
something that might be studied, grasped, and potentially imported.

English law was also off limits as a source because of the enormous importance of Dicey’s 1885 *Law of the Constitution*. As we have seen, Dicey provided one of the first discussions in the Anglo-American legal tradition of administrative law, but his aim was to show that such a body of law was not only absent from, but alien to, the Common law tradition. But Dicey should hardly be singled out for sullying the science of comparative administrative law with a political agenda. Both his German predecessor Gneist, and those who later reacted against Dicey’s "Whig" vision, saw administrative law as providing a key point from which to exert leverage over State-society relations, and drew both political and institutional inspiration from their comparative endeavors. For example, Lorenz von Stein (1815-90), who exerted a great influence over Gneist,98 and later advised Itō Hirobumi and other law reformers in Meiji Japan,99 first became known for his 1842 book *Der Socialismus und Communismus des heutigen Frankreichs* (*The Socialism and Communism of Modern France*), an analysis of developments in French politics and society.100 In that work, which

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was based on his experience studying law and working as a journalist in Paris.\textsuperscript{101} Stein first expounded his theory that politics in the modern age is driven by economically-based class antagonism, and that the state must rise above and insulate itself from civil society in order to avoid "class rule," and to rule instead in the general interest. Stein's solution to the social problem was for the State, organized as a constitutional monarchy, to carry out reform from above to ameliorate the conditions of the lower classes, thus preempting pressures for radical reform.

Stein's paternalist social reform agenda was shared by Gneist, who himself created and relentlessly propagated his highly idealized picture of both administrative law and local self-government in England to support his reform programs for Prussia.\textsuperscript{102} Though Gneist criticized that other great political comparativist, Montesquieu, for presenting a model of English practice that was largely driven by Montesquieu's own agenda for France,\textsuperscript{103} he himself was aware that English practices diverged quite strongly from the model as he presented it to his German audience. The English case was crucial to Gneist's reform program for two reasons, however. First, for his positive program for decentralizing Prussian administration and creating independent courts to review

\textsuperscript{101} Gottfried Salomon, \textit{Stein, Lorenz von (1815-90), in Encyclopaedia of the Social Sciences} (1930).

\textsuperscript{102} Hahn, \textit{supra} note 12, \textit{passim}.

\textsuperscript{103} \textit{Id.} at 73-74.
administrative action, England as presented by him provided the best model. In addition, by showing that the secret of England's political stability and social peace relative to Continental conditions lay in these institutions, rather than in a separation of powers system or in fully democratic parliamentary government, Gneist could undermine calls for liberalization in Prussia that were more progressive than his own.

Thus when Goodnow, Freund and others looked at German administrative law it was obvious that the greatest German administrative law theorists put comparative study at the center of their work. Gneist and Stein saw administrative law as being at the heart of the governance system, deeply implicated with social and political theory, and there was no illusion that comparative work was non-political, or ideologically neutral.

Additional reasons for the comparative nature of early American administrative law scholarship must be sought in the personal histories of Goodnow and Freund, for these two men exerted an enormous influence over the development of administrative law in this country. As we have seen, Goodnow, professor of political science at Columbia and later president of Johns Hopkins University, focused his earliest studies on foreign public law systems, and as late as 1905, in his Principles of American Administrative Law, he based his discussion of controls over administrative action on the framework provided
by Gneist in *Das Englische Verwaltungsrecht* of 1884.\textsuperscript{104}

Like Goodnow, Freund was of the generation born around the time of the Civil War, in 1864. Although Freund was born in New York City, his parents were Germans visiting the U.S., who returned to Germany after his birth.\textsuperscript{105} Freund grew up German, studying law in Berlin and Heidelberg from 1881 to 1884.\textsuperscript{106} He received a doctorate in law from the Heidelberg faculty in 1884, though interestingly in Canon law and Civil law rather than in public law.\textsuperscript{107} Freund then left Germany for the U.S., but he left fully trained in German law and in German legal thinking. On this foundation he added American legal training, studying law at Columbia with Goodnow, and then practicing in New York from 1886 to 1894. In the early 1890s he began teaching and graduate work in public law at Columbia, but in 1894 he left to join the faculty of political science at the University of Chicago.

While Goodnow and Freund were most knowledgeable concerning German, particularly Prussian, administrative law, other scholars focused on France and the institution of the *Conseil d'Etat*. French administrative law had exercised an important influence on German administrative law in the 19\textsuperscript{th}


\textsuperscript{106} Id.

\textsuperscript{107} Id.
century,\textsuperscript{108} and a number of American scholars sought to make the French system intelligible to a wider American audience. In 1909 Edmund Parker, from 1904 to 1910 a lecturer on Comparative Administration at Harvard University and a scholar of the French administrative court system,\textsuperscript{109} advocated a system of administrative courts for the U.S.\textsuperscript{110} Parker presents an interesting example of the use of comparative scholarship to bolster calls for radical reforms of U.S. administrative law, which often involved calls for a specialized Administrative Court.\textsuperscript{111} Quoting Herbert Spencer to the effect that “the diving right of kings, ..., has become the divine right of the multitude,” which “rests on no better basis in the latter case than in the former,”\textsuperscript{112} he criticized from a comparative perspective the unique American attachment to the doctrine of sovereign immunity with respect to torts committed by state actors in the course of their employment,

\textsuperscript{108} Ulrich Scheuner, \textit{Der Einfluß des französischen Verwaltungsrechts auf die deutsche Rechtsentwicklung}, Heft 19-20 \textsc{Die Öffentliche Verwaltung} 713 (Oktober 1963).


\textsuperscript{112} Parker, \textit{supra} note 110, at 47.
which had recently been upheld in both state\textsuperscript{113} and federal courts.\textsuperscript{114} Another important early practitioner of comparative administrative law was James W. Garner, who from roughly 1900 to 1930 wrote a whole series of articles on German and especially French administrative law.\textsuperscript{115} In 1914 Leon Duguit, one of France's leading public law theorists, was given space to write a glowing account of the French administrative court system for the \textit{Political Science Quarterly}.\textsuperscript{116}

The ability of Goodnow, Freund, Garner and others to reject the Diceyan anti-administrative law tropes of the Common law was perhaps related to their relative outsider status. Goodnow, for example, was one of the founders of political science as an academic field in this country, at a time when political science was much more attached to comparative politics and to the study of legal institutions than it is today. Given Goodnow's broad definition of administrative law, one could say that for him administrative law was practically synonymous with political science. Goodnow had an LL.D., but his appointment

\textsuperscript{113} Murdock Parlor Co. v. Com., 152 Mass. 28 (1890).

\textsuperscript{114} Gibbons v. U.S., 75 U.S. 269 (1868).


\textsuperscript{116} Leon Duguit, \textit{The French Administrative Courts}, 29 POL. SCI. Q. 385 (1914).
at Columbia was as the Eaton Professor of Administrative Law and Municipal Science.

Perhaps the primary reason many Americans turned to foreign models and comparative methods, however, was that they felt they were on the receiving end of a trend in world history in that America was finally developing a "state" more or less comparable to what existed in Europe. While Americans were also involved in exporting law to places like the Philippines and China, as importers of political and legal ideology and institutions, the Americans of this generation were quite unlike Americans of the post-World War Two era, who have been engaged overwhelmingly in exportation, and for whom foreign law models or comparison yields little benefit.

A second era of comparative administrative law studies might be said to coincide with the New Deal, and with a second round of proposals for an American administrative court that were put forth in the 1930s. This era also coincided with the rise of Fascism in Europe, which produced a stream of highly trained refugee academics. On the academic side, Stefan Riesenfeld, a European immigrant with law degrees from Breslau and Milan, an LL.B. from Boalt Hall and an S.J.D. from Harvard Law School, wrote a series of articles discussing the French system of administrative adjudication and its relevance for contemporary calls for an administrative court system for the U.S.\(^{17}\) Likewise

Fritz Morstein Marx, who wrote whole series of articles in the late 1930s and early 1940s. Like Freund, Morstein Marx received a legal education in Germany, but unlike Freund, he did not receive a law degree in the U.S., nor did he practice law here, as Freund did. Thus although Freund tended toward the political science view of administrative law, he taught in a law faculty, and was firmly grounded in U.S. legal practice. Morstein Marx, on the other hand, taught in American political science and public administration programs, and at the same time remained more involved with developments in Germany. While Freund appears to have written only one significant work in German concerning U.S. law, Morstein Marx remained more a part of both worlds, not only reporting on German administrative law for the U.S. audience, but also reporting on U.S. administrative law for the German audience. He eventually returned to Germany, to take a position at the Deutschen Hochschule für Verwaltungswissenschaften in Speyer, a public research institute focusing on


\[119\] DAS ÖFFENTLICHE RECHT DER VEREINIGTEN STAATEN VON AMERIKA (1911)

\[120\] See, e.g., FRITZ MORSTEIN MARX, AMERIKANISCHE VERWALTUNG, Schriftenreihe der Hochschule Speyer, Band 15 (1963); Fritz Morstein Marx, Staatsaufsicht und Gemeindeverwaltung in den Vereinigten Staaten, Heft 17/18 DIE ÖFFENTLICHE VERWALTUNG 643 (1963).
public administration and administrative law.

On interesting development was that by the 1930s, conservatives, who opposed the expanding regulatory state and the idea of administrative law, had begun to champion the administrative court idea.\textsuperscript{121} By that time regulatory government had become an undeniable reality, which no opposition to “foreign institutions” was going to unmake. America then faced much the same debate it faces today: to what extent should administrative action, by definition taken by people with expertise in the matter, be constrained by concerns for separation of powers and the Rule of Law. Looked at in this way, being simply for or against an administrative court makes little sense. The answer will depend upon the position given to such a court within the institutions of government, as well as its powers/authority vis-a-vis those other organs. Thus conservatives in the 1930s called for an administrative court outside the executive branch, and with broad authority to review administrative, including agency fact finding.

Once the proposals an administrative court were defeated, and the APA adopted in 1946, comparative administrative law scholarship in the U.S. tailed off dramatically. Part of this was surely generational: Freund had died in 1932, and Goodnow in 1939. But perhaps more importantly, administrative law, political science and public administration, which had all been incorporated in the work of Goodnow, Freund, Garner and other early pioneers, had become distinct fields

\textsuperscript{121} George B. Shepherd, Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics, 90 NW. U. L. REV. 1557, 1565 (1996).
of academic endeavor, between which academic cross-over was rare. Within political science the field of comparative politics would have been the logical place for comparative administrative law studies, but like the rest of political science, comparative politics had lost interest in law and legal institutions. Likewise the discipline of public administration, which had developed into a field focused on the study of bureaucratic organization, behavior and performance, without much sustained focus on the role of administrative law as an important variable affecting these subjects of investigation. Thus, by 1959 a pair of articles in *Public Administration Review* on the state of the field in comparative administrative studies could completely ignore administrative law.\(^{122}\) But from that state of interest in comparison without an interest in law, by at least one account the field of public administration, after a spurt of comparative work in the 1960s, soon lost interest in comparison as well.\(^{123}\)

What also becomes clear is that what comparative work on administrative law that was being done was no longer central to the field of American administrative law, but was from then on peripheral, in part for the reasons that comparative law work is often peripheral: it either involves simple doctrinal


reporting on foreign legal rules or institutions, with no real effort at comparison or contrast, or it compares doctrines and institutions removed from their national contexts. That sort of work is of little use to practitioners, who tend to take Holmes' "bad man" approach to law and want to know what a foreign legal system will actually do with their clients' problems, or to post-Realist legal academics, for whom it is simply a given that a description of the formal norm structure tells little interesting about a legal system. Foreign administrative law was no longer central to domestic law reform debates, or to the thinking of most mainstream administrative law scholars, while the leaders of American comparative law scholarship, such as Rudolph Schlesinger and Arthur von Mehren, focused primarily on private law, though both included short sections on administrative law in their comparative law textbooks.\textsuperscript{124}

The notable exceptions were Bernard Schwartz, who followed French\textsuperscript{125} and English\textsuperscript{126} administrative law from the 1950s to the end of his career, and

\textsuperscript{124}\textsc{Arthur Taylor von Mehren and James Russell Gordley, The Civil Law System (2\textsuperscript{nd} edition, 1977) devotes over two hundred pages to French administrative law, but in contrast to the rest of the book, these sections are devoted exclusively to national legal doctrine, with no comparison attempted.}

\textsuperscript{125}\textsc{Bernard Schwartz, French Administrative Law and the Common Law World (1954).}

Louis Jaffe, who also devoted considerable energy to comparative research, though he tended to incorporate foreign law into his basic work,\(^{127}\) rather than reporting on foreign law, or writing self-consciously comparative exercises. This is especially true of English administrative law, but to some extent of French and German law as well. Schwartz and Jaffe aside, the most interesting work by Americans on foreign or comparative administrative law were studies that looked at an issue or institution as manifested in different legal orders. One prime example is the work of Kenneth Culp Davis, who followed up his classic *Discretionary Justice*\(^{128}\) with a volume of essays by foreign legal academics exploring similar themes in their own systems.\(^{129}\) A similar study was conducted by Walter Gellhorn, who in 1966 published an extensive study of ombudsman systems around the world.\(^{130}\) While the Davis and Gellhorn studies are important, no one would argue that their authors, or their readers, considered them central to U.S. administrative law debates in the way that earlier comparative work had been.

\(^{127}\) See, e.g., Jaffe, *supra* note 60.


\(^{129}\) DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (Kenneth Culp Davis ed., 1976).

The Gellhorn study of ombudsman systems contains a chapter on Japan, marking the fact that by the 1960s Japanese administrative law had become an issue in the U.S., not so much as a trade issue, as was later to be the case, but as part of the Japanese political and legal development in which America was so invested politically and strategically. The "area studies" initiatives in American universities influenced law schools, exemplified by the work Law in Japan: The Legal Order in a Changing Society, which contains a chapter on Japanese administrative law.\textsuperscript{131} Of particular note in this regard is the work of Nathaniel Nathanson (HLS S.J.D., '33), a leading U.S. administrative law scholar, who co-authored works on Japanese public law during the 1960s.\textsuperscript{132} Reports on foreign administrative law continued to appear through the 1960s and 1970s,\textsuperscript{133} but for the most part this era marks the point at which the U.S. became a self-confident


exporter of administrative law.

The English, largely because of their growing post-World War Two integration into Europe, and perhaps somewhat by chance, maintained a tradition of studying at least French administrative law, if not German. As has been discussed, Dicey's invocation of the Rule of Law against French administrative despotism and administrative law was politically charged, and E.C.S. Wade, who edited several editions of Law and the Constitution after Dicey's death, allowed French comparativist René David space in later editions to defend French Droit Administratif. Hamson's 1954 study, Executive Discretion and Judicial Control, remains the most thorough study in English of the Conseil d'Etat, and was intended by the author as a demonstration, contra-Dicey, that England had much to learn from French administrative law. Brown's initial French Administrative Law has evolved through several editions, and is still in active production.

Back in the U.S., with the exception of Bernard Schwartz, who continued

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135 See, Dicey, supra note 14.


to write on English administrative law until the end of his extraordinary career,\textsuperscript{138} comparative administrative law scholarship in the 1980s and 1990s remained very much on the fringes of mainstream administrative law, with most major figures in the field neither incorporating foreign or comparative insights into their work,\textsuperscript{139} as the pre-APA scholars had done, nor engaging in the "area studies" excursions of the 1960s and 1970s. At the level of political debate, meanwhile, foreign models were no longer seriously considered when Americans debated institutional reforms, certainly not French or German legal institutional arrangements.

What comparative work has been done since the late 1970s has been eclectic, but can be divided into two broad styles or approaches, both quite different from what had immediately proceeded them.\textsuperscript{140} What is interesting for purposes of this study is that both of these new camps seek to re-link administrative law with comparative social and political science, and with debates about how to understand politics and the State. To this extent they

\textsuperscript{138} See, e.g., Schwartz, \textit{Wade's Seventh Edition and Recent English Administrative Law}, \textit{supra} note 126.

\textsuperscript{139} Christopher Edley does consider the French \textit{Conseil d'Etat} as a possible solution to the failings he sees in American administrative law, though he ultimately concludes that the \textit{Conseil d'Etat} has not allowed the French to overcome essentially the same problems America faces. Edley, \textit{supra} note 61, at 240-245.

\textsuperscript{140} Foreign legal scholars writing on their own legal systems for the American audience would constitute a third group, but the approaches of these scholars tended to be traditionally doctrinal.
harken back to the originally comparative and State-focused approaches of Goodnow, Freund and the other founders of the discipline in the U.S.

One body of work is by American foreign law specialists writing on administrative law in the country of their expertise, in the "area studies" tradition. The fact that three of the main practitioners in this mode, John Haley and Frank Upham and Mark Ramseyer, all have expertise in Japan is probably not a coincidence, given the importance of Japanese administrative practice as a trade issue.\textsuperscript{141} For many years there were no really comparable "area studies" works on other countries, though since the mid-1990s similar works by scholars of Chinese law have begun to appear discussing administrative law in China.\textsuperscript{142} This "area studies" tradition generally approaches administrative law in the subject countries as a problem that needs to be solved, perhaps employing American models, and often does not appear to have higher theoretical aspirations. Subject countries have so far been quite limited, for the most part not extending to those countries whose administrative law systems so inspired our own, the French and the German.

A second important body of work in comparative administrative law is also linked directly to political and social science, but is issue focused rather than country focused. This school, which even more than the "area studies" writers

\textsuperscript{141} See Chapter Three, infra.

\textsuperscript{142} See Chapter Four, infra.
eschews doctrine to focus on politics and bureaucratic performance, could be termed the "comparative regulation" school. Operating at a somewhat higher level of generality, works in this group tend to focus on "regulation" as a phenomenon to be studied empirically and evaluated on some performance criteria. In this school one would find works such as Steven Kelman's study of occupational safety and health regulation in Sweden and the United States,\textsuperscript{143} David Vogel's work on comparative regulatory styles,\textsuperscript{144} Robert Kagan's work on "adversarial legalism" and regulatory government,\textsuperscript{145} James Q. Wilson,\textsuperscript{146} as well as Keith Hawkins' collection of articles on discretion by an international group of authors.\textsuperscript{147}

In terms of methodology, these works tend to fall on the fringes of the "law and society" rubric, though they have much in common with the general swing of

\textsuperscript{143} STEVEN KELMAN, REGULATING AMERICA, REGULATING SWEDEN (1981).

\textsuperscript{144} David Vogel, The 'New' Social Regulation in Historical and Comparative Perspective, in \textit{REGULATION IN PERSPECTIVE: HISTORICAL ESSAYS} 155 (Thomas K. McCraw, ed., 1981); \textit{NATIONAL STYLES OF REGULATION} (1986) (comparing environmental regulation in the U.S. and Britain). It is useful to note that McCraw in particular has been influenced by Alfred Chandler's approach to business history, which has often been applied comparatively, including in the work of Alice Amsden on South Korea. See ALICE H. AMSDEN, \textit{ASIA'S NEXT GIANT: SOUTH KOREA AND LATE INDUSTRIALIZATION} (1989).


\textsuperscript{147} \textit{THE USES OF DISCRETION} (Keith Hawkins, ed., 1991).
mainstream administrative law scholarship toward external, especially economic, critiques of agency performance as opposed to traditional doctrinal analysis.¹⁴⁸ In this group would be placed Susan Rose-Ackerman’s rejection of German administrative law as a solution to perceived problems in American administrative law,¹⁴⁹ as well as the only recent comparative work by a leading U.S. administrative law scholar, Edward Rubin’s 1997 study of bureaucratic discretion in the context of U.S. and German banking supervision,¹⁵⁰ which harkens back to Davis’ Discretionary Justice. Frank Upham’s efforts to put Japanese administrative law and practice into a more general theoretical framework¹⁵¹ fits comfortably within this group, and does Gerd Winter’s study of


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negotiation in regulatory relationships.\textsuperscript{152}

At the highest level of generality, with the most unabashed claims of universality, one finds a few recent works of comparative administrative law in the public choice/rational choice tradition of law and economics and political science. Though as yet quite small, this third school is likely to grow along with the influence of its underlying methodological approach. The leading example of this genre would be William Bishop’s \textit{A Theory of Administrative Law},\textsuperscript{153} which uses principal-agent theory to develop the “first positive theory” of administrative law,\textsuperscript{154} a theory that “applies equally to all the advanced capitalist democracies.”\textsuperscript{155} Ramseyer and Nakazato’s recent discussion of Japanese administrative law\textsuperscript{156} shares Bishop’s general tendencies, but is much less ambitious in terms of attempting to provide a general explanation for administrative law in general. A recent entry into this group is Tom Ginsburg,\textsuperscript{157} who focuses on Northeast Asia more broadly than Ramseyer, but without the


\textsuperscript{153} 19 J. LEGAL STUD. 489 (1990).

\textsuperscript{154} \textit{Id.} at 489.

\textsuperscript{155} \textit{Id.} at 490.


\textsuperscript{157} See, Tom Ginsburg, Comparative Administrative Procedure: Evidence From Northeast Asia, University of Illinois Law School, Law and Economics Working Papers Series No. 00-06 (September, 2000).
country-specific expertise.

The foregoing survey allows the following observations about comparative administrative law as an academic endeavor. First, the founders of administrative law in Germany, the U.S. and, ironically, in England, were all scholars of foreign law and foreign political systems, whose understandings of foreign systems were at the core of their administrative law scholarship, whether or not they would have identified themselves as comparativists. They were all consciously theorists of the state and of modern politics, suggesting that administrative law is political not merely in the sense of providing resources that can be utilized by various social actors and forces, but that administrative law in the modern state is deeply enmeshed with the very form of the political regime itself. Not surprisingly, then, major initiatives in comparative administrative law have often been associated with programs for fundamental social and governance reform; in most cases for reform, in Dicey’s case against. Unlike in the field of comparative private law, then, uncovering “politics” does not require the scholarly excavation of deep structures, or the imputation of motives to people who might profess to having been non-political scholars. For earlier writers like Stein, Gneist, Dicey, Goodnow, and Freund, administrative law was absolutely central to social and political life in the modern state, and with the possible exception of Freund, all of these writers articulated their broader social and political theories, either in their writings on administrative law, or in other published works. Later on comparative administrative law became less tied to
political science and involved more simple reporting on foreign systems, but recently, as administrative law scholarship has become reattached to political science and state theory, so as comparative work in the field. This is a welcome development.

B. Legal Family Scholarship

In addition to addressing comparative law generally, the scope of this study also implicates one of the particular preoccupations of academic comparativists over the past century; that is, to identify ‘families’ of legal systems, to which particular national systems may be assigned. The most obvious dichotomy has been between the Civilian and the Common Law families, but offered formulations have identified Germanic, Romano-Germanic, Romanistic, Scandinavian, Socialist, Islamic, Far Eastern, and other families of law.\(^{158}\) Although the practitioners of this legal family scholarship are not as reductionist as some might think,\(^{159}\) it is still not clear what the intellectual payoff

\(^{158}\) See e.g., KONRAD ZWEIGERT AND HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 63-75 (Tony Weir trans., 1987)(identifying Romanistic, Germanic, Nordic, Common Law, socialist, Far Eastern, Islamic and Hindu families); RENÉ DAVID AND JOHN E.C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 17-29 (1978)(identifying as primary the Romano-Germanic, Common law, and Socialist families, and as secondary the Muslim, Hindu, Jewish, Far East and Black Africa/Malagasy Republic families).

\(^{159}\) David and Brierley concede, for example, that “[t]he idea of a ‘legal family’ does not correspond to a biological reality: it is no more than a didactic device.” DAVID AND BRIERLEY, supra note 158, at 20.
from the exercise is meant to be.\textsuperscript{160}

Part of the problem is that mainstream comparativists focus on private law to the exclusion of public law, and part of the problem is that they try to assign in a taxonomic way entire legal systems, for all time, and on the basis of their internal "lawyers law" focus on positive law. But when they turn to the questions legal family scholarship is supposed to address, leading practitioners Zweigert and Kötz come up with the following:

"Can we divide the vast number of legal systems into just a few large groups (legal families)? How do we decide what these groups should be? And, supposing we know what the groups should be, how do we decide whether a particular legal system belongs to one group rather than another?"\textsuperscript{161}

These questions are only of interest to someone engaged in taxonomy, which the authors admit is their primary aim, but the point of the exercise is left unclear to the rest of the legal community.

What this study proposes to do is to avoid these problems by focusing on a single area of law, administrative law, and by creating a legal family for the particular purpose of creating a dynamic model for understanding past development and for predicting the path of future change. One might ask why even engage the traditional legal family scholarship, but it is hoped that the approach followed here will learn from the mistakes of the legal families

\textsuperscript{160} For an interesting critique of comparative law, including legal families scholarship, see William Twining, Globalisation and Legal Theory 174-193 (2000).

\textsuperscript{161} Zweigert and Kötz, supra note 158, at 63.
scholarship, while also contributing to the relevance of that tradition within comparative law.

As Lawrence Friedman has noted, "the classifiers, like taxonomists in biology and linguistics, single out certain basic or core features as diagnostic. The core features are then used to assign a body of law to this or that system. But the chosen diagnostic features tend to be internal to the legal system, and not chosen because felt to be important for how law functions."\(^{162}\) Although Friedman's critique is in many ways still valid, there are two exceptions. First, one important set of related approaches create legal families distinguished by non-legal criteria, that being Marxist or other economics-centered modelers, who create categories of "capitalist" or "market economy" legal systems. Such approaches may have escaped Friedman's critique because they are normally not employed by self-identified comparativists, or cast in the legal families jargon. But a wider view of legal families scholarship would include much of the writing of the Law and Development movements of the 1960s and the 1990s, which tend toward legal families thinking in creating categories such as "modern" or "market economy" to which they assign legal systems. Another example would be the work of Bishop, cited above, which creates what is in essence a legal family consisting of "all advanced capitalist democracies,"\(^{163}\) by which he means


\(^{163}\) Bishop, supra note 153, at 490.
the United States, Germany, France, and selected Commonwealth jurisdictions. An important new use of legal families relies on very mechanical application of civil law versus common law categories, but puts these to use as part of the new law and development movement.\footnote{A recent example, which contains references to other relevant literature, is Simeon Djankov, et al, Courts: the Lex Mundi Project, Harvard Institute of Economic Research Discussion Paper No. 1951 (March 2002) (arguing that in comparison to common law jurisdictions civil law countries are prone to procedural formalism, which hinders economic activity). A seminal article in this line is Rafael La Porta, et al., \textit{Legal Determinants of External Finance}, 52 \textit{Journal of Finance} 1131 (1997).}

Another instance of non-legal criteria being used to create legal families has occurred when traditional Western comparativists have encountered legal systems in Northeast Asia and other parts of the non-Western world, when they have often allowed culture and cultural difference to become the key distinguishing criterion. Culture often overwhelms traditionally legal criteria, but also overwhelms potentially important non-legal criteria, such as what particular Western law was imported by the country in question, the style of economic organization, or position in the global economic system.\footnote{David and Brierley, for example, organize their Far Eastern legal family around the claim that "[u]nlike Western peoples, those of the East do not see law as a vehicle for assuring peace and social order. Law does, of course, exist but it plays only a minor role; its function is subsidiary. . . . The maintenance of social order [in 'the East'] rests primarily upon persuasion, on mediation, the constant appeal to self-criticism as well as upon an attitude of conciliation and moderation." David and Brierley, supra note 158, at 475. Zweigert and Kötz construct their Far Eastern family on a similar cultural basis: "[i]n the West man naturally fights for his rights and seeks a clear decision, treating a compromise as a thing perhaps to be settled for, and in the East the fact-saving compromise is the ideal and a firm decision only a necessary evil." Zweigert and Kötz, supra note 158, at 72.}

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Although the fruits of "legal families" scholarship in comparative law have rightfully been questioned, one aim is this work is to propose and develop a rationale for creating legal families that may provide a more general model for comparative work. The grounding principle here is that comparative work should provide a means for testing theories about law, either about the internal workings of legal systems, or about the relationships between legal systems and other aspects of society. The second basic assumption is that the functioning and development of any legal system will be influenced by various factors, including i) the broader legal/political culture within which it is embedded, ii) its own internal logic, derived from its formal structure (legal materials and institutions), and iii) the instrumental goals of those who have the power to influence the shape of the law in any particular society. Accepting these basic positions creates the possibility for a new use of legal families in comparative law, in which legal families are created for particular pragmatic comparative projects, not on the basis of enduring essences, or for taxonomic tidiness. These three elements, political culture, formal structure, and instrumental aims, are not independent, however, but constantly refer to and are influenced by one another. One or more may act to influence another at a particular point in time, but that change will have consequences that reflect back on the other factors. To refer to an example discussed previously, American political culture and instrumental aims shaped the adoption of the APA in 1946, but once the APA became effective it in turn changed American political culture by changing people's
expectations about using law to challenge administrative action.

Rather than being inspired by the tradition of legal family scholarship within comparative law, then, this effort draws inspiration from the use of comparative research in the social sciences. An elegant argument for such work is contained in a short essay by German political scientist Fritz Scharpf.\textsuperscript{166} Charting a course between what he sees as the extremes of neoclassical economics, on the one hand, and cultural anthropology and sociology on the other, Scharpf argues that human beings must be understood as intelligent, having views, interests, and preferences of their own,\textsuperscript{167} but that most human action takes places within culturally and institutionally defined roles, a knowledge of which is indispensable for explaining that action.\textsuperscript{168} Given the importance of social, institutional context, a great virtue of national studies is that they allow the researcher to hold this context constant, and so long as the findings are not held out as having universal validity, but are admittedly valid for only for that context, spatial and temporal, this is perfectly valid. Studies that claim broader validity, however, must confront the problem of context, even if that means sacrificing universality in favor of "sometimes true" theory. Such a view of knowledge and

\textsuperscript{166} Fritz W. Scharpf, \textit{The Uses of Comparison in the Social Sciences}, in \textit{INTERNATIONALITÄT DER FORSCHUNG} 63 (Max-Planck-Gesellschaft Berichte und Mitteilungen, Heft 1/97, 1997).

\textsuperscript{167} \textit{Id.} at 66.

\textsuperscript{168} \textit{Id.} at 67.
social science presents a serious challenge to those interested in comparative law, however, because law must always be understood as embedded within a national institutional and cultural context, and because that context itself is made up not of isolated variables, but of complex and interacting constellations of factors. If mainstream comparative law is to answer the charge of theoretical sloppiness and disciplinary irrelevance leveled by its critics it must deal with legal phenomena within their broader context, but must also identify ways to do so without being completely overwhelmed by difference. Ideally comparative work can allow scholars to transcend the limitations of single-nation studies, and legal families can assist in this by facilitating comparison between national systems which do not vary, at least in relative terms, across all aspects of the cultural, institutional context.

The vision behind this proposal is in essence a quasi-scientific one of creating samples, isolating variables, and testing hypotheses. There are several important objections to this, but it is submitted that any comparative work that does not even attempt to deal with variables other than the legal rules or institutions themselves is hopelessly formalistic. Only a theory that denies external influences on law can focus on doctrine and institutions alone, but any theory that attempts to introduce non-legal influences must do so broadly, and must explain relative importance among influences, and must figure out ways to hold some constant and to assign priority among others.

Any identified legal family will be contestable and potentially impermanent,
but there will be two bases upon which to challenge a family. The first will be the
criteria used to identify the family, but as noted above the criteria will be
broadened out to include not only the origins of the formal law. The second
criteria for judging any proposed legal family will be by its usefulness: does it
allow us to say anything new about law in general, about law within the members
of the family, or does it provide a new and useful ways to test existing theories?

IV. Conclusion

This first chapter has been designed to establish a basis for an
American's venture into foreign administrative law, and to highlight the extent to
which administrative law has often developed through borrowing, both of foreign
legal forms, and of foreign political theory. What is clear, too, is that the
administrative law of a society goes directly to the core of governance, to the
relationship between the state and society. Comparative administrative law is
thus more obviously political than traditional comparative private law, and is
clearly "path dependent" in the sense that administrative law is intertwined with a
society's political institutions and practices, and thus not easy to change absent
fundamental political change. A venture in comparative administrative law that
did not at least try to take into account history, politics, and political culture would
therefore leave too much out. The next three chapters represent an exercise in
comparative law that attempts to keep much of this broader context in, while still
being sufficiently structured to generate meaningful generalizations.
Chapter Two: Importing and Appropriating Western Administrative Law

I. Introduction

Chapter One explained the broad scope of administrative law and legality addressed here, and discussed existing comparative scholarship on administrative law, and the need for a new approach. Chapter Two will begin with a proposal for a new approach to a “family” of administrative law systems (Part II), followed by an application of these ideas to Japan, South Korea and China (Part III). The initial focus will be on the three factors - political culture, formal law, and instrumental aims - as they existed in the mid to late nineteenth century Northeast, prior to efforts to adopt Western administrative law. That will be followed by a discussion of the initial decades of adoption, applying the same factors of analysis (Part IV).

II. Proposal for an Administrative Law Family

This study addresses the challenges to existing comparative law scholarship by presenting an administrative law family consisting of Japan, South Korea and Taiwan. These countries will be looked at through three variables

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which have affected administrative law elsewhere, with the goal of developing a
heuristic for understanding, in highly stylized form, the relationship between: an
existing political culture along specific dimensions that have been shown to affect
the adoption of administrative law (II.A.); the formal structure of the adopted
administrative law and institutions (II.B.), and the instrumental aims of those with
the power to affect the development of the administrative law (II.C.).

A. Political Culture as Cultural Commitments

"It is perhaps still a question whether philosophies create movements in
the outer world, or whether they only reflect or follow these movements[.]"¹

Kocourek’s question cannot be answered in the abstract, and if political
culture is not to become a catch-all explanation to reach for when all else fails, it
must be studied as ideology is studied, both as a force that shapes actions and
beliefs, and as a reflection of “movements in the outer world” that can be used,
manipulated, and misrepresented in pursuit of particular aims. Political actors
are situated inside particular political cultures, which shape their beliefs and
attitudes, as well as the beliefs and attitudes of their relevant public, but they are
also able to treat political culture as a tool, drawing on elements of it for
instrumental purposes. Political cultures are not monolithic, but should be seen

¹ Albert Kocourek, Introduction to RUDOLPH VON JHERING, THE STRUGGLE FOR LAW,
vii, xx (1879, John J. Lalor, trans., 1915).

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rather as consisting of continuing dialogues or debates over political issues seen as central in the particular society, so that political culture really refers to the range of arguments that are considered relevant, legitimate and persuasive, and the style in which such argumentation takes place. Seen in this way, political culture should be expected to change over time, and as the pace and depth of exchanges between societies increases, the potential for rapid changes in political culture increases.

If we assume that political culture influences legal development by setting even fuzzy limits on the range of legitimate legal institutions, arrangements or arguments, then it becomes plausible to hypothesize comparatively about how administrative law regimes may be affected by different political cultures. No two political cultures are identical, but there are similarities among certain societies based on shared historical circumstances. A political culture may point toward a certain outcome because it contains a positive prescriptive consensus that favors that outcome, such as where all positions represented in a political culture explicitly support a particular institution. An example of this might be the broad anti-positivist support for natural or fundamental rights across the American political spectrum, despite the fact that the content of those rights is rigorously contested. But a political culture may favor certain outcomes in a less obvious way, by tacitly acquiescing in a certain pattern of practices without in the main explicitly advocating such practices. A new formal legal institution that explicitly or implicitly supports those practices should thus be more welcome within the
political culture, as it will not need to work any major change in that culture in order to be implemented.

Political cultures can perhaps best be compared in terms of how they interact with specific legal institutions or regimes, and administrative law occupies a unique position in any attempt to understand the relationship between law and political culture. Administrative law in the sense articulated here addresses the means by which governance is carried out, but controlling the means of governance will also affect which ends can be pursued. Administrative law is then inextricably bound up with politics and governance, so as administrative law develops in a society, whether through transplants or through indigenous development, both the formal law and its application in society will be effected by, and will in turn effect, political and legal culture.

In order to reduce the concretize the idea of political culture, this study attempts to identify a set of commitments which can be held to varying degrees by a political culture, and to identify how such commitments have affected the implementation and functioning of administrative law in Western societies in which administrative law in the modern sense developed.\(^2\) The commitments

\(^2\) Though I began this study with the understanding that any area of law will be affected by the political culture in which it operates, I am indebted in particular to the writings of Todd Rakoff, and Jerry Mashaw and David Harfst, for their explorations of American political culture in relation to American administrative law. See, esp., Rakoff, Chapter One, supra, note 78; Rakoff, Chapter One, supra, note 85; Mashaw and Harfst, Chapter One, supra, note 85; Jerry L. Mashaw & David L. Harfst, *Regulation and Legal Culture: The Case of Motor Vehicle Safety*, 4 YALE J. ON REG. 257 (1987).
identified below are invoked as a way to approach how political or legal culture might affect a particular body of law, avoiding offering a totalistic picture, and without making claims so general that they say little or nothing about how a particular area of law might develop. Some of these commitments will cut across many different areas of law. For example, a commitment to judicialized justice will affect administrative law, but will also affect tort law if an attempt is made to replace individual trials with a more bureaucratized compensation system.

1. Commitment to Democratic Participation

The first commitment identified is to democratic participation in state administrative action, meaning not simply de facto influence by the private sector on policy making and implementation, but the public recognition of a legal entitlement to participation as a right of citizenship. Such participation can be achieved through a parliamentary system with strong ministerial responsibility to the legislative branch and with strong ministerial control over the career bureaucrats. In a presidential system the issues will be different, with democratic influence possible through the elected chief executive as well as the elected legislature. If independent regulatory agencies exist, they will pose particular problems for democratic participation, though members could be elected. Courts can enforce democratic, or at least pluralist input, even if statutory law doesn’t provide for it, so long as courts are committed to the goal, and either
independent, or conforming to the desires of those with power to control the
courts.

The commitment to democratic input in regulatory norm creation is
probably inevitably in conflict with expertise-based justifications of administrative
autonomy in rule making or policy formation. This is particularly true to the
extent that the claim for democratic input is based on a claimed right of self-
governance, as opposed to a claim for democratic input to supervise the
administrative body. If the claim is simply that democratic input is necessary to
police the administrative body, or to provide information from the private sector
that will result in better policy, then such pragmatic goals might be achieved by
other means, such as more stringent bureaucratic supervision, or the hiring of
more experts. In the American context a stronger claim is important, a claim for
actual participation, and for the value that has independent of whether one's
general interest may also be represented through the elected legislature and/or
the elected executive that also oversees the administrative body. It is true that
this desire for direct participation could be seen as based on a distrust that
representation via the elected branches is effective, but it seems to be more than
that. Through notice-and-comment rulemaking, and through elected
commissions in many administrative settings, America's administrative law
culture manifests a clear commitment to creating and enforcing avenues for
those who wish to participate in norm creation by administrative authorities. The
courts, by requiring administrative rule makers to address issues and evidence

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raised in the comments they receive, display a commitment to making what could be a simply pro forma exercise, a symbolic act, into actual participation.

In the U.S. the demand for democratic control over agency rules, while also wrapped in conflict between the President and Congress, is exemplified by the system of White House review of agency rulemaking, which has been supplemented since 1996 by Congressional review. In the U.S. context the strong commitment to democratic input and review is supported by two basic ideas about administrative governance. First, that democratic input in the form of Presidential and Congressional elections is insufficient because the statutes that Congress enacts delegating administrative tasks to the agencies are too general to adequately control agency activities, and second, that governing agency behavior through internal discipline and an administrative ethos to pursue the "public interest" is far too diffuse to prevent agencies from either being actively captured by the interests they are chartered to regulate, or from simply becoming oriented toward that industry and its interests. As discussed in Chapter One, pluralist administrative law is in part a response to the conviction that the existing administrative law did not sufficiently satisfy this cultural commitment to public

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3 The White House Office of Management and Budget (OMB) reviews certain agency-made regulations pursuant to Executive Order, a system that dates from the Carter administration. The Executive Order presently in force is Executive Order 12866.

4 See, 5 U.S.C. §801 et seq.

5 See, Chapter One, supra, notes 85 to 95 and accompanying text.
participation.

2. Commitment to Public versus Private Ordering

A second commitment that is particularly important for understanding administrative law, especially in economic governance, is a society's commitment to public or state ordering of society, as opposed to ordering by some other means, whether by alternative institutions such as the church, by social norms, or by the market. In Western history there have been several substantial challengers to the idea of ordering by a single omni-competent sovereign, but most importantly for recent developments in administrative law has been the idea of private ordering through the market. Regulatory government exists to address societal problems, and at least since Adam Smith and his contemporaries the West has been influenced by the argument, put forth by influential thinkers, supported by influential segments of society, and adopted by individual politicians or whole parties, that many, if not most, problems are best addressed by allowing private interest to reign. Against this strong ideological commitment to governance via the "invisible hand," public regulation of the economy has come to be justified primarily on "market failure" arguments, which are then countered with examples of "government failure."^6

3. Commitment to Separated Powers

A third dimension along which a society can be said to display a commitment is with respect to separation of powers, the separation and assignment to different state authorities of legislative, judicial and executive functions. Related to this is a societal commitment to judicial independence. In the West this commitment has been strong, though interestingly it has been invoked to justify different results with respect to judicial review. Thus the classic Continental position was to invoke separation of powers to explain their system of creating court-like bodies within the executive branch, rather than ordinary courts, to review actions of the executive branch. In England and the U.S. separation of powers ideology has provided a strong check on the combining of legislative, adjudicatory and enforcement powers in single administrative bodies. Although criticism has not stopped the practice, U.S. administrative law responded by making agency adjudicatory decisions more court-like, both through judicialized procedure and through insulation of agency adjudicators, the administrative law judges, and by making agency rulemaking activities more like the legislative process.

4. Commitment to Governance by Rules versus Discretion

A fourth area of commitment affecting administrative law is the
commitment to government decision making according to rules as opposed to expertise or discretion exercised by government functionaries. Cabining the discretion of bureaucratic actors through the construction of a framework of justiciable rules has been probably the central objective of administrative law as it has developed in the West, whether in nineteenth century Germany of the Rechtsstaat, or in the Anglo-American world. This was true before the Western nation states were democratic, so this commitment to rule-bound bureaucracy does not reflect simply the desire of citizens in a democracy to exercise sovereignty over the state apparatus. The West's counter-point to rules, the tradition of equity that has been elaborated at least since Aristotle, has seldom been put forth as a power to be held and exercised by the bureaucracy, as opposed to the courts. Arguments based on agency expertise, on the analogy of regulatory governance to the running of a business, or on the need for individualized treatment are not lacking, but they are invariably countered by the arguments demonstrating the continued power of the rule-based governance ideal.

5. Commitment to Legally Demarcated Public and Private Spheres

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7 See, Paul Vinogradoff, Common-Sense in Law (1914).

8 See, Landis, Chapter One, supra, note 67, at 23-24.

9 See, Id. at 10-12.
A fifth, and final, cultural commitment that affects administrative law and regulatory government is a commitment to the ideal that there should exist a clear line of demarcation between the state and society, and that this line should be defined by law and policed by independent courts. This commitment implicates several other commitments. It implicates the commitment to governance by rule versus governance by discretion, since to the extent government actors have discretion to intervene in society, the boundary between state and society is no longer demarcated by clear rules. It also implicates the commitment to a separation of government powers, as models of how such a commitment can be carried out usually center on an independent judiciary to enforce the rules creating the demarcation. Finally, it implicates the commitment to the predominance of either public or private ordering, as models that celebrate private ordering, even if they include a role for the state as the creator and protector of the private rights and duties with which private ordering is carried out, envision a state limited by law to that role.

American political culture is deeply committed to this ideal, and administrative law has been a central arena in which the battle has been fought. One lesson to take away from the Supreme Court’s striking down of the National Recovery Administration and similar New Deal experiments, besides the lesson that even in its most corporatist experiments America seems unable to escape
its ideal of rule-bound government,\textsuperscript{10} is that American political culture balks at extending the role of the state beyond regulation, and into the business of actively organizing and promoting business.\textsuperscript{11}

B. Formal Legal Structure: Sources

In addition to being influenced by broader political cultural commitments, the path of administrative law in a society is influenced by the laws own structure, logic and history. The formal legal structure includes both the materials of the legal system, or the particular area of law being studied, and the institutional arrangements through which law is created, interpreted and enforced. This formal structure presents itself as having an inner logic or coherence, justifying the disparate elements of which it consists, and designed to guide gap-filling when necessary. Borrowed legal institutions are normally be accompanied by what could be called a superstructure that developed with them in their home society, and once a path has been selected, meaning rules, institutions, arrangements, along with the accompanying superstructure, change

\textsuperscript{10} In comparison to the corporatist relationship between business and government characteristic of the Northeast Asian “developmental state,” the NRA envisioned a highly legalistic process. On the NRA generally, see DONALD R. BRAND, CORPORATISM AND THE RULE OF LAW: A STUDY OF THE NATIONAL RECOVERY ADMINISTRATION (1988).

\textsuperscript{11} Rakoff, Chapter One, supra, note 85, at 160.
becomes much more unlikely than one would expect. Economists such as Douglass North have discovered what historians like Alan Watson have known about law for decades — that there is a good deal of history behind any initial "transplant," and that once a choice is made it may persist for decades, or centuries, because it serves some important constituency, or because as Watson demonstrates, nobody bothers to really think about alternatives.\textsuperscript{12} In either case — whether because of functionality or benign neglect, origins matter.

C. Instrumental Aims

The third factor identified here is instrumental aims, and there are two related questions that must be addressed in this category: i) who has the power to influence the shape and functioning of a legal order, and ii) what are those individuals or groups seeking through that influence. This category thus covers issues of formal institutional design as well as questions of power, and focuses on identifying who can actually influence the legal order, and what they are trying to accomplish. The goal is to open up avenues for comparison that might be foreclosed by an inquiry based on more a priori assumptions about functions and demand. It is true, for example, that societal demand must exist in order for

\textsuperscript{12} For North, see \textsc{Douglass C. North, Institutions, Institutional Change, and Economic Performance} (1990). For Watson, see \textsc{Alan Watson, Legal Transplants: An Approach to Comparative Law} (1974).
rights provided by positive law, or for "natural" rights for that matter, to become deeply enmeshed in a social system. This is simply a restatement of Jhering's observation that,

"[t]he reality, the practical force of the principles of . . . law, is proved by the assertion of concrete legal right; and as, on the one hand, the latter receives its life from the laws, it, on the other, gives back life to the laws; the relation of objective or abstract legal right and subjective or concrete legal right is the circulation of the blood, which flows form the heart and returns to the heart."\(^{13}\)

But without at least attempting to identify and study social forces and what they are actually seeking from the legal system, one is prone to potentially misleading generalizations, such as that the holders of wealth in a society are inevitably going to provide demand for the Rule of Law.\(^{14}\) An additional goal is to facilitate inquiries into power and its exercise that are the particular concern of political science, but to do so within a framework that accords a more central role to law and the legal order.

As was noted above, the three foci for comparison identified here, political culture, formal legal structure, and instrumental aims, define and are defined by one another, and tend to be contested within legal orders. They should be understood, therefore, as being constantly evolving through mutual interaction. Having outlined above a set of criteria of a administrative law family, the

\(^{13}\) Jhering, supra note 1.

\(^{14}\) On the demand problem in transition societies, see Ohnesorge, Chapter One, supra, note 1.
following section applies those criteria to argue the appropriateness of studying Japan, South Korea and Taiwan as such a family. The best way to test the usefulness of the proposed approach to legal family building will be to go through the exercise, then see whether it yields conclusions that could not be reached and tested in a better way.

III. Japan, Korea and China on the Eve of Importation

There are several reasons for focusing on Japan, South Korea and Taiwan as a family, and keeping comparisons to the U.S., Germany, or other Western nations in the background. First, although these societies by no means share a common past, there are important similarities in their dominant political cultures and public philosophies that arguably have been important for the development of economic governance and administrative legality there. Second, these nations were all highly influenced by the German administrative law tradition, from the initial adoption of administrative law statutes in Meiji Japan, until today. Third, these three nations faced similar challenges as ‘late’ economic developers, and they responded to these challenges in broadly similar ways – ways that implicated administrative law and economic governance. This was neither an accident, nor was it preordained by the cultural background. Rather, countries in Northeast Asia have been involved in a conscious process of comparison and borrowing in the areas of law and governance for decades,
and this continues to this day under the pressures of economic globalization.

A. Political Cultures: Commitments

In arguing for the usefulness of a limited legal family approach for exploring the development of administrative law in Northeast, one of the main assertions was that the dominant political cultures in Japan, China and Korea at the time Western law was imported contained certain strands – commitments – that one would expect to affect the adoption and functioning of the imported administrative law forms.

Despite the dangers of arguments based upon political culture, noted above, it is quite clear that political culture does affect the development of administrative law in a society. The task then is not to dismiss political culture as an object of study, but to use it sensibly. As was argued above, one way to do this may be to identify how political culture has affected the development of administrative law elsewhere, and from that to extract a set of working assumptions about how another political culture is likely to interact with administrative law. The approach to comparing political cultures proposed here centers on the idea of a set of commitments which cultures display, along specific dimensions, and which are often seen as having affected administrative law in the West. The claim is that such commitments exist prior to any new administrative law innovation, though they themselves are intimately related to
the existing legal and political order, and are not simply free-floating cultural ideals.

Political culture is potentially important in two ways during the creation of a radically new legal order. First, as providing a set of ideas, a common sense, against which potential new institutions are evaluated, both by those who will propose the reforms, and by the public to which the reforms are presented. Second, as providing a set of arguments which may be invoked for or against the new legal institutions as they perform over time. This type of approach is especially appropriate with respect to the countries studied here, which not only have long and sophisticated national histories of thinking about governance issues, but which have also been involved in a complex relationship of institutional borrowing and intellectual cross-fertilization for probably close to two thousand years. In examining political culture and its relationship to administrative law in Northeast Asia, it will be appropriate to examine traditional legal systems, just as it was in identifying salient commitments of political culture that affected administrative law in the West. Those commitments, to recap, were to 1) popular participation in governance, 2) public over private ordering, 3) governance by rule as opposed to discretion, 4) separation of governmental powers, and 5) legally demarcated public and private spheres.

1. Commitment to Democratic Participation in Governance
As discussed above, strong societal commitments to democratic input in law creation are reflected in the administrative law regimes of the West. With respect to the quasi-legislative activities of unelected administrative bodies, opportunities for civil society participation, whether through notice-and-comment rulemaking, through advisory committees, or through negotiated rulemaking, are justified in part as alternative means for civil society to participate in the creation of the norms by which it is governed. Thus in addition to possibilities for democratic control through election of Congress and the President in the U.S., or through parliament in the parliamentary systems, Western administrative law systems have adjusted to allow at least some public input “from below” into the creation of administrative regulations. While such input can serve as a source of information to regulators, thus facilitating substantively better regulations, it is clear that democratizing administrative rulemaking has been an important objective as well.

None of the Northeast Asian societies considered here demonstrated in their traditional political cultures any commitment to the idea that individuals, or civil society groups, either possessed an inherent, natural right to participate in deciding the laws that governed them, or that such an individual right to self-government was desirable. Western ideas about democracy arrived in Northeast Asia not long before administrative law itself was imported, so there was no strong demand on administrative law to assist in democratizing regulatory government.
There are two important ideas that are commonly raised as examples of progressive currents in traditional East Asian political thought, namely the admonition that the welfare of the people must be the primary end of government, and the related notion of a “mandate of Heaven” that can be lost by an unjust ruler, which may either retrospectively explain popular revolts,\(^\text{15}\) or more controversially, constitute a right to revolution.\(^\text{16}\) These traditional philosophical positions were not formulated in terms of political rights to participate in rule creation, however, and there is no evidence that traditional governance practices were more progressive than the political philosophy in establishing anything comparable to a right to democratic participation, to be exercised by individuals, or by groups. As the early Chinese reformer Liang Chi-Chao said of the Chinese political tradition,

"Lincoln's definition of democratic government, 'of the people, by the people, and for the people' is in part within the thinking of Chinese philosophers. 'Of the people, and for the people,' are essential to their thought. But 'by the people' is a thought left untouched."

Applying modern categories to traditional Northeast Asia, it seems that

\(^\text{15}\) This idea, which can be restated as a claim that an impersonal "heaven" provides standards against which a government's rule will be judged, appears as early as the Western Chou (1122-771 B.C.). Herlee Glessner Creel, Legal Institutions and Procedures During the Chou Dynasty, in Essays on China's Legal Tradition 26, 29 (Jerome Alan Cohen, et al. eds., 1980).

\(^\text{16}\) The idea that Chinese political culture asserted a right of revolution is typically traced to Mencius (371-289 B.C.).

\(^\text{17}\) CHI-CHAO LIANG, HISTORY OF CHINESE POLITICAL THOUGHT 10 (L.T. Chen trans., 1930).
political culture promised expert, rather than self-governance, so that instead of a commitment to democracy, to self rule, the commitment was to rule by expert, and to meritocracy. This provides a related dimension along which societies might be compared with reference to administrative law and modern regulatory governance. In the Chinese, Korean and Japanese political traditions one finds a deep and abiding commitment to the desirability of rule by meritocracy. Ho Ping-ti traces the emphasis on merit governance in the Chinese tradition to a basic antithesis faced by the Confucian, Legalist, and other early philosophical schools: a common belief that society is naturally stratified and hierarchical, with at least a clear distinction between the rulers and the ruled, had to be reconciled with the belief that the inherent unfairness of such a society had to be mitigated if it were to survive. The way to mitigate the unfairness was to create avenues for upward social mobility through the examination system, the merit-based avenue into the upper echelons of society. In the absence of a democratic right to elect one's rulers, the merit-based bureaucratic ideal appears as a natural alternative, as the alternative of private ordering had limited currency. The Chinese examination system, the institutional manifestation of the cultural commitment to rule by expert, and to meritocracy, assumed a basic form in the Tang dynasty that lasted until the end of the imperial system, in 1911. Japan imported the Chinese examination system of the Tang dynasty during the Taika

18 Ping-ti Ho, The Ladder of Success in Imperial China 1-2 (1962).
reforms of the mid-7th century, and Korea too adopted the Chinese examination system and the promise of government by expert.

Of course to modern sensibilities the promise of government by a truly meritocratic bureaucracy, which would provide a “right” to participate in government for those able to succeed in the entrance competition, is no substitute for democratic participation. In a political culture in which popular democracy was not on the menu of potential governance options, however, the ideal of a meritocratic bureaucracy must have been a powerful legitimating force for regimes that appeared to be following the ideal, and a powerful source of critical leverage against regimes seen as violating the ideal. To someone culturally “inside” this political tradition, a demand to participate in government as a general right of any adult member of society might have felt as unsettling as a claim in modern America of a right of a physically disabled person to participate in a competitive college sport. When a society expects merit to rule in an arena of social life, rights discourse makes sense, if at all, when applied to the

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19 ROBERT M. SPAULDING, JR., IMPERIAL JAPAN’S HIGHER CIVIL SERVICE EXAMINATIONS 1 (1967).


21 Another example might be the defense by some U.S. law professors of the institution of the law review, who fear that arguing for participation in terms of rights, instead of limiting critique to making sure that merit is fairly and accurately ascertained, will undermine the entire edifice. See, e.g., ARTHUR T. VON MEHREN, LAW IN THE UNITED STATES 27-28 (1988).
establishment and administration of the system for determining merit. In the
Northeast Asian political culture, governance was such a sphere, where
violations of the meritocratic ideal often provoked heated criticism, but where
participation was not understood as a right.

2. Commitment to Public Over Private Ordering

"The question was not whether the state was responsible for the
economic order but how deliberately, explicitly, and on what scale it
should intervene to maintain economic order."^22

Political cultures may also vary according to the extent to which they are
committed to either public, meaning state, or private social ordering. Part I of
this Chapter chronicled ways in which commitments to private ordering have
provided critics of administrative government in the West with an alternative to
social ordering via state regulation that is at least superficially plausible. This is
not to say that Western societies are committed to private ordering, only that
prominent strains in Western social thought champion private ordering as more
effective than public regulation in furthering the public interest, and as better
protecting individual liberty, an ultimate political value. Particularly in the U.S.
and England, where regulatory government lagged behind industrialization,

^22 Thomas A. Metzger, The State and Commerce in Imperial China, Franz
Oppenheimer Memorial Symposium, Paper No. 10, Hebrew University of Jerusalem,
Israel, 7-8 May, 1969.
theories of private ordering were employed by those who opposed the original rise of regulatory government in the late nineteenth century,\(^{23}\) and those who led the deregulatory movement that began in the late 1970s and became ascendant in the Thatcher-Regan era of the 1980s.

In contrast to this Western tradition of holding out private ordering as a positive alternative to state regulation, political cultures in Northeast Asia were far more dedicated to public ordering, with political theory being addressed primarily to the perfection of public governance. This is true of the centralized political systems of China and Korea, as well as the hybrid system of Tokugawa Japan,\(^{24}\) in which both the central bakufu government and the governments of the individual domains had lawmaking power.

It is important to note, however, that although they never championed private ordering as a positive alternative to public regulation, Northeast Asia's political and economic thinkers recognized many centuries ago the power of markets and of individual self-interest, and the need for a wise government to take these into account in designing policy.\(^{25}\) Thus the contrast between East


\(^{25}\) See, William T. Rowe, *State and Market in Mid-Qing Economic Thought*, 12(1) *ETUDES CHINOISES* 6 (printemps 1993) ("If Qing China produced no economic theorist to
and West is not so much in the recognition of self-interest as a force of which public regulation had to take account; the contrast is rather in the extent to which, by Northeast Asian standards, important Western thinkers made a virtue out of necessity. Despite centuries of sophisticated thinking about economic governance, including discourses recognizing the importance of markets and individual self-interest, one searches in vain for the argument, so powerful in the West, and so central in Western debates over regulatory government, that the net result of individuals pursuing their private material interests will be superior to any outcome that could be achieved through enlightened public ordering. In short, while recognizing the power of markets and market behavior, the East Asian political tradition never raised market ordering to a normative ideal such as one finds in West, particularly in the Anglo-American tradition.

Although the decision to identify political-cultural commitments that have influenced administrative law in the West in a sense may establish the Western tradition as the norm from which Northeast Asia may or may not deviate, Northeast Asia's lack of ideological or political commitment to private, market ordering can just as easily be described in reverse: as Northeast Asia demonstrating a consistently stronger commitment to public ordering, and to the

identify an abstract notion of 'the market' as the invisible hand restoring price equilibrium, the regularity of such a mechanism was nevertheless widely understood.

See also, Metzger, supra note 22, passim. On Korea, see JAMES B. PALAIS, CONFUCIAN STATECRAFT AND KOREAN INSTITUTIONS (1996), and JAMES B. PALAIS, POLITICS AND POLICY IN TRADITIONAL KOREA (1991).
possibility of successful governance in the public interest based upon enlightened rule by an expert elite. Particularly in the U.S., claims for the possibility of expert, active governance have had consistently to contend with counter-arguments that government intervention not only could fail, but that even at its best it could not produce better substantive outcomes that the "invisible hand" that seemed to create order out of self-interested behavior.

The Northeast Asian cultural commitment to public over private ordering should be considered in tandem with the region’s commitment to meritocratic bureaucracy, discussed in connection with the lack in traditional Northeast Asian political theory of a commitment to democratic participation in government. Public ordering can only be justified if those exercising public power have some claim to legitimacy, and if they are not chosen by the populace the other obvious source of legitimacy is expertise.

3. Commitment to Governance by Rule Versus Discretion

A third commitment of political culture important to understanding administrative law in the West is the commitment to the ideal of governance through the application of rules, rather than via the exercise of discretionary authority to simply govern. As discussed previously, political culture throughout the West manifests a deep and continuing commitment to the ideal that State may only interfere with individual liberty and freedom of action if the State is
acting according to rules formulated and made public in advance of state action. Reconciling this core Rule of Law aspiration with the aspiration to govern important spheres of social life through interventionist regulation has been difficult, and administrative law in the West has been shaped in important ways by the felt need that regulatory government should also be government by rule. The resonance in Western political culture of this call for rules-based governance creates space for arguments from principle against public initiatives associated with regulatory governance, such as Friedrich Hayek’s Rule of Law argument against economic planning and distributive justice.26 The point here is not that Hayek was wrong, either politically or in arguing that central planning is incompatible with his Rule of Law. Rather, Hayek provides an important example of how policy arguments can draw legitimacy from values and symbols in background political cultures, which thus help shape both the range of policy options, and those most likely to be adopted.

The Northeast Asian tradition differed fundamentally from Western political culture in terms of a commitment to governance via rule versus discretion,27 though this difference has been overstated in the service of


27 The jurisprudential question of whether, or to what extent, Western judges or government actors exercising quasi-judicial powers are controlled in their decisions by the rule structure will not be addressed here. The cultural commitment exists, and has influenced the structure of administrative law in the direction of rule-based governance, regardless.
arguments that seek to draw a fundamental distinction between law in East and West. Describing traditional China, for example, Peter Corne claims that "[e]ven where the codes were applied by magistrates, they were simply treated as guidelines to be applied in accordance with the 'concrete situation.'” Corne makes this claim as part of an argument that even today Chinese rule enforcers ("regulators") are predisposed to particularism, to the "application of norms according to the circumstances existent in a particular locality," to the "application of rules, not as a general standard, but according to the unique features of each case." Corne presents this *gemeinschaft* approach to law as the antithesis of law in "modern" societies, which, following Talcott Parsons, and Max Weber before him, is seen as constituting a "general legal order," differentiated and autonomous from other social spheres and forces, and

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29 Id.

30 Id.

31 From the distinction developed by Ferdinand Tönnies between *Gemeinschaft*, or community, and *Gesellschaft*, or society. See, FERDINAND TÖNNIES, COMMUNITY AND SOCIETY (C.P. Loomis, trans., 1957).
consisting of universal, highly generalized legal norms, applied mechanically.\textsuperscript{32}

Though Corne does not cite Henry Maine, the modernization trajectory he adopts echoes Maine’s status-to-contract evolutionary scheme, with 1990s China still struggling to join what Maine termed the “progressive societies.”\textsuperscript{33}

It is not clear, however, that this is an accurate picture of how rules functioned in traditional China, or elsewhere in Northeast Asia.\textsuperscript{34} Northeast Asian society was saturated with rules, and there is voluminous evidence to suggest that in making decisions government functionaries were expected to find the applicable rule, and apply it correctly. Although still fragmentary, the growing body of evidence from China’s first dynasty, the Qin (221-210 B.C.), suggests that “officials were themselves bound by a rigid code that circumscribed capricious decisions. [The various sources] demonstrate that in some documents law, not the will of the ruler or his officials, ideally guided government in early China.”\textsuperscript{35} Although the Legalists are distinguished for this emphasis, it seems to be much older:

“All those who are insubordinate should be greatly regulated. . . how much more then . . . the administrators and various minor officers. When they depart [ from the course prescribed for them] and promulgate innovations

\textsuperscript{32} Corne, \textit{supra} note 28, at 13-14.

\textsuperscript{33} See, \textsc{Henry James Sumner Maine}, \textsc{Ancient Law} 98-100 (Everyman’s Edition, 1917, 1861).

\textsuperscript{34} Corne, for example, extends his claim to traditional Japanese governance. Corne, \textit{supra} note 28, at 49.

\textsuperscript{35} Turner, Chapter One, \textit{supra}, note 4, at 91.
... you should speedily in accord with justice, put them to death."\textsuperscript{36}

With respect to later regimes, on which more evidence exists, this emphasis on orderly government through rules becomes more clear. Thus, for example, an aspiration underlying the seventh century Tang Code was that

"once the magistrate had an understanding of all the facets of the case, he had no leeway in sentencing; the exact sentence provided by the Code had to be given. Thus throughout the empire a particular crime would be met with precisely the same punishment."\textsuperscript{37}

And with respect to the Qing dynasty it is established that political elites were aware that such governance "constituted a government by \textit{fa}, laws, systems or methods, which neutralized the Confucian claim for government by men."\textsuperscript{38}

However, "they were not willing to give up their regulations: as the Yung-cheng Emperor put it, 'I say there is government by men \textit{and} government by regulations.'\textsuperscript{39}

This aspiration may have been motivated by the universal desire of a sovereign to control the bureaucracy, rather than to provide predictability and certainty to the populace, and it is argued that some rulers were motivated by cosmological theories demanding that once cosmic balance had been affronted

\textsuperscript{36} Creel, \textit{supra} note 15, at 30 (quoting the "Announcement to K'ang," by King Wu of the Chou Dynasty).


\textsuperscript{38} JOHN R. WATT, \textit{THE DISTRICT MAGISTRATE IN LATE IMPERIAL CHINA} 18 (1972).

\textsuperscript{39} \textit{Id.}

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by the commission of a crime, restoration of that balance could only be accomplished if the precisely correct punishment were imposed.\textsuperscript{40} Whatever the impetus, however, the extent to which Northeast Asian political theory and practice were committed to rule-based, and rule-bound, governance should not be underestimated.

As with the commitment to public ordering, the attitude of Northeast Asian political culture against governance by rule alone should be considered in tandem with the traditional ideal of a meritocratic bureaucracy. Certainly the deal that government actions affecting individual rights take the form of rule application, whether speaking of judges or of administrative actors, is based upon a judgment, perhaps only implicit, that the mischief caused by blind, mechanical rule application is less than the mischief that will follow if government actors are left more free to govern through the application of judgment, rather than to adjudicate.\textsuperscript{41} And "[d]espite historical differences, the 'Rule of Law,' 'Rechtsstaat,' and 'Etat de droit' share a common concern for the control of

\textsuperscript{40} Derk Bodde calls the process by which law incorporated this ideal the "naturalization" of law. \textsc{Bodde and Morris, Law in Imperial China} 33-34 (1967). See also Creel, \textit{supra} note 15, at 42-43. Wallace Johnson attributes this view of the role of penal law to the philosophy of Tung Chung-shu, of the Han dynasty. Johnson, \textit{supra} note 37, at 10-11. On the philosophy of Tung Chung-shu see, \textsc{Yu-lan Fung, A History of Chinese Philosophy} (Derk Bodde, trans., 1966).

\textsuperscript{41} Notable Anglo-American representatives of this pole include Justice Scalia, Joseph Raz, and Hayek. See, e.g., Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. \textsc{Chi. L. Rev.} 1175 (1989); Joseph Raz, \textit{The Rule of Law and its Virtue}, 93 L. \textsc{Q. Rev.} 195 (1977); and Hayek, \textit{supra} note 26.
political power based on the perception of the inherent fallibility and arbitrariness of man." The Western tradition of course recognizes that this ideal of rule bound adjudication exists in basic tension with the ideal of equity and justice in individual cases. The Western tradition also recognizes the need to avoid blind formalism in the activities of regulatory government, which are recognized to be animated by purposes which should be pursued even if that entails departures from strict rule following and rule application.

The calculation in Northeast Asian political theory seems to have been fundamentally different, in the sense that limiting official action to strict rule application was never accepted as a normative ideal. This appears quite clearly as early as the philosophy of Xunzi (298-238 B.C.), arguably the most sophisticated of its time with respect to the role of rules in governance. With respect to the respective roles of rules versus discretion guided by virtue, Xunzi's

42 Rainer Grote, Rule of Law, Etat de Droit, and Rechtsstaat, presented to the Fifth World Congress of the International Association of Constitutional Law, Rotterdam, the Netherlands (July 12-16, 1999) <http://www.eur.nl/frg/iacl/papers/grote.html>.

43 Vinogradoff, supra note 7, at 209 ("Aristotle . . . calls attention to the fact that legal rules are necessarily general, while the circumstances of every case are particular, and that it is beyond the power of human insight and science to law down in advance rules which will fit all future variations and complications of practice. Therefore law must be supplemented by equity (epieikeia); there must be a power of adaptation and flexible treatment, sometimes suggesting decisions which will be at variance with formally recognized law, and yet will turn out to be intrinsically just.").


45 Turner, Chapter One, supra, note 4, at 99.
admonition to the bureaucrat was: "Where laws exist, to carry them out; where they do not exist, to act in the spirit of precedent and analogy – this is the best way to hear proposals."\textsuperscript{46} This is hardly a call to engage in "Kadi justice"\textsuperscript{47} in hearing disputes, and though Xunzi’s credentials as a good Confucian might be suspect due to his pessimism about human nature and his emphasis on the necessity of law, even Mencius, at arguably the opposite end of the Confucian spectrum, admitted the necessity of law. Thus Mencius conceded that "[v]irtue alone is not sufficient for the exercise of good government,"\textsuperscript{48} though he added that "laws alone cannot carry themselves to perfection."\textsuperscript{49} "It is possible to have good laws and still have disorder in the state. But to have a gentleman acting as ruler and disorder in the state – from ancient times to the present I have never heard of such a thing."\textsuperscript{50}

With the acceptance that rule application is inherently limited as a strategy for reasonable governance came an emphasis on careful deliberation, discernable as far back as the "Announcement to K’ang" by King Wu, founder of the Zhou Dynasty (1122-256 B.C.): "Having tried a case, deliberate on it for five

\textsuperscript{46} Xun Zi, Chapter 9: Regulations of a King, in I Sources of Chinese Tradition 35 (Wm. Theodore de Bary, et al. eds., 19\textsuperscript{-\textit{}}).

\textsuperscript{47} See, note 28, \textit{supra}.

\textsuperscript{48} Mencius, Book 4, part 1, chap. 1 (quoted in Turner, Chapter One, \textit{supra}, note 4, at 94).

\textsuperscript{49} \textit{Id}.

\textsuperscript{50} \textit{Id}.
or six days, or as much as ten days or a season, before deciding. . . . Do not use (punishments) so as to accord with your own wishes.\textsuperscript{51} The care exercised in applying law by magistrates and the supervising bureaucracy during the Qing dynasty has been especially well documented,\textsuperscript{52} and studies of Tokugawa Japan\textsuperscript{53} and Chosun Korea\textsuperscript{54} demonstrate a similar commitment to accuracy and regularity. An important source of information is the so-called magistrate's handbooks, some of which have now been translated, and which provide further evidence of the care and thought with which the magistrates were supposed to carry out their work.\textsuperscript{55}

4. Commitment to Separated Powers

A fourth commitment important to administrative law is the commitment to separating the powers and functions of government, assigning these to distinct

\textsuperscript{51} Creel, \textit{supra} note 15, at 31-32.


\textsuperscript{53} See, e.g., JOHN OWEN HALEY, \textsc{Authority without Power: Law and the Japanese Paradox} 38-41 (1991).

\textsuperscript{54} See, e.g., WILLIAM SHAW, \textsc{Legal Norms in a Confucian State} (1981).

\textsuperscript{55} See, e.g., \textit{The Enlightened Judgments} (Brian E. McKnight and James T.C. Liu, trans., 1999); LIU-HUNG HUANG, \textsc{A Complete Book Concerning Happiness and Benevolence: A Manual for Local Magistrates in Seventeenth-Century China} (Djang Chu, trans., 1984).
government organs, and then using law and the legal process to police the resulting boundaries and assignments. In the West the commitment to separated powers is ubiquitous, both in the overall political systems, and in administrative law and governance. As regulatory government has developed, activities of administrative agencies have been identified as adjudicatory, legislative, etc., then regulated to ensure that they conform to characteristics of the branch to which they have been assigned.

Northeast Asian political tradition, both in theory and practice, differs widely from the separation of powers ideal in some respects, though not in others. With respect to fundamental sovereign power, both theory and practice called for unity, not division. The ruler had ultimate authority over the creation, enforcement, and adjudication of law, and responsibility for all aspects of governance. In the “centralized feudalism” of Tokugawa Japan, for example, there was one legal system for the regions controlled by the central authority, and separate legal systems within each fief. The individual fiefs displayed the same basic tendency, however, so that “[w]ithin each fief or province the feudal lord or noble was three coordinate branches of government in himself...”56 In spite of this de jure omnipotence, however, Northeast Asia’s traditional legal systems displayed a remarkable degree of stability and continuity, particularly in light of the predominant Western view that law was seen in purely instrumental

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56 1(2) A.B.A. J. 182 (1915) (reporting on contemporary legal developments in Japan).
terms in Northeast Asia, and that only a constitution and an independent
judiciary to enforce it against the legislative power can prevent law from being
whipsawed by changing political will. Although Northeast Asia's fundamental
statutes remained in force for centuries, and legal institutions remained
remarkably stable, this stability arose not from legal limits on an individual
emperor's authority, but was based on social and cultural factors, including the
fact that rulers and regimes sought legitimacy based upon their adherence to the
laws and institutions of their dynastic predecessors. Thus when Zhu Yuan-
zung, founder of China's Ming dynasty (1368-1644), promulgated the Imperial
Ming Ancestral Instruction\textsuperscript{57} to guide the behavior of his dynastic successors and
the extended royal family he had reason to expect that document to have
"constitutional" influence beyond his own tenure, though clearly not through
judicial enforcement.\textsuperscript{58} At perhaps the height of his autocratic powers Zhu
himself, in a pattern repeated many times in Northeast Asian political history,
designed the legal system of newly established dynasty according to both the
substantive law and the institutional design of the Tang dynasty (618 - 907),

\textsuperscript{57} Current scholarship suggests promulgation in 1373, the sixth year of the Ming.
Edward L. Farmer, \textit{Social Order in Early Ming China: Some norms Codified in the
Hung-wu Period, in LAW AND THE STATE IN TRADITIONAL EAST ASIA 1, 6-7 (Brian E.
McKnight, ed., 1987).}

\textsuperscript{58} On the concept of constitutionalism in traditional Korea, see, Chaihark Hahm,
\textit{Conceptualizing Korean Constitutionalism: Foreign Transplant or Indigenous Tradition?},
1(2) \textit{J. KOREAN L.} 151 (2001); Chaihark Hahm, Confucian Constitutionalism (2000)
(unpublished S.J.D. dissertation, Harvard Law School) (on file with the Harvard Law
School Library).
which had ended nearly five centuries before, thus demonstrating a "supremacy of law" quite different from the Western ideal, but not inconsequential.\footnote{59}

Northeast Asian political theory also registers an argument for a "supremacy of law" from an unlikely source, China's much-maligned Legalists.\footnote{60} In addition to arguing that society should be governed primarily by a system of clear, publicly-knowable rules, both Han Feizi, the student of Xunzi, and Shang Yang argued that this legal order should remain basically stable unless actual conditions demanded a change,\footnote{61} and that the ruler himself should comply with the law.\footnote{62} Likewise, the writer(s) of the Huainanzi, a Daoist political tract from the second century B.C., provided a pragmatic argument for the ruler to follow the rules he himself established: "when leaders themselves are subject to

\begin{footnotesize}

\footnote{59}{King T'aejo, founder of Korea's Yi dynasty (1392-1910) followed the same pattern in creating a new dynastic legal order based on China's Ming Code, thus invoking the Tang Code and the Sino-Korean legal tradition. See, Chin Kim, The Tae Myöngnyul Chikhae, in SELECTED PROBLEMS IN CONTEMPORARY COMPARATIVE LAW 407, 408 (1987).}

\footnote{60}{The term "Legalists" (Fa Jia) describes one of the schools of classical Chinese political philosophy, the founders of which wrote in the third and fourth centuries B.C.). For an excellent comparative discussion of Legalist thought, see BENJAMIN I. SCHWARTZ, THE WORLD OF THOUGHT IN ANCIENT CHINA, 321-49 (1985). See also, Liang, supra note 17, at 113-138. The works of Han Fei Zi are translated in THE COMPLETE WORKS OF HAN FEI TZU (W.K. Liao, trans., 1959). The main work of Shang Yang, the Shang Jun Shu, has been translated as THE BOOK OF LORD SHANG (J.J.I. Duyvendak, trans., 1928).}

\footnote{61}{Turner, Chapter One, supra, note 4, at 97-98.}

\footnote{62}{ld. at 92, 98.}

\end{footnotesize}
regulations, then their directives are carried out by the people.  

Although these texts suggest that ancient Chinese political theory clearly recognized the importance of constraining the sovereign within the bounds of law, the fact that they were written as admonitions to the ruler, rather than as revolutionary political tracts, reflects the fundamental power relations that prevailed in traditional Northeast Asia until the end of the traditional era. The audience for such writings was generally the ruler himself, rather than a "public sphere" committed to protecting private autonomy and restraining the state, the type of audience for whom Locke and other Western rights theorists wrote, so even if political writers had privately believed in the supremacy of fundamental rights or natural law over the power of the ruler, a proposition for which there is little evidence, their audience would not have rewarded such arguments. In addition, the fact that these theorists did little to actively promote the sort of audience that would have received revolutionary supremacy-of-law arguments is understandable in light of the fact that they were embedded within, and propagators of, the political culture that valued public over private ordering, and did not recognize de jure jurisdictional limits on the state. A mistake which is often made, however, is to point out that traditional Northeast Asian law ratified

63 THE TAO OF POLITICS: LESSONS OF THE MASTERS OF HUAINAN 36 (Thomas Cleary, trans. 1990). Why the people would follow such a ruler was explained by a quote from Confucius: "When people are personally upright, others go along with them even though they are not commanded to do so; when people are not upright themselves, others will not follow them even if ordered to do so." Id.
and enforced hierarchically stratified societies, to recognize that such law fails modern normative claims that law consist of universally applicable, general norms, and to conclude therefrom that Northeast Asian governance was basically a matter of arbitrary power, the antithesis of the Rule of Law. Peter Corne, for example, writes that “[t]he Confucian legal and moral structure legitimized an unequal relationship between ruler and subjects. Thus the rule of power rather than law is ingrained in the consciousness of the rulers and the ruled.”64 Logically, the second proposition need not follow from the first, but in its structure and effect the argument parallels Dicey’s celebration of the common law over French droit administratif.

The second point at which traditional Northeast Asian governance is criticized for failing the separation of powers test is at the opposite end of the governance structure, at the level where the bureaucracy interacted with society. At the bottom of the state, authority and competence tended to unite once again, in the single office of the magistrate.65 The magistrate had no legislative powers, but was charged with enforcing basic statutes such as the dynastic codes, enforcing specific regulatory directives, adjudicating disputes between private

64 Corne, supra note 28, at 15.

65 This pattern was followed within the individual feudal domains of Tokugawa Japan, as well as in the unified states of Korea and China.
parties, and undertaking public functions such as tax collection.\textsuperscript{66} The Draft History of Qing China, for example, describes the role of the magistrate thus:

"The district magistrate is in charge of the affairs of one district. He presides in criminal and civil courts, supervises the farming of the peasants and takes care of relief work; he fights the robbers and suppresses the bullies and the crooked. He sees to it that his district prospers and education flourishes."\textsuperscript{67}

Similarly, the "judge" hearing "litigation" in Tokugawa Japan,

"was an administrative officer, for whom trial of cases was but a side duty. There was, in other words, no separation of executive and judicial powers. Actually the detailed handling of cases – evidence, testimony, records, searching for applicable precedents and decrees – was done by clerks (tomeyaku, etc.) under the bugyo."\textsuperscript{68}

In addition, no theory of judicial independence challenged the legitimacy of superiors supervising a magistrate's handling of an individual case. As might be expected, given the emphasis on regularity and accuracy described previously, bureaucratic superiors, up to the emperor in China, could actively oversee the judicial activities of the magistrate.\textsuperscript{69}

\textsuperscript{66} Classic works on the office of the magistrate in late imperial China include Watt, \textit{supra} note 38, and \textsc{Kung-Chuan Hsiao}, \textsc{Rural China: Imperial Control in the Nineteenth Century} (1960). For a more recent view on the role of the magistrate in adjudicating disputes, see Huang, Chapter One, \textit{supra}, note 4.

\textsuperscript{67} Tseng-yu Ch'üan, \textit{The Mo Liao System in the Ch'ing Administration, in Chinese Bureaucracy and Government Administration: Selected Essays} 1, 5 (Joseph Jiang, trans., 1966).

\textsuperscript{68} \textsc{Dan Fenno Henderson}, \textsc{Village "Contracts" in Tokugawa Japan} 20 n.43 (1975) (referring to those private disputes that were assigned, in feudal Japan's version of diversity jurisdiction, to the central (Edo) government for resolution.).

\textsuperscript{69} John Watt, \textit{Ch'ing Emperors and District Magistrates}, 1(8) CH'ING-SHIH WEN-T'I 16 (1968).
Seen through modern Western eyes, such an arrangement fails to protect the adjudicative function, the relatively mechanical application of extant legal norms to the discovered facts, from the magistrate's broader governance objectives. Not only is such adjudication "substantively rational" in the Weberian sense,\(^7\) since the legal norm structure is infected with a substantive value system (predominantly Confucianism), but the decision process itself is infected "Kadi justice," since the adjudicator will inevitably take into account his own broader goals and concerns when enforcing the legal rules.

5. Commitment to Legally Demarcated Public and Private Spheres

Finally, traditional Northeast Asian political culture recognized no conceptual limit to scope of state activity – no legally-defined "public-private" distinction. One of the major challenges faced by Western societies in justifying and rationalizing administrative government and the intrusive regulatory state has been to make it compatible with a deeply held commitment to the idea that there must be separate spheres of public and private, and that legal norms will

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\(^7\) In Weberian terminology, formally rational adjudication involves the mechanical application of a rule structure that is itself developed through the internal logic of the legal regime, relatively insulated from non-legal, substantive concerns. Substantive rationality differs from formal rationality in the degree to which the norms and the act of adjudication are affected by non-legal aims. For a typology of Weber's categories, see David M. Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 Wisc. L. Rev. 720 (1972).
constitute the boundary. The late nineteenth century may have represented the extreme exultation of the distinction Western jurisprudence, but the general idea is much older. In the Western tradition the idea of a private sphere appears in both substantive and procedural forms, and has been justified in terms of liberal economic theory, the liberal political theory of the social contract, or in the language of natural rights/human rights. Substantively, the private sphere represents the ideal of an irreducible core of individual autonomy, defined and protected from state or other interference by law. In procedural terms, the private sphere is constituted as those areas of social life that may only be regulated by the state if the state follows certain procedures stipulated in advance, rather than through ad hoc, case by case action based entirely on substantive, pragmatic considerations. Regardless of its historical legacy, and exact content, it is clear that the public/private distinction, and its constitution and enforcement through law, became an important fault line along which battles over the rise of the Western administrative state and administrative justice were fought.

Traditional Northeast Asian polities, by contrast, demonstrated no strong commitment to the idea of a private realm, off-limits to public regulation, let alone a commitment to the idea that the boundaries between the public and the private realm would be defined by law and policed by a jurisprudence of rights. Benjamin Schwartz’s characterization of traditional China fits well for all three societies: “One can speak of a kind of all-encompassing claim of jurisdiction by
the traditional political order . . . over all sectors of human experience which involve a social dimension – over religion, economy, family, and law."71 The state's limitless jurisdicational reach normally did not translate into totalitarian efforts to actually penetrate and control society's religious, economic, and other spheres however:

"None of these regions of cultural or social life enjoyed legal autonomy and ad hoc state intervention of good or ill was always possible. This looseness of the jurisdictional net may have been due in part to technological constraints, in part to the fact that the ruling strata did not necessarily wholly identify their interests with those of the political center, and in part to the fact that the mainstream of Confucianism itself identified its spiritual-ethical claims with light government rather than with heavy intervention."

Confirming Schwartz' observations, traditional governance in Northeast Asia was marked by a high degree of what we would view as pragmatic delegation of public governance functions to private groups of various kinds.72 Such "delegation" did not constitute a challenge to the commitment to public over private ordering, since the state always maintained its de jure monopoly on


72 See, Mcknight, *supra* note 52, at 126 (arguing that in Qing China "private groups became largely responsible for many activities, such as public works, welfare, and education, which in earlier times had been at least in part the responsibility of the state," including the "privatization of much judicial business."), and at 115 ("the traditional Chinese government was simply too small to govern in an intensive manner. And yet, despite this constraint, the government still claimed to be the locus of authority.").
authority,\textsuperscript{73} and instead incorporated governance by social groups into the overall governance structure in what could be termed a de facto, informal corporatism.\textsuperscript{74}

For example, China, Japan and Korea all made use of "village compacts,"\textsuperscript{75} documents which set out rules, structures and procedures by which small communities exercised substantial self-government. Though self-governing communities were typically below the direct reach of the state bureaucratic apparatus, the state at certain periods insisted upon reviewing village compacts before they became effective, and in any case always maintained its prerogatives with respect to all of society. What Herman Ooms demonstrates with respect to Tokugawa Japan seems to hold for Korea and China as well: village compacts represented a pragmatic means by which traditional Northeast Asian states enlisted local communities in the general governance project, entrusting local communities with tasks which we now consider quintessential exercises of public authority, such as the punishment of

\textsuperscript{73} Schwartz, supra note 71, at 132-133.

\textsuperscript{74} Corporatism is used here in the sense of a political order in which substantial areas of governance are performed by bodies recognized by the political order, though not having a role in policy formation that groups have in modern corporatist theory. See, TRENDS TOWARD CORPORATIST INTERMEDIATION (Philippe C. Schmitter and Gerhard Lembruch, eds., 1974).

crime. Yet this self-government and the written norms it produced existed at
the pleasure of the state, in theory as well as in practice, and never came to
demarcate legally enforceable boundaries on the reach of the state.

A similar pattern can be seen in the use of clan rules, which were used in
all three societies. These rules were highly formalized compared to anything
known in the modern West, and like the village compacts can be seen as an
informal delegation of governance initiative from the state to non-state groups.
In the Northeast Asian political traditions this sort of informal delegation of
sovereignty violated no strongly held commitments to legal demarcations of state
and society, which in the West have provided rallying points for important
arguments concerning administrative law and the forms of regulatory
government.

A third example is the “delegation” of governance authority to commercial
guilds, which also occurred in all three societies. Guilds had elaborate internal
rules governing member behavior, as well as formalized dispute settlement
procedures, and they too are best seen not as examples of laissez faire attitude
on the part of the state, or as independent potential challengers to state power,

76 Wagner, supra note 20, at 102 (“attempt [by state] to place important
responsibility for social order and well-being in the hands of the local populace.”).

77 On Japan, see Hirschmeier and Yui, supra note 24, at 36-66 (discussing
“house rules”).

78 See WILLIAM T. ROWE, HANKOW: COMMERCE AND SOCIETY IN A CHINESE CITY,
but as regular institutions of traditional Northeast Asian governance, in which no
bright-line distinction between state and society was demanded.\textsuperscript{79} Finally, China
and Korea also had systems of private academies inspired by Zhu Xi's White Deer Grotto Academy, with each academy having its own rules and regulations
defining the objectives of the academy, as well as practical questions such as
admissions, and the daily life of the students.\textsuperscript{80} Certainly in comparison to the
West, then, the Northeast Asian legal and political tradition displayed no
commitment to the idea of a legally determined boundary between public
authority and a sphere of private autonomy, and thus did not provide this rallying
point around which economic interests could galvanize opposition to the rise of
modern regulatory government, as they did in the West.

It may be useful for understanding these differences to consider the
differing justifications for government itself. Though not without challengers, the
dominant justification for government in the West over the last several centuries
has been social contract theory, in which the state and its law are justified as a
collective response of private individuals concerned with protecting their private
rights and interests. Given that starting point, it is not obvious that the state has
any role in pursuing social justice, particularly since it is clear that many forms of

\textsuperscript{79} Hirschmeier and Yui, \textit{supra} note 24, at 36-38.

\textsuperscript{80} Yŏng-Ho Ch'oe, \textit{Private Academies and the State in Late Chosŏn Korea, in Culture and the State in Late Choson Korea}, 15, 19-22 (Jahyun Kim Haboush and Martina Deuchler, eds., 1999).
social injustice will result from citizens pursuing exactly the private interests that the state was created to protect. The Northeast Asian tradition is in contrast much more accepting of the notion that the purpose of government is ethical and moral, a positive force for good, rather than a referee policing the boundaries of acceptable conduct in the battle of private interests. Thus even political writers who subscribed to the ancient daoist notion of wu wei, or inaction, in rulership did so out of a belief that that was the best method for achieving the goal of a just society. To quote again from the Huainanzi, a late daoist political tract,

"Rulership was set up because the strong oppressed the weak, the many did violence to the few, the cunning fooled the simple, the bold attacked the timid, people kept knowledge to themselves and did not teach, people accumulated wealth and did not share it. So the institution of rulership was set up to equalize and unify them."\(^{81}\)

B. Formal Law

A second factor supporting an administrative law family consisting of Japan, South Korea and Taiwan is that their traditional legal systems, as they existed when Western administrative law began to be introduced into Northeast Asia, shared important general characteristics, in addition to sharing characteristics important to administrative law and governance. Shared general characteristics will be addressed first, followed by a discussion of similarities

\(^{81}\) Supra note 63, at 4.
relevant to administrative law utilizing the categories of administrative law
developed in Chapter 1.

As a matter of basic legal history, from the middle of the first millennium
until the late nineteenth century, a period of roughly fifteen-hundred years,
Chinese positive law exercised an enormous influence on the legal systems of
Korea and Japan. As one historian of Japanese law describes Japan's
importation of Tang law in the late seventh and early eighth centuries,

"For Japan to enter the East Asian world and receive international
recognition as a state, a *sine qua non* was subordination to or adoption of
Chinese law as the common political language of this region and as a
global system of political norms."\(^{52}\)

According to some Japanese scholars the transition to a Chinese-derived *ritsuryō*
(*lu-ling*) state took place even earlier,\(^{53}\) and although there were periods in
Japanese history when Tang-derived law did not completely dominate Japanese
positive law,\(^{54}\) Chinese formal law remained influential in Japan through the

\(^{52}\) Ishigami Eiichi, *State and Society in Ancient Japan*, 69 ACTA ASIATICA 14

\(^{53}\) The Japanese-language literature on early Japanese state formation is
surveyed in Kito Kiyoshi, *Some Questions Concerning Ancient Japanese History: With

\(^{54}\) See, e.g., Carl Steenstrup, *The Legal System of Japan at the End of the
Kamakura Period from the Litigants' Point of View, in* McKnight, ed., *supra* note 57, at
73 (discussing law under the warrior government, bakufu, that ruled in parallel with the
imperial government from 1180 to 1333).
Tokugawa period, and provided the form for some of the earliest Meiji law reforms.

Korea was even more embedded in this Sino-centric world than Japan, and the comparative stability of centralized political control in Korea, combined with Korea's deeper and more consistent commitment to Chinese high culture, made the influence of Chinese law in Korea even greater than in Japan. Later historical writings assert that Chinese statutory law was adopted on the Korean peninsula as early as the fourth century, with Tang-style *lu-ling* statutes (*yullyông, ritsuryô*) adopted in the sixth century. The Yi, or Chosun, dynasty, Korea's last dynasty before colonization by Japan, maintained this tradition, modeling its own statutory law in large part on the statutes of China's Ming dynasty (1368-1644). As in Japan, the borrowing of formal law was seen as systemic not piecemeal, involving the importation of an entire legal culture, including not only substantive legal norms, but also the organization of the state, the various types of legal norms which were created, the style in which laws were drafted, and the conceptual categories and vocabulary in which legal

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issues were understood. If one were operating within the tradition of comparative law scholarship discussed in Chapter One, it would be no exaggeration to say that China, Japan and Korea constituted a "legal family" for a period of approximately fifteen-hundred years.

In addition to these systemic relationships among the basic legal orders of China, Korea and Japan, these legal systems shared important attributes with respect to administrative law which will be explored employing the types of administrative law discussed in Chapter One. One of Classical China's most influential political philosophers offered a definition of law that to some extent described the next two millennia of Northeast Asian legality: "Law is that which is observed by the government as orders and regulations, and observed by the people as standards of reward and punishment."  

1. Administrative Law as the Law Organizing State Authority: Organic and Internal Disciplinary Norms

As discussed in Chapter One, the term administrative law has been applied to the body of law organizing the government bureaucracy, as well as to the body of law internal to the bureaucracy used to discipline bureaucratic actors.

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88 Wagner, supra note 20, at 3-22.

89 Han Feizi, On the Codification of Law, quoted in Liang, supra note 17, at 114.
The traditional Northeast Asian states relied heavily on administrative law in this sense, to establish the basic infrastructure of governance, and to facilitate governance through the issuance of orders from the center to the local-level administrators. Thus pre-modern Northeast Asian states were for thousands of years organized according to administrative law in this sense, and it is entirely plausible to think that, although not reachable by private parties, this body of law served at least two important purposes that still resonate in modern governance.

The first and most obvious was the basic task of organizing and assigning government tasks, to make control and supervision from the top possible. This is the instrumental reason given to explain the traditional emphasis on accuracy and regularity in adjudication discussed above. Another related task was certainly legitimization, since the forms of government design were passed down from past dynasties, and in polities where policies and institutions were justified by looking to the past, the continuance of these bodies in particular forms was clearly felt to serve these purposes. The legitimization purposes served by using traditional institutional forms may well have worked against the goal of effective bureaucratic organization, yet their continued existence may also have served as a de facto legal check on sovereigns otherwise generally unrestrained by law and legality. This is not legal norms being invoked against the sovereign, but an institutional structure in legalized form providing a framework within which innovation or change must take place.

Internal disciplinary norms were an important subset of this administrative
law. An example is the Tang Code’s provision that a magistrate who did not cite a provision of law in his written decision would himself be punished.\textsuperscript{90} Such norms disciplining lower level functionaries, like the traditional organic norms, demonstrate a distinct practical aversion to challenges to tradition, order and accountability, at either the macro organizational level, or at the implementation level. In the Chinese case, McKnight argues that the legal strictures imposed from above in Chinese officials became increasingly strict in late imperial China, to the point that officials were “surrounded by a growing wall of regulations which made it difficult for them to do their jobs without committing misdemeanors.”\textsuperscript{91} In McKnight’s view, the result of this overabundance of rules cabining administrative discretion was to stifle initiative, as “[b]y and large, government officials were tempted to act only when inaction was impossible, and then only in the most cautious manner.”\textsuperscript{92}

2. Administrative Law as the Law Enforced by Administrative Bodies: Substantive Governance Norms and Delegated Rulemaking Powers

\textsuperscript{90} Johnson, supra note 37.

\textsuperscript{91} McKnight, supra note 52, at 125. See also, Watt, supra note 69, at 17 (describing Qing China’s internal disciplinary regulations as “a veritable encyclopedia of administrative duties and offices, together with the precise penalty for each kind of offense and level of culpability.”).

\textsuperscript{92} McKnight, supra note 52, at 125-126.
Second, these political orders displayed a strong commitment to stating the substantive requirements of the citizenry in the form of legal norms directing official action. Thus, with respect to substantive governance norms, the Northeast Asian states were known for the “administrative” nature of their law, as they were for their use of law in organizing and disciplining the bureaucracy. Whole sections of the traditional codes were devoted to functional areas such as agriculture, and there also existed decrees from the emperor or other central authorities directing the various government functionaries to undertake certain actions. It seems likely that law in the sense of rules emanating from the sovereign existed as early as China’s Shang era,93 and it is established that during the succeeding Zhou Dynasty (1122-256 B.C.), law was used for taxation, and for the regulation of social life.94 These norms were designed to function like typical regulatory law, with punishments assigned to various violations, with no private victim required, and with the state controlling the enforcement process.

While the Northeast Asian states displayed a remarkably strong commitment to administrative legality in the organization and the discipline of the bureaucracy, as well as a commitment to using law to convey the substance of the state’s substantive social regulation, these political orders displayed a hostility to administrative law in the sense of delegation of norm-making authority

93 Creel, supra note 15, at 29.

94 Id. at 30.
to lower-level administrative functionaries, tending to maintain instead a
rhetorical commitment to the central authority's monopoly over authoritative norm
creation. In practice, however, particular government entities often seem to have
led in preparing laws relevant to their areas of expertise, a phenomenon well-
documented by Thomas Metzger, who demonstrates the extent to which law
preparation in China's Qing dynasty was dispersed among the government
organs with relevant expertise.95

3. Administrative law as External Controls on Government:
Administrative Law Proper

The legal orders of traditional Northeast Asia never manifested their
commitment to administrative legality by creating the third category of
administrative law identified in Chapter One, in that they never created legally-
enforceable rights against the administration of government. This is one
manifestation of the lack of a cultural commitment to separation of powers, to the
idea of citizens having the right to pit one arm of the state against another.
Subjects could bring administrative wrongs to the attention of the state and
thereby hope to trigger the use by the state of its own internal policing system,

95 Thomas Albert Metzger, Some Legal Aspects of Bureaucratic Organization in
(on file with the Harvard Law School Library). See also, THOMAS ALBERT METZGER, THE
but this is not administrative law in the modern sense, which depends upon a judicialized body which will rule on the legality of bureaucratic action, and will do so when activated by a citizen as a matter of right.

What Northeast Asia offered instead was the Censorate ideal, a separate arm of the state charged with overseeing the functioning of governance at the lower levels. The Censorate was designed to be insulated from other bureaucracies dedicated to particular areas of governance, indicating that Northeast Asian political culture and theory recognized issues which the West has tried to solve via separation of powers. The Censorate was not a judiciary, however, in the sense that citizens did not drive its enforcement initiatives by right, and it also combined various oversight functions within itself. Thus in China the Censorate itself performed "general surveillance over all bureaucrats, investigation of official violations of law or misconduct, evaluation of the work of administrators at different government levels, rectification of administrative excesses or errors," and had the "power to indict officials for improper or illegal acts through the submission of impeachment memorials to the Throne, which often led to the removal or punishment of the indicted." The Censorate also performed the task of "remonstrance," under which certain censors were

96 On Korea, see Wagner, supra note 20, at 15-16.

"required to examine existing government policies or procedures in terms of their application to the people, submit their criticisms, if any directly to the Throne in the form of memorials, and make whatever recommendations for improvement they deemed necessary and proper."\textsuperscript{98}

Although the Censorate ideal was far from rights-based administrative law challenges to government action, it is also important not to engage in Diceyan romanticism with respect to the effectiveness of rights-based systems, which will provide little real relief for those without the resources to use them. Because those without resources are most likely to have been mistreated by the bureaucracy in the first place, rights-based solutions alone seem fundamentally inadequate. There will never be enough lawyers and opportunities for judicial review if bureaucracies themselves are not biased towards good decisions by internal norms, cultures, and discipline mechanisms. But leaving aside the question of actual effectiveness, the Western commitment to rights-based systems of challenging state action, based upon separation of powers ideals, clearly influenced the development of administrative law in the West, driving the preservation of external, judicial review, even where, as Goodnow pointed out,\textsuperscript{99} it seemed antithetical to the efficiency so necessary in a regulatory state. The absence of such a tradition in Northeast Asia reduced the effectiveness of similar

\textsuperscript{98} Id. at 24-25. Wagner, \textit{supra} note 20, at 15, identifies the same dual functions in Korea: bureaucratic oversight and impeachment, and remonstrance to the throne.

\textsuperscript{99} Chapter One, \textit{supra}, note 41 and accompanying text.
arguments as Northeast Asia developed administrative law and regulatory government.

4. Administrative Law as Administrative Justice

Finally, corresponding to much of what has just been said concerning political culture and legality in traditional Northeast Asia, these societies can rightly be seen as dominated by administrative, as opposed to legalized, justice. Like regulatory law in the West, traditional law was conceived of as an instrument of the sovereign for social ordering which in its broad outlines remained basically stable, but which could be adjusted when necessary. The "problem" with traditional Northeast Asian law therefore could not have been that it was an instrument for the enforcement of a substantive governance agenda, unless this same problem illegitimates all regulatory law. The "problem" likewise cannot have been that the same body of law that governed society did not also directly bind the sovereign, an oft-heard critique that basically restates Dicey's objection to droit administratif. Modern legal thought and practice attach no magical significance to having all types of disputes adjudicated by a common institution applying a single body of law. The core concerns that makes these systems problematic from a modern perspective have to do with the fact that the sovereigns were only customarily bound by law, though this was not true of the bureaucracies under them, and the fact that Law and the courts were not
idolized as they have been in the West. Northeast Asian political culture remained committed to the idea that adjudication and rule enforcement must involve more than rule application, and that the interface between state and society cannot be simply rule-governed in the sense of individual adjudicatory decisions being based only upon pre-existing rules binding the adjudicator. As we have seen, however, the extent to which traditional Northeast Asian law was a form of administrative justice has been overstated by those who focus on the state-society interface, and who see in traditional Northeast Asian dispute settlement an example of "Kadi justice," diametrically opposed to the "legal" justice of the West. The fact that the sovereign remained above the law did not result in law fluctuating aimlessly, at the whim of the sovereign, and at the other end of the spectrum, where state met society, officials likewise not simply applying their personal, instrumental judgments.

C. Instrumental Aims

A third key variable affecting the shape of administrative law, West and East, concerns the instrumental aims of those in a society who control the creation and evolution of legal doctrine. In the U.S., particularly as it has moved toward the model of pluralist administrative law, this category would include actors in the formal legislative process, the contending political parties and their private sector backers, the White House, the administrative agencies
themselves, and of course the courts. In the U.S. of today, the instrumental aims of those involved are so varied that while one can say in retrospect that an outcome was affected by such instrumental aims, it is difficult in advance to predict which aim or set of aims among the many will prevail. Adding to the complexity in the U.S. case is the non-bureaucratic organization of the judiciary, which reflects a deeply-held commitment to the independence of the individual judge, as well as to the independence of the judiciary as an institution. All of these factors contribute to administrative law being an arena in which political battles are fought, and to substantive policy decisions enacted into law constituting a "headless fifth branch."

In traditional Northeast Asia, however, control over the path of administrative law was subject to control by ruling elites and their values and interests. The instrumental aims of this elite centered, for centuries, on the maintenance of order, prosperity and stability in largely agricultural societies. Law was used primarily to maintain and reinforce social norms and values upon which this vision of society was based. In the decades leading up to the Westernization of the legal systems they controlled, these elites demonstrated no radical change in the uses to which they felt law should be put: to control the bureaucracy, which in turn would preserve order in societies that, while increasingly commercialized and urbanized, particularly Japan and China, were
still primarily agricultural.\textsuperscript{100}

D. Summary

In broad terms, the Northeast Asian states demonstrated important basic similarities with respect to the relevant stage on which the importation and implementation of Western administrative law would play out. Though not without important differences, viewed through the lens of administrative law in the West, and the various factors that have shaped its development there, the Northeast Asian states can legitimately be treated as constituting a coherent family with respect to administrative law. In terms of political culture, and cultural commitments important to administrative law, they were relatively similar. In terms of formal law, too, they represent variations on a set of common themes, not distinct traditions. Finally, in terms of who held power to control the legal doctrines of administrative law, and the instrumental aims of those power-holders, again basic similarities are apparent.

IV. Transplantation Begins: The Early Decades of Western Administrative Law in Northeast Asia

\textsuperscript{100} On nineteenth century Korean efforts to cope with increasing Western, as well as Japanese and Chinese aggression, see Palais, \textit{POLITICS AND POLICY IN TRADITIONAL KOREA}, supra note 25.
By the middle of the nineteenth century the political orders in Northeast Asia were under siege. Though societies in the region were changing under their own impetus, as all societies do, both the scale of the changes, and the particular directions they took, were driven by the incursions of the Western powers. One doesn't need to ascribe to the strong form of an "impact-response" model of modern Northeast Asia history to take this view.\textsuperscript{101} The Western attacks on Northeast Asia, which had begun earlier, became increasingly violent and ambitious after the middle of the nineteenth century. These Western incursions set off a chain of massive structural changes in Northeast Asian societies, becoming a key point for later path-dependent developments. To believe this does not require one to believe that Northeast Asia was "stagnant" prior to this assault, however, only that it permanently altered the directions in which Northeast Asian societies would subsequently develop.

This section explores these changes by examining the importation of Western administrative law, and administrative law theory, and the roles that it played once planted in the new environments. Because Japan's colonization of Korea took place so soon after indigenous Korean legal and political Westernization movements had begun,\textsuperscript{102} the inquiry will focus on China and

\textsuperscript{101} Referring to the tendency of Western scholars to view modern Northeast Asian history as a series of responses to Western initiatives.

\textsuperscript{102} Korean efforts to develop Western-style political and legal institutions are discussed in Vipan Chandra, Imperialism, Resistance and Reform in Late Nineteenth-Century Korea (1988), and Young Ick Law, Korean-Japanese Politics Behind the
Japan. Again the inquiry will focus on positive law reforms in the context of political culture and the instrumental aims of those influencing the law reform process.

A. Instrumental Aims: A New Agenda

Instrumental aims as they touched upon administrative law reforms in both China and Japan were dominated by three concerns. As was noted in an earlier discussion of instrumental aims, one could see these all as particular manifestations of a general aim by the leadership to preserve its own position, which only differ because of the changing nature of the challenges. In this view, rulers never act to further the general welfare, or even to preserve the nation from subjugation, except insofar as it benefits them personally. Even if one adopts this view, however, there is still much to learn from studying the different ways rulers respond to challenges, regardless of their ultimate motives. For late nineteenth and early twentieth century China and Japan, the dominant aims of the ruler were to i) to establish international legitimacy by adopting Western legal systems, ii) to encourage industrial development, and iii) to maintain their own power and authority in the face of social and political changes then underway,


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and over which they had limited control.

1. International Legitimacy and Constraints

Both China and Japan were subject to the system of treaty ports and extraterritoriality imposed by the Western powers, and a condition the West placed on the abandonment of this system was legal system reform. With respect to Japan, by far the dominant view in scholarship on the Meiji era has been that the Oligarchs were driven to build a Western legal system in order to end extraterritoriality and avoid a quasi-colonial dismemberment along the lines of what was happening to China.\textsuperscript{103} A second motive that is discussed is more nebulous: a conviction on the part of the Oligarchy that Japan needed to imitate the means by which the Western powers unleashed and tapped the energies of their peoples, and that legal and political reforms were the key to this social invigoration.\textsuperscript{104} Mark Ramseyer and Frances Rosenbluth seek to downplay the threat of extraterritoriality as a motivating force for Meiji legal reform, focusing instead on the desires of the Oligarchs to preserve their power and position.\textsuperscript{105} In constructing their argument Ramseyer and Rosenbluth appear to understand

\textsuperscript{103} Haley, \textit{supra} note 53, at 68 & n.1.

\textsuperscript{104} \textit{Id.} at 67-68.

their explanation as ruling out the older explanations, and to do so they present the national preservation and "modernization" explanations as somehow inconsistent with the idea of the Oligarchs as rationally self-interested actors.\textsuperscript{106} This is neither logically necessary, however, nor is it a convincing portrayal of the dominant scholarship. Both national preservation and 'modernization' explanations can be easily reconciled with self-interested action by the Oligarchs, in that one is likely better off ruling an independent and economically dynamic nation than as the 'leader' of a dismembered semi-colony with a stagnant economy. In addition, although there were certainly propagandists who portrayed the Oligarchs as selfless, the more common picture does not depend upon them being selfless, but instead appears to marvel at the fact that their self-interest did not lead to perverse consequences for Japan as a whole. It may be the case that some scholars sought the explanation for this in Japanese culture or some other extra-rational consideration, rather than in oligopoly theory, but certainly more traditionally Leftist or Marxist scholars did not ignore self-interest on the part of the Oligarchs. Legal scholar Hideo Wada, for example, describing the behavior of the authorities in importing foreign legal forms, wrote many years ago, "[t]hey thought in terms of adopting only those ideas they considered would serve their own interests."\textsuperscript{107}

\textsuperscript{106} Id. at 1-4.

\textsuperscript{107} Hideo Wada, The Administrative Court under the Meiji Constitution, 10 Law in Japan 1, 2 (1977)(from 3 Nihon Kindaisho Hattatsu Shi 85-170 (Ukai, Kawashima,}
2. Economic Development: Gerschenkron, List, and the German Historical School

In addition to sharing the characteristic of vesting control over legal doctrine in a relatively small group, history shows that the countries of Northeast Asia vested this control in people or institutions that shared a goal orientation toward market-based economic growth and development, that would at the same time be overseen by states able and willing to intervene quite directly in even those economic spheres predominantly in private hands. Thus the history of economic governance over the last one-hundred-and-fifty years in Northeast Asia must be seen, relative to economic governance in the developed West, as a history of control and intervention, including highly particular intervention, into basically market economies.

There are two influential explanations for this goal orientation in Northeast Asia. One builds on the work of the economic historian Alexander Gerschenkron,\(^\text{108}\) while the other focuses on the influence of the nineteenth century German political economist Friedrich List,\(^\text{109}\) and the later German

\(^{108}\) Gerschenkron's essays are collected in CONTINUITY IN HISTORY (1968), and ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE (1962). Longer works of his include BREAD AND DEMOCRACY IN GERMANY (1943), and EUROPE IN THE RUSSIAN MIRROR (1970).

\(^{109}\) List is famous as an advocate for a customs union (Zollverein) among the German states in early nineteenth century Germany, before the creation of the empire,
Historical School of economics, on Northeast Asian political and economic thinkers. Explanations which focus on List and then the German Historical School examine the extent to which these ideas were actually studied by Northeast Asian policy makers, since in many respects they seemed to follow such regulated market prescriptions in the way they tried to structure the role of the state in governing the economy. For example, List was a strong skeptic of the idea that Adam Smith and "Manchester" laissez faire were appropriate for Germany of his day, which was behind England economically and in the development of its industrial base and internal markets. He was thus a strong proponent of infant industry protection and nationalist economic development, and a critic of what he saw as a false universalism in economic thought.

Discussions of Gerschenkron's influence focus on the extent to which Northeast Asian governments conformed to what Gerschenkron identified as the typical roles for the state in late industrializing societies. Gerschenkron was an economic historian who saw in patterned relationships between the functions

and for his argument that free trade and free-market economic policies were fundamentally unsuited for a late-industrializing society. His major work available in English is the NATIONAL SYSTEM OF POLITICAL ECONOMY (G.A. Matile, trans., 1856).

Arguments for the influence of List, and of the German Historical School, are discussed in John K.M. Ohnesorge, States, Industrial Policies & Antidumping Enforcement in Japan, South Korea, and Taiwan, 3 BUFFALO J. INT'L L. 289, 303-320 (1996-97).

assumed by national governments and the challenges faced by those
governments based upon their historical circumstances. His basic claim
concerning the role of the state in economic development is contained in his
influential essay, Economic Backwardness in Historical Perspective.¹¹² In that
essay Gerschenkron offered several general statements on the phenomenon of
economic development, statements which were based on his understanding of
the development histories of several European countries during the nineteenth
and early twentieth centuries. In order to avoid misunderstanding
Gerschenkron's claims it is important to keep in mind that he saw the task of the
historian as being the "application to empirical material of various sets of
empirically derived hypothetical generalizations and in testing the closeness of
the resulting fit, in the hope that in this way certain uniformities, certain typical
situations, and certain typical relationships among individual factors in these
situations can be ascertained."¹¹³ The point of identifying these "uniformities,"
"typical situations," and "typical relationships" was to broaden the frames of
reference of those interested in contemporary economic development, to point to
"potentially relevant factors and at potentially significant combinations among
them,"¹¹⁴ not to lay down iron laws of historical or economic necessity.

¹¹² In Economic Backwardness in Historical Perspective, supra note 108, at 5.
¹¹³ Id. at 6.
¹¹⁴ Id. at 6.
Gerschenkron saw development in terms of industrial growth, and according to him, once major institutional impediments to economic development have been removed, the degree to which a nation lags behind in industrialization, it's degree of 'backwardness,' becomes an important predictor of how industrialization will take place. Backwardness can be conceived in terms of tension between latent potential and existing accomplishments, with the opportunities inherent in industrialization varying directly with the backwardness of the country.\textsuperscript{115} Backwardness could be seen as functioning like a dam on a river: the higher the dam, the greater the pressure building up behind it. Using the same metaphor, the more pressure has built up behind the dam, the faster the water will flow once the dam is released, so that the speed of industrialization tends to correlate directly with the degree of backwardness, once blockages are removed. Backwardness is reflected in the gap between the level of local technology and the international frontier, so overcoming backwardness almost by definition entails technological borrowing. Furthermore, because skilled labor tends to be scarce under conditions of economic backwardness, it is entirely rational for a newly industrializing country to import frontier technology, thus maximizing the productivity of its limited pool of skilled labor.\textsuperscript{116} In the nineteenth century the utilization of the most modern technology required large-scale

\textsuperscript{115} Id. at

\textsuperscript{116} Id. at 9.
productive facilities, so that bigness became one of the normal attributes of late industrialization.\textsuperscript{117} Bigness in productive facilities was accompanied by a tendency for industrialization to occur simultaneously across many fronts, a revolutionary "big push," so that developments would be mutually supporting.\textsuperscript{118}

Gerschenkron cited the above factors as the basic factors, peculiar to conditions of economic backwardness, which resulted in higher speed growth and particular productive structures in industry.\textsuperscript{119} In his view these basic factors did not operate alone, however, but tended to be reinforced by particular institutional arrangements ("instruments") and by specific industrialization ideologies.\textsuperscript{120} The main institutional instruments discussed by Gerschenkron are the banks and the state, though he also touches on the legal and institutional framework. Drawing on the history of German industrialization, Gerschenkron argued that where backwardness is not overwhelming, banks are likely to step in to perform financing functions that had been performed by financial markets in more advanced countries such as England. In the case of Russia, which suffered from severe backwardness, the state had been forced to take on financing functions that had been performed by the banks in Germany, and which had been performed by capital markets in economies that preceded

\textsuperscript{117} \textit{ld.} at 10.

\textsuperscript{118} \textit{ld.} at 10-11.

\textsuperscript{119} \textit{ld.} at 11.

\textsuperscript{120} \textit{ld.}
Germany's in development. In his view, the emancipation of the Russian peasants and the legal and administrative reforms undertaken 1860s were necessary but insufficient conditions for industrialization. Clearing institutional obstacles and providing a legal and administrative framework for economic activity might have been sufficient for the industrialization of the advanced European countries, but such measures were insufficient in Russia. In addition, the intermediate solution of bank-led industrialization ala Germany of the 1850s was impossible in Russia, which meant that the state had to step in and assume the positive role of promoting and guiding industrial development directly.

Gerschenkron recognized that the tendencies and relationships he described were flexible and subject to renegotiation, whether the relationship between banks and industry in Germany, or between the state and industry in Russia, yet he was also an exponent of what would now be called path dependency. Gerschenkron argued that although German industry eventually outgrew the tutelage of the banks, transforming the relationship from one of master-servant to one of equality or even dominance, relations between banks and industry in Germany remained close by international standards. With

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121 Id. at 19.

122 Id. at 19-20.

123 Id. at 21.
regard to Russia, the industrialization that the State had so successfully initiated in the late nineteenth century became self-sustaining, so that the Russian banks, reformed on the German model, were able to step in and allow industry to distance itself from the state.

It is quite clear that leaders in both Japan\textsuperscript{124} and China\textsuperscript{125} sought to structure state-society relations so as to allow their governments to take the active, interventionist, supportive roles called for by List and the German Historical School, and seen as natural for late developers by Gerschenkron. The extent to which they succeeded in doing so is a different question, but their aims were quite clear.

3. Preservation of Rule: The Importance of Prussian State Theory

Northeast Asia’s early administrative law reformers were also clearly interested in preserving their own status and power, and in this the importation of Prussian state theory, the theory behind the positive law they chose, was ideal. The law would take care of international concerns for a modern legal system, and help satisfy growing domestic pressure for more democratic and rights-


\textsuperscript{125} See, e.g., H.H. Kung, \textit{Government Policy in Encouraging Exports, 7 China Economic J.} 1061 (1930) (on the role of the government in fostering export industries).
based governance, while also allowing them to preserve their position. The experience of Japan is particularly important here because Japan was first in Northeast Asia to adopt Western administrative law, and its choices continue to influence Northeast Asia to this day.

It is well known that the Meiji legal system, particularly in constitutional law, was heavily influenced by German, in particular Prussian, law and legal theory. While this is undoubtedly true, it has also been claimed that the attractiveness of Prussia as an example for the Meiji Oligarchs was based not so much on the text of the Prussian constitution, but rather on the idea of the "social monarchy" championed by Rudolph von Gneist\textsuperscript{126} and Lorenz von Stein, the administrative law and \textit{Rechtsstaat} theorists who so influenced Goodnow and other early American administrative law pioneers. Before turning to the formal administrative law system, then, it will be useful to have an understanding of Gneist and Stein in the German context; what they stood for there, and how that differed from what their ideas were used to justify in the Japanese context.

Gneist's normative vision of the state was driven by his dissatisfaction with the dominant political programs of his day: Liberalism, conservatism, and later socialism and communism.\textsuperscript{127} Gneist envisioned instead a state that would


\textsuperscript{127} \textit{Id.} at 64. See also, Hahn, Chapter One, \textit{supra}, note 12; Erich Hahn, \textit{Rudolf Gneist and the Prussian Rechtsstaat}, 49 J. MOD. HISTORY 1361 (supplement Dec.
protect individual rights, while also pursuing positive welfare as well as cultural goals. In this "social constitutional monarchy" the state would govern in the general interest, avoiding the "class rule" that both the Socialist Left and the Liberal bourgeoisie would impose if given the chance. Gneist thus opposed parliamentary democracy and the responsibility of the executive to the elected legislative branch, and sought in the monarchy and the bureaucratic state, institutions capable of standing above, and mediating among, competing social forces. Gneist himself served many times in elected office, but he seems to have remained highly skeptical of the ability of democracy to function under German conditions. In place of democracy he put far more faith in legality — the Rechtsstaat — both with respect to the monarchy, and especially with respect to the bureaucracy.

Gneist's vision of a "social constitutional monarchy" checked by a complete and energetic administrative law Rechtsstaat functioning at the sub-constitutional level was shared by Stein, the other primary theoretician of the public law system adopted by the Meiji Oligarchs. Stein was particularly influential in Japan's adoption of a Prussian-style civil service examination system, and his position on this captures quite well one of the disturbing contradictions that marked his thinking, as well as Gneist's. Despite the fact that


128 Luig, *supra* note 126, at 64.
Japan's traditional political theory provided justifications for an examination-based, merit system for staffing the bureaucracy,\textsuperscript{129} this in no sense committed the Meiji reformers to creating a modern civil service or staffing it through a merit-based examination system. Although the first Meiji legal reforms were based on the codes of the eighth century, which had adopted the Tang Chinese examination system, the Oligarchs demonstrated their reluctance to deal with the question of how to constitute a civil service by failing to "restore" the portions of the codes that would have created civil service examinations.\textsuperscript{130} The first Meiji-era national assembly, the Kôgisho, in 1869 approved overwhelmingly a proposal that the government institute annual civil service examinations based on the traditional Chinese model,\textsuperscript{131} but this request was ignored by the government, which was in the hands of an authoritarian elite in no hurry to have their authority to staff the bureaucracy hindered by an examination system.

As time passed and interest revived in administrative reform and a civil service exam system, Stein provided Itô Hirobumi, the Oligarch who led Meiji public law reforms and with whom he had the most contact on administrative law matters, a neat way to split the difference, to present the examination system in a way that would not threaten the prerogatives of the Oligarchs. In an 1882

\textsuperscript{129} Spaulding, \textit{supra} note 19, at 9-19.

\textsuperscript{130} \textit{Id.} at 19.

\textsuperscript{131} \textit{Id.} at 21.
lecture to Itō in Vienna, Stein presented his thesis that,

"[a]ppointment involves two principles. First, the sovereign has the prerogative of selecting the men he wishes to appoint. Second, the men appointed must by all means first have received the education necessary for their positions, and must then have passed examinations."\textsuperscript{132}

In a later lecture he expanded on his views, stating:

"[w]hen a constitution is established, it is absolutely vital to make clear the authority of officials, and everything pertaining to their demotion or dismissal. Qualifications must be established for candidates for each office, based on the character of its duties; and they must be appointed only after passing appropriate examinations."\textsuperscript{133}

Stein's dual obsessions are both visible here: his preoccupation with legally constituted and ordered government, and his equally strong reluctance to extend public law to the point of constraining the sovereign, to subjecting the whole governmental order to law. For while Stein's vision included a competitive and rationally-oriented examination to create a pool of candidates, he carefully avoided granting successful exam takers a public law right to a position, instead leaving the sovereign complete discretion to choose from among the pool, ideally, from his point of view, to allow the supra-political, Hegelian sovereign to exclude candidates who might taint the administration with political orientations.

This accords with the Liberal \textit{Rechtsstaat} approach of Stein, Gneist and their followers, as reconciled with Prussia's and Imperial Germany's authoritarian politics: an obsession with the formal, external legality of government

\textsuperscript{132} Quoted \textit{id.}, at 48.

\textsuperscript{133} \textit{id.}
organization and administrative action, yet leaving a gaping hole for sovereign prerogative. As with their attraction to Stein's "social monarchy" theory generally, the Meiji Oligarchs could simply substitute their own clique wherever Stein's model referred to the monarch, thus giving Stein's approach an authoritarian twist beyond his own anti-democratic yet legalistic commitments.

With regard to the specific issue of civil service examinations, Stein's approach could be used by Itō to reassure those in Japan who might have objected to an examination system as a restriction on the prerogatives of the monarch.\textsuperscript{134} As the movement toward Western-style government gained momentum, opposition to an examination system developed from Diet politicians and democratic forces, who had discovered the limited nature of their authority and wished to gain access to the civil service. It was not until the post-World War Two Occupation reforms, however, that Japan's civil service achieved its current degree of professionalism and insulation from political pressures.\textsuperscript{135}

In the Japanese context the idea of the monarchy as an institution able to stand above and reconcile competing social interests was transformed from a foreign academic's normative project into a justification for a seriously dysfunctional political arrangement. The powers that were supposed to reside in

\textsuperscript{134} Id. at 49.

the monarchy disappeared into the black hole of Oligarchy government, only to emerge later in the hands of the military, which some see as one of the causes of Japan’s turn to Fascism.\textsuperscript{136}

For Stein, as a publicist of the Liberal \textit{Rechtsstaat} of nineteenth century German legal thought, the fact that in a constitutional state public participation was guaranteed at the most general level removed from the executive branch any responsibility for reasonableness in the enforcement of these statutes and ordinances, and in fact guaranteed unreasonableness in particular cases by insisting upon absolutely equal treatment of all before the law.\textsuperscript{137} Given that Stein favored a very limited suffrage, lest the underclass use its majority to seize control of the state and turn it to its own ends, and given that Stein also opposed including catalogues of basic rights, his injunction that the role of the courts and the executive was to blindly and mechanically enforce the positive law so long as it had been properly enacted, seems systematically biased against the mass of society. Stein did call for a system of administrative courts and for judicial review of administrative activities, and indeed allowed for not only judicial review of individual acts, but for the legality of ordinances, but the legality of an ordinance was to be judged against the existing statutory norms, not against general ideas.


\textsuperscript{137} \textit{Id.}
of legality, which Stein hoped to ensure by excluding such norms from the proper content of a constitution. Although Stein told the visiting Japanese student Kawashima that "every individual has the right to obtain judicial review of an ordinance he believes is inconsistent with an existing statute," he also advised that such review should be conducted by an administrative court, rather than an ordinary court, and that only the "principle" of administrative jurisdiction belonged in a constitution, not the rules governing the process of how such litigation would actually proceed.\textsuperscript{138} Gneist was even more prone to this than Stein, warning the Oligarchs not to create an administrative court at all:

"Administrative adjudication advances as general civilization advances; it should not be established until after a whole system of ordinary laws is completed. Should it be adopted at a time when civilization has not as yet advanced enough in general, the government would be so burdened that general progress itself would be hindered... Today as Japan makes its daily strides toward civilization, her government should have for itself as much freedom as possible so as not to have its hands tied.\textsuperscript{139}

Stein's empirically derived views on European public law - that it was a product of contested national histories, and that it was fundamentally connected with the social "base" out of which it grew, should have alerted him to the possibility that he might fundamentally misunderstand what would serve Japan well, in that he really didn't have first-hand knowledge of Japanese society. Stein was not dismayed, however, but proceeded to rely upon generalizations,

\textsuperscript{138} Id. at 141.

\textsuperscript{139} Quoted in Hideo Wada, \textit{The Administrative Court under the Meiji Constitution}, 10 LAW IN JAPAN 1, 16 n.33 (1977).
such as the Japanese longing and respect for authority, to propose solutions for
Japan that involved him projecting his own desire for authority onto the
Japanese, and fantasizing that their natural attraction for authority would allow
his own ideal of the non-class, general interest constitutional monarchy to
function there, uncaptured by narrow class interests. Stein also engaged in
another common error, which was to assume that some widely-used institutional
form was more than an historical artifact, but that its persistence was proof of
some important functionality or correspondence with natural law. In advising
Japan, Stein declared that it corresponded to “Nature” that only those who paid
direct taxes would be allowed to participate in the initial creation of a constitution,
and to participate in the legislative process once established.\textsuperscript{140}

Ito and others met with Gneist in Berlin, and more famously with Stein in
Vienna, but the idea of the “social monarchy” was also advocated on the ground
in Japan by Hermann Roesler, a German hired as a legal advisor by the
Japanese government. Like Gneist, Roesler was a strong advocate of
administrative courts for Germany, long before he came to Japan.\textsuperscript{141} Gneist and
Stein could be forgiven for not understanding the exact conditions in Japan that

\textsuperscript{140} Id. at 137.

\textsuperscript{141} See e.g., Hermann Roesler, \textit{Der österreichische Verwaltungs-Gerichtshof
nach dem Gesetze vom 22. October 1875, 4 Zeitschrift für das Privat-und
öffentliche Recht der Gegenwart} 14 (1877); Hermann Roesler, \textit{Ueber
Verwaltungsgerichtsbarkeit}, 1 Zeitschrift für das Privat-und öffentliche Recht der
Gegenwart 181 (1874).
would lend their theoretical system to abuse by the Oligarchs, and worse, though
given the emphasis both of them placed on the historical origins and historical
embeddedness of law, and on the importance of national social forces, it is hard
to see how they could have felt justified in giving advice on public law
arrangements for a society they knew nothing about, to a group of individuals
they knew nothing about. Roesler, on the other hand, should have been much
more aware of the authoritarianism to which he was contributing.

To the Meiji Oligarchs, it must have been a relief indeed to encounter the
Stein/Gneist vision of the monarchy, since it could serve so extraordinarily well
their own interests. From at least the eighth century onwards the Japanese
imperial family had generally lacked real military and political power, but had
enjoyed a "symbolic position as mediator between the members of the
oligarchy," and "as the prime source of legitimacy remained of such importance
that the emperor could never be assailed."¹⁴² Stein and Gneist were actually
advocating for the European monarchical state a socio-political role not unlike that
played in theory by the Japanese emperor, while fearing that the monarchical state
would become instead simply a prize of the dominant political faction, which in
fact seems to have been the fate of the emperor throughout much of Japanese
history. The Stein/Gneist vision, coming as it did from leading public law
scholars of an important Western intellectual center, was perfect for the

¹⁴² JOHN WHITNEY HALL, GOVERNMENT AND LOCAL POWER IN JAPAN: 500 TO 1700, at
13 (1966).
Oligarchs, who from their own history would have understood both the legitimating potential of such rhetoric, as well as the utopian naivete at its core. Where Gneist lamented the fact that the Prussian bureaucratic apparatus had become a tool of a political/class faction, and sought through his program of local self-government and administrative courts to return the state to its "properly" neutral, supra-societal role, the Meiji Oligarchs were the precise counterparts of those who, in the Prussian context, Gneist had been fighting against. Where Gneist feared that the formal trappings of a modern state and legal system would be unable to prevent class-based, instrumental rule in an industrialized society, for the Meiji Oligarchs, and for subsequent political regimes in Northeast Asia stretching over nearly a century, what Gneist deplored was in fact a prerequisite for their preferred program of authoritarian capitalist governance.

B. Political Culture: Changing Commitments

At the beginning of the Meiji era one of the first law reform initiatives was to enact a new criminal code, which the government attempted to pattern after existing Tokugawa law, with additions borrowed from laws of the Tang, Ming and Qing dynasties. The code was to take the form of the classic Northeast Asian

code, with norms addressed not to the public but to the government officer in charge of enforcement, and with the code itself not to be made public.\textsuperscript{144} In all likelihood this would not have satisfied the Western powers and their demands for a "civilized" legal system, which may explain why that path was soon abandoned. The fact that it was even suggested, however, is indicative of the extent to which Japan, and the rest of Northeast Asia, was soon to be forced into a revolution in legal and political thinking.

Although impossible to quantify, one can see in the political writings and social developments of the late nineteenth and early twentieth centuries that traditional political culture was under siege in several of the areas identified as important for administrative law. Western political theory and democratic ideals had become widely known in Northeast Asia, at least among elites.\textsuperscript{145} Japan was clearly in the forefront of this movement, to the extent that as early as 1869 the Emperor and the political elite, in the so-called Charter Oath, promised that "a deliberative assembly should be formed, and all measures be decided by public opinion."\textsuperscript{146} In Korea, too, social and political elites had become

\textsuperscript{144} Nakamura, \textit{supra} note 143, at 72-73.

\textsuperscript{145} On China, see PAUL A. COHEN, BETWEEN TRADITION AND MODERNITY: WANG T'AO AND REFORM IN LATE CH'ING CHINA (1974); BENJAMIN I. SCHWARTZ, IN SEARCH OF WEALTH AND POWER: YEN FU AND THE WEST (1964).

conversant in the language of democracy, and pressured the throne for reforms. The same was true in China, where leading thinkers and publicists were actively propagating ideas of law, rights and democracy. From that time forward, then, governments would be pressured to provide at least some democratic legitimation to norms originating in the executive branch, as well as those enacted through the legislative process.

Less likely to change was the cultural commitment to public over private ordering, particularly in the economic realm, as elites responded to the challenge of late industrialization by seeking to maintain a central role for the state in the economy. Particularly in Japan there were advocates for economic Liberalism, but by and large the rising economic elite of Northeast Asia appear not to have become vocal advocates of “invisible hand” arguments, and the broader publics did not either. Related to this was the traditional lack in Northeast Asia of a cultural commitment to legally demarcated public and private spheres, though this did begin to change quite dramatically in the latter half of the nineteenth century. Japan again took the lead, but by the end of the nineteenth century, Western legality and constitutionalism, with their commitment to the idea that the state itself is defined and limited by law, were widespread. With Western legality and constitutionalism came ideas of separated powers, of judicial independence,

147 See, Chandra, supra note 102.

148 THE CHINESE HUMAN RIGHTS READER (Angle and Svensson, eds., 2001), is an excellent source of translations from this period in China.
and of judicial review of state action to police the new legal demarcation between public and private realms. Lu Kung Tao's 1916 critique of the traditional Chinese district magistrate reflects these new political values, as he proclaims:

"that the Chinese system of entrusting a multitude of functions to one local official is entirely incongruous and devoid of political reasoning must be endorsed by all who have some knowledge of administration."¹⁴⁹

Interestingly, Tao also refers specifically to Gneist for the proposition that local self-rule would have to provide the basis for constitutional government in China.¹⁵⁰ Even when these ideas were propagated by Americans rather than Germans, however, they were likely to reflect the thinking of Goodnow and other Progressives. Thus Johns Hopkins political scientist W.W. Willoughby, a legal advisor to the Chinese government, would write in 1916 that in the U.S.

"there is a tendency which meets the approval of thinking men, to increase the powers and influence of the executive even though there does not prevail any system by which the legislatures may hold them politically responsible for their acts."¹⁵¹


¹⁵⁰ Id. at 60.

¹⁵¹ W.W. Willoughby, Observations with Reference to the Adoption of a Written Constitution, 1(3) CHINESE SOCIAL AND POLITICAL SCIENCE REVIEW 13, 40 (1916). As if the Chinese leadership needed encouragement to create an executive-dominated political order, Willoughby went on to write, "Especially at this time is it necessary that China should have a strong and efficient executive branch of government and this fact should not be lost sight of in any proper attempt that may be made to establish an effective party responsibility." Id. at 40. "Under any system of government, experience has shown that it is unwise for the legislature to attempt itself to exercise a control and a judgment with reference to details of administrative action." Id. at 39.
Given the fact that the power to reform the law was still held by small circles of political elites, it would be a mistake to attribute the path of administrative law reform to the broad shifts in political culture occurring in Northeast Asia. Rather, Northeast Asia's power holders were driven to adopt Western administrative law primarily by their own instrumental aims, and in these the pressures of extraterritoriality and imperialism certainly outweighed pressures arising from the fact that Western democratic and legal ideals were spreading in their societies.

C. Formal Law and Legal Institutions in Japan and China: Reconciling Instrumental Aims and Changing Political Cultures

Northeast Asian political power holders thus had no choice but to Westernize their administrative law systems, and the issue became how to do so while simultaneously meeting the demands of the Western powers, accommodating their own instrumental aims, and also meeting the demands of political cultures which were beginning to include commitments that shape administrative law. Japan took the lead in this endeavor, and provided important models for China, so Japan's formal law reforms will be addressed first. China's efforts will be addressed second.

1. Meiji and Pre-World War Two Developments
The Meiji Restoration of 1868 established the basic leadership structure that was to carry out a massive effort to Westernize Japan's entire legal system, an effort that was to take roughly thirty years. One of the earliest commitments was to adopt a "modern" constitution which would institutionalize a role for the citizenry in governance. The Meiji Constitution, finally "octroyed" by the Emperor in 1889, thoroughly reflected the influence of Gneist, Stein, and their followers Hermann Roesler and Albert Mosse, employed as advisors by the Meiji government,\textsuperscript{152} though the Japanese leadership were quite aware of what they were doing in adopting Prussian public law as the prime inspiration for their reforms, along with the Formal Rechtsstaat and social monarchy theory that justified that law. Social and political forces for more widespread democracy were powerful in Japan by the 1870s, and there was support for a British rather than a German/Prussian state system. The charge is made that Itō and others at the center of the constitution drafting effort maintained secrecy until the constitution was "octroyed" by the emperor precisely to hide the fact that it was the Prussian mold that would be followed.\textsuperscript{153}

With respect to the types of administrative law discuss earlier,\textsuperscript{154} the Meiji

\textsuperscript{152} On Roesler and Mosse, see generally, Luig, \textit{supra} note 126; Carl Hermann Ule, \textit{Zu den Anfängen der Verwaltungsgerichtbarkeit in Deutschland und Japan}, 80 VERWALTUNGS-ARCHIV 303 (1989); Johannes Siemes, Hermann Roesler and the Making of the Meiji State (1968).

\textsuperscript{153} Nakamura, \textit{supra} note 143, at 59-69.

\textsuperscript{154} \textit{Supra} notes 90 to 99 and accompanying text.
legal order maintained the traditional Northeast Asian emphasis on legally structured and ordered government. Thus administrative law in the sense of a legally organized bureaucracy, with legally defined spheres of competence, prevailed. As was discussed above, Japan moved to a professionalized civil service as well, meaning that there would be administrative law in the sense of internal disciplinary norms governing administrative action.

Administrative law in the sense of substantive norms for the bureaucracy to enforce was also prevalent. The Meiji state was constructed with Bismark's "welfare" state in the background, but as was discussed in Chapter One, the growth of regulatory government was universal among the Western powers in the latter half of the nineteenth century. The Meiji constitution left the Emperor with even more legislative authority than provided for under the Prussian Constitution, however, by providing that he "exercises the legislative power with the consent of the Imperial Diet," (Article 5), by providing that he "gives sanction to laws, and orders them to be promulgated and executed," (Article 6), and by granting him extensive independent authority to enact ordinances (Articles 8 and 9). This authority under Article 9 has been seen as going even farther than similar provisions in the Prussian Constitution of 1850, which was no model of checks on the executive authority. In addition, the Meiji Constitution flirted

155 Constitution of the Empire of Japan (1889).

156 Carl Hermann Ule, Japanische und deutsche Rechtsauffassungen im öffentlichen Recht, 103 Deutsches Verwaltungsblatt 599, 600 (1988).
with the idea of ministerial responsibility, but instead of creating ministerial responsibility to the legislative branch, which would have ensured at least some democratic control over the activities of the executive branch, the Meiji twist on the principle makes ministers "responsible" to the Emperor (Article 55). Thus the constitution was designed to enshrine the existing power relationships, which were even less democratic than those prevailing in Prussia. The term "transcendentalism," clearly related to the state theory of Stein and Gneist, came to be used to describe the essence of this extreme insulation of the emperor and the Oligarchs, who might be called the executive branch except that they in fact were fully in control of the executive function as well.\(^{157}\) The Oligarchs even acted to cut off the limited power some German legislatures held by virtue of their control over budget legislation, a power of which their German advisors apparently disapproved.

The third area of administrative law, administrative law as external controls on the bureaucracy, was the area in which the Meiji state began the most dramatic break with Tokugawa governance, in that it began the creation of a system of external administrative law. At the highest level, the Meiji

\(^{157}\) This "transcendentalism" is discussed at length in Junji Banno, The Establishment of the Japanese Constitutional System (J.A.A. Stockwin, trans., 1992) (1971). Earlier discussions of the Meiji Constitution are George M. Beckman, The Making of the Meiji Constitution (1957), Tomio Nakano, The Ordinance Power of the Japanese Emperor (1923), and Iyenaga, supra note 146. W.W. McLaren's, A Political History of Japan (1916), and Japanese Government Documents (1914) are invaluable resources.
Constitution provides in a rather backhanded way for the creation of an
administrative court with exclusive jurisdiction over a certain class of cases:

No suit at law, which relates to rights alleged to have been infringed by
the illegal measures of the administrative authorities, and which shall
come within the competency of the Court of Administrative Litigation
specially established by law, shall be taken cognizance of by a Court of
Law.\footnote{Constution of the Empire of Japan, Article 61.}

This provision did not itself create an administrative court, but left that, as well as
the creation of the procedural and substantive law of that court, to ordinary
statute law. Not surprisingly, the system of external administrative law that
resulted was limited in its functions, providing limited protection against the
overwhelming power held by the executive.\footnote{Katsumi Takabayashi, \textit{Einführung in das japanische Verwaltungsprozeßrecht},
55 \textit{VERWALTUNGS-ARCHIV} 359, 359-360 (1964).}

The Administrative Court was created in 1890,\footnote{As a single, national court it followed the Austrian, not Prussian, model. Carl
Hermann Ule, \textit{Verwaltung und Verwaltungsgerichtsbarkeit in Japan}, 99 \textit{DEUTSCHES
VERWALTUNGSBLATT} 649, 649 (1984).} but the statute creating
the court did not create private rights to challenge administrative action. Such
rights were created in 1889, with the enactment of the Administrative
Adjudication Law.\footnote{\textit{Gyosei saiban ho}, Law no. 48, of 1889.} In line with the advice of some of Japan’s German
advisors,\footnote{Mosse is given particular credit for recommending the \textit{Enumerationsprinzip}
over the broader \textit{Generalklausel}. Ule, \textit{supra} note 160, at 650.} the Administrative Adjudication Law followed the Prussian

\footnote{\textit{Enumerationsprinzip}.}
"Enumerationsprinzip" in that it created causes of action in only five specific classes of cases, rather than empowering the court more broadly through the use of "Generalklausel" on the Austrian model. The Administrative Court was the sole instance for administrative litigation in Japan, with no appeal available. In addition, the Administrative Court Act provided that the Administrative Court did not have jurisdiction to hear damage claims against the government. An individual injured by official action could in theory sue under the Civil Code, in ordinary court, but only if the act had been "in the course of private or civil transactions by the administration acting in the capacity of a legal person other than the Emperor’s government, which was inherently supreme over the subjects and could do no wrong." At the same time the Meiji reformers created a unified system for internal, hierarchical review of initial administrative dispositions, enacting the 1890 Administrative Appeals Law.

The foregoing describes the basic system of administrative law as it existed until the U.S. occupation of Japan, and the changes that set in motion.

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163 The court had jurisdiction over the following five classes of cases: i) assessments of taxes or surcharges, excluding customs duties; ii) delinquency in tax payment; iii) denial or revocation of business licenses; iv) irrigation and public works, and v) determination of land ownership between public authorities and private persons.

164 Kenji Kamino, Governmental Compensations in Japan, in COMPARATIVE STUDIES ON GOVERNMENTAL LIABILITY IN EAST AND SOUTHEAST ASIA 95, 97 (Zhang Yong ed., 1999).


166 Sogan ho, Law no. 105, of 1890.
Employing the analytical framework developed here, the creators of the system had been able to craft an administrative law system that met their instrumental aims in that it met the demands of the foreign powers, while also meeting their own desires to preserve their own prerogatives. The system represented a limited surrender to the growing consensus in Japanese political culture for separation of powers, for legal checks on the bureaucracy, and for a rule-based boundary between the state and society, yet did not become a vehicle for the rising democratic aspirations, or for the courts to assert themselves as an independent power center in Japanese politics. Although the Administrative Court was criticized, economic interests evidently did not join with progressive civil society forces to push for more protective administrative law.

Even as the Japanese public became politically active in a Western sense, and even as political parties became major forces in Japanese society, the administrative law system remained in its limited role. Japanese lawyers, too, were increasingly sophisticated about jurisprudential currents in the West, as the early twentieth century saw the introduction of European anti-formalist ("free law") thinkers such as Gény and Kantorowicz, as well as the legal sociology of Weber and Eugen Erlich. The best the liberal public law scholars could offer was the argument that the emperor was an "organ of the state,"

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167 See generally, Takayanagi, supra note 143.

168 Kiyoshi Igarashi, EINFÜHRUNG IN DAS JAPANISCHE RECHT 7 (1990).
borrowed from the German public law theorist Georg Jellinek, but even that seemingly innocuous attempt to place the emperor within a positivist hierarchy of legal norms was attacked by conservatives. The courts too were limited to positivist interpretations of the laws created by the executive. For example, when faced with a claim for damages arising out of an official act, an ordinary district court found that because there was no specific law creating a damage remedy, the official act couldn’t be questioned in the court, and the official couldn’t be sued for damages.\textsuperscript{169}

None of this increasing democratization and liberalization of Japanese political culture was sufficient to widen the universe of those who controlled administrative law doctrine, and none of it changed the instrumental calculations of that small group of actors enough to bring about a liberalization of Japanese administrative law. The attraction of the German model to the Oligarchs seems obvious in retrospect: like Japan, Germany trailed its European rivals, and sought a strong military and rapid economic modernization at the same time. Change, too, was going to come from the top down “for the sake of efficiency and at the expense of democratic principles” of the English and French types.\textsuperscript{170}

Economic elites, who became especially influential in Japan before the extreme militarization of the 1930s, and who in a liberal account of political

\textsuperscript{169} 1(2) A.B.A. J. 181 (1915).

change might have been counted upon to push for a more expansive administrative law, were able to negotiate mutually satisfactory arrangements with the state based on their fundamental importance to Japan’s developing capitalist economy.\textsuperscript{171} Public demand for constitutionalism may have contributed to a “rule by law” in Japan, meaning the creation of a public law relationship between individuals and the state, reflected in administrative review and administrative litigation avenues that were created.\textsuperscript{172} With that done, however, public demand failed to further liberalize the system.

2. Late Qing and Republican China\textsuperscript{173}

Imperial China began its law reform efforts, including its efforts to adopt Western administrative law, after Meiji Japan’s efforts were well underway. The first official proposal touching on administrative law came in 1908, as part of a broader set of legal and political reform proposals to the throne.\textsuperscript{174} The first specific proposal, which was accepted by the throne along with the rest of the proposals, called for the creation of an administrative court in year six (1913) of a

\textsuperscript{172} Wada, supra note 139, at 2.
\textsuperscript{173} This section draws extensively on Li, supra note 97.
\textsuperscript{174} Id.
nine-year program of reforms. In 1910 the throne accepted a recommendation to advance creation of the administrative court to 1911, and to enact a Law on Administrative Trials. In 1911 the newly created Cabinet drafted the Draft Law on Organization of the Administrative Court, the model for which was likely Japan's 1890 Administrative Adjudication Law. Under China's Cabinet Organization Law of 191_, proposed laws were supposed to be voted on by the Cabinet before going to legislative branch for passage, however the Draft Law on the Organization of the Administrative Court was never put to a Cabinet vote, and the proposed Law on Administrative Trials never emerged from the drafting process. What prevented any of this from coming to fruition was the 1911 Revolution and the fall of the Qing dynasty.

Although these late-Qing proposals were aborted, it is interesting to note the influence of Prussian public law, mainly via Japan, on the Chinese political elites. It was "advanced," Western law that would help get them out from under the extraterritoriality system, it conceded to a changing domestic political culture the creation of private rights against the state and a more legalized relationship between state and society, and yet it did not threaten the unity of state power, or

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175 The Institute for Investigation and Compilation of Laws for Constitutional Government, and the Department of Conference and Political Affairs were charged with drafting the statutes.

176 (Xingzheng Shenpan Fa).

177 (Xingzheng Caipan Yuan Guanzhi Cao An).

178 Li, supra note 97, at 73.
the prerogatives of the throne or the modernizing elites who surrounded it.

With the success of the 1911 revolution came the Chinese Republic, founded in 1912 with its capital in Nanjing. The Republic reaffirmed that administrative litigation had become an element of a "modern" government by including in its Provisional Basic Law\(^{179}\) a right of citizens to complain to a Court of Administrative Justice\(^{180}\) if their rights were violated by administrative action. The Provisional Basic Law also provided that a law was to be enacted to establish procedures for administrative litigation, and President Sun Yat-Sen directed provincial governors to notify the public of its right to petition the Court of Administrative Justice. Although this proposed system was also aborted, this time by the fall of the Nanjing government in 1912, the movement would continue along basically the same trajectory.

In 1912 a new government was created with Beijing as the capital. Administrative law remained on the law reform agenda,\(^{181}\) but at this stage some interesting diversity began to appear. One development was that the ordinary courts were given jurisdiction over administrative law cases, pending further study, though because no administrative litigation statute was in force, there was

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\(^{179}\) Enacted March 11, 1912.

\(^{180}\) (Pingzheng Yuan).

\(^{181}\) Administrative law reform was on the agenda of the National Judicial Conference, held in Beijing in December, 1912.
no statutory law for them to enforce.\textsuperscript{182} Also, debate occurred over whether to have a designated administrative court at all, and the question was brought to the Constitution Drafting Committee of the National Assembly. Like other sprouts of Chinese administrative law reform, this was cut short when President Yuan Shi Kai dissolved the National Assembly.

Efforts continued, however, and in 1914 the government promulgated by Executive Order an Order for the Organization of the Court of Administrative Justice,\textsuperscript{183} and a Court of Administrative Justice was established. Shortly thereafter a new Basic Law\textsuperscript{184} was enacted, Article 8 of which provided that, "[A]ll persons shall have the right to make appeals to administrative agencies and to bring suits before the Court of Administrative Justice in accordance with law."

This recognized the two paths of internal agency review and external complaints to the Court of Administrative Justice, as well as the \textit{Enumerationsprinzip} defining a limited set of causes of action. This was followed by a Presidential Decree promulgating an Administrative Litigation Statute,\textsuperscript{185} replaced shortly by an Administrative Litigation Law.\textsuperscript{186}

\textsuperscript{182} Li, \textit{supra} note 97, at 33.

\textsuperscript{183} \textit{(Pingzheng Yuan Bianzhi Ling)}.

\textsuperscript{184} \textit{(Yue Fa)}, of May 1, 1914, enacted to replace the earlier Provisional Basic Law of the Provisional Government.

\textsuperscript{185} \textit{(Xingzheng Susong Tiaoli)}, by Presidential Decree of May 17, 1914.

\textsuperscript{186} \textit{(Xingzheng Susong Fa)}, of July 20, 1914.

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The Court of Administrative Justice was placed under the President, and all its judges were appointed by the President. It was more than a court, in that it also contained an Office of Supervision, and a Board of Disciplinary Actions Against Government Officials, which enforced the impeachment law.\textsuperscript{187} It thus was designed to take on substantial roles in the disciplining of the bureaucracy from the inside, reminiscent of the Censorate in traditional government.

The Administrative Litigation Law of 1914 created causes of action: i) where rights had been injured by an unlawful disposition of the highest administrative agency either at the central or the local government level, and ii) where their rights having been so injured, after an administrative appeal to the highest agency concerned, the decision rendered by that agency was still unacceptable to the complainant. It also created a public "supervisor" with the right to initiate litigation if the injured individual chose not to file suit. Trials were to be public and open, with all parties allowed to cross-examine witnesses, clarify issues, present rebuttal evidence, make oral arguments, etc. Remedies available under the statute were very limited, however. Damages were not available, and judgments annulling or ordering modification of administrative dispositions were not self-executing. The Chief Justice had to ask the President to order an agency to comply.

This system remained in force until the 1920s, and the Nationalist

\textsuperscript{187} (\textit{Jiutan Tiaoli}).
Revolution. When the Nationalists established their Revolutionary Government in Guangzhou, in 1925, they organized a new administrative court, the Court of Administrative Trials.\(^{188}\) In 1927 the Nationalist Government was established in Nanjing, and when the Nationalists occupied North China in 1928 the Court of Administrative Justice in Beijing ceased to operate. The Nationalist Government then began its own law reforms, which, under the Basic Principles of Political Tutelage, were in the hands of the Nationalist Party's Political Conference of the Central Executive Committee. In 1928 the Nationalist Government promulgated the Law on Organization, which placed administrative litigation within the Judicial Yuan.\(^{189}\) The government then promulgated the Law on Organization of the Judicial Yuan,\(^{190}\) which provided for a Bureau of Administrative Trials. This bureau was renamed the Administrative Court, the name that the Nationalist Government subsequently used in Mainland China, and later on Taiwan. In 1932 a law creating the Administrative Court was promulgated,\(^{191}\) and the court finally came into existence in 1933. Accompanying the creation of the court was the promulgation of a new Administrative Litigation Law, to replace the 1914 statute of the defunct Peking government, which had been the statute in force

\(^{188}\) (Shenzheng Yuan).

\(^{189}\) (Zuzhi Fa), of October 4, 1928. Article 33(1) assigned administrative litigation to the Judicial Yuan (Sifa Yuan).

\(^{190}\) (Sifa Yuan Zuzhi Fa).

\(^{191}\) (Xingzhengfa Yuan Zuzhi Fa).

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before the defunct Court of Administrative Justice.

This 1932 system continued on the Mainland until 1949, and on Taiwan until the Administrative Litigation Law was extensively amended in the mid-1970s. It abolished the "supervisor" position of the earlier law, as well as the supervisory functions reminiscent of the Censorate. The Administrative Court has been, from then on, a forum for private actions against the state. Jurisdiction under the Administrative Litigation Law was limited to claims of illegality, so dispositions within the discretionary power of an administrative body and not in violation of law could only be appealed to higher administrative authorities under the administrative review statute. Plaintiffs would now be required to exhaust administrative remedies before filing suit, unlike under the Administrative Litigation Law of 1914, which allowed challenges to decisions of the highest level of an administrative agency, without exhausting administrative review. In addition, the new Administrative Litigation Law allowed retrial in accordance with the Civil Code,\(^{192}\) whereas the 1914 Administrative Litigation Law foreclosed any retrial. The new ALL allowed adjudication on documents and evidence in the record alone, and did not require a public trial or oral argument except in exceptional circumstances. The law expanded the available remedies to include damages, but limited claims to actual damages suffered, not expectation damages.

\(^{192}\) Article 461 of the Civil Code provided grounds for retrial in civil cases.
Few cases were filed under the 1932 arrangement, and fewer still fell within the new jurisdiction. In a step reminiscent of the current Chinese government's legal education efforts, the Administrative Court distributed around China 26,000 copies of a pamphlet explaining the administrative litigation system. The Administrative Court sat in Nanjing from 1933 to 1937, moved to Chongqing with the Nationalist Government until 1945, sat in Nanjing again between 1945 and 1949, and then relocated to Taiwan with the Nationalist Government in 1949.

D. Conclusion

In creating the Meiji administrative law system Japan did much to establish the basic path of Western administrative law in Northeast Asia. What emerged during the Meiji era was a German/Austrian administrative law system that subsequently influenced China's law reform efforts, and which Japan imposed on Korea and Taiwan through colonization. As will be discussed in Chapter Three, elements of this system remain at the core of Northeast Asian administrative law to this day.

The fact that Northeast Asia's legal systems, including administrative law

\footnote{On the legal status of Korea and Taiwan in the Japanese legal system during the colonial era, see, Edward I-te Chen, \textit{The Attempt to Integrate the Empire: Legal Perspectives}, in \textit{THE JAPANESE COLONIAL EMPIRE, 1895-1945} (Ramon H. Myers and Mark R. Peattie, eds., 1984).}
systems, are based on German sources is important for several reasons. The European tradition influences the organization of Northeast Asia's judiciaries, the organization and roles of the legal profession, and the style of legal scholarship. The Germans who advised on administrative law reforms showed their preoccupations – to avoid social strife by managing social change under the Liberal Rechtsstaat, thus limiting the role of the public and the courts – and this clearly resonated with the Northeast Asian political elite. Returning to the U.S. for a moment, although Goodnow and Freund, like other American Progressives, shared with Gneist and Stein an emphasis on the state and a somewhat hesitant attitude toward democratic politics, they were also both fundamentally committed to private rights and the need for law to protect them against the state. By contrast, in Asia the elites not only elevated the state and distrusted democracy, they took it one step further and also suppressed the exercise of private rights even at the administrative law level, let alone at the constitutional law level.

From the beginning of the Meiji reforms until the U.S. occupation of Japan after World War Two, foreign legal scholars appear to have paid almost no attention to administrative law in Northeast Asia. Yet as was discussed in Chapter One, these were the decades in which Americans interested in administrative law were actively engaged in comparative work. Perhaps this neglect of administrative law in Northeast Asia was a result of Americans being obsessed, either as devotees or as critics, with "advanced" European administrative law. This put the Americans in a sort of semi-periphery in terms of
the flow of legal culture, with nothing to learn from the Northeast Asians in the real periphery. On the other hand, the Westerners who were engaged in the exporting of law to Northeast Asia did not pay much attention to administrative law, though one would have expected at least Goodnow, who served as an advisor to the Yuan Shikai government's constitution drafting efforts, to have left more of a record concerning China's administrative law efforts.

If it was indeed international trade relations that finally got the West interested in Northeast Asian administrative law, if it was economics that somehow drove the scholarly effort to understand Japanese industrial policy and the seeming extra-legal power of Japanese bureaucrats to influence the behavior of private companies, Japanese and foreign, then the conditions were simply not ripe until the East Asian Miracle was discovered in the 1960s. When the treaty port system and extraterritoriality were in effect, foreign-owned businesses could operate out of reach of many of the police powers of the Japanese or Chinese governments, and did not rely on local courts to protect their rights as investors. And though it was well-known that the Japanese government, in particular, was involved in attempts to promote industry and guide development, this was an essentially undemocratic government in the age of economic imperialism, and it apparently didn't seem interesting to study how administrative law structured relationships between government and society in such an environment.
Chapter Three: Administrative Law in the Developmental State, and Beyond

I. Introduction

This chapter first addresses administrative law in the "developmental state" era in Northeast Asia, the period from approximately 1950 to 1990 (Part II). The statutory structure of administrative law will be discussed in the context of political culture and the instrumental aims of those holding political power. Part III then introduces the wave of statutory changes that have been occurring in Northeast Asian administrative law since the early 1990s, identifying specific statutory innovations, discussing the context in which those changes have taken place, and attempting to evaluate the extent to which those changes herald a turn in the region toward the pluralist administrative law style discussed in Chapter One.

II. Administrative Law and the "Developmental State"

In the history of economic development, Japan, South Korea and Taiwan stand out as the leaders of the East Asian Miracle. During the decades that they
achieved miracle status, however, foreigners interested in trade and investment were speaking of "Japan, Inc.," and "Korea, Inc.," based on a perception that what they were encountering in Northeast Asia were not textbook free-market economies, in which trade and investment decisions, whether by locals or by foreigners, are left basically to market forces. What foreign business people were encountering was Northeast Asian industrial policy, which manifested itself in each country as a statutory, regulatory framework designed to allow the national bureaucracy to control virtually all aspects of cross-border economic activity, whether in goods, technology, investment, services, or currency. Northeast Asian Industrial policy was designed to guide economic development, and the statutory structures left considerable discretion to government actors charged with implementing the various elements of the regulatory schemes.

This industrial policy consisted formally of foreign exchange controls, of statutes requiring approval of foreign investments, of technology licenses, and of licensing systems for foreign trade. Foreign investments were channeled by this approval system into manufacturing for export, not for local sale, and sectors such as retailing and distribution were long simply closed to foreign participation. In those industrial sectors in which foreign investment was allowed the regulatory framework required, or at least favored, investments via minority shares in joint ventures with local industry. Portfolio investment was very limited, first to funds or depository receipts traded on foreign exchanges, and later to stakes far too small to gain control of local companies. Manufacturing investments were made
subject to “local content” requirements conditioning approval on commitments to
source inputs locally, rather than via imports, and were also subject to export
performance requirements. The combination of protectionist controls on imports,
and extensive restrictions on even foreign manufacturing investments, left many
foreign businesses with the choice of licensing their technology to a local
manufacturer/competitor, or not participating at all in Northeast Asia’s growing
economies. Technology import licenses also went through a bureaucratic
screening process designed to improve the terms available to the local licensee,
thus maximizing the inflow of useful, up-to-date technology, and minimizing the
outflow of hard currency in the form of royalty payments. Local companies had
to deal with the same system, meaning that they could not get access to raw
materials, equipment, or technology without navigating the industrial policy
bureaucracy. Local entrepreneurs could not access foreign capital markets
without government approval, and particularly in South Korea and Taiwan, where
the nationalizing of the banking sectors had been one of the first steps toward
industrial policy, raising capital from domestic sources meant dealing with the
government. Beyond the support to local industrial provided by these systems,
industrial policy also involved active government support to targeted industries.

Factually this is beyond dispute, though criticism of Northeast Asian
industrial policy was for many years limited to those actually affected by it,
because when compared to the rhetoric of “dependency theory” and the New
International Economic Order that was emanating from much of the developing

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world, and the West’s critics of capitalism, the Northeast Asians were basically market-oriented.

What came to be a matter of dispute, probably beginning with Chalmers Johnson’s 1982 work *MITI and the Japanese Miracle*,¹ was the extent to which Northeast Asian industrial policy presented a challenge to liberal, free-market orthodoxy concerning the optimal role of the state in a market economy. It was one thing to point out that Japan’s industrial policy had been instrumental in its obtaining much of America’s best industrial technology at bargain rates, or that it hurt non-Japanese industries. That was just an argument that the Northeast Asians were mercantilists, and liberal economic theory told us that mercantilists were only hurting themselves, especially “in the long run.” It was something else, however, to argue, as Johnson and other writers seemed to do, that properly implemented industrial policy allowed a country to achieve better-than-market performance, that rather than being “cheating,” industrial policy was a good thing and that we should have one too.² The arguments that ensued were not unlike arguments in American politics from the New Deal era, and it was not

¹ MITI was the Ministry of International Trade and Industry, which together with the Ministry of Finance administered much of Japan’s industrial policy system.

² Kozo Yamamura, one of the most insightful Western commentators on Japanese industrial policy, connects this shift in perceptions to the U.S. “stagflation” of the late 1970s, which made an idealized picture of Japanese industrial policy “extremely attractive to most American business executives, bankers, and some political leaders.” Kozo Yamamura, *Success that Soured: Administrative Guidance and Cartels in Japan*, in *Policy and Trade Issues of the Japanese Economy* 77 (1982)
lost on everyone that “New Dealers” had been intimately involved in the creation of Japan’s post-War system.³

Debate also centered on the status of the bureaucracies charged with administering these industrial policies. Were they in fact, as Johnson and others seemed to suggest, highly insulated from politics, exercising their discretionary authority in light of their expertise and in pursuit of the public interest? Or were they better understood as just additional examples of what American political science said about all bureaucracies: captured by the forces they were supposed to regulate, shirking “agents” mainly interested in feathering their own nests, and certainly not able to out-think the wisdom of the market to “pick winners.” If Johnson,⁴ Alice Amsden,⁵ Robert Wade,⁶ and many others writing the new political economy literature on Northeast Asia were right,⁷ then all the rational

³ As John Haley likes to remind those who emphasize the “Japanese-ness” of these industrial policy tools, many of them were put in place by the U.S. Occupation Government in the years following World War Two.

⁴ Another important contribution by Johnson was his article, Politics, Institutions and Economic Performance: The Government-Business Relationship in Japan, South Korea, and Taiwan, in The Political Economy of the New Asian Industrialism (Frederic C. Deyo, ed., 1987).

⁵ Amsden, an MIT professor and one-time World Bank economist, wrote first on statist economic development in Taiwan, see, Alice H. Amsden, Taiwan’s Economic History, 5 Modern China 341 (1979), then on South Korea. See, Alice H. Amsden, Asia’s Next Giant: South Korea and Late Industrialization (1989).


⁷ Other works in this genre include The Role of the State in Taiwan’s Development (Joel D. Aberbach et al., eds., 1994), Contending Approaches To The
choice critics of American bureaucracy were doing was describing individual
cases of bureaucratic failure, and were simply wrong if they thought they had
discovered universally valid rules that would forever illegitimate activist
government.

Although the financial crisis that swept Asia beginning in 1997 did much to
undermine the more extravagant claims for the Northeast Asian industrial policy
bureaucracies, these debates are nonetheless important. The Northeast Asian
economies had a remarkable run of economic development prior to the financial
crisis, so for developing countries the problems exposed by the crisis might
seem insignificant compared to potential gains if they could replicate what
Northeast Asia accomplished at similar levels of economic development. In
addition, the debates are important for understanding the never-ending interplay
of economics, politics, and for purposes of this work, law. The following section
discusses administrative law during the developmental state era, first in terms of
formal law, then in the context of instrumental aims and political culture.

A. Formal Administrative Law in the Developmental State: The Package

POLITICAL ECONOMY OF TAIWAN (Edwin A. Winckler and Susan Greenhalgh, eds., 1988),
THOMAS B. GOLD, STATE AND SOCIETY IN THE TAIWAN MIRACLE (1986), THE POLITICAL
ECONOMY OF THE NEW ASIAN INDUSTRIALISM (Frederic C. Deyo, ed., 1987), and Bruce
Cumings, The Origins and Development of the Northeast Asian Political Economy:
Industrial Sectors, Product Cycles, and Political Consequences, 38 INTERNATIONAL

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Building upon the developments discussed in Chapter Two, Japan, Taiwan, and newly independent South Korea, possessed administrative law systems that were broadly similar, and remarkably stable, during the era discussed here. Because the developments discussed in Chapter Two had already established the basic legality of public administration, the focus here will be on the law directly governing the relationship between the state and private sector actors. In the background there existed constitutional norms allowing delegation of legislative authority to executive branch bodies, the law creating such bodies was in place, and there existed internal rules governing bureaucratic activities. With the exception of Japan, however, politics remained authoritarian.

1. Administrative Review Law

Each of the countries discussed here had, by this time, a basic statute governing internal administrative review when requested by an affected citizen. In Japan this was governed by the 1962 Administrative Complaint Investigation Law,\(^8\) which still provides the general framework for intra-administration review of administrative acts. The basic sequence calls for two levels of review, one by the body that made the initial decision, and one by that body's immediate

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superior in the bureaucratic hierarchy. Because the initial review is not designed to vindicate judicial values by providing for an independent decision maker, or a quasi-judicial procedure, it is often dispensed with unless required by specific statute, such as in the case of tax administration, or unless the initial decision was taken by a Minister, in which case no administrative superior exists to hear the complaint.\textsuperscript{9} Generally, then, a request for administrative review is filed with the nearest superior administrative organ, which had broad power to quash or alter the act of the lower body, or order that body to take specific action. These powers of administrative supervision are governed by principles of administrative hierarchy and the National Administrative Organization Act, which allow superior administrative organs much more leeway to craft effective remedies than courts are given when reviewing administrative actions.\textsuperscript{10}

In Korea, the applicable statute was the Administrative Appeals Law, and appeals under this had to be exhausted before administrative litigation could be filed.\textsuperscript{11} In Taiwan the basic statute governing internal agency review remains the Complaint Appeal Law,\textsuperscript{12} enacted in 1930.

\textsuperscript{9} Fuke, Chapter Two, \textit{supra}, note 165, at 229.

\textsuperscript{10} \textit{Id.}


\textsuperscript{12} \textit{(Suyuan Fa)}.  

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2. Government Compensation

Each of these countries also had in operation a system for compensating citizens injured by official action, thus relinquishing sovereign immunity. The fact that Japan's pre-World War II administrative law had not included such a provision was a point of criticism, and to guarantee that this would be remedied the 1947 Constitution provides that "[e]very person may sue for redress as provided by law from the State or a public entity in case he has suffered damage through illegal act of any public official."\(^{13}\) This constitutional provision is given life by the State Compensation Law,\(^{14}\) which together with the Civil Code comprises Japan's governmental liability system.

This system important in Japan because the Japanese courts, which hear both administrative litigation under the Administrative Litigation Law, and government liability litigation under the State Compensation Law and the Civil Code, interpret standing more strictly under the Administrative Litigation Law,\(^{15}\) and are seen to be hesitant to revoke administrative acts, based on a broad

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\(^{13}\) 1947 Constitution, Article 17.

\(^{14}\) Law no. 120, of 1947. This reform came at the initiative of the Japanese, and was initially rejected by the U.S. Occupation authorities. John O. Haley, *Japan's postwar Civil Service: The Legal Framework*, in *THE JAPANESE CIVIL SERVICE AND ECONOMIC DEVELOPMENT* 77, 81 (Hyung-Ki Kim, et al., eds., 1995).

\(^{15}\) Kenji Kamino, *Government Compensations in Japan*, in *COMPARATIVE STUDIES ON GOVERNMENT LIABILITY IN EAST AND SOUTHEAST ASIA* 95, 105 (Yong Zhang, ed., 1999).
deference to administrative discretion. In addition, the limitation period under the Administrative Litigation Law is shorter than for government compensation litigation, and it is felt that Japanese courts take a less passive attitude in compensation cases than in cases arising under the Administrative Litigation Law. According to one commentator, the courts’ tradition of awarding damages in compensation actions may well have been based on a recognition by the courts that they were dealing with administrative acts that properly should have been enjoined or otherwise prevented from occurring, had the law given them effective remedial tools.

Like Japan, South Korea provides a constitutional basis for government liability, providing in article 29(1) of the Constitution that, “[i]n cases where a person has sustained damage due to the unlawful acts of public officials done in the course of their official duties, he may make a claim against the State or public agency for just compensation in accordance with the provisions of the law. In this case, the public officials concerned shall not be immune from liability.” Article 29(1) has been interpreted by courts as functioning analogously to respondeat superior, creating liability in the state based on acts of state officials.

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16 Id.

17 Id.

18 Fuke, Chapter Two, supra, note 165, at 233. Professor Fuke suggested in 1989 that Supreme Court decisions over the previous five to six years had sought to restrict the scope of governmental liability under the Government Liability Act in order to help reign in government expenditures. Id.
while also allowing the state to seek reimbursement from the official whose actions gave rise to such liability. Korea's State Compensation Act gives concrete form to this constitutional mandate, creating private law rights against both central and local governments, while not preempting ordinary causes of action existing under the tort provisions of the Civil Code.

Taiwan provides for state compensation via the State Compensation Law, as well as under the Civil Code. Unlike other aspects of Taiwan's administrative law, the State Compensation Law does not date from the Republican period on the Mainland, but was enacted in 1980.

3. Administrative Litigation Law

During the developmental state era Japan, South Korea and Taiwan also had in force administrative litigation statutes along the lines discussed in Chapter Two. In Japan, the postwar reform efforts which led to the reform of government

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19 Won Woo Suh, Governmental Liability in Korea, in Zhang, ed., supra note 15, at 9, 10-11.

20 (Kukka paesangbob). An English version of the law is available in Zhang, ed., supra note 15, at 221-228.

21 Suh, supra note 19, at 10-13.


compensation law also focused on reforming the administrative litigation system. In contrast to their counterparts in occupied Germany, the Occupation law reformers in Japan insisted upon the abolition of the Meiji Administrative Court, and the transfer of jurisdiction over administrative litigation to the ordinary courts. Toward this end the 1947 Constitution stipulated that, "[t]he whole judicial power is vested in the Supreme Court and in such inferior courts as established by law,"\(^\text{24}\) and that "[n]o extraordinary tribunal shall be established, nor shall any organ or agency of the executive be given final judicial power."\(^\text{25}\) Although this language would certainly seem to allow for a system of administrative courts so long as it remained within the judicial branch and inferior to the Supreme Court, the prevailing interpretation has been that administrative courts are precluded.\(^\text{26}\) The Court Organization Law,\(^\text{27}\) which entered into force simultaneously with the 1947 Constitution, reinforces this interpretation by omitting administrative courts from its exclusive catalogue of courts, and by its repeal of the Administrative Court Law of 1889.

As of 1948, then, Japan had abolished the Meiji Administrative Court without creating an effective replacement forum for administrative litigation. The

\(^{24}\) Article 76. para. 1.

\(^{25}\) Id., para. 2.


\(^{27}\) Law no. 59, of 1947.
ordinary courts were to be the forum, but with the exception of a provision relating to administrative litigation in a statute amending the Code of Civil Procedure, no statute existed defining the causes of action available to challenge administrative action, or regulating the course of administrative litigation. This situation was ameliorated with the enactment of the Administrative Case Litigation Special Regulations Law in 1948, which replaced the Meiji-era administrative litigation statute. The 1948 statute was then replaced in 1962 by the Administrative Case Litigation Law (ACLL). Under the ACLL the general rule is that exhaustion of administrative review is not necessary prior to judicial review, though that too may be deviated from by statute, as has been done in the case of tax administration.

The administrative litigation system established by the ACLL has been the subject of a great deal of criticism, Japanese and foreign. The main theme of the critics is that the ACLL is applicable to only a very narrow range of

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28 Law no. 75, of 1947.


30 *Gyôsei jiken soshô tokurei hâ* Law no. 87, of 1948.

31 *Gyôsei jiken soshâhâ* Law no. 139 of 1962.


34 See, e.g., FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN (1987).
administrative actions, and that even with respect to such acts, the ACLL
discourages litigation through strict standing requirements, through placing the
burden of proof on plaintiffs with few means to access government documents,
and by limiting remedies to quashing of particular administrative acts.

South Korea's Administrative Litigation Law, first enacted in 1951, then
substantially revised in 1984, took Japan's 1962 ACLL as its model.\textsuperscript{35} Like its
Japanese counterpart, the Korean ALL was criticized on many grounds.\textsuperscript{36} For
purposes of understanding administrative law in the developmental state, what is
noteworthy is that South Korea's ALL lacked a mechanism by which a court
could enter a mandatory injunction against agency action, and restricted
standing so that collective interests could not easily be vindicated through resort
to the statute. In addition, the ALL required erstwhile plaintiffs to exhaust
administrative remedies before filing suit under the ALL, and the courts did little
to carve out exceptions to the rule.\textsuperscript{37}

In Taiwan the applicable statute was the Administrative Litigation Law,\textsuperscript{38}
enacted in 1932 when the Nationalist government ruled China, which underwent

\textsuperscript{35} Hong, supra note 11, at 55-56.

\textsuperscript{36} Id. at 56.

\textsuperscript{37} Id.

\textsuperscript{38} (Xingzheng Susong Fa) of 1932.

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substantial amendment in 1974.\textsuperscript{39}

B. Understanding Administrative Law in the Developmental State

In order to offer a picture of administrative law in the developmental state that will make sense to a American audience, it will be useful to highlight those areas where administrative law differed importantly from a pluralist administrative law model. This will be followed by a more positive account, not focusing on what Northeast Asia lacked, but on what it was attempting to do.

1. Developmental State Administrative Law as Failure

The most common approach to administrative law in the developmental state has been to focus on what it lacked. This is understandable for foreign observers, if not exactly excusable, because what generally drew it to their attention in the first place was some problem, such as "administrative guidance," which was only perceived as a unique problem because it wasn’t remedied by

\textsuperscript{39} These amendments are discussed at length in Li, Chapter Two, supra, note 97. See also, Chen, supra note 23, at 36-39 (discussing relationship between ALL and State Compensation Law).
local administrative law in the way foreign observers expected it to be.\textsuperscript{40} It is also understandable that local scholars focus on what they perceive as problems with their systems, and in countries that are on the receiving end of the legal transplant process, solutions are often found in foreign systems.

In this process, the place to start has often been with the judiciaries. Even accepting the exceptional nature of the remedial powers possessed by common law judges, Northeast Asia's judiciaries were remarkably restrained. South Korea and Taiwan were military dictatorships during much of the developmental state era,\textsuperscript{41} and while their courts were often left free to perform basic judicial functions, their independence was not established, and in administrative law matters the state's interests were always involved. Thus it is not surprising that the South Korean and Taiwanese judiciaries did not interpret administrative law doctrines broadly, or introduce new restraints on administrative action by through the invocation of constitutional norms or natural justice. Especially for administrative law specialists trained in European law this would have been

\begin{footnote}{\textsuperscript{40} One problem this raises is that foreign observers may perceive a problem as unique only because they are either ignorant of how their own system fails in the same way, or else don't feel that that fact undercuts their critique of the foreign system. American writers on administrative guidance, for example, would do well to read Robert A. Antony, "Well, You Want the Permit, Don't You?" Agency Efforts to Make Nonlegislative Documents Bind the Public, 44 ADMIN. L. REV. 31 (1992), as well as Kenneth Culp Davis' DISCRETIONARY JUSTICE, Chapter One, supra, note 128.}

\begin{footnote}{\textsuperscript{41} DAE-KYU YOON, LAW AND POLITICAL AUTHORITY IN SOUTH KOREA (1990); CONSTITUTIONAL REFORM AND THE FUTURE OF THE REPUBLIC OF CHINA (Harvey J. Feldman, ed., 1991).}

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disappointing, since in both France and Germany many central doctrines are judicially developed, not statutory.\textsuperscript{42}

Less easily explained is the restraint of the Japanese judiciary. This restraint has disappointed those hoped for an American-style Supreme Court, and constitutes one of the major contrasts between Japan and post-World War Two Germany.\textsuperscript{43} The fact of this restraint is not disputed, though there are different explanations. Haley argues that the restraint is not the result of political control,\textsuperscript{44} while Setsuo Miyazawa\textsuperscript{45} and Ramseyer and Rosenbluth\textsuperscript{46} offer political explanations that center on the role of the Secretariat of the Supreme Court in controlling the career paths of individual judges. Kiyoshi Igarashi appears to adopt a straight-forward political explanation based on the Liberal Democratic Party's political monopoly, though he discusses only the Supreme Court.\textsuperscript{47}

\textsuperscript{42} L. Neville Brown and John Bell, Recent Reforms of French Administrative Justice, 8 CIVIL JUSTICE Q. 71 (1989); Mahendra P. Singh, GERMAN ADMINISTRATIVE LAW IN COMMON LAW PERSPECTIVE (2001).

\textsuperscript{43} Igarashi, Chapter Two, supra, note 168, at 41.

\textsuperscript{44} John O. Haley, Judicial Independence in Japan Revisited, 25 LAW IN JAPAN 1 (1995).


\textsuperscript{47} Igarashi, Chapter Two, supra, note 168, at 41.
How did Northeast Asia’s courts come up short? First, they interpreted standing and justiciability requirements under the administrative litigation statutes narrowly, defining reviewable administrative acts narrowly, as well as direct injury requirements.\(^48\) They also failed to expand administrative law into the administrative process, a key element of pluralist administrative law, and a major focus of administrative law in most developed economies. There was no “due process revolution” in the developmental state, even in democratic Japan, where knowledge of U.S. law was widespread. Administrative rulemaking processes were not closely regulated by statute, and courts did not create extra-statutory public participation requirements.

During the 1960s and 1970s, while courts in the Western democracies were actively “concretizing” due process protections from constitutional law, enforcing natural justice, judicializing quasi-judicial processes, or trying to enforce political pluralism and democratic legitimacy by broadening public participation,\(^49\) the courts of the developmental states were doing little of the sort. The Japanese judiciary, for example, relying on an extreme version of separation of powers, has denied that courts in administrative litigation may legitimately do


more than to act as a passive check on administrative organs.\textsuperscript{50} The judicial role in litigation under Japan's Administrative Case Litigation Law was thus limited to declaring void particular administrative acts, with the courts not even being empowered to declare that an administrative organ has a duty to take a specific action, or the refrain from acting in a specific way.\textsuperscript{51} In 1992, leading scholars of South Korean law could still write, "in practice administrative dispositions – including executive decisions affecting industrial organization and labor relations – were seldom subjected to legal challenge until quite recently."\textsuperscript{52}

Noteworthy also was the lack of independent regulatory bodies in Northeast Asia during the decades of the developmental state. No theory of administrative law requires such bodies, which in fact do a certain amount of violence to separation of powers principles in the interests expertise and of insulating regulatory decisions from the short-term pressures of partisan politics. But our inquiry here is how administrative law in the developmental state differed from what has become the pluralist administrative law model, to which independent regulatory bodies arguably belong. At very least, the principle of horizontal differentiation has become the norm, so that even if units exercising

\footnotesize{
\textsuperscript{50} Fuke, Chapter Two, supra, note 165, at 231-32.

\textsuperscript{51} Id. at 232.


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regulatory authority remain within a single bureaucratic organization they perform their functions in isolation of one another, so that they enforce the norms and perform the functions appropriate to them under the law.

It is well-known that the Occupation attempted to impose upon Japan the U.S. model of independent regulatory commissions, and that this initiative was substantially undone by the Japanese once the Occupation ended. More specifically, the SCAP had encouraged independent administrative commissions, but in many cases these were turned into Administrative Councils once Japan regained its sovereignty in 1952. The distinction between the two forms is that while the independent commissions had enjoyed final decision-making powers, the post-1952 Administrative Councils are merely advisory bodies, with whom the relevant Minister must merely consult, and whose recommendations must receive due respect.\textsuperscript{53}

A third major area of criticism was the lack of generally applicable administrative procedure statutes, along the lines of either the U.S. Administrative Procedure Law of 1946, or the German Administrative Procedure Law of 1976. Constitutional due process requirements that existed were weakly enforced with respect to executive action, and administrative procedure requirements existed only in individual regulatory regimes.\textsuperscript{54} At least some


\textsuperscript{54} On Japan, see generally, \textit{id.}
administrative law scholars found this approach inadequate, and had been
calling for general administrative procedure statutes for decades. General
open hearing statutes along the lines of the U.S. Government in the Sunshine
Act were also absent, as were information disclosure laws such as the U.S.
Freedom of Information Act. With only very limited pre-trial discovery in any civil
litigation, not only litigation against the state, the public had only very limited
means for getting information out of state actors. It has often seemed that only
the prosecutors were able to get documents from other ministries, and that they
exercised this prerogative only when a scandal had grown so large that it had
direct political implications. Held against the standards of pluralist administrative
law, it was clear that the administrative law of the developmental state came up
short.

2. Understanding Administrative Law in the Developmental
State: an Asia-Centered Alternative

The approach of the previous section is useful for comparative purposes
in that it highlights formal differences, but it’s obvious shortcoming is that it tends
to hold up Western administrative law as the ideal which the Northeast Asians
have failed to achieve. This section attempts to put developmental state

55 On Japan, see Fuke, supra note 8, at 32-33. On Taiwan, see Yeh, supra note

48.
administrative law in a different light, as an integral part of a relatively coherent, though problematic, approach to governance.

Administrative law in the developmental state can also be understood not as the absence of administrative law, but as an alternative system designed to function with that particular political-economic system – as the "form" which corresponded to the "substance" of interventionist industrial policy pursued by the developmental states. It shared many elements of any modern administrative law system, but some elements were fundamentally incompatible with pluralist administrative law. Common are the basic use of positive law to create agencies and to give them legally formulated mandates, to allow legal challenges to specific administrative actions, but largely missing were judicially developed norms of procedural due process based on constitutional or "natural justice," or generally applicable statutes to that effect. Broad delegations of authority were the norm, with weak judicial review of these delegations. Judicial review was also weak in the area that in French administrative law is termed détournement de pouvoir, which can be used to invalidate an administrative act in which,

"an administrative agent has accomplished an act within the scope of his powers; he has observed all the forms prescribed by law; but he has performed the act from motives other than those for which the power was conferred."56

Something like that doctrine would have been necessary to enforce functional separation between regulatory authorities located within common bureaucracies to prohibit cross-enforcement, but such cross-enforcement was a key element of the "administrative guidance" that Northeast Asia made notorious.

With respect to institutional design, the rejection of independent regulatory commissions meant de facto not de jure pluralism among regulatory authorities. This is not a question of compliance with the rule of law or some other general principle, but of whether regulatory authority divided is such a way as to encourage regulatory bodies to act on their own, or is combined to encourage them to coordinate and act in concert. Haley, for example, presents a compelling case for Japan's rejection of the independent regulatory commissions mandated by the Occupation, arguing that the American solution is ill-suited to parliamentary systems, and sacrifices overall policy coherence in the interests of narrow regulatory agendas.57 Rather than seeking to let a hundred regulatory flowers bloom, Northeast Asia's developmental state's opted instead for de facto pluralism and non-transparent, non-legalized bureaucratic rivalry. For example, when the South Korean government under Park Chung-Hee finally began to take action to protect the environment it chose, over the objections of environmental experts, to place the new environmental agency within the Ministry of Health and

57 Haley, supra note 14, at 83-87. As discussed elsewhere, the fact that we in the U.S. have created avenues for White House and Congressional review of agency rulemaking suggests that we ourselves are not comfortable with the level of incoherence our system produces.
Social Affairs, rather than make it a cabinet-level agency.\textsuperscript{58}

One need not either idolize or condemn the "purposive rationality" that this style of administrative law helped the developmental state achieve to see how it meshed with intrusive industrial policy, and how it left many areas of governance relatively informal, in particular the relationship between government and the private sector.

C. Instrumental Aims

One of the premises underlying this work is that the developmental state is best understood as a combination of an interventionist state holding authority over finance and trade, ruling over a society not marked by the de jure pluralism created by pluralist administrative law. State "strength" exists in that the state is able to institute its policies insulated from challenge through legal channels, and the question of the actual autonomy of the state and its agents from social forces then becomes an empirical question. All law tells us is that legality does little to check this autonomy; administrative law in the developmental state does not prevent state authorities from wielding the "handles of power," to use a Legalist metaphor, from employing carrots and sticks. In democratic Japan the bureaucrats may have been controlled by the ruling party, as Ramseyer and

\footnote{\textsuperscript{58} Yeon-Chang Koo, \textit{Environmental Law and Policy in Korea}, in \textit{SELECTED PROBLEMS IN CONTEMPORARY COMPARATIVE LAW} 315, 337 (1987).}
Rosenbluth argue, but other literature on parliamentary systems, as well as conventional wisdom, suggests that the effectiveness of legislative oversight varies, and can't be assumed. Developmental state bureaucracies may also have been subject to capture by regulated industry, but administrative law to legalize the government business relationship, to give business judicial review as another arrow in its quiver, was largely absent. Because administrative law in this sense was largely absent, it becomes difficult to say whether business wanted to escape the developmental state's corporatist embrace, within which it was prospering.

With respect to foreign economic interests, the lack of pluralist administrative law, or even aggressive enforcement of the administrative law that existed, meant that the relationship between the developmental states and foreign investors was similarly non-law governed. Foreign investment was highly regulated, but the statutes granted a great deal of discretion to the bureaucracies, who could exercise their discretion without having to anticipate how their actions would fare in court. The following description of Taiwan's foreign investment regime would have been equally applicable to Japan and South Korea:

"One of the important features of the investment laws of the Republic of China is the delegation of broad power of discretion to the executive branch. The basic law governing foreign investment, ..., contains only some 20 short articles. The implementation of this basic statute is provided in numerous administrative regulations which are subject to constant change. This delegation of authority enables government agencies in charge of foreign investment approval to adopt flexible
measures to meet the changing needs and circumstances of the country. In this connection, legal stability is not necessarily the rule of the game. MNEs should recognize this key point and should not, for instance, attack a reasonable repeal of previous tax incentives or other legal privileges which have been found no longer beneficial to the economic and social development of the country.59

Unlike today, foreign investors and their governments did not demand much in terms of administrative law from the developmental state. Initial investment decisions were made in full knowledge that investments were to be screened by administrative organs applying substantive criteria and not subject to judicial review, and so long as there was no real fear that investments would be expropriated or circumscribed by later changes in law, the overall structure and functioning of the legal system didn’t matter much. To put it another way, the “investment climate” in the developmental state consisted of a discretionary screen surrounding societies in which social order was obviously being maintained, and which were dominated, politically and socially, by an orientation

59 CHING-YUAN HUANG, MULTINATIONALS IN THE REPUBLIC OF CHINA: LAWS AND POLICIES 182-83 (1978). The writer went on to note,

“A national or international standard treatment of foreign nationals is often advocated by scholars and practitioners in the developed world. In principle, the Republic of China follows this school of thought. In the writer’s opinion, however, it is questionable whether national treatment must be accorded to foreign-controlled corporations in such areas as exchange control, local content requirements, import control and demand for exports. ... [I]t is submitted that a foreign invested enterprise may not claim equal treatment in every government regulatory measure, no matter whether it is classified as a domestic or foreign corporation in its legal sense. In other words, MNEs should also recognize that equal treatment is not necessarily the rule of the game, especially in the area of administrative law.” Id.
toward productive economic activity and growth. Foreign investors relied upon politics instead of law to get them through the investment screens, both local and via home government intervention. When problems arose post-investment, foreign investors no doubt would have used the tools of pluralist administrative law, had they been available, but they were not.

D. Political Culture

By the time the developmental states took shape, approximately 1950 in Japan, and roughly a decade later in Taiwan and South Korea, political cultures in Northeast Asia were already displaying strong commitments to values directly at odds with the limited role that administrative law was playing in controlling state action and legalizing state-society relations. Democratic ideals were widespread in Northeast Asia well before World War Two, for example, so the limited opportunities that administrative law created for public participation must be seen as lagging behind changes in political culture. In South Korea and Taiwan this would not have mattered much to the authoritarian governments, but in democratic Japan it is less understandable. To the extent traditional Northeast Asian political culture was relatively weakly committed to governance by rule, as opposed to expert discretion, and to the extent that traditional Northeast Asia political culture was tolerant of violations of separation of powers dogma, and tolerant of blurring of public and private spheres, the limited functioning of
administrative law in the developmental states would not have been altogether problematic.

E. Conclusion

During the developmental state period, associated with invasive industrial policy and high growth, administrative law displayed few attributes of pluralist administrative law. Important features of that period were that liberal legal orders were generally in place and functioning on most levels, and that constitutions and codes contained all necessary formal elements of a liberal legal order. Administration was largely legalized, but one could argue that this served the interests of the state as much as civil society. The state, whether autonomous or controlled by private interests, still needs to make sure its functionaries perform their designated roles.

In each country the exact combination of forces that determined policy outcomes, an essential question for political scientists, was difficult to define, but unlike in the pluralist ideal-type, was relatively unmediated by administrative law. The question that so preoccupied the Chalmers Johnson school and its critics, whether the industrial policy bureaucrats or business interests were "really" in charge in Northeast Asia's economic development miracle, was so hard to answer because the limited nature of administrative law left the relationship particularly non-transparent. If industry, or other elements of civil society, had
been free to seek judicial review of administrative action, but had chosen not to do so, then one could be more sure that it had in fact captured the regulators. As it is, it remains unclear whether business would have preferred the more arms-length relationship with the state that we expect in market economies; all we know is that it didn’t push the political system hard enough to get it, even in democratic Japan.

Although the political economy literature on Taiwan and Korea has long focused on the state and its autonomous role in guiding the economy, this is changing. The new literature does not challenge the state’s autonomy via formal legal requirements, however, but based on ideas of bureaucratic rivalry, bureaucratic capture, bureaucratic dependence on the private sector for information, the influence of the political branches over the bureaucrats, etc. To take the paradigmatic example, Ramseyer and Rosenbluth do not claim that there was legally grounded pluralism in high-growth Japan, but rather that there was *de facto* pluralism.\(^{60}\) That may be true, and a useful antidote to fantasies that the state in a capitalist society could really be autonomous from business interests, but this is quite different from the legally constituted pluralism of post-due process revolution America.

What lessons can be drawn from this exploration of administrative law in the developmental state? First, Northeast Asia in the developmental state era

\(^{60}\) Ramseyer and Rosenbluth, *supra* note 46.
provides the single most successful period of economic development known. Not only were high rates of growth achieved, over sustained periods, but gains from growth were distributed relatively evenly.\textsuperscript{61} It is possible to speculate that Northeast Asia would have been even more successful economically had pluralist administrative law emerged in the 1960s instead of the 1990s, as will be explored in Part III, below, but that is a difficult counter-factual argument to make given that no recorded societies have developed more successfully. Thus it is probably fair to rule out pluralist, or even fully functioning liberal administrative law as in any way a prerequisite to successful economic development. The virtues, then, of pluralist administrative law should be seen as primarily as political, as inhering in the value to be placed on the ability of citizens to meaningfully participate in government, and to receive some sort of "natural justice" in their dealings with the state. The idea that pluralist administrative law is necessary to prevent governments from making consistently bad decisions is not supported by the Northeast Asian experience, at least not while economies were geared toward catching up to defined targets, when criteria were clear. At the technological or financial frontier perhaps pluralist administrative law is necessary so that courts can try to ensure that administrators are considering all relevant information, and weighing it correctly, in adjudications or rulemakings. Even if that is true, however, and our own critiques of adversarial legalism and

\begin{footnote}
\textsuperscript{61} The Gini coefficient scores for Northeast Asia are reproduced in \textit{THE EAST ASIAN MIRACLE} 72-74 (World Bank, 1993).
\end{footnote}
"ossification" caution us that it may not be, the appropriateness of pluralist administrative law will be an empirical question, not a given.

Administrative law probably played a role in the sense that the Northeast Asian states acted through legally constituted bodies and had a monopoly over the power to block economic activity, which they maintained in part by suppressing labor as a political force. In this sense the developmental states provided something like a credible commitment to economic actors: invest, produce, export, once you’ve received our approval, and we will do our part to ensure that you do not fail due to idiosyncratic behavior on the part of the state, or anyone else. Clarity and regularity were provided in the sense that authority was exercised through knowable channels, applying knowable criteria, even if the criteria were substantively rather than formally rational, to use Weber's terms.

The interests of a pro-growth polity align naturally with those of business, particularly where the state preceded historically the rise of industry, and participated in its creation, as occurred in Northeast Asia. Thus business interests did not need to press for pluralist administrative law innovations such as notice-and-comment rulemaking, public hearing rights, participation-enhancing

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judicial review doctrines, information disclosure laws, etc., and it was mainly the political Left that advocated for such institutions during the developmental state era. Thus the hope of some that the economic interests that arise in and dominate a market economy can be trusted to lead a drive toward pluralist administrative law, and liberal legality generally, seems misplaced.

Developmental state administrative law was not fundamentally incompatible, however, with what traditional political culture had to say on these issues. Administrative law did not result from traditional Northeast Asian political culture, but was also not threatening to traditional views. Political culture didn't provide ammunition for opponents of developmental state administrative law: those advocating pluralist administrative law had to base their arguments on foreign political theory as well. A legally organized state apparatus, with clear lines of authority and avenues for internal review of lower level actions, were all consistent with traditional political ideals, but so was unified bureaucratic government and a non-legalized state-society boundary. In addition, the idea that the public authority should be able to intervene in the economy to enforce the public will in a discretionary, yet substantively rational manner, required no abrogation of widely held political ideals, and provided no effective rallying cry for economic or other private interests resisting the state.

The style of administrative law associated with the developmental state was always somewhat controversial, however. From the lawyers working with the foreign investment community came the concern, accurate in fact, that
Northeast Asian governments retained a great deal of discretion over the terms and conditions on which foreigners were going to be allowed to operate in the local economies, and that the courts and administrative law of judicial review were not going to help them much against the state. This had always been obvious with respect to foreign direct investment, and as barriers to imports were lowered pursuant to international trade negotiations, it became obvious that this affected trade in goods as well. Thus by the 1980s free trade purists, as well as "fair" trade warriors, also began to focus on administrative law as a key to opening Northeast Asia to imports.

The foreigner lawyers who looked at Northeast Asian administrative law during this period focused almost exclusively on Japan, and primarily on "administrative guidance" as a problematic practice unique to Japan. The focus on Japan seems natural given Japan's political importance, its distinction as the first "miracle" economy in Asia, and the fact that Japan's regulatory practices had come to be seen as constituting a barrier to imports and to free flows foreign direct investment. For lawyers the idea of administrative guidance was a challenge to their view of the role law should play in controlling administrative action. Taiwan and South Korea were mere blips on the legal map of the world, and the thought that one could use the legal system of such a place to engage in general theoretical debates does not seem to have occurred to many.

Administrative law in the developmental state had unlikely supporters,
however. Harvard’s Institute for International Development,63 and later the East Asian Miracle report of the World Bank,64 both celebrated the insulation of the economic planning bureaucracies, which allowed them flexibility to quickly adjust their policies with little interference from economic interests.65 There is certainly something sensible in this praise, particularly when compared to the more recent neo-liberal orthodoxy, which includes a vision of administrative law that is basically a naive caricature of pluralist administrative law, though one gets the feeling that the economists are more concerned with constructing a Hayekian rule structure to thwart “planning,” but have compromised rhetorically with civil society advocates whose model is the American due process revolution. Human rights advocates tended to focus more on problems with substantive law in the developmental state, rather than on structural reforms,66 perhaps because, unlike in the case of China today, they were not so closely associated with the business community. For whatever reason, one didn’t see the alliance of


64 Supra, note 61.

65 This perhaps reflected the fantasy of economists of the freedom to set economic policy via expertise, but neglected Hayek’s caution that planners will always lack sufficient knowledge to out-think markets. Hayek’s epistemological argument is discussed in Ryszard Legutko, Was Hayek an Instrumentalist?, 11 CRITICAL REVIEW 145 (1997).

Western business and human rights communities under a common banner like the Rule of Law, under which today they jointly advocate administrative law reforms and structural reforms to increase judicial independence.

The political scientists and economists responsible for the developmental state moniker were quite interested in how administrative guidance fit in the general Japanese economic governance scheme, generally seeing it as demonstrating the admirable autonomy of Northeast Asia's economic technocrats from those they were supposed to be regulating and guiding. In that sense Johnson's *MITI and the Japanese Miracle* can be seen as a response to both the Marxist and the Right economic critiques of the American regulatory state that arose in the 1960s and 1970s, both of which harkened back to the earlier "agency capture" indictments. In that sense, Johnson's work, and the works of those who followed in his path, can be seen as defending at least the possibility of the New Deal ideal: expert public authorities regulating the economy in the public interest, sufficiently sensitive to, yet not captured by, private interests. The "comparative regulatory styles" literature also focused to some extent on administrative guidance during the developmental state era, as administrative guidance fit into the broader picture of Japanese regulatory style as an example of the effectiveness of negotiation and consultation between regulator and regulated, a healthy alternative to the "adversarial legalism" it finds in the U.S.

This discussion of the developmental state will close with the words of one
of the West's most thoughtful observers of Northeast Asia:

One might say that the unblinking acceptance of hierarchy, status, and authority in traditional East Asian society has made it possible for these societies to confront these aspects of late industrialism with a much clearer vision than is to be found in societies which continue to speak of advanced industrial systems wholly in the language of individualism. . . . These East Asian societies are prepared to see no unbridgeable gulf between the hierarchies of the political and the economic systems and to treat the relations between the two in a much more flexible and nuanced way than is the case in societies transfixed by the dogma of the ideal centralized economy versus the ideal free market system. 67

The question presented by the reforms discussed in the next chapter is whether Northeast Asian societies have moved beyond what Schwartz saw as a healthy local skepticism, towards societies committed to pluralist administrative law.

III. Slouching Towards Pluralism?: Reforms to Northeast Asian Administrative Law in the 1990s

"Social structural changes, even if partially put in motion by the state itself, supersede the organizations and policies that created them, forcing changes in the state itself. . . . [T]he social structural bases of the developmental state have been at least partially undercut by the new industrial society it helped create." 68

A. Introduction

67 Schwartz, Chapter Two, supra, note 71, at 137.

Since the 1990s developmental state administrative law has been amended and supplemented throughout Northeast Asia, so that statutory frameworks have begun to resemble the pluralist administrative law model. Among foreign observers the best known instance of these statutory changes was Japan's enactment in 1993 of its Administrative Procedure Law, but other important changes have occurred in Japan in addition to the APL, and perhaps more far-reaching changes have occurred in South Korea and Taiwan. And the changes have not all been statutory; judiciaries have begun to assert themselves, going beyond positivist restraint in cases with implications for administrative law. The following section discusses these changes in the framework developed earlier in the work.

The overwhelming doctrinal development in Northeast Asia in the 1990s has been the trend towards the adoption of general administrative procedure statutes, for which the important international models are the U.S. Administrative Procedure Act of 1946, and the German Administrative Procedure Law of 1976. Another important statutory trend has been toward adoption of information disclosure statutes, for which the U.S. Freedom of Information Act is generally assumed to be the basic point of reference internationally. Along with these statutory developments have come increased activism among the judiciaries. The progress of these changes to date, the reasons for their enactment, and

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69 A translation of the APA can be found in 25 LAW IN JAPAN 141 (1995).
their likely long term implications for state-private relations are the focus of this chapter. This chapter will discuss changes to the national systems that make up the Northeast Asian administrative law family, both identifying changes that have occurred and seeking to explain such changes. Focus will be first on South Korea, then on Taiwan, and finally on Japan, and the goal will be to demonstrate that important administrative law reforms are taking place in the region, and that these reforms both reflect, and will tend to support, more liberal economic governance orders and more legally formal pluralist politics in the region. These changes cannot be seen as simply the result of natural evolutionary processes, but rather result from a combination of political and economic motivations, originating both within and without the relevant nations.

B. South Korea

In mid-1990s, in the presidency of Kim Young-Sam, South Korea began a major reform of its administrative law system, the implications of which are still unfolding. These reforms, which accompanied measures to reduce economic regulation generally, began once the transition from authoritarian government was basically complete, and well before the Asian financial crisis of 1997. This supports the view that South Koreans were well aware that their system needed reform before 1997, and should also suggest that any reforms that seem to originate from the crisis, and from bilateral or International Monetary Fund
pressures, will be best understood against the backdrop of the existing reform pressures and initiatives. In addition, one sympathetic to the idea that South Korea's economic crisis in 1997 and 1998 was triggered by the fact that South Korea had deregulated its financial system and integrated it into global financial markets without creating a suitable re-regulation framework, might find support in the fact that South Korea began deregulating financial flows in the 1980s, but did not begin serious reform of its regulatory system until the early to mid-1990s.

Korea's first step in reforming its administrative law was the enactment in 1994 of the Basic Law on Administrative Regulation and Civil Service,\(^70\) enacted by the National Assembly as part of a Judicial Reform Legislation Package prepared by a committee under the Chief Justice of the Supreme Court.\(^71\) This statute sought to introduce basic cost-benefit analysis into the process of enacting new or more stringent regulatory requirements,\(^72\) as well as the principle that agencies should consult with other government agencies as well as concerned private interest groups and organizations before enacting new regulatory requirements.\(^73\) The new statute also sought to require agencies possessing licensing and approval authority to publish "objective and detailed"

\(^{70}\) Law no. 4735, of 1994.

\(^{71}\) Hong, supra note 11, at 56.


\(^{73}\) Id.
criteria concerning the requirements for such approvals, and to endeavor to act on applications in a timely manner.\textsuperscript{74} Finally, on the institutional level the statute established the National Grievance Commission, a non-judicialized review body within the Prime Minister's office.\textsuperscript{75} Patterned after the "ombudsman" system pioneered by the Scandinavian countries,\textsuperscript{76} the commission was designed to allow easy access by petitioners, but seems not to have been given authority to act in an legally authoritative manner against other agencies.

The results of the 1994 innovations appear to have been very limited and unsatisfactory to all concerned, in part because the process by which they were prepared was seen as non-transparent and undemocratic.\textsuperscript{77} They also did little to enhance the role of the courts in the regulatory process, or to facilitate the \textit{de jure} pluralism that comes when the interests of business and other private civil society groups are legally recognized and transformed into legal rights.

The next surge of reform, which holds out the possibility of a true reformation of Korean administrative law, occurred in 1997, at the tail end of the Kim, Young-Sam presidency. These reforms will be discussed individually. First, the 1994 Basic Law on Administrative Regulation and Civil Service was

\textsuperscript{74} \textit{Id}.

\textsuperscript{75} \textit{Id}.

\textsuperscript{76} See generally, Gellhorn, Chapter One, \textit{supra}, note 130.

\textsuperscript{77} Hong, \textit{supra} note 11, at 56.
replaced by the Basic Law on Administrative Regulation ("BLAR"). In Sections 4 and 5 the BLAR seeks to limit the scope of regulatory activity by requiring that the objects and means of any regulation be necessary to achieving the legal objectives of that regulation, and requiring that any regulation be based upon clear and concrete statutory authority. The BLAR also creates a 5-year "sunset" provision on new or strengthened regulations, and introduces a requirement of regulatory impact analysis. In addition, the 1997 BLAR replaced the National Grievance Committee, created in 1994, with the Regulatory Reform Commission, attached to the president, which is supposed to review regulations, as well as maintaining an ombudsman function.

A more major statutory innovation, however, was the long-anticipated enactment of the Administrative Procedure Law ("APL"), which took effect January 1, 1998. Voices within Korea had been calling for an administrative

78 Law no. 5368, of 1997. See generally, Jun-Gen Oh, The Characteristics and Results of Korea's Administrative Regulations Reform, in Yoon, ed., supra note 11, at 73 (translating BLAR as "Framework Act on Administrative Regulations").


80 Id.

81 Law no. 5241, of 1996.

procedure law since at least the 1960s, to no avail. In 1981 the Korean Bar Association proposed such a statute,\textsuperscript{83} at a time when developmental state authoritarianism was firmly in place under Chun Do-Hwan, but when the Thatcher-Regan revolutions were well underway, and when international pressure for neo-Liberal economic reforms had begun. The Bar Association proposal did not result in legislation, and the initiative passed to the Ministry of Government Administration, which in 1986 established an Administrative Procedure Law Research Committee.\textsuperscript{84} That committee published a draft Korean APL in 1987, which likewise languished.

The APL as finally enacted addressed both agency rulemaking, and agency action on individual matters.\textsuperscript{85} As to rulemaking, the APL requires advance public notice of the objects and contents of new enactments in the official gazette, as well as an opportunity for public comment. These requirements apply when agencies act with respect to agency regulations and, somewhat surprisingly, when agencies prepare draft legislation to be submitted to the National Assembly for enactment through the political process. The relative dominance of ministries over legislatures in preparing legislation has

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Wisconsin Law School Library); Hong, \textit{supra} note 35.


\textsuperscript{84} \textit{Id.} at 9.

\textsuperscript{85} See generally, Hong, \textit{supra} note 11.
been cited as an example of bureaucratic autonomy characteristic of the developmental state, though critics have argued that this phenomenon is normal in parliamentary democracies such as Japan, and that rather than reflecting ministry autonomy it reflects the extent to which ministries do the bidding of elected politicians.\textsuperscript{86} In pre-democratic Korea the ministries also prepared much legislation, which was then rammed through the National Assembly, and this extension of notice-and-comment principles to legislation may reflect a desire by a democratically elected president and National Assembly to prevent a similar phenomenon from occurring in the future, should a future president's party also control the National Assembly.

With respect to non-legislative "administrative acts," the APL endeavors to legalize agency decision making with respect to applications by requiring agencies to promulgate decision criteria in advance, including time periods within which the agency must act.\textsuperscript{87} In addition, the APL mandates notice and an opportunity for at least an informal hearing prior to administrative action affecting private rights,\textsuperscript{88} and requires that agencies provide grounds for decisions they take.\textsuperscript{89} Like Japan's 1993 APA, the APL includes provisions directly addressing

\footnotesize{\textsuperscript{86} Ramseyer and Rosenbluth, \textit{supra} note 46.}

\footnotesize{\textsuperscript{87} Art. 19, para. 1; art. 20, para 1.}

\footnotesize{\textsuperscript{88} Art. 21, para. 1.}

\footnotesize{\textsuperscript{89} Art. 23.}
"administrative guidance." These provisions require first that a recipient of administrative guidance may request that it be put in writing, which in theory will keep agency instructions within the bounds of what could pass public scrutiny, and could help facilitate later judicial review. In addition, the APL seeks to address the enforceability of administrative guidance. Although not always recognized by foreign commentators, the use of the term "guidance" in this context may always have been ironic, since as has been discussed above, authorities in the developmental state had tools to enforce compliance with informal instructions that they had no formal legal authority to issue, let alone enforce. In recognition of this history, the APL seeks to restrict the ability of agencies to use their powers to retaliate against those not complying with administrative guidance.

The fact that these provisions, and the APL in general, were enacted at all reflects an important shift in Korean politics away from the executive-dominance associated with developmental state authoritarianism. Once enacted, however, these provisions become not only a reflection of a changed political dynamic, but represent a new mechanism through which politics may be further reformed. In terms of the influences on administrative law highlighted in this work, thought these changes in positive law result from changes in political culture and in instrumental aims, they will facilitate further change in political culture, and will

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90 Arts. 48-51.
change any future instrumental calculations. Assuming that even in democratic Korea the president maintains great power over the ministries, if these provisions of the APL are implemented aggressively they will contribute to the further shift of power away from the executive branch, and away from the state toward the private sector generally. Aggressive implementation of these provisions will require the active cooperation of the judiciary, however, which brings us to the next major area of reform in Korea, the rise of the judiciary.

In 1996, toward the tail end of the Kim Young Sam administration, Korea enacted its first comprehensive “freedom of information” law, the Information Disclosure Act (IDA).\(^9\) The IDA is one of those statutes that stipulates administrative review prior to judicial review, which will now be conducted by the Administrative Court, discussed below. The IDA is criticized for the limited scope of its application, the broad and vague grounds justifying non-disclosure, and for the insufficiency of the arrangements it makes for administrative and then judicial review.\(^9\) On the other hand, there is no doubt that the law constitutes a step forward.

In addition to the statutory reforms placing new requirements on agencies, the Korean courts have risen to an unprecedented level of importance in Korean public law generally. Part of this is the result of statutory changes placing new

\(^9\) Law No. 5242, of 1996.

\(^9\) Hong, *supra* note 11, at 55.
requirements on agencies, and statutory changes elevating the role of courts. Another part has to do with political changes that facilitated statutory change, while also allowing courts more freedom to innovate on their own.

Despite the German origins of its administrative law system, since gaining independence from Japan, Korea had never employed the device of the administrative court. Rather, the ordinary Courts of Appeals had been the courts of first instance for litigation under the Administrative Litigation Law. In the 1990s this system came under attack on two grounds: that ordinary appellate judges lacked expertise in handling administrative litigation, and that because the Court of Appeals acted as the court of first instance, the system did not provide the three instances that normally exist in South Korean litigation. As part of the 1997 reforms Korea took the interesting step of creating a specialized administrative court as a division of the Seoul District Court, as well as administrative divisions in each of the local courts, an innovation that does not draw exactly on any foreign model. Decisions of this court can be appealed to the ordinary Appeals Court and the Supreme Court, with review of constitutional decisions presumably by the Constitutional Court, so the ability of this new court

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94 Rhi, supra note 79.

95 Id.

96 ALL, art. 9, para. 1.
to innovate or act out of step with the rest of the judiciary will likely remain limited, but it has already taken important decisions. In addition, the importance of the Administrative Court has been given a boost by another amendment to the ALL, which removes the general requirement that administrative remedies be exhausted prior to court review, and instead stipulates that administrative exhaustion will only be necessary where required by other law.\textsuperscript{97}

Based upon a brief examination of the work of the court to date, it is clear that the Administrative Court has been thrust into a number of areas of governance which even five years ago would have seemed beyond the scope of legal resolution. The prime example would probably be what has become known as the Korea Life case, which interjected the Administrative Court directly into political and economic struggles arising out of attempts to reform the Korean economy in the wake of the financial crisis. Korea's Financial Supervisory Commission ("FSC") attempted in the summer of 1999 to declare the ailing Korea Life Insurance Company insolvent, cancel its outstanding shares, then inject public funds to effectively nationalize the company before selling it off.\textsuperscript{98} Korea Life's chairman, jailed for violating Korea's capital controls and for embezzlement, teamed up with erstwhile U.S. investor Panacom to use the

\textsuperscript{97} The importance of this provision will depend, of course, on whether specific statutes are amended to require exhaustion, an empirical question that is beyond the scope of the current inquiry.

\textsuperscript{98} Panacom Threatens to Sue FSC for Defamation Over Korea Life, KOREA HERALD, Aug. 30, 1999, available in Westlaw, 1999 WL 17752036.
newly invigorated Korean legal system to launch a multifaceted attack on the FSC. One aspect of this strategy involved Panacom threatening legal action against individual members of the FSC for defamation, which presumably would have been heard by the ordinary courts, but part of the strategy involved filing suit against the FSC in the Administrative Court. The Administrative Court initially enjoined cancellation of the shares, then overturned on procedural grounds the FSC's decisions to cancel existing shares, and to appoint a supervisor to replace the incumbent board of directors. The Administrative Court did not overturn the FSC's basic finding that Korea Life was insolvent, however, and the FSC reacted by giving Korea Life a period of seven days within which to produce an adequate reorganization plan. When Korea Life failed to do so the FSC sought to take essentially the same steps against the company, at which point Korea Life filed a second suit in the Administrative Court. The Administrative Court first upheld the legality of the FSC's decision to cancel shares.\textsuperscript{99}

In addition to the Korea Life case, several other cases have brought the Administrative Court into important areas of government-business relations and economic governance. In a series of cases that could have important economic consequences, and that reflect directly on the relationship between the state and big business, several of Korea's to chaebol launched Administrative Court

challenges to fines imposed by Korea’s Fair Trade Commission for insider trading.\textsuperscript{100} Meanwhile, in a case that may have important implications for labor relations, the Administrative Court was asked in early 2000 to overturn a decision of a local police office denying a request by laid-off workers for a permit to demonstrate.\textsuperscript{101} In denying the permit the police had invoked a statutory prohibition on demonstrations within one hundred meters of a foreign embassy, and a labor organization challenged the constitutionality of that prohibition before the Administrative Court. The Court upheld the police decision and the statutory provision, though the Court’s decision will certainly not resolve the general issue. A number of small countries locate their embassies in corporate office buildings, and if police enforce the prohibition mechanically they will allow business groups to thwart demonstrations aimed at the groups themselves, rather than at the small embassies that happen to be housed there.\textsuperscript{102} Finally, in October, 2000 a widow filed suit in the Administrative Court seeking to overturn a decision of the labor welfare body finding that her husband’s death had not been work-related, and thus denying her survivor benefits.\textsuperscript{103}

\textsuperscript{100} Chaebol Take FTC to Court on Insider Trading Fines, KOREA TIMES, Apr. 2, 1999, available in Westlaw, 1999 WL 5591989.

\textsuperscript{101} Court Upholds Ban on Rallies Near Embassies, KOREA HERALD, July 29, 2000, available in Westlaw, 2000 WL 21233778.

\textsuperscript{102} See generally, ROK Union to Seek Revision of Law Banning Assembly, Yonhap, May 24, 2000, available in Westlaw, 2000 WL 22031023.

The jurisdiction of the Administrative Court has also been invoked in a number of cases that, while politically charged, have less obvious economic consequences. For example, a jailed student activist filed suit in early 1999 challenging the Ministry of Justice's practice of demanding "conversion letters" renouncing belief in communism before those convicted under national security laws may be considered for pardons. A few months later a conservative party member of the National Assembly filed suit against the Kim, Dae Jung's Ministry of Foreign Affairs and Trade, alleging that Korea's ambassador to the U.S. was illegally working beyond a mandatory retirement age.

Although no in-depth discussion of these cases will be attempted here, the fact that they are even being brought reflects the extent of the change that has occurred in Korea. Furthermore, although the Korean judiciary may well develop a relatively conservative or restrained jurisprudence with respect to its role in reviewing agency decisions, at least these cases suggest no general unwillingness on the part of the Administrative Court to provide a forum for, and to decide, highly charged political-economic cases. In addition, given the more general assertion of independence on the part of the Korean judiciary since democratization, and the fact that there is no dominant ruling political party ala' th


Japan's LDP that might be able to reassert dominance over the judiciary, there is no reason to think that this new role for the courts in adjudicating administrative law disputes will be temporary.

This conclusion is buttressed by the fact that Korea's Constitutional Court, created under the 1987 Constitution, has also weighed in on crucial administrative law matters. Two important decisions of the Constitutional Court will be discussed here, both of which attack notorious elements of administrative practice in the developmental state. The first case, dubbed here the "Land Records Case," was brought by a property owner to challenge the actions of the local land records office. The judgment in this case is remarkable as an indictment of two notorious aspects of administrative practice in Korea's developmental state. First, the petitioner challenged the fact that the local land registry had in fact received his request, but had refused to acknowledge or act on it in any official, legally cognizable way. As discussed previously, this behavior was notorious among Northeast Asia's regulatory authorities, and is an example of how an overly formalistic approach to law and bureaucratic behavior in fact allowed, and contributed to, rampant informality. To

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106 On the Constitutional Court generally, see West and Yoon, supra note 52. For recent appraisals, see Symposium: Constitutional Adjudication in Korea, 1(2) J. KOREAN L. (2001).


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modern American sensibilities, the obvious answer to this problem is 1) that in
refusing to act the official concerned has committed the requisite "judicial act"
making judicial review, and 2) that the reviewing court must find that the agency
may have discretion to allow or not allow a properly submitted request, but that a
decision to simply not act will be treated as a decision on the merits, a denial or
an approval, thus allowing the petitioner to either proceed on an approval, or
appeal a denial. What happened instead was that the courts were either unable
or unwilling to apply this sort of pragmatic reasoning to provide a plausible
remedy to a petitioner in this situation. The bureaucrats, then, were secure in
the knowledge that they were safe so long as formally did nothing, so long as no
piece of paper with their seal affixed left their office. The formalism of the courts
thus protected the formalism of the bureaucrats, which created the relationship of
informality between the petitioner and the bureaucrat, with the petitioner unable
to force the bureaucrat's hand to push the matter into the formal sphere, to opt
out of the informal game, so to speak.

The Land Records judgment goes right at this practice, by holding that the
land registry's refusal to release the records, in which the petitioner
unquestionably had a legitimate interest, violated the petitioner's constitutional
right to freedom of expression.\textsuperscript{108} By grounding its decision thus in the
Constitution, the Constitutional Court signaled that the movement for greater

\textsuperscript{108} See, Kyu Ho Youm, The Constitutional Court and Freedom of Expression,
access to government-held information would advance even in the absence of an information disclosure statute, which was not to come for another few years.

The other fundamental contribution of the Land Records case was its holding that the petition was not barred by the fact that the petitioner had not exhausted his administrative review remedies, and had not challenged the action under the Administrative Litigation Law. The petition had been brought as a direct petition by an individual alleging a violation of constitutional rights, and the Court refused to require exhaustion of administrative or other legal remedies before accepting the petition.

The Constitutional Court's decision in the Kukje case must be considered a victory for those favoring neo-Liberal reforms to the Korean economy in that it will require a higher degree of legality, formality and transparency when the state seeks to influence the private sector. Those means of influencing the private sector for which the state never had legal authority may well fade into disuse under the threat of post-Kukje legal challenges. In another sense, however, the Kukje decision may hamper structural reforms to the Korean economy that are necessary to bring about an economic structure even approximating the neo-Liberal ideal.

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109 This avenue of access to the Court, one of four under the Constitutional Court Act, is provided for in Article 68(1).

110 See, James M. West, Kukje and Beyond: Constitutionalism and the Market, in 3 WORLD CONSTITUTIONAL L. REV. 321 (Festschrift for Professor Ts cholSU Kim, Korean Branch of International Association of Constitutional Law, 1998).
C. Taiwan

Taiwan was the last of the three to begin serious statutory reforms to its administrative law system, with major enactments in the late 1990s. Administrative litigation in Taiwan had been conducted under the Administrative Litigation Act of 1932, which had been revised in 1975. In 1998, late in the presidency of Lee, Teng Hui, Taiwan enacted a thorough amendment of the law, to provide a substantially new basis for administrative litigation. Another important initiative underway at this time was the creation of an information disclosure law, the Law for Government Information Accessibility, adopted in 1999. Finally, probably the most important reform of the late 1990s was the preparation of a general law on administrative procedure, which culminated in the 1999 enactment of Taiwan's Administrative Procedure Law.\textsuperscript{111}

It seems likely that these statutory reforms will be meaningful, because as has been the case in South Korea, the end of authoritarian rule in Taiwan has led to an assertion of independence and authority by the judiciary.\textsuperscript{112} In 1990 it


\textsuperscript{112} See generally, Dennis Te-Chung Tang, Constitutional Reforms on Taiwan in the 1990s, paper presented to the Fifth World Congress of the International Association of Constitutional Law, July, 1999, Rotterdam, The Netherlands <http://www.eur.nl/frg/iacl/papers/tang.html>; Tzong-li Hsu, The Rule of Law in Taiwan,
could be said of Taiwan's courts in the context of environmental disputes, a key area for activist administrative law elsewhere, that "[i]n the case of social transformation, courts in Taiwan have not played a significant role in initiating reform. Rather they have been limited to a punitive role in social conflicts."113 Taiwan's judiciary now plays a radically different role than it did even a decade ago, and given the new statutory structure, may well play a leading role in liberalizing Taiwan's administrative law.

D. Japan

In Japan, too, changes to the administrative law system occurred in the 1990s that could signal development toward what we have called the Liberal-Pluralist model. These changes occurred along the statutory and case law fronts. First, and most widely discussed, Japan enacted in 1993 its Administrative Procedure Law, to take effect October 1, 1994. Any claim that the Japanese have been united, for cultural or other reasons, in their satisfaction with their administrative law must take account of the fact that forces in Japan have been calling for a unified law on administrative procedure since at least the


113 Yeh, supra note 48, at 95.
early 1960s. In 1964 the Special Investigation Committee on Administration recommended a unified law on administrative procedure, and put forth a proposed APL. Interest in such a statute was revived in the late 1970s, in the aftermath of a conference on countermeasures for the prevention of airplane scandals,114 and in 1983 a Second Special Investigation Committee on Administration issued a report that included a chapter on an APL, as well as a chapter on an information disclosure statute.115 Meanwhile, an APL study group had been established by the Administrative Management Agency, and in 1983 this body also issued a report on an APL. In 1985 a second APL study group was established by the Management and Coordination Agency, successor to the Administrative Management Agency, and in 1989 this study group issued an interim report favoring a general APL. Meanwhile, a Third Special Council on the Promotion of Administrative Reform had been established, and in 1990 Prime Minister Toshiki Kaifu a proposal on “fair and transparent” administrative procedure to this body. The Third Special Council submitted its report to the government in 1991, in 1992 the government promised the U.S. that it would submit an APL bill to the next ordinary Diet, and in 1993 the APL bill was submitted to and enacted by the Diet. In addition, after decades of discussion,


115 Id. at 28.
Japan in 1999 enacted a national information disclosure law, the Law Concerning Access to Information Held by Administrative Organs, following enactments by many local government bodies.

Finally, the Japanese judiciary has produced decisions that suggest that the courts are beginning to take a more aggressive attitude towards at least certain kinds of abuse of discretion by administrative authorities. For example, Nakazato and Ramseyer make much of cases in the mid-1980s that appear to have restricted the ability of local governments to place extra-statutory requirements on real estate developers, and if the courts extend this trend to other areas of governance, including national government agencies, it could herald a real change in Japanese administrative law. Again, however, this work seems dedicated to slaying MITI AND THE JAPANESE MIRACLE, however, and their breezy assertion that recipients of administrative guidance could have always obtained judicial review by simply ignoring the guidance and forcing the agency


to bring a formal enforcement action,\textsuperscript{119} ignores those areas of governance where authorities possessed cross-enforcement mechanisms, such as the power to deny a privilege in some unrelated matter, and the fact that Japanese courts were not effective in policing that behavior.\textsuperscript{120} Faced with non-reviewable retaliation that might have serious financial implications, this "right" to force judicial review of administrative guidance would have been effectively meaningless. Thus the fact that Japanese courts are acting now seems evidence of some underlying change, and not to be simply random.

E. Political Culture and Instrumental Aims

How are these changes in formal law related to political culture and to instrumental aims, the other two factors identified here as guiding administrative law? It seems clear that Northeast Asian societies were ready for administrative law reform; that there was pent-up demand. In Taiwan and South Korea, once democratization was seen as inevitable, the instrumental calculations of those holding political power would have led them toward liberalizing legal reforms,

\textsuperscript{119} Nakazato and Ramseyer, supra note 118, at 205-206.

\textsuperscript{120} One of the virtues of Gellhorn's 1966 Ombudsman study is that he did field research, which resulted in the following observation: "In its most acute form the citizen's disinclination to challenge public authorities is marked by a positive fear of reprisals or other untoward consequences." Gellhorn, Chapter One, supra, note 130, at 337.

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even before full democratization. The realization of competitive electoral
democracy has made law reform a political issue in these societies, subject to all
the complex political machinations that make up politics in a democracy, and
democratization has also freed the courts to take a much more central role in
shaping the path of legal doctrine. Legally sophisticated non-governmental
organizations have blossomed as well, and when these developments are
added together, suddenly it becomes much more difficult to identify whose
instrumental aims matter. On the surface, at least, South Korea and Taiwan
must count as potential members of the pluralist administrative law world. There
is great pressure for this, but it may well mean the end of the industrial policies
that seem to have helped bring these countries up from poverty, and there are
local voices questioning this.

Instrumental aims are still being influenced in all three nations by U.S.
pressures. The Bush and Clinton administrations pressured Japan to enact the

\[121\] In South Korea, for example, the People's Solidarity for Participatory
Democracy ("PSPD") has become active in public interest litigation, especially in
shareholder litigation against management of the Korean Chaebols. See, Jooyoung
Kim and Joongi Kim, Shareholder Activism in Korea: A Review of How PSPD Has Used
Legal Measures to Strengthen Korean Corporate Governance, 1(1) J. KOREAN L. 51

\[122\] See, e.g., Yun-han Chu, Re-engineering the Developmental State in an Age
of Globalization: Taiwan in Defiance of Neo-liberalism, 2(1) CHINA REVIEW (forthcoming,
2002); Ku-hyun Jung and Inchoon Kim, Republic of Korea, in GOVERNANCE AND CIVIL
SOCIETY IN A GLOBAL AGE 33, 60 (2002).
Administrative Procedure Law,\textsuperscript{123} and the Clinton administration lobbied Japan for an information disclosure law,\textsuperscript{124} clearly hoping that creating these statutes would somehow disable bureaucratic influence over the Japanese economy, rendering coherent industrial policy impossible, and opening up opportunities for American investors. This was particularly true of the U.S. insurance industry, with the 1994 Insurance Agreement between the U.S. and Japan containing explicit promises by Japan to bring its insurance regulatory regime within the sphere of the Administrative Case Litigation Law and the Administrative Review Law, and to "not delegate any authority" to private sector industry groups.\textsuperscript{125} The Web page of APEC now contains lists of administrative litigation in APEC member countries, and South Korea goes to the trouble of translating case summaries into English to satisfy foreign demands for active administrative law.\textsuperscript{126}

It is clear, also, that people in the region are using the opportunities

\textsuperscript{123} See, \textit{Asia: Open for Business}, \textit{INSURANCE INDUSTRY INTERNATIONAL}, November 1994, \textit{available in} Lexis, News Group File (with prediction by International Insurance Council that the U.S.-Japan Framework Agreement would "eliminate secretive administrative guidance, and ensure that Japan's administrative procedure law will apply immediately to the insurance industry."). Some Japanese scholars are willing to attribute the enactment of the APL primarily to U.S. pressure. See, e.g., Fuke, supra note 8, at 37 n.36.

\textsuperscript{124} Boling, \textit{supra} note 117, at 4.

\textsuperscript{125} Measures by the Government of the United States and the Government of Japan Regarding Insurance, October 11, 1994.

\textsuperscript{126} <www.apec.org.tw/doc/korea/judicial/krjud01.html>.
created by the new administrative law statutes. In Japan, for example, a citizen's organization used information disclosure law to obtain records from Japanese embassies and consulates showing that development assistance funds were being used to cover diplomats' personal expenses.\textsuperscript{127} It seems unlikely that the commitments of traditional political culture are going to play any obvious role from this point out, with future developments depending more on political agendas and the specific cultures of Northeast Asia's judiciaries. Japan's experience suggest the importance of judicial culture and organization in a democracy, and this will matter more in South Korea and Taiwan with democratization.

What are we to make, then, of the last ten years of administrative law reform in Northeast Asia; is it a case of "the more things change, the more they stay the same," or is Northeast Asia headed for a due process revolution? What seems likely is that Northeast Asian administrative law will become much more understandable to Americans, without becoming "Americanized," and without a fundamental convergence. There seem to be poles within which administrative law fluctuates, along the lines of Christopher Edley's "trichotomy" of expertise, politics, and law. In competitive democratic polities it seems that these competing visions of what administrative law should be about ebb and flow over time, which suggests that "converging systems," or "Americanization," is

something of a mirage. Actors with interests in administrative law, whether judges, politicians, or NGOs, are likely to favor of procedural rights and judicial review, while also valuing the efficiency that results from agencies being able to act quickly and authoritatively, and while also valuing of democratic control.

While Northeast Asia's administrative law systems certainly resemble the systems of the West more than they did ten years ago, the West is also changing. In recent decades the U.S. has adopted administrative law innovations, such as negotiated rulemaking, OMB and now Congressional review of agency rules, and cost-benefit and "flexibility" analysis that one might see as evidence of U.S. "convergence" toward the more managed, less pluralistic regulatory style of the developmental state. Even the much maligned administrative guidance seems to have its uses in U.S. practice, and to be hard to stamp out with traditional legal tools. And at least one important U.S. reform proposal sounded positively Northeast Asian, calling for the "creation of a small, centralized administrative group, charged with a rationalizing mission,

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130 See, 5 U.S.C. Sec. 801 et. seq.

131 See, Regulatory Flexibility Act, 5 U.S.C. Sec. 601 et. seq.

whose members would embark on a career path." The group would be characterized by five features: "a specific mission, interagency jurisdiction, political insulation, prestige, and authority," its authority to arise "in part out of a legal power to impose its decisions," . . . but also "in part thru informal contacts with line agency staffs, out of its perceived knowledge and expertise, out of 'rationalizing' successes that indicate effectiveness, and out of the public's increased confidence that such successes may build." Because even in America, Justice Breyer believes, "trust in institutions arises not simply as a result of openness in government responses to local interest groups, or priorities emphasized in the press – though these attitudes and actions play an important role – but also from those institutions' doing a difficult job well." What this suggests is that what Northeast Asia's administrative law systems mean to those societies will continue to fluctuate over time, though within a range that now more closely mirrors fluctuations elsewhere.

IV. Conclusion: Administrative Law Reforms, Law and Development, and the Rule of Law

\footnote{STEPHEN Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation 60-61 (1993).}

\footnote{Id. at 61.}

\footnote{Id.}

\footnote{Id. at 81.}
In order to better understand the path of these reforms, it may be useful to put Northeast Asian administrative law and regulation in comparative perspective by reviewing the sequence in which liberal legality, industrialization, and regulatory government have occurred in different societies. This clearly requires some broad generalizations, but may nonetheless yield useful insights.

In the U.S. liberal legality was well established prior to industrialization, and industrialization was well underway prior to the rise of administrative government at the end of the nineteenth century. In this sequence, one could say that the establishment of liberal legality and a relative separation of the state from private interests meant that industrialization was generally carried out by private entrepreneurs, who in a democratic polity amassed great power to resist regulatory government, and to ensure that administrative law, in the sense of the law governing the regulatory relationship between the state and private interests, was highly protective of the latter. The fact that judicial independence and the private legal profession were well-instituted in the U.S. meant that the courts and the private bar were positioned to resist those aspects of administrative governance that would limit their roles, and opponents of regulatory government could rely on deeply held societal commitments to liberal legality and private property when crafting their arguments for the courts, or for the public arena.

Nineteenth century Germany provides an example of a somewhat different sequence, though not so different as some would argue. In important German polities, such as Prussia, bureaucratically organized governments with
relatively ambitious regulatory agendas arose prior to the rise of liberal legality, and both of these arose prior to industrialization. The Liberal Rechtsstaat that became the goal of German liberals such as Gneist and Stein during the nineteenth century was based on ideas of individual rights and formal legality, but was not as hostile to the rising tide of regulatory government as liberal legality in the U.S. context, and important German liberal administrative law theorists like Stein and Gneist became supporters of an interventionist state in response to the social problems associated with industrialization.\textsuperscript{137} At least by comparison to the U.S., administrative law as it developed in Germany focused more on controlling how the state carried out its governance tasks, on insuring that governance was in accordance with law, and less on trying to handicap the state's substantive regulatory agenda.

In Northeast Asia, one could say that a third sequence has been followed, according to which the interventionist state arose prior to, but really in conjunction with, industrialization. With these two established first, and established in a manner that left the state and private industry in a complex and mutually dependent relationship, liberal legality and liberal administrative law have been struggling to establish themselves ever since. Judicial independence has been problematic, even in Japan, which meant that judiciaries were not

\textsuperscript{137} See, Ernst-Wolfgang Böckenförde, \textit{Lorenz von Stein as Theorist of the Movement of State and Society towards the Welfare State}, \textit{in State, Society and Liberty} 115 (J.A. Underwood, trans., 1991); Hahn, Chapter One, \textit{supra}, note 12.
going to be able to do much in the way of creating and enforcing systems of liberal administrative law on their own, even if they saw that as an appropriate task. The states did not regulate all areas of the economy, but what they did regulate, such as the interface between their domestic economies and the international economy, or the structure of important national industries, they regulated with comparatively little interference from the courts. Two points are important here, however. First, this is not an argument for autonomy of the Northeast Asian state from private interests, but rather an argument that the relationship between the state and private interests was relatively unconstrained by legality. The fact that the relationship was so little governed by law has laid the groundwork for years of debate about state autonomy, because so much must be inferred. In the cases of South Korea and Taiwan it is easy to understand why private interests did not effectively push for a more legalized relationship with the state, but in the case of Japan, where democracy and political corruption scandals have been the norm since the end of World War II, one must assume that they did not do so because they did not feel that it would benefit them economically. The second point is that governance was not necessarily arbitrary, or even un-law like, despite the fact that the courts were kept at a distance. Administration may be highly rule-bound, and discretion highly constrained, by internal bureaucratic norms, processes and procedures, with little or no supervision by the courts.

The liberalization of economic controls that has been going on in
Northeast Asia is well known, but this has also been accompanied by steps to introduce more liberal administrative law regimes, specifically by adopting statutes governing the internal decision making processes of administrative agencies, so-called administrative procedure laws. The U.S. adopted its Administrative Procedure Act in 1946, West Germany adopted a version of such a statute in 1976, and there had been calls for such statutes within Asia for decades. Those calls are now being met, with administrative procedure laws being adopted in all three jurisdictions. In South Korea and Taiwan political democratization has been accompanied by enhanced judicial independence, so that the administrative law reforms that have been enacted will play out in the context of judiciaries that are more independent from the executive, and that perhaps wish to take on a more active role in mediating state-private interactions. In Japan the judiciary itself has not changed, so changes in administrative law there will be implemented by a judiciary that still faces the same structural challenges to its independence.

The timing of these initiatives, once they finally achieved some success, may be useful for evaluating some of the claims of the new Law and Development literature. One such claim is that ‘civil society,’ in particular private owners of capital, can be assigned the function of providing demand for the Rule of Law and liberal legality, in much the same was as an increasingly wealthy middle class is assigned the function of demanding democracy in modernization models. Although one might simply look at the economic oligarchy in Russia for
yet another example of how extensive private property cannot be assumed to
result in a demand for the Rule of Law, one could also look at the problematic
history of private capital in Japan in relation to liberal administrative law. It may
be that private capital interests now feel that they want to extricate themselves
from existing relationships with governments and ruling parties, but that doesn't
mean they want the Rule of Law in society generally, only a more law-governed
relationship with the state.

But even such potentially important administrative law reforms as are
going on in Northeast Asia will remain highly dependent upon particular
circumstances, and there will be many important issues that cannot be resolved
by invoking Rule of Law rhetoric, or the rhetoric of liberal legality. As Frank
Upham has demonstrated so well in the case of Japan, a key issue will involve
the doctrine of standing to challenge administrative decisions. Generous
standing doctrine will tend to slow down administrative action by facilitating legal
challenges, while narrow standing doctrine could keep judicial review far in the
background in spite of reforms to the statutory law. The Rule of Law concept
isn't very useful in the debate over scope of standing, though if the Rule of Law
is achieved in terms of the courts becoming more firmly independent it will likely
be they who determine the scope of standing, within broad limits. Likewise the
issue of justiciability – whether the government agency has undertaken the

138 Upham, supra note 34.
requisite "administrative act" that will allow a citizen to obtain judicial review. This is a notoriously malleable doctrine, and Rule of Law ideals arguably provide only a bottom limit on how restrictively the "administrative act" requirement might be interpreted. This is a key doctrine in administrative law, with important economic governance implications, the detailed interpretation of which would typically lie within the authority of an independent judiciary. Yet despite the fact that there would seem to be clear economic governance effects from enhanced judicial independence, as part of the Rule of Law, the raw economic effects would not be subject to easy generalization, as the impact of broad or narrow standing or justiciability doctrines would vary depending upon what sort of regulatory initiative was involved.

Similar problems arise if we look at other basic areas of administrative law, such as the intensity of judicial review of agency factual determinations, of agency compliance with procedural requirements, or of agency interpretations of law. These and other doctrinal areas are subject to continuing debate and development in the U.S., and with certain exceptions the Rule of Law is not at the core of contemporary debates. To the extent that administrative law in Northeast Asia comes to resemble administrative law in the U.S., and to the extent that judiciaries in Northeast Asia are given autonomy to develop administrative law doctrines, what can be expected is not tight convergence to the U.S. or any other model, but rather that legal debates and doctrinal shifts will occur within broadly similar parameters, and will be conducted on broadly similar
rhetorical grounds. After a century of debate we in the U.S. have not settled fundamental issues concerning the respective roles of the President and Congress in supervising administrative agency activities, the extent to which Congress may delegate its legislative authority to administrative agencies, and the extent to which Federal agencies may regulate matters not obviously within Federal authority. Leaving aside such legal issues, we have yet to reach settlement on even the most basic questions of political theory raised by the coexistence of democracy and bureaucracy — the desired balance between bureaucratic expertise and public participation in administrative agency decision making, and how to best achieve that balance. From the outside U.S. administrative law may appear to comprise a model that might be imported, but from the inside the system appears dynamic along several different dimensions, and intimately connected with broader political concerns and debates.

One notorious facet of regulatory practice in Northeast Asia, administrative guidance, could be quite dramatically effected by a shift toward a stronger Rule of Law in administrative law, but this will likely depend upon the courts. Administrative guidance has probably been over-conceptualized in some senses, but in one important sense it has not. Although not all administrative guidance would fall into this category, it is quite clear that in many instances informal requests or suggestions emanating from the government were in fact backed up by threats of retaliation, and thus were voluntary only in the most formal sense. These threats of retaliation were facilitated by the fact that many

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areas of regulatory control fell within the jurisdiction of mainline, hierarchically
organized ministries, as opposed to the U.S. model of independent regulatory
commissions and single function agencies, so that cross-jurisdiction retaliation
was facilitated. A company that did not heed an informal government request or
suggestion could suffer unfavorable treatment in a later, formally unrelated
matter coming before the same ministry.

Nearly any conception of the Rule of Law would seem to render this
illegitimate, as an abuse of the authority given to the retaliating authority. For
example, for tax authorities to audit a company because that company ignored a
government campaign against imports of luxury goods, or for a company to be
denied an import license, a license to enter a line of business, or permission to
access international capital markets because it ignored guidance in a legally
unrelated matter, would mean that such later decision was based on factors
inappropriate to the agency’s decision making process. Courts in many
jurisdictions have developed administrative law doctrines to combat this sort of
practice as an abuse of otherwise lawful discretion, but the development and
enforcement of such doctrines require aggressive courts willing to explore the
actual, subjective motives of government actors, since the later retaliatory action
might very well fall within the scope of the legitimate regulatory authority of that
government body. In other words, effective administrative law in this context
requires courts that will go beyond a review for formal compliance with the rules,
but there is no guarantee that more independent courts will actually heighten
their scrutiny of government actions in this way. To the extent that neoliberal economic reforms do away with capital controls and other controls over domestic industrial structures such reforms would seem to complement and support a stronger Rule of Law in administrative law, though governments might try to maintain extra-legally the legal control measures they have lost. Reforms that involve creating quasi-independent regulatory bodies should tend to reduce the abuse of discretion problems that have been discussed here, though efforts to export this U.S. innovation have not fared well in the past.

The story of administrative guidance and the Rule of Law can be complicated, however, as exemplified by the South Korean government’s desire to push through *chaebol* reforms known as the “Big Deal”. The Law and Development literature’s core Rule of Law concern is with the protection of private property rights against government interference, yet constitutional protection of private property could be interpreted in such as way as to call into question the legality of the means by which the Kim Dae Jung government is pushing the Big Deal. South Korea’s Constitutional Court ruled that government restrictions on bank lending to the *Kukje chaebol* in the 1980s, and the resulting forced sale of *Kukje* assets by the owner, was an unconstitutional infringement upon private property rights.¹³⁹ To the extent that the Big Deal relies on similar government leverage over bank lending policies, a legacy of Korea’s

¹³⁹ Hong, *supra* note 11; West, *supra* note 110.
developmental state that has been hard to relinquish, the outcome of the Big Deal could be subject to future legal challenges. Yet the overwhelming power of the chaebol in the South Korean economic and political environment may also hinder the long run development of the Rule of Law in South Korea, in addition to being economically questionable. If that is the case, perhaps achieving the Rule of Law in the long run will require a violation of the property rights-Rule of Law in the short run, just as a rationalized economic structure may require some substantial pressure on private property to push through the Big Deal. This is hardly ideal, but neither is it ideal to see property rights and Rule of Law rhetoric stand in the way of initiatives such as chaebol reform, or land reform in some developing countries, which can improve societies in very fundamental ways, both economically and politically. In any case, while the South Korean judiciary may now enjoy the stature in that society that is required when constitutional norms are invoked to limit popular political initiatives, courts in many developing countries simply cannot be assumed to possess such authority.
Chapter Four: Conclusion: Applying the Model to China

Historical research consists essentially in application to empirical material of various sets of empirically derived hypothetical generalizations and in testing the closeness of the resulting fit, in the hope that in this way certain uniformities, certain typical situations, and certain typical relationships among individual factors in these situations can be ascertained. ¹

I. Introduction

The current legal development efforts of the People’s Republic of China ("China"), generally seen as beginning in 1978, ² include as one component the creation of a system of administrative law in the broad sense that the term has been used here. ³ When these reforms are discussed, emphasis is often placed

¹ Gerschenkron, ECONOMIC BACKWARDNESS IN HISTORICAL PERSPECTIVE, Chapter Two, supra, note 108, at 5-6.


³ Overview of the administrative law components of these reforms include, Randall Peerenboom, Globalization, Path Dependency and the Limits of Law:
on the fact that China is reforming a socialist command economy and a Soviet-influenced legal system,⁴ which could lead one to discount the usefulness of studying the experiences of China's capitalist neighbors for clues to China's likely future path. While recognizing that the differences between China and its Northeast Asian neighbors have been, and remain, profound, this chapter will emphasize similarities between China's current tasks in reforming its administrative law and the experiences of China's Northeast Asian neighbors. For this exercise it is not necessary to claim that China's path is in any sense determined by what has gone on before in Northeast Asia, either by culture or by some universal modernization trajectory. Rather, the claim is that the structural similarities between China's current situation and the situations faced by Japan, South Korea and Taiwan in the recent past, combined with China's quite intentional tendency to borrow from its Northeast Asian neighbors, suggest that to predict, even in broad terms, China's administrative law future it will be useful

⁴ See, e.g., Corne, supra note 3, at 42 ("To understand the role of law as perceived by China's rulers, law must always be assessed in the context of the Marxist conception of societal transformation. Chinese Marxist orthodoxy insists that law is a mere extension of the economic system – a system of ownership that determines the mode of production.").
to view Chinese administrative law through the framework of the previous chapters. To summarize the argument of this chapter, with respect to development of a system of administrative law, China has so far embarked on a path that one would expect based on an understanding of the Northeast Asian administrative law family developed in Chapter Two, and the administrative law characteristics of the developmental state era, discussed in Chapter Three.

II. Formal Law: Building Developmental State Administrative Law

With respect to formal law and legal institutions, China’s legal development effort has included the creation of a basic framework of administrative law that is similar in form to the developmental state administrative law system discussed in Chapter Three. The formal elements of this “package” are outlined below.

A. State Compensation Law

Like South Korea and Japan, China has enshrined in its successive constitutions an explicit promise of compensation for injuries incurred as a result of wrongful state action.\(^5\) The guarantee first appeared in the 1954 Constitution

in the following formulation: "Those who suffer from damages caused by the
tortuous act of State organ functionaries are entitled to compensation." The
language was revised slightly in the 1982 Constitution, to read, "those who suffer
from damages as a result of their civil rights being infringed upon by State
organs and State organ functionaries are entitled to acquisition of compensation
in accordance with the law." The Chinese courts were certainly not going to be
delegated the task of transforming these constitutional provisions into justiciable
individual rights in the absence of specific legislation, and no such legislation
was enacted until the mid-1980s. It is interesting nonetheless that even in 1954
the Chinese leadership was willing to acknowledge that the state, despite
representing the institutionalized victory of the proletariat, could through its
functionaries cause harm to an innocent individual, and that such an individual
should be compensated. This suggests that at some level the PRC leadership
has always conceded that a mechanism for compensating citizens injured by
wrongful state action is an element of the legal system of a modern nation-state
— that administrative law not only furthers the interests of the state in policing the
behavior of its lower-level functionaries, but also the interests of injured
individuals. This concession obviously pales in comparison with the enormous

at 49, 52-53.

6 Id.; Constitution of the People's Republic of China ("PRC Constitution")
(Zhongguo Renmin Gongheguo Xianfa), art. 97 (1954).

7 PRC Constitution (1982), art. 41.
harms that the Chinese state has inflicted on its citizens over the last five decades, yet it is nonetheless interesting in light of ideological rhetoric that the socialist state, as representing the victory of the proletariat, could do no wrong.⁸

As the law reform efforts of the 1980s and 1990s proceeded, a series of statutory enactments included provisions potentially giving life to these constitutional provisions. As in the Northeast Asian legal systems examined previously, China's initial step toward a Civil Code, the 1987 General Principles of Civil Law,⁹ provides a fundamental civil law basis for State liability. Article 121 of the General Principles provides, "State organs or state organ functionaries causing damages as a result of infringement upon the legal rights of citizens and corporations in carrying out their official duties should undertake civil liability."¹⁰ It is reasonable to assume that as litigation becomes more common in China, the relationship between state liability under the Civil Code, and under the more specific administrative law statutes discussed below, will become increasingly clear.

In 1989 China took another step toward formal conformity with its

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⁸ For further discussion of this point, see Zhang, supra note 5, at 51-54.


¹⁰ General Principles of Civil Law, Art. 121.
Northeast Asian neighbors when it adopted its own Administrative Litigation Law ("ALL").\textsuperscript{11} In addition to creating rights to obtain judicial review of certain administrative actions, discussed below, Articles 67-69 of China's ALL also contains provisions on state liability. The basic statutory scheme is that a court reviewing the legality of an administrative action under the ALL may find the agency liable for damages arising out of that act, if the act is found to be illegal.\textsuperscript{12} The state will be liable to the injured party, but may then claim indemnification from the particular body, and under certain circumstances from the specific personnel.\textsuperscript{13}

The formal arrangement of the scheme suggests that the state's liability is based on a theory of \textit{respondeat superior} which, if implemented, would allow citizens to proceed against just one defendant, the state, while allowing the state to proceed against the individual state agent, if appropriate.\textsuperscript{14} The injured citizen could obtain relief without having to proceed against a potentially judgement-proof lower level functionary, while the threat of possible indemnification would help police bureaucratic behavior. Commentary suggests that the ALL will be of very limited use in government compensation cases, however, as by its terms it

\textsuperscript{11} (\textit{Xingzheng Susong Fa}), of 1989.

\textsuperscript{12} Liu, \textit{supra} note 5, at 82.

\textsuperscript{13} \textit{id.}

\textsuperscript{14} \textit{id.}
would not apply to many government wrongs.\textsuperscript{15} Finally, China enacted the State Compensation Law in 1995.\textsuperscript{16}

B. Administrative Litigation Law

China's 1989 ALL, discussed above for the fact that it includes provisions on state liability, adds a second element of developmental state administrative law. Like similar statutes in Japan, South Korea and Taiwan, the ALL creates a unified system of private causes of action against government functionaries who have acted illegally. China had been experimenting with administrative litigation since the early 1980s, creating private causes of action in many particular statutes and regulations,\textsuperscript{17} but the ALL constituted a major step toward unifying and standardizing administrative litigation. By comparison with the limited attention Northeast Asian administrative law received during its formative decades, this statute has received a remarkable amount of attention.\textsuperscript{18}

\textsuperscript{15} Id.


\textsuperscript{17} \textit{Draft Administrative Litigation Law Submitted to NPC}, Xinhua, Mar. 28, 1999, available in Lexis, BBCSWB, FE/0421/C1/1.

\textsuperscript{18} The foreign literature specifically addressing the ALL is large and growing. See generally, Songnian Ying, \textit{Administrative Litigation System in China, in Comparative Studies on the Judicial Review System in East and Southeast Asia} 45.
In some respects, at least, the ALL must count as a very important statute. The statute is designed to harness the energy of private litigants to help police the behavior of lower-level state actors, and in establishing this mechanism China's leadership consciously opened the door to a more litigious society, and to a society in which the legality of state action will increasingly be a measure of its legitimacy.\(^\text{19}\) For example the State Council's newly-released *White Paper on Labor and Social Security in China* emphasizes that a person whose rights have been violated by labor or social security authorities may file suit under the ALL, or request internal agency review.\(^\text{20}\) Chinese society has

\(^{\text{19}}\) In advance of the ALL taking effect, the State Council issued a circular advising that the effect of allowing private suits via the ALL would be to place administrative activities under greater judicial supervision, thereby setting higher standards for administrative activities. See, *Circular on Implementation of Administrative Procedure Law*, Zhongguo Xinwen She, Jan. 15, 1990, available in Lexis, BBCSWB, FE/0666/B2/1.


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responded with gusto, actively bringing complaints under the ALL. There are numerous criticisms of the ALL, however, which often mirror complaints made about the effectiveness of administrative litigation in China's Northeast Asian neighbors.

C. Administrative Review Law

China added a third familiar element with the enactment, in 1999, of the Administrative Review Law ("ARL"). The ARL, enacted by the National People's Congress to replace an existing State Council regulation, governs intra-agency, hierarchical review of administrative actions affecting citizens, again paralleling statutes in China's Northeast Asian neighbors. Internal agency review, like administrative litigation, had been provided for in individual statutes and regulations for some time, so the 1991 regulation, and the 1999 ARL, reflect efforts to standardize and bring order to a set of practices that were already part of the legal landscape. As suggested in the White Paper on Labor and Social Security, administrative review is envisioned as functioning in tandem with

\[21\] (Xingzheng Fuyi Fa).

\[22\] The ARL replaced the State Council's Administrative Reconsideration Regulation (Xingzheng Fuyi Tiaoli), promulgated in 1990 and effective Jan. 1, 1991.

\[23\] A thorough overview of administrative review in PRC law prior to the ARL is Jian Su, Immediately Enact and Promulgate Regulations on Administrative Reconsideration, 24(3) CHINESE LAW & GOVERNMENT 78 (1991).
judicial review under the ALL.

D. Administrative Penalties Law

A fourth specifically administrative law statute that has garnered a good deal of attention in China is the Administrative Penalty Law.24 The purpose of the APL is to bring order to the imposition of fines and other punitive measures by government organs,25 such as measures which may be imposed on employers by China’s labor and social security authorities.26 The fact that this statute has drawn so much attention in China, while the issues it addresses drew much less attention in China’s Northeast Asian neighbors, demonstrates the distance China would have to travel to achieve even the ordered legality achieved by the Northeast Asian developmental states. The use of public authority to impose unauthorized fines and other punishments is one of the


25 Cai, supra note 24, at 259; Government Drafts Law to Regulate Administrative Irregularities, Xinhua, October 24, 1995, available in Lexis, BBCSWB, EE/D2443/G (purpose of law is to “curb rampant illegal fines and other disorderly administrative penalties”). China’s State Council has subsequently promulgated a series of regulations to implement the statute, and to bring administrative charges, fees and fines under central control. See, e.g., Top Ruling Body Issues Rules Governing Fees, Fines, Xinhua, Feb. 17, 2000, available in Lexis, BBCSWB, FE/D3767/G.

major forms of corruption in China today, which differs from the more typical payment of a bribe in order to obtain a favorable governance decision. This represents local government organs appropriating authority for themselves and using it to fill either local public coffers or the pockets of their members, which directly calls into question the center's monopoly on governance authority.

E. Quiescent Judiciary

If the administrative law package of the Northeast Asian developmental states depended upon a judiciary unwilling or unable to take the lead in expanding the realm of administrative law, as presently constituted the Chinese judiciary is even less inclined to expansive interpretations of administrative law doctrines than were its Northeast Asian counterparts. Even in their most authoritarian decades the governments of South Korea and Taiwan paid lip-service to separation of powers, checks and balances, and judicial independence. Even during those decades, then, interfering with the judiciary entailed potential costs, such as when a group of South Korean judges publically resigned in the 1970s in protest against the Park regime.

27 See, NPC Plenum Sees Draft Law on Administrative Punishment, Xinhua, March 14, 1996, available in Lexis, News Group File (“for lack of a law regulating these practices [penalties imposed by administrative bodies] the rampant illegal fines and other disorderly penalties meted out by some localities and government departments have culminated in public grievance.”).
The judiciaries themselves, moreover, were staffed by judges who were university graduates, well trained in Western law, and who at least in some cases enjoyed social status derived either from position, or from family background. From the debates that took place concerning administrative law, and from courageous acts of defiance such as the resignations of the South Korean judges, one sees that in order to prevent administrative law from moving toward a more activist, pluralist model, which would have constrained the executive branch’s freedom of action, the Northeast Asian developmental state regimes had to contend with judiciaries that were not inconsequential. To the extent the judiciary in Japan was controlled by the other branches of government, such control took the form of subtle sanctions applied via the judicial bureaucracy’s control of a judge’s career path. Controls were less subtle in South Korea and Taiwan, but efforts were certainly taken to maintain the forms of a modern judiciary.

In China the judiciary is restricted far more tightly by the authoritarian Party-state apparatus, which actively resists the extension of judicial review beyond the narrow confines of the ALL. Not having been trained in Western liberal legality there is no reason to expect Chinese judges to experience the “cognitive dissonance” that at least some Western trained judges would experience working in the judiciary of an authoritarian state. The judges themselves, moreover, do not appear to possess the level of independent social capital that judges enjoyed in other parts of Northeast Asia, whether in terms of
education or family background. China's judges, in fact, appear to gain what
social capital they do have from their association with the Communist Party and
the ruling state apparatus, rendering it doubly unlikely that they are going to lead
a challenge against executive dominance of policy making. Given this judicial
constellation, it should surprise no one that China's judiciary has thus far
remained limited as an independent force for more active administrative law.

Cases are being brought in China which seek to interject the judiciary
directly into the regulatory process; for example, legal challenges to
administrative punishments meted out by China's Securities Regulatory
Commission ("CSRC") in response to corruption in China's fledgling financial
industry.\textsuperscript{28} Based on the restrained role China's judiciary has played so far it
would be surprising if such cases usher in an era of active judicial scrutiny of
CSRC regulatory activities, and it is not obvious that the Chinese courts have a
particularly valuable role to play in this area unless one believes that they are
less corruptible and more expert that the CSRC, which cannot be assumed.

III. Instrumental Aims

The Chinese leadership is as yet unconstrained by formal democratic
processes in its ability to shape administrative law doctrine, so that, as was the

\textsuperscript{28} See, e.g., Bei Hu, \textit{Brokerage Lawsuit Against Watchdog Accepted}, \textit{South
case in Meiji Japan, and South Korea and Taiwan more recently, the universe of those whose aims have to be taken into account is relatively small. Though China's National People's Congress ("NPC") is not entirely superfluous, even those who argue for its growing importance point mainly to instances in which a minority of delegates have openly objected to government-sponsored measures that were eventually passed. Thus even if one believes that the NPC represents the popular will, and that it favors administrative law reforms to limit bureaucratic power and to enhance public participation along the lines of the pluralist administrative law, at this stage it is still not necessary to assign great importance to the NPC in estimating the confluence of forces driving administrative law doctrine in China.

What then are the instrumental aims of those who control the direction and pace of administrative law in China? While it is fair to say that preservation of their own power is a preeminent concern, the important question is how they seek to do that. It is quite clear that the aims of China's leadership now largely overlap with the aims of the Northeast Asian developmental state. Rapid economic growth, led largely by private enterprise, is a prime objective, which depends upon foreign investment and extensive integration into the global trading system. Administrative law of the developmental state variety is important to this goal, as it would provide a relatively stable and predictable business environment, in which business interests would have some assurance that in their dealings with the state they would encounter a relatively organized.
disciplined, rule-bound bureaucracy, and would have available to them a somewhat credible threat of recourse to the judicial system if presented with a truly aberrant decision by a bureaucratic entity. In addition, the leadership clearly feels the need to control official corruption, and a more effective administrative law system will aid in achieving that goal. The alternative normally offered now for controlling corruption, which calls for reigning in the jurisdictional authority of the state in order to eliminate opportunities for "rent seeking," 29 is clearly not a viable solution from the perspective of China's leadership since it involves removing the strings with which they dominate Chinese society. Far preferable would be an "internal" solution to corruption, based upon more effective top-down control of a more professionalized, better trained bureaucracy.

When the Chinese leadership speaks of the "principle of promoting law-based administration and enforcing laws strictly," 30 it may well be displaying the essence of where it sees administrative law in the broader governance scheme: as an enabler of both central control and state power. In this view, administrative law reforms will help the central government assert its authority in a China which one U.S. observer calls,

"a decentralized de facto federal state that lacks federal institutions that

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facilitate central control and coordination such as the federal courts system and regional offices of central government ministries. Many orders and regulations from the central government are ignored from the outset or forgotten after only a few months.\textsuperscript{31}

A. The Late Development "Imperative"

Not only does the Chinese leadership desire growth, there is much evidence that they prefer to pursue that growth via policies reflecting the List-Gerschenkron, developmental state perspective, eschewing for the most part the so-called "Washington consensus" approach to development, based on largely unmediated integration into global trade, investment, and financial flows. They have consciously established the mechanisms of the developmental state with respect to trade and economic development, and have attempted to use these mechanisms to channel foreign investment and trade. They have attempted to guide foreign direct investment into export-oriented manufacturing, preserving the local market for domestic producers, which limits the options of domestic consumers, yet maximizes export earnings. They have maintained foreign exchange controls, and have created a bank-based financial system dominated by state-owned banks. They have limited the importance of the local equity markets as a source of finance, and limited the ability of foreigners to invest in


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these local equity markets. They likewise control the ability of Chinese firms to bypass the national financial system by borrowing directly from abroad, or by accessing foreign equity markets. They have also attempted to influence the terms on which Chinese companies license foreign technology by screening technology import contracts, with the aim of assisting Chinese licensees in obtaining the highest level of technology at the lowest cost, both in terms of royalty obligations, and in terms of restrictions on the licensees use of the technology.

Like the developmental states, the system that the Chinese government has created vests its officials with a great deal of discretion. And like the developmental states, China's rulers have an interest in seeing that this system is administered in a rational way, in line with the objectives for which it was designed, which means that they intend that implementation decisions be constrained by internal rules and policy objectives. They therefore do have an interest in administrative law as a mechanism by which private interest can be harnessed to help police the lower levels of the implementing bureaucracies, which is consistent with administrative law in the developmental state, and consistent with the framework that China is now putting in place. They have no interest, however, in seeing the Chinese judiciary introduced into this mix as an alternative source of policy direction, which would occur if the Chinese courts were given authority to review administrative rulemaking, or to review substantive decisions in areas in which the judiciary has no expertise, such as

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decisions reviewing foreign investment proposals, technology import contacts, or bank lending decisions.

Whether the Chinese leadership actually believe that such an approach is best for China overall, for example by contributing to a relatively equal distribution of the benefits of growth, as well as to the creation of a national high-tech industrial base, as the World Bank’s East Asian Miracle report suggested it might, or whether they simply believe that this approach will maximize their own utility by providing growth that contributes to their legitimacy without challenging their political power, ultimately turns on the subjective motives of individuals, and is therefore unknowable. It is clear, however, that so far the instrumental aims of those who control Chinese administrative law are best served by not moving to a more pluralist model.

B. Constraints of the International Economic System

"China’s WTO transition will establish uniform, transparent and efficient rules that govern the relationships among workers, enterprises, central and local governments. . . . Reforms that China must undertake to align its system with that of the WTO will turn China into a normal market economy."³²

While it is easy to dismiss this kind of breathless proclamation about the

³² Andy Xie, Three Pillars for a Safe Transition, CAIJING (China), March 20, 2002.
transformative power of WTO accession, with respect to the means available to
the Chinese leadership for achieving their instrumental aims, however, China
does face outside pressures quite different from those faced by the Northeast
Asian developmental states. China is under much greater pressure because the
WTO accession process is far more demanding than processes undergone by
Japan and South Korea, and China is far less developed, economically and in
terms of legal infrastructure, than Taiwan, which is also entering the WTO now.
Under the general rubric of "transparency," the WTO regime that resulted from
the Uruguay Round of multilateral trade negotiations seeks to impose procedural
standards on national regulatory regimes to the extent that these affect trade, as
a result of which the domestic administrative law systems of WTO members are
now a "key feature" of the WTO agenda. Indeed, the argument is made that
WTO developments, together with possibilities under the North American Free
Trade Agreement ("NAFTA") for challenging decisions made by the domestic
trade regulatory bodies of NAFTA member states, may herald the development
of an "international administrative law." The limited administrative law of the
developmental states is not likely to satisfy the proponents of this new order.

Japan and South Korea were brought in to the Bretton Woods system,

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34 Gilbert R. Winham, *NAFTA Chapter 19 and the Development of International
including the General Agreement on Tariffs and Trade ("GATT"), when the U.S. was at the height of its global economic dominance, and while the Cold War was raging in Asia. Free market fundamentalism, with its hostility to government intervention, did not dominate economic thinking in the West at that time, certainly not in the sub-field of development economics, and by comparison with other developing countries of that era the Northeast Asian economies were market-oriented and relatively open to trade and investment.\textsuperscript{35} Even if developmental state industrial policy had been well-understood in the West at that time, however, the importance of Northeast Asia as political allies of the West would have dampened Western criticism of Northeast Asian compliance with principles of free trade and economic liberalism.

China's current situation lacks all of these attributes except U.S. global dominance, but that dominance now manifests itself as an unwillingness to compromise with China, to sympathize with the notion that China should be free to experiment with policy measures that might violate free-trade orthodoxy. The U.S., in other words, is not behaving as if its global dominance allows it to be generous with a country as underdeveloped as China, but is behaving more as though its dominance is simply further proof of the inherent rightness of its own

\textsuperscript{35} In the 1970s, the UN General Assembly declared the New International Economic Order ("NIEO"). "dependency theory" was challenging mainstream liberal answers to the problems of developing economies, and autarchic trade and development policies in many developing countries were closely connected with the establishment of national identity and with post-colonial politics.

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brand of market economy, which will benefit the Chinese even if it has to be forced upon them. This is certainly due, in part, to the fact that as the U.S. economy has become more service-based the balance of economic power in the U.S. has shifted more to financial service industries, and that shift is reflected in the government’s trade agenda. When U.S. trade policy was dominated by the interests of U.S. manufacturers the outward focus was on either opening foreign markets to U.S. exports, or on forcing foreign governments to allow U.S. manufacturers to set up factories in their countries. Manufacturing investments are essentially one-shot deals compared with the tasks required to open a foreign services market, which are much more invasive. The influence of the U.S. insurance industry on Japan’s Administrative Procedure Law has been noted, and the insurance and banking industries are at the forefront of foreign efforts to police China’s compliance with its WTO obligations.  

The Rule of Law might be good for China, but what would be really good from the perspective of the U.S. government, and the business interests it

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36 See, e.g., Lester Ross, *Why China’s regulations are stalling foreign banks*, 21(4) INT’L FIN. L. REV. 55 (April, 2002). See also, Deputy Treasury Secretary Kenneth W. Dam, Transforming China’s Financial Sector into Efficient Engine of Growth, Address to University students, Beijing, China (May 14, 2002), available at http://www.ustreas.gov/press/releases/po3102.htm (announcing the Bush Administration’s “engines of growth” policy targeting foreign financial sectors). Notably, Dam gave a nearly identical speech in South Korea one day later, referring to South Korea, an OECD member, as a country “in transition.” Deputy Treasury Secretary Kenneth W. Dam, Transforming Korea’s Financial Sector into a Domestic Engine of Growth, Address to Korean Chamber of Commerce and Industry, Seoul, Korea (May 15, 2002), available at http://www.ustreas.gov/press/releases/po3101.htm.
represents, would be an administrative law regime in China that would render developmental state industrial policy impossible. Sylvia Ostry's claim that "most of the domestic impediments to market access in Japan stem from the postwar development model, which restricted foreign investment and utilized regulation for both economic and political management,"\(^{37}\) seems to now be conventional wisdom among Americans interested in trade. That China is being scrutinized against a backdrop of the East Asian Miracle is clear from the words of United States Trade Representative Robert Zoellick with respect to China's preferential tariff treatment for imports used in production versus imports destined for the Chinese domestic market. Zoellick warns, "[i]f China tries to subvert the free trade principles of the WTO by twisting them into elements of a bureaucratic industrial policy, it will both fail to derive the advantages of those principles and undercut global WTO objectives."\(^{38}\)

China already has an industrial policy that mirrors many elements of developmental state industrial policy, however, so the question is how that will be affected by WTO accession. China has long guided direct foreign investment into manufacturing for export, rather than into manufacturing for the domestic


\(^{38}\) Ambassador Zoellick is quoted in, _Zoellick Sees Potential U.S. WTO Cases Against China as Last Resort_, 20(5) INSIDE U.S. TRADE 33, 34 (Feb. 1, 2002) (emphasis added). See also, Dam, Transforming China's Financial Sector into an Efficient Engine of Growth, _supra_ note 36 ("Gone are the days when a national airline or heavy investments in manufacturing are the badges of economic development.").
market or into service industries. Likewise, China has long screened technology licenses from abroad, and has done so for ostensibly the same reasons as the developmental states did, i.e., to try to ensure that the local licensee gets the most and best technology for the lowest possible royalty payment, that the local licensor will be able to export to third-country markets in competition with the licensor, that the licensee will be able to exploit improvements it may make to the licensed technology, and to ensure that when the license expires the technology will remain with the licensee, meaning that such a license is in effect a sale.

What Ambassador Zoellick's remarks convey is the sense of America, in particular, that it was somehow wronged by the industrial policies of China's Northeast Asian neighbors, and that the WTO system can prevent China doing the same thing. Thus, while the "Washington consensus" is telling China that industrial policy will not work, Washington is actually quite concerned that Chinese industrial policy may shape technology transfers, in particular, in ways that benefit China at the expense of U.S. industry. A clear-headed discussion of this issue is found in a 1999 study commissioned by the U.S. Commerce Department, which argues that

"rather than ease government controls and allow technology imports to be more responsive to market demand, the Chinese government seems to have decided to try to manage technology imports by formulating more specific technology import and investment policies to assist domestic

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39 Ostry, a Canadian trade diplomat and scholar, provides a balanced look at the U.S. reaction to Japan's industrial policy, which began gathering real force in the 1970s. See, Ostry, supra note 37, at 35-56.
Chinese industry.\textsuperscript{40}

China's practice of screening technology licensing arrangements between foreign licensors and Chinese licensees, which has been in place for years and is almost certainly inspired by Northeast Asian industrial policy, is now claimed to violate the WTO's national treatment principle,\textsuperscript{41} though the authors fail to cite a WTO provision that would extend that principle to a technology license screening process.

Whether China remains committed to such an industrial policy will become clear as the new WTO compliance statutes and regulations are implemented, though the post-WTO accession Regulations on Guiding Foreign Investment employ the same basic administrative screening and approval approach that China has employed since opening to foreign investment, and that was employed by the developmental states.\textsuperscript{42} If they are implemented in ways that suggest active industrial policy, the pressure will be on other WTO members to


\textsuperscript{41} Warren Rothman and Grace Chen, Can China play fair on technology imports?, INTERNATIONAL FINANCIAL LAW REVIEW, December 1, 2001, at 50 (arguing that China's legal regime governing technology import contracts violates its WTO "national treatment" obligation because it does not apply to purely domestic technology licenses.) The elements of China's regime for screening foreign technology licenses, as described in this article, were all found in the equivalent regimes of China's Northeast Asian neighbors.

\textsuperscript{42} The Regulations on Guiding Foreign Investment, State Council Decree No. 346, of February 21, 2002.
decide how vigorously to confront China, either bilaterally or through the WTO, with the latter option potentially presenting severe challenges to the WTO itself. It should be remembered the "the most acrimonious [GATT/WTO] disputes of the 1980s and early 1990s reflected differences in regulatory and legal systems between the United States and Japan,"\(^{43}\) and the U.S., in particular, may have to decide between a healthy overall relationship with China, and an aggressive policy towards China's industrial policy.

Critics of the Chinese legal system who hope for a transformation by WTO accession often speak in the language of transparency. Ostry, for example, writes that:

"However imprecise the GATT/WTO definition of transparency, the core of the definition goes to the heart of a country's legal infrastructure, and more precisely to the nature and enforcement of its administrative law regime. Importantly, the current nature of China's administrative legal infrastructure lacks this trait."\(^{44}\)

Transparency-talk has two faces, however, often being presented to the world as an antidote for corruption,\(^{45}\) while at the same time serving as code among foreign investors, and their supporters, for administrative law doctrines that would allow legal challenges to the discretionary decisions involved in

\(^{43}\) Ostry, \textit{supra} note 37, at 210.

\(^{44}\) Ostry, \textit{supra} note 33, at 2.

\(^{45}\) For example, the primary activity of the non-governmental organization Transparency International \(<\text{http://www.transparency.org/}>\) is to highlight government corruption.
administering industrial policy, and to generally intervene as a matter of right in the regulatory process. For example, less than two weeks after its December 10, 2001 accession to the WTO, China enacted regulations on foreign investment in its domestic insurance industry, an industry included within China's market access commitments under the General Agreement on Trade in Services (GATS). 46 After surveying the areas covered by the regulations, as well as several areas that remain vague, a commentator from a leading international law firm noted,

"Perhaps more disturbing than the incomplete nature of the regulations is that no opportunity to comment was provided before they were enforced, an action that was inconsistent with China's duties of transparency under the WTO. Such opportunity to comment could have helped resolve many of the ambiguities and shortcomings of the resulting regulations."47

The writer, echoing what has become something of a mantra in the U.S. business community and the U.S. government with respect to Chinese law,48

46 Regulations for the Administration of Foreign-Invested Insurance Companies, issued December 22, 2001, effective February 1, 2002. China's WTO accession was December 11, 2001, eleven days before the regulations issued.


48 See, e.g., Dam, Transforming China's Financial Sector into an Efficient Engine of Growth, supra note 36 ("Implementation on these commitments is important. Particularly on the issue of transparency, China should continue to apply new, transparent methods of creating and applying regulations. Regulators should seek out the insights of the private sector before creating the rules of the game. We use these methods in the United States. The U.S. Federal Reserve, for example, regularly publishes proposed regulations and asks for comments from the private sector in a reasonable period of time."). On global resistance to U.S. demands for notice-and-comment rulemaking, see, U.S. Seeks Transparency Annex for Financial Services
conflicts a policy argument for why China might wish to receive comments on
draft regulations with a legal duty to engage something like notice-and-comment
rulemaking, based on "transparency" obligations grounded in the WTO. China in
fact resisted a WTO obligation to even publish regulations pre-enforcement, as is
clear from the colloquy contained in the October, 2001 report of the WTO
Working Party on China's accession.\textsuperscript{49} In response to a comment by the
Working Party that some WTO members had pushed China to make regulations
available prior to enforcement,\textsuperscript{50} China responded that it would "to the maximum
extent possible . . . make . . . laws, regulations and other measures available
before they were implemented or enforced, but in no case later than 90 days
after they were implemented or enforced."\textsuperscript{51} China finally relaxed this position,
pledging in the Protocol on its WTO accession to "make available to WTO
Members, upon request, all [relevant] laws, regulations and other measures . . .
before such measures are implemented or enforced, except in emergency


\textsuperscript{49} World Trade Organization, Report of the Working Party on the Accession of
China, WT/ACC/CHN/49, 1 October 2001 (01-4679).

\textsuperscript{50} Id. at 68 ("Transparency of regulations and other measures, particularly of sub-
national authorities, was essential since these authorities often provided the details on
how the more general laws, regulations and other measures of the central government
would be implemented and often differed among various jurisdictions. . . . [M]embers
emphasized the importance of such pre-publication to enhancing secure, predictable
trading relations.").

\textsuperscript{51} Id. at 69-70.
situations,"\textsuperscript{52} to publish enacted norms in a designated journal, and to "provide a reasonable period for comment to the appropriate authorities before such measures are implemented." This is a far cry from creating a right of private parties to intervene in the Chinese rulemaking process, however. First, like all such obligations it runs to WTO member governments, not interested parties generally.\textsuperscript{53} Second, the obligation is to make such norms available prior to implementation or enforcement, rather than prior to enactment, which is a prerequisite to the participatory function of notice-and-comment. China's leadership recognizes that making enacted norms available prior to implementation or enforcement makes sense from a regulatory effectiveness perspective,\textsuperscript{54} and from a fairness perspective, because it gives affected parties warning and a better opportunity to comply, but by itself does not allow participation in norm creation. Finally, the obligation does not include an


\textsuperscript{53} The foreign investor community, and some in China, clearly hope that China's WTO commitments will be directly enforceable, by private parties, in Chinese domestic law, rather than remaining international obligations that have to be enacted into Chinese law by specific legislation. For an explanation of why China is unlikely to accord such effect to WTO norms, see Donald C. Clarke, Statement Before the U.S. - China Security Review Commission, January 18, 2002, available at http://www.uscc.gov/tescla.htm.

\textsuperscript{54} For example, "[t]o ensure that labor standards are scientific and rational and that they are implemented smoothly, the government solicits suggestions from trade unions, enterprises, specialists and scholars while formulating, promulgating or adjusting labor standards." White Paper on Labor and Social Security, supra note 20.
obligation to receive public comments on such enacted-but-unenforced norms, let alone an obligation that received comments carry any weight in evaluating the legality of the enacted norm. The insurance regulations discussed above were enacted December 22, 2001, but by their terms did not come into force until February 2, 2002. China may have violated its WTO obligation to publish the regulations, once enacted, in a designated journal, and by not creating a formal process for accepting comments. On the other hand, the author of the cited article, and his law firm, clearly had a copy of the enacted regulations prior to February 2, 2002, and could easily have made any objections known to the enacting authority, China's State Council. Given the limited nature of China's WTO obligation in this area, it is not obvious that its violation was substantial, rather than merely technical. To have gotten the new regulations enacted within two weeks after WTO accession might even deserve some praise, but the current international agenda seems to be to maintain maximum pressure on China.

Western scrutiny of China's human rights record, more intense than the scrutiny applied to the Northeast Asian developmental states, presents another possible external force for administrative law reform. Because China both lacks a complete legal system and systematically abuses human rights, human rights activists, foreign business interests, and Chinese and foreign governments can agree on the general project of legal system development, including administrative law development. The Chinese government can therefore
improve its international standing by enacting administrative law reforms that render the state more accountable with respect to individual actions, yet do not present systematic challenges to the political order. For example, in a highly critical report on China's human rights situation, the U.S. State Department singled out the State Compensation Law as a bright spot:

"The State Compensation Law provides a legal basis for citizens to recover damages for illegal detentions. Although many citizens remain unaware of this law, there is evidence that it is having a growing, if still limited, impact. Throughout the year, the official press published numerous articles to raise public awareness of recent laws meant to enhance the protection of citizens' rights, including the Criminal Procedure Law, the State Compensation Law, the Administrative Procedure Law, and others. Many citizens have used the State Compensation Law during the year to sue for damages."\(^{55}\)

An additional source of external pressure on China arises from the fact that many in the West have vested interests in being able to say that China is moving toward the Rule of Law. In selling to the American public China's WTO accession and permanent most-favored-nation status, many in government and business have argued that commercial engagement with China will contribute substantially to the Rule of Law there.\(^{56}\) Sometimes the argument is that, over the long term, economic development will result in an educated middle-class that will demand the Rule of Law. At other times the argument is that the


\(^{56}\) See generally, Ohnesorge, Chapter One, supra, note 1.
rationalization and clarification of law that the government will undertake in order
to comply with its WTO obligations will somehow spill-over into general Chinese
legality. However the argument is put, however, those making it have exposed
themselves to potentially damaging critique if China’s legal system does not do a
better job of protecting individual rights as economic integration proceeds.

Academics have made similar arguments. One pair of European writers,
for example, went so far as to claim that,

"[t]he transformation of the legal and judicial system in the economic area,
as required by the WTO framework, will influence and change the entire
Chinese legal system. Only the change from the 'rule of socialism' to the
'rule of law' can provide a successful membership in the WTO."\(^{57}\)

While tarnishing the academic reputations of a few foreign academics would little
trouble China’s leadership, cutting the legs out from under those in the West who
supported China’s WTO entry could have consequences. The Bush
Administration is reported to be “looking for ‘positive’ stories about China’s
implementation [of WTO obligations] so they can better defend China’s WTO
accession to critics in the U.S. Congress,”\(^{58}\) and the Administration and its pro-
engagement business allies certainly have an incentive to monitor China’s legal
practices to a far greater degree than past U.S. administrations and business

\(^{57}\) Margaret Hilf & Christoph Feddersen, *GATTing China into the WTO - A
European Perspective in China*, in *THE WORLD TRADE SYSTEM 87*, 115 (Frederick Abbott

\(^{58}\) Zoellick Sees Potential U.S. WTO Cases Against China as Last Resort, *INSIDE
U.S. TRADE* (Feb 1, 2002), at 33.
interests scrutinized the legal regimes of China's Northeast Asian neighbors.

C. Domestic Legitimation

A third aim of the Chinese leadership must be to maintain some level of domestic political legitimacy for policies produced by the country's undemocratic political system. To this end, China is also experimenting with public hearings in the context of certain regulatory decisions, a necessary step if China is to move toward a more pluralist administrative law order. The recently enacted Law on Legislation provides for the use of hearings in the process of administrative rulemaking, and the 1996 Administrative Penalty Law also provides that those subject to administrative punishments receive a hearing. Statutory recognition of public hearings is being accompanied by the use of hearings in practice, a sign in itself that China is changing. In Hunan Province, for example, the provincial legislative affairs office and the provincial authority in charge of industry and commerce recently held a hearing prior to enacting a regulation


\[60\] (Lifa Fa), of 2000.

\[61\] Article 58.

\[62\] Cai, supra note 24, at 261.
relevant to business.\textsuperscript{63} Under the 1998 Price Law, and its implementing regulations, China's State Development Planning Commission is to hold public hearings when setting certain prices, such as prices for train tickets.\textsuperscript{64}

Leaving aside for a moment other possible motives for, or long-term effects of, these innovations, the Chinese leadership clearly believes that this administrative law innovation has value in the battle of public perceptions. Thus, the director of the Henan legislative affairs office was quoted as saying that "[c]ompared with the past, direct mass participation in the legislative process has increased the transparency of legislation. This shows that our province has made a new breakthrough in improving democracy and the legal system."\textsuperscript{65}

Exhibiting the characteristic intertwining of domestic and international concerns, the official announcement of the hearing on train ticket prices cited the hearing as proof of China's adherence to the Rule of Law, the official Xinhua news agency reported the announcement on its English language service,\textsuperscript{66} and the Chinese embassy in Washington posted the story on its Web site.\textsuperscript{67}

\textsuperscript{63} Henan Holds First Public Legislative Hearing on Business Law, Henan Ribao, March 1, 2001, available in Lexis, BBCSWB file, FE/D4108/G.


\textsuperscript{65} Henan Holds First Public Legislative Hearing on Business Law, supra note 63.


\textsuperscript{67} Embassy of the People's Republic of China in the United States of America, Public hearing on ticket prices on track, Jan. 7, 2002. Available at

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To summarize, it is unfortunately still the instrumental concerns of a fairly small group that dominate the path of administrative law reform in China, and from their actions to date it seems that their aims in creating an administrative law system are closer to those of the Meiji Oligarchs, or Park, Chung-hee, than to the architects of the due process revolution. They have every reason to believe that a limited administrative law system will not prevent rapid economic development, while preserving their current status. Pressures from the international economic system for more pluralist administrative law are greater than those faced by the developmental states, but it seems unlikely that WTO access is going to fundamentally change the calculus of instrumental aims.

IV. Political Culture

China was of course the primary source of Northeast Asian political philosophy, and as discussed in Chapter Two in the context of Nationalist China's law reforms, shared the basic pattern of governance practices that arguably influenced the original adoption and functioning of Western administrative law in Northeast Asia. To review, rather than seeking to present a total, or totalizing, picture of a common political culture, what was sought instead was to identify a set of variables relevant to administrative law to which political

societies could evidence greater or lesser degrees of commitment.

China's political culture is clearly changing with respect to some of these commitments. First, with respect to democratic participation in the creation of legal norms, there is ample evidence that such demand, extant in China since roughly the turn of the twentieth century, is widespread. The leadership, too, has clearly decided that it's instrumental aim of preserving its position of power can be served by democratic governance reforms. This is clearly the case with respect to the elections of local government officials, which have been held since the 1980s. With respect to the likely path of administrative law reforms this is crucial, since in authoritarian China the instrumental aims of the leadership are reflected much more clearly in the law than is broad public sentiment. Public demand for democracy is necessary if the instrumental aims of the leadership are to be met, however, since the leadership's legitimacy would not be enhanced by democratic reforms if the public were completely indifferent. Although public demand for democracy will not be sufficient to bring about radical change, to the extent the leadership feels it can gain from democratizing reforms, the more likely they become. With respect to administrative law reforms, one sees in the new provisions for public hearings prior to issuing regulations an attempt by the leadership to use administrative law in the same way that it has used local elections: as a means to enhance its legitimacy by institutional innovation that responds, however shallowly, to public demand for democracy.

Evidence also suggests that China's political culture is changing with
respect to the relationship between public (state) and private ordering, and that again the leadership is taking this into account. Faith in the socialist state, declining since the Cultural Revolution, is being severely undermined by widespread official corruption. In this context “the market” appears to some to offer an alternative to public ordering in many areas of social life, an alternative that will be more transparent, objective and rational than governance by the state.

Once again, the leadership may well feel that it too can benefit from shedding responsibility over many areas of social life, while retaining control over those that benefit it. The economic difficulties facing China’s state-owned enterprises (“SOE”s) are one manifestation of this broader issue. Their economic failure, paralleling the state’s failure in governing other areas of social life, undermines faith in public as opposed to private, market-oriented governance. In this situation the leadership has little to gain from preserving state ownership, except in those industries such as steel or chemicals, that are directly related to national defense or industrial sovereignty, or in areas crucial to the financial system. Here again, the examples South Korea and Taiwan are relevant, as in neither society did the fact of a largely private economic structure preclude an authoritarian leadership from preserving its monopoly on political power. The key was to incorporate private interests into the governing elite, the authoritarian corporatist pattern, so that their interests were substantially aligned with those of the leadership. It was that alignment that made it so difficult to
answer the question “Who Governs?” in Japan, but it also made the question somewhat academic if one was hoping for pluralist administrative law: whoever was governing didn’t want it.

With respect to a cultural commitment to governance by rule versus discretion, one can see a similar pattern. Decline in popular faith in the state appears to lead to a desire to bind state action within a system of rules – “Hayek fever” – sweeping intellectual circles, just as it leads to a desire to scale back the range of state activities. China’s leadership has adopted Rule of Law rhetoric to a great degree, though by refusing to include separation of powers within the Rule of Law it has limited that rhetoric to mean something more like a legalized state apparatus.68 As discussed in Chapter Two, legalized governance has been part of China’s political tradition for two millennia, albeit then, as apparently now, that legalization was not enforced by private actors invoking law before institutionally insulated courts. Legalization was explained and justified as a means for maintaining the desired order, and appealed to holding power, rather than in terms of protecting individual rights.

At the same time as the Chinese government is affirming its commitment to rule through rules, observers of the Chinese legal system in action find it rife with failures to fulfill this ideal. Chinese regulators, for example, are said to be

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68 Russian president Vladimir Putin’s promise of a “dictatorship of law” probably captures the essence of what China’s leadership has in mind, in a less confusing manner.
prone to “particularistic tendencies . . . to apply law as though it were a policy tool.” Such commentary generally does not present rule versus discretion as a general issue, existing in all legal systems, but focuses on areas where exercises of discretion by Chinese state actors are seen as problematic. As China has entered the global trading system, and now the WTO, China’s formal rule structure has come to favor foreign investors and other private interests in ways that it didn’t before, which predisposes them to argue for rule application rather than discretion. The opposite of rule application becomes arbitrariness in much of the commentary, and to the extent that the Chinese leadership maintains instrumental aims that contradict the norms of the global trading order, such as aspirations to operate a Northeast Asian-style industrial policy, this will only continue.

V. Predictions

The hope of the Chinese leadership is clearly to limit the number of actors with a voice over the path of administrative law reforms. China’s political culture is also clearly changing, as noted above, but as of yet the instrumental aims of China’s authoritarian political elite dominate. Their instrumental aims would be familiar to those of the Meiji Oligarchs, and to the authoritarian governments in

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69 Corne, Chapter Two, supra note 28, at 14.
Taiwan and South Korea: maintaining power, guiding a growing market economy, and at the same time achieving some legitimacy from a populace that increasingly understands and demands legality in government activities, and some popular participation in the creation of law. A lesson one can draw from the study of China’s Northeast Asian neighbors, however, is that a changing political culture in an authoritarian society is insufficient to force administrative law beyond the limited legalization of administration promised, but not always delivered, during the developmental state era. If the Chinese state maintains its current goal orientation toward economic growth and industrialization, and can succeed in its current policy of coopting the emerging business class into the ruling regime, there is no reason to expect Chinese business and commercial interests, one pillar of civil society in any market economy, to push for a legally governed, transparent relationship that China’s current reforms ostensibly aim for, let alone pushing for the pluralist administrative law that seems to be the current global trend.

And if the Chinese state can continue to provide a rising standard of living to the educated urban elite, another pillar of civil society, providing them with educational opportunities, opportunities to travel, to internationalize, there is no reason to expect them to provide a strong demand for pluralist administrative law. In the rest of Northeast Asia pluralist administrative law was a long-standing goal of progressive public law scholars and social activists, but it never entered the legislative agenda until there had been either fundamental political change,
as in South Korea and Taiwan, or until intense U.S. pressure coincided with
deregulation of a highly developed economy and financial system, as in the case
of Japan. Only then did the de jure pluralization of Northeast Asian
administrative law described in Chapter Three begin, and it is far from clear
whether these statutory initiatives will lead to radically different state-society
relations. Put in the categories employed here, South Korea and Taiwan didn’t
change until democratization radically altered the universe of those whose
instrumental aims mattered directly. Political culture had already changed
substantially, with commitments to democratic participation, to a legally protected
private sphere, to rule-based government, to separation of powers, already
widespread in society. But without democratization the universe of those whose
aims and objectives mattered was limited to a small political elite and their
corporatist collaborators in the major private industries, and they had no interest
in even an arms-length, legalized and transparent relationship, let alone the
relationship implied in the pluralist model, in which administrative law becomes a
battleground upon which nearly any executive branch measure can be contested
by a range of actors, and in which the judiciary holds the wild card of “law,” with
which it can at least temporarily trump the others.

A second important lesson from the Northeast Asian developmental state
is that a limited formal package of administrative law, even if enforced only by a
highly restrained judiciary and characterized in practice with pervasive
informality, is completely compatible with high-speed economic growth, and with
admirably wide-spread distribution of the gains from that growth. Neoliberal institutions such as the World Bank will admit this when forced to, as in the East Asian Miracle Report, while earlier generations of development economists helped create the relatively insulated and superficially autonomous economic steering organs of the developmental state.

On the other hand, the Chinese leadership will likely wish to control and limit the development of activist administrative law, and be able to do so. First, the desire of the leadership to limit change derives from its own lack of domestic political legitimacy. As for the ability of the leadership to limit change, the fact is that China's enormous domestic market and attractiveness as a site for foreign investment give China leverage to counteract and quiet external demands for change.

Although some observers believe the Chinese leadership is both willing and able to create a neo-fascist "hard" state in China,\textsuperscript{70} the central government's lack of control over something as basic as the leveling fines and punishments by government organs throughout the country suggests that at this point that comparisons with Mussolini's Italy, Nazi Germany, or perhaps more appropriately, Park's South Korea,\textsuperscript{71} are misplaced. Neither the European fascist


\textsuperscript{71} I am indebted to the late scholar of South Korea, Dr. James West, for the suggestion that to understand South Korea one should read JAMES A. GREGOR, \textit{ITALIAN FASCISM AND DEVELOPMENT DICTATORSHIP} (1979), a work on Mussolini's Italy.
states, nor the Northeast Asian developmental states, were plagued by the fundamental disorder still present in Chinese governance, as exemplified by the discussions surrounding enactment of the Administrative Punishments Law, and by the lack of certain attributes of a monopolistic legal order, such as a clear hierarchy of norms and authority.\textsuperscript{72} Even if the will is present, China's ruling elite appears too fractured by a no-holds-barred pursuit of purely private gain to unite behind a program of relatively constrained, managed corruption such as exemplified the Park regime. China now compares better to the South Korea of Syngman Rhee, which was both undemocratic and highly corrupt, and which was forcibly replaced before South Korea's developmental state project began.\textsuperscript{73}

Returning to the pluralist administrative law ideal type developed in Chapter One, it seems impossible to imagine any of the particular elements being introduced and functioning aggressively in China absent fundamental political change. Certain specific doctrinal innovations, such as open meeting or information disclosure norms, are being enacted already, or likely will be enacted to keep pace with what seems to be an evolving global administrative law culture. Even a unified administrative procedure statute is probably likely within the next decade, which may well include opportunities for public participation in

\textsuperscript{72} Stanley Lubman cites this in arguing that China still lacks a "legal system" in the modern sense. Lubman, \textit{supra} note 2. For more on the problem, see Perry Keller, \textit{Sources of Order in Chinese Law}, 42 AM. J. COMP. L. 711 (1994).

\textsuperscript{73} On the political economy of the Rhee regime, see JUNG-EN WOO, \textit{RACE TO THE SWIFT: STATE AND FINANCE IN KOREAN INDUSTRIALIZATION} (1991).
the administrative rulemaking process. Such doctrinal innovations are necessary
to a pluralist administrative law system, but they are not sufficient. Another
necessary condition is a judiciary that is not only competent and institutionally
independent, but is also organized, as the Japanese case makes clear, in such a
way as to allow individual judges real freedom to aggressively enforce the
statutory norms in the face of serious political opposition. Functioning pluralist
administrative law would present fundamental challenges to China's ruling elite
in several respects. Leaving aside the argument that a developmental state
might have good faith reasons for wishing to limit information disclosure rights in
order to maintain its authority with respect to the private sector, the current
Chinese regime appears to believe that its very existence can be challenged by
the collection and publication of information about the recent past. Knowledge is
power in every society, and the Chinese regime has specific reasons for
preserving its monopoly on this form of power. The judiciary that could
implement a pluralist administrative law regime implies a separation of powers
model, with the judiciary constituting an independent power based on its ability to
invoke law to trump the other branches. The political change that would allow
Chinese courts to act as an independent source of administrative law, expanding
scrutiny of administrative actions to the point of becoming an independent
source of policy, and enforcing participatory rights, will not come absent
fundamental political change that must also be of a particular sort. A change to
the political right, for example, would likely not lead to such a role for the courts.
Absent a fundamental political change towards a liberal-pluralist regime, no government of China will allow the courts to take on this role of their own accord.

Looked at in the context of Northeast Asian administrative law, and the historical development of administrative law more generally, China's current situation is least like the Anglo-American experience, in which liberal legality and democratic ideals were well entrenched in the political culture at the time of industrialization, and further liberalization of corporate and commercial law fed the additional growth of industry. When efforts finally began in the latter half of the nineteenth century to erect an administrative state, a wide range of interests had to be accommodated, and those interests could draw support from a political culture that was predisposed toward legalization and democratization of administrative governance. China's current situation is somewhat more like that of nineteenth century Germany, in that industrialization and the growth of a massive private sector are coming at a time when the state has already established a broad base of administrative government. In Germany, however, ideals of liberal legality, though not necessarily democracy, were well established in the political culture at the time that the modern welfare state began to take shape in the nineteenth century, and the formal, or Liberal, Rechtsstaat that developed, though weakly democratic and within a monarchy, was highly legalistic. In Germany, also, large scale industry grew up with the welfare state, so the interests of private industry and commerce could not be ignored when the welfare state was being crafted.
What China most resembles, at this stage, is Meiji Japan, though it is likely to develop quickly the administrative law package of the developmental states. In Meiji Japan, as in China today, the political culture was committed to legally-defined administrative governance and to the predominance of public authority over private ordering, but was not strongly committed to democratic participation, to a legal demarcation between public and private spheres, or to a separation of powers in which private parties would be able, as a matter of right, to have one branch of government protect them against another. As in Meiji Japan, the path of administrative law reform in the near future is going to be determined by a small political elite, and their instrumental aims are not compatible with pluralist administrative law. Their aims are similar to those of the Meiji Oligarchs: to oversee the legalization of governance and the progress of an increasingly market-oriented economy, while at the same time preserving their own status and autonomy. The image of law as a headless fifth branch has no place in this vision.

VI. Conclusion

The aim in this work has been to provide a framework for understanding the macro history of administrative law in Northeast Asia, a framework that seeks to set legal doctrine, broadly defined, within broader social contexts in which instrumental aims and political culture both matter. Administrative law reform is a
particularly difficult process to judge. It is one thing to contemplate the likely implications of changing a single substantive rule of private law, though even this is fraught with problems, not the least of which is that rule changes seldom occur in such isolation. Understanding the implications of changes to procedural rules is also difficult, though perhaps less so because at least some procedural rule changes are acted upon fairly quickly and obviously by society. Administrative law reform of the scope discussed here multiplies these difficulties, not least because administrative law is so closely tied to politics and political power that one may be dealing with complicated feed-back loop, in which legal change affects the political power relationships that allowed the reform in the first place, but which also hold the power to shape the continuing path of reforms.

A deeper problem, however, may be to get past the current style of external comparative law, that is, comparative law that tries to examine the functioning of legal systems in various societies and to compare them along some axis, such as the Rule of Law, or compatibility with a market economy. In one sense this work is an important step forward for comparative law scholarship, in that it does move beyond doctrinal comparisons of legal rules to try to get at the functioning of law in society.

This work has sought to offer suggestions about how administrative law in Northeast Asia has evolved, and will continue to evolve, based in part on comparisons with how administrative law has evolved in the West, particularly the U.S. This doesn't imply a universal evolutionary path, or eventual
convergence. What seems to be happening is that once Northeast Asia adopted the forms of constitutional, multi-party government and liberal legality, including administrative law, the institutional logic of those forms began to structure social forces that made demands upon the state, including demands for more activist, less constrained administrative law. In this sense, the Northeast Asian states appear to have been engaged for a long time in a sort of rear-guard action, trying to meet the challenges of 'late' development, which Northeast Asian elites believed called for a strong state role, while at the same time trying to stave off demands from their populations for more democracy, transparency, and bureaucratic justice. For many years economic interests did not seem concerned with expanding administrative law to provide them with legally-based leverage against the state, and without that impetus even democratic Japan did not move far from its prewar German base toward pluralist administrative law. And it was clearly political liberalization in Taiwan and South Korea that triggered the waves of administrative law reforms there, though the relationships between the state and business are becoming more legalized as a result. With respect to China, a functioning system of developmental state administrative law would be a substantial improvement over the current situation, and would probably satisfy the demands of foreign and domestic economic actors, though perhaps not proponents of a new international administrative law, centered in the WTO. It could also raise the level of justice and fairness between Chinese citizens and the state, though that alone would not solve China's human rights problems.
And if one believes in the Asian Miracle, and that a more humane Chinese state could effectively administer a developmental state industrial policy, moving to a more pluralist administrative law order, and the limits that would place on the state's prerogatives vis-a-vis economic actors, might be premature.