

## FOREWORD

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Since the proliferation of administrative regulation by the federal government began in the 1930's, the course in Administrative Law has been a fixture in law school curricula. Students of the subject have traditionally concerned themselves with the theoretical foundations for the exercise of massive new powers by new-fangled governmental entities, grasping for principles that would legitimize uniting in one body the functions of rule-making, adjudication, and law enforcement, and justify the application of these functions in particular situations. The central thought guiding these efforts has been that the administrative agency, like any repository of overt governmental power, may be a practical necessity, but of equal practical necessity is effective control of its actions. Control could be expected from the other branches of government; but in the study of administrative law, the chief focus has been on the judiciary's role in checking upon administrative action.

The extensive emphasis on judicial review of agency action has embroiled the typical Administrative Law course in a controversy of mild proportions. It may be only a small exaggeration to observe that there are two schools of thought regarding the teaching of the course: the one holds that it cannot be taught, and the other, that it should not be. Judicial review, it is argued, does not provide as significant a control—in frequency or in kind—upon administrative action as the emphasis given to it would suggest. Moreover, judicial review is not a unitary phenomenon; because it varies in substance from agency to agency, it cannot be taught as though it did not.

Other forces have added impetus to some reexamination of the traditional perspectives of administrative law. The movement for the study of law in action has found an inviting target in the emphasis on judicial review. That movement calls for studies of the internal processes of administrative agencies, in an effort to identify the real forces shaping administrative decision-making, and to improve the fairness and efficiency of agency procedures. At a minimum, the impact, if any, of

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judicial opinions on those internal processes ought to be made a matter of knowledge rather than conjecture or anecdote. At a maximum, the administrative process ought to be exposed as a political reality, in which policies about how men and institutions should behave are made, by design or inadvertence, and sometimes pursued. The galaxy of Ralph Nader-sponsored studies has contributed strongly to lawyers' interest in the political and substantive quality of regulatory administration. To a subject that received considerable attention in its procedural aspects, the Nader-style studies, whatever one may think of their quality, have added a relatively new dimension.

A call for new approaches to the study of administrative law has also come from perhaps its most influential American scholar, Professor K. C. Davis. In his book *Discretionary Justice*, and again in his widely-read *Administrative Law Text*, Professor Davis exhorts students of the subject to consider the dimensions of discretion in the administrative process, particularly in areas that have traditionally escaped all-but-minimal judicial review. Although administrative discretion has been the pivot around which several doctrines of judicial review have traditionally turned, Professor Davis' functional focus on the phenomenon of discretion promises to lend support to (loosely speaking) empirical approaches to the study of administrative

Concurrently with these trends that lead away from emphasis on judicial review, we are now undergoing, curiously enough, pressures for increased use of the courts with respect to administrative action. Whereas the conventional foundation of judicial review has stressed limitations upon governmental power—including the paradox of limitations on the power of the judiciary to limit the power of the administrative realm—the contemporary appeal to the courts calls on them to spur the agencies to positive action in the interest of substantive policies. Emanating from environmentalists and consumerites, among others, these demands on judicial and administrative resources have renewed interest in the doctrines of judicial review, and have begun to make their mark on the definition and application of these doctrines. There is, of course, a close kinship between the advocacy of increasing judicial authority in pursuit of social and political objectives, and the movement to examine the sub-

stantive quality of administrative institutions from an internal perspective.

Enough has been said to suggest that the student of administrative law confronts a broad range of approaches in embarking upon examination of any regulatory program or doctrinal problem. The present volume reflects this diversity. Its title, *Legal Problems of Administrative Practice*, by eschewing the traditional term "Administrative Law, reinforces the multi-faceted character of its contents. From the perspective of the intellectual history of the field, the articles in this volume afford the opportunity to ask whether the approach selected with respect to any particular topic illuminates it as fully as another approach might have. With respect to articles that combine methods of inquiry, we have an occasion to examine the extent to which such combinations contribute to our understanding of the problems under discussion.