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Through the Looking Glass to a Shared Reflection: The Evolving Relationship between Administrative Law and Financial Regulation

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THROUGH THE LOOKING GLASS TO A SHARED REFLECTION: THE EVOLVING RELATIONSHIP BETWEEN ADMINISTRATIVE LAW AND FINANCIAL REGULATION

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Administrative law and financial regulation have an uneasy relationship today. It was not always so. Indeed, the two were closely intertwined at the nation's birth. The Treasury Department was a major hub of early federal administration, with Alexander Hamilton crafting the first iterations of federal administrative law in his oversight of revenue generation and customs collection.[1] One hundred and fifty years later, administrative law and financial regulation were conjoined in the New Deal's creation of the modern administrative state. This time it was James Landis, Chair of the newly formed Securities and Exchange Commission (SEC) and author of the leading defense of the new federal administrative government, who embodied the connection between administrative law and financial regulation.[2] And the two fields have crossed paths periodically since, as demonstrated by the financial regulation decisions that have canonical status in administrative law and vice versa.[3] Nor is this overlapping relationship surprising; financial regulation is, after all, a form of administrative governance to which the general transsubstantive requirements of administrative law would naturally apply.

Yet in many ways administrative law and financial regulation now stand poles apart. They are divided not simply by their separation in law school curricula and faculty, but even more by opposite precepts and framing principles. Indeed, there is almost a through-the-looking-glass quality when approaching financial regulation with an administrative law lens.[4] In modern

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1. JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 40–42, 112 (2012).

2. *See generally* JAMES LANDIS, THE ADMINISTRATIVE PROCESS (7th ed. 1966).

3. *See, e.g.*, Ass'n of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150 (1970); SEC v. Chenery Corp., 318 U.S. 80 (1943).

4. By administrative law, I mean to include not simply measures that are typically identified as part of federal administrative law, such as the Administrative Procedure Act and judicial review doctrines, but also substantive nonfinancial regulatory schemes, like the Clean Air Act, that are often

U.S. administrative law, notice-and-comment rulemaking, frequently on matters of great scientific or technological uncertainty, is the paradigmatic example of administrative action. The goal of such regulation often is to compensate for market deficiencies—to force industries to internalize the costs of their actions and to protect the public or particular groups from harms they lack the ability to avoid or foresee. Accountability is administrative law's central obsession, which it furthers through mechanisms for public participation, congressional oversight, centralized White House regulatory review, and judicial review.[5] Fear of agency capture is a recurring theme, as is the concern that agencies will wield their delegated powers arbitrarily.[6]

A very different model dominates in the world of financial regulation. There the defining structural precept is not accountability but independence. The vast majority of financial regulators enjoy protection from removal from office, often coupled with budgetary autonomy from Congress and other indicia of independence, such as exemption from White House regulatory oversight.[7] Far from fearing agency capture, financial regulatory agencies seem structured to invite it, with a number of agencies being given authority over narrow industry slices and being made financially dependent on industry fees.[8] Much financial regulation displays a collaborative approach, with greater reliance on information sharing and partnership between regulators and those they regulate.[9] Although financial regulation agencies engage in notice-and-comment rulemaking, their regulatory mode is often more informal, ad hoc, and hidden from public view.[10] Protecting vulnerable groups and preventing externalities are important concerns, but an overriding regulatory goal is ensuring the stability of the financial system, which often means protecting profitable lines of

viewed as part of distinct substantive fields, internal executive-branch practices and structures that overlap with public administration, as well as administrative law scholarship. My contrast is thus perhaps better described as one between financial regulation and the rest of administrative government, rather than administrative law per se. I use the term administrative law, however, in part to signal that these other dimensions are core aspects of the field, even if pushed to the edges of traditional administrative law courses.

5. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 469, 472–74, 481–85, 488–91 (2003).

6. *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1760, 1786 (2007); Thomas W. Merrill, *Capture Theory and the Courts: 1967–1983*, 72 CHI.-KENT L. REV. 1039, 1050–53 (1997).

7. Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 26–27, 42–43 (2010).

8. *See* Adam J. Levitin, *The Politics of Financial Regulation and The Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2042–49 (2014) (detailing tendencies towards capture in financial regulation).

9. *See id.* at 2043–44 ("The relationship between banking regulators and financial institutions is sometimes more symbiotic than supervisory."); David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 208–10 (2010).

10. *E.g.*, Zaring, *supra* note 9, at 199–201; Ben Protess, *Lawsuit Challenges Government's $13 Billion Deal With JPMorgan*, N.Y. TIMES (Feb. 10, 2014, 5:54 PM), http://dealbook.nytimes.com/2014/02/10/justice-department-sued-over-13-billion-jpmorgan-pact.

business.[11] The market plays a different role, too, acting as much as an arbiter of successful financial regulation as the object of regulators' attention. Put differently, rather than viewing the marketplace with skepticism as a place of industry exploitation, financial regulation aims to free financial markets to work their magic.

To be sure, these models of administrative law and financial regulation represent incomplete accounts of both fields. Market-based regulation has long been a staple of standard administrative law, as has reliance on informal and collaborative governance mechanisms. Interest-group influence is a constant at all agencies, and independent agencies are neither limited to the financial sector nor immune from presidential oversight.[12] Significant differences in structure, jurisdiction, and regulatory approach exist among different financial regulators and among the large and diverse group of nonfinancial regulators.

But even though these characterizations exaggerate the divergence between administrative law and financial regulation, they help to demonstrate the upside-down aspect that each field can possess when viewed from the other. The contrast also helps elucidate the contingent and contestable nature of each field's framing presumptions, thereby opening up room for rethinking approaches to regulation in both. Indeed, that rethinking is already underway largely as a result of the financial crisis, and many of the starker differences between the two fields are abating.

The time is thus ripe for sustained and reciprocal engagement between administrative law and financial regulation at both a conceptual and more granular level. This article aims to contribute to that process of mutual reflection. Part I begins with a description of two agencies that typify administrative law and financial regulation and uses that description to showcase the core precepts and structures that characterize each field. Part II focuses in on recent developments in financial regulation and administrative law, identifying the ways that these changes are increasingly erasing the differences between the two fields. Part III then details some lessons that each field could glean from the other.

I
A STUDY IN CONTRASTS

Every field has its archetypes. The differences between administrative law and financial regulation become apparent when contrasting two agencies that in many ways stand as archetypes of each field: the Environmental Protection

11. *Cf.* CHARLES W. CALOMIRIS & STEPHEN H. HABER, FRAGILE BY DESIGN: THE POLITICAL ORIGINS OF BANKING CRISES AND SCARCE CREDIT, 274–76 (2014) (discussing the Fed putting primacy on monetary policy over financial regulation).

12. *See* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 813–17 (2012); Neal Devins & David E. Lewis, *Not–So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459, 497–98 (2008).

Agency (EPA) and the Federal Reserve (The Fed).

Staffed with 16,000 employees and charged with broad responsibility for protecting the nation's environment, the EPA's regulatory scope is vast. The EPA implements numerous major environmental statutes, including the Clean Air and Clean Water Acts; issues national standards for a wide array of pollutants; distributes significant amounts in grants; and oversees toxic chemicals, pesticides, and clean-ups.[13] The matters it addresses frequently involve complicated issues of scientific uncertainty, future impact, and technological capacity. Statutorily mandated to set many of its requirements by legislative or notice-and-comment rulemaking, EPA rules often have a substantial impact on the environment and economy. As a result, they are often highly contentious and trigger both substantial political scrutiny and litigation.[14] The EPA is headed by a single administrator who is removable by the President at will and given cabinet status, with top administrators also being presidentially appointed and Senate confirmed.[15]

The Fed is larger than the EPA in personnel—above 18,500—and exercises even more immediate and profound influence on the national economy, given its control over the nation's monetary policy.[16] Its other core responsibilities include supervising and regulating banking institutions; maintaining the stability of the financial system; and providing financial services to depository institutions, the U.S. government, and foreign official institutions.[17] The Fed is a national banking system, consisting of twelve regional Federal Reserve banks and a Board of Governors at the top. The seven members of the Board of Governors are appointed by the President with Senate confirmation to fourteen-year terms and are protected against removal from office except for cause.[18] Like the EPA, the Fed often addresses matters of significant uncertainty. It also issues notice-and-comment rules, particularly with respect to its bank supervision, financial stability, and financial services responsibilities.

13. *Our Mission and What We Do*, EPA, http://www2.epa.gov/aboutepa/our-mission-and-what-we-do (last visited Apr. 4, 2015) [hereinafter *Our Mission and What We Do*].

14. *See, e.g.*, Util. Air Regulatory Grp. v. EPA, 134 S.Ct. 2427 (2014) (challenge to EPA's greenhouse-gas-permitting requirements); Juliet Eilperin & Steven Mufson, *EPA Proposes Cutting Carbon Dioxide Emissions from Coal Plants by 30% by 2030*, WASH. POST (June 2, 2014), http://www.washingtonpost.com/national/health-science/epa-to-propose-cutting-carbon-dioxide-emissions-from-coal-plants-30percent-by-2030/2014/06/01/f5055d94-e9a8-11e3-9f5c-9075d5508f0a_story.html.

15. Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (July 9, 1970) (issued pursuant to 5 U.S.C. § 901); 42 U.S.C. § 4321 (2012).

16. *See* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, ANNUAL REPORT: BUDGET REVIEW (2013) (indicating personnel numbers), *available at* http://www.federalreserve.gov/publications/budget-review/files/2013-budget-review.pdf.

17. *Mission*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., http://www.federalreserve.gov/aboutthefed/mission.htm (last visited Apr. 4, 2015).

18. Peter Conti-Brown, *The Institutions of Federal Reserve Independence* 36 (Rock Center for Corp. Governance, Working Paper No. 139, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2275759. Presidential appointment and Senate confirmation are similarly required for selection of the Fed Chair and Vice-Chair, who are also members of the Board. *Id.*

But much of the Fed's policysetting and supervisory activity takes a more informal and ad hoc guise, and such Fed decisions are rarely formally subject to political approval ex ante or undergo judicial review ex post.[19] Perhaps an even more significant factor is the Fed's budgetary autonomy, with the Fed funding itself primarily through income generated by its open market operations.[20]

These are, of course, only two of myriad federal agencies, and they lack many features characteristic of others. The EPA is nowhere near as large as military and security agencies like the Departments of Defense, Veterans Affairs, and Homeland Security, and several important nonfinancial regulatory agencies, like the Federal Communications Commission (FCC) or the Federal Energy Regulatiory Commission (FERC), are headed by multiperson boards whose members serve terms and enjoy for cause–removal protection.[21] The Fed, in turn, differs significantly from other financial regulators because of its central engagement with monetary policy. This monetary policy role also leads to an overall systemic focus on the part of the Fed compared to other financial regulators who train their attention on particular financial sectors.[22] Another divergence exists between banking regulators, like the Fed or Federal Deposit Insurance Corporation (FDIC), and other financial regulators such as the SEC or the Commodities Futures Trading Commission (CFTC), which lack the budgetary autonomy that bank regulators enjoy.[23]

Nonetheless, what makes the EPA and the Fed archetypal of administrative law and financial regulation respectively is the extent to which each embodies the core obsessions and concerns of its field. With the advent of major new public-interest regulatory legislation in the 1960s and 1970s, the focus on administrative law shifted from economic regulation and ratemaking to notice-and-comment rulemaking on complex scientific and technological issues of the kind that the EPA undertakes.[24] There the focus has remained, with both doctrines and scholarship keying to rulemaking as the paradigmatic administrative activity. The EPA also is emblematic of administrative law's central struggles to guard against agency capture, balance political and legal

19. This was particularly true of the Fed's critical moves during the recent financial crisis. Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 477–79 (2009); *see also* Zaring, *supra* note 9, at 208–09 (Treasury's regulatory approach).

20. Conti-Brown, *supra* note 18, at 22; BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *supra* note 16, at 2.

21. *See* 42 U.S.C. § 7171(b)(1) (2012) (FERC); 47 U.S.C. § 154(a) (2012) (FCC).

22. *See* Kathryn Judge, *Three Discount Windows*, 99 CORNELL L. REV. 795, 808–09 (2014); *Blueprint for a Modernized Financial Regulatory Structure* 14, U.S. DEP'T OF THE TREASURY (Mar. 2008), http://www.treasury.gov/press-center/press-releases/Documents/Blueprint.pdf [hereinafter *Blueprint*].

23. Joel Seligman, *Self-Funding for the Securities and Exchange Commission,* 28 NOVA L. REV. 233, 238–49, 253–54 (2004) (describing SEC's lack of independent funding and impact of inadequate resources on the agency). The SEC and CFTC also rely more on rulemaking and are more frequently subject to suit. *See infra* text accompanying note 68.

24. Merrill, *supra* note 6, at 1092–93; Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189, 1284–95 (1986).

accountability with administrative expertise, and improve the regulatory process through analytic requirements. In addition, disputes over EPA rules often play out in the public eye, amidst allegations of lost jobs and growing pollution-caused health crises such as childhood asthma. The Fed, meanwhile, represents the apogee of independence that is the traditional hallmark of financial regulation.[25] Its methods of operation are particularly tied to the financial markets and are distinctive to financial regulation as opposed to other administrative contexts. And its central role in the economy gives it a broader import and greater popular stature than any other national financial regulator, a role that has only expanded after the recent financial crisis.[26]

Comparing the EPA and the Fed highlights four central areas of contrast between administrative law and financial regulation: (1) administrative structure and institutional design; (2) relationships to other regulators; (3) regulatory methods and approaches; and (4) the role of the market. Yet at the same time, closer analysis reveals greater similarity on these fronts than might at first appear. The net effect is to situate administrative law and financial regulation not at diamterically opposite regulatory poles but rather at different, yet sometimes overlapping, points on a regulatory spectrum.

A. Administrative Structure and Institutional Design

Perhaps the most immediate and obvious difference between the EPA and the Fed involves the two agencies' structures. A common distinction among federal administrative agencies is between executive agencies and independent agencies, with independence referring to protection against presidential and, to a lesser extent, congressional control.[27] Recently several scholars have argued that agency independence (or lack thereof) is actually a function of a number of factors, including budgetary autonomy, bipartisan and multimember composition, and the extent of substantive oversight in addition to removal protection. Agency independence thus needs to be assessed on a continuum rather than on a binary basis, with different combinations of structural features resulting in agencies enjoying different degrees of independence from political oversight.[28]

The contrast between the EPA and the Fed is stark whether the distinction is viewed in binary terms or from a more scalar perspective. The Fed and many other financial regulators enjoy numerous indicia of independence: not just removal protection and (in the case of the Fed) lengthy terms, but also

25. The formal independent status of the Fed is typical of financial regulators not just in the United States but in many countries, particularly those with central banks. *See* Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CAL. L. REV. 327, 331–32 (2013).

26. *See* Lawrence C. Baxter, *Capture Nuances in Financial Regulation*, 47 WAKE FOREST L. REV. 537, 539, 545 (2012); Judge, *supra* note 22, at 805–06.

27. *See* Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 600 (2010) ("By design, independent agencies are insulated from the plenary control of the President."); Datla & Revesz, *supra* note 12, at 775–76, 778–81.

28. *See* Datla & Revesz, *supra* note 12, at 825–27.

multimember composition, budgetary autonomy, freedom from White House regulatory oversight, and norms of noninterference.[29] The Federal Open Market Committee (FOMC), which sets monetary policy and consists of five regional bank presidents who are selected by their banks' shareholders as well as members of the Board of Governors, is even more insulated from political control.[30] The EPA lacks these features. Not only is it headed by a single administrator removable at will, but its rules frequently come in for extensive White House review, and Presidents are often prominently involved in major EPA policy decisions.[31] Indeed, by some accounts, EPA rules are scrutinized even when they do not appear to meet the economic significance threshold that triggers greater scrutiny by the White House through the Office of Information and Regulatory Affairs (OIRA), housed in the Office of Management and Budget.[32]

But digging deeper, the contrast in independence is not as sharp as it first might appear. To begin with, there are features of the EPA's structure and operations that lend it more independence from political pressure than its leadership structure might suggest. In particular, the large number of career scientists staffing the agency, combined with internal rulemaking procedures that both give staff a large role in assessing the scientific evidence and also require participation by outside scientific advisors, transform professional norms and professional reputation into a shield against politically driven decisionmaking.[33] Similar professional and civil-service protections and reputational concerns operate within other nonfinancial regulators whose leaders lack removal protection.[34]

At the same time, the Fed's protection from political influence can be exaggerated. A striking feature of accounts of the Fed's actions during the recent financial crisis is the close working relationship between the Treasury

29. *See* Bressman & Thompson, *supra* note 27, at 611; Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1166 (2013).

30. Peter Conti-Brown, *The Constitutional Crisis at the Fed*, POLITICO (Apr. 13, 2014), http://www.politico.com/magazine/story/2014/04/federal-reserve-constitutional-crisis-105663.html#.VEQm3YvF--Z.

31. *See, e.g.*, Memorandum from President Barack Obama, Power Sector Carbon Pollution Standards (June 25, 2013) (instructing the EPA to issue standards on greenhouse gasses from power plants); Letter from Cass R. Sunstein, Admin., Office of Info. & Regulatory Affairs, to Lisa Jackson, Admin., EPA (Sept. 2, 2011) (blocking the EPA's effort to lower ozone-emission standards).

32. *See* Lisa Heinzerling, *Inside EPA: A Former Insider's Reflections on the Relationship Between the Obama EPA and the Obama White House*, 31 PACE ENVTL. L. REV. 325, 346–47 (2014) ("Most of the rules OIRA reviews are not economically significant.").

33. *See* Emily Hammond & Daniel Markel, *Administrative Proxies for Judicial Review: Building Legitimacy from the Inside-Out*, 37 HARV. ENVTL. L. REV. 313, 353–55 (2013) (professional and reputational forces); Wendy Wagner et al., *Rulemaking in the Shade: An Empirical Study of EPA's Air Toxic Emission Standards*, 63 ADMIN. L. REV. 99, 110–18 (2011) (describing staff role in rulemaking).

34. *See, e.g.*, DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES 1862–1928, at 282–87, 366 (2001) (describing use of professionalism in development of the Forest Service); Gillian E. Metzger, *Abortion, Equality, and Administrative Regulation*, 56 EMORY L.J. 865, 901–02 (2007) (describing role of professionalism at FDA).

and the Fed.[35] No doubt this relationship reflected the momentousness of the Fed's decisions for the economy at the time, but it also demonstrated the high-level political attention and pressure that may be brought to bear on the Fed.[36] This political pressure comes as much or more from Congress as from the President, with Congress influencing the Fed through hearings, confirmations, and legislative mandates.[37]

Moreover, as Peter Conti-Brown has argued, assessments of the Fed's independence need to address the question of audience, or, "independence from whom?" Although the Fed is insulated from presidential and congressional control and rarely subject to judicial review, it is structurally more dependent on private banks. Private banks that hold stock in regional Federal Reserve banks largely select the regional Feds' boards of directors and potentially can affect monetary policy through the presence of five regional bank presidents on the FOMC.[38] The Fed's structural connections to member banks is unusual, but many financial regulators enjoy close relationships with particular industry sectors, supported by structural features of financial sector regulation—specifically, the presence of multiple financial regulators, many with fairly narrow jurisdiction and financial dependence on fees from those they regulate.[39]

These structural features fuel concerns that financial regulators are too easily captured by the entities that they regulate and advance those entities' interests at the expense of the public.[40] To be sure, claims of capture are periodically raised against nonfinancial regulators with particular industry responsibilities, and the EPA has advisory committees that, along with frequent

35. *See, e.g.*, ANDREW ROSS SORKIN, TOO BIG TO FAIL 394–95 (2010); DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE'S WAR ON THE GREAT PANIC 10–13 (2010); Bressman & Thompson, *supra* note 27, at 626–30.

36. Now with FSOC, this attention is statutorily mandated. *See infra* Part III.

37. *See* Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765, § 125 (codified as amended at 12 U.S.C. §5233 (2012) (creating the Congressional Oversight Panel); STEPHEN H. AXILROD, INSIDE THE FED: MONETARY POLICY AND ITS MANAGEMENT 8–11 (2009); Sudeep Reddy, *The Fed Pick: Summers Fight Eases Yellen's Confirmation*, WALL ST. J. (Oct. 9, 2013, 6:00 AM), http://blogs.wsj.com/economics/2013/10/09/the-fed-pick-summers-fight-eases-yellens-confirmation.

38. *See* Conti-Brown, *supra* note 18, at 52–53 (discussing selection of regional-bank leadership and influence of private banks); *see also* Conti-Brown, *supra* note 30 (private-bank influence on the FOMC, which controls monetary policy).

39. *See* Barkow, *supra* note 7, at 50; Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J.L. ECON. & ORG. 93, 99–100 (1992).

40. *See* James Kwak, *Cultural Capture and the Financial Crisis*, *in* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE IN REGULATION AND HOW TO LIMIT IT 74 (Daniel Carpenter & David A. Moss eds., 2013) (detailing subtle cultural levers of influence in financial regulation); Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 629–31 (2012) ("Financial regulators often come to view their institutional interests or mission as largely congruent with the interests of their regulated industry constituency."). *But see* Baxter, *supra* note 26, at 539, 543–49 (arguing that capture has limited analytic purchase in bank regulation because of complexities of regulatory scheme and the quasi-public role of banks).

informal meetings, can serve as conduits for industry- or environmental-group input analogous to the Fed's relationship to private banks.[41] Still, there is a notable contrast between the model of large executive departments with broad subject-area responsibility that often dominates the administrative law context and the industry-specific model of financial regulation.[42]

B. Relationships to Other Regulators

A second related contrast between the EPA and the Fed concerns their relationships to other regulators, both public and private. States play a critical role in many federal environmental programs; they are responsible for formulating state emission plans, issuing licenses and permits, and collaborating on inspection and enforcement.[43] It is hardly coincidental that four of the last five appointed EPA administrators previously had played significant roles in state government.[44] The central importance of the states is true also of health, welfare, and education programs, which are similarly structured on cooperative federalism lines.[45] States also play important roles in financial regulation; state regulators bear primary responsibility for overseeing state-chartered banks, insurance companies, and some financial intermediaries, and state attorneys general undertake consumer financial protection enforcement actions.[46] Traditionally, however, federal and state financial regulators operate largely independently, in relationships traditionally characterized more by regulatory rivalry than by cooperation. Perhaps the clearest manifestation of this rivalry came in recent efforts by federal regulators, in particular the Office of the Comptroller of the Currency (OCC) and the now-defunct Office of Thrift

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41. *See All Federal Advisory Committees at EPA*, EPA, http://www2.epa.gov/faca/all-federal-advisory-committees-epa (last visited Apr. 4, 2015) (listing EPA advisory committees); *see also* Coral Davenport, *Taking Oil Industry Cue, Environmentalists Drew Emissions Blueprint*, N.Y. TIMES (July 6, 2014), http://www.nytimes.com/2014/07/07/us/how-environmentalists-drew-blueprint-for-obama-emissions-rule.html (environmentalists' role in developing Obama adminsitration's carbon policy). On mechanisms of interest group influence on the EPA and other nonfinancial regulators, see Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 749–51 (1996); Wagner *supra* note 33, at 104–09.

42. Again, these are overall tendencies at best. The separation of the National Park Service, located in the Department of the Interior, and the U.S. Forest Service, located in the Department of Agriculture, is a prominent counterexample. On the evolution and perpetuation of this divide, see CARPENTER, *supra* note 34, at 8–10.

43. *See, e.g.,* EPA v. EME Homer City Generation, L.P., 134 S.Ct. 1584, 1594–95, 1597–98 (2014) (noting state implementation plan requirements under the Clean Air Act (CAA)); *see also* John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 MD. L. REV. 1183, 1190–92 (1995) (describing the role of the states under the CAA); *Our Mission and What We Do*, *supra* note 13 (discussing role of states in EPA regulations, grants, and partnerships).

44. *See Chronology of EPA Administrators*, EPA, http://www2.epa.gov/aboutepa/chronology-epa-administrators (last visited Apr. 4, 2015).

45. *See* Philip J. Weiser, *Toward a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 665 (2001).

46. *See* Arthur E. Wilmarth, Jr., *The Dodd–Frank Act's Expansion of State Authority to Protect Consumers of Financial Services*, 36 J. CORP. L. 893, 909, 924, 949–51 (2011) (describing state regulatory and enforcement actitivies addressing financial institutions and practices).

Supervision, to preempt state oversight.[47]

Similarly rivalrous relationships have characterized interactions among federal financial regulators. Financial regulation in the United States is notoriously fragmented.[48] The presence of several federal financial regulators with narrow oversight authority, combined with relatively easy movement from one regulator's purview to another's and budgetary dependence on fees, has led at times to competitive approaches among federal regulators, as well as between federal and state regulators.[49] Such turf battles are hardly unique to financial regulation, and many nonfinancial regulatory schemes involve multiple regulators.[50] Indeed, the EPA shares regulatory authority with other agencies in a number of key areas, such as with the Army Corps of Engineers over waters and wetlands.[51] Unlike the traditional pattern in financial regulation, however, many of these overlaps represent instances of shared, rather than competitive, regulatory responsibilities, with statutes mandating interagency collaboration and consultation even when granting one agency primary regulatory authority.[52] Such shared arrangements can lead to duplicative regulation and high coordination burdens, but they can also offer fewer opportunities for regulatory arbitrage.[53]

Financial and nonfinancial regulators also vary in their regulatory interactions on the international plane. The Fed works closely with central banks and financial overseers in other countries, particularly on monetary policy but also on coordinated regulation among banks.[54] To a large extent, this is simply a reflection of the interconnected nature of financial markets today and the easy flow of capital across national boundaries, a development traceable to the collapse of the Bretton Woods fixed exchange rate system in

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47. *See* Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009); KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 157–59 (2011).

48. Lawrence Cunningham & David Zaring, *The Three or Four Approaches to Financial Regulations*, 78 GEO. WASH. L. REV. 39, 49–56 (2009); *Blueprint*, *supra* note 22, at 32.

49. *See* Wilmarth, *supra* note 48, at 910–13, 915–16 (describing competition between federal banking regualtors and resultant efforts to preempt state enforcement). *But see* Cunningham & Zaring, *supra* note 48, at 42 (noting benefits).

50. *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1145–50 (2012) (discussing different types of redundant regulation and providing examples); Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 187–88 (2011) (providing examples of duplicative regulation).

51. *See* 33 U.S.C. § 1344 (2012).

52. See Eric Biber, *The More the Merrier: Multiple Agencies and the Future of Administrative Law Scholarship*, 125 HARV. L. REV. F. 78, 80–81 (2012) (describing different models of shared regulation, distinguishing collaborative from cooperative approaches); Freeman & Rossi, *supra* note 50, at 1145–50.

53. *See* Freeman & Rossi, *supra* note 50, at 1185–87; Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1693–94 (2006) (explaining the consequences of shared arrangements in the national-security context).

54. GIANNI TONIOLO, CENTRAL BANK COOPERATION AT THE BANK FOR INTERNATIONAL SETTLEMENTS, 1930–1973, at 11–13, 320 (2005) (monetary cooperation); David Zaring, *Finding Legal Principle in Global Financial Regulation*, 52 VA. J. INT'L L. 685, 690–703 (2012).

the 1970s.[55] International financial regulation thus is understood to be a necessary element of successful domestic financial regulation.[56] International regulatory engagement in other fields has been expanding in recent years, but overall it is a less significant aspect of nonfinancial regulators' agenda.[57] Although the EPA addresses regulatory issues of international scope—think global warming—and undertakes a number of international environmental programs, the bulk of its attention is still on domestic environmental issues, and it has more sustained interactions with the states than with other nations or international environmental organizations.[58]

Further differences exist with respect to each field's approach to private regulation, though here the contrast is somewhat more muted. Reliance on private actors is a central and recurring theme of financial regulation. Supervisory responsibilities are delegated to private self-regulatory organizations, like the Financial Industry Regulatory Authority (FINRA), which oversees the securities industry.[59] Regulators increasingly require evaluations by private third-party entities, such as rating agencies and auditors, and measures developed by regulated entities to inform their own decisionmaking are being included in regulatory schemes.[60] The inclusion of representatives of private member banks in the Fed's institutional structure is another manifestation of this incorporation of private actors into public financial regulation.

Financial regulation stands out for the prominent oversight responsibilities assigned to private regulators. But incorporation of private regulators is also prevalent outside of the financial context, with similar use of self-regulation, negotiated rulemaking, private standard-setting, and private enforcement in

55. *See* Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405, 1414–22 (2013).

56. *See* David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 60–61 (2013).

57. *See* Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490, 1543–60 (2006); Zaring, *supra* note 9, at 212–15 (describing the Treasury Department's involvement in international affairs).

58. *See FY 2014: EPA Budget in Brief*, EPA, http://nepis.epa.gov/Exe/ZyPDF.cgi/P100GCS2.PDF?Dockey=P100GCS2.PDF (last visited Apr. 4, 2015) (listing budget allocations by program area, including international programs). A heavily domestic focus is particularly true of federal administrative law generally, which applies only to units of the federal government and often only to actions taken within U.S. territory. 5 U.S.C. § 551 (2012); *see also* Zaring, *supra* note 56, at 60–61 (arguing that international regulation fits poorly within traditional administrative law paradigms).

59. *See* William A. Birdthistle & M. Todd Henderson, *Becoming a Fifth Branch*, 99 CORNELL L. REV. 1, 22–24, 45–46 (2013); Donna M. Nagy, *Is the PCAOB a "Heavily Controlled Component" of the SEC?: An Essential Question in the Constitutional Controversy*, 71 U. PITT. L. REV. 362, 386 (2010); Eric J. Pan, *Understanding Financial Regulation*, 26 (Cardozo Sch. of Law, Working Paper No. 329, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1805018.

60. Jonathan R. Macey, *The Regulator Effect in Financial Regulation*, 98 CORNELL L. REV. 591, 605–08 (2013); Pan, *supra* note 59, at 28–29; Robert Weber, *New Governance, Financial Regulation, and Challenges to Legitimacy: The Example of the Internal Models Approach to Capital Adequacy*, 63 ADMIN. L. REV. 783, 785–86 (2010).

multiple areas.[61] New governance scholars have documented the rise of collaborative public–private regulatory strategies, including at the EPA, and privatization is dramatically expanding across the federal government.[62] Citizen suits, wherein private individuals are statutorily authorized to enforce environmental laws and challenge the EPA's actions, represent a particularly prominent form of private involvement in the environmental context—one not present with respect to financial regulation.[63]

C. Regulatory Methods and Regulatory Approaches

A third difference between the EPA and the Fed concerns methods and approaches to regulation. The EPA is known for its high-stakes legislative rulemakings that set emissions limits and other requirements on a nationwide and general basis. Key statutes implemented by the EPA not only require the use of rulemaking to set governing standards, but also provide that standards be reviewed on regular intervals and specify procedural requirements beyond those ordinarily imposed on rulemaking under the Administrative Procedure Act (APA).[64] As noted, these rulemakings are often marked by substantial public comment, political involvement, and frequent resort to litigation by those unhappy with the agency's regulatory choices. By contrast, the Fed operates more informally and, to some extent, outside of the public eye.[65] The main drivers of Fed policy—such as the federal funds rate, discount rate, and reserve requirements—are promulgated through Board releases or FOMC market actions that never go through the notice-and-comment process or formal external review prior to issuance.[66] The Fed's supervision of individual banks takes an even more informal and continuous guise, with Fed bank examiners located on site for the biggest banking institutions and assessing bank safety and soundness on a principles-based and ongoing basis.[67]

61. *See* Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 820–28 (2000); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1377–92 (2003).

62. *See* Jody Freeman, *Collaborative Governance in the Administrative State,* 45 UCLA L. REV. 1, 55–57 (1997) (discussing Project XL, a collaborative program at the EPA); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342, 373–76 (2004); Jon D. Michaels, *Privatization's Pretensions*, 77 U. CHI. L. REV. 717, 725, 733–34 (2010).

63. *See, e.g.*, 42 U.S.C. § 7604 (2012) (authorizing "any person" to commence a civil action against any person who "is alleged to have violated" a requirement under the Clean Air Act or against the EPA for failure to perform a non-discretionary duty under the statute); *see also* Robert L. Glicksman, *The Value Of Agency-Forcing Citizen Suits To Enforce Nondiscretionary Duties*, 10 WIDENER L. REV. 353, 358–82 (2004) (impact of citizen suits on the EPA). Although financial regulatory statutes lack citizen-suit provisions, the Court has taken a broad view of the zone-of-interest requirement of the Administrative Procedure Act, 5 U.S.C. § 702, frequently allowing private individuals and entities to challenge financial regulators' treatment of third parties with whom they compete. *See, e.g.*, Nat'l Credit Union Admin. v. First Nat'l Bank & Trust Co., 522 U.S. 479, 488–99 (1998).

64. *See, e.g.*, Clean Air Act of 1970, 42 U.S.C. §§ 7411(b)(1)(B), 7607(d) (2012).

65. *See supra* text accompanying notes 7–10.

66. *See* Conti-Brown, *supra* note 18, at 6–10.

67. *See* Kathryn Judge, *Interbank Dicipline*, 60 UCLA L. REV. 1262, 1287–88 (2013);

Again, this contrast undoubtedly exaggerates differences in regulatory method between the EPA and the Fed, and more generally between administrative law and financial regulation. The Fed does engage in notice-and-comment rulemaking, as do other financial regulators—in particular the SEC, and the SEC is more frequently subject to suit.[68] In turn, the EPA issues many more informal measures—guidance documents, manuals, plans, and the like—than notice-and-comment rules and undertakes significant compliance and enforcement activities.[69] Still, the contrast in regulatory methods between administrative law and financial regulation remains a real one. Despite growing attention to more informal agency issuances, administrative law doctrine and scholarship remains largely focused on notice-and-comment rulemaking.[70] Many financial regulators share the less-formal, less-rule-based, and less-litigated regulatory approach of the Fed.[71]

A related difference, one getting substantial attention of late, is the importance of cost-benefit analysis (CBA) to EPA rulemaking and administrative law compared to its traditional absence from financial regulation. Given their more limited reliance on legislative rulemaking, the Fed and other financial regulatory agencies have had fewer occasions to undertake CBA. More importantly, their independent-agency status has meant that most financial regulators are exempt from the centralized Office of Management and Budget (OMB) regulatory-review process under Executive Orders 12,866 and 13,563.[72] This process, with its requirements that agencies produce cost-benefit assessments for significant regulatory actions, has been the major force behind

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Purposes and Functions, FEDERAL RESERVE, http://www.federalreserve.gov/pf/pf.htm (last visited Apr. 3, 2015).

68. *See* Zaring, *supra* note 9, at 200, 208–09. According to the Federal Register website, http://www.federalregister.gov, the SEC and CFTC together published 178 rules in the three-year period from January 1, 2011 through January 1, 2014, compared to 113 rules for the Fed, FDIC, OCC and OTS combined. Similarly, a Westlaw search reveals that there were 91 cases in the D.C. Circuit (the prime federal court venue for administrative challenges) against the SEC and CFTC combined (including 82 against the SEC alone) in that period, compared to 56 against the Fed, FDIC, OCC, and OTS combined (Accessed by searching for: TI(Securities /3 "exchange commission") TI("Commodity Futures trading commission") & DA(aft 12/31/2010) & DA(bef 1/2/2014) compared to TI("federal reserve") TI("federal deposit insurance corporation") TI(office /s comptroller /3 currency) TI(office /3 "thrift supervision") & DA(aft 12/31/2010) & DA(bef 1/2/2014), both in the D.C. Circuit CADC database).

69. *See, e.g.*, Natural Res. Def. Counsel v. EPA, 643 F.3d 311, 319–21 (D.C. Cir. 2011) (holding that an informally issued guidance document was a legislative rule that was required to go through notice-and-comment process); Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 398–401, 405–06 (2007).

70. *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. Rev. 1031, 1046 (2013) (little attention given to enforcement); Gillian E. Metzger, *Embracing Administrative Common Law,* 80 GEO. WASH. L. REV. 1293, 1354–55 (2012).

71. *See supra* note 67; Zaring, *supra* note 8, at 204–10 (describing the Treasury Department's functioning in similar terms).

72. *See* Exec. Order No. 13,563: Improving Regulation and Regulatory Review, 76 Fed. Reg. 3821 (Jan. 18, 2011); Exec. Order No. 12,866: Regulatory Planning and Review, 58 Fed. Reg. 51735 (Oct. 4, 1993).

the development of CBA in federal regulation. [73] Despite growing emphasis on CBA in financial regulation, financial regulators remain significantly behind the EPA and other major rulemaking agencies in their use of CBA.[74]

Financial regulators' comparative lack of CBA is somewhat surprising given the presence of many economists on their staffs. The Fed in particular employs a large number of highly qualified economists, including within its leadership, such as the Fed Chair.[75] But the Fed is not alone in this regard, with the SEC similarly having a well-regarded cadre of economists and economic analysts.[76] Interestingly, the EPA also has a large staff of economists, which it has deployed to help ensure its decisions survive OMB's CBA of rulemaking.[77] Where the EPA and the Fed differ is that the EPA also employs a substantial body of scientists, engineers, and other analysts, reflecting the scientific and technological nature of the issues it is charged with addressing. Yet another staffing difference concerns the role of lawyers. Lawyers can exert significant influence over regulatory decisions at the EPA and other nonfinancial agencies, given the looming risk of judicial review and reversal that agencies face, particularly in major rulemakings.[78] Lawyers have had less of a policy-setting role at some financial regulators, with economists instead being the drivers of regulatory choices.[79]

D. The Role of the Market

A final contrast is more ephemeral and concerns the different goals and perceptions that seem to dominate the worlds of administrative law and financial regulation. At a broad level, regulators in both fields share similar goals. They aim to advance individual and public well-being, but that entails both protecting against undue risks and encouraging economic and technological development.[80] And though the cultures of different financial and nonfinancial regulators may vary—the Fed is more frequently condemned for

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73. *See* Exec. Order No. 12,866, *supra* note 72, at § 6; Robert Ahdieh, *Reanalyzing Cost Benefit Analysis*, 88 N.Y.U. L. REV. 1983, 1994–99 (2013) (discussing the role of presidential executive orders in developing regulatory cost-benefit analysis).

74. *See infra* text accompanying notes 136–138; John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications* 93–94 (Eur. Corp. Governance Inst., Law Working Paper No. 234/2014, 2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375396.

75. Coates, *supra* note 74, at 16 n.49.

76. *See id.*; Datla & Resz, *supra* note 12, at 325–27.

77. *See* Michael A. Livermore, *Cost Benefit Analysis and Agency Independence*, 81 U. CHI. L. REV. 609, 626–36 (2014) (noting the high number of economically significant EPA rules reviewed by OIRA).

78. DAVID L. HARFST & JERRY L. MASHAW, THE STRUGGLE FOR AUTO SAFETY 22–23, 93–105 (1990); Elizabeth Magill & Adrian Vermeule, *Allocating Powers Within Agencies*, 120 YALE L.J. 1032, 1043–44, 1046, 1054–55, 1079–80 (2011).

79. *See* Conti-Brown, *supra* note 18, at 52. This is true of the Fed and of some international regulators, but less true of the SEC, which remains more lawyer dominated. Erik Sirri & Jennifer E. Bethel, *The Importance of Financial Policy Makers Making Informed Decisions, in* CURRENT PERSPECTIVES ON MODERN EQUITY MARKETS 94 (Sue Freese ed., 2010).

80. *See, e.g.*, *Our Mission and What We Do*, *supra* note 13.

the laxness of its oversight whereas the EPA is more frequently criticized for imposing burdensome regulations—both agencies acknowledge the costs and benefits of regulation and the need to account for unintended consequences.[81] Moreover, an agency's culture and regulatory approach varies tremendously according to the presidential administration in power and particular agency leaders; simply compare the EPA of Anne Gorsuch under President Reagan with the EPA of Lisa Jackson under President Obama.[82]

Nonetheless, there is a difference in how financial and nonfinancial regulators approach their tasks, and it is perhaps most apparent by focusing on how each views the market. In the world of environmental, health, and safety regulation, the market can be a useful tool of regulation.[83] Fundamentally, however, the market is viewed as needing to be controlled. In part, the goal is to ensure that market actors are responsible for the full costs of their actions, such as pollution or other environmental harms.[84] But in addition, allowing free play of the market is understood to represent a normative and political choice, one that can be at odds with other political commitments, such as ensuring a safe and healthy environment for all regardless of individual preferences or resources.[85]

Financial regulators also well understand the need for market controls to protect individuals and guard against externalities or harmful incentives. But the ostensible goal of financial regulation is often more to free the market to function properly than to constrain it. Thus, for example, the danger of insider trading is that it distorts the market, deposit insurance is needed to prevent irrational behavior such as bank runs, and programs like quantitative easing are intended to encourage firms to invest or expand at more appropriate levels. To some extent, this difference is just a reflection of financial regulators' specific charge; after all, they are responsible for ensuring that financial markets

81. *See Policy, Guidance & Publications*, EPA, http://www2.epa.gov/enforcement/policy-guidance-publications (last visited Apr. 4, 2015); *see generally* Thomas O. McGarity, *The Internal Structure of EPA Rulemaking*, 54 DUKE L.J. 57 (1991).

82. *See* Thomas O. Mcgarity, *EPA At Helm's Deep: Surviving The Fourth Attack On Environmental Law*, 24 FORDHAM ENVTL. L. REV. 205, 207–09, 223–34 (2013).

83. See, for example, proposals for a greenhouse-gas cap-and-trade system. Amy Harder, *EPA Set to Unveil Climate Proposal*, WALL ST. J. (May 26, 2014 8:04 PM), http://online.wsj.com/news/articles/SB10001424052702304811904579585843675203708 (discussing proposed EPA cap-and-trade program for greenhouse-gas emissions); *see also Cap and Trade Markets*, EPA, http://www.epa.gov/captrade/allowance-trading.html (last visited Apr. 4, 2015) (discussing allowance trading in the EPA's acid rain program).

84. *See, e.g.*, Daniel C. Esty, *Toward Optimal Environmental Governance*, 74 N.Y.U. L. REV. 1495, 1503–08 (1999) (describing market failures as an underlying cause of environmental harms); Mollie Lee, *Environmental Economics: A Market Failure Approach to the Commerce Clause*, 116 YALE L.J. 456, 477–82 (2006) (describing forms of market failure triggering the need for environmental regulation).

85. *See* David M. Driesen, *Regulatory Reform: The New Lochnerism?*, 36 ENVTL. L. 603, 646–49 (2006) (arguing that environmental legislation should and does embody value choices); *see generally* FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004) (arguing that economic analysis misunderstands the moral and value-laden choices that underlie environmental law).

function well.[86] Moreover, in situations like the financial crisis, the intense focus on market functioning reflects the fact that what triggered an immediate need for regulatory intervention was a seizing up of the financial markets. Yet this focus has the effect of obscuring the normative and political dimensions of financial regulation behind the seeming neutrality of the market and economics. Perhaps the clearest representation of this dynamic is the justification of central bank independence on the grounds that insulation from politics helps ensure bankers make economically driven decisions, thereby implying that economically driven decisions are apolitical. Focusing on securing well-functioning markets similarly hides the normative issues involved in determining what makes a market well-functioning. It also presents the market as the arbiter of successful regulation, rather than an object to be regulated to achieve separate policy goals.

II

RECENT TRANSFORMATIONS AND GROWING CONNECTIONS BETWEEN ADMINISTRATIVE LAW AND FINANCIAL REGULATION

Recognizing the ways in which administrative law and financial regulation diverge raises two interesting questions. One is why these differences developed, and the other is whether these differences will continue. Some of the divergence may reflect substantive regulatory imperatives of each field. The prevalence of central bank independence, for example, might suggest a generally recognized need to insulate monetary policy from politics.[87] In turn, self-regulation allows government regulators to overcome information disadvantages and gain better insights into complicated securities markets, as well as to offload regulatory costs onto private actors.[88]

On the whole, however, these differences between administrative law and financial regulation appear more contingent than inherent and appear to turn in large part on path dependency and political economy. Several financial regulatory agencies are longstanding and emerged at a time when administrative agencies had a more circumscribed footprint and narrower delegated responsibilities.[89] Industry desires for dedicated overseers, combined with congressional and federal–state turf contests as well as agency self-protection, have supported continuing to establish regulatory arrangements, or perhaps adding new regulators with distinct slices of oversight, rather than

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86. Coates, *supra* note 74, at 89–90.

87. *See* Conti-Brown, *supra* note 18, at 14–16.

88. *See* Birdthistle & Henderson, *supra* note 59, at 55–56; Metzger, *supra* note 61, at 1471–73; Donna M. Nagy, *Playing Peekaboo with Constitutional Law: The PCAOB and its Public/Private Status*, 90 NOTRE DAME L. REV. 975, 997–98 (2005); Pan, *supra* note 59, at 26–27.

89. *See* National Currency Act of 1863, ch. 58, 12 Stat. 665–682 (creating the Office of the Comptroller of Currency); Federal Reserve Act, ch. 6, 38 Stat. 251 (1913) (codified at 12 U.S.C. Ch. 3) (creating the Federal Reserve System); RICHARD SCOTT CARNELL ET AL., THE LAW OF FINANCIAL INSTITUTIONS 4–37 (5th ed. 2013) (describing historical overview of financial institutions).

reconfiguring the existing financial regulatory landscape.[90]

By contrast, the EPA was created at a time when the environmental movement was growing in political power and against a backdrop of failure by existing agencies to make environmental concerns a priority.[91] Its cross-cutting substantive focus and broad responsibilities reflect that genesis and represent an effort to construct a consolidated regulatory structure that would be more effective in addressing environmental problems.[92] Similarly, statutory requirements of rulemaking and deadlines are characteristic of the public interest era in which many of the nation's major environmental statutes were first adopted. The emphasis on cooperative federalism in environmental statutes, in turn, stemmed in large part from political compromises.[93] Presidential struggles to assert control over the executive branch underlie the increased emphasis on centralized regulatory review, but questions about the President's legal authority to oversee independent agency decisionmaking explain why such review was limited to executive agencies, thereby excluding financial regulators.[94]

Another factor worth noting is the different paths that administrative law and financial regulation took in the legal academy over the latter half of the twentieth century. As federal administration shifted from an emphasis on economic regulation in the post–New Deal era to an emphasis on environmental and health risks in the 1960s and 1970s, the discipline of administrative law transformed as well. It became solidly lodged in the public-law camp, populated with faculty whose interests lay largely in constitutional law or the substantive areas that had become administrative law's focus, such as environmental and labor law. By contrast, as financial regulation dropped on the political and administrative radar, it became more identified with the business side and private-law side of law schools and more the bailiwick of professors focused on economic analysis. This academic division has meant that scholars from each field often have limited familiarity with the analytic paradigms and core concerns that dominate the other, further reinforcing their divergence.

Perhaps the clearest evidence of the contingency of the administrative law–financial regulation divide, however, is the ways in which that divide is now

90. *See* Freeman & Rossi, *supra* note 50, at 1140–45, 1152.

91. Gillian E. Metzger, *The Story of Vermont Yankee: A Cautionary Tale of Judicial Review and Nuclear Waste, in* ADMINISTRATIVE LAW STORIES 124 (Peter L. Strauss, ed., 2005); Rabin, *supra* note 24, at 1298–1301.

92. The EPA was created by President Nixon in 1970 under his Reorganization Act authority and represented a consolidation of extant staff and offices from several different agencies. *See* Reorganization Plan No. 3 of 1970, 35 Fed. Reg. 15,623 (July 9, 1970) (issued pursuant to 5 U.S.C. § 901); *see also* Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 139–45 (2000) (describing background of the EPA's creation).

93. *See* Dwyer, *supra* note 43, at 1197–99; Robert v. Percival, *Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1160–62, 1174–75 (1995).

94. *See* PETER L. STRAUSS ET AL., GELLHORN AND BYSE'S ADMINISTRATIVE LAW, CASES AND COMMENTS 214–17 (11th ed. 2011).

collapsing. Recent developments in financial regulation in response to the financial crisis are mitigating many of the contrasts identified above. The most significant development in financial regulation in recent years—indeed, in decades—was the enactment of the Dodd–Frank Wall Street Reform and Consumer Protection (Dodd–Frank) Act. Dodd–Frank not only created important new institutional structures; it imposed massive regulatory responsibilities on financial regulators that involved highly politically charged issues and that required close administrative coordination. Expanded agency coordination is also a theme in recent administrative law contexts. Other longer-term trends in administrative law, meanwhile, are pushing it closer to the traditional financial regulation model. Of particular relevance are trends towards greater informal and ad hoc regulatory approaches, regulatory experimentation, and public–private collaboration. Yet at the same time that the two fields are drawing closer together, their traditional features have not entirely dissipated. As a result, each field can offer useful lessons on how similar regulatory concerns might be pursued.

A. Structural Transformations: Independence, Accountability, and Coordination

Dodd–Frank brought two particularly significant structural innovations to the world of financial regulation: the creation of the Financial Stability Oversight Council (FSOC) and the creation of the Consumer Financial Protection Bureau (CFPB). Chaired by the Secretary of the Treasury, the FSOC consists of the chairs or heads of the other federal financial regulatory agencies—the Fed, the OCC, the CFPB, the SEC, the CFTC, the Federal Housing Finance Administration, and the National Credit Union Administration—as its voting members, along with a presidentially appointed independent member with insurance expertise. The FSOC is responsible for identifying and responding to risks to the nation's financial stability and has the power to designate certain nonbank financial companies to be systemically important and therefore subject to the Fed's oversight. Another central part of the FSOC's role is to coordinate the activities of the nation's financial regulators, including recommending specific regulatory actions and priorities and monitoring regulatory developments.[95]

The creation of the FSOC can be seen as part of an effort to inject more political accountability into financial-system oversight, a development that Stavros Gadinis has identified as occurring globally after the recent financial crisis.[96] In the case of the FSOC, political accountability arises not simply from the leadership role of the Treasury Secretary, a paradigmatic presidential "alter ego" who is removable at will,[97] but also from a number of procedural and

95. *See* 12 U.S.C. §§ 5321–33 (2012) (Dodd–Frank sections establishing the Financial Stability Oversight Council).

96. *See* Gadinis, *supra* note 25, at 332–34.

97. *See* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 537 F.3d 667, 686 n.1 (2008)

substantive requirements. Certain key determinations, such as subjecting a nonbank company to Fed supervision or invoking authority to orderly liquidate a financial company, specifically require the Treasury Secretary's approval and involvement.[98] More striking perhaps, the Treasury Secretary is required to consult the President in making the determination of whether liquidation of a financial institution is warranted.[99] Several contexts require immediate congressional notification of FSOC actions or (in the case of emergency financial stabilization assistance) prior congressional authorization, and the Government Accountability Office (GAO), Congress's investigatory body, has statutorily mandated audit and review responsibilities.[100]

Yet, at the same time, the FSOC retains the strong independence features typical of financial regulators. Other than the Treasury Secretary, the agencies whose heads compose the FSOC are insulated from presidential and congressional control, in some cases significantly so, and the President cannot exclude certain financial regulators from the FSOC.[101] Dodd–Frank sought to create greater accountability and coordination largely by adding a new layer on the top of existing arrangements rather than by integrating established regulatory agencies.[102] Key decisions like liquidation depend on acquiescence by a supermajority of the FSOC and the relevant prudential regulators in addition to the Treasury Secretary.[103] Further, FSOC can only recommend specific regulatory requirements or solutions to disagreements between agencies; it cannot require that the agencies involved adopt such measures.[104]

The CFPB represents a different structural approach, albeit one that similarly links independence and accountability.[105] Dodd–Frank consolidated existing and new consumer financial-protection responsibilities in the CFPB, giving it a streamlined, single-director internal structure and sole rulemaking

(Kavanaugh, J., dissenting); *see also* Myers v. United States, 272 U.S. 52, 133 (1926).

98. *See* 12 U.S.C. §§ 5323, 5383 (2012); *see also* Gadinis, *supra* note 25, at 369–75; Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 699 (2013).

99. *See* 12 U.S.C. § 5383 (2012).

100. *See, e.g.*, 12 U.S.C. §§ 5323, 5332, 5383, 5612 (2012); *see also* 12 U.S.C. § 5322(a)(2)(N) (2012) (requiring annual congressional reports); 12 U.S.C. § 5322(b) (2012) (requiring individual attestation to annual reports by each member of FSOC).

101. *See* Gersen, *supra* note 98, at 704–09; Vermeule, *supra* note 29, at 1195–99, 1218–22. The independent member is appointed for a period of six years, but there is no express restriction on removal. *See* 12 U.S.C. § 5321 (2012).

102. *See* Cunningham & Zaring, *supra* note 48, at 42–45 (discussing alternative proposals); Gadinis, *supra* note 25, at 368–75.

103. *See* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, § 203 (2010) (codified at 12 U.S.C. § 5383 (2012)).

104. *See* 12 U.S.C. § 5329(d) (2012) ("Any recommendation made by the Council [is not] binding on the Federal agencies that are parties to the dispute.").

105. *See* Susan Block-Lieb, *Accountability and the Bureau of Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 25, 29 (2012) (noting "political and procedural limits" that make the CFPB "both independent *and* accountable" (emphasis in original)).

authority in the areas within its ambit.[106] Although the CFPB must consult with prudential regulators when issuing rules, prudential regulators' objections do not prevent the CFPB from acting.[107] In these respects, the CFPB is more like the EPA, and its being headed by a single director rather than by a multimember board is unusual for an independent agency.[108] On the other hand, like other financial regulators, the CFPB enjoys multiple levers of structural independence, in particular removal protection and budgetary autonomy.[109]

Two unique features of the CFPB are its location within the Fed and the express provision for FSOC reversal of proposed CFPB rules, but it is unclear how much significance these features will have in practice. The Fed expressly lacks authority to overrule CFPB decisions, intervene in matters before the CFPB, or limit its budget, and the FSOC can only reverse a CFPB rule if two-thirds of its members publicly determine that specific conditions are met.[110] In any event, as both the Fed and the members of FSOC enjoy substantial independence, neither of these mechanisms seems likely to yield greater political influence over the CFPB.

As a result, though achieving greater accountability was an animating goal behind the CFPB's structure, the type of accountability sought was programmatic accountability to the substantive goals of consumer financial protection embodied in the statute rather than accountability to current national political leaders. Consolidating consumer financial protection in a single agency represented an effort to give this function a central priority that it had lacked in the hands of prudential regulators.[111] Requirements that the CFPB must regularly report to and testify before Congress and receive GAO audits have more of a political nexus, but the agency's budgetary autonomy minimizes Congress's oversight power.[112]

The FSOC's and CFPB's significance also lie in their restructuring of relationships among financial regulators. The FSOC represents a vision of a new world of financial regulatory coordination, one that provides a fulcrum through which agencies can coordinate policies on systemic financial risks.[113] The CFPB provides a contrasting strategy for coordination, one in which a

106. *See, e.g.*, 12 U.S.C. §§ 5512, 5581(b)(1)(B) (2012); Gersen, *supra* note 98, at 706–07.

107. *See* 12 U.S.C. § 5512(b)(2) (2012); Block-Lieb, *supra* note 105, at 46–47.

108. *See* Barkow, *supra* note 7, at 73–75, 77–78.

109. 12 U.S.C. §§ 5497(a)(1)–(3), 5491(a) (2012); Adam J. Levitan, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 339–40 (2013).

110. *See* 12 U.S.C. § 5323(a)(1) (2012); *see also* 12 U.S.C. § 5513(c)(3)(A), (c)(6) (2012).

111. *See* Barkow, *supra* note 7, at 72–79; Block-Lieb, *supra* note 105, at 35–37; Levitan, *supra* note 109, at 367–68.

112. *See* 12 U.S.C. §§ 5495, 5496(a)–(b), 5515, 5516 (2012); 12 U.S.C. § 5332 (2012) (providing for GAO audit); 12 U.S.C. § 5497(a)(5)(A) (2012) (providing for audit by Comptroller General). Members of Congress instead have sought to control the CFPB by blocking appointment of a CFPB director, but filibuster reform put a stop to that strategy. *See* Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES, Jan. 5, 2012, at A1.

113. *See* 12 U.S.C. § 5323(b) (2012); *see also* Floyd Norris, *Financial Crisis, Over and Already Forgotten*, N.Y. TIMES, May 23, 2014, at B1.

single agency is given regulatory primacy on an issue but is subject to consultation requirements and enforcement constraints. Despite their different responsibilities and scope, the simultaneous creation of the FSOC and the CFPB creates an opportunity for assessing how these different approaches to financial regulation coordination work in practice. Joint rulemaking efforts are a third example of greater coordination, with a signal feature of the recent Dodd–Frank-authorized Volcker rulemaking being the rule's coordinated issuance by five financial regulators—the Fed, FDIC, OCC, SEC, and CFTC.[114] Involving multiple regulators with different concerns helps ensure that a variety of perspectives are taken seriously, but it also makes reaching agreement on a regulatory strategy extremely difficult and provides more openings through which negatively affected interests can seek to derail action.[115]

In the administrative law context, the dominant structural theme for some time has been expanded political accountability—in particular, greater presidential oversight and control of agencies. With the debate largely framed around the relationships between the White House and agencies, little attention has been paid to potential benefits from combining independent and executive agencies in a regulatory scheme. In that regard, administrative law and financial regulation differ. But recent administrative law scholarship intent on breaking down the categorical distinctions between independent and executive agencies, as well as examining the FSOC and CFPB as case studies in institutional design, may yield greater attention to such combinations.[116]

The clearest administrative law link to structural trends in financial regulation lies in a shared emphasis on interagency regulatory coordination. To be sure, interagency coordination is a longstanding feature of many regulatory schemes, and a major justification of the centralized White House regulatory review process is to encourage better coordination among agencies.[117] But in recent years, coordination among federal regulators has become a much more prominent feature of the administrative law landscape, as it has for financial regulation. In part, this is a reflection of new legislative enactments. Thus, the Departments of Health and Human Services, Labor, and the Treasury have undertaken joint rulemakings under the Affordable Care Act (ACA), which

114. *See* U.S. Gov't Accountability Office, Rep. No. GAO-14-282R, Commodity Futures Trading Commission: Prohibitions and Restrictions on Proprietary Trading and Certain Interests in, and Relationships with, Hedge Funds and Private Equity Funds (2014), *available at* http://www.gao.gov/assets/670/661136.pdf; *see also* Ryan Tracy, *Banks, Agencies Draw Battle Lines Over 'Volcker Rule'*, WALL ST. J. (Dec. 11, 2013, 8:54 PM), http://online.wsj.com/articles/SB10001424052702304202204579252592600657058.

115. *See* Freeman & Rossi, *supra* note 50, at 1181–85; Jacob E. Gersen, *Designing Agencies: Public Choice and Public Law*, *in* RESEARCH HANDBOOK IN PUBLIC LAW AND PUBLIC CHOICE 351–57 (Daniel A. Faber & Anne Joseph O'Connell eds., 2010).

116. *See, e.g.*, Barkow, *supra* note 7, at 78; Datla & Revesz, *supra* note 12, at 825–27; Gersen, *supra* note 98, at 693–708.

117. *See* S. DOC. NO. 73-12 (1933) (Copeland report); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 175–77 (2011); STRAUSS, *supra* note 94, at 758.

they all have responsibility to implement.[118] It is also a feature of some executive-branch initiatives, such as the recent joint rulemaking by the EPA and the National Highway Traffic Safety Administration (NHTSA) on automobile emissions.[119] Another notable parallel to recent financial regulatory transformations was the creation of a new Director of National Intelligence (DNI) in the aftermath of September 11. Like the CFPB, the Department of Homeland Security brought responsibility for domestic security operations, previously dispersed across the federal establishment, into one agency, and, like the FSOC, DNI's role is to oversee and better coordinate existing intelligence agencies.[120]

B. Regulator Relationships Outside the Federal Government: Federal–State and Public–Private

The growing focus on coordination in financial regulation and administrative law is one example of transformed relationships among regulators. Another area of change concerns the relationship between federal and state financial regulators. The FSOC contains three representatives of state financial regulators as nonvoting members—one representative each for banking, securities, and insurance regulators.[121] This incorporation of state regulators is a departure from the dual banking system that long dominated the nation. Insurance companies, for which the states remain the primary regulators, are an important category of nonbank companies that may now come under the Fed's supervision as systemically important institutions. As a result, new forms of federal–state interaction on insurance seem likely to develop in the future.[122] Similar involvement of the states is evident with respect to the CFPB. Dodd–Frank makes clear that the states may bring actions enforcing CFPB rules and that state protection measures are not preempted unless they directly conflict with federal law.[123] Agency culture and orientation is an even more important factor here than formal inclusion. Richard Cordray, the CFPB's current Director, is a former state attorney general, and many of the senior staff have state backgrounds, reflecting strong state commitment to

118. *See, e.g.*, Incentives for Nondiscriminatory Wellness Programs in Group Health Plans, 77 Fed. Reg. 70,620 (proposed Nov. 26, 2012) (to be codified at 29 C.F.R. pts. 54, 2590 and 45 C.F.R. pts. 146–47) (rule jointly proposed by Departments of Health and Human Services, Labor, and Treasury under the ACA).

119. *See* Freeman & Rossi, *supra* note 50, at 1169–73.

120. *See* O'Connell, *supra* note 53, at 1665–68.

121. *See* 12 U.S.C. § 5321(b)(2) (2012).

122. *See Basis for the Financial Stability Oversight Council's Final Determination Regarding Prudential Financial, Inc.*, U.S. DEP'T OF THE TREASURY (Sept. 19, 2013), http://www.treasury.gov/initiatives/fsoc/designations/Documents/Prudential%20Financial%20Inc.pdf (last visited Apr. 4, 2015).

123. *See* 12 U.S.C. § 5551 (2012) (relation to state law); 12 U.S.C. § 5552 (2012) (preservation of enforcement powers of states); § 5552(b) (requiring States to consult with the CFPB before instituting civil actions for subjects covered by the act); Gillian E. Metzger, *Federalism Under Obama*, 53 WM. & MARY L. REV. 567, 582–84 (2011). Dodd–Frank also includes a unique provision requiring the CFPB to seek public notice on a rulemaking petition filed by a majority of the states.

consumer protection. Given that commitment, the states are obvious allies for a CFPB committed to consumer protection, and the agency has coordinated closely with the states in the past.[124]

Similar expansions in federal–state cooperation mark the current administrative law landscape. Several of the Obama administration's major regulatory initiatives, such as the health exchanges under the ACA or the EPA's proposals to regulate greenhouse gases, put heavy emphasis on the states.[125] These initiatives were structured to grant the states substantial discretion, but in practice that has not always transpired. For example, substantial state resistence to the ACA resulted in a far greater federal role in running the health exchanges than initially envisioned. In other contexts, most notably education, the federal government has used administrative waivers to grant the states more discretion than the governing statutes directly provide. Moreover, while state financial regulators complain about their limited role in the FSOC, nonfinancial regulators have been more intent on wooing states to participate in federal regulatory schemes.[126]

Clear trends are harder to identify with respect to public–private relationships. Private regulation remains an important element of financial regulation, but Dodd–Frank did require greater oversight of some third-party intermediaries and self-regulating bodies.[127] Similar calls for greater oversight of private contractors are a feature of administrative law scholarship on privatization but have been met with uneven success, and the growth in privatization through contracting continues apace.[128] Dodd–Frank also represents a rethinking of the deregulatory strategies that dominated financial regulation in the lead-up to the financial crisis, with far greater emphasis now placed on governmental regulatory policing.[129] A similar proregulatory bent is evident outside of financial regulation, with leading examples being reform of the health insurance market and new initiatives on climate change.[130] Such moves towards greater regulation in both fields remain politically contentious,

124. Inclusion of state regulators on the FSOC has not been as successful a collaboration, with the state members regularly complaining about resistance from federal regulators. *See* Metzger, *supra* note 123, at 584–85.

125. *See* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, Fed. Reg. 34,830, 34,834 (June 18, 2014) (to be codified at 40 C.F.R. Pt. 60) [hereinafter Carbon Pollution Emission Guidelines]; Metzger, *supra* note 123, at 572–81, 594–97, 604–07.

126. Metzger, *supra* note 123, at 610–18.

127. *See* 15 U.S.C. § 78j-3(a)(1) (setting forth listing standards); 15 U.S.C. §§ 78c, 78o-7 (enhancing regulation of rating agencies); Macey, *supra* note 60, at 613–16.

128. Michaels, *supra* note 62, at 722–23, 730.

129. *Compare* Dodd–Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S.C. (2, 5, 7, 11, 12, 15, 16, 18, 19, 20, 22, 25, 26, 28, 29, 30, 31, 41, 42, 44, 49, and 112)), *with* Gramm–Leach–Bliley Act, Pub L. No. 106-102, 113 Stat. 1228 (1999) (codified in scattered sections of 12 U.S.C. and 15 U.S.C.), *and* Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES, Oct. 24, 2008, at B1.

130. *See* Carbon Pollution Emission Guidelines, *supra* note 125; Metzger, *supra* note 123, at 595–97, 602–05.

and thus their staying power is difficult to predict. But to the extent they do, they represent a rebalancing of the relationship between private-market arrangements and public regulation.

C. Transformed Regulatory Approaches

One area of pronounced change, for both financial regulation and administrative law, concerns regulatory approaches. Here the increased linkage between the two fields is particularly evident, as the methodological changes in each field move it closer to the other.

Financial regulation has become more centered on rulemaking, more public, and more reliant on CBA. Dodd–Frank is significantly responsible for the increase in rulemaking, as it requires a massive number of rulemakings by financial regulators.[131] Moreover, Dodd–Frank also imposes relatively tight deadlines for its required rulemakings, further reinforcing the new focus on rulemaking in the financial regulator world.[132] This expanded rulemaking has contributed to financial regulation's greater publicity, bringing financial regulation more into the public eye with a number of high-profile rulemakings.[133] And the CFPB has played a role as well, seeking from its inception to encourage greater public engagement in the agency's regulatory and supervisory tasks.[134] But perhaps the most basic cause of financial regualtion's higher public profile is greater public skepticism of financial institutions and regulators since the financial crisis.[135]

The most significant methodological development in financial regulation, however, is the increased emphasis on CBA. This development is partially traceable to Dodd–Frank's emphasis on new financial regulation and its requirements that regulators consider costs and benefits in a few specific contexts.[136] But the prime mover in the rise of CBA in financial regulation is the D.C. Circuit. In several decisions dating back to 2005, the D.C. Circuit held that new statutory requirements that the SEC consider the impact of its rules on "efficiency, competition, and capital formation" required the agency to assess

131. *See* Paul Rose & Christopher J. Walker, *Dodd–Frank Regulators, Cost-Benefit Analysis, and Agency Capture*, 66 STAN. L. REV. ONLINE 9, 9 (2013); Davis Polk & Wardwell LLP, *Dodd–Frank Progress Report*, http://www.davispolk.com/sites/default/files/Progress.Report.May2014.pdf (last visited Apr. 4, 2015) (208 of 398 required rulemakings finalized as of May 1, 2014).

132. *See* Gersen, *supra* note 98, at 724–25.

133. *See* Kimberly D. Krawiec, *Don't Screw "Joe the Plumber": The Sausage–Making of Financial Reform*, 55 ARIZ. L. REV. 53, 70–82 (2013) (detailing the extent of public involvement in the Volker Rule promulgation).

134. *See* Ethan Bernstein, Leonard J. Kennedy & Patricia A. McCoy, *The Consumer Financial Protection Bureau: Financial Reform for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1158–59, 1164–65 (2012).

135. *See* Ben S. Bernanke, Chairman, Fed. Reserve, Speech at the Annual Meeting of the American Economic Association: The Federal Reserve: Looking Back, Looking Forward (Jan. 3, 2014), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20140103a.htm.

136. *See* Coates, *supra* note 74, at 2–3; *see, e.g.*, 12 U.S.C. § 5512 (requiring the CFPB to consider "the potential benefits and costs to consumers and covered persons, including the potential reduction of access by consumers to consumer financial products or services resulting from such rule").

the costs of proposed regulations.[137] In the years since, the court has overturned several SEC rules for inadequate consideration of costs, most prominently in its 2011 invalidation of the SEC's proxy access rule in *Business Roundtable*.[138]

The growing importance of CBA in financial regulation creates an obvious parallel to administrative law. Yet there are important differences worth underscoring. One is substantive and concerns the extent to which costs and benefits of financial regulation can be determined with any meaningful and useful accuracy.[139] In truth, this complaint has been long raised by critics of CBA in other regulatory contexts, who contend that such assessments are prone to manipulation, turn on undeterminable variables, and can be at odds with statutory policy choices.[140] Where the difference lies is not in the criticism, but in the greater support and traction that the criticism has received from regulators and academics in the context of financial regulation.

The second, more significant difference is institutional. In the administrative law context, CBA requirements overwhelmingly rest on the executive orders that impose centralized regulatory review and are enforced by OIRA. These requirements are expressly an executive-branch matter, with the orders explicitly precluding judicial enforcement.[141] Moreover, the presence of an elaborate internal executive-branch process has likely forestalled judicial inclination to read cost-benefit assessment requirements into statutes.[142] Thus, the opportunity for courts to reject agency cost-benefit assessments as arbitrary in violation of the APA is significantly minimized. Equally important, the executive orders have led nonfinancial regulators to develop greater sophistication in their approach to cost-benefit assessment, and they can also rely on OIRA expertise and guidance.[143] By contrast, CBA requirements for financial regulators are rooted in statutes, and the prime external reviewers of agency analyses are the courts. And the courts are a particularly poor institution for such review.[144] Courts not only lack agency substantive expertise, access to

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137. *See* 15 U.S.C §§ 78c(f), 80a-2(c); Chamber of Commerce v. SEC, 412 F.3d 133,143 (D.C. Cir. 2005); *see also* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 298–308 (2013) (detailing D.C. Circuit litigation under the ECCF requirement and earlier, in the lead up to Business Roundtable).

138. *See* Coates, *supra* note 74, at 24–29; Kraus & Raso, *supra* note 137, at 303–19. *But see* Nat'l Ass'n of Mfrs. v. SEC, 748 F.3d 359 (D.C. Cir. 2014). Business Roundtable has received substantial scholarly criticism. *See* Kraus & Raso, *supra* note 137, at 292 n.12 (collecting sources).

139. *Compare* Coates, *supra* note 74, at 88–91, *with* Rose & Walker, *supra* note 131, at 12, *and* Eric Posner & Glen Weyl, *Benefit-Cost Analysis for Financial Regulation* 5, 103 AM. ECON. REV. 393–97, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2188990##.

140. *See* Christopher H. Schroeder & Sidney A. Shapiro, *Beyond Cost-Benefit Analysis: A Pragmatic Reorientation*, 32 HARV. ENVTL. L. REV. 433, 457–59 (2008).

141. *See* Exec. Order No. 12,866, *supra* note 72; Exec. Order No. 13,563, *supra* note 72, at § 10.

142. For an instance when the Court nonetheless has done so, see *Entergy v. Riverkeeper*, 556 U.S. 508 (2009).

143. *See* Am. Petroleum Inst. v. EPA, 684 F.3d 1342, 1351 (D.C. Cir. 2012); Livermore, *supra* note 77, at 639–66; Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1791–92 (2013).

144. Coates, *supra* note 74, at 24–29.

data, and CBA expertise, but in addition, they perform their reviews ex post, once a rule is finally promulgated, and are much less predictable in their reviews, given the importance that judicial-panel composition can play in judicial review of regulation.[145]

Oddly, as financial regulation has moved more towards a heavy rulemaking focus, administrative law has headed in the opposite direction, towards more informal and contingent forms of regulation. Charles Sabel and William Simon maintain that there is a trend towards contextualized administrative regimes, in which public officials and private stakeholders jointly derive governing norms and the emphasis is on experimentation and evolution.[146] A separate, more longstanding trend is a move away from notice-and-comment rulemaking and toward increasing use of guidance, policy statements, and other informal agency actions.[147]

A pronounced example of this movement towards more ad hoc and informal regulation is the recent increase in the use of waivers in administrative law contexts. Although waivers for exceptional cases are a well-established feature of administrative regimes, a different type of waiver has surfaced in recent years—one involving waiver of basic statutory requirements underlying a regulatory scheme. These "big waivers," as David Barron and Todd Rakoff have called them, are undertaken pursuant to statutory waiver authority but serve to fundamentally transform the administrative programs at issue.[148] The result is a dramatic increase in discretionary administration, with agency officials fashioning new regulatory arrangements to address the particulars of specific entities. And it creates a close parallel to the actions of prudential financial regulators, with their heavily discretionary oversight of particular financial institutions. Indeed, perhaps the nearest analogy is to the actions of the Fed during the financial crisis, when it responded to unfolding events with highly discretionary, ad hoc arrangements of major significance that often deviated from established practices.[149]

III
CONCLUSION: EMERGENT LESSONS

In short, today is a period of dramatic change for both administrative law and financial regulation. Despite their shared focus on government regulation

145. *See* Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. CHI. L. REV. 831, 846–50 (2008).

146. *See* Charles F. Sabel & William H. Simon, *Contextualizing Regimes: Institutionalization as a Response to the Limits of Interpretation and Policy Engineering*, 110 MICH. L. REV. 1265, 1266–68 (2012); *see also* Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 82 (2011).

147. *See, e.g.*, Connor R. Raso, *Note, Strategic or Sincere? Analyzing Agency Use of Guidance Documents*, 119 YALE L.J. 782, 815 (2010).

148. *See* David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 277–79 (2013).

149. *See* Davidoff & Zaring, *supra* note 19, at 477–79.

and administration, these fields evolved in significantly different directions over the decades since the New Deal. Administrative law traditionally emphasized broad political accountability, rulemaking, judicial review, and cooperation with the states; financial regulation, on the other hand, put primacy on independence, informal oversight, private regulation, and market forces. But now these differences are breaking down, with each moving towards the regulatory paradigms and key approaches of the other. As a result, this is a moment in which each field can gain important lessons from the other. Some of those lessons are already being explored. Administrative law and financial regulation scholars are increasingly turning to each others' fields for insights on agency structure and accountability. The FSOC and CFPB are prime targets of study for both, offering real-life examples against which to test theoretical arguments for greater coordination, independence, and political accountability. Cross-pollination is evident in the context of CBA.[150] There are also some lessons that each field has yet to fully embrace. Administrative law scholars have more to mine from financial regulation on the range of public–private interactions. Financial regulation offers an important window on the advantages and drawbacks of greater incorporation of private actors into regulatory schemes. Some financial regulatory scholars have begun to study financial regulation with an eye to this question,[151] but privatization scholarship on the administrative law side remains focused on nonfinancial contexts and, in addition, on contracting out and privatizing service provision.[152] In turn, financial regulation could benefit from engaging more with administrative law's approach to federal–state relationships. The field remains heavily federal in focus, and federalism discussions are largely limited to preemption.[153] This leaves unexplored the possibilities for more innovative state roles in implementing federal financial regulation.

But the most important lesson administrative law holds for financial regulation is the inevitability of politics. For the first sixty years of the twentieth century, during the period when the modern administrative state was born, the dominant administrative law model was one of neutral expertise, and administrative agencies were viewed as merely transmitting legislative policy choices into the world. Over the ensuing decades, this account was cast aside, replaced by a vision of agencies as fundamentally political, exercising broad discretion and formulating policies as compromises among competing interest

150. *See, e.g.*, Barkow, *supra* note 7, at 33–34; Kraus & Raso, *supra* note 137, at 340.

151. *See* Conti-Brown, *supra* note 18, at 50–51; Macey, *supra* note 60, at 592.

152. There are, of course, exceptions. One is increased focus on concerns with incorporation by reference, where private regulatory standards are incorporated into public regulatory arrangements. *See* Nina A. Mendelson, *Private Control Over Access to the Law: The Perplexing Federal regulatory Use of Private Standards*, 112 MICH. L. REV. 737, 748–53 (2014); Peter L. Strauss, *Private Standards Organizations and Public Law*, 22 WM. & MARY BILL RTS. J. 497, 518–24 (2013). Self-regulation also is attracting some attention on the administrative law side. *See* Freeman, *supra* note 61, at 832–35; Metzger, *supra* note 61, at 1394–97.

153. *See, e.g.*, Wilmarth, *supra* note 46, at 925–35.

groups.[154] Once agencies were seen as largely making legislative choices among competing interests, increased political accountability became essential for their legitimacy.[155] By contrast, the neutral expertise model continued to dominate financial regulation, fueled by financial regulation's emphasis on the market and economic principles.[156] The traditional insulation of financial regulators both depended on and served to reinforce this image of neutrality. But the financial crisis has brought politics front and center in financial regulation. Financial regulation is now faced with the challenge that administrative law has struggled with for much of the last half century: how to combine neutral expertise with politically accountable administration. Administrative law holds insights for how to address this challenge, the first step of which is forthright acknowledgement of the inescapably political nature of governmental regulation.

Indeed, the political nature of regulation is perhaps more evident today than at any point in recent American history. Increasing party polarization means vanishingly few areas of regulatory consensus and all-out attacks on administrative governance. These new heights of political contestation in administration—administration as a "blood sport," according to Tom McGarrity and Arthur Levitt[157]—are the new shared reality for all federal regulators, financial and nonfinancial alike. Going forward, the dominant contrast is unlikely to be between administrative law and financial regulation, but rather between proregulatory and antiregulatory forces.

154. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1671–84, 1711–12 (1975).

155. *See* Bressman, *supra* note 5, at 481–85; Merrill, *supra* note 6, at 1090–92.

156. *See* Levitan, *supra* note 109, at 45.

157. *See* Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1680–81 (2012).