NOTES

CASHING OUT A SPECIAL RELATIONSHIP?: TRENDS TOWARD RECONCILIATION BETWEEN FINANCIAL REGULATION AND ADMINISTRATIVE LAW

Like an optical illusion or an Escher drawing, the relationship between financial regulation and administrative law is intricate and prone to reflect one's perspective.[1] From a distance, the fields may appear entirely in sync, even derivative. Financial regulation — legal structures governing markets, institutions, and actors — is formally bound by the procedural constraints of administrative law and that law limits agency action.[2] Yet on closer approach, the two show signs of serious inconsistencies.[3] The day-to-day practice of financial regulation operates relatively unimpeded by major elements of administrative procedure, and the larger commitments of administrative law — visions of ordered agency policymaking and expansive judicial engagement — remain largely unrealized.[4] Closest up, the fields offer stark contrasts on their first principles: each locates itself in divergent economic and political ecosystems and calls for separate end goals.[5]

Juxtaposing financial regulation with administrative law thus seems to offer a paradox: the fields are coordinate in their basic descriptions but vaguely detached in day-to-day activities and misaligned on their points of deep logic. Perhaps for this reason, scholars have often struggled to understand how financial regulation fits within the administrative law scheme — whether it represents administrative principles applied to a transformative extreme, or else is a curious exception to the general norm.[6] Regardless of the reason, the result is a

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[1] *See* Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS., no. 3, 2015, at 129 (drawing distinctions between the fields and developing lessons shared).

[2] *See id.* at 129 ("[F]inancial regulation is, after all, a form of administrative governance to which the general transsubstantive requirements of administrative law would naturally apply."); *see also* Eric J. Pan, *Understanding Financial Regulation*, 2012 UTAH L. REV. 1897, 1902–07 (contextualizing financial regulation within larger principles of regulation).

[3] *See* Michael S. Barr, Comment, *Accountability and Independence in Financial Regulation: Checks and Balances, Public Engagement, and Other Innovations*, 78 LAW & CONTEMP. PROBS., no. 3, 2012, at 119, 120 ("[F]inancial regulation often raises unique problems that may not neatly align with the literature on administrative law mechanisms . . . .").

[4] *See* David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 199–203 (2010).

[5] *See, e.g.*, Metzger, *supra* note 1, at 142–44 (discussing differences on the role of the markets).

[6] *Compare* David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 543–49 (2011) (seeing financial regulation as cognizable in administrative terms), *with* Kristin E. Hickman, *Coloring Outside the Lines: Examining Treasury's (Lack of) Compliance with Administrative Proce-*

financial regulatory system that appears distinctive from many other forms of regulatory law: it is faster moving, opaque in its decisionmaking, and highly oriented to preventing crisis — at the cost of some inconsistency with general administrative procedure.

Recently, however, a new leveling wind has begun to blow. In a number of cases at the boundaries of the two fields, courts have applied rigid constraints of administrative law to resolve relatively amorphous financial regulatory issues. These cases express a strong set of presumptions about how financial regulation should be conceptualized and administered.[7] They reject views of financial regulation as demanding a tailored approach, and instead seek to cover the field with off-the-rack administrative law doctrines. Underlying this movement are two broad yet congruent thoughts: a heightened concern for a perceptibly overpowering financial regulatory apparatus[8] and increased confidence in the methods of administrative law, most notably a heavily monetized cost-benefit analysis (CBA).[9] The result is an approach treating financial regulatory action as largely indistinct from any other subject of agency policymaking.

Yet this impulse toward a one-size-fits-all framework eludes the reasons why approaches to financial regulation have and should be tailored to their circumstances. This normalization trend applies administrative tools to situations outside the scope of their design and contradicts the major principles underlying the modern financial regulatory state.[10] The result is both overinclusive in limiting necessary exercises of regulatory power and underinclusive in confounding the areas of most pointed concern. Rather than attempting to channel the anxieties generated by regulatory policymaking through such an untailored approach, the impulses driving the normalization trend should be realized in a more nuanced and limited form.[11]

Part I of this Note outlines the conceptual relationship between administrative law and financial regulation. Part II grounds the trend

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dure Act Rulemaking Requirements, 82 NOTRE DAME L. REV. 1727 (2007) (viewing a state of curious exceptionalism).

[7] *Cf.* Jacob E. Gersen, Recent Development, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689 (2013) (attempting to reconcile "new institutional arrangements" with "the administrative law framework into which they are to be slotted," *id.* at 692).

[8] *See, e.g.*, Thomas W. Merrill & Margaret L. Merrill, *Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?*, 163 U. PA. L. REV. 165, 171 (2014) (analyzing the purported unconstitutionality of one key new provision).

[9] *See, e.g.*, Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward A Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983, 2065–72 (2013).

[10] *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015) (critiquing the intellectual foundations of strong CBA).

[11] For an argument that this *is* the current state of administrative law, see Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355 (2016).

in history. Part III identifies the countertrend of financial regulatory normalization, as found in three recent decisions straddling the administrative-financial regulatory line: *Business Roundtable v. SEC*,[12] *State National Bank of Big Spring v. Lew*,[13] and *Metlife, Inc. v. Financial Stability Oversight Council*.[14] Part IV discusses the latent concerns behind this development and suggests reasons why a more tailored approach acknowledges anxieties and better achieves the intended ends.

I. THE UNEASY RELATIONSHIP BETWEEN FINANCIAL REGULATION AND ADMINISTRATIVE LAW

Delineating between financial regulation and administrative law proves a surprisingly involved task, not least because each of the fields contains both a central core and a larger periphery.[15] On the broadest level of definition, nonetheless, one might see few inconsistencies and perhaps major connections. The top-level boundaries of administrative law are marked by issues of procedure, with a matter called administrative if its decisionmaking is sufficiently developed.[16] In turn, the basic definition of financial regulation involves questions of substance, with boundaries based on the nature of the thing regulated.[17] To be sure, the latter's limits may be rather blurry: while matters like banking, insurance, or investment management are clearly within the scope, matters like securities, pensions, or consumer credit raise questions.[18] Nonetheless, at least on principle, these two definitional questions seem entirely congruent. One thus might view financial regulation as a clear subset of administrative law akin to environmental law: realizing its policy through administrative means.[19]

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[12] 647 F.3d 1144 (D.C. Cir. 2011).

[13] 795 F.3d 48 (D.C. Cir. 2015); *see also* Recent Case, State National Bank of Big Spring v. Lew, *795 F.3d 48 (D.C. Cir. 2015)*, 129 HARV. L. REV. 835 (2016) (discussing that case).

[14] C.A. No. 15-0045, 2016 WL 1391569 (D.D.C. Mar. 30, 2016).

[15] *Cf.* Gillian E. Metzger, Foreword, *Embracing Administrative Common Law*, 80 GEO. WASH. L. REV. 1293, 1298–1304 (showing the "dominance" of administrative common law over thinner statutory structures, *id.* at 1298).

[16] *See* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1152–54 (2014) (arguing that agencies are defined by the reasonableness of their procedures).

[17] *See* Charles K. Whitehead, *Reframing Financial Regulation*, 90 B.U. L. REV. 1, 3 (2010) (noting the division of "regulation of financial intermediaries into categories . . . based on the functions, products, and services they provided at the time"). Defining financial regulation itself proves tricky. Perhaps the best way to conceptualize it, then, is in the nature of the concerns that a regulation aims to forestall: to wit, crisis.

[18] *Cf. id.* at 21–25 (discussing how to conceptualize nonbank actors with significant bank-like attributes and effects).

[19] *Cf.* David S. Tatel, Remarks, *The Administrative Process and the Rule of Environmental Law*, 34 HARV. ENVTL. L. REV. 1 (2010) ("As environmental lawyers well know, admin is where the action is." *Id.* at 1.).

Even at this degree of highest definition, it is striking not how much financial regulation incorporates administrative procedure, but how much it does not. For example, few Federal Reserve Board decisions face judicial review in the form contemplated by the Administrative Procedure Act[20] (APA). The substantial role of private financial regulators complicates public administrative law's generally exclusive status.[21] Most illustratively, the *Chevron* doctrine is nearly entirely absent from the financial regulatory sphere.[22] One might respond that the APA includes explicit allowance for exceptions,[23] and thus the fact of financial regulation's day-to-day practices does not necessarily imply its independence from that broader law.

Yet such responses may miss a larger point. Legal fields are not just assortments of doctrine but also larger statements about the world that doctrine shapes.[24] In administrative law, the broad vision includes a formalized policymaking process, restrictions on agency decisionmaking, and an expansive role for judicial review.[25] On this conception, administrative law represents carefully balanced compromises about means of crafting policy, and legal doctrines seek to realize those commitments.[26] That deep view may even sometimes conflict with its shallower expressions: for example, the standing doctrine implied by the APA differs from that of current law.[27] An understanding of financial regulation as coextensive with the APA has a more difficult time incorporating this result than one that views the law as an instrumental means to larger (here, separation of powers) values.

The broader vision of financial regulation takes a different and somewhat contradictory tone. Financial regulation is marked by a

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[20] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.); *see* Metzger, *supra* note 1, at 133.

[21] *See* Pan, *supra* note 2, at 1931–32 (noting how financial regulators "still rely quite frequently on private regulatory strategies" as compared to the tools of public regulatory law, *id.* at 1931); Sidney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389, 408–09 (2003).

[22] John F. Coverdale, Chevron*'s Reduced Domain: Judicial Review of Treasury Regulations and Revenue Rulings After* Mead, 55 ADMIN. L. REV. 39, 84 (2003). Professor John Coverdale argues that *Chevron*'s absence owes mostly to error. Yet *Chevron* is more than just a multistep dance; it incorporates a worldview centered on allocation of powers. *See generally* Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 836 (2001). Because financial regulation blurs so many jurisdictional boundaries, it is perhaps unsurprising that *Chevron*, the classic reward for such clarity, proves so absent.

[23] *See* 5 U.S.C. § 701(a)(2) (2012) (exempting from judicial review "agency action [that] is committed to agency discretion by law").

[24] *See, e.g.*, William M. Landes & Richard A. Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 851 (1981).

[25] *See* Metzger, *supra* note 15, at 1312–13.

[26] Wong Yang Sung v. McGrath, 339 U.S. 33, 40 (1950) ("The [APA] . . . enacts a formula upon which opposing social and political forces have come to rest.").

[27] *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 220–23 (1992).

strongly outcomes-focused attitude, defining itself by problems to be solved rather than abstract values to be realized.[28] It thus preferences quickness over deliberation, willingness to decide based on limited information, and a general faith in market behavior.[29] Where administrative law seeks to distribute powers among government branches, financial regulation aims to secure regulators' authority against regulated entities.[30] If the key anxiety of administrative law is that power might be exercised arbitrarily, the worry of financial regulation is that no power will be exercised at all.[31]

Thus, in many ways, the practice of financial regulation shows as much variability as overlap with administrative law.[32] Take the process of day-to-day banking supervision. These procedures tend toward extreme informality, "enforced through phone calls and jawboning, rather than through enforcement orders and prohibition."[33] Moreover, the standards for what such decisions entail may be loose or even somewhat irregularly formed.[34] Under the view of administrative law, this conduct might seem the definition of impermissibly arbitrary action. For a financial regulator, by contrast, concerns about accountability and transparency pale in comparison to those of context: the best decision tomorrow might be worse than a more arbitrary one today.[35]

II. HISTORICAL ROOTS OF A CONTROVERSY

Financial regulation and administrative law have not always been so divided. Indeed, the fields were largely coterminous in their nascence.[36] Both fields are, of course, children of the New Deal era, where administrative law developed to execute the budding financial

[28] *See* Metzger, *supra* note 1, at 130–31. Of course, administrative law cares about results, but its deep fear is agency overreach, not that an optimal policy may slip away.

[29] *See id.* at 142–44.

[30] *Cf.* Pan, *supra* note 2, at 1933–34 (showing structural challenges of financial regulators).

[31] *See* Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2041–49 (2014) (book review) (sketching the worry about "feckless or even rogue regulators," *id.* at 2042).

[32] *See* Robert B. Ahdieh, *Notes From Across the Border: Writing Across the Administrative Law/Financial Regulation Divide*, 66 J. LEGAL EDUC. 64, 68 (2016) (pointing out how few financial regulatory commentators use administrative law frameworks like "notice and comment").

[33] Zaring, *supra* note 4, at 208–09.

[34] *See id.*

[35] *See* Ahdieh, *supra* note 32, at 71–72.

[36] *See, e.g.*, DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014) (showing administrative law's long history); Alejandro Komai & Gary Richardson, *A Brief History of Regulations Regarding Financial Markets in the United States: 1789 to 2009* (Nat'l Bureau of Econ. Research, Working Paper No. 17443, 2011), http://www.nber.org/papers/w17443 [https://perma.cc/82UU-TDN2] (same for financial regulation).

regulatory system.[37] Understanding how the systems evolved and grew apart thus sheds light on the scope of controversy today.

A. The New Deal Vision

Even eighty years on, "the basic financial regulatory structure is a New Deal legacy."[38] Scholars have told, and overtold, the story of how the U.S. financial regulatory system evolved as a reaction against the excesses of the 1920s, an attempt to stem an intractable economic downturn, and an effort to leverage the mediating power of government toward broad societal benefit.[39] The New Deal years saw the creation of many of the most prominent of today's agencies: the Federal Deposit Insurance Corporation (FDIC), the Federal Reserve's Open Market Committee, and, of course, the Securities and Exchange Commission (SEC).[40] Yet while these agencies enjoyed new substantive powers, arguably the more important development was the growth in means of their administrative decisionmaking.[41] Where previous financial regulators enjoyed relatively limited policymaking fora, New Deal–era agencies enjoyed both numerous new procedural powers as well as newfound freedom to choose among them.[42] Indeed, at the end of the period, the Supreme Court famously upheld agencies' power to make such procedural choices as instrumental to their mission.[43]

In administrative law, the New Deal era was likewise a time of ferment, and the 1946 passage of the APA largely reflected lessons of New Deal–era practice.[44] An overwhelming amount of this formation occurred in the financial regulatory space. Many major intellectual in-

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[37] To be sure, the idea of a single moment of creation may obscure more than it inspires. *Cf.* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1466 (2000) (pointing to the "interpretive baggage" of enabling statutes).

[38] Levitin, *supra* note 31, at 2039.

[39] *See, e.g.*, Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 745–46 (1984); A.C. Pritchard & Robert B. Thompson, *Securities Law and the New Deal Justices*, 95 VA. L. REV. 841, 846–49 (2009); Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 534–46 (2003).

[40] *See* JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET 73–100 (3d ed. 2003).

[41] *See* Pritchard & Thompson, *supra* note 39, at 890–92 (discussing N. Am. Co. v. SEC, 327 U.S. 686 (1946)); *see also* SELIGMAN, *supra* note 40, at 127–53 (discussing the "imaginative and effective" activities, *id.* at 149).

[42] *See, e.g.*, James J. Park, *The Competing Paradigms of Securities Regulation*, 57 DUKE L.J. 625, 674 & n.198 (2007) (discussing the SEC's broad discretion in choices of procedure).

[43] *See* SEC v. Chenery Corp. (*Chenery II*), 332 U.S. 194, 204 (1947) (noting the SEC's engagement with "particular facts in the case, its general experience in reorganization matters and its informed view of statutory requirements"); *see also* Pritchard & Thompson, *supra* note 39, at 902–07 (discussing *Chenery II*).

[44] Adrian Vermeule, *Leviathan Had a Good War*, JOTWELL (Feb. 29, 2016), http://adlaw.jotwell.com/leviathan-had-a-good-war [https://perma.cc/H5GX-Y7Z6] (viewing the APA as "in effect a treaty of peace").

fluences in administrative law came out of a financial regulatory background, and subsequent work has highlighted the degree to which early conceptions of administrative law reflected financial regulatory practice.[45] Take, for instance, the paradigmatic example of Professor James Landis, early SEC Commissioner and author of the canonical *The Administrative Process*.[46] Landis's skepticism about separation of powers was almost certainly informed by the SEC's expansive powers to combine authorities — a combination Landis viewed as essential to effective policymaking.[47] Nor was Landis an outlier in these views; indeed, one retrospective of the period has emphasized the "consistent pattern of deference to the SEC" in validating the agency's design.[48]

The New Deal–era connection between administrative law and financial regulation succeeded largely on the basis of the former's concession to the latter's regulatory needs. Financial regulation existed — arguably quite successfully — with a relatively thin layer of administrative law oversight.[49] For Landis and other New Dealers, the purpose of administrative law was an instrumental good rather than an end goal: the field aimed to authorize greater discretion than previous legal regimes had enabled. To be sure, history also suggests that thin review need not imply total judicial abdication.[50] Nonetheless, the New Deal indicates that coordination between financial regulation and administrative law proves most successful when financial regulation enjoys full procedural choice, even over administrative law concerns for accountability and standardization in policymaking form.

B. Eras of Departure and Change

Subsequent years have seen the substantive relationships between administrative law and financial regulation — the former shaping itself to the substantive needs of the latter — drift increasingly apart. Scholars have offered explanations for why this movement occurred, including economic developments demanding new financial approaches, shifts in administrative rulemaking focus from economic to social risks, and developments in the nature of legal scholarship.[51]

That degree of disconnect may be most evident in the departure from the New Deal–era conception that financial regulation and administrative law enjoyed no substantial tradeoffs.[52] During the New

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[45] *See* Metzger, *supra* note 1, at 129.

[46] *See* Charles H. Koch, Jr., *James Landis: The Administrative Process*, 48 ADMIN. L. REV. 419, 425–28 (1996) (explaining Landis's preference for administrative agencies over courts).

[47] *See id.* at 421–25 (outlining Landis's views).

[48] Pritchard & Thompson, *supra* note 39, at 912.

[49] *See id.* at 912–17.

[50] *See* ERNST, *supra* note 36, at 129–32 (discussing Jerome Frank's defense of the SEC).

[51] *See* Ahdieh, *supra* note 32, at 66–67; *see also* Metzger, *supra* note 1, at 130–31.

[52] *See* Koch, *supra* note 46, at 426 (noting Landis's view of the superiority of the SEC process).

Deal era, agencies portrayed the substance of regulations as involving choices of normative values, while administrative law mostly involved ministerial considerations regarding the execution of those wishes.[53] Today, by contrast, administrative law is often tagged with political connotations, as it appears to implement the vision of how government should relate to affected parties.[54] Moreover, one increasingly prevalent view of financial regulation casts it as a largely apolitical effort; neither bankers nor their regulators benefit from a market crash, after all.[55] One might push back on that argument, pointing to concerns like agency capture or somnolence.[56] The point is not that arguments for discretion ignore these concerns; rather, they evaluate them as less harmful than the cost of crippled policymaking.[57]

The result, at least until recently, was that while financial regulation engaged with some doctrines of current administrative law, the fields willingly disengaged on others. Take, for example, the use of international standards. As Professor David Zaring has noted, an increasing amount of regulatory policy comes through internationally negotiated agreements: accords on proper means for evaluating anticompetition or emissions standards, for example.[58] Such efforts raise substantial domestic concerns about appointments and delegation, and these agreements have made little headway with most regulatory agencies.[59] Yet financial regulators have had no trouble incorporating such agreements into their work, and where challenged, courts have been willing to accept a view of financial regulatory agencies as excepted from generally applicable administrative law requirements.[60] In this realm, agencies enjoy an individualized review designed for their industry and purposes, with general doctrine informing but not finalizing the law to which the agency is bound.

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[53] *See* Mark Tushnet, Lecture, *Administrative Law in the 1930s: The Supreme Court's Accommodation of Progressive Legal Theory*, 60 DUKE L.J. 1565, 1568–76 (2011).

[54] *See* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1804–05 (2007) (seeing administrative law as "a bridge between law and politics," *id.* at 1805); *cf.* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001) (arguing for political control).

[55] *See* Zaring, *supra* note 4, at 209; *see also* Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 504–05 (2000) ("[I]f Congress provides broad delegation of authority to a singular agency with a high degree of political independence, then effective regulation is likely . . . .").

[56] *See* Levitin, *supra* note 31, at 2041–49.

[57] *Cf.* Ramirez, *supra* note 55, at 583–84 (pointing to advantages of "power and flexibility," *id.* at 584).

[58] *See* David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 61–64 (2013).

[59] *See id.* at 84–90.

[60] *See id.* at 101–05.

The financial crisis of 2008 complicates this picture. While the tumult had many fathers, one particularly strong critique blames the financial regulatory agencies' blinkered visions for exacerbating the crisis, most notably in their perceived failure to confront an out-of-control industry.[61] The crisis also sparked a number of ancillary concerns, including a critique of so-called "revolving door" staffing,[62] and it cost agencies regulatory prestige. One might push back on the indictment, since failure in an industry is not necessarily identical to the failure of regulators. Perhaps unsurprisingly, some observers since 2008 have questioned the unique structures of financial regulation and suggested a return to the unadulterated constraints of administrative law.[63] This solution, once sublimated, is increasingly coming to the fore.

III. THE ERA OF CONVERGENCE

A series of recent scholarly projects have attempted to reject rigid yet increasingly questionable distinctions between financial regulation and administrative law and draw them closer together once more. A limited form of this project argues that the two fields share substantial types of problems and can learn lessons from one another: administrative law in financial regulation's ability to match structure to the crisis at hand, financial regulation in administrative law's emphasis on creating quantifiable guideposts for judicial review.[64] A more ambitious version sees financial regulation and administrative law as almost entirely overlapping, and financial regulation benefitting from drawing upon administrative law's relatively more defined structures.[65]

It might seem that these arguments are speculative, describing a distant future. Yet a closer examination of the trends on the ground suggests that reality may be accelerating well ahead of theory. A series of recent cases at the border of administrative law and regulatory practice offers a robustly developed treatment of financial regulatory issues as largely administrative in form and rejects a more focused financial regulatory approach. If the era of financial regulatory normalization is approaching, these cases are its vanguard.

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[61] *Compare* Levitin, *supra* note 31, at 2038–39 (seeing 2008 as posing "a crisis of faith in the financial regulatory system and its underlying claims to technocratic or scientific expertise," *id.* at 2039), *with* Brett McDonnell, *Don't Panic! Defending Cowardly Interventions During and After a Financial Crisis*, 116 PENN ST. L. REV. 1 (2011) (acknowledging an increasingly "complex and diverse" financial system, *id.* at 18).

[62] *See* Levitin, *supra* note 31, at 2041–42 (discussing industry capture).

[63] *See* David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1420–34 (2014) (discussing failed challenges to government actions).

[64] *See generally* Metzger, *supra* note 1.

[65] *See, e.g.*, Gersen, *supra* note 7 ("[F]inancial reform statutes . . . paint on a working canvass [sic] of existing administrative law." *Id.* at 734.).

A. Review of Agency Substance: Business Roundtable v. SEC

Business Roundtable v. SEC involved a challenge to the SEC's recently promulgated proxy access rule, an apparently technical subject with larger immediate challenges and even more significant implications.[66] Prior to the case, new statutory authority had allowed the SEC to promulgate a rule requiring companies to streamline the process of shareholder access to proxy cards for elections to a company's board.[67] The SEC readily promulgated an expansive new rule.[68] A number of business groups objected to this output on grounds that the regulation imposed a substantial burden for comparatively low gain.[69] While the SEC had conducted a notice-and-comment procedure and informally assessed the justifications for the regulation for itself, it had not promulgated a full CBA.[70] In part, as the SEC viewed the issue, the importance of the subject compelled quick movement: the rulemaking expressed the view that the rule would substantially promote market efficiency and might even have limited the 2008 financial crisis.[71] With such great gains apparently available, it is perhaps understandable why the SEC viewed drawbacks as obviously less significant.

The D.C. Circuit nonetheless invalidated the rule. The key to the decision was the APA's provision that courts reject agency actions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[72] The arbitrariness here came from the agency's refusal to conduct a fleshed out CBA.[73] The court saw that avoidance as particularly salient because it perceived a mandate that the SEC "apprise itself — and hence the public and the Congress — of the economic consequences of a proposed regulation."[74] Notably, the court did not (and could not) find that this requirement was explicitly imposed by the Commission's organic statute, or else by practice; rather, it constructed the mandate through reading implications of similar provisions elsewhere in the statute as authorizing the rule.[75]

Much ink has been spilled over the decision in *Business Roundtable*, perhaps more so than for any other financial regulatory case of the past decade. Scholars have taken issue with the claim that

[66] Bus. Roundtable v. SEC, 647 F.3d 1144, 1146–48 (D.C. Cir. 2011).
[67] 15 U.S.C. § 78n(a) (2012).
[68] *Bus. Roundtable*, 647 F.3d at 1147.
[69] *Id.* at 1146.
[70] *Id.* at 1148–49.
[71] Facilitating Shareholder Director Nominations, 74 Fed. Reg. 29,024, 29,025 (proposed June 18, 2009) (to be codified in scattered parts of 17 C.F.R.) (expressing those views).
[72] 5 U.S.C. § 706(2)(A) (2012).
[73] *Bus. Roundtable*, 647 F.3d at 1149–51.
[74] *Id.* at 1148 (quoting Chamber of Commerce v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005)).
[75] *Id.*

the Commission's CBA was limited or haphazard, pointing out that the analysis did consider the factors highlighted by the court — the court simply disagreed on the ultimate evaluation.[76] Beyond the narrow factual disputes about the decision's internal correctness, observers have expressed even greater consternation at the highly substantive review offered by the *Business Roundtable* court, a form of review strongly at odds with understandings of agency expertise.[77] Where most reviews of agency actions take issue with procedural invalidity, or else with evidence so overwhelming that it makes an opposite decision arbitrary or capricious, the *Business Roundtable* court took the unique approach of substantively weighing for itself the factors that the agency itself had previously considered.[78]

Yet perhaps the most intriguing element of *Business Roundtable* is the threshold assumption that CBA represents an appropriate lens for financial regulatory decisionmaking and subsequent judicial review. Professor John Coates, for example, has pointed out the mismatch between the questions CBA best evaluates and the sets of concerns that financial regulation can address.[79] As he argues, CBA functions best in places of relatively known variables, a static environment, and few externalities. Finance's centrality to the economy, its lack of stability, and significant noneconomic implications challenge all of these conditions.[80] If there ever were a place to find CBA inapposite — or at least limited — financial regulation would appear to be it.[81]

That *Business Roundtable* thus saw not just the possibility but the necessity of sophisticated CBA in financial regulation suggests a larger vision about the expansion of administrative law constraints to even the most distant fora. CBA has gained significant ground in administrative law, so much so that a reasonable argument exists that an agency decision not run through the matrix of CBA lacks rationality

[76] *See, e.g.*, Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CALIF. L. REV. 1423, 1430 (2014).

[77] *See, e.g.*, James D. Cox & Benjamin J.C. Baucom, *The Emperor Has No Clothes: Confronting the D.C. Circuit's Usurpation of SEC Rulemaking Authority*, 90 TEX. L. REV. 1811, 1828 (2012) (critiquing a perceived end to deference by the D.C. Circuit); Jonathan D. Guynn, Note, *The Political Economy of Financial Rulemaking After* Business Roundtable, 99 VA. L. REV. 641, 664–67 (2013) (arguing that *Business Roundtable* presents a new, nondeferential regime).

[78] *See Bus. Roundtable*, 647 F.3d at 1151.

[79] *See* Coates, *supra* note 10.

[80] *See id.* at 998–1003.

[81] *Cf.* Bruce Kraus & Connor Raso, *Rational Boundaries for SEC Cost-Benefit Analysis*, 30 YALE J. ON REG. 289, 335–36 (2013) ("Economic analysis should therefore inform, but should not be expected or allowed to dictate, policy." *Id.* at 336). *But see* Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 YALE L.J.F. 263, 270 (2015) (arguing CBA is possible and desirable).

by definition.[82] In turn, advocates of CBA argue that the tool is useful both in constraining perceptibly excessive agency discretion and in laying bare otherwise obscured agency assumptions to facilitate more extensive judicial review.[83] This assertion — apparently at play in *Business Roundtable* — stands at striking odds with key principles of financial regulation.[84] Historically, financial regulators' broad procedural discretion has enabled CBA adopted on a voluntary basis and only lightly reviewed later.[85] By endorsing a vision of CBA and highly substantive subsequent judicial revaluation as the default rather than the exception, *Business Roundtable* imposed significant barriers to regulatory policymaking, but it even more notably rejected the elements that make financial regulation distinctive.

B. Review of Agency Procedures: State National Bank of Big Spring v. Lew

If *Business Roundtable* demonstrates how the tools and coordinate assumptions of broader administrative law can be applied to financial regulatory practice to an unexpected degree, *State National Bank of Big Spring v. Lew* demonstrates how implicit understandings about those tools increasingly infect judicial engagement with financial regulatory decisionmaking. In the case, the eponymous bank, joined by a number of other plaintiffs, challenged new legal authorities in the Dodd-Frank Wall Street Reform and Consumer Protection Act[86] (Dodd-Frank): the Financial Stability Oversight Council (FSOC) and the Orderly Liquidation Authority (OLA).[87] The plaintiffs argued that FSOC raised significant separation of powers issues in the establishment and enforcement of its decisions. They also asserted that the OLA could result in an arbitrary exercise of government power and would thus constitute a taking of plaintiffs' property.[88]

The D.C. Circuit found for the government on entirely procedural grounds. The court avoided the challenge to FSOC's substantive powers, since the procedural posture of the case involved firms in the

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[82] Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review* 3–4 (Harvard Pub. Law Working Paper No. 16-12, 2016), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2752068 [https://perma.cc/Q8SV-7BTZ] (explaining the "maximalist" view).

[83] *See* Caroline Cecot & W. Kip Viscusi, *Judicial Review of Agency Benefit-Cost Analysis*, 22 GEO. MASON L. REV. 575, 591 (2015).

[84] Perhaps the strongest defense of the *Business Roundtable* court is a view that its objections are about pretext: concern that the SEC hadn't taken its duties seriously at all. *See* Jill E. Fisch, *The Long Road Back:* Business Roundtable *and the Future of SEC Rulemaking*, 36 SEATTLE U. L. REV. 695, 700–01 (2013).

[85] *See* Coates, *supra* note 10, at 909–12.

[86] Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of the U.S. Code).

[87] State Nat'l Bank of Big Spring v. Lew, 795 F.3d 48, 51–52 (D.C. Cir. 2015); *see also* 12 U.S.C. § 5384 (2012).

[88] *State Nat'l Bank*, 795 F.3d at 52.

same industry attempting to apply the doctrine of competitor standing — a claim the court viewed as "simply too attenuated and speculative" in these circumstances.[89] The court likewise applied doctrines of standing and ripeness, doctrines instrumental in administrative law, to reject the OLA-based challenge, perceiving that it was "premature for a court to consider the legality of how the Government *might* wield the [OLA] in a *potential* future proceeding."[90] The court did allow the bank's challenge to the constitutionality of the Consumer Financial Protection Bureau (CFPB) to proceed on grounds that challenges to the existence of agencies regulating the plaintiffs themselves are permissible.[91]

State National Bank might seem a run-of-the-mill administrative law case, but this ordinariness is itself the point. Administrative law doctrines pose unique challenges for parties in the financial regulatory realm, so much so that they have rarely been applied in full force to many financial regulatory decisions.[92] Given the complex and often opaque nature of financial markets, showing direct connections or the nature of the harm to a legally cognizable degree of precision proves a particularly difficult task. For example, a demonstrated drop in bond prices owing to the designation may be more opaque than a factory closure.[93] Moreover, given the uncertainty inherent in those markets, it can often be difficult to predict which parties, even if nominally all under the same aegis, are actually likely to bear regulatory burdens, and which assertions of harm are merely hypothetical.[94]

The traditional reconciliation of the high burdens of general administrative law with the unique circumstances of financial regulation has been a rather light and narrowly tailored application of doctrines like standing and ripeness.[95] Even if one sees *State National Bank*'s procedural posture as ambitious, the multifaceted nature of financial regulation makes it difficult to draw a principled line that would distinguish this case from an unquestionably meritorious challenge. The general administrative approach may thus prove unwelcome, since the subject of financial regulation is so dissimilar to the usual administrative decisionmaking.

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[89] *Id.* at 55.

[90] *Id.* at 56; *see also id.* ("State plaintiffs will be affected . . . only *if* a company in which they are invested is liquidated or reorganized by the Government, and only *if* the States are then treated differently from other similarly situated creditors.").

[91] *Id.* at 54 (citing Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 490 (2010)).

[92] *See generally* Recent Case, *supra* note 13 (discussing *State National Bank*).

[93] *See* Coates, *supra* note 10, at 1002 (pointing to the "non-stationary" attributes of financial markets).

[94] *See* Recent Case, *supra* note 13, at 840.

[95] *See* Zaring, *supra* note 63, at 1431–34 (advocating for this approach).

State National Bank thus illustrates and potentially exacerbates the difficulties that administrative law procedural doctrines have in the realm of financial regulatory action. Even prior to the case, observers had warned that such doctrines were inappropriate given the unique nature of financial regulation and worrisome policy outcomes.[96] *State National Bank* may accelerate these concerns. Following the decision, observers in other financial regulatory fields have noted general uncertainty about when administrative law doctrines apply at procedural stages and thus constrain agency policymaking or citizens' rights, or whether financial regulatory procedural standards still apply.[97] One might wish to view *State National Bank* as a one-off case — the strangeness of its posture limiting its impact — but the assumptions implicit in the case may bear in other lights.

C. *Normalization's Apotheosis:* MetLife, Inc. v. Financial Stability Oversight Council

MetLife, Inc. v. Financial Stability Oversight Council demonstrates how substantive and procedural elements of administrative law can yield more significant effects on financial regulation than either element alone. The case again involved a challenge to a systemically important designation, this time by a firm so designated: Metlife.[98] Metlife's petition alleged a host of complaints, but the most significant issue that Metlife raised was an alleged failure by FSOC to fully consider the impacts on Metlife of this particular designation and thus the need for FSOC to design its procedures to incorporate more vigorous due process protections.[99]

The court found for Metlife on these grounds and rescinded its designation as a systemically important financial institution.[100] Crucial to its conclusion was its understanding that full CBA applied in this case. The *Metlife* court read two recent Supreme Court opinions, *Michigan v. EPA*[101] and *Whitman v. American Trucking Ass'ns*,[102] as creating a strong presumption that CBAs are applicable in regulatory actions.[103] The government had pointed out the lack of a clear statutory demand for CBA in FSOC's decisionmaking and suggested the principle that

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96 *See, e.g.*, Carolyn Sissoko, Note, *Is Financial Regulation Structurally Biased to Favor Deregulation?*, 86 S. CAL. L. REV. 365, 402–03 (2013).

97 *See* Mark J. Roe & Michael Tröge, *Taxing Banks Properly: The Next Regulatory Frontier*, at 11 (2016), http://web.law.columbia.edu/sites/default/files/microsites/law-economics-studies/taxingbanksproperly_feb_20_2016_v5.2.pdf [https://perma.cc/5E5L-ZSNW].

98 C.A. No. 15-0045, 2016 WL 1391569, at *1 (D.D.C. Mar. 30, 2016).

99 *See id.* at *14–15.

100 *Id.* at *17.

101 135 S. Ct. 2699 (2015).

102 531 U.S. 457 (2001).

103 *Metlife*, 2016 WL 1391569, at *15–16.

what is not explicitly included in a statute is left to agency discretion to adopt or not adopt as it sees fit.[104] By contrast, the court saw the statutory silence in entirely different terms: the fact that CBA wasn't explicitly prohibited by statute suggested its inclusion, given what the court read as the crucial background assumption of mandatory CBA.[105] On this view, FSOC "intentionally refused to consider the cost of regulation," violating "a consideration that is essential to reasoned rulemaking," and thus the designation could not stand.[106]

In one sense, *Metlife* represents yet another articulation of the expansive use of CBA in the financial regulatory realm, in a manner largely similar to that of *Business Roundtable*. Yet *Metlife*'s internal logic and normative implications offer a more expansive vision of the applicability of administrative doctrines than *Business Roundtable* itself suggested. The court in *Business Roundtable* saw the mandate for expansive CBA in that case as derived from the specific context of the SEC's decisionmaking: the SEC not only had to conduct CBA, but it also had to do so to a maximum degree of effectiveness.[107] By contrast, the *Metlife* court read the CBA requirement as a general background rule of law, not one derived from specific context.[108] If any circumstance would seem to justify a departure from a CBA requirement, this case's decisionmaking backdrop of relatively high epistemic uncertainty, substantial technical considerations, and convoluted consequence would seem to qualify. Indeed, such grounds have often previously justified financial regulation's departure from general administrative law norms.[109] That the *Metlife* court, by contrast, saw itself as capable of assessing the metacosts and metabenefits of a CBA speaks to a more engaged judicial role.

Beyond its specific implications for the future of CBA in financial regulation, *Metlife* also matters for the idea of administrative procedural choice in financial regulation. Financial regulatory agencies have typically focused relatively little on issues of transparency and decisionmaking regularity, which are more concerning to their administrative counterparts.[110] Indeed, some scholarship suggests that agencies' powers to shape procedures to the challenges they face are inherent to the business of financial regulation, much more so than they are

[104] *Id.* at *15.
[105] *See id.* at *15–16.
[106] *Id.* at *17.
[107] *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1148–51 (D.C. Cir. 2011) (setting out specific factors the agency should have considered in its CBA).
[108] *Metlife*, 2016 WL 1391569, at *15–17.
[109] *See* Steven L. Schwarcz, *Regulating Financial Change: A Functional Approach*, 100 MINN. L. REV. 1441, 1463–69 (2016) (noting and critiquing the historically ad hoc approach to regulation in the financial context).
[110] *See* Ahdieh, *supra* note 32, at 73–74.

to general administrative law.[111] Further, scholars have argued that CBA in the financial regulatory realm offers metacosts exceeding its metabenefits.[112] Yet there is also a larger point on the question of who gets to choose. Historically, financial regulation has assumed that agencies would take the lead in deciding issues of design, with the courts playing a small and even subordinate role.[113] By endorsing a more vigorous review on both procedure and substance, *Metlife* speaks to an entirely new vision of how the field should operate.

IV. THE DOCTRINE (?) OF FINANCIAL ADMINISTRATION

Taken apart, *Business Roundtable*, *Metlife*, and *State National Bank* each lays individual markers for an expansion of the tools of general administrative law to financial regulatory action. Taken together, they suggest an overarching indication. If one case is an anecdote, two a trend, and three a doctrine, the cases offer indications on how these related areas of the law are developing, and why. Yet efforts to normalize financial regulation offer their own concerns. If financial regulation and administrative law enjoy their special relationship because of differences in their deep logic, an approach treating financial regulation as indistinguishable from any other form of regulatory law will suffer serious deficiencies. Instead, it would be more consistent with both the history and purpose of financial regulation and administrative law to neither embrace the normalization trend entirely nor reject it as a whole; rather, courts ought to insist that any engagement must be careful, discerning, and individualized to the situation at hand.

A. Trends Toward Regulatory Normalization

The most obvious first factor explaining the evolution of the financial regulation–administrative law relationship is the scope of financial regulation's new powers. Indeed, both *State National Bank* and *Metlife* dealt with authorities established under the most significant alteration in financial regulatory authority since the New Deal era: Dodd-Frank.[114] Dodd-Frank has many elements, but the law is perhaps best understood as an attempt to address perceived gaps in the traditional system of financial regulation by creating a series of powers overlapping these gaps.[115] Dodd-Frank's powers are expansive and

[111] *See* Zaring, *supra* note 6, at 544–46 (developing that sensibility).
[112] *See* Coates, *supra* note 10, at 1011.
[113] *See* Ramirez, *supra* note 55, at 527–28.
[114] *See generally* ROBERT G. KAISER, ACT OF CONGRESS (2013) (discussing Dodd-Frank).
[115] *See* Barr, *supra* note 3, at 123 ("FSOC's authorities fill important gaps in the system and help to reduce the risk of regulatory arbitrage.").

subject to relatively few external controls.[116] Unlike its regulatory predecessors, Dodd-Frank's powers exist with relatively low degrees of internal constraint.[117] This combination of strong new powers with an increasingly adversarial regulatory focus has caused some scholars to see the law as introducing a quintessentially administrative law-style character to the financial regulatory space.[118]

At the same time, new administrative tools seem to offer a potent (if ultimately illusory) means of providing judicial oversight over an otherwise unconstrained regulatory system. Even if the result was inapposite, the *Business Roundtable* and *Metlife* courts were not capricious in their choice to focus on CBA. Experience from other areas of administrative law suggests that CBA can be highly effective in ensuring that otherwise opaque or unaccountable agencies reconcile themselves to more coherent policy outputs.[119] More broadly, the substantial doctrines of modern administrative law have done much to constrain agency policymaking discretion — so much so that anxieties about runaway bureaucracies have largely been replaced by the opposite concern about "ossified" regulators.[120] In this light, it may matter less whether particular elements like CBA are fully appropriate; what may matter more is the logic from which out-of-control agency policymaking seems to demand some method of constraint. CBA specifically — and administrative law generally — ostensibly offers that check.

Taken apart, the combination of greater need for control and enhanced tools to achieve that control go a long way to explaining why financial regulatory normalization may be happening, and why now. Taken together, they also help explain particularly questionable elements behind the trend. In *Business Roundtable*, for example, it may seem incongruous that a generalist court viewed itself as more capable than the specialist administrators. If one reads the case to imply some skepticism that the SEC's administration was analytical rather than pretextual, and the court's stronger view of CBA as a close-enough substitute for that expertise, then the decision may appear to enjoy greater justification.[121]

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[116] *See, e.g.*, Merrill & Merrill, *supra* note 8, at 172.

[117] *See* Gersen, *supra* note 7, at 691–92 (outlining the point).

[118] *See* Metzger, *supra* note 1, at 145–46 (arguing that Dodd-Frank shows how "that divide [between financial regulation and administrative law] is now collapsing").

[119] *See* Sunstein, *supra* note 82 (manuscript at 5–8) (developing the argument from a social welfare perspective).

[120] *See* Kagan, *supra* note 54, at 2266–67 (discussing contemporary fears of regulatory slowdown).

[121] *See* Fisch, *supra* note 84, at 700–01.

B. The False Promise of Regulatory Normalization

The approach of treating financial regulation as an ordinary subject of administrative law thus derives from real concerns, but even on those terms, the merger may harm more than help. To start, it is not clear whether the doctrines of general administrative law enjoy a more rigorous intellectual foundation than the ad hoc application of usual financial regulation. Even attempts to apply specific administrative law tools offer their own unique sets of concerns; for example, the most recent high-profile application of CBA, *Michigan v. EPA*, may have involved significantly more complicated concerns than the Court's analysis revealed.[122] Perhaps some individual error is a reasonable tradeoff for systemic gains, but it is not clear how quickly the costs become "impossibly daunting."[123]

The challenges of administrative law are not unique to financial regulation, but they are amplified to an extreme degree in this space. To start, a major critique of hard look agency policing points to the gap between agency specialist knowledge and courts' comparative institutional limitations.[124] The highly sophisticated elements of financial regulation heighten those concerns. Likewise, strong doses of judicial review raise concerns about judges substituting their own values for those of the underlying agencies, a concern even further amplified where, as in financial regulation, the relevant risks "have a speculative character."[125]

Other elements particular to financial regulation suggest reasons for discomfort with applying usual forms of administrative law to that field without any alteration. For example, it is unclear how one key principle underlying modern financial markets — that future directions are not subject to present knowledge — can be reconciled with sophisticated quantitative analysis, given that highly monetized analyses are meant to incorporate such future values.[126] Likewise, the contingent impacts of mechanisms like the OLA fit uneasily with usual

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[122] Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. (forthcoming 2017) (manuscript at 23–25), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757770 [https://perma.cc/MXG2-K34B]. Of course, the underlying administrative law has also undergone substantive evolutions. *See, e.g.*, *The Supreme Court, 2014 Term — Leading Cases*, 129 HARV. L. REV. 181, 317–26 (2015).

[123] Sunstein, *supra* note 81, at 275.

[124] *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 388–94 (1986). *But see* Gersen & Vermeule, *supra* note 11 (arguing that current law shows little evidence of hard look review).

[125] *See* Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 450 (2015).

[126] *See* Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. PA. L. REV. 851, 851 (1992).

standing and ripeness doctrines and offer comparatively few options for judicial remedy.[127] It might be possible to carve out special financial regulatory exceptions from general standing rules, for example, but this approach would hardly suit the one-size-fits-all approach desired by supporters of financial regulatory normalization.

Most important, perhaps, is the degree to which the application of an off-the-rack version of administrative law contradicts key principles underlying current financial regulatory mechanics. One crucial ideal behind Dodd-Frank is an increased need for agency responsiveness, particularly in crisis.[128] Administrative law, by contrast, aims to be fundamentally deliberative, focused on the "need for checks and controls" to prevent agency overzealousness.[129] Yet if one's object is solving the most exigent challenges, it is hard to see how any zeal would be excessive.

C. Toward a Tailored Approach

The full, standardized doctrines of administrative law thus prove an uneasy fit with the theory and practice of financial regulation. Yet it would be overbroad to say that courts face a choice to either conduct such an extensive judicial review that it enervates agency policymaking, or else leave agencies entirely unchecked. If financial regulatory normalization proves a difficult medicine when taken as a whole, moderate doses of its elements may offer less cause for concern and may even prove salutary to the system's general effectiveness.

To start, the administrative law tools for policing the boundaries of agency jurisdiction offer significant advantages in the financial regulatory realm. In other administrative areas, courts have historically acted to ensure agencies stand within defined limits.[130] By contrast, financial regulatory agency powers are notoriously ill defined, and the complexity of the newest set of authorities only exacerbates that issue.[131] The boundary-setting tools of general administrative law may thus be worth importing wholesale into the financial regulatory space. In practice, those tools would imply a modest but effectual role for the courts in policing agency jurisdiction, emphasizing a livable settlement

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[127] *See* Recent Case, *supra* note 13, at 840–41.

[128] *See* Barr, *supra* note 3, at 123.

[129] *See* Breyer, *supra* note 124, at 363.

[130] *See* Thomas W. Merrill, *Step Zero After* City of Arlington, 83 FORDHAM L. REV. 753, 754–55 (2014) (discussing "the traditional judicial function of boundary maintenance," *id.* at 755).

[131] *See, e.g.*, Merrill & Merrill, *supra* note 8. To take the most visible example, a number of recent cases have involved questions about the scope of the CFPB's authority. *See* CFPB v. Accrediting Council for Indep. Colls. & Sch., No. 15-1838, 2016 WL 1625084, at *2–4 (D.D.C. Apr. 21, 2016); CFPB v. Mortg. Law Grp., LLP, 157 F. Supp. 3d 813, 819–21 (W.D. Wis. 2016); CFPB v. ITT Educ. Servs., Inc., No. 1:14-CV-00292, 2015 WL 1013508, at *21–24 (S.D. Ind. Mar. 6, 2015).

between agencies and regulated parties.[132] Jurisdictional determinations also stand within the realm of court expertise and raise few concerns about the timing or extensiveness of that engagement.[133]

At the same time, anxieties about the form of agency policymaking could be addressed through a similarly focused inquiry into the structures of internal agency decisionmaking. General administrative law recognizes that effective divisions of power within agencies offer advantages such as more accurate determinations, protections against biased processes, and greater likelihood of protecting individual rights.[134] These concerns are no less trenchant in financial regulation, as demonstrated by a recent D.C. Circuit decision striking down the CFPB's single-director structure. In *PHH Corp. v. CFPB*,[135] the court applied a number of examples from general administrative law to find that the Bureau "departs from settled historical practice" and "threatens individual liberty far more than a multi-member independent agency does."[136] Yet *PHH* also suggests that courts may effectively tailor approaches to particular regulatory circumstances: in this case, for example, the court relatively intensively engaged with the organic Dodd-Frank scheme and intended CFPB function to find a remedy of eliminating the Director's for-cause removal requirement, rather than closing the Bureau altogether.[137]

By contrast, effective scrutiny of the substance of financial regulatory policymaking likely falls between the strongly substantive inquiry of *Business Roundtable* and the hands-off approach of *State National Bank*; the former limits any exercise of agency discretion, while the latter fails to conceptualize elements making financial regulation unique. Rather than inquire into the adequacy of the substance or procedure at issue, a court could instead ask whether the procedures emerged through a rational process. Specifically, a court could inquire whether an agency enjoyed sufficient reason for choosing the procedure that it did.[138] To the extent that this is (or should be) the state of play in broader administrative law, the applications to the financial regulatory field would seem to prove even more compelling. After all, much of the pushback to *Business Roundtable* pointed out that more compre-

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[132] *See* Merrill, *supra* note 130, at 757.

[133] *See* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201, 216–19. *But see The Supreme Court, 2015 Term — Leading Cases*, 130 HARV. L. REV. 307, 447–56 (2016).

[134] *See* Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515, 530–31 (2015).

[135] 839 F.3d 1 (D.C. Cir. 2016).

[136] *Id.* at 8; *id.* at 34.

[137] *Id.* at 37–39.

[138] *See* Adrian Vermeule, Essay, *Deference and Due Process*, 129 HARV. L. REV. 1890, 1916 (2016).

hensive reviews could discourage otherwise valid agency action.[139] Yet high-level procedural rationality review would also allow means of policing agency misconduct: if it is true, for example, that the SEC in *Business Roundtable* intentionally chose a relatively low level of CBA to avoid the conclusions that a more vigorous analysis would have offered, then that procedural choice would lack rational justification, and a court could (and should) exercise a more intensive and skeptical review.[140] By contrast, a CBA chosen in good faith but poorly executed would not necessarily violate procedural-rationality review's requirements — allowing courts to avoid rewarding litigants for "waging in a judicial forum a specific policy battle which they ultimately lost in the agency."[141]

Taken together, these three approaches offer a relatively consistent, tailored approach, bringing the most effective parts of administrative law into financial regulation. This proposal rests on the idea — common in modern administrative law — that those best positioned to evaluate the substance of agency action are those closest to the scene.[142] On this vision, agencies are prevented from overreach through jurisdictional policing and from underreach by strong internal checks reducing any points of particular pressure. These two sets of policing tactics orient agencies toward the political process, while a review of the rationality of an agency's procedural choice addresses at least some concerns about agency capture or somnolence.

In practice, this system implying vigorous judicial review of the borders of agency policymaking and relative deference at the center might seem to offer relatively little difference for the run-of-the-mill circumstances. Take, for example, some challenge to a new set of bank capital standards. Under a traditional view of financial regulatory exceptionalism, such decisions might enjoy substantial deference from the courts — perhaps complete deference if adopted through the mechanisms of global agreement. In contrast, if understood as an ordinary exercise of administrative law, such a decision would face a more restrictive set of constraints — such as concerns about substantive arbitrariness, delegation, or rationality — which would potentially impose greater hurdles. The limited version of administratively normalized financial regulation would attempt to thread the two needles: if promulgated by an agency with proper jurisdiction and sufficient internal checks, and so long as sufficient reasons for the decision existed,

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139 *See* Revesz, *supra* note 76, at 1430.

140 *Cf.* Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 97–98 (1983) ("The role of the courts is simply to ensure that the agency has adequately considered and disclosed the . . . impact of its actions . . . .").

141 Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 864 (1984).

142 *Cf.* Vermeule, *supra* note 138, at 1916.

such promulgations would be presumptively valid. For those objecting to the content of the regulation, their remedies would be through intellectual or political means — not through the courts.

If marginally more efficient for the average case, the edge problems offer perhaps the strongest arguments for such tailored normalization of administrative law. Procedural-rationality review would likely lead a case like *State National Bank* to emerge the same way, albeit on substantially different grounds. For the court there, the usual administrative law principles of standing and ripeness enjoyed priority over the existence of concerns specific to financial regulation.[143] A more limited approach would, by contrast, simply refuse to engage in such a balancing act, so long as the agency made a reasoned choice. Meanwhile, the process of tailored review would suggest different outcomes for *Metlife* and *Business Roundtable*, unless one views FSOC as so unconstrained that it violatedconstitutional norms. In those cases, however, the decisions would speak to the substantive concerns at issue, rather than through second-order approaches.

This is not to say that this approach would be without demerits — even administrative agencies suffer inconsistent structures, and the line between review of arbitrariness in choice and arbitrariness in substance may be blurry.[144] Yet its greatest strength would be to reconcile the major principles of administrative law and financial regulation. If administrative law's adherence is to an ex ante rationalized decisionmaking system, then such an approach would offer those clear procedural precommittments. If financial regulation, by contrast, rests on the ideas of flexibility, responsiveness, and choice, then such an approach would offer that power, within the defined box.

CONCLUSION: A NEW WAY FORWARD

Financial regulation and administrative law are thus related, but ultimately distinct, fields. Comparing the two shows areas of overlap but also areas of robust and deservedly continued differences. While the two enjoy similarities on a superficial level, the logical commitments underpinning each field yield significant dissimilarities. As demonstrated in practice, the wooden application of administrative law doctrines in the setting of nuanced financial regulatory actions risks harming both domains. That the fields are and should be engaged remains clear, but what the move toward financial regulatory normalization suggests is that such engagement, like any good suit, should be tailored.

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[143] *See* State Nat'l Bank of Big Spring v. Lew, 795 F.3d 48, 56 (D.C. Cir. 2015).

[144] *Cf.* Ronald M. Levin, *Administrative Procedure and Judicial Restraint*, 129 HARV. L. REV. F. 338 (2016).