

## THE ADMINISTRATIVE STATE AND ITS LAW

*Michael S. Greve\**

## INTRODUCTION

The essays collected in this symposium volume were commissioned for the Eighth Annual Conference of the Transatlantic Law Forum (TLF),<sup>1</sup> conducted under the auspices of the Law & Economics Center (LEC) at Antonin Scalia Law School in October 2015. They reflect the TLF's mission to provide a forum for a sustained transatlantic dialogue among legal scholars, judges, and practitioners, on salient (but also lasting) questions of democratic government and the rule of law.

If venues and opportunities of that sort are few and far between, that is because the topic is difficult, both in its own right and for want of a common parlance. In specialized legal fields from antitrust to trade and financial regulation, lawyers from around the world have created an infrastructure of international organizations, without any great effort: a high degree of specialization and a set of common problems, transcending national boundaries, produce a common legal language. Similarly, political scientists and economists have little trouble communicating across the pond and around the world: they have their models. Administrative law, as well as "structural" constitutional law outside the domain of universal rights, is entirely different. Legal rules and doctrines are entangled in widely varying institutional arrangements, and they are the products of long-evolving, often idiosyncratic traditions. To be sure, administrative law encompasses technical subjects (say, the use of cost-benefit analysis) that lend themselves to a trans-national discussion among experts. And at a high level of abstraction, all administrative law systems reflect the common aspiration to govern modern societies not only liberally and democratically but also rationally and with tolerable efficiency. Between the arcana and the abstractions, however, lies a vast field where a lot gets lost or, as the case may be, made up in translation.<sup>2</sup> The problem is all the more

---

\* Professor of Law, Antonin Scalia Law School; Director, Transatlantic Law Forum. Thanks to Jeremy Rabkin and to the authors for helpful comments on an earlier draft; and thanks to Katie Smithgall, Mackenzi Siebert, and the editors of the *George Mason Law Review* for their splendid work on this symposium volume.

<sup>1</sup> Eighth Annual Transatlantic Law Forum, hosted by the Law & Economics Center at the Antonin Scalia Law School at George Mason University, Oct. 23–24, 2015. Videos of conference panels are available at <http://masonlec.org/events/eighth-annual-transatlantic-law-forum/>.

<sup>2</sup> Not for the first time. Cf. Daniel R. Ernst, *Ernst Freund, Felix Frankfurter, and the American Rechtsstaat: A Transatlantic Shipwreck, 1894-1932*, 23 *STUD. AM POL. DEV.* 171 (2009).

acute because the traditions have become intensely controversial *within* individual countries.<sup>3</sup>

The conference objective was nothing so grand as to create a common language or error-free translation. (We are ambitious, not delirious.) Our more modest aim was to explore some common themes and salient problems and to learn what thoughtful scholars on both sides of the Atlantic might have to say about them. Our hope was to extend scholarly horizons; to generate fruitful questions for further inquiry; and perhaps to suggest that the literature would benefit from comparative studies that transcend the gee-this-is-different or look-how-similar genre of comparative law.<sup>4</sup> To that end and in that spirit, we solicited several essays on overarching themes, especially including the judicial review of executive action (Robert R. Gasaway & Ashley C. Parrish; Adam Tomkins; Florian Becker). We commissioned a second set of essays to examine varying administrative (law) responses to a common set of more specific problems and challenges: energy and environmental policy (Alexander Proelss; James W. Coleman); financial regulation (David Zaring; Christopher C. DeMuth & Michael S. Greve); and central banks (Marco Goldoni; Peter Conti-Brown).

The authors have rewarded us well beyond our expectations. Practically by design, though, their contributions defy any easy summary or overview. Thus, this brief Introduction serves the more limited purpose of highlighting a few themes that promise to enrich the raging debate about the administrative state and its law. At the same time it attempts to put that debate in a broader context, the better to capture a central point of agreement among all the authors: something very big is at stake here.

## I. THE ADMINISTRATIVE STATE AND THE CONSTITUTION

The essays by Robert R. Gasaway and Ashley C. Parrish,<sup>5</sup> Adam Tomkins,<sup>6</sup> and Florian Becker<sup>7</sup> address the general state of administrative law in the United States, the United Kingdom, and Germany respectively. All three essays insist that administrative law must be *constitutionally* grounded. All

---

<sup>3</sup> See, e.g., Robert R. Gasaway & Ashley C. Parrish, *Administrative Law in Flux: An Opportunity for Constitutional Reassessment*, 24 GEO. MASON L. REV. 361, 397 (2017) (“[T]here are today no shared ways of thinking about, and there is no common vocabulary for talking about, America’s unique jurisprudential inheritance.”); Adam Tomkins, *The Guardianship of the Public Interest*, 24 GEO. MASON L. REV. 417, 417 (2017) (“In the United Kingdom and . . . across the common law world, the constitutional relation of parliamentary government to the courts is contested.”).

<sup>4</sup> Cf. Martin Shapiro, *Comparative Law and Comparative Politics*, 53 S. CAL. L. REV. 537 (1980).

<sup>5</sup> Gasaway & Parrish, *supra* note 3.

<sup>6</sup> Tomkins, *supra* note 3.

<sup>7</sup> Florian Becker, *The Development of German Administrative Law*, 24 GEO. MASON L. REV. 453 (2017).

three essays focus on a central question of administrative law: the reviewability of administrative acts, and the role of judicial review. Read side-by-side, they reveal several intriguing comparative suggestions and surmises.

“The ultimate ends of administrative law,” Messrs Gasaway and Parrish explain,

include ensuring *fidelity* to the commands of the sovereign demos, *regularity* in governing the demos, and the *transparency* to the demos of the nature and effects of the manifold activities government undertakes on its behalf. These logically interrelated aims—fidelity, regularity, transparency—are all presupposed by the idea that republican governments are accountable to their citizens.<sup>8</sup>

How, though, are those objectives to be safeguarded, both at a constitutional level and in everyday administration? The three essays reflect very different constitutional models and experiences: an old, widely admired and emulated written Constitution that rests on the separation of powers (presidentialism), judicial review, and federalism (the United States); an unwritten but ancient constitution, resting on common-law traditions and the sovereignty of parliament (the United Kingdom); and Germany’s 1949 Basic Law—a written constitution shaped in response to the bitter experience of the Weimar Republic and the Nazi tyranny; much younger than America’s, but by now of very respectable vintage.

The articles differ strikingly in their tenor. Messrs. Gasaway and Parrish describe an administrative law in deep crisis. Long-accepted canons, foremost including *Chevron* deference, have become intensely controversial. The rise of an executive-led government and the corresponding decline of the powers of Congress have likewise sparked intense debate.<sup>9</sup> Effectively boundless delegations of legislative powers, coupled with highly deferential judicial review and increasingly “unorthodox” forms of administrative regulation,<sup>10</sup> have prompted prominent scholars from diametrically opposed vantages to argue that all administrative law is a charade or worse—an unlawful

---

<sup>8</sup> Gasaway & Parrish, *supra* note 3, at 341.

<sup>9</sup> See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); Michael S. Greve & Ashley C. Parrish, Administrative Law Without Congress, 22 GEO. MASON L. REV. 501 (2015); Christopher C. DeMuth, *Can the Administrative State Be Tamed?* 8 J. OF LEGAL ANALYSIS 121 (2016); Adrian Vermeule, *No*, 93 Tex. L. Rev. 1547 (2015) (reviewing PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014)). Apprehensions about an overbearing “administrative state” have begun to appear in Supreme Court opinions. See, e.g., *City of Arlington v. FCC*, 133 S. Ct. 1863, 1878 (Roberts, C.J., dissenting) (“The administrative state ‘wields vast power and touches almost every aspect of daily life.’” (quoting *Free Enterprise Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010))); *Alden v. Maine*, 527 U.S. 706, 807 (1999) (Souter, J., dissenting) (“[T]he administrative state with its reams of regulations would leave [the Framers] rubbing their eyes.”).

<sup>10</sup> Abbe R. Gluck et al., *Unorthodox Lawmaking, Unorthodox Rulemaking*, 115 COLUM. L. REV. 1789 (2015).

departure from constitutional government,<sup>11</sup> or a thin veneer for an essentially “Schmittian” state above and beyond effective legal control (and a good thing, too).<sup>12</sup> While Messrs. Gasaway and Parrish resist such dramatic claims, they do argue that the existing *corpus juris* lacks any serious grounding in the Constitution’s structure and rule of law logic.<sup>13</sup> Professor Tomkins discusses two recent developments in the United Kingdom: judicial oversight of immigration and deportation decisions, and judicial freedom-of-information decisions. Each field, he writes, “marks an attempt to shift the constitutional guardianship of the public interest from politically-accountable government to the courts of law.”<sup>14</sup> Modest parliamentary attempts to stem the tide have often met with judicial hostility. Thus, Professor Tomkins concludes that the United Kingdom’s administrative law, founded on ministerial accountability to a sovereign parliament, is not yet in crisis—but may be very soon. In contrast, Professor Becker describes a robust, stable, and thoroughly constitutionalized body of administrative law. Germany’s highly theorized and systematized administrative law is “constitutional law made concrete” and particularized.<sup>15</sup> The protection of individual rights by independent courts is the lodestar of the constitutional order and of administrative law in its daily operation.

#### A. *Constitutional Grounding*

One might think that administrative law would conform most readily to constitutional commands and protections in countries with a deeply rooted commitment to a constitution, written or not but in any event elaborated over centuries. Conversely, one might think that constitutional administrative law would have grave difficulties in a notoriously “belated” country<sup>16</sup> where executive and authoritarian government, with an administrative law system to match, long preceded the advent of constitutional democracy. Apparently, though, it’s the other way around: crisis atmosphere here; rule of law confidence over there; potential crisis in-between. Weird, is it not?

Admittedly, the thumbnail summary just sketched fails to do justice to the authors’ nuanced accounts. Messrs Gasaway and Parrish believe that they

---

<sup>11</sup> See generally HAMBURGER, *supra* note 9.

<sup>12</sup> Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1096 (2009); ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* (2011).

<sup>13</sup> Gasaway & Parrish, *supra* note 3 and 392. (“For better or worse, the logic of the Constitution, as well as logical advances achieved in non-legal disciplines, played only submerged and subordinate roles in this evolution [of administrative law].”)

<sup>14</sup> Tomkins, *supra* note 3 at 418–19.

<sup>15</sup> Becker, *supra* note 7 at 454 (quoting Fritz Werner, *Verwaltungsrecht als Konkretisiertes Verfassungsrecht*, in: DEUTSCHES VERWALTUNGSBLATT (DVBl) 527–33 (1959)).

<sup>16</sup> Cf. HELMUTH PLESSNER, *DIE VERSPÄTETE NATION: ÜBER DIE VERFÜHRBARKEIT BÜRGERLICHEN GEISTES* (1935). [HELMUTH PLESSNER, *THE BELATED NATION* (1935)].

can identify *enough* remaining or re-emerging rule of law substance—a “gravitational pull of constitutional principle”<sup>17</sup>—to launch a decidedly ambitious attempt to re-ground American administrative law on non-ideological, constitutional bedrock. And Professor Tomkins’ and Professor Becker’s discussions of the influence of European law on domestic legal arrangements complicate the picture. While EU law and doctrines—foremost, the review of administrative acts for “proportionality”—have profoundly affected British law, there appears to be some residual political and judicial resistance.<sup>18</sup> (Indeed, Professor Tomkins’ essay exemplifies it.) In contrast, on Professor Becker’s account, the German administrative courts and legal profession appear to be quite receptive to a highly improvisational, “networked” European administrative law without a state, a superintending legislature, reliable hierarchical controls, or systematic judicial controls—in other words, without any of the rule of law institutions and doctrines that form the backbone of Germany’s constitutionalized administrative law.<sup>19</sup>

To that caveat, one could and should add others. No individual author, however fair-minded, can adequately capture the state of administrative law and scholarship in a single article, least of all under conditions of severe internal disagreement. And surely, the essays reflect the spirit of the times: grave concerns over a separation-of-powers model that, having failed in much of the world, now seems to be failing in the United States; a Westminster model that (as Professor Tomkins acknowledges) seems to have gone out of fashion across the globe; the diffident persuasions of a tolerably well-governed country whose political and economic model has, if anything, proven *too* successful for the rest of Europe.

All that acknowledged, the perplexity remains. At a bare minimum, the essays cast doubt on an administrative law picture that, while fiercely contested, has gained considerable currency in the contemporary debate in the United States. Germany, the story goes, acquired a full-blown state and, accompanying it, a civil-law tradition and an authoritarian administrative law long before it acquired a liberal bourgeoisie, nationhood, and democracy.<sup>20</sup> That cannot end well; and it didn’t. In contrast, England and America are the quintessential “modern” states, established on principles of common law and democratic constitutionalism (albeit of different kinds). To the extent that those principles have been compromised, that is due to the “German Connection”—the import of civil-law notions into the United States<sup>21</sup> (and now, via the EU, the United Kingdom). This is obviously not the place to argue over the history of British administrative law or the role of the “German connection” in the United States. Suffice it to say that the picture that emerges from

---

17 Gasaway & Parrish, *supra* note 3, at 369.

18 Tomkins, *supra* note 3, at 425–32.

19 See Becker, *supra* note 7, at 473–74.

20 See *id.*, at 455–62 (tracing the political and legal trajectory of the German administrative state).

21 HAMBURGER, *supra* note 11 at 441–78.

the three essays complicates facile stories of institutional or cultural path dependency. Doubtful legal traditions, when coupled with a radical break, may yet produce a happy outcome. And the most glorious rule of law traditions, when poorly understood and remembered, may yet produce deeply problematic results.

Two of the essays suggest the point. In an important paragraph, Professor Becker writes:

The Basic Law has subjected large areas of administrative discretion to constitutional constraints, . . . . Even so, the Federal Republic does not present a picture of a one-sided triumph of lofty constitutional aspirations over administrative law, as understood and developed in accordance with the juristic method. Rather, the interplay is best understood as a synthesis. The experience of the Nazi era compelled the legal profession to think very hard about the prerequisites of a liberal democratic order in accordance with the rule of law—the *freiheitlich-demokratische Rechtsordnung* enshrined in the Constitution. [The earlier body of] administrative law had obviously failed to provide a barrier against autocracy and tyranny. Even so, its formal conceptual apparatus and especially its emphasis on lawfulness proved highly conducive to the important task of making general, highly abstract constitutional precepts concrete in the day-to-day operation of an administrative—yet liberal and democratic—state.<sup>22</sup>

Compare and contrast this account with the American picture, as described by Messrs. Gasaway and Parrish:

Today's administrative state has been built up over decades as an improvised amalgamation of traditional notions of fair play and newfangled substantive commitments—above all, the New Deal's expansive administrative state; the Warren Court's constitutional protections for "new property;" and the Rights Revolution's commitment to making judicially enforceable a range of public-rights determinations previously left to executive discretion.<sup>23</sup>

These forceful propositions suggest that at least sometimes and under some circumstances, it may be easier to democratize and liberalize a functioning state and its administrative law than it is to make republican governments—formed under very different political and economic conditions and resting on premises that are not easily squared with an "administrative state,"—work for a modern society. That thought, though, raises further questions. What *exactly* in Germany's administrative law permitted its thorough constitutionalization under liberal-democratic auspices? And what *exactly* in the constitutional set-up and tradition of the United States and, perhaps to a lesser extent, the United Kingdom made those arrangements vul-

---

<sup>22</sup> Becker, *supra* note 7 at 466 (footnote omitted).

<sup>23</sup> Gasaway & Parrish, *supra* note 3, at 392.

nerable to extra-constitutional improvisation? Jointly and severally, the essays suggest that the explanation may have something to do with foundational distinctions between public and private, law and politics.

B. *Judicial Review: Law and Politics*

The principles and doctrines of modern German administrative law, Professor Becker explains, were formulated by Otto Mayer and his disciples a century ago, at the dawn of the Weimar Republic. Mayer's project is captured in his famous dictum: "*Verfassungsrecht vergeht, Verwaltungsrecht besteht.*"<sup>24</sup> That sentence, sure to set Anglo-American lawyers' teeth on edge, encapsulated both an empirical observation and a legal aspiration. Throughout the turmoil of German history, administrative bodies at all levels had performed their ordinary functions. Ideally, that ought to be done in a lawful, impartial way, even as many civil servants were still committed to a pre-democratic order and its representatives. To that end Mayer and his disciples constructed a rigidly positivist, highly formalistic system of general administrative law, whose principles and structure could be discerned through a "juristic method" freed from any grand speculation about normative political and constitutional theory. The system revolved around the legality, regularity, and binding force of the individual administrative act (*Verwaltungsakt*). Mayer insisted that an administrative act had binding force (regardless of its ultimate legality) until it is successfully challenged in court. The system requires an independent (administrative) judiciary and the availability of judicial review for any private citizen who alleges a violation of his rights (his *subjektive oeffentliche Rechte*, to be precise).<sup>25</sup>

Grim experience would show that it is possible to layer a brutal *Fuehrerstaat* on top of Mayer's system.<sup>26</sup> And yet, Mayer's conceptual apparatus later came to harmonize readily with a liberal-constitutional order that guarantees comprehensive legal protection of private rights against any act of public authority. Professor Becker lucidly describes the interplay between constitutional norms and administrative law under the Federal Republic's Basic Law.<sup>27</sup> His account leaves little doubt that the forms and formalities of

---

<sup>24</sup> "Constitutional law comes and goes; administrative law is there to stay." Otto Mayer, *DEUTSCHES VERWALTUNGSRECHT*, Band I, 3rd ed., Berlin 1924 (reprint Berlin 1969) Vorwort zur 3. Auflage 1969.

<sup>25</sup> Becker, *supra* note 7, at 464–65. German administrative law is *very* precise about the concept. The theory of *subjektive oeffentliche Rechte* is not a grab bag of entitlements; it is a *system*. See, e.g., the still-canonical treatment: Georg Jellinek, *SYSTEM DER SUBJEKTIVEN ÖFFENTLICHEN RECHTE* (Jens Kersten, ed., Mohr Siebeck 2011).

<sup>26</sup> A justly famous account is ERNST FRAENKEL, *THE DUAL STATE: A CONTRIBUTION TO THE THEORY OF DICTATORSHIP* (1941), written in Fraenkel's exile and published in a later German translation under the title *DER DOPPELSTAAT* (1974).

<sup>27</sup> Becker, *supra* note 7, at 465–72.

Otto Mayer's administrative law helped to make constitutional norms "concrete" in the ordinary administration of justice.

At the same time, constitutionalism did not leave the received body of administrative law unaffected. Professor Becker describes three examples of the "synthesis." The most instructive example for comparative purposes is the principle of proportionality, which requires administrative acts to be not only authorized by law but also "proportional," *i.e.* no more intrusive than is necessary to achieve public purposes.<sup>28</sup> The principle appears to have real bite—more bite, certainly, than the traditional rationality review under British law or the slightly misnamed "hard look" review under U.S. law. And evidently, German scholars agree that the proportionality principle is constitutionally guaranteed and a fundamental element of the rule of law. It is, Professor Becker emphasizes, a *legal* concept.<sup>29</sup>

Professor Tomkins takes a very different view. "Proportionality" migrated from German into EU law and from there into British administrative law, via the 1998 Human Rights Act. The principle is incompatible with British administrative law, Professor Tomkins maintains, because it is *not* a legal concept but rather a determination of reasonableness or public policy—in other words, the kind of public interest determination that belongs to a ministerial bureaucracy accountable to parliament.<sup>30</sup>

Professor Tomkins is unyielding in his insistence on the distinction. British statutory freedom-of-information law provides that when a tribunal or court determines that the public interest requires information in the government's hands to be disclosed, a Cabinet Minister or the Attorney General may override such a decision. The Cabinet Minister or Attorney General must explain the decision to Parliament, and the power has been used on only a handful of occasions. Still: *really?* The hard core of the judicial power, in the common understanding both in the United Kingdom and in the United States, is that judicial determinations of right must not be subject to executive or legislative revision.<sup>31</sup> If Professor Tomkins nonetheless maintains that the override provision is constitutional, that is because in his estimation a court's public interest determination is not a *legal* determination at all.<sup>32</sup>

---

<sup>28</sup> *Id.* at 468–69.

<sup>29</sup> *Id.* at 469.

<sup>30</sup> See Tomkins, *supra* note 3, at 439.

<sup>31</sup> For the U.K., see *id.* at 448–49. For the U.S., see *Plaut v. Spendthrift Farms*, 514 U.S. 211, 218 (1995) ("Congress cannot vest review of the decisions of Article III courts in officials of the Executive Branch."); *Hayburn's Case*, 2 U.S. 409, 410 n.2 (1792). While the principle (finality of judicial decisions; *res judicata* effect vis-à-vis the political branches) is uniformly recognized, its precise reach is somewhat uncertain. For present purposes, though, it seems safe to ignore the complications.

<sup>32</sup> Tomkins, *supra* note 3, at 451. American readers will readily recognize the parallels to the "*Brand X* problem": when a court accepts an agency's "reasonable" interpretation of an ambiguous statute, does an agency's subsequent decision to adopt a different interpretation (by binding rule) amount to a "revision" of the court's judgment? *National Cable & Telecommunications Association v. Brand X Internet Servs.*, 545 U.S. 967, 981–83 (2005); *De Niz Robles v. Lynch*, 803 F.3d 1165, 1167 (10th Cir. 2015)

Not all readers may not wish to go quite so far; for example, one might object that freedom-of-information decisions might also be described as determinations of right. That said, Professor Tomkins has a powerful point. Determinations of proportionality or reasonableness of public action aren't quite legal in the way in which, say, an *ultra vires* ruling or *mandamus* to perform a non-discretionary duty is legal. Administrative acts tend to be *more or less* reasonable or proportional, and it is a good question whether generalist courts are any better at making those calls than a specialized bureaucracy that has some sense of its field of operation and which is accountable to elected officials. That of course is why Professor Tomkins associates "proportionality" with juristocracy and why Messrs. Gasaway and Parrish, writing in a similar vein, lament a regime of judicial review that "relies more on quality-control principles and intuitions of reasonableness than rigorous logic."<sup>33</sup>

Why does Professor Becker seem unperturbed by such concerns?<sup>34</sup> The answer (and here I speculate) may have something to do with the range of Germany's proportionality principle. Judicial review must be available to everyone claiming a violation of his own rights—and to no one else. That proposition is enshrined in Germany's Basic Law.<sup>35</sup> It is enshrined in key provisions of the administrative code.<sup>36</sup> And it appears in each of Professor Becker's careful summaries of the law. Germany's non-delegation doctrine (the *Wesentlichkeitstheorie*, which holds that parliament may not delegate

---

("[*Brand X*] requires this court to defer to the agency's policy choice even when doing so means we must overrule our own preexisting and governing statutory interpretation. Together [with *Chevron*], then, these decisions mean that there are indeed some occasions when a federal bureaucracy can effectively overrule a judicial decision.") (citations omitted); see also *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1143-44 (10th Cir. 2016) ("[A]ccepting that an agency may overrule a court, may it do so not only prospectively but also retroactively, applying its new rule to completed conduct that transpired at a time when the contrary judicial precedent appeared to control?").

<sup>33</sup> Gasaway & Parrish, *supra* note 3, at 390.

<sup>34</sup> The author acknowledges, albeit obliquely, that proportionality review is not quite like administrative law in Otto Mayer's sense: "The idea of a system that prevents the citizen from being subjected to a disproportionate measure can be traced back to the police law and the case law of the Prussian administrative courts." Becker, *supra* note 7, at 468. Note that this is the "constitutional" tradition Mayer tried to transcend; and note further that the Prussian courts were not independent but part of the bureaucracy, precisely because they undertook reasonableness review at the behest of just about anyone who would ask for it. See *id.* at 468-69. The point of the juristic method was that administrative courts must be courts of law, and nothing else. Thus, "[i]t took the Basic Law to transform the principle of proportionality into the universal safeguard it is today." *Id.* at 468.

<sup>35</sup> GRUNDGESETZ, [GG] [BASIC LAW], Art. 19 (4) ("Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. . . .") (emphasis added), translation at [http://www.gesetze-im-internet.de/englisch\\_gg/index/html](http://www.gesetze-im-internet.de/englisch_gg/index/html).

<sup>36</sup> *Verwaltungsgerichtsordnung*, [Code of Administrative Procedure], as amended by Article 5 of the Act of 10.10.2013 (Federal Law Gazette I p. 3786), 1 VwGO §42, online version in English available at [https://www.gesetze-im-internet.de/englisch\\_vwgo/englisch\\_vwgo.html](https://www.gesetze-im-internet.de/englisch_vwgo/englisch_vwgo.html).

“essential” decisions) applies to binding administrative acts that restrict private rights—and to nothing else.<sup>37</sup> And “[t]he principle [of proportionality] binds all governmental action *as long as citizens’ subjective rights are being restricted*.”<sup>38</sup> So long as judicial review remains limited to the context of coercive government interferences with private rights and conduct, proportionality review arguably looks and operates pretty much like strictly legal *ultra vires* review. It serves as a shield against government overreach.

Proportionality review does not appear to operate in that fashion in the United Kingdom. With an undertone of alarm, Professor Tomkins describes the situation as follows:

The law requires that for a claimant to be able to bring a judicial review case, he or she must have a “sufficient interest” in the matter. Over the course of recent years the courts have relaxed this requirement, so that interested parties, pressure groups, and campaigners have been able to use judicial review more and more freely as a means of challenging government policy. . . . [J]udicial review has become a campaign tool, in which the generality of government policy, rather than a specific instance of alleged injustice, is challenged in court. The changing nature of judicial review is compounded by the growing acceptance of third-party interventions . . .<sup>39</sup>

Mind you: that paragraph could have been written, *verbatim*, about the “reformation” of American administrative law some forty-five years ago.<sup>40</sup> The United States has led the way in transforming judicial review of administrative action into an interest group sport. The most famous case of all is tellingly captioned *Chevron v. Natural Resources Defense Council*<sup>41</sup>—as if the agency (and for that matter the reviewing court) were a mere forum for “stakeholders” who wield judicial review not as a shield but as a sword, the better to press divergent but equally legitimate claims of reasonableness and the public interest. *That* form of contestation, not the confrontation between citizens with rights and a government acting with the force of law, has become paradigmatic of administrative law. In this context, proportionality review does indeed become, as Professor Tomkins fears, a warrant for comprehensive judicial superintendence. And scholarly controversies over the scope or standard of judicial review become disconnected from law in any mean-

---

<sup>37</sup> BVerfGE 33, 125 1 BvR 518/62 & 308/64, May 9, 1972, <http://www.servat.unibe.ch/df/bv033125.html>.

<sup>38</sup> Becker, *supra* note 7, at 468. (emphasis added) (footnote omitted).

<sup>39</sup> Tomkins, *supra* note 3, at 423 (footnotes omitted).

<sup>40</sup> See, e.g., Richard B. Stewart & Cass R. Sunstein, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669 (1975).

<sup>41</sup> 467 U.S. 837 (1984).

ingful sense of that word. Whether one wants review to be more or less stringent will depend on one's assessment of the relative competence of courts and agencies, and of their political direction at one time or another.<sup>42</sup>

It is true, of course, that distinctions between law and politics, private and public, rights and the public interest, also underpin the Anglo-Saxon common law and constitutional tradition. (Start the music; cue *Marbury v. Madison*.)<sup>43</sup> Professor Tomkins obviously believes that the distinctions continue to have traction. The bold project proposed by Messrs. Gasaway and Parrish, as I understand it, attempts to rehabilitate them.<sup>44</sup> Both of these programs, though, presuppose a shared sense and conviction that through the confusing landscape of the administrative state and its varied entitlements, there still runs a discernible line that separates common law-ish claims (say, to a license) from inherently public, political claims (say, the right to have agencies follow appropriate procedures,<sup>45</sup> or the right to have the law enforced against third parties).<sup>46</sup> German administrative law reflects and in fact rests on a consensus that claims of the latter sort *cannot* be rights (*subjektive oeffentliche Rechte*) and, if recognized, would bring down the *Rechtsstaat*.<sup>47</sup> It has therefore proven strikingly resistant to the political and ideological challenges that now engulf British administrative law and in the United States have periodically prompted “reformations” and ideologically fraught debates. In a sentence, or two: Germany has managed to constitutionalize a doctrinaire body of administrative law. In what ways and how is that comparable (or easier, or more difficult) to the project of recovering constitutional traditions or of *re*-constitutionalizing a jumble of “one-size-fits-all doctrines

---

<sup>42</sup> In striking contrast to the United States, Professor Tomkins writes, “concern about the increased power of the courts is now found [in the United Kingdom] almost exclusively on the political Right.” Tomkins, *supra* note 3 at 421 (footnote omitted). The contrast is of relatively recent vintage. In the 1980s and well into the 1990s, the orthodox conservative administrative law agenda in the United States was a demand for judicial deference to a “unitary executive.” Aggressive judicial review was the program of the political Left. The combatants have since reversed their positions—manifestly, not for any reasons grounded in the Constitution.

<sup>43</sup> 5 U.S. 137, 163–65 (1803) (explicating the distinction between vested rights and question in their nature political).

<sup>44</sup> See, e.g., Gasaway & Parrish, *supra* note 3, at 390 (urging “independent judicial identification and interpretation of applicable laws coupled with scrutiny of overall administrative judgments that varies in intensity, depending on the constitutional context in which administrative action has been taken. . . . [T]he intensity of judicial scrutiny would vary according to constitutionally grounded distinctions.”) (footnote omitted).

<sup>45</sup> *Calvert Cliffs’ Coordinating Committee, Inc. v. United States Atomic Energy Commission*, 449 F.2d 1109, 1115 (D.C. Cir. 1971).

<sup>46</sup> See, e.g., *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 184–85 (2000).

<sup>47</sup> For extended discussion see Michael S. Greve, *The Non-Reformation of German Administrative Law: Standing to Sue and Public Interest Litigation in West German Environmental Law*, 22 CORNELL INT’L L. J. 197 (1989).

that could accommodate, at least presumptively, review of public right determinations, more intrusive review of private-rights conferrals, and a vast enlargement of administrative power”<sup>48</sup>

Those hard questions appear in sharp light in a comparative perspective, and *only* in that perspective. Do they matter? Asked and answered.

## II. COMMON PROBLEMS, VARYING REPOSES: ENERGY, FINANCIAL INSTITUTIONS, AND CENTRAL BANKS

For more in-depth discussion, we selected three topics that occupy a prominent place on the political agenda both in the United States and in the European Union and its member-states: energy and climate change, financial institutions, and central banks. All three issues are global and international in scope. All pose common problems of vertical and horizontal policy coordination; all test the capacity and adaptability of what one might call ordinary administrative law.<sup>49</sup>

---

<sup>48</sup> Gasaway & Parrish, *supra* note 3, at 393. To put the question in parlance more familiar to political theorists than lawyers, and in an incendiary form: It may be relatively easy to draw distinctions between law and politics, state and society, in a (civil law) system that actually *has* a “State.” The distinctions may be more difficult to sustain under a system in which the *demos* delegates authority to rival branches of government or a parliament. The essays contain hints in that direction. Professor Becker writes:

[T]he distinction between public and private administrative and civil law has been a foundation of German law over the centuries. In recent decades it has become controversial, and it is sometimes dismissed as an ideological construct of the nineteenth century—both because modern-day government features so many “hybrid” forms of public-private action, and because in a democratic system society has become the foundation of the state’s sovereignty. Contrary to such suggestions, however, the Basic Law presupposes and in fact cements the distinction, while stripping it of its historical authoritarian connotations and implications.

Becker, *supra* note 7, at 469 (footnote omitted).

Compare and contrast this account with the contention of Messrs. Gasaway and Parrish that administrative law serves the purposes of fidelity, regularity, and transparency (and in turn republican government’s over-all objective of accountability), quoted *supra* note 8: the functional categories abstract from any categorical distinctions between state and society, sovereign power and private right. Tellingly, the administrative law system that the authors criticize as improvised and disconnected from constitutional logic sailed under precisely the same monikers of fidelity, regularity, transparency, and accountability. *See, e.g.*, Stewart, *supra* note 40, at 1660–70; *see also Calvert Cliffs*, 449 F.2d at 1100 (holding that the purpose of judicial review is to see that “important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy.”).

It may be possible to recover the true constitutional “logic” of the relevant distinctions, as the authors understand them. The suspicion remains that they are hard to extract from a mental universe that seamlessly unites democratic and rule of law notions in an overarching idea of “republican” government.

<sup>49</sup> We do not presume that those issues are somehow representative of administrative law in action. Occupational licensing, workmen’s compensation, and many other administrative law matters of a more domestic and perhaps less contentious nature also merit attention. Comparative studies would surely yield fruitful insights, quite possibly at variance with the surmises sketched in this Introduction. We simply

### A. *Energy and Climate Change*

Both the EU and the U.S. pursue energy and climate environmental policies that require an inordinate amount of both central coordination and member-state cooperation. The American legal and institutional system is widely thought to be ill-adapted to such endeavors. Ambitious policies have been improvised in a contentious, litigious process and under a Clean Air Act that is manifestly ill-suited to the purpose. Europe's regulatory "style" and legal architecture are supposedly more conducive to coherent policymaking and smooth implementation. The essays by Professors Alexander Proelss<sup>50</sup> and James W. Coleman<sup>51</sup> confirm these general impressions, but they also offer intriguing perspectives and unsuspected parallels.

In some respects, the two essays present a study in contrasts. Professor Proelss explains that "the institutions of the EU are generally barred from dealing with 'renegade' Member States that refuse to implement a renewables-oriented energy policy."<sup>52</sup> Instead, they are called upon to harmonize the lead-states' policies with EU requirements regarding state aid and free trade. In diametrical contrast, the U.S. EPA's sticks-and-carrots policies are principally aimed at "renegade," carbon-energy-producing states, and concerns over anti-competitive and protectionist state policies have played virtually no role in the development of climate change policy.<sup>53</sup> Both systems, however, confront the problem of coordinating local demands with central direction. Here as there, the effort has taken on a decidedly executive coloration. Here as there, it has taken forms that strain the boundaries of administrative and perhaps constitutional law.

Professor Proelss provides a lucid account of the tensions between the EU's legal framework and Germany's *Energiewende*, a suite of ambitious policies aimed at de-carbonizing the country's economy.<sup>54</sup> Germany's policies sought to transpose EU climate objectives, embodied in a Renewable Energy Directive and other instruments, into national law. However, while no one doubts Germany's commitment to playing a lead role in fighting climate change, the convoluted scheme of subsidies and surcharges through

---

chose to focus on what one might call administrative law's boundary problems. *Cf. generally* Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841 (2014).

<sup>50</sup> Alexander Proelss, *The Energiewende Under Fire: The Influence of European Union Law on Germany's Climate Policy*, 24 GEO. MASON L. REV. 477 (2017).

<sup>51</sup> James W. Coleman, *Policymaking by Proposal: How Agencies are Transforming Industry Investment Long Before Rules Can be Tested in Court*, 24 GEO. MASON L. REV. 497 (2017).

<sup>52</sup> Proelss, *supra* note 50, at 479.

<sup>53</sup> Lead states such as California are effectively unconstrained by any constitutional impediments to state aid or other forms of parochialism and protectionism. *See, e.g.*, For extended discussion see James W. Coleman, *Importing Energy, Exporting Regulation*, 83 FORDHAM L. REV. 1357 (2014).

<sup>54</sup> Proelss, *supra* note 50, at 479–85.

which the legislature has pursued that path—while shielding domestic producers and consumers against price shocks and other adverse consequences—has raised serious questions as to whether the *Energiewende* complies with EU law regarding the free movement of goods (here: energy) and state aid (*i.e.*, subsidies).

For an American audience it bears emphasizing a point that Professor Proelss, along with every other European Law expert, simply takes for granted: unlike in the United States, the EU’s free movement and state aid provisions are *constitutional*.<sup>55</sup> They have served as principal vehicles for European integration, and they are taken seriously. When those foundational commitments conflict with the EU’s and member-states’ deeply held policy commitments—such as the *Energiewende*—the central authorities confront constitutional dilemmas and difficulties.

Professor Proelss’ essay suggests that the EU authorities adopted a policy of “bend, don’t break.” The ECJ held that while territorially limited subsidy schemes of the kind Germany has adopted would generally be prohibited as non-tariff barriers to trade, such interferences are justifiable in light of the legitimate objective to promote the use of renewable energy sources.<sup>56</sup> Similarly, the European Commission essentially “saved” the *Energiewende* despite grave legal doubts.<sup>57</sup>

The “give” at one end, though, appears to have been accompanied by a “take” at the other. In 2014, the Commission proposed a comprehensive set of guidelines on state aid for environmental protection and energy, setting out the conditions under which aid for energy and environment may be considered compatible with the internal market under the European Treaties.<sup>58</sup> While the Commission is charged with supervising member-states’ compliance with EU state aid requirements and restrictions, it does *not* have authority to authentically interpret the provisions of the European Treaties. Even so, member-states disregarding the guidelines will face the risk to be brought

---

<sup>55</sup> Consolidated Version of the Treaty on the Functioning of the European Union art. 45(1), May 9 2008, 2008 O.J. (C 326) 65 [hereinafter TFEU] (freedom of movement); TFEU arts 107, 108 (economic aid); TFEU art. 210 (humanitarian aid).

<sup>56</sup> Proelss, *supra* note 50, at 485–86 (discussing *PreussenElektra*, Case C-379/98, *PreussenElektra AG v. Schleswag AG*, 2001 E.C.R. I-2159, Decision of 13 March, 2001, <http://curia.europa.eu/juris/showPdf.jsf?jsessionid=9ea7d2dc30d5ae2dec7169547f19154d780624b8b2b.e34Kax-iLc3qMb40Rch0SaxyKaNb0?text=&docid=45891&pageIn-dex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=171109>).

<sup>57</sup> Proelss, *supra* note 50, at 489.

<sup>58</sup> C(2014) 5081 Final, State Aid SA.38632 (2014/N)—Germany EEG 2014—Reform of the Renewable Energy Law, European Commission ¶ 192 (July 23, 2014), [http://ec.europa.eu/competition/state\\_aid/cases/252523/252523\\_1589754\\_142\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/252523/252523_1589754_142_2.pdf); C(2014) 8786 Final, Commission Decision of November 25, 2014 on the Aid Scheme S.A. 33995 (2013/C) (ex 2013/NN) [implemented by Germany for the Support of Renewable Electricity and of Energy-Intensive Users], European Commission ¶ 140 (Nov. 25, 2014), [http://ec.europa.eu/competition/state\\_aid/cases/251153/251153\\_1609393\\_4127\\_2.pdf](http://ec.europa.eu/competition/state_aid/cases/251153/251153_1609393_4127_2.pdf).

before the ECJ by the Commission. Irrespective of their lacking binding effect, the guidelines can thus potentially be relied upon by the Commission as a mechanism for implementing a binding regulatory policy. That course of action, Professor Proelss warns, may come to upset the inner-European institutional balance, conflict with principles of democracy and the rule of law, and interfere with the member-states' sovereign powers.<sup>59</sup>

Closely analogous concerns take center stage in James W. Coleman's bracing essay. Industries with long investment horizons, Professor Coleman explains, must plan and "invest for compliance" not only with existing but also with *proposed* agency rules and regulations—even when the firms fully intend to contest those rules in court, and even when they can expect to prevail.<sup>60</sup> In such situations, the EPA can achieve most of its objectives simply by proposing a rule. Regulated industries, especially utilities that are subject to state approval of their rates, will invest preemptively for compliance; and "by the time that these industries can overturn a regulatory initiative in court they will have no incentive to unwind previously approved investments."<sup>61</sup> Professor Coleman demonstrates that the agency has exploited this dynamic to pursue bold policy objectives at the outer limits of its statutory authority, and perhaps beyond those limits. In fact, rulemaking by proposal seems to have a transformative, rather perverse logic: the more tenuous the agency's legal footing, the more aggressive its initial policy proposal will be.<sup>62</sup>

Both authors, then, describe the same problem of central direction and superintendence by institutional means that break with conventional forms of administrative and perhaps constitutional law. And both authors converge on the same policy prescription: increased judicial scrutiny. Professor Proelss urges the ECJ to ask whether "the guidelines and their application by the Commission go beyond what is necessary to enable effective supervision of State aids. . . . to take a critical stance towards the guidelines being used in a manner that treats them as a legally binding document, and . . . indirectly safeguards the Member States' broad powers on the field of energy policy."<sup>63</sup> Similarly, Professor Coleman urges the courts to curb rulemaking-by-proposal by entertaining industry and state prayers for prompt relief more readily and by exercising more robust judicial review.<sup>64</sup> Both essays, though, leave some doubt about the courts' capacity to stem unorthodox forms of agency action that appear rooted in very fundamental policy commitments and incentives.<sup>65</sup>

---

<sup>59</sup> Proelss, *supra* note 50, 493–94.

<sup>60</sup> Coleman, *supra* note 51, at 499.

<sup>61</sup> *Id.* at 500.

<sup>62</sup> *See id.* at 503–15; *see also id.* at 504 (EPA's clean power proposals were "designed . . . to threaten any realistic proposal for a new or modified coal power plant with legal ruin").

<sup>63</sup> Proelss, *supra* note at 50, at 494–95.

<sup>64</sup> Coleman, *supra* note 51, at 520–25.

<sup>65</sup> Professor Coleman makes the point explicit. *Id.* at 501 ("[T]here is little reason to think that [the Supreme] Court alone can police agencies' abuse of their power to set the agenda for industry investment."); *id.* at 525–31 (urging legislation providing for an automatic stay).

A broader question is whether the unconventional practices described so compellingly by the authors represent a kind of climate change exception to established principles of EU and U.S. law—or whether they are emblematic of broader, trans-substantive tendencies. Professor Coleman’s essay suggests the latter interpretation. Professor Proelss’s essay suggests potentially fruitful comparisons to regulatory arenas where the EU confronts comparable difficulties in harmonizing policy under high-stress conditions, such as financial regulation.

### B. *Financial Regulation*

After the 2008-2009 financial crisis, both Europe and the U.S. ramped up regulatory authorities’ rulemaking, oversight, and enforcement. On both sides of the Atlantic, the effort spawned novel institutional, administrative, and legal arrangements. At the same time, the crisis impressed upon financial regulators the need for increased international coordination and cooperation. David Zaring’s intriguing essay on “The Next Financial Crisis”<sup>66</sup> focuses on the international dimension. Christopher C. DeMuth and Michael S. Greve<sup>67</sup> examine a prominent aspect of the domestic U.S. landscape: the explosive growth of financial settlements. Over both essays hovers the common question of how much law can still be had in financial regulation.

Professor Zaring asks the question point-blank. The response to the 2008-2009 crisis, he writes, makes one wonder whether there is “any hope for legal constraint in what will surely be an international effort requiring coordination between domestic regulators and politicians in a tense, fast-moving situation.”<sup>68</sup> Crisis response aims at cost minimization. On the last go-around, much of it was managed by the G-20 and by central banks. Central banks generally operate outside the normal constraints of administrative law, and their crisis responses are largely transactional and discretionary. Professor Zaring expects central banks to remain different from an effort to oversee financial institutions (as distinct from making loans to them). However, he also expects their interventions to evolve into increasingly predictable customs. Moreover, he describes with admirable clarity a growing, increasingly dense regulatory network to establish and enforce improved capital standards, procedures for resolution next time, and other matters.<sup>69</sup> The hallmarks of this network—political supervision, increasingly regularized output, and bureaucratic order—are the fundamentals of administrative law.

---

<sup>66</sup> David Zaring, *The Legal Response to the Next Financial Crisis*, 24 GEO. MASON L. REV. 533 (2017).

<sup>67</sup> Christopher DeMuth, Sr. & Michael S. Greve, *Agency Finance in the Age of Executive Government*, 24 GEO. MASON L. REV. 555 (2017).

<sup>68</sup> Zaring, *supra* note 66, at 536.

<sup>69</sup> *Id.* at 538–41.

Thus, “[i]nternational financial regulation is looking increasingly like an administrative agency stretched into a global multilateral context.”<sup>70</sup> The system is “meant to do the sort of work that public international law does: create a structure that can facilitate international cooperation and minimize conflict and beggar-they-neighbor policymaking.”<sup>71</sup>

Messrs. DeMuth and Greve address the very different topic of agency self-finance, especially through U.S. enforcement agencies’ financial settlements with regulated industries. Such settlements, they note, have become substantial revenue sources for governments at all levels.<sup>72</sup> They appear prevalent in industries that enjoy close relations with regulatory authorities, including pharmaceutical firms, health insurers, and defense contractors. But the authors note that multi-billion-dollar settlements are particularly common in the financial sector, and their data show that the frequency and the amounts of such settlements increased sharply in the aftermath of the 2008-2009 financial crisis.<sup>73</sup> Declining to attribute the phenomenon to a sudden outbreak of corporate criminality in a closely supervised industry, the authors suggest varying explanations that revolve around considerations of political economy—that is, the monetary and institutional incentives of public and private actors. Those incentives, they strongly suggest, have generated departures from administrative and even constitutional norms and conventions, foremost including the legislature’s power of the purse.<sup>74</sup>

For all their obvious differences, the two essays raise a number of common, interrelated questions—all subjects of a voluminous, often highly specialized economic literature, but surely worth further investigation by legal scholars. One set of concerns revolves around the question of whether law-ish structural mechanisms and institutional practices actually do what they are supposed to be doing: curb hazardous behavior; increase systemic stability; establish an institutional framework to better manage the next, sure-to-come crisis. A second question concerns the relation between governments and regulated financial institutions. Messrs. DeMuth and Greve ask (but do not answer) whether financial settlements might to be a form of “crony capitalism” or “adversarial corporatism”: an unholy matrimony between the state and industries that are private in name only, thinly disguised by a bilateral show of enmity.<sup>75</sup> The same question can be asked about the system described by Professor Zaring: are we actually looking a system of global, networked *governance* that maintains some distance from financial institu-

---

<sup>70</sup> *Id.* at 539 (footnote omitted).

<sup>71</sup> *Id.* at 542.

<sup>72</sup> DeMuth & Greve, *supra* note 67, at 568–73.

<sup>73</sup> *Id.* at 572–73, 590 (Appendix 1).

<sup>74</sup> *Id.* at 567–68.

<sup>75</sup> *Id.* at 579, 586.

tions—or, as neo-Marxists would have it, a globalized system of *Finanzkapitalismus* that does the bankers' bidding?<sup>76</sup> A third question concerns the interplay between domestic and emerging international arrangements. For example, the enforcement and settlement practices pioneered by the U.S. have gone global in the wake of the 2008-2009 crisis, raising both legal and financial concerns.<sup>77</sup> Conversely, international commitments interact—at least in the United States—with a regulatory system that already operates at some remove from the forms and formalities of ordinary administrative law.<sup>78</sup> Let's stipulate to a premise of increased interpenetration: how *exactly* do the dynamics work, and what do they portend in terms of sensible, lawful governance?

A final question, most closely related to the symposium theme, is the one flagged earlier: can any *law* be had in this venue? The two essays have an empirical orientation, and they have purchase on that account. “[Y]ou could call it law, law-ish, governance, soft law, or whatever you like,” Professor Zaring writes of the “legal-ish structure” he describes, “but given that it involves regulators regulating, and rules being issued through an administrative procedure, there is little point in deeming it not-law or ignoring it.”<sup>79</sup> Messrs. DeMuth and Greve for their part proffer “a perspective on the administrative state *in actual operation*, as distinct from its appearance in agency pronouncements, court decisions, and law reviews and textbooks with their heavy emphasis on doctrine.”<sup>80</sup> Even so, the authors are fully cognizant of the lurking “law” question. Professor Zaring acknowledges “that the rule of law embodied by global financial regulation has few of the formal characteristics of the rule of domestic law.”<sup>81</sup> And Messrs. DeMuth and Greve

---

<sup>76</sup> See, e.g., RUDOLF HILFERDING, *DAS FINANZKAPITAL* (1910) [RUDOLF HILFERDING, *FINANCIAL CAPITAL*]; MICHAEL HUDSON, *FINANCE CAPITALISM AND ITS DISCONTENTS* (2013).

<sup>77</sup> See, e.g., *2016 Mid-Year Update on Corporate Non-Prosecution Agreements (NPAs) and Deferred Prosecution Agreements (DPAs)*, GIBSON, DUN, & CRUTCHER, LLP 12 (July 6, 2016), <http://www.gibsondunn.com/publications/documents/2016-Mid-Year-Update-Corporate-NPA-and-DPA.pdf>; Mara Lemos Stein, *Judges Play Big Role in UK Deferred Prosecution Agreements*, WALL ST. J. (Sept. 26, 2016), <http://blogs.wsj.com/riskandcompliance/2016/09/26/judges-play-big-role-in-uk-deferred-prosecution-agreements/?cb=logged0.6276722302135482>; Aruna Viswanatha, Jenny Strasburg, & Eyk Henning, *Deutsche Bank is Asked to Pay \$14 Billion to Resolve U.S. Probe Into Mortgage Securities*, WALL ST. J. (Sept 16, 2016), <http://www.wsj.com/articles/deutsche-bank-is-asked-to-pay-14-billion-to-resolve-u-s-probe-into-mortgage-securities-1473975404> (noting that “European banks are already thin on capital and slogging through job cuts and restructuring.”).

<sup>78</sup> Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 691–92 (2013); Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS. 129, 146 (2015).

<sup>79</sup> Zaring, *supra* note 66, at 536.

<sup>80</sup> DeMuth & Greve, *supra* note 67, at 558.

<sup>81</sup> Zaring, *supra* note 66, at 541.

insist that their inquiry “bears on many of the central themes of administrative and constitutional law,” such as delegation, the power of the purse, and the separation of powers.<sup>82</sup>

A widely shared view, buttressed by numerous accounts of the 2008-2009 crisis, is that under acute crisis conditions, few if any legal constraints can be had.<sup>83</sup> A less-widely-shared but realistic view urges resistance to clamorous demands to “prevent the next financial crisis,” because it *will* happen again.<sup>84</sup> The better question may be whether legal regimes can and should simply recognize the inevitability and “revert to normal” as soon as possible; or whether each post-crisis response should but in any event almost certainly will normalize previously unacceptable institutional practices. The essays suggest that the answers—both in the normative and the positive dimension—may depend on the context.<sup>85</sup> Acknowledging rule of law and other misgivings about the emerging system of global financial regulation, Professor Zaring deems it an improvement over the alternatives of pure, unguided discretion or naked panic, a point that seems difficult to contest.<sup>86</sup> In contrast, Messrs. DeMuth and Greve write and argue and speculate against the backdrop of a domestic alternative that remains available in principle: an established constitutional order. To the extent that that order retains currency, “law-ish” forms of conduct, even and especially in conformity with international practices, will remain suspect.

### C. *Central Banks*

Central banks are bureaucracies and “part of the administrative state,”<sup>87</sup> Marco Goldoni<sup>88</sup> and Peter Conti-Brown<sup>89</sup> observe in their essays on the European Central Bank (ECB) and the Federal Reserve Board (“the Fed”) respectively. To that extent one would expect them to be subject to the ordinary strictures of administrative law. Obviously, though, central banks are very special and peculiar bureaucracies. Owing to their roles as, well, *banks* and

---

<sup>82</sup> DeMuth & Greve, *supra* note 67, at 559.

<sup>83</sup> For an excellent, nuanced discussion see generally, PHILIP A. WALLACH, *TO THE EDGE: LEGALITY, LEGITIMACY, AND THE RESPONSES TO THE 2008 FINANCIAL CRISIS* (2015).

<sup>84</sup> See generally CARMEN M. REINHARD & KENNETH S. ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2011).

<sup>85</sup> See DeMuth & Greve, *supra* note 67, at 583–87; Zaring, *supra* note 66, at 546–49.

<sup>86</sup> Zaring, *supra* note 66, at 536. However, it is not *impossible* to contest. For example, if the emerging system of governance were shown to increase global risks, less of it might be better.

<sup>87</sup> Peter Conti-Brown, *Ulysses and the Punch Bowl: The Governance, Accountability, and Independence of the Federal Reserve*, 24 *GEO. MASON L. REV.* 595, 618 (2017).

<sup>88</sup> Marco Goldoni, *The Limits of Legal Accountability of the European Central Bank*, 24 *GEO. MASON L. REV.* 613 (2017).

<sup>89</sup> Conti-Brown, *supra* note 87. See also PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* (2016).

as guardians of a stable currency the ECB and the Fed enjoy far greater independence from both democratic and legal checks than any other bureaucracy. In the EU, the ECB has enjoyed constitutionally protected independence ever since the Treaty of Maastricht and the creation of the Euro.<sup>90</sup> In the U.S., the Fed's independence is in Professor Conti-Brown's commendably nuanced account a function of a century-old statute (the Federal Reserve Act of 1913), institutional conventions, political alignments, and other infra-constitutional forces and factors.<sup>91</sup>

Due to these very different arrangements, the contributors address very different issues. Professor Goldoni discusses the relation between the European Court of Justice (ECJ) and the ECB, especially the Court's *Pringle*<sup>92</sup> and *Gauweiler*<sup>93</sup> decisions in the wake of the "Euro crisis."<sup>94</sup> Professor Conti-Brown declines to even mention the courts, for the excellent reason that they have had exceedingly little to do with the Fed; his focus instead is on questions of agency design and culture. Barely beneath the surface, though, lies a common theme: central bank "mission creep" beyond the guarantee of currency stability—a tendency that since 2008 appears to have accelerated into a trot, if not a gallop.

Professor Goldoni compellingly describes the ECB's transformation from an already powerful independent central bank into a potent constitutional actor that "together with the [European] Commission and the [IMF], and outside the framework of EU law, co-dictates certain policies and then supervises their application by the Member State subject to the program."<sup>95</sup> In addition, the ECB has been given new tasks of supervision in the recently enacted European Banking Union. Professor Goldoni argues that political actors (with the notable exception of Germany's *Bundesbank*) aided and abetted the ECB's transformation in the interest of maintaining the Euro as a common currency, at considerable cost to the rule of law, the institutional balance established by the European Treaties, and the economies of effectively insolvent member-states.<sup>96</sup> Pre-Euro crisis, the ECJ actually rejected ECB claims of total autonomy; post-crisis, "it has shown a remarkable level of deference"—foremost, in adopting an a-textual, purposive and teleological reading of the no-bailout clause of the European Treaties, thus permitting

---

<sup>90</sup> Goldoni, *supra* note 88, at 596–97.

<sup>91</sup> Conti-Brown, *supra* note 87, at 621–21.

<sup>92</sup> Case C-370/12, *Pringle v. Gov't of Ireland*, ECLI:EU:C:2012:756.

<sup>93</sup> Case C-62/14, *Gauweiler v. Deutscher Bundestag*, EU:C:2015:7.

<sup>94</sup> Goldoni, *supra* note 88, at 606–15.

<sup>95</sup> *Id.* at 601. Goldoni notes that the ECB also "negotiate[es] economic policy and monitoring compliance with adjustment programs to the level of detail where it is dictating the opening hours of bakeries." *Id.* at 614 (quoting Michael Wilkinson, *The Euro Is Irreversible! . . . Or is it?: On OMT, Austerity and the Threat of "Grexit"*, 16 GER. L. J. 1041, 1058 (2015)).

<sup>96</sup> Goldoni, *supra* note 88, at 606–07.

the ECB to engage in broad schemes of stealth re-finance of banks and sovereigns and, subsequently, to conduct massive interventions in financial markets.<sup>97</sup>

Professor Conti-Brown likewise observes that the Federal Reserve has acquired tasks and functions well beyond the maintenance of a stable currency (and full employment), especially after 2008.<sup>98</sup> The dimension of the problem appears less daunting in the U.S. than in the EU. The crisis in the EU was constitutional in every sense in the word: the very survival of the EU was at stake. Still, the impending collapse of the financial system in 2008-2009 prompted unprecedented Fed interventions and, as in the EU, a substantial expansion of the Fed's portfolio into regulatory, supervisory, and inter-agency tasks.

Both authors urge pragmatic reforms, tailored to the different situations. Professor Goldoni pleads for more robust proportionality review of the ECB's decisions.<sup>99</sup> Professor Conti-Brown urges institutional governance reforms conducive to "a central bank that will protect the currency from the winds of electoral politics, without losing the benefits of democratic legitimacy and without indulging the myth that all central bank policy is purely technocratic."<sup>100</sup> The authors are not just splendid scholars but also good soldiers: in the interest of maintaining a coherent conference theme, they were *told* to focus on the administrative law aspects of central bank governance. Still, the two fine essays highlight the question of how much (administrative) law and pleas to normalize central banks' operations can actually do. Once the EU's hard-bargained-for, supposedly sacrosanct no-bailout clause was effectively cast aside, it seems inconceivable that even the most resolute court would seriously question a central bank's decisions for want of proportionality, all the more so because the review comes long after the fact. It seems equally inconceivable that governance reforms might abate the Fed's increased dominance over the U.S. economy, or for that matter the world's.

The authors are well aware of the large looming questions.<sup>101</sup> Somewhat perplexingly, central banks have acquired their new powers despite vehement political headwinds in the form of rising populism and distrust of government by experts. It is hard to shake the suspicion that those paradoxical tendencies go together. It is equally hard to shake the suspicion that central banks, no less than chief executives and perhaps more so, have come to present the ultimate conundrum of administrative law: the power and prerogative to act

---

<sup>97</sup> *Id.* at 608.

<sup>98</sup> Conti-Brown, *supra* note 87, at 625.

<sup>99</sup> Goldoni, *supra* note 88, at 615-16.

<sup>100</sup> Conti-Brown, *supra* note 87 at 631-32.

<sup>101</sup> *E.g., id.* at 621 ("The standard account of Fed independence . . . doesn't work when politicians whip up popular sentiment in favor of taking away the punch bowl—precisely the opposite of what we expect in a democracy. It doesn't work when the central bankers make headlines not for being boring chaperones [of the national currency] but for bailing out the financial system."); Goldoni, *supra* note 88, at 600-02.

outside, without, or even against the law. “Whatever it takes” is the declared policy of the ECB<sup>102</sup> and the *de facto* policy of the Federal Reserve and other central banks. It is not easily reconciled with more conventional notions of representative government.

#### CONCLUSION

It is appropriate to conclude on a note of gratitude to the authors and a final thought on the state and direction of the administrative law debate. In the United States, it is fair to say, the debate over “the administrative state”—a poorly and often un-defined term of convenience—has been short on empirics and perspective. It has been lamentably long on dramatic claims, partisan rancor, and arcane doctrinal quarrels that serve as placeholders for a grim clash of convictions.<sup>103</sup> Gaining any kind of distance from those passionate engagements is a challenge for the most judicious scholars, judges, and practitioners. The essays in this volume aid that effort in two ways. First, a *comparative* administrative law inquiry provides a wider perspective and food for further, deeper reflection and inquiry. Second, all essays in this volume are unified by an overarching spirit of serious engagement with profound questions of lawful government. All recognize the urgency of those questions; none succumb to the temptation of technocratic answers. All are opinionated, and some may provoke strong reactions; none provides ammunition for partisan administrative lawfare on one side or another. It is our fond hope that this volume will help to create more common and solid ground for the debate over the administrative state and its law.

---

<sup>102</sup> Mario Draghi, President of the European Central Bank, Speech at the Global Investment Conference in London (July 26, 2012), <https://www.ecb.europa.eu/press/key/date/2012/html/sp120726.en.html>.

<sup>103</sup> See, e.g., Cass R. Sunstein & Adrian Vermeule, *The Unbearable Rightness of Auer*, 84 U. CHI. L. REV. (forthcoming, 2017) (manuscript at 3), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2716737](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2716737) (arguing that debate over so-called *Auer* deference reflects far more basic contentions).