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2016

## Notes from the Border: Writing Across the Administrative Law/ Financial Regulation Divide

Robert B. Ahdieh

*Texas A&M University School of Law*, [ahdieh@law.tamu.edu](mailto:ahdieh@law.tamu.edu)

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### Recommended Citation

Robert B. Ahdieh, *Notes from the Border: Writing Across the Administrative Law/Financial Regulation Divide*, 66 J. Legal Educ. 64 (2016).

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## Notes from the Border: Writing Across the Administrative Law/Financial Regulation Divide

Robert B. Ahdieh

A central feature—if not the central feature—of legal scholarship today is analysis across divides.

It is perhaps surprising, then, how little has been written across the seemingly thin divide that separates administrative law and financial regulation. To be sure, the cross-fertilization of administrative law and financial regulation scholarship and practice is not without its challenges—including a number grounded in the self-reinforcing norms and expectations of legal academia. Such norms can change, however, and they should.

The benefits of increased engagement across the administrative law/financial regulation divide are substantial. Consider the various other occasions for analysis across divides that define legal scholarship today: interdisciplinary studies, comparative law, legal history, and even the common law method writ large.

Over the past fifty years, interdisciplinary study—the analysis of questions across the divide between disciplines—has come to dominate legal scholarship. Law and economics has been described as “the most successful intellectual movement in the law of the past thirty years.”<sup>1</sup> From a few scholars, at a few schools, writing on a few subjects, it has established its place in nearly every field, at nearly every law school in the United States, and even overseas. But law and economics is far from unique in that regard.

Starting from the seminal work of Lawrence Friedman, Marc Galanter, Stewart Macaulay, David and Louise Trubek, and others, the study of law and society has enjoyed similarly wide—if distinct—influence. Law and psychology, law and politics, and law and philosophy have each secured a wide following as well. The “law and . . .” movement thus captures much of the history of legal

**Robert B. Ahdieh** is Vice Dean and K.H. Gyr Professor of Private International Law at Emory University School of Law. He thanks David Zaring and participants in the *Journal of Legal Education*'s symposium, *The Future of Legal Scholarship*, and the Administrative Law Discussion Forum.

1. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT* 216 (2008).

scholarship over the past half-century<sup>2</sup>—and arguably represents the dominant approach to legal scholarship today.

Long before the rise of interdisciplinary studies, comparative law scholars can be understood to have engaged in an analogous exercise. No less than scholars of law and economics or law and psychology, comparativists sought insight in analyzing questions across relevant divides. Their divides were simply ones of geography, rather than disciplines. If one hopes to understand the role of consideration in our common law system—as I tell my contracts students—one might find greater insight in the absence of that doctrine in civil law jurisdictions than anywhere else.

The work of legal historians might be framed in a similar light. Rather than a geographic divide, however, the scholar of legal history seeks insight across divides of a temporal nature. Our understanding of modern-day admiralty law is thus significantly enhanced by reference to the *lex mercatoria* and even Roman law.

One might even understand doctrinal legal scholarship to turn on analysis across divides of a sort. The essence of the common law—and of scholarly analysis of it—is the task of distinguishing cases. It is precisely in the distinctions among cases—in relevant divides—that common law reasoning finds opportunity for doctrinal evolution.

Legal scholars do not lack appreciation, then, of the utility of analysis across divides. The absence of such analysis in the study of administrative law and financial regulation is thus something of a mystery. Perhaps especially so, given the modest nature of the relevant divide: one that is *intra-* rather than interdisciplinary, one that operates *within* rather than across geographic boundaries, and one that involves no temporal dimension but operates entirely within current-day law.

For all the proximity in their interests, targets of study, and even analytical tools, however, scholars of administrative law and of financial regulation (including securities regulation, in particular) have shown strikingly little interest in one another. Analysis across this narrow divide has been all but nonexistent; scholars of each discipline rarely read one another, cite one another, or even talk to one another.

To engage this peculiar lacuna in the legal literature, this essay proceeds in four stages. First, I review the history of the divide, as well as recent efforts to bridge it. Second, I outline core characteristics of the divide: the two fields' distinct motivations, divergent assumptions about the market, and particular limitations. With a clearer picture of the nature of the divide, I suggest some of the insights that might be gained from engagement across it. Finally, I conclude by acknowledging the challenges attendant to writing across the administrative law/financial regulation divide—while also highlighting the need to overcome those challenges.

2. Critical legal studies is perhaps the most important exception.

### **History of the Administrative Law/Financial Regulation Divide**

Notably, the divide between administrative law and financial regulation cannot be traced to the genesis of each body of law—or to the scholarly work that initially emerged around them. To the contrary, during the New Deal, the overlap of administrative law and financial regulation was substantial.

That overlap began with the centrality of the financial markets—and the need to regulate them more effectively—as key drivers in the emergence of the administrative state. Financial regulation can thus be understood as a critical impetus for the elaboration of a law and jurisprudence of government administration. Agencies oriented to financial regulation were among the first administrative agencies, meanwhile, and among the most important ones established during the New Deal.<sup>3</sup> The engagement of federal regulation with state law also saw some of its earliest manifestations in the realm of financial regulation, including with reference to state Blue Sky Laws.<sup>4</sup>

The close connection between the study/practice of administrative law and financial regulation in the early days of each field might be seen even more vividly in the career of James Landis. A professor of legislation at Harvard Law School, Landis was invited to Washington at the urging of Felix Frankfurter, to help draft what became the Securities Act of 1933. Upon establishment of the Securities and Exchange Commission the following year, Landis was appointed a member, and subsequently as its second chairman.

Landis is equally well-known, however, as author of *The Administrative Process*—drafted during his tenure as chairman of the Commission and published immediately after, when he stepped down to become the Dean of Harvard Law.<sup>5</sup> From the date of its publication and for decades thereafter, Landis's work stood as the leading defense of the rise of the administrative state. Further, it heavily influenced the design of the Administrative Procedure Act—the core framework of administrative law to this day.

In subsequent years, however, the disciplines drifted apart. No single explanation accounts for the shift, but a number of contributing factors might be identified. Gillian Metzger, to begin, points to the changed focus of federal rulemaking in the 1960s and 1970s. In its origins, economic regulation—utility regulation, ratemaking, common carrier rules, entry controls, and the like—represented the primary content of federal regulation. Over time, however, environmental and health risks, among other social concerns, emerged as alternative—and even dominant—areas of focus. With that shift, scholars of administrative law increasingly found themselves in conversation with their

3. The Office of the Comptroller of the Currency was established in 1863, and the Federal Reserve System in 1913. Two of the earliest and most significant New Deal administrative agencies, meanwhile, were the Federal Deposit Insurance Company (1933) and the Securities and Exchange Commission (1934).
4. See Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 25-29 (1998).
5. See JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938).

public law colleagues. Scholars of financial regulation, by contrast, gravitated to the private side of the academic house, engaging their business law colleagues.

Another likely factor behind the growing divide was the pattern of increased specialization in legal scholarship generally.<sup>6</sup> The strong emphasis on ensuring independence in financial regulation—in some contrast with the emphasis of administrative law on accountability—may also have been important.<sup>7</sup> To related effect may have been the greater role of internal and political checks in financial regulation, as manifest in its reliance on multimember commissions and distinct interest-group dynamics.<sup>8</sup> Following directly from those differences, in turn, was each field's distinct approach to judicial review.<sup>9</sup>

One might also consider a more fundamental reason scholars of administrative law and financial regulation might have gone their separate ways. The fields are, in a sense, engaged with fundamentally different questions. Administrative law focuses on question of process, separate and apart from any given area of law. Financial regulation, by contrast, is one such substantive area of law—akin to environmental law, workplace health and safety law, and the like. As obvious as that contrast might seem, however, it cannot alone explain the sharp divide in the study of administrative law and financial regulation. Scholars of substantive environmental law and workplace health and safety law thus engage regularly with scholars of administrative law. Not uncommonly, in fact, they are the same people.

Whatever the precise origins of the administrative law/financial regulation divide, recent engagement across it may suggest it can be bridged. For the most part, such engagement has not been explicit. Rather, it emerges in the work of scholars conversant in both bodies of law, some of whose writing looks to one of the relevant literatures in attempting to engage the other.

David Zaring's scholarship may be most notable in that regard. In work on the appropriate level of transparency in financial regulation, for example, Zaring has drawn on insights from administrative law.<sup>10</sup> Conversely, exploring the impact of globalization on administrative law, he has taken lessons from the experience of financial regulation.<sup>11</sup> Analogously, some of my own work—

6. See David K. Levi & Mitu Gulati, "Only Connect": *Toward a Unified Measurement Project*, 58 DUKE L.J. 1181, 1182 (2009) (noting increased specialization of legal scholarship).
7. 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. 129, 130 (2015).
8. See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 610 (2010); Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2042-49 (2014).
9. See Robert B. Ahdieh, *Reanalyzing Cost-Benefit Analysis: Toward a Framework of Function(s) and Form(s)*, 88 N.Y.U. L. REV. 1983, 2004 (2013); Metzger, *supra* note 7, at 133.
10. See David Zaring, *Free Trade Through Regulation?*, 89 S. CAL. L. REV. (forthcoming 2016).
11. See David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U.L. REV. 59, 94 (2013); see also David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187 (2010).

including on the Securities and Exchange Commission's construction of a National Market System and on monetary policymaking by the Federal Open Market Committee—has sought to engage both bodies of scholarly work.<sup>12</sup> Scholarly analysis of the extension of cost-benefit analysis to financial regulation in recent years might also be cited in this regard.<sup>13</sup>

Of late, moreover, scholars have begun to engage the divide more explicitly. In *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, Gillian Metzger highlights differences in the focus of each discipline and the institutions that characterize it, as well as the ways in which the global financial crisis may have helped to draw them closer together.<sup>14</sup> Responding to Metzger's analysis, Tom Merrill has questioned the viability of meaningful analysis across the administrative law/financial regulation divide, let alone closer alignment in relevant regulatory practices—given what he describes as the “quicksilver” problem in financial regulation.<sup>15</sup> Jacob Gerson, finally, cites the financial crisis as the source of significant shifts in our framework of administrative law—to embrace a role for so-called “superagencies,” to encourage what he terms a “web of jurisdiction” approach to agency authority, and to increase reliance on statutory deadlines to shape agency action.<sup>16</sup>

The scope of this recent engagement should not be overestimated, however. By way of a bit of loose empiricism, I conducted a quick search of Westlaw's database of journals and law reviews (JLR) for articles with “securities regulation,” “securities law,” or “financial regulation” in the title, and found 1133 pieces.<sup>17</sup> Among those, only *sixty-five* included any textual reference to the basic administrative law terminology of “notice and comment” or “arbitrary and capricious.” Whatever might have been read into that small number a decade ago, one might have expected to find more today—some five years after a seminal ruling of the D.C. Circuit on the arbitrary and capricious nature of a highly visible Dodd-Frank Act rulemaking by the Securities and Exchange Commission.<sup>18</sup>

12. See Robert B. Ahdieh, *From FedSpeak to Forward Guidance: Regulatory Dimensions of Central Bank Communications*, 50 GA. L. REV. 213 (2015); Robert B. Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215 (2004).
13. See Ahdieh, *supra* note 9; John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE. L.J. 882 (2015); Jeffrey N. Gordon, *The Empty Call for Benefit-Cost Analysis in Financial Regulation*, 43 J. LEGAL STUD. S351 (2014).
14. Metzger, *supra* note 7.
15. Thomas W. Merrill, *A Comment on Metzger and Zaring: The Quicksilver Problem*, 78 LAW & CONTEMP. PROBS. 189 (2015).
16. Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689 (2013).
17. Search by author in Westlaw's JLR database (June 28, 2016).
18. *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

### Nature of the Administrative Law/Financial Regulation Divide

Whatever the historical origins and future of the administrative law/financial regulation divide, it is useful to understand its key characteristics today. Consider three critical points of differentiation: First, what motivates each field of law—and the scholarly analysis thereof? Second, what are the assumptions about the market against which each field operates? Finally, what constraints does the regulatory project face in each field? However much our answers might change over time, significant differences might be identified today, across each of these areas.

#### *Motivations/Goals*

Central to the project of administrative law are the intertwined goals of transparency and accountability. With the delegation of significant regulatory, adjudicatory, and enforcement authority to unelected agency officials, the Administrative Procedure Act, the jurisprudence that has emerged around it, and the associated scholarly literature have sought to define appropriate limitations on agency power.<sup>19</sup> In particular, Congress, the judiciary, and the academy have called for significant transparency in agencies' procedures and sought to hold them accountable for their actions through both judicial and political review—the former imposed explicitly and the latter encouraged and facilitated, including by way of enhanced transparency.<sup>20</sup>

In financial regulation as well, one might find some emphasis on transparency and accountability. Some meaningful interest in fealty to statutory text—or at least to those texts that offer some meaningful degree of precision—might be seen to reflect those goals. One might also see them reflected more directly, including in the broad orientation of financial regulation to disclosure,<sup>21</sup> in increasingly robust rulemaking processes,<sup>22</sup> and in the accountability generated by the collaborative nature of Securities and Exchange Commission decision-making, especially given its politically diverse membership.<sup>23</sup>

Any orientation to transparency and accountability in financial regulation should not be overstated, however. One might identify some desire—and even need—to *limit* transparency and accountability in financial regulation. As I will suggest below, a high level of transparency might conflict with effective regulation of the financial markets, as in the problematic consequences of giving

19. See PETER H. SCHUCK, *FOUNDATIONS OF ADMINISTRATIVE LAW* 53 (1994) (suggesting due process functions of the Administrative Procedure Act).

20. See Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WISC. L. REV. 297, 342.

21. See Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 418 (2003).

22. See, e.g., Letter from Mary L. Schapiro, Chairman, Sec. & Exch. Comm'n, to Scott Garrett, Representative, U.S. House of Representatives 2 (Aug. 5, 2011).

23. See Bressman & Thompson, *supra* note 8, at 610.

market participants notice of potential agency action.<sup>24</sup> As for accountability, meanwhile, relevant interest groups' focus on particular financial regulators can be expected to be quite intense, given the financial consequences of their alternative regulatory choices. Heightened political accountability, as a consequence, has the potential to serve as a path to increased, rather than decreased, interest group influence.

The primary focus of financial regulation, instead, is on two other goals—and on achieving an appropriate equilibrium between them: namely, the protection of shareholders and investors more generally, and the raising of capital via efficient markets. As the Securities and Exchange Commission summarizes its mission, it seeks “to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.”<sup>25</sup>

One can see echoes of transparency and accountability in that mandate, of course. As suggested above, however, the goals of investor protection and market efficiency may—perhaps as often as not—best be secured by *reduced* transparency, and even diminished accountability. Even where transparency or accountability is the goal, meanwhile, financial regulation might well pursue that goal in ways distinct from those demanded by administrative law.

#### *Distinct Assumptions About the Market*

Distinct assumptions about the market also contribute to the divide between the study/practice of administrative law and financial regulation.<sup>26</sup> In administrative law, the market represents the structure to be policed by way of effective regulation. Much of the work of administrative agencies can thus be understood as responses to perceived market failures.

Financial regulation, by contrast, engages the market as something to be facilitated—even encouraged. Of course, regulation must ensure efficiency of the market. That caveat aside, however, a role for regulation in facilitating markets differs markedly from the project of correcting market inefficiencies.

This distinctive attitude of each field toward the market should not be exaggerated, of course. Financial regulation places significant limitations on markets as well, from disclosure requirements and anti-fraud regulation to capitalization requirements and licensure rules. Certain other fields, meanwhile, also embrace a role for agencies in market facilitation. Aspects of telecommunications regulation—and government standard-setting generally—can be understood in that light. Certain aspects of natural resource management and energy policy are to similar effect. Nowhere is the task of market facilitation and encouragement as direct, however, as in financial regulation.

24. See *infra* note 28 and accompanying text.

25. *What We Do*, SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/about/whatwedo.shtml>.

26. See Metzger, *supra* note 8, at 142-44.



*Constraints on Regulatory Process and Design*

The divide between the study/practice of administrative law and financial regulation also turns on distinct constraints on the effective application of each body of law. A number of such limitations might be highlighted, but let me emphasize just two—*time* and *space*—that can be expected to impact each field in significantly different ways.

Consider time: In questioning the viability of any convergence—or even meaningful engagement—of administrative law and financial regulation, Tom Merrill calls attention to the capacity for quick exit in the financial markets.<sup>27</sup> In many—if not most—of the areas in which administrative law has been applied, the entities and assets subject to regulation are not capable of rapid relocation. Railroads, for example, are literally nailed to the ground.

By contrast, money is highly mobile—and even fungible. That is in its very nature. It is even more true today, however, as a result of fast-moving—even instantaneous—trading technologies. Increasingly globalized capital markets further ease exit, as do sophisticated financial instruments, including ever-changing synthetic products not susceptible to sustained regulation.

Given as much, Merrill suggests the deliberative and intentionally slow-moving processes at the heart of administrative law are likely to have little to offer in financial regulation. Between the rapidity of capital movement and the pace of innovation, the market can be expected to get ahead of almost any potential regulatory intervention—let alone one that emerges with the methodical pace required by administrative law.

Consider, for example, the placement of banks and other systemically important financial institutions into receivership.<sup>28</sup> In the case of banks, relevant federal agencies have long been permitted to proceed expeditiously and in secret to avoid both the classic “run on the bank” and potential asset-stripping moves by incumbent managers. In extending those agency powers from banks to a broader range of financial institutions, the Dodd-Frank Act insisted on judicial review of agencies’ receivership decisions. But consider the legislation’s limitations on that review, in the name of expedition and confidentiality: The judicial process is itself to be secret, with significant criminal sanctions for those who disclose even the *fact* of such review. The judge must rule within twenty-four hours, is permitted to evaluate only *two* of the seven factors that the agency weighed in its decision, and must do so under a relatively permissive “arbitrary and capricious” standard of review. After the court’s decision, meanwhile, no stays are permitted pending appeal, and no injunctive relief is available against the receiver. The discrepancy between this process and administrative law’s expectations of transparency and accountability, of course, could not be more stark.

Beyond such constraints of time—the relative need for expedition in financial regulation, as compared with administrative law—certain constraints of *space*

27. See Merrill, *supra* note 9.

28. See *id.* at 197-99.

might also be understood to distinguish financial regulation and administrative law. For much federal regulation—and hence for administrative law—an entirely domestic reach is likely to be sufficient. Vehicle safety regulation, workplace health and safety rules, and even a great deal of environmental protection play themselves out almost entirely at the national (or even subnational) level.

It is almost impossible, by contrast, to approach financial regulation from a purely domestic perspective. Whatever select questions might be engaged in that fashion, they represent the exception rather than the rule in financial regulation. From audit committee composition requirements to questions of extraterritorial enforcement, the Securities and Exchange Commission must attend to both static and dynamic reactions to its regulatory initiatives overseas. One might even see the progressive advance of financial market regulation from state-level to federal-level regulation, and the ensuing (and still developing) role of federal regulators in shaping transnational regulatory processes—including the much-discussed rise of transnational regulatory networks<sup>29</sup>—as indicative of the progressively expanding geographic reach of financial regulation.

That said, distinctions of space in administrative law and financial regulation may be diminishing. To a growing degree, regulators outside the financial arena face the need to consider the transnational dynamics associated with their regulatory choices. Climate change and internet regulation are only the most obvious examples.

### **Learning Across the Divide**

There exists, then, a real—if perhaps shifting—divide in the study/practice of administrative law and financial regulation. Might it be useful to bridge that divide? What might we learn from scholarly engagement across it?

Before suggesting a handful of particular opportunities for learning across the administrative law/financial regulation divide, it may be useful to return to where we started. How should we understand the benefits of other analyses across divides—interdisciplinary scholarship, comparative legal analysis, legal history, and engagement across distinct legal disciplines, from torts and criminal law to antitrust and consumer protection?

In each analysis, we gain something from studying the distinct motivations, assumptions, and modes of thinking of the “other.” Economic analysis may help us better evaluate the efficacy of damages versus specific performance as a remedy in contract law.<sup>30</sup> German civil procedure may suggest the limitations of an adversarial approach to expert testimony.<sup>31</sup> An awareness of the origins

29. See Robert B. Ahdieh, *Coordination and Conflict: The Persistent Relevance of Networks in International Financial Regulation*, 78 *LAW & CONTEMP. PROBS.* 75 (2015); Stavros Gadinis, *Three Pathways to Global Standards: Private, Regulator, and Ministry Networks*, 109 *AM. J. INT’L L.* 1 (2015).

30. See Steven Shavell, *Specific Performance Versus Damages for Breach of Contract: An Economic Analysis*, 84 *TEX. L. REV.* 831 (2006).

31. See John H. Langbein, *The German Advantage in Civil Procedure*, 52 *U. CHI. L. REV.* 823 (1985).

of the hearsay rule may clarify its appropriate application today.<sup>32</sup> And our understanding of culpability in criminal law may be enriched by studying the principles of liability in tort law.<sup>33</sup>

Something similar might be expected across the gap that divides the study of administrative law and financial regulation. Consider, once again, questions of secrecy and confidentiality. As described above, financial regulators must necessarily proceed with secrecy in placing a bank or other systemically important financial institution into receivership. The same is true of their routine interest-rate setting decisions, as well as their response to nonroutine incidents of financial panic. Even fairly mundane regulatory and adjudicatory tasks may require confidentiality where proprietary business data must be evaluated.

Such pressures are less likely to be present—at least ordinarily—in administrative law. On the other hand, administrative law has had the benefit of decades of experience navigating the trade-off between transparency and efficiency. In fostering the efficacy of agencies' regulatory undertakings, thus, administrative law scholars have been forced to grapple with just the question faced by students of financial regulation: the appropriate limits of transparency.<sup>34</sup> Scholars of financial regulation would do well, as such, to engage the principles of transparency developed in administrative law.

Financial regulation scholars might also learn something from administrative law, practice, and scholarship as they seek to promote increased regularity in relevant decision-making procedures. Elements of the administrative law framework of *external* accountability may thus offer insight into procedures for the generation of *internally* oriented guidance and interpretations—which play a relatively more central role in financial regulation, for the reasons of secrecy outlined above.

In precisely that spirit, I have explored the ways in which the Federal Open Market Committee embraced something more of a “rulemaking” approach as it sought to respond to the Great Financial Crisis.<sup>35</sup> In seeking to bend the curve of long-term interest rates, with short-term rate targets already at zero, the Committee increasingly relied on *communication* as a tool of monetary policy. In doing so, however, it needed to introduce significantly enhanced

32. See John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437 (1904).

33. See David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59 (1996). An analogous case for integrating administrative law and immigration law has been offered by Chris Walker. See Chris Walker, *The Costs of Immigration Exceptionalism*, <http://www.yalejreg.com/blog/the-costs-of-immigration-exceptionalism-by-chris-walker>.

34. See Daniel E. Andersen, *Straddling the Federal-State Divide: Federal Court Review of Interstate Agency Actions*, 101 IOWA L. REV. 1601, 1610 (2016) (“Efficiency often comes at the expense of accountability and vice versa.”); see also Sidney A. Shapiro, *The Top Ten Reasons that Law Students Dislike Administrative Law and What Can (Or Should) Be Done About Them?*, 38 BRANDEIS L.J. 351, 359-60 (2000).

35. See Ahdieh, *Fedspeak*, *supra* note 6.

dimensions of notice and reason-giving into its decision-making procedures—echoing precisely the demands of notice-and-comment rulemaking.

No less opportunity exists for administrative law scholars to learn from financial regulation. A succession of D.C. Circuit decisions over the last decade, for example, imposed significant cost-benefit analysis requirements on the Securities and Exchange Commission. In particular, the *Business Roundtable* decision of 2011 held the Commission's economic analysis of its proposed proxy access rule to be arbitrary and capricious—a significant departure from past judicial practice with regard to financial regulation.<sup>36</sup>

For precisely that reason, the decision provides an important opportunity for learning in administrative law. In exploring the extension of cost-benefit analysis into a new and complex area, administrative law scholars have the opportunity to gain new insight into its nature.<sup>37</sup> This begins with the possibility of a broader range of potential *forms* of cost-benefit analysis than have commonly been acknowledged. It also raises questions of function, including the need to move away from a singular emphasis on *efficiency* as the operative goal of cost-benefit analysis. No less, the study of cost-benefit analysis in financial regulation raises important questions about the appropriate scope of judicial review of such analysis. Ultimately, by exploring the application of cost-benefit analysis in financial regulation, administrative law scholars may come to embrace a more ecumenical conception of the nature of—and the appropriate approach to—cost-benefit analysis.<sup>38</sup>

### Challenges of Crossing the Divide

However much scholars of administrative law and financial regulation might stand to learn from one another, significant challenges face those who seek to bridge the divide. Three issues are particularly salient: audience, authority, and advancement. While not insurmountable, each of these barriers is substantial.

As things stand today, scholars of administrative law and financial regulation write in different journals, attend different conferences, and sit on different panels, even when they attend conferences directed to both. When given the opportunity to sponsor joint programs on topics of mutual interest—as at the annual meeting of the Association of American Law Schools—they do so less often than one might hope. Scholarship in each field, as such, speaks to entirely different audiences. And efforts to write across the fields face resulting difficulties of appropriate starting points, framing, and language.

The challenges of audience in administrative law and financial regulation are likely aggravated by broader trends in audience selection in legal scholarship.

36. *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

37. See Ahdieh, *Reanalyzing*, *supra* note 7.

38. It is telling, however, that the bulk of the writing on cost-benefit analysis in financial regulation has been penned by scholars of financial regulation rather than by administrative law scholars.

The narrowcasting of scholarly writing in law is a pattern many decades in the making. That trend has likely accelerated in recent years, with the growth in online distribution—often directed to one, relatively narrow audience.

The (eminently reasonable) drive to reduce the length of law review articles might also contribute to challenges of audience in bridging the gap between administrative law and financial regulation. Given a need to limit the length of one's submitted work, the natural place to trim is in background and context. Yet those are precisely the elements that make scholarly work accessible to those outside the author's field—perhaps especially for those writing in a more technical field, such as financial regulation.

Questions of audience lead directly to questions of *authority*. Administrative law and financial regulation scholars, perhaps unsurprisingly, cite very different sources. Consider, by way of example, the Supreme Court's pair of decisions in *SEC v. Chenery*—both staples of the administrative law canon.<sup>39</sup> For all their importance in administrative law, the cases are of little relevance in financial regulation. They are rarely cited, and most assuredly are not central to the jurisprudence of securities law, notwithstanding their genesis in that field.

The same might be said of the case law generally—as well as relevant treatises and the secondary literature cited by scholars in each field. Loss & Seligman's seminal treatise on securities law is unlikely to be cited by administrative law scholars—even in analyzing a securities law case.<sup>40</sup> Nor would the *Administrative Law Treatise*, first prepared by Kenneth Culp Davis more than a half-century ago and now authored by Richard Pierce, likely be cited by those writing on financial regulation.<sup>41</sup> No law review article on administrative law, meanwhile, is likely to be chosen for inclusion on one of the various annual lists of “top ten” works in corporate and securities law. And vice versa.

One might also see something of the challenge of divergent authority in the quasi-constitutional status of the Administrative Procedure Act in the study of administrative law. The Act enjoys no similar stature in scholarship on financial regulation. Rather, the substantive legislation that undergirds the latter—the Securities Act, the Securities Exchange Act, the Investment Company Act, and the Investment Advisers Act, among other major statutes—enjoy pride of place. These are not inherently exclusive sources, of course. In practice, however, things tend to work out that way—with attendant implications for the ease of writing across the two fields.

Finally—and not unrelated to the challenges of audience and authority—writing across the administrative law/financial regulation divide also raises significant questions of professional advancement. The difficulties begin with one's home institution.

39. *SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *SEC v. Chenery Corp.*, 318 U.S. 80 (1943).

40. LOUIS LOSS, JOEL SELIGMAN & TROY PAREDES, *SECURITIES REGULATION* (5th ed. 2014).

41. RICHARD J. PIERCE, JR., *ADMINISTRATIVE LAW TREATISE* (4th ed. 2002).

In setting one's teaching priorities, in the selection of scholarly mentors, in the distribution of drafts, and the like, focus is invaluable. At a minimum, this arises from scarcity of time. But it also responds to something more fundamental: what might be understood as lawyers' natural tendency toward classification. For reasons of both simplification and measurement/evaluation, thus, we are apt to define our colleagues as working in one given field versus another.

A similar dynamic plays itself out beyond one's home institution. In receiving invitations to speak at relevant symposia (and even general workshops, depending on how speakers are chosen), in securing mentors, and otherwise, having a singular field of expertise can be valuable. With such focus, one might expect to achieve greater recognition and renown—at least within a given field.

Of course, such external concerns come to a head in the context of tenure and promotion reviews. From the ability of any given reviewer to engage the full scope of one's work to the prospect of a reviewer having some prior familiarity with it, a risk-averse strategy would likely favor writing in one field—both in terms of the scope of any given piece of writing, and in terms of one's overall work.

Broadly, the challenges of advancement in writing across fields of law come down to the question of who one is as a scholar. Consider, thus, the difficulty we would have in characterizing someone who wrote in two entirely disconnected fields—perhaps environmental law and antitrust law. The difficulty should be less daunting in administrative law and financial regulation, of course. Given the reality of that divide as it stands today, however, an author writing across the fields might likely still seem like neither fish nor (scholarly) fowl.

Of course, the challenges of advancement are not insurmountable ones. My own approach, thus, has been to engage the questions I found interesting, and let things to play out as they might. I recognize, however, that I may have had the luxury of doing so in ways that others might not. More telling, though, may be my usual counsel to young scholars with interests in multiple fields: Do as I say, not as I did.

The norms and expectations that undergird that advice, however, are not fixed. Neither are currently prevailing practices in promotion and tenure. Even audiences may be more malleable than we assume. Consider where we started: the interdisciplinary engagements of the “law and . . .” movement. Hard as it may be for us to imagine today, little or no audience existed for economic—or political science, psychological, or literary—analysis in law schools a half-century ago. Might an audience for scholarship at the intersection of administrative law and financial regulation simply be just around the corner?

### **Conclusion**

As the impact and influence of interdisciplinary scholarship, comparative legal studies, legal history, scholarly work across other distinct legal fields, and

perhaps even the common law method make clear, legal analysis across divides has the potential to offer us significant insight. Across methods and even fields, there is much to be gained from the effort. Whatever the challenges, thus, scholars of administrative law and financial regulation do well to engage one another more actively. As the early shoots of such engagement begin to emerge, we would be wise to nurture and encourage them.