

THE FUTURE OF FINANCIAL REGULATION AND THE
ADMINISTRATIVE STATE:
*A SYMPOSIUM FOR THE 20TH ANNIVERSARY OF
THE JOURNAL OF LAW, ECONOMICS & POLICY*

*Adam J. White*¹
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JLEP's twentieth anniversary is cause for celebration. It's also an opportunity to look ahead to the next two decades and beyond. And it occurs at a pivotal moment in American financial regulation, which is undergoing profound transformations in nearly every respect: in what is being regulated, and how, and by whom.

The subjects of financial regulation are expanding significantly. The Securities & Exchange Commission's recent final rule on climate risk attracted significant attention,² and the subsequent litigation will only further elevate the issue. But it is just one part of a much broader effort to bring climate policy into financial regulation.³ And, to the extent it succeeds in court and as a matter of public policy, it will inspire efforts to incorporate more policy questions into financial regulation.⁴

There surely are several reasons for this development, but one that deserves more attention is the fact that financial regulators often administer statutes that are much more open-ended, and they do so through means that are much more amorphous than administrative law's familiar stuff of notice-and-comment rulemaking. To the extent that an administration bristles under the statutory and procedural constraints on other agencies, the financial regulators will become an increasingly attractive policymaking tool.

¹ Co-Executive Director, Antonin Scalia Law School's C. Boyden Gray Center for the Study of the Administrative State; Senior Fellow, American Enterprise Institute.

² SEC, *The Enhancement and Standardization of Climate-Related Disclosures for Investors*, 89 Fed. Reg. 21668 (Mar. 28, 2024).

³ See, e.g., Dep't of Treasury *et al.*, *Principles for Climate-Related Financial Risk Management for Large Financial Institutions*, 88 Fed. Reg. 74183 (Oct. 30, 2023); CFTC Climate-Related Market Risk Subcommittee, *Managing Climate Risk in the U.S. Financial System* (Sept. 9, 2020), <https://www.cftc.gov/sites/default/files/2020-09/9-9-20%20Report%20of%20the%20Subcommittee%20on%20Climate-Related%20Market%20Risk%20-%20Managing%20Climate%20Risk%20in%20the%20U.S.%20Financial%20System%20for%20posting.pdf>.

⁴ Cf. Gary Gensler & Lily Bailey, *Deep Learning and Financial Stability* (Nov. 13, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3723132 (on artificial intelligence and financial stability); Richard Vanderford, *Big Businesses Should Disclose China Risks, Ex-SEC Chairman Says*, WALL ST. J. (Sept. 12, 2023), <https://www.wsj.com/articles/big-businesses-should-disclose-china-risks-ex-sec-chairman-says-68e67fb6>.

That said, the financial regulators' own administrative processes may change, too. Most significantly, major financial institutions and their trade groups are increasingly willing to challenge their financial regulators in court.⁵ This will implicate substantive standards of review—including *Chevron* deference and the “major questions doctrine”—but it also may cause agencies eventually to undertake more rigorous notice-and-comment procedures,⁶ just as judicial review of cost-benefit analysis spurred some regulators to improve that aspect of their process a decade ago.⁷

And, finally, the “who” of financial regulation may be changing too. As financial regulation grows in significance, it becomes a subject of increasing White House interest,⁸ and eventually there will be greater interest in incorporating at least some of the regulatory actions from traditionally independent financial regulators. Four decades ago, when President Ronald Reagan first enacted the modern framework for White House regulatory management, one of its architects observed that the financial regulators and other independent regulatory commissions had been exempted from the new Office of Information and Regulatory Affairs' oversight because they did not seem to be of central policymaking importance.⁹ Things are much different now, to say the least.

With all of this in mind, our approach for this symposium was straightforward. To some of the best minds on financial regulation, we asked: *what will be the most important financial regulatory issues of the next twenty years?* And to some of the best minds on administrative law, we asked: *how should we think about the convergence of financial regulation and OIRA?*

Their responses, in the pages that follow, are a genuinely great collection of essays.

⁵ Laura Noonan et al., *The U.S. Pushback Against 'Basel Endgame,'* FIN. TIMES (Mar. 19, 2024), <https://www.ft.com/content/48555d55-ca6d-4ab8-ae29-aba4d4f10f13>; Liz Hoffman, *Big Banks Mull the Unthinkable: Suing the Fed,* SEMAFOR, (Jan. 11, 2024, 1:41 PM), <https://www.semafor.com/article/01/11/2024/big-banks-mull-the-unthinkable-suing-the-fed>.

⁶ Cf. *Chamber of Commerce v. CFPB*, 2023 WL 5835951 (E.D. Tex. Sept. 8, 2023) (holding the CFPB's update of its supervisory manual was final agency action).

⁷ See, e.g., *Business Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011); Steven Sloan, *Schapiro Says SEC Will Change Cost Calculation of Regulation*, BLOOMBERG (Apr. 17, 2012), <https://www.bloomberg.com/news/articles/2012-04-17/schapiro-says-sec-will-change-cost-calculation-of-regulation-1-?sref=NeFsviTJ>.

⁸ See, e.g., Executive Order 13772, *Core Principles for Regulating the United States Financial System*, 82 Fed. Reg. 9965 (Feb. 8, 2017); Exec. Order 14030, *Climate Related Financial Risk*, 86 Fed. Reg. 27967 (May 25, 2021).

⁹ C. Boyden Gray, then-counsel to Vice President George H.W. Bush and counsel to President Reagan's Task Force on Regulatory Relief, explained this at a press conference at the U.S. Chamber of Commerce on April 10, 1981. See *Role of OMB in Regulation*, H.R. Rep. No. 70, 97th Cong., 1st Sess. 152 (1981) (reprinting transcript), http://njlaw.rutgers.edu/collections/gdoc/hearings/8/82601518/82601518_1.pdf.

On the future of financial regulation, Stanford's John Cochrane and Amit Seru warn that "the bailout-and-regulate spiral must end."¹⁰ Connecting monetary and fiscal policy to regulatory policy, and drawing from the experience of the 2008 financial crisis, the COVID-19 pandemic, and the recent bank failures, they predict that "the central approach of allowing a fragile and highly leveraged financial system, providing bailouts that incentivize that fragility, but counting on regulators to spot and contain risk[,] is fundamentally doomed."¹¹

Columbia's Kathryn Judge is looking beyond recent debates over financial stability too, but for different reasons. She observes that the last decade's overwhelming focus on financial stability has overshadowed two other subjects of financial regulation: anti-money laundering (AML) and housing finance. Indeed, these are two of the most practically important aspects of financial regulation—and, she urges, they both need significant reforms. AML "is one of the most extensive public-private ecosystems," but it "is performing abysmally by some metrics."¹² As for housing finance, "it is past time to stop kicking the can down the road, allowing a regime that is obviously suboptimal by any objective standard, to continue to bilk an implicit public backstop primarily for the benefit of member financial institutions."¹³

Peter Wallison, too, focuses on lending. In 1990, shortly after the savings & loan crisis, the American Enterprise Institute senior fellow called for significant reforms to bank supervision and deposit insurance.¹⁴ Now with the additional experience of the 2008 financial crisis and the recent bank failures, he updates his analysis and reiterates his call for greater private-sector responsibility for policing banks. "It may be that banks require supervision," he concludes, but "incentives can be built into supervision so that banks can be compelled to act safely and soundly the same way that other private sector suppliers of goods and services do. It only takes a bit of imagination and the will to try."¹⁵

Scalia Law's own Todd Zywicki brings a similar reform-minded approach to this symposium. Surveying the history of consumer financial protection, he sees a "simple, but powerful" theme: "regulation in both structure and substance must adapt to changes in technology and the challenges those

¹⁰ See *infra*, John H. Cochrane & Amit Seru, *Ending Bailouts, At Last*, 19 J.L. Econ. & Pol'y 169, 171 (2024).

¹¹ *Id.* at 184.

¹² See *infra*, Kathryn Judge, *Financial Regulations Beyond Stability*, 19 J.L. Econ. & Pol'y 194, 205 (2024).

¹³ *Id.* at 209.

¹⁴ PETER WALLISON, *BACK FROM THE BRINK: A PRACTICAL PLAN FOR DEPOSIT INSURANCE AND STRENGTHENING OUR BANKS AND THRIFTS* (1990).

¹⁵ See *infra*, Peter J. Wallison, *A Proposal for Removing Government Agencies from Supervising or Insuring Banks and S&Ls*, 19 J.L. Econ. & Pol'y 211, 222 (2024).

present.”¹⁶ Yet the regulatory system is too often slow to “recognize these realities.”¹⁷ In our own time, he sees excessive “regulatory barriers that currently stand in the way of greater inclusion of underserved populations.”¹⁸ And legislative or regulatory efforts to give customers better information and transparency has had an unfortunate effect: “consumers are buried in disclosures that fail to distinguish in any way between what is truly relevant to the consumer . . . and what is not.”¹⁹

Finally, Yale’s Jonathan Macey pans back to much broader trends in American politics and government. He sees political turmoil and institutional decline as profound threats to the rule of law that undergirds free and functioning markets. Specifically, he focuses on the Federal Reserve, federalism, and the courts of law: “structural components of the U.S. regulatory system, particularly the independent central bank, the provisions of corporate law and corporate governance rules at the state rather than the federal level, the independent judiciary and its protection of free speech have worked well to insulate the capital markets from the recent political turmoil.”²⁰ Will they continue to serve that purpose for twenty more years?

Turning more specifically to the future of presidential administration and financial regulation, recent OIRA Administrator Paul Ray grapples directly with the question of whether OIRA should review the financial agencies’ rules, and how they might do so. He surveys the benefits of OIRA review (*e.g.*, improving agency analysis and promoting democratic accountability), but also its costs (*e.g.*, slowing the rulemaking process, particularly in multi-member commissions). If those sound familiar, it’s no accident: “At day’s end,” he concludes, “the benefits and costs of OIRA review of [independent financial regulators’] rules would likely be about the same as the benefits and costs of review of executive agency rules”—maybe “not *exactly* the same,” but sufficiently close that “[t]hose who find themselves in agreement with the consensus of the last seven presidents about the value of OIRA review” should “have good reason to extend OIRA review” to the independent financial regulators.²¹

On this point, what can we learn from recent experience—namely the White House’s recent expansion of regulatory review authority over Internal Revenue Service rules?²² Minnesota’s Kirstin Hickman and Ohio State’s

¹⁶ See *infra*, Todd J. Zywicki, *Looking Forward by Looking Backward: The Future of Consumer Finance and Financial Protection*, 19 J.L. Econ. & Pol’y 223, 224 (2024).

¹⁷ *Id.*

¹⁸ *Id.* at 237.

¹⁹ *Id.* at 238.

²⁰ See *infra*, Jonathan Macey, *Finance Without Government: Financial Regulation in an Age of Political Unrest*, 19 J.L. Econ. & Pol’y 241, 241 (2024).

²¹ See *infra*, Paul J. Ray, *A Distinction Without a Difference: On the Case for OIRA Review of Rules by Independent Financial Regulators*, 19 J.L. Econ. & Pol’y 260, 271 (2024) (emphasis in original).

²² See Memorandum of Agreement, The Department of Treasury and the Office of Management and Budget, Review of Tax Regulations Under Executive Order 12866 (Apr. 11, 2018),

Bridget Dooling describe dueling narratives. Among OIRA’s supporters, “OIRA review brings worthwhile, salutary benefits to the public and the regulatory process.” Among its critics, “OIRA review is meddlesome in multiple ways, dismissive of agencies’ subject matter expertise, and its analytical methods are not worth the effort they impose”—particularly in the context of tax regulation.²³ Unpacking the arguments, and looking seriously at facts, Hickman and Dooling avoid sweeping conclusions one way or another, but they seem generally optimistic that OIRA review of IRS regulations could be done well, if carefully.²⁴

All of these papers were presented at a conference last fall in Washington, D.C., followed by a keynote conversation with the Federal Deposit Insurance Commission’s recent chairman, Jelena McWilliams.²⁵ And the conference also featured an excellent Mercatus Center panel on “regulatory sandboxes” in financial and tech regulations. It featured the last paper in this symposium, in which Ryan Nabil draws lessons from recent years’ efforts to apply sandbox frameworks for FinTech, and he applies those lessons to new regulatory debates around artificial intelligence.²⁶

The C. Boyden Gray Center for the Study of the Administrative State is grateful to all the conference’s speakers, and especially to the authors in this symposium. Most of all, we are grateful for the chance to help commemorate *JLEP*’s twentieth anniversary in the best possible way: by studying recent history and looking to the future.

<https://home.treasury.gov/sites/default/files/2018-04/04-11%20Signed%20Treasury%20OIRA%20MOA.pdf>; *but see* Memorandum of Agreement, The Department of Treasury and the Office of Management and Budget, Review of Tax Regulations Under Executive Order 12866 (June 9, 2023) (superseding 2018 agreement), <https://www.whitehouse.gov/wp-content/uploads/2023/06/Treasury-OMB-MOA.pdf>.

²³ See *infra*, Kristen E. Hickman & Bridget C.E. Dooling, *Competing Narratives on OIRA Review of Tax Regulations*, 19 J.L. Econ. & Pol’y 272, 273 (2024).

²⁴ *Id.* at 294 (“[W]e hope this essay sheds some light on the nature of the disagreement and how it might be resolved.”).

²⁵ Videos of the panels are available at <https://administrativestate.gmu.edu/event/the-future-of-financial-regulation-symposium/>.

²⁶ See *infra*, Ryan Nabil, *Artificial Intelligence Regulatory Sandboxes*, 19 J.L. Econ. & Pol’y 295 (2024).