

## TRUST AS A RELIANCE INTEREST: ADMINISTRATIVE LAW AND FINANCIAL REGULATION IN THE UNITED STATES AND ITS COMPARATIVE IMPLICATIONS\*

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### **Abstract**

This article argues that regulatory trust is established and maintained through a relationship between stakeholders and the government, with the former group of organizations and individuals relying on their understanding of this relationship. Federal administrative law in the United States makes the expectations about the regulatory environment on which stakeholders rely more meaningful by granting stakeholders the right to bring actions in court when their expectations are being (or seem likely to be) dashed. To make this argument, I begin with the threshold question of how courts serve as a forum for voicing claims of distrust in regulatory regimes. I then consider the importance of political accountability over regulatory decision making, illustrating the concerns about the structure of agencies that regulate consumer and housing finance. Next, I will discuss a second major challenge to trust that arises from the extent to which the authority of regulatory agencies is circumscribed by legislation. Along the way, I draw on the case law presented to argue that problems of trust in financial regulation center on the reliance interests of stakeholders. Finally, the argument suggests a research agenda into trust as a reliance interest that I sketch in the conclusion.

**Keywords:** trust, administrative law, financial regulation, regulatory agencies.

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\* I thank Yannis Papadopoulos and Martino Maggetti for helpful comments and Megan Minnich for excellent research assistance. Mistakes are my own.

## 1. Introduction

The concept of trust is one of the most widely examined in the context of public administration (de Walle and Migchelbrink, 2022; Bouckaert, 2012), and what is more, the regulatory agency has emerged as a popular subject for understanding trust relationships between officials and stakeholders (Maman, Feldman and Levi-Faur 2022; Charron, Haring and Lapuente, 2021). Because regulatory agencies, and the policies they implement, are the subject of intense comparative study (Jordana, Fernández-i-Marín and Bianculli, 2018; Koop and Hanretty, 2018). As a result of this, trust in American regulators has and will continue to become the subject of comparative interest for scholars. I argue that federal administrative law in the United States provides a fertile source of arguments about the trust regulatory stakeholders have in regimes financial regulation. That it does so should be rather self-evident: regulated entities and organized stakeholder groups file lawsuits that challenge both the structure of regulatory agencies and their decisions.

The arguments in these legal cases offer an evocative portrait of the problems of trust in financial regulation in the contemporary American context, and they show how the law both shapes and is shaped by arguments with trust considerations at their core. My core argument in this essay is that these arguments conceive of ‘trust as preserving a reliance interest’ of regulated entities and stakeholders in the ‘stability’ of regulatory practices. The regulated rely on a relationship with (and among) regulators—the currency of which is ‘expectation’ about what the rules are and will continue to be. The enemy of expectation is the perception of arbitrary action. In this way, the law provides a way of unpacking the ‘process’ by which regulated entities and stakeholder groups come to trust regulatory regimes, a process that is often approached through surveys and the methods of social psychology (see Cannas, 2023). I will also advance the claim that the arguments in legal actions can help researchers to better understand how the process of trust is revealed, which can then inform research designs for making comparisons between regulatory trust in the United States (U.S.) and European jurisdictions.

Legal actions challenging agency structure and decision-making—and investing in the capacity for threatening such challenges—are costly actions that help to reveal the contours of trust in regulatory regimes. Gordon and Hafer (2005, p. 247) illustrate my claim by analogy:

*‘Lawsuits are costly, so litigants typically reach a settlement before going to trial. In order to improve his or her bargaining position, each party to the suit would like to be able to signal credibly to the other his or her willingness to spend a significant sum on a trial if a favorable settlement were not reached. While any costly action (i.e., “burning money”) could indicate his or her willingness to go to trial, retaining an army of high-priced trial attorneys would be the most unambiguous gesture of a party’s resolve in the contest’.*

When regulated entities and stakeholder groups develop expectations that a regulatory regime—that is, both institutions, such as a regulatory agency, and decision-making practices—creates uncertainty about the furtherance of their interests, federal administrative

law allows them to go to court to assert their claims about why the regime will do this. Regulated entities and stakeholder groups have strong incentives to expend the resources to argue to a court because the law provides a credible strategy of influence. Whether they win or lose a particular case, litigants' arguments become a part of the narrative by which the court maintains its credibility, which, of course, relates to litigants' trust in it (Popelier *et al.*, 2022). Thus, in the U.S., it is difficult to understand why regulatory regimes hold or lack trust from stakeholders without a careful look at the arguments before federal courts<sup>1</sup>.

To illustrate the importance of legal argument as a source of information about stakeholder trust, I focus on the case of financial regulation. Within this domain, I discuss challenges to the structure and decision making of agencies that regulate a wide variety of substantive problems from consumer and housing finance to the oversight of business accounting practices to the regulation of securities and trade. This sector provides an excellent source of case law that evokes the primary problems of trust that are important enough for stakeholders to invest in the judicial process and how courts address those problems.

This essay proceeds as follows. First, I address the threshold question of how courts serve as a forum for voicing claims of distrust in regulatory regimes. Doing this also illustrates the basic structure of administrative law in the U.S. Second, I turn to the importance of political accountability over regulatory decision making to trust, illustrating the concerns about the structure of agencies that regulate consumer and housing finance. Third, I discuss a second major challenge to trust that arises from the extent to which the authority of regulatory agencies is circumscribed by legislation. This introduces the oft-cited 'uneasy' constitutional position of administrative agencies in the U.S., which distinguishes it from the civil law systems of continental Europe. Fourth, I draw on the case law presented to argue that problems of trust in financial regulation center on the reliance interests of stakeholders. That is, trust is established through a relationship between regulated entities and stakeholders and the government, with these groups of organizations and individuals relying on their understanding of this relationship. American administrative law makes those expectations meaningful through stakeholders' right to bring actions in court when they are being (or seem likely to be) dashed. Fifth, I conclude by sketching elements of a comparative research agenda into trust as a reliance interest.

## 2. Courts and trust

In a policy brief entitled 'Assessing Social and Political Trust: A Systematic Review', collaborators on a large-scale European project on trust in regulation expressed the view 'that trust is not just a matter of vertical relations between citizens and public authorities. Instead, attention should also be given to horizontal trust relationships between actors that

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1 In American federalism, state administrative law also plays an important role in some areas and embraces the same framework discussed here (Bonfield, 1986). Given this correspondence and my focus on contemporary financial regulation, I focus on federal actions in this essay.

are part of the rule-making process, such as public agencies and courts' (TiGRE project, undated; see also Popelier *et al.*, 2022). Addressing these relationships in the U.S. context requires a brief introduction to federal administrative law, which this section provides. There are two basic kinds of regulatory trust problems voiced through arguments before the American courts. A belief that past action by a regulator was, in fact, unexpected leads to an argument about the 'process' of agency decision making. A belief that future unexpected action will occur leads to an argument about defects in the 'structure' an administrative agency.

### ***2.1. Challenging process***

The Administrative Procedure Act of 1946 (APA) provides regulated entities with a set of tools to use in court to ensure that any regulatory practices are in accordance with the law, enacted through legally proscribed methods, and applied in a fair method. In the present context of financial regulation, this is important because many legal standards applied to banks and other financial institutions are established by agency rulemaking rather than statute. For example, 12 U.S.C. § 3907(b)(1) gives agencies the authority to classify any bank practice as unsafe because it fails to maintain a stock of capital at or above some minimum level. The APA allows courts to set aside an agency action that is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law', 5 U.S.C. § 706. This standard is commonly used where agency rulemaking is highly technical and rests on empirical information, which is frequent in the context of financial regulation. As we shall see, one recurrent argument for arbitrariness is that an agency's decision ignores the economic costs of a regulated firm or sector of operations.

Judicial review of agency rulemaking is common, and it is designed to be that way. The U.S. Supreme Court has held that there is a 'strong presumption that Congress intends judicial review of administrative action' (see *Bowen v. Mich. Acad. of Family Phys.*), 476 U.S. 667, 670 (1986). That said, the presence of review is not meant to shift regulatory decision-making to the courts. Regarding the standard in 5 U.S.C. § 706 quoted above, the Supreme Court has held that '[t]he scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgement for that of the agency' (*Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*), 463 U.S. 29, 43 (1983). Moreover, in '*SEC v. Cheney Corp.*', 332 U.S. 194, 196 (1947), it further circumscribed the role of the court when regulatory decisions are reviewed, holding that a court may not 'supply a reasoned basis for the agency's action that the agency itself has not given'.

The APA is not the only place where standards for the decision making of regulatory agencies are found. Importantly, some actions raise constitutional questions. For instance, a federal appeals court held that an administrative law judge (ALJ) who held office in the Securities and Exchange Commission (SEC) violated the Appointments Clause of the U.S. Constitution when he presided over the plaintiff's hearing in the case. In that decision, the court clarified that there is significant judicial authority over such standards: 'When it has faced a case or controversy concerning separation of powers, the Supreme Court has

determined whether the legislative or executive branches or both have violated the Constitution’ (*Bandimere v. United States SEC*), 844 F.3d 1168, 1185-88 (10<sup>th</sup> Cir. 2016). Consequently, the decision-making process in regulatory agencies can lead to mistrust when it creates questions about how it respects the very ‘structure’ of the U.S. government. Indeed, the debate over the APA itself was deeply rooted in such questions, with fears that agencies combined the powers of ‘judge, jury and prosecutor’ (Bertelli and Lynn, 2006, p. 88, quoting Walter Gellhorn). How agencies make their decisions is inextricably intertwined with the trust of those they regulate, and particularly with questions about how those decisions might upset expectations about the regulatory environment, either because they are arbitrary or because they are (more or less) immune to political accountability (see Bertelli, 2024 forthcoming).

Sunstein and Vermeule (2020) have recently argued that there are three values the regulatory process ought to embrace in order for it to be legitimate, and legitimacy so achieved enhances the trust of regulated entities and stakeholders. They go so far as to suggest ‘that there is an *optimal* level of *transparency, retroactivity, and intelligibility*, and to arrive at the optimal level, trade-offs must be made, including consideration of costs of multiple kinds’ (Sunstein and Vermeule, 2020, p. 98, emphasis added). To see this, consider their claim that ‘[n]o one should deny that people in the private sector are sometimes concerned about a lack of sufficient transparency and intelligibility’ (Sunstein and Vermeule, 2020, p. 100). Nonetheless, regulations might lose important nuance if they indeed become simpler and more comprehensible. What is optimal is some ‘balance’ among these values. One way to think of the trust content of legal arguments, then, would be to consider how they think about the interplay of transparency, retroactivity and intelligibility.

First, when there is a failure of transparency, parties affected are not made aware of the rules with which they must comply (Sunstein and Vermeule, 2020, p. 100). Transparency is very important (see e.g., Grimmelikhuisen *et al.*, 2013). I argue here that transparency is a ‘vehicle’ that allows stakeholders to become informed of the expectations about what the rules are and will be going forward. Importantly, this means that it is not a first-order value for courts, like justice or fairness, but a second-order value that promotes mechanisms for achieving justice or fairness. At the elite level of regulatory stakeholders, transparency does not promote trust on its own. What it does is to allow for stakeholders who challenge the process of regulatory decision making to have better information about the subject of that challenge. When decision making is transparent, it informs arguments about, for instance, the fairness of regulatory decisions.

Second, and related, many contemporary critics of the administrative state are concerned with an ‘abuse of retroactivity, in the sense that people cannot rely on current rules, and are under threat of change’ (Sunstein and Vermeule, 2020, p. 57). In 1988, the Supreme Court prohibited administrative retroactivity unless Congress had explicitly authorized it: ‘retroactivity is not favored in the law’ (*Bowen v. Georgetown Univ. Hosp.*), 488 U.S. 204, 208 (1988). Retroactivity ‘weakens’ expectations for the most straightforward of reasons. When taking an action such as making a strategic business investment, a regulated entity would have reasonably relied upon and conditioned its action on what

the rules were. Should a later change in those rules mean that such reliance was misguided, expectations are upended, and trust is diminished with them.

Third, regulatory decisions ought not to bring one rule (or set of rules) into contradiction with another. The Supreme Court has held that agencies must supply a rationale for adopting a new policy that is ‘different’ from its prior policy, that is, agencies may not ‘depart from prior policy *sub silentio* or simply disregard rules that are still on the books’ (Sunstein and Vermeule, 2020, p. 75, quoting ‘FCC v. Fox Television Stations, Inc.’, 556 U.S. 502, 2009). Contradictions clearly ‘weaken’ expectations. That case, ‘FCC v. Fox’, arose when a musician and a presenter used vulgarities during an awards program. The Federal Communications Commission (FCC) had previously held that a sprinkling of bad words did not make a broadcaster liable for the kind of ‘indecenty’ prohibited in its regulations, it nevertheless served notice of a violation. While the FCC claimed that Fox, the broadcaster, had formed its expectations from ‘staff letters’ and statements that did not constitute its official position, the U.S. Court of Appeals for the Second Circuit considered its action ‘arbitrary and capricious’ under the APA standard mentioned above. While the majority opinion disagreed, holding that an agency need not show that a new rule improves upon the old, but only that the new rule is ‘permissible’. Such an authorization condition was too weak for a minority of justices, and a pair of dissenting opinions by Justice Stevens and Justice Breyer suggested that, at a minimum, the FCC ought to explain ‘why’ it was making this change. The difference between requiring authorization and requiring rationale is evocative of the effect of retroactivity on expectations. If an unexpected change need only be authorized, it remains difficult to incorporate exactly what has changed in the regulatory environment into stakeholder expectations. If, however, a rationale is required, the model whereby a stakeholder forms its expectations can be updated accordingly. The rationale requirement does more to maintain trust, I think, than the authorization condition because it also contributes to an *ex post* accountability of the court to the rule of law and to the people (see Mansbridge, 2009).

The transparency, retroactivity, and non-contradiction (or intelligibility) principles that Sunstein and Vermeule (2020) set out are an important set of considerations that influence the expectations stakeholders have about their regulatory environment. Still, my principal argument is simpler: ‘when expectations are sullied, trust in those who make regulations diminishes’. And because regulation is made in discussion (and negotiation) with stakeholders, the TiGRE project’s focus on a relationship among stakeholders, agencies and courts is the appropriate lens to understand how these and other principles can enhance trust in the process by which regulatory regimes are implemented.

## ***2.2. Challenging structure***

The structure and organization of a regulatory agency influences stakeholders’ expectations about what the rules it makes will be and how they will impact the choices those stakeholders must make in the regular course of business. Constitutional challenges to agency structures manifest distrust in that they express a view that an agency so conceived is unlikely to produce stable rules on which stakeholders can rely. That is, the structure of

an agency makes arbitrary action more likely, or because it is sufficiently removed from democratic deliberation, it cannot contribute to self-government.

The independence of regulators is possibly the preeminent structural concern in cases challenging structure. On the one hand, independence from politics increases trust as it divorces regulatory choices from the pulling and hauling of partisan politics. On the other hand, independence from politics changes the contours of democratic input. That distance can lead both citizens and stakeholders to perceive that regulations are made without regard to the democratic ideal of self-government, weakening their trust in regulatory regimes. Administrative law weighs in on this trade-off by giving independent regulators substantial discretion, but also requires them to satisfy certain standards which are enforced by courts (e.g., Quintyn and Taylor, 2004). For example, commission structures allow for presidential appointments, but they also stagger terms and distribute power across multiple persons. This balances between political control and its connection to the people through representatives and the fears of stakeholders that a single, unguided regulator is more likely to take arbitrary action.

Political appointments are indeed an important way in which federal administrative law has addressed the mechanism of enhancing trust through political accountability. The structure of agencies varies greatly, but it has two basic forms that have been recognized by the courts. These forms differ in how they promote political control. Executive agencies are headed by an administrator who the President appoints (and takes office on the condition of Senate confirmation) and who the President ‘can’ remove without cause. Political control happens prospectively through appointments and retrospectively through removals. Independent commissions have a shared decision-making structure where several commissioners are appointed by the President (subject to Senate confirmation), but whom the President ‘cannot’ remove without cause. Political control comes only prospectively through appointments. The Supreme Court has held in ‘Myers v. United States’, 272 U.S. 52 (1925), that limiting the President’s removal power requires approval from the Senate because the President is empowered by the Constitution to remove any executive officer. In ‘Humphrey’s Executor v. United States’, 295 U.S. 602 (1935), the Supreme Court distinguished ‘Myers’ and held that the President’s ability to control the actions of the executive branch has limits, and these are meant to ensure the protections (and effective decision-making independence) that Congress gave to the heads of independent agencies in enabling legislation.

### **3. Challenges to Agency Structure**

Executive agencies and independent commissions in the U.S. are in a delicate balance. In this section, I discuss challenges to the structure of several financial regulatory agencies that evoke the constitutional issues presented by each form.

### **3.1. The Consumer Financial Protection Bureau**

The Consumer Financial Protection Bureau (CFPB) was created by Congress after the 2008 financial crisis. The agency is tasked with ensuring that consumer debt products are safe and transparent. At the time of challenges to its structure that I review below, the CFPB was headed by a single director, appointed by the President, with the advice and consent of the Senate, to serve for a fixed, five-year term and removable only for cause. This structure, which was championed by Senator and later Democratic presidential candidate Elizabeth Warren, sits uncomfortably between the executive agency and commission and has been a flashpoint in political debates. Mick Mulvaney, who served as Acting Director of the CFPB during the Trump administration went so far to write in the official Semi-Annual Report of the Board (Bureau of Consumer Financial Protection, 2018):

*‘The best that any Bureau Director can do on his own is to fulfill his responsibilities with humility and prudence, and to temper his decisions with the knowledge that the power he wields could all too easily be used to harm consumers, destroy businesses, or arbitrarily remake American financial markets’.*

Throughout its short history, the CFPB received critical coverage in the press, as exemplified by the following (McCoy, 2017):

*‘[Financial service providers] say the consumer bureau has imposed unnecessary regulations that hurt business while failing to protect consumers. One example is the CFPB’s recent regulatory crackdown on payday lending, loans that cash-strapped consumers take to make ends meet until their next paycheck. Although the consumer bureau contended that such high-interest loans mired workers in a never-ending borrowing cycle, payday lenders say they provide a service that consumers need and want’.*

All of this came to a crescendo in a series of court cases that challenged its structure as independent but also headed by a single administrator.

Seila Law is a California based firm that provides legal services regarding debt. In 2017, the CFPB investigated Seila Law to determine whether it had engaged in unlawful acts relating to its debt relief services. The law firm, given standing by the CFPB’s investigation, argued that the structure of the CFPB is unconstitutional because the single director, removable-only-for-cause, independence structure violates separation of powers principles. The Supreme Court agreed, holding that ‘[t]he CFPB’s single-Director structure contravenes this carefully calibrated system [of a balance of separated powers] by vesting significant governmental power in the hands of a single individual accountable to no one’ (see *Seila Law, LLC v. CFPB*), 140 S. Ct. 2183, 2203 (June 29, 2020). The Court explained the separation of powers in American government as one that aims to ‘divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections’ (2203). ‘In that scheme’, the opinion continued, ‘individual executive officials will still wield significant authority, but that authority remains subject to the ongoing supervision and control of the elected President’ (2203). The CFPB struc-

ture ‘lacks a foundation in historical practice and clashes with constitutional structure by concentrating power in a unilateral actor insulated from Presidential control’ (2192). The separation of powers requires that an individual who heads an agency, with ‘the authority to bring the coercive power of the state to bear on millions of private citizens and businesses’ must be removable by the President at will (2200-01).

The ‘Seila Law’ case had not been the only time the structure was at issue before the courts. In ‘PHH Corp. v. CFPB’, 881 F.3d 75, 82 (D.C. Cir. 2018), the CFPB filed a Notice of Charges in 2014 against PHH, a large mortgage lender, challenging their mortgage insurance premiums. PHH made a very similar argument to the one with which Seila Law won its case. Yet the U.S. Court of Appeals for the District of Columbia Circuit ruled—a ruling now overturned by the ‘Seila Law’ case—that the CFPB’s structure and independence was constitutional. The opinion stated that ‘Congress and the President have historically countenanced sole-headed financial regulatory bodies’ (80) and ‘[i]t remains unexplained why we would assess the challenged removal restriction with reference to the liberty of financial services providers, and not more broadly to the liberty of the individuals and families who are their providers’ (106). The court countenances the concern that agencies regulating financial actors could be prone to overreaching in the name of protecting individuals, while being less concerned about limiting financial institutions. This muddles the expectations of the latter, resulting in their distrust of the regulatory scheme. A dissenting opinion by Judge Henderson gave a clear voice to that distrust: ‘The CFPB flunked ‘Rule of Law 101’ and was called out for ‘gamesmanship’ and ‘absurd[]’ reasoning’ (150). Moreover, she contended that ‘[t]he administrative agencies sprawled across Washington, D.C.—especially the ‘independent’ ones—do not fit comfortably within the text and structure of the Constitution’ (140). While the dissent did not ‘question the importance of protecting consumers’, it contended that ‘an agency cannot be considered ‘impartial[]’ under Humphrey’s Executor if in partisan fashion it uniformly crusades for one segment of the populace against others. Consistent with its design, that is what the CFPB has done’ (149).

In a subsequent case, the CFPB sued a legal support firm for violations of the Consumer Financial Protection Act. The firm, RD Legal Funding, moved to dismiss the complaint, *inter alia*, because the CFPB is unconstitutionally structured (CFPB v. RD Legal Funding, LLC), 332 F. Supp. 3d 729, 745 (S.D.N.Y. 2018). The U.S. District Court for the Southern District of New York held that the CFPB’s single-director leadership structure is unconstitutional, adopting some of the logic of Judge (now Justice) Kavanaugh’s dissent in ‘PHH Corp.’ rather than that of the majority.

*‘Respectfully, the Court disagrees with the holding of the en banc court [in PHH Corp] and instead adopts Sections I-IV of Judge Brett Kavanaugh’s dissent..., where, based on considerations of history, liberty, and presidential authority, Judge Kavanaugh concluded that the CFPB ‘is unconstitutionally structured because it is an independent agency that exercises substantial executive power and is headed by a single Director’ (784, quoting PHH Corp., 881 F.3d at 198).*

The ‘Seila Law’ case followed and agreed, but it did not hold that the CFPB could no longer operate. In ‘Seila Law’, the Supreme Court held that the provision regarding the CFPB Director’s removal was severable. The CFPB continues to operate, but the President can now remove the Director at any time, for any reason. The CFPB filed formal ratifications in all other pending enforcement actions, and most other courts have upheld the CFPB’s pending enforcement actions. For example, on remand, the court found that CFPB’s suit against Seila Law could continue. An enduring issue for the agency deals with enforcement actions that were initiated at a time when its structure violated the Constitution. Parties will likely continue to challenge the CFPB’s ratifications of their enforcement actions (Lev and Williams, 2021). Once the structure has been successfully challenged, the decisions taken under that structure come to occupy a precarious position.

### ***3.2. The Federal Housing Finance Agency***

Like the CFPB, the Federal Housing Finance Agency (FHFA) was created in 2008, but its role was to assume responsibility for ‘Fannie Mae’ and ‘Freddie Mac’, two government-sponsored enterprises (GSEs) that aim to create a secondary market for mortgages. The FHFA complements the CFPB and has a similar structure. The difference is that FHFA (primarily) regulates GSEs rather than private actors. In the specific case of FHFA, the GSEs that it regulates are privately owned by shareholders but operate under a public charter that includes conditions private companies do not face. One such condition is that Fannie Mae and Freddie Mac provide the U.S. Treasury Department nearly all of their net worth each quarter as a dividend.

In ‘Collins v. Mnuchin’, 938 F.3d 553 (2019), the FHFA secured financing from the Treasury to keep the two GSEs afloat, and shareholders objected to this agreement (562–63). The shareholders alleged that the Treasury and the FHFA simply took their money when they agreed in 2012 to a ‘net worth sweep’ (566–68). The shareholders’ argument was that the structure of the FHFA is unconstitutional. The U.S. Court of Appeals for the Third Circuit agreed in two ways (587–88). On the issue of abuse of power, the court found that ‘[u]nder traditional principles of insolvency, investors and the market reasonably expect a conservator to ‘operate, rehabilitate, and restore the health of the troubled institution,’ not summarily take its property’, but the action by the Treasury and FHFA to issue ‘inverts traditional conservatorship’ (585). The problem of trust is that the ‘net worth sweep’ upends shareholder expectations about how the regulatory regime influences the value of their holdings.

The Court also held that the structure of the FHFA was unconstitutional, focusing once again on the single directorship with removal only for cause. As the Court put it, ‘[a] single agency director lacks the checks inherent in multilateral decision making and is more difficult for the president to influence’ (587–88). The separation of powers preserves ‘multilateral decision making’, which slows rule change and makes expectations about a regulatory environment more stable. On appeal as ‘Collins v. Yellen’, 141 S. Ct. 1761, 1787 (2021), the Supreme Court held that the for-cause restriction on removal violates the Constitution. Writing for the Court, Justice Alito explained that ‘the FHFA’s powers ...

differ critically from those of most conservators and receivers. It can subordinate the best interests of the company to its own best interests and those of the public' (1785). This substitution of interests disrupts expectations and lowers trust on the part of regulated entities and stakeholders. However, in dissent, Justice Sotomayor clearly presented the independence-as-credible-commitment logic and tied it to public trust: 'The public has long accepted (indeed, expected) that financial regulators will best perform their duties if separated from the political exigencies and pressures of the present moment' (1807).

'Collins' differs from 'Seila Law' in a crucial way. In order to get retrospective relief from an FHFA decision, 'Collins' requires plaintiffs to show that if the statutory removal protection were not in place, then the President would have removed the administrator to prevent finalizing the agency action. This means that plaintiffs have a much lower likelihood of a successful retrospective challenge against the FHFA than the CFPB (Walker, 2021). Such differences in treatment across policy domains surely pose trust questions for regulated entities and stakeholders under various regulatory regimes.

### ***3.3. Public Company Accounting Oversight Board***

The Public Company Accounting Oversight Board (PCAOB) was created as a part of a series of accounting reforms in the Sarbanes-Oxley Act of 2002 in the wake of the Enron meltdown. The PCAOB regulates accounting firms and can initiate investigations and is a sub-agency within the SEC that has five members appointed by the SEC. Its original structure protected PCAOB members by two layers of for-cause limitations on their removal. Under 15 U. S. C. §§7211 the SEC could only remove a PCAOB member for cause, and the President could remove a member only if her actions rose to the 'inefficiency, neglect of duty, or malfeasance in office' standard in the 'Humphrey's Executor' case described in the preceding section (295 U. S., at 620).

In 'Free Enterprise Fund v. PCAOB', 561 U.S. 477 (2010), the PCAOB began an investigation into the accounting firm of Beckstead and Watts, a member of an organized interest group called the Free Enterprise Fund, which brought the action against the Board. The Free Enterprise Fund argued that the PCAOB structure was unconstitutional (487), and the court agreed, leaving in place the for-cause protection at the SEC, while invalidating the presidential restriction (496). Justice Roberts wrote: 'The President therefore cannot hold the Commission fully accountable for the Board's conduct ... [a]nd even if the President disagrees with their determination, he is powerless to intervene' (496). In striking down the removal restriction for the President, the Roberts opinion restricted the reach of its holding to the unique situation of the PCAOB, distinguishing the official Humphrey's Executor from the 'inferior officers' on the Board. Justice Breyer dissented, arguing that this attempt to restrict the holding was ambiguous and created uncertainty that could lead to the unconstitutionality of thousands of offices. Roberts retorted: 'The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive's control, and thus from that of the people. This concern is largely absent from the dissent's paean to the administrative state' (499). The disagreement between Roberts and Breyer in 'Free Enterprise Fund' high-

lights the competing problems underlying trust in regulatory regimes that we have been discussing. For Roberts, too much independence leads to inconsistent expectations about the effect of elections on policymaking. For Breyer, trying to make the PCAOB more in line with other independent agencies challenges the stable principle in ‘Humphrey’s Executor’, throwing the whole administrative state into ambiguous territory.

I think that the cases reviewed in this section show that the relationship between the structure of agencies and stakeholder expectations about their process of decision making are correlated and raise constitutional questions. In the next section, I turn to challenges to the decision-making process of regulatory agencies to illustrate that the reliance interest and expectations of stakeholders remain crucial to visualizing their legal arguments through the lens of trust.

#### **4. Challenges to agency discretion and to its exercise**

The relationship between the structure of an administrative agency and its process of making decisions is clearly visible when confronting the question of what legal authority an administrative agency has been given by Congress. It is hardly surprising that it is difficult to circumscribe the four corners of an agency’s authority, but the threshold problem of whether it can have any authority in the first place, while resolvable and latent in much administrative law, is non-trivial in the American context. I begin with this authorization question and then turn to the concern that once authorized, an agency must interpret its own enabling law. Then, I discuss how courts consider the process of decision making.

The non-delegation doctrine states that Congress cannot alienate its legislative powers to other entities, and this includes, specifically, the executive branch. For the separation-of-powers to work, it is important that the separate branches of government be authorized to and in fact deploy their enumerated powers. Article I of the Constitution states that ‘[a]ll legislative powers herein granted shall be vested in a Congress of the United States’. This clause does not explicitly prohibit Congress from delegating its ‘legislative powers’, but it does not grant Congress that authority either. In ‘Wayman v. Southard’, 23 U.S. 1 (1825), Chief Justice Marshall states that Congress does have the power to delegate its Article I authority but leaves the extent of permissible delegations opaque. As the administrative state expanded, broad delegations of legislative authority were permitted by the courts, while the non-delegation doctrine remained dormant in constitutional law. In ‘Whitman v. American Trucking Associations’, 531 U.S. 457 (2001), the Supreme Court held that when Congress delegates decision-making to agencies, enabling legislation must present an ‘intelligible principle’ to guide what the agency is authorized to do. While that may be a low bar, the non-delegation doctrine remains latent.

The non-delegation doctrine is thus hard to enforce. I have been arguing that the trust of regulatory authority is based on stakeholder expectations, and in this case, these are expectations that even broad powers will not be arbitrarily exercised because to do so would be to undermine the reliance interest stakeholders have made in a regulatory regime. In this way, the reliance interest at the heart of this essay begins with the authorization of

delegated powers. Because the Constitution does not speak to delegation, any regulatory regime created through delegation requires a reliance interest in the intelligibility and predictability of regulations that are promulgated as well as in the authority regulators have to use—and not to abuse—their delegated powers. That is, ‘regulated parties should know what is required of them so they may act accordingly ... precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way’, (*FCC v. Fox Television Stations, Inc.*’, 132 S. Ct. 2307, 2317 (2012)).

How do agencies themselves appropriately understand how much authority they have and over what domains it extends? In determining whether statutory authority has been exceeded, courts grant varying degrees of deference to agency’s own interpretations of what authority they have. ‘*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*’, 467 U.S. 837 (1984) provides a rather permissive, two-step test for determining whether an agency ‘has stayed within the bounds of its statutory authority’, ‘*City of Arlington v. FCC*’, 569 U.S. 290, 297 (2013). The first step is to ask whether Congress directly spoke to the precise issue at bar. The second step is to ask whether agency’s answer to the first question is ‘based on permissible construction of the statute’ ‘*Chevron*’, 467 U.S. at 842–43. If the agency has articulated a reasonable interpretation, the court will defer to its interpretation rather than substitute its own. Essentially, then, ‘*Chevron*’ allows agency interpretations to fill gaps in legislation, and those efforts ‘are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute’ (844). The ‘*Chevron*’ test supports stakeholders’ reliance interest by allowing regulatory agencies, with which they have a relationship of trust, to maintain expectations about the rules they promulgate without concern that courts will change those rules as long as those agencies make reasonable inferences about what authority they do have.

There are limits to the applicability of the ‘*Chevron*’ standard, and, indeed, the entire standard is being challenged before the Supreme Court during the current term in the case of ‘*Loper Bright Enterprises v. Raimondo*’ (Docket No. 22–451). When multiple agencies are authorized under the same statute, they each have the authority to interpret it, and courts must resolve inconsistent views about what agencies can do, ‘*Collins v. NTSB*’, 351 F.3d 1246, 1253 (D.C. Cir. 2003). This exception is relevant in the case of financial regulation because many statutes in this domain are administered by multiple agencies and because the presence of multiple agencies might lead to unintelligible rules that confuse expectations and reduce trust. The U.S. Court of Appeals for the District of Columbia Circuit declined to use ‘*Chevron*’ deference for agencies’ interpretations of the Federal Deposit Insurance Act because several agencies enforce it, ‘*Proffitt v. FDIC*’, 200 F.3d 855, 863 n.7 (D.C. Cir. 2000).

Courts also consider what kind of process a regulatory agency must take when deciding how to make rules. ‘*Motor Vehicle Mfrs. Ass’n of US, Inc. v. State Farm Mut. Auto. Ins. Co.*’, 463 U.S. 29, 42 (1983) states: ‘The agency must examine the relevant data and articulate a satisfactory explanation for its action’. This implies a ‘searching and careful’ review of agency decision-making ‘*Citizens to Preserve Overton Park v. Volpe*’, 401 U.S. 402 (1971). Review of agency decision-making is, however, limited by ‘*Vermont Yankee*

Nuclear Power Corp. v. Natural Res. Def. Council, Inc.’, 435 U.S. 519, 525, 549 (1978), which held that courts may not impose additional procedures on agencies beyond those required in the APA. Courts are not experts. If allowed to tell an agency how to go about making regulations, courts could upset stakeholder expectations and diminish trust in the predictability of a regulatory regime.

Trust is associated with the ‘reasonable’ use of discretion (see Bertelli, 2021; Bertelli and Schwartz, 2023). While this statement realistically depicts the authority of a regulatory agency, discretion has become highly politicized in contemporary financial regulation and correlates with the reliance interest underlying trust. Consider the following: ‘Backers of tougher rules established after the 2007–2009 financial crisis insist allowing regulators to identify specific firms for stricter scrutiny as key cogs of the financial system is a critical cool. But conservative critics argued the [Financial Stability Oversight Council] applied the power in an inconsistent and opaque fashion’ (Schroeder, 2018). And consider the words of then White House Counsel Don McGahn to the 2017 Federalist Society National Lawyers Convention (Nielson, 2017):

*‘The government has an obligation to clearly inform parties of the rules that will apply to them. Anyone who is engaged with the regulatory state over the last several decades knows that agencies have often taken precisely the opposite approach. Far too often agencies issue vague regulations or in some cases, no regulations at all. Then they interpret those vague regulations through byzantine interpretive rules, guidance documents, or so-called ‘Dear Colleague’ letters. To administrative law experts, these are known by the Orwellian term “subregulatory actions.” But whatever you call them, they are illegitimate.’*

Such sentiment makes cases that challenge an agency’s decision-making fertile ground for understanding trust in regulatory regimes.

#### **4.1. Securities and Exchange Commission**

The Securities and Exchange Commission (SEC) was created in the aftermath of the Wall Street crash of 1929. Its purpose is to enforce laws against securities market manipulation. The SEC is an independent agency with five commissioners who are appointed by the President with the advice and consent of the Senate.

In ‘Lindeen v. SEC’, 825 F.3d 646, 648 (D.C. Cir. 2016), the Commission made a new rule that pre-empted registration under state law and the qualification requirements for a subset of securities. The petitioners filed the action to review the SEC’s definition of a ‘qualified purchaser’ in the statute (652–53). The U.S. Court of Appeals for the District of Columbia Circuit held that the agency’s definition must be reasonable, and the SEC’s definition was reasonable. Agencies ‘enjoy broad discretion’ in defining the ambiguous terms in a statute (653). The opinion stated: ‘After acknowledging that eliminating state-level review might reduce investor protection, the SEC explained that “[s]everal factors could mitigate’ the risk” (652). ‘Lindeen’ illustrates how questions of statutory interpretation by agencies both abound and relate to the process of rulemaking. Moreover, political

accountability survives under this kind of broad deference. If Congress (or a new partisan composition of it) does not like this interpretation, it can enact a new statute. The reliance interest of stakeholders cannot be so strong as to overturn the Article I authority of Congress to make laws.

Questions of authority and process often coincide in litigation. In ‘Chamber of Commerce of the United States v. SEC’, 412 F.3d 133, 137 (D.C. Cir. 2005), plaintiffs challenged two corporate governance conditions required by the SEC. The challenged provisions mandated that a corporate board must have at least 75% independent directors and an independent chairman to engage in certain transactions otherwise prohibited by the Investment Company Act (137–38). The court held that while the SEC did not exceed its authority in adopting the conditions, but it did violate the APA by failing to adequately consider the costs that mutual funds would incur (145). As noted, a frequent argument is that in the process of making regulations, agencies do not adequately consider the economic costs that will be imposed on regulated entities. In ‘Business Roundtable v. SEC’, 647 F.3d 1144 (D.C. Cir. 2011), the Business Roundtable and the Chamber of Commerce, both organized stakeholder groups with members that issue publicly traded securities, requested review of an SEC rule that requires public companies to provide shareholders with information any candidates for their boards of directors nominated by shareholders (1146). The petitioners argued that the SEC’s rule violated the APA because the SEC failed to consider the rule’s effect on competition (1147). The U.S. Court of Appeals for the District of Columbia Circuit held that the SEC acted arbitrarily because it failed to adequately assess economic costs of the rule.

*‘We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once against—as it did most recently in American Equity Investment Life Insurance Company v. SEC, 613 F.3d 166, 167-18 (D.C. Cir. 2010), and before that in Chamber of Commerce of the United States v. SEC, 412 F.3d 133136 (D.C. Cir. 2005)—adequately assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters (1148–49)’.*

‘Business Roundtable’ suggests that in financial regulation, agency ‘reasoning, which fails to view a cost at the margin, is illogical and, in an economic analysis, unacceptable’ (1152). It brings a financial accounting to the reliance interest of stakeholders. It is expensive to distribute information to all stakeholders of a publicly traded company. If the courts allowed the agency to exclude economic costs from its decision-making process, that would create a great deal of uncertainty for regulated firms. The opinion continued: ‘By ducking serious evaluation of the costs that could be imposed upon companies from use of the rule by shareholders representing special interests, particularly union and government pension funds, we think the Commission acted arbitrarily’ (1153). Economic costs are a

major part of the expectations-generating models of firms regulated by the SEC. They can rely on a rulemaking process only if these costs are accounted for in SEC decision making.

#### **4.2. Federal Trade Commission**

The Federal Trade Commission (FTC) was established in 1914 under the Federal Trade Commission Act, which was a response to the 19<sup>th</sup> century age of large and monopolistic trusts. The FTC is an independent agency with a mission to enforce antitrust law and protect consumers. It is composed of five Commissioners who each serve seven-year terms. Commissioners are nominated by the President and subject to Senate confirmation, and no more than three FTC members can be of the same political party. The Chair serves at the President's pleasure and thus can be removed at will.

A challenge to the authority of the FTC arose in 'American Financial Services Assoc. v. FTC', 767 F.2d 957 (D.C. Cir. 1985). In the case, American Financial Services Association and the South Carolina Department of Consumer Affairs sought review of the FTC's Trade Regulation Rule on Credit practices. The Credit Practices Rule, which provides, *inter alia*, restraints on creditors regarding the use of contract clauses it has found to harm consumers. Petitioners claimed that in promulgating the rule, the FTC acted beyond its authority to define unfair acts and practices (962-64). The U.S. Court of Appeals for the District of Columbia Circuit disagreed.

*'While we agree with petitioners that the Commission cannot be allowed to intervene at will whenever it believes the market is not producing the "best deal" for consumers, we nonetheless believe that this court would be overstepping its authority if we were to mandate, as petitioners urge, that the Commission's unfairness authority is limited solely to the regulation of conduct involving deception, coercion or the withholding of material information (982)'.*

The court promotes regulated entities' reliance interests but clearly places limitations on it in order to balance the separation of powers and maintain the deference given to agencies that, as I have discussed, promotes reliance interests as well. In 'American Financial Services', the definition of unfairness could not be conceived so broadly as to upset reasonable expectations about what contract provisions are permissible. Moreover, 'American Financial Services' also raises the question of what it means for the SEC to consider economic interests. The opinion states: 'Petitioner's argument harbors a fundamental misconception about the nature of the Commission's required cost-benefit analysis. Petitioners would require that the Commission's predictions or conclusions be based on rigorous, quantitative economic analysis' (986). Thirty years later, the Supreme Court did require agencies to consider costs before deciding to regulate in 'Michigan v. Environmental Protection Agency', 576 U.S. 743 (2015). While the FTC claimed in 'American Financial Services' that 'a full evaluation of the economic impact of the rule would have to await its implementation', the decision might be different were the case to be litigated today.

### ***4.3. The National Credit Union Administration***

The National Credit Union Administration (NCUA) was created in 1970 to supervise federal credit units which provide credit at reasonable rates and banking services to people of small means. The three-member board is appointed by the President and confirmed by the Senate. Board members serve on six-year terms.

'American Bankers Association v. NCUA', 934 F.3d 649 (D.C. Cir. 2019) offers a very close look at the relationship between agency authority and process. The NCUA promulgated a rule that makes it easier for community credit unions to expand their geographical coverage to reach more potential members (656). The American Bankers Association (ABA) is a stakeholder group that represents competitors to credit unions, and it challenged the rule on behalf of its members. The ABA claimed that the rule changes were arbitrary and capricious and entitled to no deference under 'Chevron' (660). The U.S. District Court for the District of Columbia Circuit agreed, stating that one change precipitated by the rule could not be allowed because the NCUA had not adequately explained it, and thus eliminated it as 'arbitrary and capricious' under the APA (669). The court reasoned that "[l]ongstanding principles of administrative law teach us to give federal agencies breathing room when they make policy and 'resolv[e] the struggle between competing views of the public interest'" (656, citing 'Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.', 467 U.S. 837, 866, 1984). Moreover, 'Congress often expects agencies, with their political accountability, 'bod[ies] of experience[,] and informed judgment,' to make sound interpretive choices with 'the force of law'" (656, citing 'United States v. Mead Corp.', 533 U.S. 218, 227, 229, 2001). While agencies enjoy deference, they enjoy more when they explain the reasons for their decisions.

### ***4.4. The Financial Stability Oversight Council***

The Financial Stability Oversight Council (FCOS), like the CFPB and FHFA, was created after the 2008 financial crisis in the Dodd-Frank Wall Street Reform and Consumer Protection Act. Among other responsibilities, the FCOS places certain non-bank financial entities under the supervision by the Board of Governors of the Federal Reserve System. The Treasury Secretary is the head of the FSOC. The Council is composed of ten voting members (nine *ex officio* members and one independent insurance expert appointed by the President with the advice and consent of the Senate) and five non-voting members.

MetLife, an insurance company, challenged an FSOC's finding of 'material financial distress' that would lead to stricter government oversight, 'MetLife, Inc. v. Fin. Stability Oversight Council', 177 F. Supp. 3d 219, 223–25 (D.D.C. 2016). The FSOC designated MetLife as one of the non-bank financial entities that needed additional supervision after its finding of 'material financial distress'. The U.S. District Court for the District of Columbia rescinded the FSOC's determination because it departed from two of its own without explanation or recognition of the same. The court also found that FSOC purposefully omitted any consideration of the cost that closer oversight would bring to MetLife. FSOC insisted that it did not change its position, but the court rejected that argument, stating that 'the

requirement that an agency provide a reasonable explanation for the deviating action *per se* entails acknowledging that it is changing position’ (235 citing ‘FCC v. Fox Television Stations, Inc.’, 556 U.S. 502, 515, 2009). As several other cases have shown, a failure to explain decisions and to consider the economic costs of a rule seems to compel courts to intervene and protect regulated entities’ reliance on the existing regulatory framework.

#### **4.5. The Centers for Disease Control**

As in so many areas of life and law, the coronavirus pandemic has brought issues of agency decision-making before courts. The Centers for Disease Control (CDC) were jointly involved in one important case. The CDC is the national public health agency of the United States. Its main purpose is to protect public health and safety through prevention of disease, injury, and disability. The Director of the CDC may be a career employee or a political appointment that does not require Senate confirmation. The Director serves at the pleasure of the President.

The authority of the CDC to impose a moratorium on the eviction of tenants during the pandemic was the subject of ‘Alabama Association of Realtors, *et al.* v. Department of Health and Human Services’, On Application to Vacate Stay, No. 21A23 (Supreme Court of the United States, 2021). The CDC imposed a nationwide moratorium on evictions after the moratorium authorized by Congress expired. Associations of realtors and managers of rental properties in Alabama and Georgia sued to stop the moratorium. In a *Per Curiam* opinion, the court agreed, stating that ‘[i]t strains credulity to believe that this statute grants the CDC the sweeping authority that it asserts’ (1). The opinion continues:

*‘It is indisputable that the public has a strong interest in combating the spread of the COVID-19 Delta variant. But our system does not permit agencies to act unlawfully even in pursuit of desirable ends. Cf. Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579, 582, 585–586 (1952) (concluding that even the Government’s belief that its action [to seize and run steel mills during the Korean War] “was necessary to avert a national catastrophe” could not overcome a lack of congressional authorization). It is up to Congress, not the CDC, to decide whether the public interest merits further action here (8)’.*

While this case seems to stray from my present focus on financial regulation, the CFPB made a related rule that built on the CDC moratorium. It strengthened the CDC’s eviction moratorium by requiring that all debt collectors pursuing an eviction provide written notice to tenants and the protections and rights provided by the CDC Eviction Moratorium (Bureau of Consumer Financial Protection, undated). While this rule is likely moot because it was based on the CDC moratorium, the CFPB’s final rule making it harder to foreclosure did go into effect (Hicks and Lewis, 2021). This suggests that the CFPB is continuing to strengthen protections, and because the Supreme Court showed no appetite for the eviction protections, the CFPB shored up protection against foreclosure.

This back and forth between courts and multiple agencies shows that while the law provides a venue for arguing in favor of a reliance interest in a regulatory environment, that environment can go topsy-turvy as litigation unfolds.

## 5. Conclusions and implications for comparative research

I have argued that it is difficult to understand the underlying problem of trust in regulatory structures in the U.S. without considering the arguments regulated entities and stakeholder groups make before courts. This is because it is impossible to understand the American administrative state without considering the pivotal role of judicial review in it. Both constitutional challenges to agency structure and APA review of agency decisions and of the process of making those decisions reveal important elements of trust. Trust in these cases is based in a reliance interest. Regulated entities rely on a model of what they expect the relevant regulatory landscape currently ‘does’ and subsequently ‘will’ look like.

When the structure of agencies pulls them too far away from democratic influence, the courts can be asked to review that structure. Several of the cases discussed above reviewed a novel structure of agencies created in response to the 2008 financial meltdown. This new structure disturbed expectations. The extreme independence—codified by the single-head, for-cause removal provisions—makes the agency too insulated from influence that stakeholder groups might put on political principals. The structure of the agency thus upsets the reliance interest regulated entities and stakeholders have formed, and this is articulated in the arguments before the court.

Regulated entities may feel that actions taken by an agency regarding rulemaking are upsetting their expectations about the regulatory environment on which they rely. The APA provides for relief against arbitrary and capricious action. The litigation reviewed above shows that while agencies enjoy rather broad deference in the process of regulatory policymaking, that deference is far from boundless. The arguments in these cases reveal when and why regulated entities and stakeholder groups have difficulty in developing a clear set of expectations about what the rules are and what they will be in the future.

In continental Europe, the importance of courts as a forum for voicing (dis)trust might seem peculiarly American. One reason for this is, of course, a significant difference in constitutional structure. The cases I have reviewed reflect disputes between individuals (or organizations) before courts and regulatory agencies, and they reveal an important limitation of administrative law in the U.S. It is widely recognized that the administrative state is built into the constitutions of the countries of continental Europe. Civil law systems and the primacy of statutory law within them provide a particularly strong separation of powers; and because power is exercised by public administration, it must be among those separate powers (see Bignami, 2012). But the United States turned 160 years old before it had an Administrative Procedure Act, and it does not direct agencies toward ‘principles’ of good public administration as does European law (Hoffmann, 2014; Bertelli, Falletti and Cannas, 2023; Bertelli *et al.*, 2023). Instead, as we have seen, its solution is political, inviting ‘participation’ in rulemaking by all interested through the notice-and-comment process of informal rulemaking and ‘litigation’ by all affected through judicial review in the regular courts. While continental European systems envision public administration as a separate power of the state, in the U.S. public agencies are a constitutional incongruity to be held in check by the people through the institutions we authorized back in 1789 (see

Cohen-Ilya and Porat, 2017). The French distrust in courts that ‘led to an administrative law regime designed to protect prerogative rights of administration’ cannot be more different than the American distrust of the public administration that makes the courts the forum for asserting individual rights against it (Bertelli, 2005, p. 137). I think that differences in the locus of suspicion—the courts or the public administration—go a long way toward understanding differences in the role of courts in matters of regulatory trust.

These differences form the basis for a fruitful comparative agenda on regulatory trust as a reliance interest. My call for such research would begin to enhance such comparisons in the public administration literature more generally. In a systematic review of leading public administration journals, Fiona Cece and I ‘did not reveal any study that compares, for instance, how administrative law differs in its ... implications across civilian and common law systems’ (Bertelli and Cece, 2020, p. 175). While there are many ways in which trust as a reliance interest might be studied, one possible route might be as follows.

In the first step, the U.S. cases that I have reviewed provide a rich source of scenarios that can be translated into vignettes that allow lawyers or law students to determine how they would be resolved in various jurisdictions. Because the cases themselves have been resolved by U.S. courts, they are ‘anchored’ such that lawyers or law students in other jurisdictions could resolve them under local law and reveal differences across jurisdictions. This is similar to a method in comparative law where hypothetical scenarios are created ‘to see how they would be solved’ by law in various jurisdictions (Cananea and Bussani, 2019, p. 222). For the comparisons to work, such scenarios must be comprehensible in the various systems under study, so the facts of the U.S. cases would have to be cleansed of specific references to American institutions and actors. This would allow the researcher to develop a reasonable ‘expectation’ of what the law requires in each jurisdiction. This is the kind of advice that stakeholders would ask their own legal counsel to provide, and it would certainly form their expectations.

In the second step, the vignettes, which the first step anchors in the law of each jurisdiction under study, could be placed on a survey given to a sample of stakeholders or regulated individuals. Vignettes, written with their legal resolution from the first step, could be used to judge their responses about trust as a reliance interest. To provide an adequate dependent variable, such questions should judge both stakeholders’ ‘expectation’ of what the law requires and their ‘reliance’ on it. The expectation could be captured by asking whether the respondent would anticipate such a resolution of facts in the vignette. Then, respondents could then be asked whether they would rely on the resolution to guide their own actions.

Researchers might also vary characteristics of the agency ‘structure’ as well as the ‘decisions’ that are at issue in a vignette to see how that would change their expectations and reliance. Do changes in structure and the characteristics of decisions change the expert resolutions in the first step? Do they shift expectations and reliance by stakeholders in the second step? This kind of exploration would benefit tremendously from qualitative research designs as well, which could offer insight into the mechanisms behind expectation and reliance that might be at play more generally. Finally, observational data on the resolution

of actual disputes could be examined to uncover patterns of reliance, particularly when external shocks create quasi-experiments that shift expectations.

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