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Administrative Law and Multi-Level Administration: An EU and US Comparison

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Abstract: The aim of this chapter is to assess what, if anything, administrative law can demonstrate about multi-level administration in the European Union and the United States. The particular focus of the examination is not on the content of administrative law in each legal order, but rather on the impact of EU and US federal administrative law on the Member States and US States respectively. It will be seen that, while US federal administrative law has primarily only influential effect on US States, EU administrative law is often binding on Member States. This observation challenges presumptions often made, particularly in political science, as to the degrees of inter-penetration in administration in the EU and the US. It will be argued that the cause of divergence is largely derived from differing judicial attitudes as to the fundamental tenets of the co-operation between the different levels of administration, and indeed, more general understandings of federalism in the two jurisdictions. In this way, this study also provides a useful prism through which to consider integration in the EU and US more broadly.

I. INTRODUCTION

THE CORE INQUIRY of this chapter is to assess what, if anything, administrative law can demonstrate about multi-level administration in the European Union (EU) and the United States (US). The particular focus of the examination is not on the content of administrative law in each legal order, but rather on the impact of EU and US federal

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administrative law on the Member States and US States ('States') respectively. When considering this impact, the paper will distinguish between the particular system of administrative law having 'binding force',[1] on the one hand, and having what might be deemed 'influential effect' on the other. The former, to adopt Toth's understanding, suggests that the relevant system of administrative law creates a 'legal obligation' on Member States or States 'to comply with it'.[2] By contrast, the latter suggests that the underlying concepts and principles of either EU or US federal administrative law are persuasive in the evolution of the administrative law of the corresponding Member States or States. It appears that while EU administrative law is capable of both 'binding force' and 'influential effect' on Member States—and indeed much has been written on this latter issue[3]—US federal administrative law is, for the most part, likely to produce merely 'influential effect' for States.

As will be seen, evaluating the divergences between the two systems, while difficult, can nonetheless provide useful insights for thinking about administration and integration in each legal order. Multi-level administration in the EU has been examined extensively by political scientists and lawyers,[4] but the 'multi-level' impact of EU administrative law has received less attention. It will be suggested here that incorporating analysis of the impact of EU administrative law on Member States may challenge certain of the assumptions usually made by political scientists in this context. Moreover, important distinctions in judicial attitudes emerge from this study. The limited impact of US federal administrative law on States can be considered in light of a general self-imposed restraint exercised by federal courts, motivated in part at least by federalist concerns. This stands in contrast with the different, and oft-discussed, broadly integrationist agenda pursued by the European Court of Justice (the ECJ). Through

[1] The term 'binding force' is used here instead of, for example, 'direct effect', which is more often used in the EU context. The term 'direct effect' is often interpreted in different ways and can be contested; it is also not a term that is useful in the US context. As such, for the purpose of this comparison, it is considered preferable to avoid it.

[2] AG Toth, 'The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects' (1984) 4 *Yearbook of European Law* 1, 5.

[3] See, eg, J Schwarze (ed), *Administrative Law Under European Influence* (London, Sweet and Maxwell, 1996); J Schwarze, *European Administrative Law* (London, Sweet and Maxwell, 1992); G de Búrca, 'Proportionality and *Wednesbury* Unreasonableness: The Influence of European Legal Concepts on UK Law' (1997) 3 *European Public Law* 561; P Birkinshaw, *European Public Law* (London, Cambridge University Press, 2003); G Anthony, 'Community Law and the Development of UK Administrative Law: Delimiting the Spill-Over Effect' (1998) 4 *EPL* 253; J Schwarze, 'Towards a Common European Public Law' (1995) 1 *EPL* 227; C Hilson, 'The Europeanization of English Administrative Law: Judicial Review and Convergence' (2003) 9 *EPL* 125.

[4] See, eg, M Egeberg (ed), *Multilevel Union Administration: The Transformation of Executive Politics in Europe* (Basingstoke, Palgrave Macmillan, 2006); H Kassim, 'The European Administration: between Europeanization and Domestication' in J Hayward and A Menon (eds), *Governing Europe* (Oxford, Oxford University Press 2003); HCH Hofmann and AH Türk (eds), *EU Administrative Governance* (Cheltenham, Edward Elgar, 2006).

examining potential explanations for the divergences in the impact of EU and US federal administrative law, it is also hoped that a modest contribution will be made to broader debates on the nature of EU integration.

The chapter will begin by providing context for the comparison through briefly: explaining the comparative methodology underpinning this study; describing EU and US federal administration; and clarifying the terms 'EU administrative law' and 'US federal administrative law'. In turn, the chapter will then consider, in Part III, the impact of EU administrative law on Member States; in Part IV, the impact of US federal administrative law on States; and in Part V, the potential explanatory factors for the differences in impact of EU and US federal administrative law. In Part VI, a brief comment will be made on the implications of this comparative review for discussion of the evolution of and integration in the EU.

Although perhaps not strictly within the remit of a review of the binding force of EU administrative law and US federal administrative law on Member States and States respectively, to present a more complete picture, it is also helpful to incorporate into the discussion a brief consideration of those aspects of EU and US federal law which do not, strictly speaking, constitute a part of EU or US federal 'administrative law', but which nonetheless have binding consequences for Member State or US State administrations and administrative law.

II. FRAMING THE STUDY

A. Comparative Methodology

Comparisons between the US and the EU are increasingly commonplace in almost every legal sphere;[5] and, more particularly, the US is regularly used as a benchmark to assess levels of integration or evolution in the EU.[6] As Weiler has put it: 'comparisons between the distinct federalisms in North American and Europe have constituted a staple feature in the ongoing discussion concerning European integration'.[7] Caution must always

[5] See, eg, D Meltzer, 'Member State Liability in Europe and in the United States' (2006) 4 *International Journal of Constitutional Law* 39; J Mashaw, 'Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance' (2007) 76 *George Washington Law Review* 99; and K Lenaerts and K Gutman, '"Federal Common Law" in the European Union: A Comparative Perspective from the United States' (2006) 54 *American Journal of Comparative Law* 1.

[6] See, eg, A Menon and M Schain (eds), *Comparative Federalism: The European Union and the United States in Comparative Perspective* (Oxford, Oxford University Press, 2006); K Nicolaïdis and R Howse (eds), *The Federal Vision: Legitimacy and Levels of Governance in the United States and the European Union* (Oxford, Oxford University Press, 2001) 1.

[7] JHH Weiler, 'Federalism Without Constitutionalism: Europe's *Sonderweg*' in K Nicolaïdis and R Howse (eds), *The Federal Vision* (New York, Oxford University Press, 2002) 54, 54.

be exercised when engaging in such comparisons and, given significant background differentiation, the extent to which comparisons can be informative may be questionable.[8] It is neither possible nor necessary for present purposes to explore all the background contextual divergences of administrative law in the EU and the US. In very general terms, though, the US is a 'fully-fledged nation state', with 'an old political system'.[9] By contrast, the EU has been described as an 'old regional institution' but a 'young and still developing political system'[10] or as 'somewhere between a functionally limited supranational organization and a political community with open-ended objectives'.[11]

Ultimately, regardless of context, it is the technique and purpose of any comparative enterprise which determines its legitimacy and usefulness. The primary purpose of this comparative study is modest: it is expository or descriptive.[12] It seeks to examine and outline the primary ways in which EU or US federal administrative law affects the Member State and States respectively. However, given that administrative law is so closely intertwined with the distribution of governmental power in a given legal order and given that it has 'particularly deep roots inside a cultural and political framework',[13] it is perhaps unsurprising that a comparison in this context should lead naturally to useful insights into the evolution of multi-level administration in each legal order more generally.

B. EU and US Administration

Both EU and US federal administration can be analysed effectively in terms of two management orders: to use the EU terminology, 'direct' or 'centralised' management and 'shared management'.[14] Very simplistically, the

[8] For a summary, see CM Donnelly, *Delegation of Governmental Power to Private Parties: A Comparative Perspective* (Oxford, Oxford University Press, 2007) 10–13.

[9] A Sbragia, 'The United States and the European Union: Comparing Two *Sui Generis* Systems' in A Menon and MA Schain (eds), *Comparative Federalism* (Oxford, Oxford University Press, 2006) 15, 15.

[10] *Ibid*.

[11] A Gatto, 'Governance in the European Union: A Legal Perspective' (2006) 12 *Columbia Journal of European Law* 487, 489. See also G de Búrca, 'The Constitutional Challenge of New Governance in the European Union' (2003) 28 *European Law Review* 814.

[12] K Zweigert and H Kötz (T Weir, tr), *An Introduction to Comparative Law*, 3rd edn (Oxford, Clarendon Press, 1998) 15 (noting that 'the primary aim of all comparative law, as of all sciences, is knowledge').

[13] C Harlow, 'Voices of Difference in a Plural Community' in Voices of Difference in a Plural Community' in P Beaumont, C Lyons, and N Walker (eds), *Convergence and Divergence in European Public Law* (Oxford, Hart Publishing, 2002) 199, 208; P Legrand, 'Public Law, Europeanization, and Convergence: Can Comparatists Contribute?' in P Beaumont, C Lyons, and N Walker (eds), *Convergence and Divergence in European Public Law* (Oxford, Hart Publishing, 2002) 227, 246.

[14] See generally Committee of Independent Experts, *Second Report on Reform of the Commission: Analysis of Current Practice and Proposals for Tackling Mismanagement,*

former entails implementation of EU or US federal policies by the EU or US federal administration respectively; while the latter involves implementation of EU or US federal policies with the assistance of the Member States or States respectively.

(i) EU Administration

In the EU, direct administration arises where EU programmes are 'administered by the Commission itself, either "in-house", or by contracting-out'.[15] It also arises where management is delegated by the EU institutions to executive agencies, which are 'legal persons under Community law created by Commission decision'.[16] Direct administration is generally dependent upon a delegation of administrative powers to EU institutions, either in primary or secondary form, or by way of 'implied powers'.[17] An example of EU direct administration is the *Leonardo da Vinci* programme, which is part of the Commission's *Lifelong Learning Programme* and promotes transnational projects based on co-operation in vocational training.[18] In the past, the Commission has entrusted the Directorate-General for Education and Culture to make grants for projects in pursuance of the programme's aims[19] and contracted out administration tasks;[20] but since January 2006, the programme has been implemented by the new Education, Audiovisual and Culture Executive Agency.[21]

Promoted by Eastern expansion, the desire to alleviate the burden on the Commission, and need to adopt institutional responses to the crisis of the

Irregularities and Fraud Volume I (1999) (CIE Second Report); P Craig, 'The Constitutionalisation of Community Administration' (2003) 28 *EL Rev* 840, 841; Article 53b of Council Regulation (EC) 1605/2002 on the financial regulation applicable to the general budget of the European Communities, OJ 2002 L248/1 (the Financial Regulation); P Craig, *EU Administrative Law* (Oxford, Oxford University Press, 2006) chs 2 and 3.

[15] P Craig, 'The Constitutionalisation of Community Administration', above n 14, 841; P Craig, *EU Administrative Law*, above n 14, ch 2.

[16] Art 55(1), Financial Regulation, above n 14; see also Art 54, Financial Regulation. See generally J Saurer, 'The Accountability of Supranational Administration: The Case of European Union Agencies' (2009) 24 *American University International Law Review* 429; D Curtin, 'Delegation to EU Non-Majoritarian Agencies and Emerging Practices of Public Accountability' in D Gerardin and N Petit (eds), *Regulation Through Agencies in the EU: A New Paradigm of European Governance?* (London, Routledge, 2005) 88; D Curtin, 'Holding (Quasi-) Autonomous EU Administrative Actors to Public Account' *European Law Journal*, Special Issue on Accountability in the EU, July 2007, 523. For a current list of agencies, see: europa.eu/agencies/public_contracts/index_en.htm (accessed last on 1 May 2009).

[17] HCH Hofmann and AH Türk, 'Policy Implementation' in HCH Hofmann and AH Türk (eds), *EU Administrative Governance*, above n 4, 74, 74–6.

[18] See ec.europa.eu/education/lifelong-learning-programme/doc82_en.htm (accessed last on 1 May 2009).

[19] See ec.europa.eu/education/lifelong-learning-programme/doc82_en.htm (accessed last on 1 May 2009).

[20] P Craig, 'The Fall and Renewal of the Commission: Accountability, Contract and Administrative Organisation' (2000) 6 *ELJ* 98, 103.

[21] See eacea.ec.europa.eu/index.html (accessed last on 1 May 2009).

fall of the Santer Commission,[22] the role of executive agencies has been growing recently, and, with decentralised agencies located all over Europe, there has been a corresponding increase in the visibility of EU administration.[23] However, even given recent 'agencification'[24] of the EU, the 'greater part' of the EU's administration continues to involve the assistance of Member States.[25] 'Shared management' refers to

> the management of those Community programmes where the Commission and the Member States have distinct administrative tasks which are inter-dependent and set down in legislation and where both the Commission and national administrations need to discharge their respective tasks for the Community policy to be implemented successfully.[26]

'Shared management' is sometimes also described as 'composite' or 'cooperative administration'.[27] For instance, EU Cohesion Funds are grants made to national managing authorities, which distribute the funding to support projects which tackle regional disparities and support regional development,[28] while, pursuant to Article 13 of Regulation 355/77,[29] applications for aid from the European Agricultural Guidance and Guarantee Fund must be made to the Commission through the Member State and Member State approval is a necessary precondition to payment of aid.[30]

More sophisticated analyses of EU administration have also emerged. For example, Hofmann has noted that '[i]n reality there are hardly any examples for pure forms of either direct or indirect administration without any forms of co-operation between the national and the EU levels'.[31] It has been suggested therefore that it is more appropriate to conceptualise

[22] J Saurer, 'The Accountability of Supranational Administration', above n 16, 444–6.

[23] *Ibid*, 452–3. See, for eg, A Kreher, 'Agencies in the European Community—a step towards administrative integration in Europe' (1997) 4 *Journal of European Public Policy* 225.

[24] D Geradin, 'The Development of European Regulatory Agencies: What the EU Should Learn from American Experience' (2004–05) 11 *ColJEL* 1, 2.

[25] J Schwarze, 'Judicial Review of European Administrative Procedure' [2004] *Public Law* 146, 147.

[26] CIE Second Report, above n 14, para 3.2.2. See also P Craig, *EU Administrative Law*, above n 14, ch 3.

[27] HP Nehl, *Principles of Administrative Procedure in EC Law* (Oxford, Hart Publishing, 1999) 4 and 82.

[28] See *Cohesion Fund*, available at ec.europa.eu/regional_policy/funds/cf/index_en.htm (accessed last on 1 May 2009). For UK national administration details, see Department for Business, Enterprise and Regulatory Reform, available at: www.berr.gov.uk/whatwedo/regional/european-structural-funds/Structural%20&%20Cohesion%20Funds%20Administration/page25724.html (accessed last on 1 May 2009).

[29] Council Regulation (EEC) 355/77 on common measures to improve the conditions under which agricultural products are processed and marketed, OJ 1977 L51/1.

[30] Article 13(3); see Case C-97/91 *Oleificio Borelli SpA v Commission* [1992] ECR I-6313, paras 1–4.

[31] HCH Hofmann and AH Türk, 'Policy Implementation' in HCH Hofmann and AH Türk (eds), *EU Administrative Governance*, above n 4, 74, 90.

EU administration in terms of a 'network structure'. The term 'network' encompasses

> various forms of co-operation both in the 'vertical' relation between the European commission and agencies on one hand and the Member States' agencies on the other, as well as the 'horizontal' co-operation directly between different national agencies.[32]

Networks can involve different types of co-operation,[33] including information exchange, co-ordinated planning, enforcement of EC law—as most notably exemplified by the European Competition Network established by the 'Modernization Regulation'[34]—and 'trans-territorial' administrative activity, namely 'consensual ceding' of administrative sovereignty by Member States, as found for instance in the principle of mutual recognition. It has been suggested that this co-ordination between national agencies implementing EU law in various guises and the EU institutions has created 'centrifugal forces in processes of Europeanization'.[35] Others have gone further and referred to a 'fusion' created by the repeated interaction between national administrations and EU actors.[36] The reasons for the preponderance of 'shared' administration in the EU are obvious, with more extensive direct administration being considered neither appropriate nor feasible, given limited EU resources.

Overall though, whatever form shared management takes and regardless of its cause, the importance of Member State administration in the implementation of EU law is pivotal. It must also be recalled that often, in practice, although the obligation to implement EU law will fall on the Member State, it will be sub-national administrations that will ultimately give effect to EU law.[37] As such, the conduct of EU administration can penetrate deeply into Member State legal orders.

[32] *Ibid*.

[33] *Ibid*, 91–5.

[34] Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L1/1; White Paper on Modernization of the Rules Implementing Articles 81 and 82 of the EC Treaty of May 1999; Ølivind Støle, 'Towards a Multilevel Union Administration? The Decentralization of EU Competition Policy' in M Egeberg (ed), *Multilevel Union Administration*, above n 4, 86.

[35] Ø Støle, 'Towards a Multilevel Union Administration?', above n 34, 92.

[36] W Wessels, 'Comitology: fusion in action: Politico-administrative trends in the EU system' (1998) 5 *Journal of European Public Policy* 209 (referring to the role of national administrative actors in the Comitology process).

[37] BG Peters, 'Federalism and Public Administration: the United States and the European Union' in AA Menon and M Schain (eds), *Comparative Federalism*, above n 6, 177, 179. This is sometimes referred to as 'pay without say'; it is argued that at least Member State authorities are compensated for loss of competence to Europe by involvement in the decision-making processes of the Council, whereas by contrast, regional governments within Member States carry the burden of implementing EU policies without that participation: TA Börzel and C Sprungk, 'Undermining Democratic Governance in the Member States? The Europeanization of National Decision-making' in R Hozhacker and E Albaek (eds), *Democratic Governance*

(ii) US Administration

In the US, again, a model of direct and shared administration emerges: federal programmes can be executed by federal agencies, either by themselves or through contracts with private actors; or they can be implemented through engagement of the assistance of States. The former method of administration may promote 'dual federalism', according to which States are deemed to be autonomous actors separated from federal government[38] and federal and State authorities are divided into 'two uncoordinated domains',[39] each with their own programme in a particular area. This concept of federalism no longer enjoys widespread support in either practice or federal court jurisprudence.[40] Alternatively, execution of federal programmes by federal agencies may exemplify 'preemptive federalism', as found in regimes such as the Employee Retirement Income Security Act (ERISA),[41] where federal agency action will pre-empt and preclude all State administrative action in the relevant field.

By contrast, where the assistance of States is enlisted to execute federal programmes, what is known as 'cooperative federalism' is promoted.[42] Notable programmes engaging State assistance include the Personal Responsibility and Work Opportunity Reconciliation Act 1996,[43] which provides for grants to States to administer welfare programmes,[44] and the Telecommunications Act 1996,[45] which institutes a regulatory regime conferring authority on both federal and State agencies to open local telephone markets to competition. In such co-operative federalism regimes:

> Congress and the federal agency bear responsibility for setting forth the basic framework within which state agencies can act, defining relevant federal statutory terms, and instituting uniform minimum standards. State agencies then can supplement that framework and experiment with regulatory approaches that are consistent with it.[46]

and European Integration: Linking Societal and States Processes of Democracy (Cheltenham, Edward Elgar, 2007) 113, 121–2.

[38] JC Yoo, 'Sounds of Sovereignty: Defining Federalism in the 1990s' (1998) 32 *Indiana Law Review* 27, 41–3 (advocating the dual federalism model).

[39] PJ Weiser, 'Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act' (2001) 76 *New York University Law Review* 1692, 1697.

[40] MH Redish, 'Reassessing the Allocation of Judicial Business between State and Federal Courts: Federal Jurisdiction and "the Martian Chronicles"' (1992) 78 *Virginia Law Review* 1769, 1772–3.

[41] 29 USCA §§1001 *ff*; see also PJ Weiser, 'Federal Common Law', above n 39, 1697.

[42] PJ Weiser, 'Federal Common Law', above n 39, 1692.

[43] 42 USC §§601 *ff*.

[44] *Ibid*, §602.

[45] Pub L No 104-104, 110 Stat 56 (codified as amended in scattered sections of 47 USC).

[46] PJ Weiser, above n 39, 'Federal Common Law', 1697–8.

C. EU and US Federal Administrative Law

It is, of course, also important to clarify our understanding of the term 'administrative law', for, as is well-accepted, when asked what 'administrative law' is, lawyers of different legal systems are likely to '[identify] administrative law in different ways and [speak] of different things'.[47] For the purposes of the comparison in this chapter, the term 'administrative law' shall be deemed to refer to both the rules and procedures governing the activities of administrative actors and to judicial review of these activities by courts. This is an understanding which is perhaps more readily apparent from the conception of administrative law in the US than in the EU. Particularly at the federal level, the term 'administrative law' is generally understood to refer to the federal Administrative Procedure Act 1946 (APA)[48] and the federal courts' jurisprudence pursuant to that Act. The APA regulates federal agencies in two primary ways: first, by prescribing procedures which must be followed by agencies in respect of rulemaking, adjudication and publication;[49] and, secondly, by listing the grounds of judicial review of agency action.[50] Other sources of administrative law exist, although clearly they are much less overarching and central than the APA. For example, the Sunshine Act[51] requires agencies to conduct all meetings of the members of the agency in public. This means that, subject to certain exceptions,[52] when two or more members of the agency meet to discuss agency business, the meeting 'shall be open to public observation'.[53] The Federal Advisory Committee Act[54] provides that before any agency may seek the collective advice of a committee that has at least one member from the private sector, it must first ensure that the membership of the committee is fairly balanced in terms of the points of view represented, that the committee has operated for only a fixed period of time, and that its duties are merely advisory. Further, the Freedom of Information Act provides that 'each agency upon any request which reasonably describes such records… shall make the records promptly available to any person'.[55] In addition, of course, although not strictly part of federal 'administrative law', certain

[47] P Birkinshaw, *European Public Law*, above n 3, 7; see also C Harlow, 'European Administrative Law and the Global Challenge' in P Craig and G de Búrca (eds), *The Evolution of EU Law* (Oxford, Oxford University Press, 1999) 261, 263; MJ Breger, 'Defining Administrative Law—A Review of an Introduction to Administrative Justice in the United States by Peter L Strauss' (1991) 60 *George Washington Law Review* 268.

[48] 5 USC §§551 *ff*.

[49] 5 USC §§551–9.

[50] 5 USC §§701–6.

[51] 'Government in the Sunshine Act' 5 USC §552b.

[52] 5 USC §552b(c).

[53] 5 USC §552b(b).

[54] 5 USC App 2.

[55] 5 USC §552.

provisions of the federal Constitution can also have particular relevance for federal and state administrative agencies, most notably the due process requirements of the Fifth and Fourteenth Amendments and the search and seizure constraints of the Fourth Amendment.

In the EU context, the term 'administrative law' is more amorphous, but clearly also encompasses both aspects of the definition provided, namely, procedures governing the administration and judicial review. Unlike in the US, EU administrative law generally does not take an overarching form but has multiple sources: the EC and EU Treaties, secondary legislation, the Charter of Fundamental Rights of the European Union (the Charter)[56] and the fundamental principles of the ECJ. Again, unlike in the US, there is as yet no overarching administrative procedure legislation to regulate the new EU agencies, and these entities are mostly regulated by their founding legislation and the general principles of the jurisprudence of the ECJ and Court of First Instance.[57] The advent of the Financial Regulation in 2002[58] constituted a significant codification of general principles governing key areas of Community administration[59] such as implementation of the budget by the Commission[60] and delegation of tasks to third parties.[61] Nonetheless, the multiple sources of EU administrative law remain central to the present analysis and indeed, as will be seen, the degree of binding force on a Member State attributable to any aspect of EU administrative law is closely allied to its form.

Having identified the purpose of using a comparative methodology in this chapter, the way in which administration is conducted in the EU and the US, and the sources of administrative law in both jurisdictions, it is now necessary to turn to the comparison of the impact of EU and US federal administrative law.

[56] Even though not yet legally binding, the Charter is invoked increasingly regularly by the Court of Justice: see, for example, Joined Cases C-402/05 P and C-415/05 P *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, judgment of 3 September 2008, nyr, para 335 (referring to the right to 'effective judicial protection', which is 'reaffirmed' in Art 47 of the Charter). Advocates-General have also often referred to the right to good administration found in Art 41 of the Charter: see, eg, Joined Cases C-147/06 and C-148/06 *SECAP SpA v Comune di Torino (Tecnoimprese Srl and Others, intervening)*, judgment of 15 May 2008, nyr (Advocate-General Opinion, para 50).

[57] See generally E Vos, 'Reforming the European Commission: What Role for EU Agencies?' (2000) 37 *Common Market Law Review* 1113; E Chiti, 'The Emergence of a Community Administration: The Case of European Agencies' (2000) 37 *CML Rev* 309. See, eg, Case T-74/00 *Artegodan GmbH v Commission* [2002] ECR II-494, paras 197–200.

[58] See note 14 above.

[59] See generally P Craig, 'The Constitutionalisation', above n 14.

[60] Council Regulation (EC) 1605/2002 on the financial regulation applicable to the general budget of the European Communities OJ 2002 L 248/1 (the Financial Regulation), Art 53(1).

[61] *Ibid*, Art 54.

III. THE IMPACT OF EU ADMINISTRATIVE LAW ON MEMBER STATES

As will be seen, the degree to which EU administrative law *binds* Member States is dependent upon whether it is derived from: (a) the EC Treaty and secondary legislation; (b) the Charter (if it becomes enforceable); or (c) the ECJ's jurisprudence. Meanwhile, although not addressed in the same detail here, it is also the case that EU administrative law is capable of influential effect on Member States.

A. Administrative Law in the Treaty and Secondary Legislation

For the most part, insofar as administrative law obligations are found in the Treaties, they tend to apply only to EU institutions and not to bind Member States. Oft-cited examples in the EC Treaty include: the duty to give reasons of the Parliament, Council and Commission;[62] the duty on the Community to act proportionately;[63] the duty to observe professional secrecy and confidentiality of information supplied by undertakings as well as by natural persons to EU officials;[64] the right to be heard in the context of control of national subsidies;[65] the right to reparation of damages caused by the Community;[66] and the right to write to the institutions in one of the Treaty languages and receive an answer in the same language.[67]

One notable exception to the general absence of Treaty administrative law obligations addressed to Member States is the principle of non-discrimination, which is found, for example, in the free movement provisions[68] in Articles 2, 3, 12, 13, 34(2) and 141 EC. In particular, Article 12 has been used to significant effect by the ECJ in its citizenship jurisprudence to extend access to various state benefits provided in one Member State by nationals of another Member State.[69] Furthermore, of course, Treaty obligations, which are not strictly 'administrative' in nature, can have enormous implications for Member State

[62] Art 253 EC.
[63] Art 5 EC.
[64] Art 287 EC.
[65] Art 88(2) EC.
[66] Art 288 EC.
[67] Art 21 EC.
[68] See Arts 28, 39(2), 43 and 49 EC.
[69] See, eg, C-85/96 *Martínez Sala v Freistaat Bayern* [1998] ECR I-2691, paras 8, 15–16, and 63 (non-contributory child-raising allowance); Case C-184/99 *Rudy Grzelczyk v Centre public d'aide sociale d'Ottign* [2001] ECR I-6193, para 32 (the minimex); Case C-456/02 *Trojani v Centre Public d'Aide Sociale de Bruxelles* [2004] ECR I-7573, para 46 (the minimex); Case C-209/03 *R (on the application of Dany Bidar) v London Borough of Ealing, Secretary of State for Education and Skills* [2005] ECR I-2119, paras 32 and 42 (student maintenance assistance); Case C-406/04 *De Cuyper v Office National de l'Emploi* [2006] ECR I-6947.

administration. One such example is the impact of the Article 39 right to free movement of workers on access for non-nationals to the public service in Member States and the definition of 'public service' for the purpose of the Article 39(4) exception.[70]

Insofar as principles of administrative law are contained in secondary legislation, they tend to constitute—aside from the example of the Financial Regulation given above—what Nehl has described as a 'patchwork codification tailored to the specific requirements of sectorial policy implementation'.[71] Often, when the Community is legislating to regulate a particular area, it will include administrative procedures that apply only to that area.[72] Sometimes, indeed, an entire regulatory scheme will essentially involve an elaboration of procedural protections, such as in competition regulation,[73] the control of national subsidies,[74] or the administrative law relating to the Community's civil service.[75] Much of this legislation will apply only to the EU institutions and as such, like the Treaty provisions addressed to EU institutions, will have no binding force on Member States.

However, secondary legislation may directly impose administrative obligations or procedures on Member States in specific areas. One obvious example is legislation relating to public procurement.[76] Another example is found in Article 7 of the Collective Redundancies Directive and Acquired Rights Directive,[77] which requires consultation of workers and their representatives in cases of large-scale redundancies and transfers of undertakings. Similarly, Article 8 of Regulation 1258/99[78] obliges Member States to require the repayment of wrongly paid premiums in the context of the implementation of the Common Agricultural Policy, which overrides any different administrative rules on revocation of administrative

[70] Case 149/79 *Commission v Belgium* [1982] ECR 1845, para 7; Case C-405/01 *Colegio de Oficiales de la Marina Merccante Española v Administración del Estado* [2003] ECR I-10391, paras 38–45.

[71] Nehl, *Principles of Administrative Procedure in EC Law*, above n 27, 3.

[72] Schwarze has cited the example of Council Regulation (EEC) 2988/74 concerning limitation periods and enforcement of sanctions under the rules of the European Economic Community relating to transport and competition rules, OJ 1974 L319/1: J Schwarze, *European Administrative Law*, above n 3, 43. See also J Schwarze, 'Judicial Review of European Administrative Procedure', above n 25, 148.

[73] Council Regulation (EC) 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L001/1.

[74] The detailed rules for the application of Article 88 EC are found in Council Regulation 659/99, OJ 1999 L83/1.

[75] The staff regulations for officials and conditions of employment of other servants of the European Community are set out in Council Regulation 259/68, OJ 1968 L56/1.

[76] European Parliament and Council Directive (EC) 2004/18 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ 2004 L134/114.

[77] Council Directive 2001/23 EC in the event of transfers of undertakings, businesses or parts of businesses, OJ 2001 L82/16.

[78] Council Regulation 1258/1999 on the financing of common agricultural policy, OJ 1999 L160/103.

acts in national administrative procedure.[79] It may also be that national administrations are required to impose punitive administrative sanctions, such as administrative fines, for breach of EC obligations.[80] For example, Regulation 2988/95[81] contains a list of different administrative sanctions Member States have to impose if an economic operator commits an irregularity, whether intentionally or negligently, which prejudices the Community's budget.[82] Other examples include supervisory administrative obligations imposed on Member States to ensure compliance with EC law, such as the Bathing Water Directive 76/160, which provides for a minimum frequency of sampling operations.[83]

Specific principles can also be protected by secondary legislation: the principle of legitimate expectations in the context of dealings with customs officials has been codified in Article 9(4) of Regulation 2913/92,[84] while the prohibition on discrimination is found in several directives and regulations.[85] Obviously, secondary legislation is binding on Member States, whether due to Article 249 EC or the doctrine of direct effect, which in the context of Member State administrative structure and organisation has 'pressed [Member States] into action', most noticeably in 'the general field of health and safety, the environment and public procurement'.[86]

B. Administrative Law in the Charter

The Charter contains a right to good administration in Article 41. Although, in general, rights granted by the Charter are to bind institutions of the Union and Member States 'when they are implementing Union law',[87] Article 41 is specifically only addressed to 'institutions and bodies of the Union',[88] the

[79] Joined Cases 146 and 192–193/81 *BayWa v BALM* [1982] ECR 1503, paras 29–31.

[80] The ECJ has held that the EC is competent to prescribe punitive administrative sanctions in Case C-240/90 *Germany v Commission (Sheepmeat)* [1992] ECR I-5363.

[81] Regulation 2988/95, OJ 1995 L312/1.

[82] This example is also given by R Widdershoven, 'European Administrative Law' in RJGH Seerden (ed), *Administrative Law of the European Union, its Member States and the United States: A Comparative Analysis* (Antwerp, Intersentia, 2007) 312.

[83] *Ibid*.

[84] OJ 1992 L302/1.

[85] See, eg, EC Directive 76/207, Equal treatment of men and women in the labour process, OJ 1976 L39/40.

[86] J Jowell and P Birkinshaw, 'English Report' in Schwarze (ed), *Administrative Law under European Influence*, above n 3, 273, 314–15.

[87] Art 51(1). This expression means that Member States are bound to comply with Charter rights when acting in the context of Community law. See, eg, Case 5/88 *Wachauf v Germany* [1989] ECR 2609; Communication on the legal nature of the Charter of fundamental right of the European Union COM(2000) 644 final (October 2000); and *Updated Explanations relating to the text of the Charter of Fundamental Rights*, CONV, 828/03, 9 July 2003, 46–7.

[88] Art 41(1).

Community,[89] and 'institutions of the Union'.[90] This appears to narrow the Article's scope, since it seems that, even when implementing EU law, Member States themselves will not be bound directly by Article 41. However, previous ECJ case law has held that the onus is on the Commission to ensure appropriate procedural standards in cases of shared administration,[91] even if the Commission does not have direct contact with the parties to the proceedings.[92] Moreover, even though Member States themselves will not be bound directly by Article 41, this will probably not make a huge difference given that, as shall be seen, the limited scope of application of Article 41 will not necessarily preclude the ECJ from requiring Member States to abide by the principles of good administration it has developed in its case law.[93]

C. Administrative Law in the ECJ's Jurisprudence

Indeed perhaps the most significant source of EU administrative law is 'the creative law-making and decision-making process of the European Court of Justice'.[94] Even though an increasing number of the general principles of the ECJ are being incorporated into secondary legislation,[95] the general principles still constitute an important source of EU administrative law, since, as noted above, much secondary legislation tends to focus on a particular area of EU competence rather than regulating EU administration more generally. The general principles of administrative law developed by the ECJ include the principle of fair legal process,[96] legal privilege,[97] good administration,[98] the rule of law,[99] the right to a hearing,[100] proportionality,[101] legitimate

[89] Art 41(3).
[90] Art 41(4).
[91] K Kańska, 'Towards Administrative Human Rights in the EU: Impact of the Charter of Fundamental Rights' (2004) 10 *ELJ* 296, 309, referring to Case T-450/93 *Lisrestal v Commission* [1994] ECR II-1177.
[92] *Ibid*, citing Case T-147/99 *Kaufring v Commission* [2001] ECR II-1337.
[93] In particular, it may be that the reach of the Charter is interpreted in accordance with the position adopted in Case C-60/00 *Carpenter v Secretary of State for the Home Department* [2002] ECR I-6279.
[94] Schwarze, *European Administrative Law*, above n 3, 4–5.
[95] J Schwarze, 'Judicial Review of European Administrative Procedure', above n 25, 148. Schwarze cites the example (at fn 9) of Art 27 of Council Regulation 1/2003, OJ 2003 L001/1, on the implementation of Arts 81 and 82 EC, which deals with the right to be heard, the right to have access to the Commission's files and the protection of business secrets.
[96] Case C-185/95 P *Baustahlgewebe v Commission* [1998] ECR I-8417, para 21.
[97] Case 155/79 *AM & S Europe Ltd v Commission* [1982] ECR 1575, paras 27–8.
[98] Case C-361/02 *Greece v Tspalos* [2004] ECR I-6405, Opinion of Advocate-General Kokott, para 30.
[99] *Ibid*.
[100] Case C-269/90 *Hauptzollamt München-Mitte v Technische Universität München* [1991] ECR I-5469, para 14.
[101] See, eg, Case 114/76 *Bela-Mühle Josef Bergman KG v Grows-Farm GmbH & Co KG* [1977] ECR 1211; Case C-453/03 *ABNA Ltd v Secretary of State for Health* [2005]

expectation,[102] non-discrimination,[103] effective judicial protection[104] and the emergent transparency principle.[105]

The administrative law principles developed by the ECJ are applicable to acts of EU institutions and to Member States when acting 'within the scope of Community law'. This formulation is 'fluid'[106] and has been interpreted broadly.[107] At a minimum, it means that the Member State will be bound by the ECJ's administrative law principles when acting for and/or on behalf of the Community in the 'agency' or shared management situation, including: when implementing Community law;[108] when acting for and/or on behalf of the Union by implementing Union law;[109] and when the Member State relies on a derogation from fundamental market freedoms.[110] This has had an impact on both the substantive and procedural or remedial aspects of Member State administrative law.

Thus, derogations from the fundamental freedoms are always reviewed for proportionality.[111] Furthermore, national courts are required to engage in review of the actions of national administration in light of the general principles developed by the ECJ in the context of EU law—an obligation which has been reinforced by the recent *Köbler*[112] case. English courts have on occasion shown reluctance to apply proportionality,[113] but this is rare 'given that [proportionality] is one of the principles which is expressly required by the ECJ to be applied by national courts "within the scope of application" of

ECR I-423, paras 67–9. The principle of proportionality is now also recognised in Art 5 EC.

[102] Case 54/65 *Chatillon v High Authority* [1966] ECR 185, 196; Case 81/72 *Commission v Council (Staff Salaries)* [1973] ECR 575, paras 8–10; Case 148/73 *Louwage v Commission* [1974] ECR 81, para 12.

[103] See, eg, Case C-453/03 *ABNA Ltd v Secretary of State for Health* (ECJ) [2005] ECR I-423, paras 62–6.

[104] Case 222/84 *Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651, paras 18–19.

[105] P Craig and G de Búrca, *EU Law: Text, Cases, and Materials* (Oxford, Oxford University Press, 2007) 562–8; K Lenaerts, '"In the Union we Trust": Trust Enhancing Principles of Community Law' (2004) 41 *CML Rev* 317.

[106] C Costello and E Browne, 'The EU and the ECHR before European and Irish Courts' in U Kilkelly (ed), *ECHR and Irish Law* (Bristol, Jordans, 2008) 21, 35.

[107] See, eg, *Carpenter*, above n 93.

[108] Case 249/86 *Commission v Germany* [1989] ECR 1263, para 20 (proportionality).

[109] Case C-354/04 P *Gestoras Pro Amnistia* [2007] ECR I-1579, para 51; Case C-355/04 P *Segi and Others v Council* [2007] ECR I-1657, para 45.

[110] See generally Craig and de Búrca, *EU Law: Text, Cases, and Materials*, above n 105, 337–49; Case 36/75 *Rutili v Ministre de l'Intérieur* [1975] ECR 1219; Case C-260/89 *Elliniki Radiophonia Tiléorassi AE v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas* [1991] ECR I-2925, paras 42–5; Case C-368/95 *Vereinigte Familiapress Zeitungsverlags v Heinrich Bauer Verlag* [1997] ECR I-3689.

[111] See, eg, Case 33/74 *Van Binsbergen v Bestuur van de Bedrijfsvereniging Metaalnijverheid* [1974] ECR 1299, paras 14–16.

[112] Case C-224/01 *Köbler v Republik Österreich* [2003] ECR I-10239.

[113] See, eg, *Stoke-on-Trent City Council and Norwich City Council v B&Q plc* [1991] Ch 48 (Ch) 69–72.

EC law'.[114] For example, in the well-known early case of *R v Chief Constable of Sussex, ex p International Traders Ferry Ltd*,[115] in the context of an Article 29 (ex Article 34) claim, Lord Slynn noted that it should be asked whether the chief constable 'did all that proportionately and reasonably he could be expected to do with the resources available to him'.[116]

Insofar as administrative procedures and remedies are concerned, as is well known, the two principles which guide the suitability of national procedures and remedies for enforcement of Community rights are first, the principle of equivalence, and secondly, the principle of effectiveness. According to the former principle, the procedural rules governing actions to safeguard Community rights must not be less favourable than the rules governing actions to safeguard similar domestic rights, while the latter principle requires that the national rules governing procedures in which rights conferred by Community law are at issue must not render the exercise of those rights virtually impossible or excessively difficult.[117] Although initially the ECJ exhibited a reluctance to interfere with Member States' procedures and remedies,[118] concerns about uniform application and '*l'effet utile*' of EU law eventually resulted in a different approach, such that the duty to provide effective remedies for breaches of Community law has now been described as '[p]erhaps the most prominent duty to assist in the effective implementation of Community policies'.[119]

A few examples are illustrative. In *Johnston v Chief Constable of the Royal Ulster Constabulary*,[120] a national statutory ouster clause was overridden by Article 6 of Directive 76/207 which required that all persons have the right to obtain an effective remedy in a competent court against measures which they considered to be contrary to the principle of equal treatment for men and women laid down in the Directive.[121] The ECJ interpreted Article 6 in light of what it described as 'a general principle of law which underlies the constitutional traditions common to the Member States'[122]—the principle of 'effective judicial control'.[123] Thus, a certificate issued by a national authority stating that the conditions for derogating

[114] G de Búrca, 'Proportionality and *Wednesbury* Unreasonableness', above n 3, 577 (noting *R v Minister of Agriculture, Fisheries and Food, ex parte Roberts* [1991] 1 CMLR 555(QBD) paras 69, 88).
[115] *R v Chief Constable of Sussex, ex parte International Traders Ferry Ltd* [1999] 2 AC 418 (HL).
[116] *Ibid*, 439.
[117] Case 33/76 *Rewe-Zentralfinanz eG and Rewe-Zentral AG v Landwirtschaftskammer für das Saarland* [1976] ECR 1989.
[118] *Ibid*, paras 5–6.
[119] D Halberstam, 'Of Power and Responsibility: The Political Morality of Federal Systems' (2004) 90 *Virginia L Rev* 731, 774.
[120] *Johnston*, above n 104.
[121] *Ibid*, paras 19–20.
[122] *Ibid*, para 18.
[123] *Ibid.*

from the principle of equal treatment for men and women for the purpose of protecting public safety were satisfied, could not be treated as conclusive evidence so as to exclude the exercise of any power of review by the courts pursuant to Article 6.[124] Here, the ECJ was clearly motivated by a desire to ensure 'compliance with the applicable provisions of Community law'.[125] Similarly, in the *Heylens* case,[126] the principle of 'effective judicial protection' was found to be binding on a Member State's administration in the context of the fundamental right to free access to employment which the Treaty confers. Consequently, 'the existence of a remedy of a judicial nature against any decision of a national authority refusing the benefit of that right is essential in order to secure for the individual *effective protection* for his right' (emphasis added).[127]

More recently, the ECJ has expanded its administrative law obligations beyond effective protection of a particular right, and in *Mellor*[128] the ECJ held that there was an obligation, upon request, for a Member State administrative authority to communicate reasons for concluding that an environmental impact assessment pursuant to Article 4 of Directive 85/337[129] was not necessary. Although part of the ECJ's reasoning is based on interpreting Directive 85/337,[130] an important part of the reasoning relies more broadly on the principle of effective judicial review, not just to ensure effective protection of a right, but rather to ensure compliance by the administrative authority with its obligation.[131] Two further obvious examples of the impact of the ECJ on national remedies are found, first in the *Factortame* litigation,[132] where English courts were required to provide interim relief in the form of an injunction against the Crown to temporarily suspend the application of primary legislation—a remedy previously unknown to English law; and secondly in the *Francovich* jurisprudence.[133]

Generally, the ECJ's approach to Member State administrative procedures, as exhibited in cases such as *Van Schijndel*[134] and *Peterbroeck*,[135] has been

[124] *Ibid*, para 21.
[125] *Ibid*, para 19.
[126] Case 222/86 *Union Nationale des Entraineurs et Cadres Techniques Professionnels du Football (UNECTEF) v Georges Heylens* [1987] ECR 4097.
[127] *Ibid*, para 14.
[128] Case C-75/08 *R (Mellor) v Secretary of State for Communities and Local Government*, judgment of 30 April 2009 (ECJ) nyr.
[129] Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L175/40.
[130] *Ibid*, paras 48–57.
[131] *Ibid*, paras 58–60.
[132] C-213/89 *R v Secretary of State for Transport ex p Factortame* [1990] ECR I-2433.
[133] Joined Cases C-6/90 and C-9/90 *Francovich v Italy* [1991] ECR I-5357, para 37.
[134] Case C-430-431/93 *Van Schijndel & Van Veen v Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705.
[135] Case C-312/93 *Peterbroeck, Van Campenhout & Cie SCS v Belgian State* [1995] ECR I-4599.

considered to have evolved from strong interventionism to a requirement that national courts balance the competing Community and Member State interests when reviewing national procedures.[136] Now, national courts must scrutinise each Member State provision that governs the enforcement of a Community right before national courts, not in the abstract, but in the specific circumstances of each case, to determine whether it renders the exercise of the right excessively difficult.[137] Although this approach is perhaps less interventionist than some of the ECJ's earlier jurisprudence, as Dougan has noted, it nonetheless requires an 'intrusive level of analysis' on the part of the national court which means that procedural or remedial restrictions on Community rights which might be justified in principle by having regard to their objectives, may actually be found to infringe the principle of effectiveness, in practice, for reasons specific to the claimant's situation.[138]

D. The Influential Effect of EU Administrative Law

It is beyond the scope of this chapter to provide an overview of the innumerable ways in which EU administrative law can be considered to have influenced the evolution of the administrative law of Member States.[139] For present purposes, it suffices to note that the existence of this 'influential effect' is undeniable. Two well-known examples demonstrate the point. First, in the English *In Re M* case,[140] following the *Factortame* ruling, the House of Lords granted an interim injunction against a Crown minister in a situation which did not involve the application of EU law, Lord Woolf noting the 'unhappy situation' involved in attempting to maintain two separate systems of administrative remedies.[141] Secondly, in France, Article L 22 of the *Code des Tribunaux Administratifs*, which provides for the formerly unknown remedy of interim relief, was inserted with regard to certain areas concerned with Community law; its application was subsequently expanded to situations which had no bearing on Community law.[142]

[136] For discussion, see Craig and de Búrca, *EU Law*, above n 105, ch 9.
[137] *Ibid*, 250, referring to *Van Schijndel*, above n 134.
[138] See generally M Dougan, *National Remedies before the Court of Justice: Issues of Harmonisation and Differentiation* (Oxford, Hart Publishing, 2004) 32.
[139] See n 3 above for references to writings on this issue.
[140] *In Re M* [1994] 1 AC 377.
[141] *Ibid*, 407. See also J Scharwze, 'The Convergence of the Administrative Laws of the EU Member States' (1998) 4 *European Public Law* 191, 199; *Woolwich Building Society v Inland Revenue Commissioners* [1993] AC 70 (HL) 177 (Lord Goff noting that 'it would be strange if the right of the citizen to recover overpaid charges were to be more restricted under domestic law than it is under European law'.).
[142] Schwarze, 'The Convergence of the Administrative Laws of the EU Member States', above n 141, 199–200.

IV. THE IMPACT OF US FEDERAL ADMINISTRATIVE LAW ON STATES

When examining the extent to which US federal administrative law has binding effect on US State administrative law, it is important to assess: (1) the extent to which federal law generally has an impact on State administration; (2) whether the APA has binding repercussions for State administrative law; (3) the extent to which the APA influences State administrative law; and (4) whether there are principles of the federal courts' jurisprudence—similar to the fundamental principles of the ECJ's jurisprudence—which have an impact on State administration.

A. The Impact of Federal Law Generally on US State Administrative Law

In keeping with the structure adopted in the discussion of the impact of EU administrative law on Member States and before considering the APA, it is worth noting that insofar as the federal constitution has implications for State administration, it obviously enjoys 'binding force' on those administrations—equivalent to the Article 12 and Article 39(4) examples given above. The most relevant example in this context is the Fourteenth Amendment due process clause. In this respect, federal constitutional law, although not falling within the realm of 'federal administrative law' *stricto sensu*, will have 'binding force' on—and far-reaching implications for—State administration. Moreover, where States implement federal programmes, federal legislation on federal regulatory programmes can impose administrative law obligations on State administrations implementing those programmes. For example, the federal Housing Act 1937,[143] which creates a federally subsidised housing programme, administered in part by State agencies, requires the participating State agencies to provide tenants with administrative grievance procedures.[144]

B. The APA's Lack of Binding Force

The APA is extremely limited in its applicability: both its administrative procedural requirements[145] and its judicial review provisions[146] apply only where the entity in question constitutes an 'agency'. In the Act itself, the term 'agency' is defined as 'each authority of the Government of the United

[143] 42 USC §1437.
[144] 42 USC §1437d(k).
[145] 5 USC §551 *ff*.
[146] 5 USCA §701 *ff*.

States', whether or not it is within or subject to review by another agency, but does not include Congress, the courts and other exceptions.[147] This term has been interpreted very restrictively by federal courts, and will not apply to State agencies, even where they are acting in the sphere of co-operative federalism or implementing federal policies. For example, in the case of *Hunter v Underwood*,[148] even though the Des Moines Housing Authority—a State agency created pursuant to the authority granted in Iowa Code Chapter 403A—was providing federally-subsidised public housing to low income families pursuant to the federal Housing Act 1937 and regulated by federal regulations made pursuant to that Act in regard to public housing leases, it was not deemed to be an authority of the Government of the United States.[149] In *West Penn Power Company v Train*,[150] the APA was found not to apply to the secretary of a State agency in respect of actions conducted in the course of implementing the federal Clean Air Act.[151] Likewise, in *Public Citizen Health Research Group v Department of Health, Education and Welfare*,[152] a professional standards review organisation, performing its functions under contract with the Department of Health, Education and Welfare under the Medicaid and Medicare programmes, was not found to be an agency for purposes of the Freedom of Information Act[153] (which adopts the same definition of 'agency' as the APA) in part because, despite the fact that the body was independently run by private physicians and making conclusive decisions with direct implications for the federal Medicare and Medicaid programmes,[154] it was a corporation organised under State law.[155] Thus, clearly, the APA has no binding force on States.

C. The APA's Influential Effect

While the APA is not binding on States, it has, however, had significant 'influential effect' on States. Bonfield, for instance, has noted that 'the impact of the federal APA on the development of State administrative law has consisted primarily of indirect State borrowing from the federal act of certain general concepts rather than details'.[156] The 1946 Model

[147] 5 USCA §§551(1), 701(b).
[148] *Hunter v Underwood* 362 F3d 468 (8th Cir 2004).
[149] *Ibid*, 477. See also *Rosenfeld v Hackett* (D Or 2008) 24 June 2008.
[150] *West Penn Power Company v Train* 522 F2d 302 (3rd Cir 1975).
[151] 42 USC §7607.
[152] *Public Citizen Health Research Group v Department of Health, Education and Welfare* 668 F2d 537, 538 (DC Cir 1981) (Public Citizen Health Research Group).
[153] 5 USC §552 (2000).
[154] See n 148 above, 544.
[155] *Ibid*, 543.
[156] AE Bonfield, 'The Federal APA and State Administrative Law' (1986) 72 *Virginia Law Review* 297, 302.

State Administrative Procedure Act (1946 MSAPA) was drafted during the same period in which the federal APA was drafted and was adopted by the National Conference of Commissioners on Uniform State Laws' only after the APA was finally approved.[157] Certain of the same people were involved in drafting the APA and the 1946 MSAPA; and those involved accepted that the APA was 'utilized as a source of many useful ideas' for the 1946 MSAPA,[158] on which many States have subsequently based their administrative procedure acts. In particular, six important concepts which underlie the APA have been identified in corresponding State administrative procedure acts:[159] first, the conclusion that a general and comprehensive administrative law statute is actually desirable; secondly, the rule-order dichotomy, which reflects the division of agency actions into rule-making and adjudication and subjects each class to separate procedural schemes; thirdly, public access to agency-created law, which was not a right which had been clearly established with respect to State agencies as a matter of State administrative law prior to the adoption of the 1946 MSAPA; fourthly, use of the notice and comment rule-making procedure which requires advance public notice of the content of proposed rules and an opportunity for informal comment on them by members of the public; fifthly, classification and regulation of agency adjudication (although State APAs have classified agency adjudication differently from the federal APA); and sixthly, discretion on the part of agencies to determine which method of law-making they will use, rule or order.[160]

Given that the APA is not binding, it is open to States to diverge from it in order to accommodate the particular requirements of their own State agencies, which, in general, tend to be considerably smaller in size than their federal counterparts; more visible and accessible to those governed than federal agencies; less well-financed than federal agencies; and relatively lacking in access to technical expertise or legal assistance by comparison with federal agencies.[161] These differences mean that many of the feasible or effective solutions to federal administrative problems are not feasible or effective in the State. Perhaps unsurprisingly, therefore, there have been three model State administrative procedure acts (MSAPAs) to date, each one evolving to reflect changing social circumstances.[162] There are many

[157] *Ibid*, 300.

[158] E Stason, 'The Model State Administrative Procedure Act' (1948) 33 *Iowa Law Review* 196, 199.

[159] See generally Bonfield, 'The Federal APA', above n 156.

[160] Although to some extent, this sixth concept is being abandoned by states. See, eg, 1981 MSAPA §§2-104(3)–2-104(4); see generally AE Bonfield, 'State Administrative Policy Formulation and the Choice of Lawmaking Methodology' (1990) 42 *Administrative Law Review* 121.

[161] AE Bonfield, 'State Law in the Teaching of Administrative Law: A Critical Analysis of the Status Quo' (1982) 61 *Texas Law Review* 95, 126–8.

[162] 1946 MSAPA; 1961 MSAPA; 1981 MSAPA; see also Bonfield, 'State Law in the Teaching of Administrative Law', above n 161, 100.

examples of deviation from the APA in the MSAPAs and in various State administrative procedure acts.[163] For present purposes, it suffices to note the following: different exemptions of rules from rule-making procedures from those found in the APA;[164] provision of a right to an oral proceeding in rule-making[165] which is not found in the APA; provision to executive actors, such as state governors, of a power of review over agency rule-making;[166] schemes of legislative review of agency rules;[167] and, finally, while the APA only regulates 'formal adjudication', which by section 554(a) of the APA consists of those adjudications 'required by statute to be determined on the record after opportunity for an agency hearing', many State administrative procedure acts and the 1981 MSAPA create several distinct classes of agency adjudication, each subject to procedural requirements specially tailored to the needs and circumstances of that particular class of adjudication.[168] Thus, as Bonfield noted, while the broad concepts of the APA have had 'influential effect' on State administrative law, States have readily departed from the detail.

D. The Absence of General Principles of Federal Administrative Law

Given the 'binding force' of the general administrative law principles of the ECJ, it is important to explain that, unlike the ECJ, US federal courts do not have the jurisdiction to develop freestanding administrative law principles. It is true that, often, the APA can be deemed to serve as no more than an 'underlying decisional guidepost', which has actually resulted in a 'modern common law of the administrative process'.[169] For instance, the APA merely provides skeletal heads of review—such as arbitrary or capricious decision-making[170]—and the substance of what this actually means is provided by

[163] See, eg, Bonfield, 'The Federal APA', above n 156; F Scott Boyd, 'Florida's ALJS: Maintaining a Different Balance' (2004) 24 *Journal of the National Association of Administrative Law Judges* 175; BD Shannon, 'The Administrative Procedure and Texas Register Act and ADR: A New Twist for Administrative Procedure in Texas' (1990) 42 *Baylor Law Review* 705; AE Bonfield, 'The Quest for an Ideal State Administrative Rulemaking Procedure' (1991) 18 *Florida State University Law Review* 617.

[164] Bonfield, 'The Federal APA', above n 156, 335.

[165] *Ibid* and 1961 MSAPA §3(a)(2); 1981 MSAPA §3-104.

[166] The 1981 MSAPA vests in state governors the authority to review the rules of their State's agencies and to 'rescind or suspend all or a severable portion of a rule of an agency' at any time: 1981 MSAPA §3-202(a).

[167] 1981 MSAPA §§3-203–3-204(d); see Bonfield, 'The Quest for an Ideal State Administrative Rulemaking Procedure', above n 163, 649.

[168] Bonfield, 'The Federal APA', above n 156, 322.

[169] GJ Edles, 'Developing a European Administrative Law Tradition: The Model of the US Administrative Procedure Act' (2000) 6 *EPL* 543, 548; JF Duffy, 'Administrative Common Law in Judicial Review' (1998) 77 *Texas L Rev* 113, 115.

[170] 5 USC §706(2)(A).

the courts. However, there is no federal administrative law alternative to the APA, and no such thing as freestanding federal common-law administrative law, equivalent to the 'creative law-making' of the ECJ, which has constituted such a font of binding administrative law principles in the EU context.

The explanation for this situation is complex and can only be considered in very basic terms here. Article III of the federal constitution grants Congress discretion to create lower federal courts and to define the jurisdiction of the tribunals it establishes.[171] As a result, a federal court may only adjudicate a case if there is both constitutional *and* statutory authority for federal jurisdiction[172]—the latter requirement deriving from Congress's power to determine the jurisdiction of lower federal courts.[173] Even where federal jurisdiction is established, federal courts operate under a partially self-imposed prohibition on creating 'federal common law'. The term '"federal common law" … refer[s] to any rule of federal law created by a court … when the substance of that rule is not clearly suggested by federal enactments—constitutional or congressional'.[174] The prohibition on the development of federal common law derives from judicial interpretation of the Federal Rules of Decision Act, placed in the judicial code by the Judiciary Act 1789, which made the first statutory grant of jurisdiction to federal courts. The Act remains largely unchanged to this day and states that 'the laws of the several states, except where the Constitution or treaties of the US or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply'.[175]

Initially, the term 'laws of the several states', was interpreted to refer to State legislation only, thereby creating the possibility of development of federal common law.[176] Although uniformity was a justification for this decision, there was no suggestion by Justice Story, who articulated the position,[177] that States would actually be bound to follow federal law, just that they may be persuaded by it.[178] However, in the case of *Erie Railroad v Tompkins*[179]—in a deliberate re-thinking of earlier case law[180]—the Supreme Court decided that 'laws of the several states' also included common law of the States. A number of reasons were advanced for the holding, including

[171] US Constitution Article III §1.
[172] E Chemerinsky, *Federal Jurisdiction*, 4th edn (New York, Aspen, 2003) 260 §5.1; see also MA Field, 'Sources of Law: The Scope of Federal Common law' (1986) 99 *Harvard Law Review* 881, 899.
[173] Chemerinsky, above n 172, 260–61 §5.1.
[174] Field, 'Sources of Law', above n 172, 890.
[175] 28 USCA §1652.
[176] *Swift v Tyson* 41 US (16 Pet) 1 (1842).
[177] *Ibid*, 19.
[178] Field, 'Sources of Law', above n 172, 900–901.
[179] *Erie Railroad v Tompkins* 304 US 64 (1938).
[180] The issue was not argued by counsel: see Field, 'Sources of Law', above n 172, 902.

the fact that the States had failed to follow the federal position in such a way as actually to achieve uniformity.[181] The Supreme Court also reasoned that to permit federal courts to develop federal common law was inconsistent with the federal Constitution. In essence, 'Congress has no power to declare substantive rules of common law applicable in a State … And no clause of the Constitution purports to confer such a power upon the federal courts'.[182] Even post-*Erie*, federal courts have created federal common law in a number of situations, such as where they have discerned a 'uniquely federal interest' or where a statute has conferred federal jurisdiction that the courts have deemed to require the creation of substantive federal law.[183] Moreover, the reluctance of federal courts to develop federal common law has varied at different times.[184] However, as a general principle, federal courts, unlike the ECJ, do not develop common law administrative rules, due to this controversial and much-debated self-imposed prohibition on the development of federal common law.[185]

When contrasted with the EU, this limitation on the federal courts' ability to develop federal administrative law is striking. Indeed, at the State level in the United States, in contrast to the federal situation, administrative law usually consists of both State administrative procedure acts and a judicial jurisprudence surrounding the traditional prerogative remedies of certiorari, mandamus and prohibition, derived originally from English common law.[186] In the absence of a federal administrative common law, this State judicial jurisprudence to a large extent develops and evolves independently of federal administrative law—unlike the situation in the EU, where, for example, English administrative law has been subjected to the 'influential effect' of the general principles of the ECJ.

V. EXPLAINING THE DIFFERENCES AND THINKING ABOUT MULTI-LEVEL GOVERNANCE

In summary, therefore, EU administrative law can have 'binding force' on Member States if derived from secondary legislation addressed to Member States or if derived from the general principles of the ECJ where the Member State is acting within the scope of Community law. Furthermore,

[181] *Ibid*, 73–7.
[182] *Ibid*, 78.
[183] Weiser, 'Federal Common Law', above n 39, 1705; see, eg, *Clearfield Trust Co Ltd v US* 318 US 363, 366–7 (1943).
[184] Weiser, above n 39, 1705–15.
[185] See generally GD Brown, 'Federal Common Law and the Role of the Federal Courts in Private Law Adjudication—a (New) Erie Problem?' (1992) 12 *Pace Law Review* 229; AJ Bellia Jnr, 'State Courts and the Making of Federal Common Law' 153 *University of Pennsylvania Law Review* 825.
[186] See, for example, 6 NYJur2d Article 78 and Related Proceedings §1 (2006); 14 AmJur2d Certiorari §1 (2005); 52 AmJur2d Mandamus §2 (2005).

aspects of EU law, although not strictly 'administrative', can have 'binding' consequences for Member States' administrative law—such as a Treaty provision protecting a particular right which requires re-ordering of Member State administration. US federal law can also have 'binding force' on State administrations: through constitutional law or legislation implementing federal programmes which result in administrative law obligations on State administrations. However, federal *administrative* law, in the strict sense in which it is commonly understood, namely, as pertaining to the APA, has absolutely no 'binding force' on States. It is difficult to provide comprehensive observations as to the causes of the divergence and consequences for multi-level governance of this study. However, a number of important issues can be raised: first, differences in administration; and secondly, important divergences of judicial attitude.

A. Explaining Differences through Administration

As was outlined above, both EU and US federal administration can be viewed in broadly similar structural terms: with both centralised and shared elements. Superficially, US shared administration may appear to correspond with shared administration in the EU. However, there is a very fundamental and important distinction between administration in the EU and the US, namely, the *relational* principle governing whether centralised or shared administration is used.

In the EU, Member States have an obligation to assist in the administration of EU law. Under the EC Treaty, the obligation derives from the duty of fidelity found in Article 10 EC which requires that Member States 'take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community' and that they 'facilitate the achievement of the Community's tasks'. It has been held by the ECJ that this duty extends to implementation of measures falling within the scope of the EU Treaty.[187]

By contrast, in the US, from the principle that residual sovereignty is reserved explicitly to State government and to the people by the Tenth Amendment,[188] has been derived a very important principle of federal constitutional law and administration: the 'anti-commandeering doctrine'.[189]

[187] Case C-105/03 *Criminal Proceedings against Pupino* [2005] ECR I-5283, para 42.

[188] 'The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the States respectively or to the people'. For useful discussion, see *Printz v US* 521 US 898, 918–19 (1997).

[189] See generally D Halberstam, 'Comparative Federalism and the Issue of Commandeering' in K Nicolaïdis and R Howse (eds), *The Federal Vision*, above n 6, 213; RM Hills Jnr, 'The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual

The 'anti-commandeering' doctrine prevents Congress from compelling States to enact, administer or enforce a federal regulatory programme.[190] The doctrine was propounded most notably by the Rehnquist Court, with the primary explanation being that both the federal and State government should bear entire responsibility for their own acts when facing the electorate. It would therefore be unacceptable to oblige the elected State officials to pass legislation which they were not free to decide upon but for which the voters could hold them politically accountable.[191]

In the post-New Deal era of expansive federal power and in spite of the Rehnquist Court's attempted revival of federalism in its strict application of the anti-commandeering doctrine, the balance has titled in favour of national power[192] and States are increasingly called upon to implement federal programmes. However, where the federal government seeks to engage State agencies for the purposes of federal administration, as Rossi notes, '[o]ften the federal government offers a "carrot" for state or local compliance, providing funding for programs such as welfare, Medicaid, or public school standards and testing'.[193] The assistance will be awarded—either through a grant or what is known as a co-operative agreement—to the State, for the performance of the federal task, which the State may perform itself or contract out.[194] By offering assistance in return for State implementation the federal government cannot be said to be 'commandeering' State officials, since the State will have the option of refusing the assistance.[195]

It has been observed that there is actually 'limited textual support' for the anti-commandeering doctrine, since the Tenth Amendment reads as a standard conferral of powers provision,[196] not dissimilar to Article 5 EC.

Sovereignty" Doesn't' (1998) *Michigan Law Review* 96, 813; HJ Powell, 'The Oldest Question of Constitutional Law' (1993) 79 *Virginia L Rev* 633.

[190] *Printz*, n 188, 935 (invalidating commandeering of state and local executive officials); *New York v US* 505 US 144, 161 (1992) (invalidating commandeering of state legislative process); R Stewart, '"Pyramids of Sacrifice"? Problems of Federalism in Mandating State Implementation of National Environmental Policy' (1977) 86 *Yale Law Journal* 1196; NS Siegel, 'Commandeering and its Alternatives: A Federalism Perspective' (2006) 59 *Vanderbilt Law Review* 1629, 1632 (doubting the reasoning in *New York*).

[191] *New York*, above n 188, 168–9.

[192] See EA Young, 'Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments' (2005) 46 *William and Mary Law Review* 1733, 1806–7.

[193] J Rossi, 'Dual Constitutions and Constitutional Duels: Separation of Powers and State Implementation of Federally Inspired Regulatory Programs and Standards' (2005) 46 *William and Mary L Rev* 1343, 1345.

[194] OMB Circular A-102; 45 CFR §602, *Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments*, available at www.whitehouse.gov/omb/circulars/a102/a102.html (last accessed on 1 May 2009 and discussed below).

[195] See, eg, *South Dakota v Dole* 483 US 203, 210 (1987); *New York*, above n 190, 166–7 and 174.

[196] GA Bermann, 'The Role of Law in the Functioning of Federal Systems' in K Nicolaïdis and R Howse (eds), *The Federal Vision*, above n 6, 192, 207–8.

The doctrine is therefore often considered to function as a deliberate 'strategy of containment' of US federal government, which enables States to 'take on a competitive relationship with the federal government and reject cooperation'.[197]

Thus, while there are similarities between the systems of administration in the EU and the US, there is clearly a very different relational principle governing multi-level administration in the EU and the US. While Member States in the EU are obligated to administer EU programmes, State agencies only do so when they choose to accept funding to do so. To a greater extent, therefore, Member State administrations act as 'agents' of the EU; and if they were not bound by, for example, the ECJ's general principles of administrative law, that would create a lacuna in administrative law protection in the EU. The administration of EU policies would be subject to national administrative traditions in a way that would hamper the impact of EU law,[198] and, as has been seen for instance in the strength of the effectiveness principle in the evolution of ECJ's procedures and remedies jurisprudence, the ECJ is generally motivated by the concern that if European rules are not implemented according to their purpose, 'the potential benefits of developing shared rules will remain unrealized'.[199] Dehousse, for instance, has suggested that in the context of decentralised implementation, the way to ensure uniformity is to ensure that 'the actors in charge of the implementation of Community policies behave in a similar manner'.[200] It is therefore of great importance to the European project that the administrative law obligations accompanying administrative actors bind Member State administrations.

While the same lacuna arises in the US context where State agencies implementing federal programmes are not bound by the APA, it may be arguable that the lacuna is less extensive given that the bulk of federal administration will be conducted by federal actors, who are clearly bound by US federal administration law. As against this, and as has been seen,[201] State agencies often implement federal policies in exchange for funding, and there is a lacuna in administrative law protection where these agencies are not bound by the federal standards if those federal standards are higher. It appears from the case law, however, that this is a lacuna that federal courts are prepared to tolerate.

[197] Halberstam, 'Comparative Federalism', above n 189, 242.

[198] R Dehousse, 'Regulation by networks in the European Community: the role of European agencies' (1997) 4 *Journal of European Public Policy* 246 (presenting the increased use of agencies as an effort to promote uniformity in administration through co-ordinating networks of administrative actors).

[199] U Sverdrup, 'Implementation' in P Graziano and MP Vink (eds), *Europeanization: New Research Agendas* (Basingstoke, Palgrave Macmillan, 2007) 197, 199.

[200] Dehousse, 'Regulation by networks', above n 198, 254.

[201] See text relating to nn 42 to 46 above.

B. Judicial Attitudes

Following from this, it is perhaps not surprising—given the ECJ's integral role in binding Member States to administrative law obligations—that an explanation for the difference in 'binding force' of EU and US federal administrative law can also be derived from examining the courts of both systems: first, in respect of the powers accorded to them; secondly, in terms of the sources of administrative law available to them; and thirdly, in terms of their motivation.

(i) Powers

First, the position of US federal courts stands in contrast to that of the ECJ, of which '[t]he authority ... in principle to undertake creative law-making is today hardly in dispute'.[202] To begin with, the very existence of US federal courts, placed at the discretion of Congress by Article III of the federal constitution, is relatively precarious:[203] indeed, the 'traditional' view of Article III has been that 'Congress may deprive the lower federal courts, the Supreme Court, or all federal courts of jurisdiction over any cases within the federal judicial power, excepting only those few that fall within the Supreme Court's original jurisdiction'[204]—albeit that adherents to this view almost never advocate the use of such jurisdiction-stripping power.[205]

By contrast, the ECJ derives its substantive law-making power from Article 220 EC, which states that the ECJ 'within its own jurisdiction, shall ensure that in the interpretation and application of this Treaty the law is observed'.[206] This authority is bolstered by the second paragraph of Article 288 EC regarding the non-contractual liability of the Community, which is to be developed 'in accordance with the general principles common to the laws of the Member States' and Article 6(2) EU, which accords power to the ECJ to formulate fundamental rights principles 'as they result from the constitutional traditions common to the Member States'.[207] The preliminary ruling procedure set out in Article 234 has also been central to the evolution of judge-made law in the EU, as this procedure had provided the primary means through which the general principles of EU administrative

[202] Schwarze, *European Administrative Law*, above n 3, 1447.
[203] PR Dubinsky, 'The Essential Function of Federal Courts: The European Union and the United States Compared' (1994) 42 *AJCL* 295, 298.
[204] DJ Meltzer, 'The History and Structure of Article III' (1990) 138 *U Pennsylvania L Rev* 1569, 1569. A 'revisionist' view holds that Congress is limited in its power to strip federal courts of power: Dubinsky, 'The Essential Function', above n 203, 303–8.
[205] *Ibid*, 301.
[206] Lenaerts and Gutman, '"Federal Common Law"', above n 5, 15.
[207] *Ibid*, 15–16.

law have been developed by the ECJ. The absence of a federal common law of administrative law clearly reduces the flexibility of federal courts to impose federal administrative law values on State administrations in the manner in which the ECJ has imposed administrative law principles on Member States.

The ECJ's development of principles has also received democratic legitimation: by 'soft' law, in the form of the Joint Declaration issued in 1977 by the Council, Commission and Parliament; and in 'hard' law through Article 6 of the Treaty on European Union which declares that the Union 'is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States'. Moreover, perhaps, the ECJ has traditionally been protected from some of the criticism directed at US federal courts due to the absence of powerful democratic institutions in the EU.[208]

When thinking about multi-level administration, the ability of EU and federal courts to develop EU general principles or federal common law is also reflective of vertical division of power between the EU or US federal level and the Member States and States respectively. For example, in the *Erie* case, in rejecting the development of federal common law principles, the Supreme Court's declaration that no clause of the Constitution granted authority to either Congress or the Court to develop common law rules identified a clear division of power between federal and State courts. This study therefore is also a reminder that '[t]here is no true reflection, in the [European] Community judicial system, of the distinction between state courts and federal courts which is sometimes found in developed federal systems'.[209]

(ii) Source of Administrative Law Principles

The source from which the ECJ has developed its principles of administrative law is important. The ECJ has been described as 'by nature a "comparative" institution',[210] which derives its fundamental principles in part from the 'constitutional traditions common to the Member States',[211] albeit that it is well-known for adopting solutions which further the EU's

[208] Dubinsky, 'The Essential Function', above n 203, 344.

[209] FD Jacobs and KL Karst, 'The "Federal" Legal Order: The USA and Europe Compared—A Judicial Perspective' in M Cappelletti *et al* (eds), 1 *Integration Through Law—Europe and the American Federal Experience* 169, 217–220.

[210] K Lenaerts, 'Interlocking Legal Orders in the European Union and Comparative Law' (2003) 52 *International Comparative Law Quarterly* 873, 905.

[211] See, eg, Case 4/73 *Nold v Commission* [1974] ECR 491, para 13; see also Case 44/79 *Hauer v Rheinland Pfalz* [1979] ECR 3727, paras 17–30.

objectives.[212] It has presented its development of each administrative law principle 'as no more than the application of a principle which was part of the Member State's own constitutional tradition'[213]—thereby rendering the binding force of the principle more palatable for the Member State. Schwarze has identified a number of phases in the evolution of EU administrative law. The initial phase entailed the influence of principles of national constitutional and administrative law on the development of unwritten general legal principles of the ECJ; the principles were then formulated by the ECJ by way of an 'evaluative comparison of laws'.[214] This method enabled the ECJ to accept as a general principle a principle that did not already exist in all Member States.[215] In the later phase of evolution of EU administrative law, the new principles were reflected back into national law and influenced it.

This is not to suggest that principles of EU administrative law have always been transplanted into national legal orders with complete ease—as is well known, the repercussions of the receipt of the principle of proportionality by English courts has generated debate;[216] while French lawyers initially regarded lawyer-client privilege as 'an attempt to foist on the Community what was no more than a domestic rule of English law'.[217] Nonetheless, ECJ administrative law is 'nourished by the laws of the Member States' which operates as a form of 'back-check' to ensure implementation of Community law.[218] In this way, and again generally speaking, it may perhaps seem more palatable for Member States to have to comply with EU administrative law principles if they can identify some of those principles at least as derived from their own legal orders in the first instance.

By contrast, as was seen above, although some of the personnel involved in drafting the APA and the model State APA[219] overlapped and the federal APA was regarded as a useful source of ideas for States, the two processes were not as organically intertwined as has been the process of evolution of EU administrative law from Member State principles.

[212] Schwarze, *European Administrative Law*, above n 3, 17.

[213] Craig and de Búrca, *EU Law*, above n 105, 339; see also Schwarze, *European Administrative Law*, above n 3, 93–5, 1434–5. Although these principles have been modified to fit EU purposes: Harlow, 'European Administrative Law', above n 13, 266–7.

[214] J Schwarze, 'Enlargement, the European Constitution, and Administrative Law' (2004) 53 *ICLQ* 969, 970.

[215] *Ibid*, 971.

[216] J Jowell and A Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1988] *PL* 368; de Búrca, 'Proportionality and *Wednesbury* Unreasonableness', above n 3; Lord Hoffmann, 'The Influence of the European Principle of Proportionality upon UK Law' in E Ellis (ed), *The Principle of Proportionality* (Oxford, Hart Publishing, 1999); S Boyron, 'Proportionality in English Law: A Faulty Translation' (1992) 12 *Oxford Journal of Legal Studies* 237.

[217] Case 155/79 *AM & S Europe Ltd v Commission* [1982] ECR 1575.

[218] Lenaerts and Gutman, above n 5, 19.

[219] See text to n 158 above.

(iii) Judicial Attitudes

Judicial attitudes also differ significantly between the EU and the US in this context: 'teleological or purposive interpretation has gained acceptance with the European Union—largely without criticism—whereas interpretivism remains a dominant force in constitutional interpretation in America'.[220] Consequently, motivations such as the 'full effectiveness' of federal law will be less persuasive in the US context than they have been for the ECJ in the EU context. It is undeniable that the ECJ's motivation is very different from that of US federal courts. It has constantly undertaken a strongly integrationist role in the context of the evolution of the EU—particularly in the face of the dilatoriness of both the EU institutions and the Member States.[221] This role may well be changing in response to the changing demands of the EU,[222] but it has nonetheless had a huge impact on the evolution of the ECJ's jurisprudence to date. The need for uniformity to achieve the effectiveness in the application of Community law has been a regular theme in both the ECJ's administrative law jurisprudence and in the academic commentary: for example, in *Factortame*, which required development of the administrative remedies of Member States, the ECJ stressed the necessity for 'full effectiveness' in the application of EU law.[223] Commentators have also accepted that the uniform application of Community law 'calls for a certain convergence of national administrative law'.[224] More generally, the ECJ has required that Member States heed 'the solidarity which is the basis … of the whole of the Community system';[225] and has pointed to the 'mutual duties of sincere cooperation on the Member States and the Community institutions' imposed by Article 10.[226] A failure by Member States to provide EU institutions with information regarding their implementation of EU obligations can result in a breach of Article 10 EC.[227]

By contrast, US federal courts have rarely ever perceived themselves as having an integrationist role: if anything, they are hesitant to interfere with State activities—particularly State administrative activities. Even where

[220] Dubinsky, above n 203, 341; see also L Azoulay, 'The Court of Justice and the Administrative Governance' (2001) 7 *ELJ* 425, 427.
[221] *Ibid*, 295.
[222] See generally Dougan, *National Remedies*, above n 138.
[223] Case C-213/89 *R v Secretary of State for Transport ex p Factortame* [1990] ECR I-2433, paras 20 to 22.
[224] J Schwarze, 'The Europeanization of National Administrative Law' in Schwarze (ed), *Administrative Law under European Influence*, above n 3, 791.
[225] Joined Cases 6 and 11/69 *Commission v France* [1969] ECR 523, para 16.
[226] Joined Cases C-213/88 and C-39/89 *Luxembourg v Parliament* [1991] ECR I-5643, para 29.
[227] Case 240/86 *Commission v Greece* [1988] ECR 1835. This is discussed in Halberstam, 'Of Power and Responsibility', above n 119, 767–8.

federal jurisdiction is established and federal courts would normally have a duty to adjudicate claims,[228] in what is known as the *Burford* abstention,[229] where timely and adequate State court review is available, federal courts will abstain from exercising jurisdiction in cases involving State administrative agencies (1) when there are 'difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar' or (2) where the 'exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern'.[230] It has been held that this abstention doctrine arises from deference to the 'paramount interests of another sovereign, and the concern is with principles of comity and federalism'.[231]

Furthermore, as evidenced by their restrictive interpretation of the APA, US federal courts are clearly not interested in extending the scope of federal administrative law. For example, had a functional approach been adopted in any of the cases involving State agencies, surely a State agency implementing a federal programme could be deemed to fall within the definition of an 'agency' in the APA, as an 'authority of the Government of the United States'. As argued powerfully by the one dissenting judge in the *Public Citizen Health* case, '[b]odies with the delegated authority to make significant decisions are agencies in their own right. They act in the place of a pre-existing government body in the exercise of a central function'.[232]

Finally, for US federal courts, the need for uniformity in the application of federal law—although articulated on occasion[233]—has never really succeeded in gaining predominance[234] and is now, perhaps more than ever, generally considered unappealing.[235] In *United States v Kimbell Foods*[236] the Supreme Court deemed the application of a federal rule unnecessary where there had been mere 'generalized pleas for uniformity', which did not provide 'concrete evidence that adopting state law would adversely affect administration of the federal programs'.[237] Whereas the value of uniformity is presumed by the ECJ, in *Kimbell*, by contrast, the Supreme Court indicated that a federal court must evaluate whether 'federal programs

[228] *Corvello v New England Gas Co Inc* 532 F Supp 2d 396, 401 (2008).
[229] *Burford v Sun Oil Co* 319 US 315 (1943).
[230] *New Orleans Public Service, Inc v Council of New Orleans* 491 US 350, 361 (1989) (although federal jurisdiction was exercised in this case since resolution of the issue did not require significant familiarity with and would not disrupt state resolution of distinctively local regulatory facts and policies: 364).
[231] *Quackenbush v Allstate Ins Co* 517 US 706, 723 (1996).
[232] See n 152 above, 546.
[233] *Martin v Hunter's Lessee* 14 US (1 Wheat) 304, 348 (1816).
[234] Dubinsky, above n 203, 324.
[235] Weiser, above n 39, 1706.
[236] *US v Kimbell Foods* 440 US 715 (1979).
[237] *Ibid*, 730.

that "by their nature are and must be uniform in character throughout the Nation" necessitate formulation of controlling federal rules'.[238] Where there is little need for a nationally uniform body of law, State law may be applied. Secondly, a court 'must also determine whether application of state law would frustrate specific objectives of the federal programmes';[239] and it has been added in *Atherton v FDIC* that conflict between a federal policy or interest and state was 'normally a "precondition"' to the development of a federal common law rule.[240] Thirdly, a court 'must consider the extent to which application of a federal rule would disrupt commercial relationships predicated on state law'.[241] Even in the area of the pre-emptive federal regime implementing ERISA referred to above, the Supreme Court has cautioned against developing nationwide standards to supplement those provided in ERISA's statutory regime.[242]

In general, in the administrative law context, federal courts have exhibited a preference for 'synergistic, symbiotic, and dynamic interaction' with States;[243] and their lack of interest in uniformity has contributed to the lack of 'binding force' of US federal administrative law. For example, in the context of accepting appeals, the tendency of the Supreme Court has been to allow lower federal and State courts to work out a new rule and intervene only after there has been significant divergence between these courts.[244] As (now former) Justice O'Connor has observed,

> [w]hile uniformity is a necessary and desirable goal, its immediate achievement is not always possible. Nor is immediate action necessarily desirable. Part of the beauty of our federalism is the diversity of viewpoint it brings to bear on legal problems.[245]

This different perspective of the ECJ and US federal courts on the relevance of uniformity is significant. While uniformity is 'mostly taken for granted' in national legal systems—even if it does not always exist—the ECJ is still fighting for these presumptions to be applied to EU law.[246] It has been noted, for instance, that the ECJ's core concern is not always uniformity, but

> [t]he Court rather fears that EU law would not be applied at all. The strong (and unrealistic) strive for uniformity serves as a justification for the Court of Justice's

[238] *Ibid*, 728.
[239] *Ibid*.
[240] *Atherton v FDIC* 519 US 213 (1997), 218.
[241] *US v Kimbell Foods* 440 US 715 (1979), 728–9.
[242] *Hughes Aircraft Co v Jacobson* 525 US 432, 447 (1999).
[243] Redish, above n 40, 1773.
[244] J Komárek, 'In the Court(s) We Trust? On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure' (2007) 32 *European Law Review* 467, 471.
[245] SD O'Connor, 'Proceedings of the Middle Atlantic State-Federal Judicial Relationships Conference' (1994) 162 *Fed Rules Dec* 173, 181–2.
[246] Komárek, above n 244, 471.

> involvement in cases of minor importance for EU legal order as a whole, where an ordinary supreme court in a mature system of law would never intervene.[247]

It may therefore be that a further explanation for the varying impact of EU and US federal administrative law is linked to the contrasting degrees of maturity within each legal order. After all, in the US, the initial *Swift* emphasis on the role of federal common law in ensuring uniformity was abandoned in the later *Erie* case. Given that the degree of centralisation in any multi-level system is dependent on multiple variables,[248] including the interaction of formal rules with institutional dynamics, it is perhaps unsurprising that judicial attitudes should prove to be so important in assessing the degree of centralisation of administrative law in each legal order.

VI. OBSERVATIONS ON INTEGRATION

It was noted at the outset that this chapter would seek to make a modest contribution to debates on EU and US integration and there is space for a brief remark. For political scientists, the EU's model of administration has generally been regarded as reflecting the 'old inter-governmental order'.[249] Alternatively, it has also been considered to track a more 'international' model of translating norms into national legal orders;[250] or indeed, scrutiny of the EU's administration has been invoked to support the thesis that the EU is a 'severely limited international organization for bureaucratic and judicial coordination, among democratic governments'.[251] Yet as has been shown by this perusal of the impact of EU administrative law on Member States, this account is not entirely persuasive. Given the far-reaching effect of EU administrative law—especially when viewed in light of the corresponding effect of US federal administrative law—it appears that, in fact, the EU administrative system is heavily integrated.[252] As Hofmann and Türk have noted, paraphrasing Article 1 EU, there is a development towards an ever-closer union amongst the different administrative actors.[253] To borrow Weiler's expression, just as there is a 'constitutional discipline which Europe

[247] *Ibid*, 472.
[248] D McKay, *Designing Europe: Comparative Lessons from the Federal Experience* (New York, Oxford University Press, 2001) 14.
[249] M Martens, 'National Regulators between Union and Governments: a Study of the EU's Environmental Policy Network IMPEL' in M Egeberg (ed), *Multilevel Union Administration*, above n 4, 124, 125.
[250] Halberstam, above n 189, 218.
[251] See, eg, A Moravscik, 'Federalism in the European Union: Rhetoric and Reality' in K Nicolaïdis and R Howse, *The Federal Vision*, above n 6, 161, 186.
[252] See also HCH Hofmann and AH Türk, 'Policy Implementation' in Hofmann and Türk (eds), *EU Administrative Governance*, above n 4, 74, 75.
[253] *Ibid*.

demands of its constitutional actors',[254] so too is there an administrative discipline which is demanded of the EU's administrative actors.

This contrast between US and the EU administration been captured aptly by Halberstam as being a contrast between an 'entitlements' model of federalism and a 'fidelity' model of federalism.[255] Halberstam observes that generally (albeit with qualifications),

> the United States Supreme Court treats the various levels of government as permanently hostile adversaries that have reached a bargain in a historically situated arms-length deal, whereas the European Court of Justice views the various actors as fundamentally joined in a common enterprise.[256]

This comparative study supports that thesis. It suggests that administrative interpenetration in the EU is deep, with Member State administrators bound both to implement EU policies and to abide by EU administrative law obligations. Central to that interpenetration is the relational principle governing the use of direct or shared management and the relationship between the different levels of administration—namely, the Article 10 fidelity principle, as against the Tenth Amendment's anti-commandeering doctrine. Indeed, it has been observed that Article 10 forms the 'core' of the EU's constitutional system.[257] As such perhaps, at least insofar as much of the political science literature is concerned, by focussing on multi-level administration, without also considering the reach of EU administrative law obligations, an important perspective on administrative integration in the EU has been overlooked.

VII. CONCLUSION

Given the close relationship between administrative law and political choices, it is perhaps unsurprising that a review of the impact of EU and US federal administrative law on Member States and States respectively should lead us, albeit cursorily, to over-arching themes in EU evolution. The tentative conclusions offered by this comparison are threefold. First, in terms of its administration, the EU still operates primarily according to an international institution model, with heavy reliance on Member States to implement its policies. However, when this model is allied with the expansive binding reach of EU administrative law principles, a much more deeply integrated picture emerges of the way in which the EU functions

[254] Weiler, above n 7, 56.
[255] Halberstam, above n 119.
[256] *Ibid*, 801.
[257] J Temple Lang, 'The Core of the Constitutional Law of the Community—Article 5 EC' in L Gormley (ed), *Current and Future Perspectives on EC Competition Law* (London/The Hague, Kluwer Law International 1997) 41.

administratively. Secondly, the significance of the ECJ's ability to develop common law has been highlighted, as that has been the source of the most far-reaching impact of EU administrative law on Member States. Thirdly, the importance of uniformity and the duty of fidelity in the EU's legal order have also emerged as being of importance. Uniformity is clearly not a strong motivating factor for US federal courts and this may give rise to interesting debates when assessing the extent to which uniformity remains, or should remain, a motivating factor for the ECJ[258] and a core element of the EU framework more generally.[259] Meanwhile, the contrast between Article 10 EC and the Tenth Amendment provides a crucial insight into very differing conceptions of the premise underpinning multi-level administration in the EU and the US.

[258] See generally Dougan *National Remedies*, above n 138.

[259] See, for example, G de Búrca, 'The Constitutional Challenge of New Governance in the European Union' (2003) 28 *EL Rev* 814, 824, discussing the Open Method of Co-ordination which 'leaves a considerable amount of policy autonomy to the Member States'; see generally G de Búrca and J Scott (eds), *Constitutional Change in the EU: from uniformity to flexibility?* (Oxford, Hart Publishing, 2000).