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**FEDERALIST
SOCIETY**

GEORGE MASON UNIVERSITY SCHOOL OF LAW

**LAW &
ECONOMICS
CENTER**



HENRY G. MANNE PROGRAM IN LAW & ECONOMICS STUDIES

**EIGHTH ANNUAL
TRANSATLANTIC LAW FORUM**

OCTOBER 23 – 24, 2015

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THE LAW & ECONOMICS CENTER Since its inception in 1974, the Law & Economics Center has played a critical role as a leader in law and economics research and education. The LEC recognizes both the importance of timely, relevant, and unassailable research on public policy issues as well as the necessity of communicating research findings to those who are directly shaping our country’s public policy discussions. With research divisions devoted to large-scale empirical projects and top-quality legal policy analysis, and educational arms reaching out to judges, attorneys general, and other policymakers, the LEC is uniquely equipped to positively affect national policy outcomes.

COUNCIL ON PUBLIC POLICY The Council on Public Policy was established in 2001 by a group of American and European editors, scholars, and executives. Its mission is to strengthen individual liberty in public policy, to improve transatlantic relations by correcting mutual misperceptions, and to build a network of policy experts and think tanks.

THE FEDERALIST SOCIETY The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.

THE EIGHTH ANNUAL TRANSATLANTIC LAW FORUM

Administrative law reflects the hope that modern societies can be governed not only liberally and democratically but also rationally, sensibly, and with tolerable efficiency. On both sides of the Atlantic, that once-confident conviction now meets with considerable skepticism, in somewhat different ways and for different reasons.

Americans like to tell themselves that their country is too rebellious, too big, too democratic, too fragmented, and too individualistic to be “administered” like France, Germany, or Denmark. But that “exceptionalist” story and self-image stands in tension with the pervasive presence of public administration (though not always federal administration) throughout American history. Lately, many scholars, pundits, politicians, and even Supreme Court Justices have come to lament that the administrative state—ill suited to the country’s constitutional culture in any event—appears increasingly beyond effective political and judicial control. Among the proposed remedies, perplexingly, is a quintessentially “European” product: bureaucratic legalism, either through more specific legislation or more aggressive judicial controls (or both). All the while, prominent scholars argue from diametrically opposed vantages that all administrative law is a charade—an unlawful departure from constitutional norms, or a thin veneer for an essentially “Schmittian” state above and beyond effective legal control.

If that raging debate seems confusing and perhaps bizarre to European scholars, American scholars are bound to be equally perplexed at the absence of any comparably fundamental (and polemical) debate on the European Continent. Nation-states with long traditions of administrative law—*droit administratif*, *Verwaltungsrecht*—have long recognized the costs of excessive legalism, such as bureaucratic rigidity, a concomitant stifling of entrepreneurial activity and innovation, and a lack of democratic accountability. Perhaps, administrative law traditions are too entrenched to yield readily to ideological demands or perceived social imperatives. Oddly, though, they have posed no obstacle to the emergence of a highly improvisational, “networked” European administrative law without a state, a superintending legislature, reliable hierarchical controls, or systematic judicial controls.

At the Transatlantic Law Forum’s Eighth Annual Conference, prominent scholars, judges, and lawyers from European countries and from the United States will examine the administrative state and its law from a wide range of perspectives. Some panels will address overarching topics, such as judicial review and increased public discontent with administrative governance. Other panels will examine varying administrative (law) responses to a common set of more specific problems and challenges, from energy policy to financial regulation and central banks.

HENRY G. MANNE PROGRAM IN LAW & ECONOMICS STUDIES
EIGHTH ANNUAL TRANSATLANTIC FORUM

FORUM: George Mason University, Founders Hall Auditorium, 3351 Fairfax Drive, Arlington, VA 22201

Friday, October 23

All sessions in the Founders Hall Auditorium

8:00 AM - 8:45 AM
REGISTRATION AND BREAKFAST

Founders Hall Multipurpose Room

8:45 AM - 9:00 AM
WELCOMING REMARKS

MICHAEL S. GREVE
 Professor of Law, George Mason University School of Law

TODD J. ZYWICKI
 Executive Director, Law & Economics Center and George Mason University Professor of Law, George Mason University School of Law

9:00 AM – 10:30 AM
PANEL 1:
ADMINISTRATIVE LAW IN CRISIS?

The United States and the European Union both have acquired administrative law in fits and starts. Both have borrowed extensively from foreign legal systems; both have struck often uneasy political and institutional compromises. In other crucial respects, however, the experiences differ greatly. In the United States, periods of quiescence and acceptance of administrative law have alternated with periods of intense ideological contest. Europe presents a more placid picture, notwithstanding the awkwardness of creating an administrative system that lacks any robust parliamentary checks or judicial controls. Is administrative law (in its contemporary versions) actually law—or merely a coping mechanism for what governments want to and will do in any event?

PRESENTERS:
Administrative Law in Flux: An Opportunity for Constitutional Reassessment

ROBERT R. GASAWAY
 Partner, Kirkland & Ellis LLP

ASHLEY C. PARRISH
 Partner, King & Spalding LLP

COMMENTERS:
NEOMI RAO
 Associate Professor of Law, George Mason University School of Law

FRANCESCA BIGNAMI
 Professor of Law, The George Washington University Law School

MODERATOR
THE HONORABLE DOUGLAS H. GINSBURG
 Senior Judge, US Court of Appeals for the District of Columbia Circuit and Professor of Law, George Mason University School of Law

Friday, October 23

All sessions in the Founders Hall Auditorium

10:45 AM – 12:15 PM
PANEL 2:
JUDICIAL CONTROL OF AGENCY ACTION

Independent judicial review of administrative action is widely viewed as an essential element of lawful government. There remains, however, the perennial tension with democratic government. How has this tension played out over time—and how is it playing out now, in countries whose long traditions of administrative law confront a supra-national administrative law of uncertain contours, provenance, and democratic legitimation?

PRESENTERS:
The Guardianship of the Public Interest
ADAM TOMKINS
 Professor and John Millar Chair of Public Law, University of Glasgow School of Law

The Development of German Administrative Law
FLORIAN BECKER
 Professor of Public Law, Christian-Albrechts-University Kiel

COMMENTERS:
JEREMY A. RABKIN
 Professor of Law, George Mason University School of Law

JACK M. BEERMANN
 Harry Elwood Warren Scholar and Professor of Law, Boston University School of Law

MODERATOR
CHRISTIAN VON SYDOW
 Partner, McDermott Will & Emery Rechtsanwälte Steuerberater LLP

Lunch in Founders Hall Multipurpose Room; All sessions in the Founders Hall Auditorium

Friday, October 23

12:15 PM – 1:45 PM
LUNCHEON AND DISCUSSION: THE ADMINISTRATIVE STATE AND ITS DISCONTENTS

Europe's economic (and political) recovery, it is widely believed, requires monetary accommodation and fiscal discipline—but also “structural reform,” meaning a sharp reduction of bureaucratic rigidities. That has not happened. Similarly, many observers have argued that ambitious regulatory initiatives—the Dodd-Frank Act, the Affordable Care Act, climate and energy policy—may account for the mediocre performance of the US economy over the past several years.

Does the administrative state and its law have anything to do with this? Or is it merely a reflection of broader social and political forces—democratic decay, the inexorable growth of executive government, or simply voter resistance to change?

DISCUSSANTS:
STEVEN M. TELES
 Associate Professor of Political Science, Johns Hopkins University
PETER H. SCHUCK
 Simeon E. Baldwin Professor Emeritus of Law, Yale Law School
ALBERTO MINGARDI
 Director General, Istituto Bruno Leoni

MODERATOR
MICHAEL ZÖLLER
 President, American-European Council on Public Policy and Professor Emeritus, Bayreuth University

Friday, October 23

All sessions in the Founders Hall Auditorium

2:00 PM – 3:30 PM
PANEL 3: RULEMAKING UNDER STRESS: GOVERNING FINANCIAL INSTITUTIONS

After the 2008-2009 financial crisis, both Europe and the US felt compelled to ramp up their authorities' rulemaking and oversight. On both sides of the Atlantic, the effort spawned novel institutional, administrative, and legal arrangements. And here as there, the innovations have been accompanied by concerns over excessive delegation of lawmaking authority to poorly supervised agencies. In what respects are those responses similar? How and why do they differ? What do they tell us about the adaptation of administrative law to new social and political demands?

PRESENTER:
The Legal Response to the Next Financial Crisis
DAVID ZARING
 Associate Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania

COMMENTERS:
JEAN-CLAUDE GRUFFAT
 Managing Director, Galileo Global Advisors
ALASTAIR SUTTON
 Barrister, Brick Court Chambers, London and Brussels
GILLIAN METZGER
 Stanley H. Fuld Professor of Law, Columbia Law School

MODERATOR
J.W. VERRET
 Associate Professor of Law, George Mason University School of Law

3:30 PM
ADJOURN FOR THE DAY

6:00 PM - 9:00 PM
RECEPTION & DINNER (INVITATION ONLY)
SPONSORED BY THE FEDERALIST SOCIETY

The W Washington DC, 515 15th Street NW, Washington, District of Columbia 20004

KEYNOTE SPEAKER:
JONATHAN RAUCH
 Senior Fellow in Governance Studies, The Brookings Institution

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Saturday, October 24

All sessions in the Founders Hall Auditorium

<p>8:00 AM – 8:45 AM BREAKFAST <i>Founders Hall Multipurpose Room</i></p>	
<p>8:45 AM – 10:15 AM PANEL 4: COMMANDEERING THE CLIMATE</p> <p>Both the EU and the US pursue environmental and energy policies that require an inordinate amount of both central coordination and member-state cooperation. The American legal system is notoriously ill-adapted to such endeavors, and ambitious federal policy initiatives have encountered fierce resistance in the courts, in litigation brought by industry as well as states. Europe's regulatory "style" and legal architecture are supposedly more conducive to coherent policymaking and smooth implementation. Is this actually the case? Clearly, the institutional and legal differences are great. For example, the EU may "commandeer" member-states; the US EPA may not. In the US, environmental groups can sue in federal court to force action and ensure compliance; not so in Europe. But how do these differences shape the outcomes?</p>	<p>PRESENTERS: <i>Regulation by Threat: EPA's Clean Power Plan</i> JAMES W. COLEMAN Assistant Professor of Law, University of Calgary Faculty of Law</p> <p><i>Implementing Climate Change Policy in the EU</i> ALEXANDER PROELSS Chair for Public Law and Director, Institute of Environmental and Technology Law, University of Trier</p> <p>COMMENTERS: JONATHAN H. ADLER Johan Verheij Memorial Professor of Law and Director, Center for Business Law and Regulation, Case Western Reserve University School of Law</p> <p>E. DONALD ELLIOTT Senior Of Counsel, Covington & Burling LLP; Professor (adjunct) of Law, Yale Law School</p> <p>MODERATOR THE HONORABLE STEPHEN F. WILLIAMS Senior Judge, US Court of Appeals for the District of Columbia Circuit</p>

Saturday, October 24

All sessions in the Founders Hall Auditorium

<p>10:30 AM – 12:00 PM PANEL 5: FINANCIAL SETTLEMENTS: LAW ENFORCEMENT, SO-CALLED</p> <p>Both in the US and in Europe, law enforcement has become big business: regulatory authorities routinely collect many billions in fines and settlements from banks and other financial institutions. It seems difficult to attribute this phenomenon to a sudden outbreak of corporate criminality in a most closely supervised industry. More likely, it is a regulatory response—but to what, precisely? The perceived need to wring exorbitant rents out of the financial system? To mollify restless voters? To disguise the uncomfortably close marriage of state and capital? If the fines have become purely transactional, what does that tell us about government's capacity to actually regulate financial industries?</p>	<p>PRESENTERS: <i>For-Profit Government: Agency Finance in an Age of Executive Government</i> CHRISTOPHER C. DEMUTH Distinguished Fellow, Hudson Institute</p> <p>MICHAEL S. GREVE</p> <p>COMMENTERS: CHARLES W. CALOMIRIS Henry Kaufman Professor of Financial Institutions, Division of Finance and Economics, Columbia Business School and Professor of International and Public Affairs, Columbia School of International and Public Affairs</p> <p>NIZAN G. PACKIN Assistant Professor of Law, Baruch College, City University of New York</p> <p>PHILIP A. WALLACH Fellow in Governance Studies, The Brookings Institution</p> <p>MODERATOR ALASTAIR SUTTON</p>
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Saturday, October 24

All sessions in the Founders Hall Auditorium

12:00 PM – 1:15 PM
LUNCHEON AND DISCUSSION:
THE POWER TO TAX AND ITS JUDICIAL CONTROL

In the US, judicial controls over the IRS and its exercise of tax and regulatory authority are much weaker than the controls that are available under general administrative law. Supposedly, fiscal imperatives warrant this arrangement. However, as the IRS is changing from a mere revenue collector into a regulatory agency, there are reasons to worry about extreme judicial deference. Moreover, other countries with (presumably) the same need for orderly fiscal administration provide rather more robust judicial checks. Germany, for example, subjects tax administrators' decisions to *de novo* review by independent courts. What explains these different institutional arrangements, and how well have they served their intended purposes?

DISCUSSANTS:

THE HONORABLE ULRICH SCHALLMOSER

Judge, The Federal Fiscal Court, Germany

THE HONORABLE MARK V. HOLMES

Judge, US Tax Court

MODERATOR

KRISTIN E. HICKMAN

Harlan Albert Rogers Professor in Law and Associate Director, Corporate Institute, University of Minnesota Law School

Saturday, October 24

All sessions in the Founders Hall Auditorium

1:30 PM – 3:00 PM
PANEL 6:
LEGAL CONTROLS OVER CENTRAL BANKS

In the United States, the Federal Reserve Board operates effectively outside the constitutional and even the administrative law framework. Recently, however, the Board's regulatory activities have become subject to judicial review, and some legislators are clamoring to "audit the Fed." In the EU, the European Central Bank's status under the Treaties continues to be a matter of great controversy. How does, how can administrative law deal with independent institutions of this type? In what respects, how, and from whom are they and should they be "independent"? In light of the central banks' role, it may not be terribly helpful to think of them as administrative bodies. But then, what are they?

PRESENTERS:

The Failures of Judicial Review of Central Banking: The ECB before the ECJ

MARCO GOLDONI

Lecturer in Legal Theory, University of Glasgow School of Law

Ulysses and the Punch Bowl: The Law and Politics of Federal Reserve Independence

PETER CONTI-BROWN

Assistant Professor of Legal Studies and Business Ethics, The Wharton School, University of Pennsylvania

COMMENTERS:

ALEX J. POLLOCK

Resident Fellow, American Enterprise Institute

MICHAEL WOHLGEMUTH

Economist and Director, Open Europe Berlin

MODERATOR

THE HONORABLE HERVÉ MARITON

Member, National Assembly of France

3:00 PM
CONCLUDING REMARKS AND ADJOURN