FOREWORD:

BRIDGING DIVERGENCE AND CONVERGENCE IN U.S.-EU FINANCIAL REGULATION

BY RÉGIS BISMUTH, ANNE-CATHERINE MULLER, ANNE-CLAIRE ROUAUD & STEVEN L. SCHWARCZ, SPECIAL EDITORS

This symposium issue seeks to harmonize international financial regulation by comparing and critiquing U.S. and EU approaches, including their convergences and divergences and the reasons therefor. To achieve this goal, the issue introduces a somewhat innovative approach: each article is co-authored by leading U.S. and EU financial regulation scholars.

The divergences in the U.S. and EU financial regulatory frameworks might be explained, at least in part, by the differences in the structure of their financial systems: the United States is primarily market-based, whereas the European Union is largely bank-based.[1] For example, approximately 80% of corporate financing in the United States is funded through the capital markets, compared to only 30% in the European Union.[2] Another possible explanation for the divergences is that EU regulators and the European Central Bank have been more willing to impose top-down policy than their U.S. counterparts, which tend to rely more on voluntary, market-led efforts.

Recognizing these differences, this symposium issue's comparative analyses should help the United States and the European Union learn from each other's regulatory successes and failures. That, in turn, should help identify "best practices" and increase regulatory efficiency. The comparative analyses should also further economic growth by increasing U.S. and EU regulatory convergence, building trust, and encouraging cross-border market access and business relationships. The demand for such cross-border access and business is increasingly critical with the expansion of crypto-assets and decentralized finance (DeFi), which transcend geographic boundaries.

Regulatory convergence should also increase legal certainty, reduce regulatory risk, lower compliance costs, and facilitate more cooperative cross-border regulatory supervision. Additionally, such convergence could provide more common crisis

Copyright © 2026 by Régis Bismuth, Anne-Catherine Muller, Anne-Claire Rouaud & Steven L. Schwarcz.

This Article is also available online at http://lcp.law.duke.edu/.

1. Ross Levine, *Bank-Based or Market-Based Financial Systems: Which Is Better?*, 11 J. FINAN. INTERMEDIATION 398, 399–400 (2002).

2. Clive Horwood, Nikhil Sanghani & Taylor Pearce, *Competitiveness for European Financial Services*, OFF. MONETARY & FIN. INSTS. F. (2024), https://www.luxembourgforfinance.com/wp-content/uploads/2024/01/OMFIF-LFF-report-2024.pdf [https://perma.cc/M9PK-YBSS].

responses to similar market failures, thereby reducing cross-border financial contagion.[3]

1. Rosa M. Lastra & Patricia A. McCoy, *Delegation and Agency Deference in Financial Regulation: A Comparative EU-U.S. Perspective*[4]

The authors pose this fundamental question: Ultimately, who holds—or should hold—the pen when it comes to enacting "binding *ex ante* rules of general applicability to regulate financial institutions and markets"? Should it be elected legislators or expert agencies? This "basic choice" implicates "a tension between popular will and agency expertise that is rife in constitutional democracies."

This article examines how the United States and the European Union "address the issues of ex ante legislative delegation and ex post judicial review of the agencies' rulemaking activities," assessing the importance placed on expertise in financial regulation, the statutory measures designed to "protect expert decisionmaking from political pressure," and the accountability mechanisms designed to ensure that "agency action comports with statutory delegations of power and constitutional requirements."

The authors' examination reveals that the European Union and the United States appear in this respect to be experiencing opposite trends, with more "deference to agency expertise and protection of regulatory independence" in the European Union and, conversely, "less deference and enhanced executive authority" in the United States.

In light of EU treaties and the case law of the EU's Court of Justice, strategic policy choices at the EU level are legislative responsibilities. The power to adopt general rules of a binding nature cannot be delegated to expert agencies such as supervisory, banking, or securities authorities. Thus, a "European SEC—as proposed in the Draghi Report—could not have a general rulemaking power." There is however a gap between these non-delegation principles and reality, with the European Central Bank and EU expert agencies adopting "soft law acts" that have a kind of *de facto* binding effect; the Court of Justice has shown a certain degree of deference to the expertise and discretion of the European Central Bank and those agencies.

In the United States, while longstanding constitutional case law authorized congressional delegations of rulemaking power to agencies under the "delegation doctrine," in the past ten years "the U.S. Supreme Court has seriously undermined the ability of federal agencies [such as the Securities and Exchange Commission] to institute new rules." A series of recent Supreme Court cases "ha[ve] cabined the scope of congressional delegation while upending the longstanding tradition of deference to agency expertise in rulemaking proceedings," "depriving agencies of the ability to interpret statutory questions of economic and political significance without clear congressional authority" and also making it "significantly more difficult for federal

3. The harmonization of bank capital requirements by the Basel Committee on Banking Supervision exemplifies how regulatory convergence could help to achieve these benefits. *See* Andrea Enria, Chair, Supervisory Board of the ECB, Address at the EUROFI 2023 Financial Forum (Sept. 14, 2023), https://www.bankingsupervision.europa.eu/press/speeches/date/2023/html/ssm.sp230914~c6c0be0cc6.en.html [https://perma.cc/N988-88XX] ("[A]fter a decade-long international debate, the final Basel standards are now being implemented in all jurisdictions based on a sound international agreement . . . We should now all accept that these international standards provide our guiding star.").

4. 88 LAW & CONTEMP. PROBS., no. 2, 2026, at 1.

agencies to prevail if their final rules are challenged in court."

The authors point out that these differences might have larger implications, particularly for regulating multinational banking organizations that operate both in the European Union and United States. The differences also "could further imperil the international standards setting that has anchored global financial regulation for over thirty years." Furthermore, the "paralysis of U.S. financial rulemaking could undermine financial stability, with devastating repercussions for the worldwide financial system."

2. Seraina Grünewald & Jeremy Kress, *Systemic Risk and Macroprudential Regulation*[5]

This article explains how the United States and the European Union moved from a pre-2008 microprudential approach to a macro view of financial stability after the global financial crisis. It shows why regulating single firms was not enough and how systemic linkages required new institutions and tools. To these ends, the article shows where U.S. and EU approaches are already similar, where they differ, and how each can learn from the other, especially on the use of flexible tools that adapt to the economic cycle, the oversight of the nonbank financial sector, and the critical need for cross-border cooperation.

On institutional design, the authors compare the U.S. Financial Stability Oversight Council (FSOC) and the EU's European Systemic Risk Board (ESRB). Both bodies aim to look across sectors and rely on a "comply-or-explain" process, yet they operate differently in practice. FSOC has formal power to tag individual systemically important insurers or finance companies as "nonbank SIFIs," a tool the EU lacks, but it has used that power sparingly. The ESRB cannot designate firms, but its recommendations have seen relatively strong follow-through across member states. The result is a shared framework with different tools and follow-up.

On policy tools, the article compares the capital requirements designed to address system-wide vulnerabilities. The European Union and the United States both adopted the countercyclical capital buffer (CCyB), which is meant to build an extra cushion of capital during periods of economic expansion which can be released to absorb losses and maintain lending during a downturn. Several EU countries have turned this buffer on, while the United States has never activated it, but both apply extra capital to global systemically important banks. The European Union also uses a flexible systemic risk buffer (SyRB) that can target specific lending areas, often real estate. The United States ties capital more closely to its annual stress test through the stress capital buffer (SCB), which converts projected losses under a severe scenario into a firm-specific add-on.

The article also compares prudent lending requirements, which can help address system-wide vulnerabilities by minimizing loan defaults. The European Union frequently imposes borrower-based tools such as loan-to-value, loan-to-income, and debt-service-to-income caps. The United States instead relies on the mortgage ability-to-repay (ATR) rule, which requires residential-real-estate lenders to verify income, debts, and other factors to make a reasonable determination that the borrower can repay

5. 88 LAW & CONTEMP. PROBS., no. 2, 2026, at 29.

the loan, with a qualified-mortgage safe harbor for loans that meet set standards.

Finally, the article scans emerging risks. On crypto, for example, both the European Union and United States monitor potential risks that could spill over into traditional finance. On climate, the European Union has integrated clear expectations, stress exercises, and a legal basis into supervision. United States efforts moved somewhat during the Biden years and then slowed, leaving a gap with international peers.

3. Dan Awrey & Pauline Pailler, *An Ocean Apart: The Regulation of Financial Technology in the United States and European Union*[6]

This article explains how U.S. and EU regulation of financial technology (FinTech) has been growing apart. After the 2008 financial crisis, the United States and European Union were leaders in expanding regulatory coordination and harmonization. Together, they designed a wide range of post-crisis regulatory reforms. These included the Basel III bank capital and liquidity frameworks, various structural reforms targeting global derivatives markets, and cross-border resolution planning for troubled financial institutions. Today, however, the United States and European Union have become economic and geopolitical competitors, which undercuts that coordination and harmonization.

The authors argue that this disharmony is most evident in regulating FinTech. The regulatory differences stem, in part, from differences in "why, by whom, and how" FinTech regulation is made. For example, U.S. and EU policymakers view the role of financial law differently. EU policymakers view financial law "primarily as a prophylactic against consumer harm and socially excessive risk-taking." In contrast, U.S. policymakers often view financial law "as a way to support the development of new technology-driven business models, products, and services."

The United States and European Union also have different views of the federal and local role of financial regulation. The European Union is increasingly centralizing financial regulation and supervision. U.S. financial regulation and supervision, however, remains partly decentralized across the states.

Furthermore, both jurisdictions have radically split approaches toward financial rulemaking responsibility. In the European Union, that responsibility is largely delegated to technocratic experts. In the United States, at least at the federal level, Congress leads the effort based on political considerations. That split also informs regulatory neutrality. Although the European Union takes a somewhat neutral approach towards financial regulation, U.S. regulators are beginning to take a more active approach, such as promoting the development of cryptocurrency and other crypto-assets.

The authors do not judge whether the U.S. or EU approaches are better adapted to regulate FinTech. They say that both approaches may have fundamental flaws, and only time will tell which is better. Nonetheless, the authors view the U.S. and EU divergent paths as "important experiments in what works and what doesn't in the regulation of financial technology."

6. 88 LAW & CONTEMP. PROBS., no. 2, 2026, at 53.

4. Howell E. Jackson & Katja Langenbucher, *The Regulation of Technological Innovation in Financial Services: A Comparative Approach with Respect to Digital Assets and Artificial Intelligence*[7]

This article gives the symposium a practical framework for how institutions shape policy in the United States and the European Union. The core contrast is clear. The European Union tends to write early, central rules that build new risks into a "seamless web of codified law." The United States usually starts with agency actions, court challenges, and state activity, and only later, if at all, turns to Congress. The trade-off is straightforward. The European Union offers advance clarity but faces uneven application across EU Member States. The United States leaves more room to experiment but often ends up in "regulation by enforcement," which raises uncertainty for supervised firms.

On digital assets, the article explains how U.S. regulatory agencies brought crypto under existing rules after the collapse of FTX. Although those rules discouraged bank-crypto ties, they were not modified to adapt to the new crypto technology. Major federal legislation did not arrive until 2025, when Congress enacted a law focused on stablecoins (the so-called GENIUS Act) that was shaped by pioneering state-level frameworks, such as New York's licensing for crypto firms and Wyoming's special charter for digital asset banks.

In contrast, the European Union took a more proactive and comprehensive approach with its Markets in Crypto-Assets Regulation (MiCAR). Rather than wait for the market to develop, the European Union established a clear classification system for different crypto assets and built detailed rules from the outset. However, it left the enforcement of these standards to national authorities in each member country, which can result in inconsistent application across member states.

On AI, the article analyzes the U.S. swing from the Biden effort to coordinate policy to a later shift toward innovation. It contrasts this approach with the EU adoption of a risk-based AI Act that interfaces with its data privacy rules and its regulations on algorithmic trading and market abuse. Both approaches face similar problems. Proving intent for algorithmic trading abuses is difficult, and credit scoring raises issues of fairness, transparency, and consumer rights. In the United States, the SEC's withdrawn predictive-analytics proposal and later focus on disclosures show how agencies are still testing the right tools and how debates over a technology-neutral approach persist.

The article provides a plan for closer alignment. The European Union could strengthen consistent enforcement. The United States should build public expertise for supervising fast-moving tools and balance its cultural urge to "move-fast-and-break-things." Near-term alignment looks most plausible on stablecoins. For AI, any deeper convergence seems further away and will likely have to interface with industry practice and international bodies.

7. 88 LAW & CONTEMP. PROBS., no. 2, 2026, at 77.

5. Alessio M. Pacces & David Zaring, *The Divergence of Mandatory Climate Disclosure in the United States and European Union*[8]

The authors observe, "There is an increasing divergence between EU and U.S. securities regulation, particularly on matters of Environmental, Social & Governance performance (known as ESG)" as well as on climate change. Despite a single goal—reducing global warming—mandatory disclosure of climate risk differs significantly between the United States and the European Union.

This article reflects on the causes of this divergence and how differences in the policymaking process affect substantive rules. It also discusses "the pros and cons of climate disclosure from an economic perspective."

In the European Union, "[T]he mode of policymaking is bureaucratic and political (rather than driven by litigation)" and in the hands of EU institutions with "legislative authority to introduce far-reaching climate disclosure obligations." Furthermore, under the EU treaty framework, "[C]limate-related financial disclosures can be justified as furthering not only environmental goals but also . . . the establishment of the internal market, making sustainability a concern of financial regulation." In contrast, the U.S. "constitutional and statutory framework has separated environmental regulation from financial regulation" and the Securities and Exchange Commission (SEC) faces obstacles to mandate climate disclosures under U.S. constitutional and administrative law. Furthermore, "[L]itigation is an essential component of disclosure regulation" in the United States, not least because litigation is a large part of how disclosure is enforced.

These differences cause EU and U.S. climate disclosure rules and regulation to "reflect fundamentally different policy goals." The United States and European Union particularly differ in how they view the purpose of climate disclosure. The EU disclosure, for example, "aims to change the behavior of companies" and investors in order to fight climate change, not merely—as in the United States—to inform investors about climate risks.

6. Luca Enriques, Alessandro Romano & Andrew F. Tuch, *Sustainability Assurance*[9]

This article addresses a fundamental but relatively unexplored topic: from a U.S.-EU perspective, comparing the quality of information on sustainability issues disclosed to the public by issuers of securities.

The main difficulty is identifying precisely what sustainability information should be disclosed to the public. This might include such diverse elements as environmental and governance data, as well as information relating to human rights. In the European Union, furthermore, determining which information to disclose is based on new concepts such as double materiality, which includes both financial materiality and the materiality of the issuer's impact on its environment. So far, the United States only considers financial materiality.

8. 88 LAW & CONTEMP. PROBS., no. 2, 2026, at 115.
9. 88 LAW & CONTEMP. PROBS., no. 2, 2026, at 141.

In determining what information to disclose, issuers also face the reality that regulations are changing. This makes it even harder to control the information disclosed, which is particularly important for the purpose of ensuring comparability between issuers. Accuracy is also important because this information can be used both by issuers to guide their strategy and activities and by investors to direct their investments.

As with accounting, certain international, U.S., and EU auditing standards are being developed to evaluate the quality of sustainability-related information, but these standards are still too heterogeneous to ensure comparability between issuers. Even more uncertain are the methods for controlling information. The persons authorized to carry out this control, their qualifications, and the depth of the control remain unclear, creating the risk of seeing a proliferation of falsely granted certifications for the information disclosed. This could undermine investor reliance. It is therefore necessary to regulate the verification process and place a clear responsibility on the controllers of the information. The assurance providers on sustainability disclosures are green gatekeepers, whose role has to be enhanced. It may even be necessary to entrust independent third parties with verifying the accuracy of the information disclosed.

The legal construction work required to address these issues is huge and has only just begun. This article highlights the importance of the issue of sustainability information verification and the need for appropriate regulation.