The Corporatist Foundations of Financial Regulation

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ABSTRACT: Banks are subject to heavy regulation that is secret, not justified by cost-benefit analysis, not reviewed by the courts, not constrained by congressional appropriations, and not responsive to the President. They nonetheless prosper under the regime. The fact that they do challenges some of the basic assumptions of American administrative law—that transparency and process creates better regulation through sunlight and reasoned decision-making, that judicial review checks regulatory abuses where sunlight and reasoned decision-making do not, and that a utilitarian assessment of the merits of regulation is essential. Instead, the banking regulators offer a different approach to administration—one that is collaborative and corporatist rather than adversarial and legalized. This Article shows how this model works, how it differs from the model of administrative law most often taught in law schools, and where else it can be found in government—in areas ranging from power supply to national defense to vaccine production. Collaborative administrative governance can work, but the banking variant of it would benefit by becoming a more transparent regulatory regime, where the precise nature of the collaboration, and the moments of adversarial separation between banks and government, are more obvious to all who wish to look. It means, among other things, that banks and nonbank interest groups should sue the government more, that the government should make public more of its dealings with banks, and that the international aspects of banking regulation should continue their journey toward greater transparency.

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INTRODUCTION

Nobody should feel sorry for banks. Our banks are making returns on equity of twenty percent and more,[1] and they take home more investment-banking fees than the rest of the banks across the world combined.[2] The total assets of the largest, most successful banks exceed a trillion dollars.[3]

But, banks labor under heavy, and in almost every important way, unchecked, regulation.[4] The prosperity of banks challenges some of the basic assumptions of American administrative law—that transparency and process create better regulation through sunlight and reasoned decision making, that judicial review checks regulatory abuses where sunlight and reasoned decision making do not, and that a utilitarian assessment of the merits of regulation is essential.[5] As we will see, the banking regulatory regime features none of these regulatory basics.

The heavy nature of banking regulation stems from one of the uniquely appealing aspects of banking (from the government's perspective) and one of its particularly unpleasant features.

The appealing aspect lies in the fact that, ever since the beginning of the American experiment, the government has encouraged the widespread

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1. *Profits at America's Banks Are Sky-High*, ECONOMIST (Apr. 17, 2021), https://www.economist.com/finance-and-economics/2021/04/17/profits-at-americas-banks-are-sky-high [https://perma.cc/ESU2-6YTP] ("[B]anks are making returns on equity of 20% once more.").

2. Liz Hoffman & Telis Demos, *How U.S. Banks Took Over the World*, WALL ST. J. (Sept. 4, 2019, 5:58 AM), https://www.wsj.com/articles/how-u-s-banks-took-over-the-world-11567589403 [https://perma.cc/GNM8-Y6GC] ("They earned 62% of global investment-banking fees last year . . . .").

3. FED. RSRV. STAT. RELEASE, LARGE COMMERCIAL BANKS (2022), https://www.federalreserve.gov/releases/lbr/current [https://perma.cc/TUY4-JSK6] (showing as of June 30, 2022, that the consolidated assets of J.P. Morgan are over $3.38 trillion; $2.44 trillion for the Bank of America; and $1.72 trillion for Citibank).

4. The list is enumerated below, but regulators are unsupervised by Congress, the President, and the courts. They operate secretly, often outside the borders of the United States, and do not justify their regulations through a cost-benefit analysis. For a discussion of the differences between the regulation of banks and the regulation of other financial institutions, see Howell E. Jackson, *Regulation in a Multisectored Financial Services Industry: An Exploratory Essay*, 77 WASH. U. L.Q. 319, 320 (1999) (discussing "the formal regulatory distinctions between banks and insurance companies and securities firms").

5. Each of these fundamental principles are addressed in Part II but have been supported by leading lights of the legal literature for years. Louis Brandeis praised transparency in 1913, contending that "[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman." LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 92 (1914). Christopher DeMuth and Douglas Ginsburg put a utilitarian evaluation of the costs and benefits of regulations on the White House's agenda in the 1980s on the basis that "[i]t encourages policy coordination, greater political accountability, and more balanced regulatory decisions." Christopher C. DeMuth & Douglas H. Ginsburg, *White House Review of Agency Rulemaking*, 99 HARV. L. REV. 1075, 1081 (1986). Christopher Edley captured the sentiment of many administrative lawyers with his observation that "[t]hroughout the enterprise of administrative law, judicial review has been essential." Christopher Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L.J. 561, 566.

provision of banking services, especially the provision of credit.[6] Banks provide three interrelated public goods to Americans: the ability to save, access to reliable payments, and, perhaps most importantly, the ability to borrow.[7] One might expect markets to provide these commercial services, and, perhaps if they did to the extent hoped for in the United States, banking would require less government supervision. Instead, their under-provision has led to the development of a regulatory edifice that means that the United States has far more banks than any other nation.[8] Those banks receive additional government support for the lending they do to, for example, help people purchase homes and attend college.[9]

The unpleasant aspect of finance lies in the fact that banking is a dangerous business with consequences distributed well beyond the investors and managers of a bank that fails. The financial crisis of 2008 began with the failures of banks and investment banks, but ended with a recession that affected everyone.[10] Banks regularly need a rescue by the central bank, or a taxpayer-funded bailout when things go wrong, as things often do, and are obligated to purchase deposit insurance, to be paid out upon their eventual

6. *See* CLAIRE PRIEST, CREDIT NATION: PROPERTY LAWS AND INSTITUTIONS IN EARLY AMERICA 166–68 (2021) ("The history of the laws and legal institutions underlying the colonial credit economy speaks to the history of our democracy and capitalist society.").

7. *See, e.g.*, Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1096 (2019) ("[A]ccess to credit has come to rest at the center of the discourse on economic well-being, particularly with respect to low-income communities."); Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1158 (2017) ("[A] modern bank's primary—or 'special'—role is that of licensed private purveyor of the public full faith and credit . . . ."); MEHRSA BARADARAN, HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY 210–25 (2015) (describing ways to expand access to credit).

8. *See* Thomas J. Miceli, *Free Riders, Holdouts, and Public Use: A Tale of Two Externalities*, 148 PUB. CHOICE 105, 105 (2011) ("Private markets therefore tend to underprovide public goods."). This under-provision occurs despite the fact that "[t]he United States has 'more banks per capita . . . than in any other developed economy.'" Edward Pekarek & Michela Huth, *Bank Merger Reform Takes an Extended* Philadelphia National Bank *Holiday*, 13 FORDHAM J. CORP. & FIN. L. 595, 604 (2008) (second alteration in original) (quoting Robert DeYoung, William C. Hunter & Gregory F. Udell, *Whither the Community Bank? Relationship Finance in the Information Age*, CHI. FED LETTER, June 2022, at 1).

9. For an account of the government's housing support program, see David Reiss, *The Federal Government's Implied Guarantee of Fannie Mae and Freddie Mac's Obligations: Uncle Sam Will Pick Up the Tab*, 42 GA. L. REV. 1019, 1022 (2008) (stating the assumption that "the federal government would assist [Fannie Mae and Freddie Mac] if they were unable to make good on their debt obligations" is well-founded). For an account of its student loan support, see Doug Rendleman & Scott Weingart, *Collection of Student Loans: A Critical Examination*, 20 WASH. & LEE J. C.R. & SOC. JUST. 215, 217 (2014) ("Americans today owe more than $1 trillion in student loans either held or guaranteed by the federal government . . . .").

10. For an account of the progress of the crisis, see generally Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463 (2009) (offering a first draft of the history of the government's response to the 2008–2009 financial crisis).

demise, from the Federal Deposit Insurance Corporation ("FDIC").[11] Even in good times, the regular arrival of financial panics all over the world has meant that banks are subject to onerous inspections conducted in the United States by regulators who work inside the bank itself.[12]

The collaborative relationship between banks and government, when paired with the bailouts, rescues, and government-overseen insurance, has made banks—and banking regulation—exceedingly unpopular.[13]

Before we explore solutions to this legitimacy problem, consider the relationship between regulators and bankers.

1) Financial regulatory agencies do not rely on appropriations by Congress; rather, their budgets are generated by the fees they impose on banks, and in the case of the Federal Reserve System ("the Fed"), profits that come from buying and selling government debt. This makes financial regulators legislatively unaccountable, and also reduces the executive influence of the White House, which negotiates with Congress on the rest of the budget.

2) Bank regulators are also free from presidential control. Financial rules are not reviewed by the White House before being promulgated, as is the case for most of the rest of government. The President cannot remove appointees whose policymaking she disapproves of in most cases, reducing oversight by the executive branch.

3) Banks rarely, if ever, litigate to undo rules imposed upon the industry or challenge enforcement actions levied on any particular bank; many think the reason for this reluctance to sue their supervisors is based on fear that the supervisor will retaliate against the bank. Apart from sounding arbitrary in its own right, this means that the third of the three branches of government has essentially been cut out of participation in our system of financial regulation.

4) The enforcement actions of financial regulators are often not publicized; banking regulators insist that the public will panic if

11. *See, e.g.*, Hal S. Scott, *The Reduction of Systemic Risk in the United States Financial System*, 33 HARV. J. L. & PUB. POL'Y 671, 676 (2010) ("The politics of supplying money to banks are unpopular and unsustainable [when the government does it.]").

12. *See* Matthew C. Turk, *Stress Testing the Banking Agencies*, 105 IOWA L. REV. 1701, 1707–15 (2020) (discussing the evolvement of stress testing requirement, the "internal risk assessment device" during the good times).

13. Paul Krugman, *Behind the Curve*, N.Y. TIMES (Mar. 8, 2009), http://www.nytimes.com/2009/03/09/opinion/09krugman.html [https://perma.cc/8JUS-RGTD] (noting the "deeply unpopular bank bailouts"); Curtis Bridgeman, *The Morality of Jingle Mail: Moral Myths About Strategic Default*, 46 WAKE FOREST L. REV. 123, 153 (2011) (noting that "[i]t is unpopular to take the same side as banks" in the wake of a financial crisis).

they cannot keep their disciplinary measures secret. Financial regulation is therefore not transparent, and if, as Louis Brandeis said, "[s]unlight is . . . the best of disinfectants," the lack of transparency could mask abuses.[14]

5) Banks are subject to rules set through an international process that makes domestic notice and comment requirements superfluous, at least in part, and makes it difficult for banks to monitor international policymaking, a strike against the role of public participation in standard setting.

6) Banking regulation is done without the cost-benefit protections afforded other industries. While the application of cost-benefit analysis to banking would not make a lot of sense, the application of this constraint has, since the Reagan administration, served as both a serious hurdle for regulators inclined to promulgate new rules and a different mechanism for executive branch control of administrative agencies.[15] And yet, banks cannot take advantage of it.

In 1966, Kenneth Culp Davis, a giant of midcentury administrative law scholarship, characterized banking regulators as applying a form of "secret law."[16] Banking regulators were operating on the basis of "secret evidence" in their decision making, failing to offer findings to support the decisions made, or issuing reasoned opinions, as required by the Administrative Procedure Act ("APA").[17] He considered banking regulation to be broken; it does not appear that the passage of time has changed much.[18]

There are functional reasons for regulators to enjoy such broad discretion when it comes to banks. Banking is a dangerous business, and there is a case to be made that regulators need to have the power to swoop in to prevent financial crises, which can arise within minutes, without fear of pushback by Congress, the President, the courts, or the public. In the last three decades

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14. BRANDEIS, *supra* note 5, at 92.

15. Exec. Order No. 12,291 § 3(d)(1)–(3), 3 C.F.R. 127 (1981) (indicating the requirement to conduct cost-benefit analysis when reviewing major rules and regulations).

16. Kenneth Culp Davis, *Administrative Procedure in the Regulation of Banking*, 31 L. & CONTEMP. PROBS. 713, 713 (1966).

17. *Id.* ("The banking agencies of the federal government have long maintained systems of secret evidence, secret law, and secret policy."). For a discussion, see Julie Andersen Hill, *Regulating Bank Reputation Risk*, 54 GA. L. REV. 523, 568–70 (2020).

18. Margaret E. Tahyar, *Are Bank Regulators Special?*, 6 BANKING PERSPS. 22, 23 (2018) (arguing that Davis's indictment "remains fresh today"); David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 190 (2010) ("In crises, [The Treasury Department] acts quickly, and—although not unconstrained by law—interprets its legal authority flexibly and aggressively. In ordinary times, it acts in exactly the same way. It develops policy and makes rules without much attention to the [APA]. Treasury has created for itself an ambit of discretion beyond the reach of the judiciary, and only somewhat within the bounds of congressional oversight." (footnotes omitted)).

alone, the Fed and Treasury have come to the rescue of the financial system three times, stabilizing Asian and Latin American financial markets in the 1990s, responding to the collapse of the housing market it in 2008 and 2009, and coming to the rescue of COVID-19 afflicted firms in 2020.[19] Maybe there is a need for unfettered, fast-acting expertise in banking for these bad times, while in the good times, independence arguably helps regulators push against the boom and maintain stringency when bank lobbyists might push for leniency.

But there is more to be learned from the banking paradigm than that banking is weirdly dangerous and is accordingly regulated weirdly. We can make sense of this sort of governance by understanding it as the foremost exemplar of collaborative administration in the modern American state. Modern administration offers distributive regulatory arenas and integrative regulatory arenas. In the distributive arenas, regulation is zero sum—regulators, regulated industry, and other interest groups must compete over whether the country or the industry must bear the costs of a regulatory regime. Environmental protection and workplace safety regimes are examples of distributive regulatory schemes.[20] In these contexts, traditional administrative law, where courts police regulators from overreaching, double-check the science (or, at least, the process for identifying and applying scientific insights), and insist that regulation is subjected to ventilation through comment and a cost-benefit assessment, makes sense. Throughout the rulemaking process, industry groups and their opponents watch the regulators like hawks, weigh in with their own studies, and put the regulators through their paces.

But in areas where industry and government have mutual interests—an integrative context—regulatory constraints are less important than the partnership between public and private. Financial regulation exemplifies this partnership. The United States has always been obsessed with extending credit to its citizens; banks are the principal route through which this service has been performed.[21] While some scholars have argued that this important

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19. David Zaring & Alexander Platt, *Accidents Happen in Economic Firefighting. That's Why We Need Accountability.*, BARRON'S (Dec. 9, 2020, 3:30 PM), https://www.barrons.com/articles/accidents-happen-in-economic-firefighting-thats-why-we-need-accountability-51607543019 [https://perma.cc/YJ8E-GC2M]. The problems of banking are not only of recent vintage. Financial crises have been ubiquitous in the United States, with the exception of the half-century during the Cold War. For an overview by two Nobel Prize winners, see George A. Akerlof & Paul M. Romer, *Looting: The Economic Underworld of Bankruptcy for Profit*, 2 BROOKINGS PAPERS ON ECON. ACTIVITY 1, 1–5 (1993) (reviewing various financial crises in the United States). And as we saw during the financial crisis of 2008, a crisis that afflicts the financial system can be transmitted out to the real economy at a real cost to the lives and livelihoods of ordinary people.

20. *See, e.g.*, Don Fullerton & Erich Muehlegger, *Who Bears the Economic Burdens of Environmental Regulations?*, 13 REV. ENV'T ECON. & POL'Y 62, 62 (2019) (analyzing the "distributional effects of environmental policy").

21. *See* Peter Rudegeair & AnnaMaria Andriotis, *JPMorgan, Others Plan to Issue Credit Cards to People with No Credit Scores*, WALL ST. J. (May 13, 2021, 5:30 AM), https://www.wsj.com/articles

public policy means that banks should be treated like administrative agencies, there is nothing wrong with using the private sector to perform a public purpose. The public-private partnership model has been used since the founding to procure weapons, build infrastructure, and facilitate communications.[22] The government controversially chartered two semi-private Banks of the United States in its first fifty years, and created the national banking system in part to help it finance the Civil War.[23] Ever since, banks have worked together with the government to meet public policy objectives. In addition, although the question is somewhat more fraught, banks and the government have a shared interest in a resilient financial system that can make it through a crisis. Because banks and the government share some of the objectives involved in both the normal provision of banking services and financial crisis management, banks and government have a different sort of relationship than do polluters with environmental regulators and employers with workplace safety regulators.

Although it is often ignored in administrative law scholarship, this phenomenon does not only apply to banking. Similar outcomes might particularly be the case for "public goods" sectors of the economy. These kinds of sectors are sectors in which the public interest in the provision of services—in the case of banking, the service provided is the extension of credit to businesses and individuals—is high, meaning that government oversight of the sector will look more collaborative than conflictual.

However, the benefits of collaboration come at the cost of public legitimacy. Banks are disliked, and collaboration with the government can look like capture of the government. Banks would be more popular under a more transparent regulatory regime, where the precise nature of the collaboration, and the moments of adversarial separation between banks and government, are more obvious to all who wish to look. To achieve greater transparency in a collaborative model, banks should sue the government more, the government should make public more of its dealings with banks, and the international aspects of banking regulation should continue to embrace more and more transparency.

/jpmorgan-others-plan-to-issue-credit-cards-to-people-with-no-credit-scores-11620898206 [https://perma.cc/3LX5-WR5D] (discussing how regulators like OCC have pushed major banks to extend credits to more citizens who "have often been locked out from getting them").

22. *See* Phil Davies, *The Bank that Hamilton Built*, FED. RSRV. BANK OF MINNEAPOLIS (Sept. 1, 2007), https://www.minneapolisfed.org/article/2007/the-bank-that-hamilton-built#n1 [https://perma.cc/K94G-Y7YJ] ("One of Hamilton's primary goals in establishing the [First Bank of the United States] was financing the country's war debt . . . ."); Ronnie J. Phillips, *An End to Private Banking: Early New Deal Proposals to Alter the Role of the Federal Government in Credit Allocation*, 26 J. MONEY, CREDIT & BANKING 552, 554 (1994) ("[T]he Roosevelt administration encouraged banks to sell preferred stock to the RFC in order to enable the banks to give 'the credit necessary for the recovery program.'" (citation omitted)).

23. *See* MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY 40 (Saul Levmore et al. eds., 2d ed. 2018) ("By creating a new class of national banks and requiring them to purchase government bonds, President Abraham Lincoln's Treasury raised money to fund the war against the Confederacy.").

In Part I, I make the case that financial regulation is intensive regulation—if it were not, then the lack of oversight and transparency would not be relevant. In Part II, the heart of the Article, I demonstrate the ways that financial regulation lacks the protections afforded people and institutions in other parts of administrative law. In Part III, I argue that financial regulation is better analyzed under a collaborative model of administrative governance, rather than an adversarial one, and conclude, as did the twentieth-century corporate law scholars Adolph Berle and Merrick Dodd, that such corporatist models impose some obligations on firms to serve the public good. Part IV briefly raises some downsides of the corporatist model and identifies some achievable solutions that would help mitigate the effects of the particularly unaccountable financial regulators. These solutions would not eliminate these effects but would improve the collaborative regulatory environment in ways that would be better for both banks and regulators, as well as for the general public. There simply must be more litigation. Moreover, the government should publicize more of its high value banking sanctions, and the international aspects of banking regulation should continue to adopt transparency reforms. I conclude briefly.

I. THE INTENSITY OF BANKING REGULATION

Banks are regulated particularly intensely—which is not the same thing as unfair regulation but does heighten the concerns about it.

A. *BRIEF HISTORY OF BANKING REGULATION*

The intense world of financial regulation is not incompatible with industrial success. Finance is occupying an increasingly important role in the American economy.[24] As the government has put it: "Financial markets in the United States are the largest and most liquid in the world. In 2020, finance and insurance represented 8.3 percent (or $1.7 trillion) of U.S. gross domestic product," a proportion that has increased over time.[25] Until the COVID-19 crisis, the return on average assets of all U.S. banks was higher in 2018 to 2020 than in any time since the global financial crisis.[26]

Moreover, the high profile, and profitability, of American banks has been matched with high salaries for bankers. As regulation has increased since the passage of the Dodd-Frank Wall Street Reform Act, bank CEO pay has also

24. For a discussion, see generally FINANCIALIZATION AND THE WORLD ECONOMY (Gerald A. Epstein ed., 2005).

25. *Financial Services Industry*, SELECTUSA, https://www.trade.gov/selectusa-financial-services-industry [https://perma.cc/N3EZ-2VE9].

26. *Return on Average Assets for All U.S. Banks (DISCONTINUED)*, FRED: FED. RSRV. BANK OF ST. LOUIS (last updated Dec. 10, 2020), https://fred.stlouisfed.org/series/USROA [https://perma.cc/NMN9-XGB2].

increased.[27] CEO compensation has grown 52.6 percent since 2009, including options exercised by bank executives.[28] The industry has worked out how to prosper despite being overseen by unchecked regulators.

Financial regulators have developed their idiosyncratic ways of making policy that preceded the 1946 adoption of the APA, but courts are unable to police those idiosyncrasies to drive them towards traditional administrative law—something that the Supreme Court has recently favored.[29] The Treasury Department was one of the four original departments in the executive branch, and so can trace its founding back to 1789, the Office of the Comptroller of the Currency ("OCC") to 1863, the Fed to 1913, and the FDIC to 1933.[30]

Banking regulation originated in state law and was managed by an onerous licensing system that broadly encouraged so-called "unit banking."[31] Each town would have a bank, and banks generally could not branch out to other towns.[32] To help finance the Civil War, the federal government created a national banking charter, which allowed for bigger banks who could purchase government debt and hold it as an asset against the deposits that bank customers lent to banks.[33] The national charter was overseen by the

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27. Gayle Appelbaum, Todd Leone & Katrina Gerenz, *Bank Compensation Trends: What You Need to Know*, AON (Nov. 2018), https://humancapital.aon.com/insights/articles/2018/bank-compensation-trends-what-you-need-to-know [https://perma.cc/MAP4-S2MG]. As for Dodd-Frank, see CLIFFORD ALEXANDER & ARTHUR DELIBERT, INVESTMENT MANAGEMENT COMPLIANCE GUIDE ¶ 130 (Arthur Delibert & Cary J. Meer eds., 2022) ("[T]he law has 16 titles spanning 884 pages. Dodd-Frank specifically calls for a total of 315 rulemaking actions by many federal agencies, but will no doubt require even more as the details come into focus.").

28. Lawrence Mishel & Julia Wolfe, *CEO Compensation Has Grown 940% Since 1978*, ECON. POL'Y INST. (Aug. 14, 2019), https://www.epi.org/publication/ceo-compensation-2018 [https://perma.cc/CC33-UKRA].

29. For example, the Supreme Court in *Mayo Foundation v. United States* instructed courts to review tax regulations the same way that they reviewed other regulations promulgated by other agencies. Mayo Foundation v. United States, 562 U.S. 44, 56–58 (2011). As for the evolution of administrative procedure, see Edward Rubin, *It's Time to Make the Administrative Procedure Act Administrative*, 89 CORNELL L. REV. 95, 96 (2003) (discussing changes "between 1946, when the APA was promulgated, and the present time").

30. *See History Overview*, U.S. DEPT. OF TREASURY, https://home.treasury.gov/about/history/history-overview [https://perma.cc/53TH-ZLV7]; *History of the Federal Reserve*, FED. RSRV. EDUCATION.ORG, http://www.federalreserveeducation.org/about-the-fed/archive-history [https://perma.cc/4CHH-3M5C]. As for the founding of OCC, see *infra* notes 33–34.

31. As Federico Lupo-Pasini & Ross P. Buckley have explained,

> until the mid-nineteenth century, the U.S. federal and state courts consistently denied non-locally chartered financial institutions—mostly wealthy banks in New York or Baltimore—the right to establish a branch in another state, thus preventing the creation of a national financial system. The political foundations of unit banking were thus the result of a political alliance between local populist politicians and powerful farmers in which banks were serving mostly the interests of local elites.

Federico Lupo-Pasini & Ross P. Buckley, *Global Systemic Risk and International Regulatory Coordination: Squaring Sovereignty and Financial Stability*, 30 AM. U. INT'L L. REV. 665, 687 n.102 (2015).

32. *See id.*

33. National Bank Act of 1863, Pub. L. No. 37-58, § 10, 12 Stat. 665, 668.

OCC.[34] The national banking charter coexisted with state-chartered banks, but the standards that either the Comptroller or the states imposed on banks did not prevent them from falling prey to a regular series of financial crises culminating in the bank panic of 1907, which required a rescue by the financier J.P. Morgan.[35] In the wake of that crisis, Congress eventually created a relatively quirky central bank, the Fed, which was designed to create a set of regional central banks that banks could join, and that could provide a conduit for stability by serving as a clearinghouse that banks that got into financial trouble could turn.[36] The Great Depression, which resulted in the failure of hundreds of American banks, led to reform of the Fed, centralizing much more power in Washington, and making it a more traditional administrative agency and central bank.[37] It also led to the creation of the final federal regulator of banks, the FDIC, which, by ensuring that consumers would not lose their deposits if their bank got into financial trouble, relatively successfully solved the problem of bank runs when banks were rumored to get into trouble.[38]

All of these regulators have acquired new powers since the Great Depression, but their fundamental mission is to ensure that banks are regulated at the federal level for safety and soundness.[39] State-chartered banks must obtain deposit insurance, and are therefore regulated by the FDIC to ensure that they are unlikely to draw down on the deposit insurance fund.[40] National banks are still regulated by the OCC, which also has been the power to inspect banks to ensure that they are also safe and sound.[41] Banks can also

34. *See id.* § 1, 12 Stat. at 665 (establishing the Office of the Comptroller of the Currency, which oversees "the issue and regulation of a national currency secured by United States bonds").

35. *See* Dan Awrey, *The Puzzling Divergence of the Lender of Last Resort Regimes in the US and UK*, 45 J. CORP. L. 597, 632 (2020) (noting that "the United States experienced no less than eight major banking crises: in 1857, 1861, 1873, 1884, 1890, 1893, 1896, and 1907"; the 1907 crisis was serious enough to require a rescue coordinated by the financier J.P. Morgan).

36. Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REGUL. 257, 278 (2015) ("The System was considered a federalist one, with decentralized authority located in the Reserve Banks.").

37. *See* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 28–32 (2016) (describing the restructuring of the Fed under The Banking Act of 1935).

38. FED. DEPOSIT INS. CORP., A BRIEF HISTORY OF DEPOSIT INSURANCE IN THE UNITED STATES 34 (1998) [hereinafter HISTORY OF DEPOSIT INSURANCE], https://www.fdic.gov/bank/historical/brief/brhist.pdf [https://perma.cc/E9P6-DBLU].

39. Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 90 (2008) ("These agencies are designed with a primary mission to protect the safety and soundness of the banking system.").

40. *See* HISTORY OF DEPOSIT INSURANCE, *supra* note 38, at 38.

41. The OCC describes its mission as, "[t]o ensure that national banks and federal savings associations operate in a safe and sound manner, provide fair access to financial services, treat customers fairly, and comply with applicable laws and regulations." *About Us*, OFF. OF COMPTROLLER OF THE CURRENCY, https://www.occ.treas.gov/about/index-about.html [https://perma.cc/D35Z-97BD].

join the Fed, which means that they will be supervised by the Fed.[42] As the banking industry has moved away from unit banking and toward relatively large financial institutions with branches in many states, those businesses have been restructured as holding companies, which are also regulated by the Fed under the Bank Holding Company Act.[43]

Few other countries opt for so many regulators with overlapping responsibilities, and much of the American system of financial regulation developed as a result of historical accident and path dependence, rather than a considered view by Congress that the Fed, OCC, and FDIC are optimally designed to coordinate with each other.[44] This strange American creation of three primary safety and soundness regulators, not to mention the other regulators who police banks for fraud, violations of the securities laws, and abuses of consumers, makes for a complex regulatory environment the banks must carefully navigate.[45]

B. The Intensive Nature of Bank Regulation

Three distinct aspects of banking regulation make it particularly intense. The first is the complexity of the rules that primary regulators apply to ensure that each bank, and the industry as a whole, is "safe and sound."[46] The second concerns the number of other regulators who review various aspects of bank conduct. The third comes from the look and feel of banking regulation, in which regulators are in the building, looking over the shoulder of bankers, and assessing the risks bank employees are taking on a real time basis.

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42. As one Fed Governor has put it: "Under delegated authority from the Board, the Reserve Banks also conduct on-site supervision of bank holding companies and state-chartered banks that choose to join the Federal Reserve System." Elizabeth A. Duke, Member, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the University of North Carolina Kenan-Flagler Business School's Dean's Speaker Series: From Community Banker to Central Banker—My Journey 10 (Feb. 2, 2011), https://www.federalreserve.gov/newsevents/speech/files/duke20110202a.pdf [https://perma.cc/5CDG-YUGJ].

43. Bank Holding Company Act of 1956, Pub. L. No. 84-511, 70 Stat. 133 (codified as amended at 12 U.S.C. §§ 1841–1852 (2018)).

44. For a broader discussion of this point, see Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE J. ON REGUL. 253, 286–87 (2007).

45. For a discussion of these other regulators, see David Zaring, *Enforcement Against the Biggest Banks*, 7 J. FIN. REGUL. 1, 9–36 (2021) (discussing enforcement actions of various U.S. regulators, including the Fed, the OCC, the FDIC, the DOJ, the SEC, the CFTC, the CFPB, the OFAC, and the FinCEN).

46. Both the Fed and the OCC have described their mission as: "Ensuring a Safe and Sound Federal Banking System for All Americans." OFF. OF COMPTROLLER OF THE CURRENCY, http://www.occ.gov [https://perma.cc/SM4G-GELC]. For a discussion, see Bar-Gill & Warren, *supra* note 39, at 90 n.292.

1. Bank Regulation Is Complex

Banking regulation is intense partly as a regrettable consequence of human ingenuity and partly because of the complicated relationships banks have with the larger economy.[47] The human ingenuity lies in the cat-and-mouse game bankers have played with their regulators since time immemorial. Banks have taken advantage of rules designed to manage risk by, often, taking on more risk. When regulators across the world developed standards designed to encourage banks to hold debt issued by the wealthy countries that were members of the Organisation for Economic Co-operation and Development ("OECD"), for example, some banks invested in higher-yielding debt from Greece, rather than safer debt from the United States or United Kingdom, a decision that exacerbated the length of the financial crisis in Europe in 2009.[48] Rogue bankers may be able to hide their own risky decisions from their employers, imperiling those banks, as well. For example, a banker known as the London Whale managed to dodge regulatory oversight and create a $6.2 billion loss for J.P. Morgan in a benign credit environment.[49] Economically, banks are fragile and particularly susceptible to shocks—more than is the rest of the economy.[50] The financial system can exacerbate crises in the real economy. The American economy quickly rebounded from the collapse of the dotcom industry at the turn of the century.[51] It took much longer to recover from the financial crisis of 2008.[52]

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47. As one economist and one financial law expert have put it, "[m]ounting losses and failures at banks will result in contraction of credit, with serious negative spillover effects for manufacturing, employment, and the larger economy." Patricia A. McCoy & Susan M. Wachter, *Why Cyclicality Matters to Access to Mortgage Credit*, 37 B.C. J.L. & SOC. JUST. 361, 365 (2017).

48. Louise Story, Landon Thomas Jr. & Nelson D. Schwartz, *Wall St. Helped to Mask Debt Fueling Europe's Crisis*, N.Y. TIMES (Feb. 13, 2010), https://www.nytimes.com/2010/02/14/business/global/14debt.html [https://perma.cc/EA4Y-T539].

49. *JPMorgan Chase Whale Trades: A Case History of Derivatives Risks and Abuses: Hearing Before the Permanent Subcomm. on Investigations of the Comm. on Homeland Sec. & Governmental Affs. U.S. S.*, 113th Cong. 7–8 (2013) (statement of Sen. John McCain, Member, Comm. on Homeland Sec. and Gov't Affs.).

50. For a classic account of this tendency, see CHARLES P. KINDLEBERGER & ROBERT ALIBER, MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES 191–212 (6th. ed. 2011) (reviewing the cyclical nature of financial crises, and their common features, and concluding that they are ubiquitous features of modern economies). Carmen Reinhart and Kenneth Rogoff have also made the point that crashes are ubiquitous but add that we seemingly never learn from them. CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY xxiii (2009) ("Our basic message is simple: we have been here before.").

51. *See* Kevin L. Kliesen, *The 2001 Recession: How Was It Different and What Developments May Have Caused It?*, 85 FED. RSRV. BANK ST. LOUIS 23, 23 (2003) ("[T]he 2001 recession, which ended in November 2001, was somewhat shorter than average.").

52. Wenjie Chen, Mico Mrkaic & Malhar Nabar, *The Global Economic Recovery 10 Years After the 2008 Financial Crisis* 8–9 (Int'l Monetary Fund, Working Paper No. 19/83, 2019) (showing that the world economy was still recovering from the 2008 financial crisis ten years after it happened).

Some of the regulatory complexity can be attributed to the sophistication of the banking industry itself. Even before the advent of complicated computer modeling, it took some expertise to keep a bank compliant with the leverage and other requirements imposed by regulators.[53] Fluency with financial accounting was always essential. But now, as banking has become ever more complex and technologized, bank executives have become something of a trained-from-birth sect. No accomplished McKinsey consulting partner—the training ground for nonfinancial C-suite executives the world over—would ever be invited in to run a bank unless she had spent her entire career advising banks, and a healthy dose of that career on risk management.[54] Today, being a bank manager means managing higher capital standards, but also other hurdles, including a new leverage ratio, a so-called net stable funding ratio, and a liquidity coverage ratio.[55] This complex array of balance sheet tests have been capped, for most banks of any size, with an annual or biannual stress test,[56] designed to simulate adverse economic conditions.[57] Managing a bank accordingly means mastering difficult balance sheet gymnastics, assessed through a unique-to-banks set of accounting principles, accompanied by

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53. Stilpon Nestor & Konstantina Tsilipira, *Views from the Steering Room: A Comparative Perspective on Bank Board Practices*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Nov. 3, 2019), https://corpgov.law.harvard.edu/2019/11/03/views-from-the-steering-room-a-comparative-perspective-on-bank-board-practices [https://perma.cc/3Z2U-YFTE] ("Banking experience on boards, although necessary, is not enough."). As Matt Levine has put it:

> Bad business decisions at big banks are perhaps of more societal concern than bad business decisions at tech companies or whatever, insofar as big banks are big and levered and funded by run-prone financial instruments. So you might want to regulate banks to try to keep them from making bad business decisions, and in fact we frequently do.

Matt Levine, *Regulators Don't Want Bankers to Be Paid for Taking Risk*, BLOOMBERG (Apr. 21, 2016, 4:09 PM), https://www.bloomberg.com/opinion/articles/2016-04-21/regulators-don-t-want-bankers-to-be-paid-for-risk [https://perma.cc/SF8U-6TZS].

54. Nestor & Tsilipira, *supra* note 53 ("In line with the widely-held consensus that directors' lack of banking expertise was a key contributor to the crisis, the 2009 Walker Review recommended that 'a majority of [non-executive directors] should be expected to bring to the board materially relevant financial experience . . . .'"); *see also* Geoffrey Colvin, *CEO Super Bowl: Which Make Better Managers? Elitists from McKinsey or Bruisers from GE?*, CNN MONEY (Aug. 2, 1999), https://money.cnn.com/magazines/fortune/fortune_archive/1999/08/02/263650 [https://perma.cc/B9UL-VAVV] (showing that McKinsey has produced a large number of CEOs of different major companies).

55. *See* BASEL COMMITTEE ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, BASEL III: THE NET STABLE FUNDING RATIO 1 (2014), https://www.bis.org/bcbs/publ/d295.pdf [https://perma.cc/RX7X-NQPB] (introducing net stable funding ratio, "one of the Basel Committee's key reforms to promote a more resilient banking sector").

56. The larger the bank, the more frequent the test. For an explanation of testing, see *Stress Tests*, BD. OF GOVERNORS OF FED. RSRV. SYS. (June 22, 2022), https://www.federalreserve.gov/supervisionreg/stress-tests-capital-planning.htm [https://perma.cc/K7TL-V9SR].

57. For examples of hypothetical scenarios used by the Fed, see Press Release, Bd. of Govs. of the Fed. Rsrv. Sys., Federal Reserve Board Releases Hypothetical Scenarios for Second Round of Bank Stress Tests (Sept. 17, 2020, 4:45 PM), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200917a.htm [https://perma.cc/95D7-JJAS].

additional tests of what would happen to the bank balance sheet in hypothetical situations. All of this is "so enormously complex that some major banks 'spend half of their compute budget chasing this problem,'" according to one financial executive.[58]

Meeting these requirements is complicated, and the complications are exacerbated by the fact that supervisors expect to get to know bank managers, especially as the banks grow larger. Running a bank is not just a matter of understanding a business and complying with regulatory requirements. It is also a matter of managing relations with government officials who are not particularly interested in the business of banking, unless that business has something to do with safety and soundness. During the financial crisis, the large bank CEOs were on a first-name basis with the Treasury Secretary and the Fed Chair.[59]

2. Banks Have More Regulators

Banks also need to consider compliance with rules set by a wide variety of government agencies. Banks in the past decade have regularly paid centi-million-dollar fines to the Department of Justice for transgressing a variety of different laws, most notably the anti-money-laundering and counterterrorism laws—by far the largest such fines imposed on any industry.[60] In the wake of the financial crisis, large banks paid a series of enormous fines to the Securities and Exchange Commission ("SEC") for misleading investors about the dangers of products that they structured and sold, particularly products related to the housing market.[61] They have paid fines to the Commodities Futures Trading Commission ("CFTC") for manipulating various reference rates that affected the prices of derivatives contracts.[62] The newly created Consumer Finance Protection Bureau ("CFPB") has also sanctioned banks, if

58. Bryan Walsh, *Complex Quantum Computing Is Being Aimed at Complex Financial Risk*, AXIOS (May 28, 2021), https://www.axios.com/quantum-computing-tackles-financial-risk-1a48b417-999b-4672-82cd-b0e2f38c16bd [https://perma.cc/7CMP-CJSN].

59. *See, e.g.*, Press Release, U.S. Dep't of the Treasury, Readout: Deputy Secretary of the Treasury Wally Adeyemo's Roundtable Discussion with Bank Policy Institute Members (Apr. 20, 2021), https://home.treasury.gov/news/press-releases/jy0136 [https://perma.cc/TW95-229B].

60. For full discussion on compliance-related fines, see *The Biggest Compliance Fines of the Decade*, PLANET COMPLIANCE, https://www.planetcompliance.com/2019/12/28/the-biggest-compliance-fines-of-the-decade [https://perma.cc/796V-5MW4].

61. *See, e.g.*, *SEC Enforcement Actions: Addressing Misconduct That Led to or Arose from the Financial Crisis*, U.S. SEC. & EXCH. COMM'N (July 15, 2019), https://www.sec.gov/spotlight/enf-actions-fc.shtml [https://perma.cc/T44M-M86U].

62. *See, e.g.*, Press Release, Commodities Futures Trading Comm'n, CFTC Orders Bank of America, N.A. to Pay $30 Million Penalty for Attempted Manipulation and False Reporting of U.S. Dollar ISDAFIX Benchmark Swap Rates (Sept. 19, 2018), https://www.cftc.gov/PressRoom/PressReleases/7794-18 [https://perma.cc/63TY-PB3F].

less frequently and expensively than other secondary regulators.[63] Many regulators have jurisdiction over the things that banks do—in many cases, in overlapping ways—meaning that banks that get into trouble can get into trouble with multiple regulators over the same misconduct.[64] It also means that important government relations challenges exist not just with banking supervisors, but also with criminal prosecutors, securities regulators, consumer protection regulators, and commodities regulators.[65]

3. Bank Supervision Is High Touch Regulation

Finally, banking regulation at the street level is more intense than the way other industries are regulated, because of the intimate nature of the inspection and compliance process, which in banking regulation is known as supervision.[66] Supervisors comb through a bank balance sheet during regular inspections. They also, as the bank gets larger, locate government officials inside it to monitor its daily activities. These regulators meet frequently with bank managers and have access to a full array of proprietary information that the bank would never dream of making public for anyone else.[67]

Confidential, injunction-style restrictions are baked into the supervisory model of banking regulators. When regulators see something they do not like, they can promptly meet with bank managers and explain their concern, or send the bank board a confidential letter, accompanied with a list of Matters Requiring Attention ("MRAs")[68] or Matters Requiring Immediate Attention ("MRIAs").[69] They may also impose unpublicized sanctions on the bank,

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63. *See, e.g.*, *Consumer Financial Protection Bureau Fines Wells Fargo $100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, CONSUMER FIN. PROT. BUREAU (Sept. 8, 2016), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts [https://perma.cc/5EYX-GBDC].

64. For a classic account of this, see Kenneth E. Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 STAN. L. REV. 687, 695–734 (1980); and Joel Seligman, *Key Implications of the Dodd-Frank Act for Independent Regulatory Agencies*, 89 WASH. U. L. REV. 1, 6–8 (2011) ("[T]he [Dodd-Frank Act] stresses the need for regulatory coordination, virtual elimination of gaps and omissions, and sufficient regulatory tools to optimize early warning and prompt response to a burgeoning crisis.").

65. *See supra* note 64 and accompanying text.

66. Daniel K. Tarullo, *Bank Supervision and Administrative Law*, 2022 COLUM. BUS. L. REV. 279, 291–300 (introducing the roles of supervision in banking regulation).

67. *See id.*

68. An "MRA[] constitute[s] matters that are important and that the Federal Reserve is expecting a banking organization to address over a reasonable period of time, but when the timing need not be 'immediate.'" BD. OF GOVERNORS OF FED. RSRV. SYS., SUPERVISORY CONSIDERATIONS FOR THE COMMUNICATION OF SUPERVISORY FINDINGS 3 (2013), https://www.federalreserve.gov/supervisionreg/srletters/sr1313a1.pdf [https://perma.cc/7BAQ-6UD3].

69. *Id.* at 2–3 ("MRIAs arising from an examination, inspection, or any other supervisory activity are matters of significant importance and urgency that the Federal Reserve requires banking organizations to address immediately and include: (1) matters that have the potential to

as long as those sanctions are not monetary.[70] Regulators might prevent a noncompliant bank from engaging in acquisitions.[71] Or they might restrict its ability to grow until they think that the bank has remedied its unsafe and unsound practices.[72] In addition to all the sanctions, regulators have the right to request a change in management under certain conditions, meaning that the CEO position is subject to a government veto, something shared in very few other industries.[73]

The striking enforcement powers, rooted in an inspection model of regulation, illustrate just how intertwined regulators have become in the business of the bank itself. As we will see in the next Part, this sort of business-government intermingling is often ignored in administrative law scholarship, which focuses on standalone businesses contesting the imposition of sanctions by regulators, or changes in policy by those regulators—an adversarial model of administrative law.

II. BANKING REGULATION DOES NOT MEET THE STANDARDS OF ADVERSARIAL ADMINISTRATIVE LAW

Particularly intrusive government regulation should be paired with particularly strong protections against illegitimate intrusions—or, at least, so

pose significant risk to the safety and soundness of the banking organization; (2) matters that represent significant noncompliance with applicable laws or regulations; (3) repeat criticisms that have escalated in importance due to insufficient attention or inaction by the banking organization; and (4) in the case of consumer compliance examinations, matters that have the potential to cause significant consumer harm."). For explanation of how the Federal Reserve may communicate supervisory findings to banks, see generally *id.*

70. The Fed has explained its enforcement powers in this way:

> The Federal Reserve may take informal and formal enforcement actions against entities it supervises and individuals affiliated with such entities, for violations of laws, rules or regulations, unsafe or unsound practices, breaches of fiduciary duty, and violations of written commitments. Formal actions include cease and desist orders, written agreements, PCA Directives, removal and prohibition orders, and orders assessing civil money penalties.

Supervisory Policy and Guidance Topics: Enforcement, BD. OF GOVERNORS OF FED. RSRV. SYS. (Sept. 9, 2022), https://www.federalreserve.gov/supervisionreg/topics/enforcement.htm [https://perma.cc/AX74-DUM9]. It may also impose informal enforcement orders that do not do so or ask for civil monetary penalties. *See id.*

71. For an opposing view, see Joe Mantone, *Banks Could Get Out of M&A Penalty Box Sooner, Regulator Says*, S&P GLOB. (Dec. 3, 2018), https://www.spglobal.com/marketintelligence/en/news-insights/trending/oxcCL6qtXfgKLTa1aWKpmg2 [https://perma.cc/5UH7-W9S2].

72. *See, e.g.*, Michelle F. Davis, *The U.S. Secretly Halted JPMorgan's Growth for Years*, BLOOMBERG (Oct. 26, 2018, 4:00 AM), https://www.bloomberg.com/news/articles/2018-10-26/jpmorgan-s-secret-punishment-u-s-halted-its-growth-for-years?srnd=premium [https://perma.cc/7NWW-DU7Z].

73. Exec. Order No. 12,866 § 1, 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993) (requiring that federal agencies engage in cost-benefit analysis as part of the regulatory process).

one would expect.[74] But, as this Part will demonstrate, banks have far fewer protections against state excesses than most administrative lawyers would countenance. Why this would be the case is addressed in the next Part. This Part considers the ways that banking regulators have been exempted from executive, legislative, and judicial oversight, from sunlight, and from cost-benefit analysis.

A. *Financial Regulators Are Not Constrained by Congressional Appropriations*

Control over any organization belongs to those who control how the organization is financed, a control that empowers Congress, as holder of the federal government's purse strings, to play an outsized role in agency oversight, especially the oversight of independent agencies—or agencies, like the SEC, that exist outside of the executive branch.[75] The funding needs of independent agencies have been thought to make them particularly beholden to the legislature that controls their appropriations.[76] Few political scientists would contest the power that comes from being able to set a budget of an organization. Congress's appropriation powers are arguably its most important mechanism for constraining any government agency.[77]

Still, most financial regulators—and all of the primary banking regulators—fund themselves, and never go to Congress for appropriations. The Fed, FDIC, the credit union regulator, and OCC are all funded by fees paid by the banks subject to regulation by them.[78] To those licensing fees, the Fed adds

74. *See, e.g.*, Richard A. Clarke, Michael J. Morell, Geoffrey R. Stone, Cass R. Sunstein & Peter P. Swire, *Protecting Citizens, and Their Privacy*, N.Y. TIMES (Dec. 19, 2013), https://www.nytimes.com/2013/12/20/opinion/protecting-citizens-and-their-privacy.html [https://perma.cc/YQ93-JW7P] (proposing that it is essential for the U.S. government to "strengthen the protection of privacy and civil liberties" while enhancing "[e]ffective surveillance" against "major national security threats"); Rep. of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, 12, U.N. Doc. A/HRC/29/32 (May 22, 2015) ("[W]here a restriction has a broad impact on individuals who pose no threat to a legitimate government interest, the State's burden to justify the restriction will be very high.").

75. Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 583 (1994) ("[I]ndirect political control [by Congress] will necessarily exist with any so-called 'independent' agency or officer because absent presidential control, congressional oversight and appropriations powers become the only concern for the officers of the allegedly 'independent' agencies."); Miriam H. Baer, *Choosing Punishment*, 92 B.U. L. REV. 577, 625 (2012) ("[T]he SEC is a single-issue agency, beholden to Congress for funding . . . .").

76. A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073, 1101 (2005) (arguing that "the SEC is 'independent' in name only" and beholden to Congress such that "the SEC—under the watchful eye of Congress—has fueled the cyclical swings in regulatory policy as a means of gaining additional authority and budgetary support").

77. *See id.*

78. Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 920 n.446 (2014) ("By one count, the 'short list' includes . . . [the] Comptroller of the Currency, . . . FDIC, . . . Federal Reserve Board, [and] NCUA."); *see also* Lisa Schultz Bressman & Robert B. Thompson,

its profits earned from seigniorage, the profits it earns from creating money, and net interest income earned by the so-called "open market operations" by buying and selling government securities to control the supply of money. This net interest income is so profitable that the Fed returns billions of dollars to the Treasury Department every year and pays for the CFPB—it is super self-funded.[79] "As arguably the most powerful independent agency, and one with self-funding, the Fed illustrates that budgetary independence leaves Congress and the President with less effective tools to control agencies," as one observer has put it.[80]

This insulation from the appropriations process removes the agencies from the political oversight that Congress provides other agencies. The rest of the administrative state is subject to the constraints of funding provided by Congress's budgetary role. But if Congress was unhappy with some policy adopted by financial regulators, it could not defund that policy or make it harder to implement by reducing, through a reduction in force, the personnel required to implement the policy.

Congress plays some role in financial regulation. It can hold oversight hearings and pass substantive legislation that restricts or empowers financial regulators. But it cannot threaten to withhold funding on the basis of some directive that the regulators undertake, and it cannot encourage particular sorts of policy by increasing the funding for it.

As Eloise Pasachoff has noted, budgetary independence also matters for independence from the executive branch, as well as the legislative one.

> For each component of the budget process in the executive branch—the preparation of the President's budget, the execution of the budget that Congress eventually passes and the President signs, and the implementation of presidential management initiatives that are embedded in the budget—[one] identifies and names levers that function as a form of policy control.[81]

The Future of Agency Independence, 63 VAND. L. REV. 599, 611 (2010) ("Several of the financial independent agencies have funding sources, usually from users and industry, which frees them from dependence on congressional appropriations and annual budgets developed by the executive branch."); David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 106 n.157 (2013) (discussing the financing of financial regulators).

79. Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Board Announces Reserve Bank Income and Expense Data and Transfers to the Treasury for 2021 (Jan. 14, 2022, 12:00 PM), https://www.federalreserve.gov/newsevents/pressreleases/other20220114a.htm [https://perma.cc/R9K2-TF38] (recounting the net interest income earned by the Fed in 2021).

80. Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1836 (2012).

81. Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2188 (2016); *see also* Note, *supra* note 80, at 1832 ("The President can also influence self-funded agencies through legislation.").

The power of proposing and allocating the budget is its own presidential check on regulators, along with the legislative power to appropriate funds.[82] But this second order presidential power has been curtailed when it comes to bank regulators, because there is no appropriation to propose. The consequences for banks are straightforward enough. An audience with the President, her advisors, or the head of the United States Office of Management and Budget ("OMB") is a form of lobbying to which regulated industry would be accustomed in other contexts. It is much less useful when it comes to the influencing of financial regulators.

If "the power to tax [is] the power to destroy,"[83] the banking regulators have been insulated from the sort of budget "taxation" that Congress, with the limited but real assistance of the President, can do to forestall regulatory initiatives that the agencies might want.

B. Banks Never Sue

One of the most remarkable facts about the relationship between banks and regulators is that the banks very rarely sue the regulators for making a decision that is arbitrary, capricious, or otherwise not in accordance with law—the standard of review in the APA cases that is used to routinely hale other agencies into court, despite the fact that regulators have so much influence over everything they do.[84] Moreover, when banks do sue, they do so knowing that courts like to afford banking regulators a great deal of deference.[85] This Section reviews the doctrinal bases for the lack of litigation, and pairs it with a case study of the Fed's litigation docket from 2010 to 2020.

1. Doctrinal Advantages?

This reticence is not based in any legal impediment. The Fed, OCC, and FDIC, are as subject to the APA as any other agency.[86] Courts have frequently said that the ordinary standard of review for APA cases applies to financial regulators and have often said that there is no reason to apply anything other

82. *See* Pasachoff, *supra* note 81, at 2188.

83. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 327 (1819).

84. 5 U.S.C. § 706 (2018).

85. Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 843 (1984) (establishing, in the environmental context, that when a statute is silent on a specific issue, a court should not impose its definition of the statute on the agency); *see infra* note 248; BARR ET AL., *supra* note 23, at 169. Additionally, beyond the deferential treatment granted by *Chevron*, courts tend to give banking regulators greater deference. *See infra* Section II.B.1.

86. *See, e.g.*, Kaplan v. U.S. Off. of Thrift Supervision, 104 F.3d 417, 421 (D.C. Cir. 1997) (holding, contrary to the position advanced by the now merged with the OCC Office of Thrift Supervision, that for the conduct to constitute an unsafe or unsound practice, the agency must show that there is some "undue risk to the institution" that is "reasonably foreseeable").

than ordinary principles of administrative law to regulatory efforts by the banking supervisors.[87]

But if there is a stream of "banking regulation is regulation" decisions by appellate courts, there is also a doctrinal strain of unwillingness to second-guess the decisions of financial regulators. Jurists as distinguished as Augustus Hand have said that monetary policymaking was all but committed to the government discretion, including the policy to discount notes that could be used to provide banks with access to government credit through the so-called discount window—the principal way the Fed rescues banks subject to a run or a shock.[88] The Second Circuit has gone on to conclude that banking rescues should be reviewed not under an ordinary arbitrary standard but a "grossly arbitrary" one.[89]

Consider a particular example of this super-deference: review of regulatory decisions as to whether to license banks or give a bank a charter enabling it to open for business. After years of abject deference, the Supreme Court reminded courts in 1973 that the OCC's licensing decisions were subject to judicial review.[90] But the review has been much more deferential than any administrative law doctrine would require. As Margaret Tahyar has put it, "a generation has grown to accept that the granting of bank charters is so up to the discretion of the bank regulators that the regulator need not even give reasons for a denial."[91] The Eighth Circuit upheld a chartering decision that

87. For example, because the assessment of safety and soundness—the core of banking supervision—is set forth in a statute that awards power to multiple agencies, the courts have often said that it would be inappropriate to defer to the interpretation of any one of the agencies charged with ensuring that any particular bank is in fact operating safely and soundly. *See, e.g.*, DeNaples v. Off. of the Comptroller of the Currency, 706 F.3d 481, 488 (D.C. Cir. 2013) ("We have repeatedly pointed to the agencies' joint administrative authority under [the FDI Act] to justify refusing deference to their interpretations."); Grant Thornton, LLP v. U.S. Off. of the Comptroller of the Currency, 514 F.3d 1328, 1331 (D.C. Cir. 2008) ("We review the OCC's interpretation of FIRREA and related statutory provisions *de novo* because multiple agencies besides the Comptroller administer the act, including the Board of Governors of the Federal Reserve [System], the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision in the Treasury Department.").

88. Raichle v. Fed. Rsrv. Bank of N.Y., 34 F.2d 910, 915 (2d Cir. 1929) ("It would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review. Indeed, the correction of discount rates by judicial decree seems almost grotesque, when we remember that conditions in the money market often change from hour to hour, and the disease would ordinarily be over long before a judicial diagnosis could be made.").

89. Huntington Towers, Ltd. v. Franklin Nat'l Bank, 559 F.2d 863, 868 (2d Cir. 1977). The Second Circuit elaborated: "Absent clear evidence of grossly arbitrary or capricious action" in rescuing a bank, "it is not for the courts to say whether or not the actions taken were justified in the public interest, particularly where it vitally concerned the operation and stability of the nation's banking system." *Id.*

90. *See* Camp v. Pitts, 411 U.S. 138, 142 (1973).

91. Tahyar, *supra* note 18, at 24.

"was certainly not without some support in the record."[92] The Fifth Circuit endorsed the idea that "the Comptroller's decision is entitled to a presumption of regularity."[93] Tahyar, Michael Barr, and Howell Jackson have called the review of chartering decisions a form of review practiced with "extraordinary deference."[94] Other areas where we might expect to see lawsuits—say, on the basis of a government rejection of an application made by two banks to merge—are also quiet, although partly because regulators are usually happy to countenance such mergers.[95] As Jeremy Kress has observed, "approval rates have climbed steadily, exceeding the historical average and reaching a peak of 95% in 2018."[96]

These doctrinal deviations from the ordinary standards of administrative law are regrettable and overcomplicate a jurisprudence that ought to treat banking regulators like other regulators. But it is not clear that the various cases exuding super-deference to bank regulators sprinkled among some others simply applying the usual rules are the reasons why banks do not bother to access the courts.

If anything, the usual reason propounded for a regulated industry to sue their regulator is more sinister. Banks often hint that contesting a decision by a regulator in court would only lead to reprisals on supervisory grounds[97] that courts could not review or would not reverse and that would substantially hamper the business of the bank.[98] If so, banks have sacrificed their day in court to stay in the good graces of the regulator that would punish them for exercising their rights—which sounds like the very opposite of bureaucratic order.

2. The Fed's Litigation 2010–2020

Judicial review is the *sine qua non* of agency supervision, at least under the American model. But review is largely absent when it comes to financial

92. First Nat'l Bank of Fayetteville v. Smith, 508 F.2d 1371, 1376 (8th Cir. 1974).

93. First Nat'l Bank of Southaven v. Camp, 333 F. Supp. 682, 686 (N.D. Miss. 1971), *aff'd*, 467 F.2d 944 (5th Cir. 1972).

94. BARR ET AL., *supra* note 23, at 169.

95. Jeremy C. Kress, *Modernizing Bank Merger Review*, 37 YALE J. ON REGUL. 435, 458 (2020).

96. *Id.* at 455.

97. *See* Julie Andersen Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 WASH. U. L. REV. 1101, 1174–75 (2015) (pointing out that financial institutions often choose not to appeal as going to court can "take two to five years" and "[d]uring those two to five years, the regulator continues to examine the bank, making additional material supervisory determinations and requesting or demanding additional changes").

98. David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1462 (2014) ("Banking regulators enjoy close relationships with banks, and the whole gestalt of banking regulation is quite non-adversarial and rarely results in litigation."). For an example of a rare suit against a supervisory action by a bank regulator, see *Builders Bank v. FDIC*, 846 F.3d 272, 276 (7th Cir. 2017).

regulations. The Treasury Department is rarely seen in the D.C. Circuit.[99] Nor are the banking regulators.[100]

The reticence of financial institutions is exemplified by the very light litigation load reported by the Fed since 2010.[101] That agency reports annually on its litigation burden—and over the decade, the agency reported being sued approximately eight times per year. Eighty-three total cases is a small number compared to other federal agencies,[102] let alone an important one like the nation's central bank.[103] Of those cases, as Figure 1 demonstrates, only eighteen percent could be characterized as administrative and constitutional law claims, while eight percent contested Fed enforcement actions (between 2010 and 2020, the Fed announced the commencement of 1,265 enforcement actions), almost all of which settled.[104]

The administrative and constitutional law matters ranged from big-swing impact litigation to ordinary administrative law claims by industry groups like the American Bankers Association, which once filed suit against the Volcker Rule requiring banks to avoid engaging in trading for their own account (so-called "proprietary trading"),[105] and the National Association of Mortgage

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99. Or compared to other agencies, anyway.

> Between 1998 and 2008 the SEC was a party to fifty-five cases in the D.C. Circuit; the EPA was a party to 199 cases in the D.C. Circuit; and the Department of Transportation was a party to thirty-five such cases. In contrast, Treasury was a party to only fourteen cases during that decade, twenty-five percent the level of the SEC, and seven percent the EPA number.

Zaring, *supra* note 18, at 201 (footnotes omitted).

100. *Id.*

101. The claims were drawn from the Fed's annual reports over these years and, because the Fed does not get sued often, each case could be considered and analyzed. The Fed introduced its 2019 report as follows:

> During 2019, the Board of Governors was a party in 7 lawsuits or appeals filed that year and was a party in 6 other cases pending from previous years, for a total of 13 cases. The Board intervened in or initiated one additional case relating to privileged documents or testimony. In 2018, the Board had been a party in a total of 19 cases. As of December 31, 2019, eight cases were pending.

BD. OF GOVERNORS OF FED. RSRV. SYS., 106TH ANNUAL REPORT 349 (2019), https://www.federalreserve.gov/publications/files/2019-annual-report.pdf [https://perma.cc/5G2N-4MZC].

102. *See supra* note 99.

103. The Fed is also rarely sued under FOIA, compared to other agencies. For fiscal years 2010 and 2011, it came in as the twenty-third most sued agency, only slightly ahead of the National Archive and the National Science Foundation. *See FOIA Lawsuits*, FOIA PROJECT, https://foiaproject.org/foia_lawsuits [https://perma.cc/892M-NETQ].

104. The database of enforcement actions may be found at *Enforcement Actions: Search Enforcement Actions*, BD. OF GOVERNORS OF FED. RSRV. SYS. (Dec. 21, 2020), https://www.federalreserve.gov/supervisionreg/enforcementactions.htm [https://perma.cc/4GJR-JNDZ].

105. Complaint for Declaratory and Injunctive Relief at 2–3, Am. Bankers Ass'n v. FDIC, No. 13-cv-02050 (D.D.C. Dec. 24, 2013).

Brokers, which once challenged an amendment to Regulation Z affecting mortgage loan originators.[106]

In only two administrative and constitutional law cases did a bank file suit as an individual plaintiff against the Fed—one of which was an effort led not so much by the bank, but by conservative impact litigators[107] in an effort to establish that the CFPB was unconstitutionally constituted for separation of powers reasons.[108] And, of course, these cases included some long-shot pro se claims, in one case protesting the government's bailout during the financial crisis of the American International Group ("AIG"), which collapsed as a result of its role in betting on the creditworthiness of American investments.[109] During the past decade, ten plaintiffs filed suit against the Fed for failing to prevent the bank that held the mortgage from foreclosing on that mortgage on some theory related to the government's involvement in the financial crisis.[110] These cases, often pro se, were not likely to raise the fear of judicial review inside the agency. In other, more self-evidently meritless cases, plaintiffs invoked the Texas Constitution as a constraint on the central bank,[111] or complained about monetary policy decisions by the Federal Open Markets Committee, a question that the courts have long held to be unreviewable.[112]

The rest of the lawsuits against the Fed in the past decade were almost extraneous. An additional five percent of the cases sought to bring in the financial regulator as a defendant in cases where the FDIC had rejected certain golden parachute payments contained in the contracts of bank executives whose financial institution had failed.[113] The largest number of cases faced by the Fed involved the Freedom of Information Act ("FOIA"), which comprised twenty-seven percent of the total, amounting to twenty-two separate actions

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106. Nat'l Ass'n of Mortg. Brokers v. Bd. of Governors of Fed. Rsrv. Sys., 773 F. Supp. 2d 151, 158–61 (D.D.C. 2011).

107. Alex Kotch, *Conservative Foundations Finance Push to Kill the CFPB*, CTR. FOR MEDIA & DEMOCRACY (Feb. 13, 2020, 9:32 AM), https://www.prwatch.org/news/2020/02/13540/conservative-foundations-finance-push-kill-cfpb [https://perma.cc/R34E-E3TF] ("A constellation of conservative groups has filed amicus briefs backing the plaintiff in *Seila Law LLC v. Consumer Financial Protection Bureau.*").

108. *See generally* Seila L. LLC v. CFPB, 140 S. Ct. 2183 (2020) (holding that the CFPB's single Director structure violated separation of powers but finding single-Director provision severable and maintaining the constitutionality of the CFPB); *see also* Humphrey's Ex'r v. United States, 295 U.S. 602, 608 (1935) (upholding the creation of the Federal Trade Commission).

109. Complaint at 2, Murray v. U.S. Dep't of Treasury, No. 08-cv-15147 (E.D. Mich. Dec. 15, 2008).

110. *See, e.g.*, Complaint at 12–13, Garrett v. Pennymac Loan Servs., No. 18-cv-00718 (M.D. Pa. Apr. 3, 2018); Notice of Removal, CitiMortgage, Inc v. Kokolis, No. 11-cv-02933 (D.S.C. Oct. 27, 2011); Complaint at 13–14, Haller v. U.S. Dep't of Hous. & Urb. Dev., No 11-cv-00881 (S.D. Ohio Dec. 16, 2011).

111. Notice of Removal at 4, Haase v. Bank of Am., No. 16-cv-01567 (S.D. Tex. June 3, 2016).

112. Complaint at 1, Love v. Fed. Rsrv. Bd. of Governors, No. 15-cv-01077 (D. Kan. Mar. 16, 2015). The unreviewability began with *Raichle v. Federal Reserve Bank of New York*. 34 F.2d 910, 915 (2d Cir. 1929) (holding open market purchases to be committed to agency discretion).

113. *See infra* Figure 2.

designed to obtain information from the Fed.[114] The Fed also had to deal with twelve cases over the decade claiming discrimination or the denial of job-related benefits by employees of the organization.

By contrast, the Environmental Protection Agency ("EPA") during the same decade appeared in 363 cases in the nation's busiest administrative law court, the D.C. Circuit, alone.[115] The litigation risk faced by the environmental regulator is almost unrecognizably different from that faced by the Fed.

As shown below in Table 1, reports by the Fed, EPA, and the OCC showed a similar pattern: The banking regulators face less litigation risk than does the environmental regulator.

Table 1

Lawsuits Filed Each Year Involving the Federal Reserve and EPA

(Notes: The number for the Federal Reserve/the OCC refers to the number of all lawsuits or appeals filed in the year that the Board of Governors/the OCC was a party. Meanwhile, the number for EPA only refers to lawsuits that EPA serves as the defendant)

	Federal Reserve[116]	EPA[117]	OCC
2020	6	17	5
2019	7	21	5
2018	7	17	4
2017	6	28	1
2016	6	30	2
2015	5	27	3
2014	6	19	7
2013	14	17	8

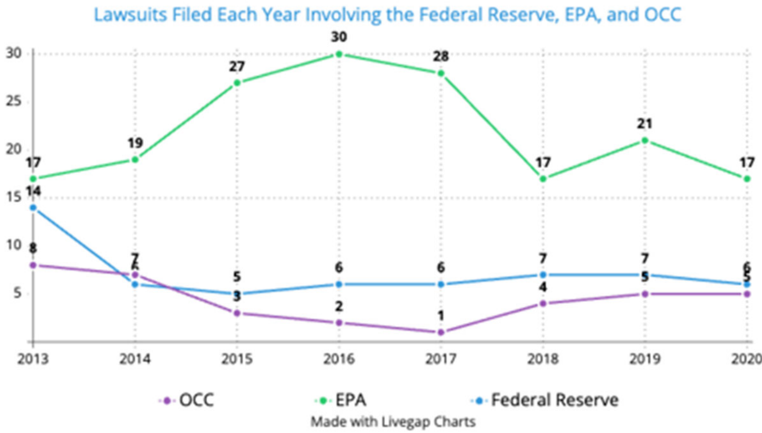
114. *See infra* Figure 2.

115. The search may be replicated at WESTLAW EDGE, https://1.next.westlaw.com/Search/Home.html?transitionType=Default&contextData=(sc.Default) (search "advanced:TI("environmental protection agency")"; then click "Filters"; then choose "Jurisdiction"; then click "Federal"; then choose "Ct. of Appeals"; then choose "D.C. Cir." from the dropdown).

116. *Id.*; BD. OF GOVERNORS OF FED. RSRV. SYS., *supra* note 101, at 349; BD. OF GOVERNORS OF FED. RSRV. SYS., 105TH ANNUAL REPORT 291 (2018), https://www.federalreserve.gov/publications/files/2018-annual-report.pdf [https://perma.cc/UW2K-8F4D]; BD. OF GOVERNORS OF FED. RSRV. SYS., 104TH ANNUAL REPORT 295 (2017), https://www.federalreserve.gov/publications/files/2017-annual-report.pdf [https://perma.cc/Z2BW-QC5H]; BD. OF GOVERNORS OF FED. RSRV. SYS., 103RD ANNUAL REPORT 301 (2016), https://www.federalreserve.gov/publications/files/2016-annual-report.pdf [https://perma.cc/9BUR-4W8C]; BD. OF GOVERNORS OF FED. RSRV. SYS., 102ND ANNUAL REPORT 279 (2015), https://www.federalreserve.gov/publications/annual-report/files/2015-annual-report.pdf [https://perma.cc/YP9H-8HDM]; BD. OF GOVERNORS OF FED. RSRV. SYS., 101ST ANNUAL REPORT 285 (2014), https://www.federalreserve.gov/publications/annual-report/files/2014-annual-report.pdf [https://perma.cc/5LMV-LV8L]; BD. OF GOVERNORS OF FED. RSRV. SYS., 100TH ANNUAL REPORT 275 (2013), https://www.federalreserve.gov/publications/annual-report/files/2013-annual-report.pdf [https://perma.cc/R65W-P9WB].

117. *Notices of Intent to Sue the U.S. Environmental Protection Agency (EPA)*, U.S. ENV'T PROT. AGENCY (Oct. 11, 2022), https://www.epa.gov/ogc/notices-intent-sue-us-environmental-protection-agency-epa [https://perma.cc/FC54-S45Q].

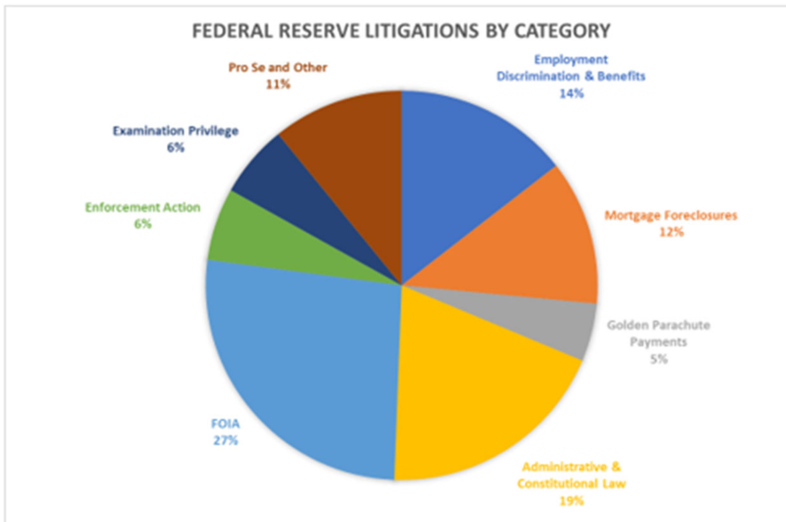
Figure 1



The Fed, thus, is rarely sued over any matter and is extremely rarely sued over its oversight of the financial system. When those suits do happen, they usually involve industry groups, rather than individual banks, but industry groups often shy away as well. Neither industry groups nor individual banks filed more than one suit over the past decade against Federal Reserve policymaking.[118]

118. While the lack of litigation does mean that courts are uninvolved in oversight of the Fed, it does not, of course, mean that the Fed is exceeding the bounds of its statutory authority or otherwise acting unlawfully. The lack of suits could mean that the regulator is ultra-cautious and unwilling to take any action that could give rise to any grounds for a lawsuit, although I find this explanation for the paucity of lawsuits to be unlikely. In general, one cannot tell whether an absence or presence of litigation means that the "right" level of litigation is being pursued—though you can draw some conclusions about the degree of supervision by the courts over the agency if those lawsuits are few and rarely successful. *See* Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493, 493 (1996) (finding the theory that there is "a tendency for plaintiffs to prevail at trial with [a] probability [of] 50 percent, regardless of the likelihood with which they would have won the cases that they settled" to be neither a central tendency in theory nor in fact).

Figure 2



3. Implications

Bank regulators have come to believe that financial regulation is not the sort of thing to be second-guessed by courts.[119] The dramatic actions of the Fed during the COVID-19 financial crisis,[120] as well as the last one, none of which were subject to notice, comment, or judicial review, revealed just how far the central bank has strayed from the conventional procedures of an APA-mindful domestic agency, and the other financial regulators were not so different.[121]

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119. Zaring, *supra* note 18, at 190 ("Treasury has marched to the beat of its own drum since the founding of the current administrative state in the aftermath of World War II."); Simon Johnson, *The Quiet Coup*, THE ATLANTIC (May 2009), http://www.theatlantic.com/magazine/archive/2009/05/the-quiet-coup/7364 [https://perma.cc/88YR-K8Z5] (arguing that banks captured the policymaking process during the financial crisis and that the Treasury Department and Federal Reserve engaged in "late-night, backroom dealing").

120. *See generally* Patricia C. Mosser, *Central Bank Responses to COVID-19*, 55 BUS. ECON. 191 (2020) (noting that the Fed has announced and implemented a significant amount of emergency programs during COVID-19).

121. To be sure, during an emergency, notice and comment requirements can be circumvented. The statute's "good cause" exception, however, permits agencies to forgo Section 553's notice and comment requirement if "the agency for good cause finds" that compliance would be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B); *id.* § 553(d). For a discussion of the general absence of judicial supervision of financial regulation, see Zaring, *supra* note 98, at 1421 (noting "the financial industry's lack of attempts, with few exceptions, to take the government to court; and courts' tendency to avoid passing judgment on policies pursued by leading financial regulators").

Nor are banks able to use their industry representative to do the suing for them.[122] To be sure, one of the reasons for the lack of litigation turns on the close relationship between regulators and regulated industry.[123] Although industry groups like the Bank Policy Institute ("BPI") participate in amicus briefs and sue regulators on behalf of banks, they also have a track record of advocating for regulators like the OCC when supported by data and analysis—and even then, the industry groups rarely get involved.[124]

C. *FINANCIAL REGULATORS ARE NOT SUPERVISED BY THE EXECUTIVE BRANCH*

One of the most important modern controls over the growth of the administrative state has been its curtailment through the application of cost-benefit analysis by the White House. A second important source of presidential control over administrative agencies lies in the power of the President to appoint, and, in particular, to remove officials who fail to carry out her preferred policies. But the White House has neither lever of oversight over financial regulators. These regulators do not need to submit their rules for White House cost-benefit review, and their senior officers are impossible to remove from office by the President.[125] The result is a regulatory sector exempt from presidential control.

1. Centralized White House Review

Centralized White House review of agency policymaking was first required of administrative agencies by executive order during the Reagan administration.[126] The order and its successors subjected rules, both before

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122. Here, too, financial regulation is different. In the environmental context, "overall most litigation is filed by industry organizations." Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 L. & SOC'Y REV. 735, 748 (1996).

123. *See infra* Part III.

124. Greg Baer, *Welcome to the Bank Policy Institute*, BANK POL'Y INST. (July 16, 2018), https://bpi.com/welcome [https://perma.cc/Q57H-Z28P]; Letter from the Structured Fin. Ass'n on Permissible Interest on Loans that Are Sold, Assigned or Otherwise Transferred, to the Off. of the Comptroller of the Currency Chief Couns.'s Off. (Jan. 21, 2020), https://bpi.com/wp-content/uploads/2020/01/Permissible-Interest-on-Loans-that-are-Sold-Assigned-or-Otherwise-Transferred-84-Fed-Reg-64229-November-21-2019.pdf [https://perma.cc/6QS6-398G].

125. *See* Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2194 (noting that CFPB's director is only removable "for cause"). As Michael Herz has observed, "(almost) no President has ever tried to fire someone for specified shortcomings amounting to 'cause.'" Michael E. Herz, *Plus Ça Change: A Century-Old Removal for Cause*, JOTWELL (Dec.14, 2018), https://adlaw.jotwell.com/plus-a-change-a-century-old-removal-for-cause [https://perma.cc/JBD4-TE44].

126. Michael Livermore reviews the history of cost-benefit analysis:

> In 1981, President Ronald Reagan signed Executive Order 12,291, which directed all executive agencies to conduct cost-benefit analysis prior to adopting new regulations. President William Jefferson Clinton continued the practice of regulatory review and cost-benefit analysis of environmental and public health policy during his term. After taking office, he issued Executive Order 12,866, which updated the

proposal and after receiving and responding to comments, to a cost-benefit review by the White House's Office of Information and Regulatory Affairs ("OIRA").[127] Rules for which the benefits could not be demonstrated to exceed the costs would be rejected by OIRA.[128] While the adoption of the cost-benefit analysis was originally controversial, and largely opposed by environmental and labor groups, the Clinton administration ratified White House review, as has every administration since.[129] We will address cost-benefit analysis as an additional constraint on regulation below—some other independent agencies, like the SEC, are subject to it, and so it is worth considering as its own constraint.[130] But here, it is worth emphasizing that most modern agencies are constrained by the White House in a way that has been compared to the constraints of judicial review.[131] OIRA review has

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> Reagan Executive Order in several important ways, but retained the fundamental architecture of central review using cost-benefit analysis. The federal government has operated under Executive Order 12,866 since that time . . . .

Michael A. Livermore, *Can Cost-Benefit Analysis of Environmental Policy Go Global?*, 19 N.Y.U. ENV'T L.J. 146, 150–51 (2011). Executive Order 12866 applies to so-called "major rules" because they would have an impact "on the economy of [at least] $100 million." Exec. Order No. 12,866 § 3(f)(1), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993) (defining "significant regulatory action").

127. On his first day in office, President Joseph Biden issued a memorandum "reaffirm[ing] the basic principles" of cost-benefit analysis. *See* Memorandum from President Joseph Biden on Modernizing Regulatory Review to the Heads of Exec. Dep'ts and Agencies (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/modernizing-regulatory-review [https://perma.cc/Q8WL-7LQH].

128. The relevant executive order defines "significant" or "major" rules as "rule[s] that . . . [h]ave [at least] an annual . . . $100 million," or otherwise "material[ly]" adverse effect on "the economy." Exec. Order No. 12,866 § 3(f), 58 Fed. Reg. at 51,738. For a discussion, see Anne Joseph O'Connell, *Political Cycles of Rulemaking: An Empirical Portrait of the Modern Administrative State*, 94 VA. L. REV. 889, 964–66 (2008) (introducing cost-benefit analysis of rulemaking). The Trump OMB extended the major rules definition to include the somewhat amorphous "major guidance" term. *See* Memorandum from the OMB on Guidance Implementing Executive Order 13891 to Regul. Pol'y Officers at Exec. Dep'ts and Agencies and Managing and Exec. Dirs. of Certain Agencies and Comm'ns 5 (Oct. 31, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf [https://perma.cc/NBT9-TFK7] (requiring a cost-benefit analysis "for any guidance document that may bring about $100 million in benefits, costs, or transfer impacts in at least one year (i.e., in one consecutive twelve-month period), or that otherwise qualifies as economically significant under Executive Order 12866").

129. Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 6 (1995) ("President Clinton thus rejected the view that an assessment of costs and benefits is an unhelpful or unduly sectarian conception of the basis of regulation."). For discussion, see Amy Sinden, *Executive Order 12866's Cost-Benefit Test Is Still with Us and I Can Hear Ben Franklin Rolling Over in His Grave*, CTR. FOR PROGRESSIVE REFORM (Oct. 2, 2013), http://progressivereform.org/cpr-blog/executive-order-12866-s-cost-benefit-test-is-still-with-us-and-i-can-hear-ben-franklin-rolling-over-in-his-grave [https://perma.cc/WLD9-BNRY].

130. *See infra* Section II.F.

131. *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 895 (2015) ("CBA mandates include laws subjecting the CBA policy analysis itself to review by another agency (such as the Office of Information and Regulatory Affairs (OIRA), a unit of OMB), or by courts . . . .").

become a critical mechanism through which the White House has taken a role in coordinating—and thus organizing—policymaking.[132]

Justice Elena Kagan has celebrated coordination by the White House as an opportunity to make executive branch policymaking consistent and uniform through expert oversight,[133] while scholars like Jennifer Nou have characterized the gatekeeping function as more a mechanism for coordination rather than a daunting and independent hurdle.[134] But all agree that White House review serves as a substantial constraint on regulatory initiative, whether that constraint comes from mandates at the OMB insisting on high quality technical quantitative analysis, or bureaucrats from other interested agencies fighting for turf and using OIRA to do it.[135]

Because the OMB review requirement was issued by the President, review applies only to the departments under presidential control.[136] It does not apply to the independent agencies that engage in financial regulation—the Fed, OCC, and FDIC.[137] Moreover, these regulators highly value their

132. As Richard Revesz and Nicolas Bagley have put it, "many of the features of OMB review create a profound institutional bias against regulation—a bias which is inexplicable except with reference to the implicit Reagan-era belief that agencies will systematically overregulate." Nicholas Bagley & Richard L. Revesz, *Centralized Oversight of the Regulatory State*, 106 COLUM. L. REV. 1260, 1262 (2006); *see also* Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2296 (2006) ("These Orders impose a cost-benefit analysis on all executive agencies . . . . [Cost-benefit analysis] does not purport to derive from any statutory command. It represents a decision of the executive branch about how to complete statutes."). In recent work, Eric Posner argues that agencies often avoid cost-benefit analysis in favor of a norming vibe that sanctions outliers and leaves approximately compliant firms in place. Jonathan S. Masur & Eric A. Posner, *Norming in Administrative Law*, 68 DUKE L.J. 1383, 1385 (2019) ("In deciding how strict to make a regulation, agencies may choose a level of strictness that puts significant burdens on industry outliers—the firms with the worst practices—while putting limited burdens or none at all to the firms whose practices are of average quality or better.").

133. *See* Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001) (arguing that "'presidential administration' . . . [c]omports with law . . . [and] advances core values of accountability and effectiveness").

134. *See* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755, 1762 (2013) (describing "presidential review" as "shorthand for the more complex dynamics of the coordinated, interagency review process within the executive branch").

135. *See* Cass R. Sunstein, Commentary, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838, 1838 (2013) ("Much of OIRA's day-to-day work is devoted to helping agencies work through interagency concerns . . . .").

136. For a discussion, see Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543, 2588 (2019) ("[T]he exemption in E.O. 12,866 insulates the Bureau, its fellow federal banking regulators, and the health of the larger economy from interference for political gain by OMB and the White House."). For explanation of rulemaking process related to cost-benefit analysis, see generally MAEVE P. CAREY, CONG. RSCH. SERV., R41974, COST-BENEFIT AND OTHER ANALYSIS REQUIREMENTS IN THE RULEMAKING PROCESS (2014) (providing a blackletter discussion of the cost-benefit review process).

137. *See* McCoy, *supra* note 136, at 2588.

independence, perhaps even more so than other independent agencies.[138] Their super-independence has been jealously guarded. Financial regulators have not submitted cost-benefit analyses to the White House.[139] Nor need they submit their major rules to the White House for executive branch review; they are not even required to participate in the unified rulemaking agenda process that puts the White House and Congress on notice of what American regulators hope to accomplish, although sometimes the agencies participate voluntarily.[140] For the Fed, this independence from presidential control has a long pedigree, and was memorialized with the so-called Fed-Treasury Accord of 1951, which has been understood to mark the moment where the Treasury Secretary committed to stay out of the Fed's monetary policy decisions.[141] The other financial regulators have successfully traded on this tradition to establish a separation from the executive order for themselves: The OCC was a bureau in the Treasury Department until it was officially pushed out of the executive branch in the Dodd-Frank Wall Street Reform Act of 2010.[142]

That insistence on independence has been controversial—President Trump's first head of OIRA, Neomi Rao, made the case for subjecting these regulators, and all independent agencies, to OIRA review, and many nonpartisan analysts have argued that she has a point as a matter of law and policy.[143] But, despite Rao's arguments, an order directing banking regulators to coordinate with the White House never arrived. Financial regulators remain untroubled by the possibility that regulated industry, if unable to persuade them to take a particular policy approach, might be able to persuade others in the executive branch to force them to do so.

2. Power to Remove Appointees

Financial regulators, because of their independence, are also not subject to the threat of removal from office by the President, a power thought to be particularly important for presidential control of administrative state policymaking. The Take Care Clause of the Constitution has been interpreted to protect the power of the President to remove officials from office, though

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138. *See generally* CONTI-BROWN, *supra* note 37 (describing the intense interest in preserving independence on the part of Fed officials—even though that independence often involves shifting and different meanings).

139. *See id.* at 179–98.

140. *See id.*

141. For a discussion, see Michael Salib & Christina Parajon Skinner, *Executive Override of Central Banks: A Comparison of the Legal Frameworks in the United States and the United Kingdom*, 108 GEO. L.J. 905, 963 (2020) (noting that the Accord "released the Fed from its obligations to the Treasury to support prices of government securities").

142. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 939D–E, 124 Stat. 1376, 1888–89 (2010) (codified at 15 U.S.C. § 78*o*).

143. *See* Neomi Rao, *Regulatory Review for Independent Agencies*, YALE J. ON REGUL. (Dec. 14, 2016), https://www.yalejreg.com/nc/regulatory-review-for-independent-agencies-by-neomi-rao [https://perma.cc/EQM2-C5WN].

somewhat atextually, to ensure presidential control over policymaking.[144] But independent agencies, on the theory that they exercise quasi-legislative and quasi-judicial, as well as executive functions, have been exempted from this strong form of presidential oversight.[145]

The intuition behind the removal power is that, by assigning the faithful execution of laws to the President, the Constitution provides that Congress cannot give executive powers to someone else, ensuring that, as the Court has put it, "[t]he buck stops with the President."[146] One implication of the Take Care Clause concerns removal—"[t]he President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them."[147] Ensuring that the President has the power to remove and replace recalcitrant bureaucrats with employees who support her program is one way to guarantee that faithful execution.

The Vesting Clause also has been invoked to protect presidential removal privileges. It provides that "[t]he executive power shall be vested in a President of the United States,"[148] and while lawyers have long debated what exactly that means, it does, at a minimum, assign responsibility for the execution of the laws to the President. The clause was cited as the basis for the President's removal power in *Myers v. United States*, a high-water mark of separation of powers jurisprudence and doctrinally is often lumped together with the removal cases.[149]

But the modern application of the removal power has never been used on financial regulators, because of their status as "independent" agencies.[150] The heads of independent agencies can only be removed for cause.[151] For cause removal in theory is not an insuperable barrier to removal, but in practice

144. U.S. CONST. art. II, § 3 (providing that the President "shall take Care that the Laws be faithfully executed").

145. Exec. Order No. 12,866 § 4(b), 58 Fed. Reg. 51,735, 51,738 (Sept. 30, 1993) (positing that independent agencies only need to provide OMB with "an agenda of all regulations under development or review").

146. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 493 (2010).

147. *Id.* at 484.

148. U.S. CONST. art. II, § 1, cl. 1.

149. Myers v. United States, 272 U.S. 52, 119 (1926).

150. For cause removal protections were approved by the Supreme Court in *Humphrey's Ex'r v. United States*, 295 U.S. 602, 629 (1935). Now the Supreme Court infers those protections for all independent agencies, regardless of the statutory language. *Free Enter. Fund*, 561 U.S. at 487 ("The parties agree that the Commissioners cannot themselves be removed by the President except [for] . . . 'inefficiency, neglect of duty, or malfeasance in office,' and we decide the case with that understanding." (citations omitted)).

151. Seila L. LLC v. CFPB, 140 S. Ct. 2183, 2192–93 (2020). The vast majority of the civil service enjoys "for cause" job removal protections. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1178 n.158 (2000) ("There exists an elaborate web of laws and regulations associated with the civil service system; those laws limit patronage and require for-cause removal of some employees."). So do the heads of independent agencies. *See Humphrey's Ex'r*, 295 U.S. at 629.

has never been used to eject a financial regulator from her position, giving the regulators' independence from the President that some aficionados of presidential control of the executive branch find to be troubling.[152] Financial regulators do have to win presidential and congressional approval to be appointed, but, once appointed, the President has no real power to get rid of them, no matter how unappealing their policy choices.

One related way that this insulation of appointees has worked, most clearly with the Fed, is that there is some stability at the top of the organization. Since Ronald Reagan in 1981, there have been twenty administrators (including acting administrators; thirteen if acting ones are not counted) who have run the EPA.[153] During that time period, the Fed has had four chairs.[154] The President's control over the EPA, for that matter, has, in the view of scholars like Richard Lazarus, led to some jealous efforts to increase oversight of the agency to pull it out of sole presidential control—arguably a virtuous circle of political accountability.[155]

The normal checks on regulators used by the President—OIRA review and at-will removal of agency heads—are not available in the case of bank regulators.

D. Financial Regulation Is Secretive

American financial regulators operate without much of the sunshine that has been foisted on their regulatory counterparts. One way that this can be seen is just how rarely the Fed regulates by passing a notice and comment rule, at least as compared to the EPA. Notice and comment rulemaking, of course, is subject to judicial review, meaning that agencies who go through the process of rule writing subject themselves to more judicial supervision and

152. *See generally* David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REGUL. 708 (2020) (discussing the weakening of the separation of powers doctrines over the past twenty years).

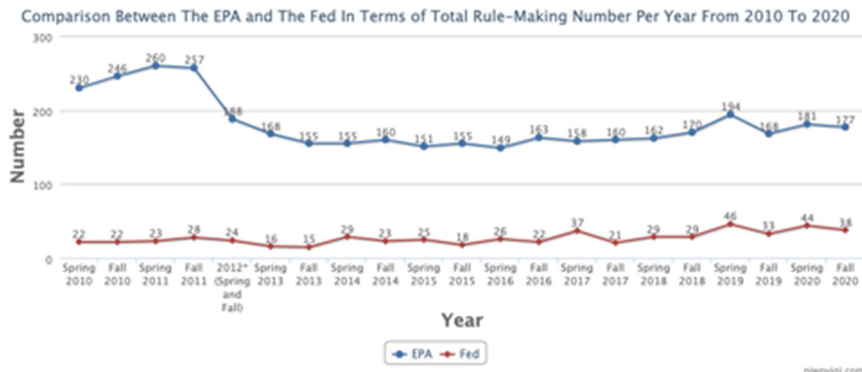
153. For a list of EPA Administrators, see *Chronology of EPA Administrators*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/history/chronology-epa-administrators [https://perma.cc/QX9T-5YUX].

154. For a list of Federal Reserve Chairpersons, see *People: Federal Reserve Chair*, FED. RSRV. HIST., https://www.federalreservehistory.org/people/federal-reserve-chair [https://perma.cc/N7EZ-RXGS].

155. *See* Richard J. Lazarus, *The Neglected Question of Congressional Oversight of EPA: Quis Custodiet Ipsos Custodes (Who Shall Watch the Watchers Themselves)?*, 54 L. & CONTEMP. PROBS. 205, 211 (1991) ("Congressional supervision of EPA each year includes lengthy and rigorous appropriations hearings on the agency's budget, numerous appearances by EPA officials at hearings, between 100 and 150 congressionally commanded EPA reports to Congress, approximately 5,000 congressional inquiries to the agency . . . ." (footnotes omitted)); Robert V. Percival, *Checks Without Balance: Executive Office Oversight of the Environmental Protection Agency*, 54 L. & CONTEMP. PROBS. 127, 173 (1991) ("Congress has become increasingly aggressive in attempting to influence EPA's implementation of the environmental laws.").

general transparency than those who do not.[156] However, as shown in Figure 3, the Fed acts through notice and comment rulemaking relatively rarely.

Figure 3



The lack of sunshine also lies in the confidential nature of many of the most important sanctions that regulators can apply to banks. But it is supported by regulatory privileges that keep those sanctions secret. Perhaps most importantly, many of the sanctions that they impose on banks—especially sanctions that are "injunctive" in nature—do not have to be disclosed to the public. This general power to regulate secretly is supported by two privileges that financial regulators can invoke to keep their supervisory materials, or the information and records they create to ensure that banks are operating safely and soundly, away from the eyes of the public. Those records are exempt from disclosure under FOIA and can be kept out of litigation discovery by a common law privilege that supervisors can and do invoke. One policy recommendation of this Article is that regulators disclose any sanction on a financial institution projected to cost more than ten million dollars. In this Section, the nature of the secret regulation of financial institutions will be explained; the proposal will be outlined in more detail later in the Article.

1. Bank Regulation Is Not Transparent

For financial institutions, nonpublic enforcement has a safety and soundness basis.[157] Investors and depositors who hear from regulators that

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156. OFF. OF FED. REG., A GUIDE TO THE RULEMAKING PROCESS 11 (2011), https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/7MUN-NFBC]. *See* 5 U.S.C. § 704 (2019) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review.").

157. *See* Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin., 290 F. Supp. 2d 124, 135–36 (D.D.C. 2003) (describing the basis for a confidentiality requirement as "to safeguard public confidence . . . which could be undermined by candid evaluations of financial institutions"

their bank has committed some sort of striking wrongdoing might be tempted to pull their investments and deposits from the bank, which could lead to a run on the bank's resources and the sort of panic that regulators always hope to avoid.[158]

For this reason, a regulator publicly telling a bank that it is unsafe and unsoundly capitalized is a rare beast. It is much harder to discern when a regulator is privately telling a bank when it is in trouble, or when the regulator is requesting changes in the way the bank is run. Instead, this sort of informal supervision is impossible to pick up by examining the formal record of the enforcement activity against the nation's largest banks.[159] The public enforcement actions mounted by regulators only cover some of the things that they might require of banks. If they want a monetary penalty, ranging from five dollars to five hundred million dollars, they must make that penalty public.[160] A cease and desist order requiring a financial institution to abjure from any systematic misconduct, such as a violation of the anti-money laundering laws, would also be publicized and on the record.[161]

But that leaves an extremely broad array of regulatory actions that do not have to be publicized, in which the banking regulators characterize as informal enforcement orders. Nonetheless, we know that unpublicized enforcement is important. There are several examples of big banks being subjected to unpublicized regulatory orders that would simply be unfamiliar to administrative law practitioners in other fields. J.P. Morgan was ordered not

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and "to ensure that [banks] continue to cooperate . . . without fear that their confidential information will be disclosed").

158. *See* Randall I. Marmor, *Obtaining Bank Examination and Suspicious Activity Reports in the Investigation of Financial Institution Bond Claims*, 39 TORT TRIAL & INS. PRAC. L.J. 947, 958 (2004) ("Courts have observed that [E]xemption 8 serves the dual purpose of protecting from public disclosure reports containing frank evaluations that might undermine public confidence in financial institutions and safeguarding the relationship of the agencies and banks."); Consumers Union of U.S., Inc. v. Heimann, 589 F.2d 531, 534 (D.C. Cir. 1978) ("[T]here is nothing in the legislative history to indicate that Congress . . . intended [E]xemption 8 to apply only to the varieties of bank examinations then extant, for, in our view, the disclosure of bank examination reports of any type . . . could lead to the same adverse results."); Feinberg v. Hibernia Corp., No. 90-4245, 1993 WL 8620, at *4 (E.D. La. Jan. 6, 1993) ("Exemption 8 was adopted primarily to 'ensure the security of financial institutions.'" (quoting *Consumers Union*, 589 F.2d at 534)).

159. *Federal and State Enforcement of Financial Consumer and Investor Protection Laws: Hearing Before the H. Comm. on Fin. Servs.*, 111th Cong. 83 (2009) (statement of Elizabeth A. Duke, Member, Bd. of Governors of the Fed. Rsrv. Sys.) ("To ensure that banks with performance deficiencies give appropriate attention to supervisory concerns, we may require them to enter into nonpublic enforcement actions, such as memoranda of understanding. When necessary, we use formal, public enforcement actions, such as Written Agreements, Cease and Desist Orders, or civil money penalties.").

160. *See supra* note 70 and accompanying text; *SR 18-4/CA 18-5: Policy Statement on Interagency Notification of Formal Enforcement Actions*, BD. OF GOVERNORS OF FED. RSRV. SYS. (Jun 29, 2018), https://www.federalreserve.gov/supervisionreg/srletters/sr1804.htm [https://perma.cc/ULN7-9MLN].

161. 12 U.S.C. § 1818(u).

to grow its business—that is, expand the amount of assets under management—for years during the Obama administration.[162] This order was never publicized and is the sort of information that, in any other context, would be precisely the sort of information to which investors are entitled under the securities laws (and that banks would ordinarily be obligated to disclose).[163] In one relatively rare case where the Fed did act, it announced a 2018 consent cease and desist order with Wells Fargo that restricted the firm "from growing any larger than its total asset size as of the end of 2017."[164] But this also would have been quite a surprise to investors.

These cases do not appear to be outliers. The Fed often rejects applications to make acquisitions by banks for reasons that it keeps secret. In 2014, the Fed reported that from 2009 to 2012, seven hundred applications, often to merge financial institutions, were withdrawn after "significant issues identified by Federal Reserve staff during the application review process that would have led to staff recommending denial" of the application to merge.[165] Here too, the nature of these applications and the reasons for the denials were not made public.[166]

This sort of enforcement action is striking, but it is not unrepresentative. Confidential injunction-style restrictions are baked into the supervisory model of banking regulators. They are part and parcel of the regulatory instruction manual for determining whether a bank is likely to run into financial trouble.

Consider the CAMELS scale that banking regulators use to assess the safety and soundness of a bank.[167] Banking regulators assess the safety and soundness of firms on a five-point scale, and the largest banks in the country can come in at very different points in the scale. But no one gets to see the scores. Firms that come in with a score of three or higher will be subject to restrictions that limit their ability to engage in mergers or acquisitions.[168] There is accordingly speculation about which of the largest banks would be

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162. Davis, *supra* note 72.

163. As the Supreme Court has explained, for undisclosed information to be considered material, "there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." TSC Indus., Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).

164. Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Responding to Widespread Consumer Abuses and Compliance Breakdowns by Wells Fargo, Federal Reserve Restricts Wells' Growth Until Firm Improves Governance and Controls. Concurrent with Fed Action, Wells to Replace Three Directors by April, One by Year End (Feb. 2, 2018, 6:15 PM), https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm [perma.cc/PC9Z-QMGR].

165. *SR 14-2/CA 14-1: Enhancing Transparency in the Federal Reserve's Applications Process*, BD. OF GOVERNORS OF FED. RSRV. SYS. (Feb. 24, 2014), https://www.federalreserve.gov/supervisionreg/srletters/sr1402.htm [https://perma.cc/MBR4-C97Y].

166. *See id.*

167. Julie L. Stackhouse, *The ABCs of CAMELS*, FED. RSRV. BANK OF ST. LOUIS (July 23, 2018), https://www.stlouisfed.org/on-the-economy/2018/july/abcs-camels [perma.cc/5UT5-9K34].

168. *CAMELS Rating System*, CORP. FIN. INST. (Oct. 11, 2022), https://corporatefinanceinstitute.com/resources/knowledge/finance/camels-rating-system [https://perma.cc/NM5V-UDPR].

permitted to enter into negotiations to purchase a strategic partner—speculation based entirely on the non-publicized question as to where the regulators placed the bank on the CAMELS scale.[169]

The materiality of these secret sanctions is plain to see. A financial technology firm might explore options for a strategic partnership with a large bank and yet not know whether some of the firms it courts would even be permitted to bid.[170] An investor might weigh the possibility of purchasing equity in a publicly traded financial institution on the basis of its prospects for growth without knowing whether it will be permitted by its regulators to expand its assets under management.[171]

In short, the financial regulatory regime privileges the confidential nature of the relationship between supervisors and banks over the interests of customers, investors, and potential partners.

2. Special Privileges Help Regulators Maintain Non-Transparent Oversight

The non-publicness of supervision is supported with explicit privileges that only apply to bank regulators. One of the ways that bank regulators have emphasized how important confidentiality is when it comes to supervisor-bank relationships is through the successful invocation of privileges to protect information learned through the relationship. Both Congress and the judicial branch have approved of these privileges, Congress through a specific FOIA exemption, and the judicial branch by recognizing a bank examination privilege at common law.

i. FOIA Exemption 8

FOIA generally makes government records available to anyone who requests them; the idea is that government processes should be transparent.[172] The Supreme Court has explained that "[t]he basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[173] FOIA comes with a number of exemptions, however, that

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169. Heidi Mandanis Schooner, *The Secrets of Bank Regulation: A Reply to Professor Cohen*, 6 GREEN BAG 2d 389, 390 (2003) ("CAMELS ratings are non-public and always have been.").

170. *Id.* ("[T]he CAMELS rating of a bank is material information.").

171. *Bank Financial Reports*, FED. DEPOSIT INS. CORP. (Mar. 21, 2022), https://www.fdic.gov/regulations/resources/call [https://perma.cc/FD5J-7ZQL].

172. EPA v. Mink, 410 U.S. 73, 80 (1973) (explaining FOIA is "broadly conceived" and meant "to permit access to official information long shielded unnecessarily from public view and . . . to create a judicially enforceable public right to secure such information from possibly unwilling official hands"). For a discussion of FOIA's ends, see Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 949 (2006) ("[T]ransparency is . . . necessary because a state that fails to design a system capable of disclosing information essential for a government to be held accountable by an uninformed public is undemocratic.").

173. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 242 (1978).

establish a number of safe harbors for government records exempt from the transparency requirement. As the Court has put it, "Congress sought 'to reach a workable balance between the right of the public to know and the need of the Government to'" protect certain information through these exemptions.[174]

The exemption relevant to financial regulators is one of the few that applies to a particular regulatory relationship; usually FOIA exemptions direct all agencies to protect, say, trade secrets or internal personnel matters.[175] Exemption 8 is different.[176] It provides that FOIA requests may not be made with regard to matters that are "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions."[177] Congress thus empowered financial regulators to reject requests for records related to this regulatory role and gave them a defense for the rejection if the regulators were taken to court.[178]

Courts have viewed this exemption as applicable to almost any record touching on the regulator-financial institution relationship.[179] As the D.C. Circuit has put it, "Congress has left no room for a narrower interpretation of [E]xemption 8."[180] The doctrine is broad enough to be unmoored from any particular supervisory relationship: "It is clear from the legislative history that the exemption was drawn to protect not simply each individual bank but the integrity of financial institutions as an industry."[181]

The exemption was created to alleviate the concern that there might be "unwarranted runs on banks" caused by the disclosure of "candid evaluations of financial institutions."[182] By the same token, judges have worried that "banks would be less likely to cooperate with federal examiners 'if details of the bank examinations were made freely available to the public and to banking competitors.'"[183]

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174. John Doe Agency v. John Doe Corp., 493 U.S. 146, 152 (1989) (quoting H.R. REP. NO. 89-1497, at 27 (1966)).

175. *See* 5 U.S.C. § 552(b)(2), (4) (noting the Section does not apply to personnel matters and trade secrets, respectively).

176. *Id.* § 552(b)(8).

177. *Id.* For a recent discussion, see *James Madison Project v. Dep't of the Treasury*, 478 F. Supp. 3d 8, 13 (D.D.C. 2020).

178. *See, e.g.*, ACLU v. Nat'l Sec. Agency, 925 F.3d 576, 584 (2d Cir. 2019) ("To defend the withholdings, the Government invoked specific statutory exemptions, including FOIA . . . .").

179. DEP'T OF JUST., FREEDOM OF INFORMATION ACT GUIDE: EXEMPTION 8 (2004) ("This exemption received little judicial attention during the first dozen years of the FOIA's operation.").

180. Consumers Union of U.S., Inc. v. Heimann, 589 F.2d 531, 535 (D.C. Cir. 1978).

181. Gregory v. FDIC, 631 F.2d 896, 898 (D.C. Cir. 1980).

182. Nat'l Cmty. Reinvestment Coal. v. Nat'l Credit Union Admin., 290 F. Supp. 2d 124, 135–36 (D.D.C. 2003) (quoting Pub. Citizen v. Farm Credit Admin., 938 F.2d 290, 291 (D.C. Cir. 1991)).

183. 1 CORNISH F. HITCHCOCK, GUIDEBOOK TO FREEDOM INFORMATION AND PRIVACY ACTS § 13:1 (2022) (quoting McKinley v. FDIC, 744 F. Supp. 2d 128, 143 (D.D.C. 2010), *aff'd sub nom.* McKinley v. Bd. of Governors of Fed. Rsrv. Sys., 647 F.3d 331 (D.C. Cir. 2011)).

The outer reaches of Exemption 8 are quite far away from memos sent by regulators to banks and responses by banks provided to the regulators. One court has concluded that Congress has "given sufficient indication that it expects securities exchanges to be numbered among [financial institutions]" in the application of the exemption.[184] Other courts have applied the exemption to communications by brokers and dealers with their regulators.[185] Courts have allowed secondary regulators like the SEC to invoke the privilege; communications with failed banks—that is, no longer banks—are similarly not subject to disclosure.[186]

Exemption 8 has contributed to the surprisingly high proportion of FOIA litigation in all litigation to which the Fed is a party. Over the ten-year period between 2010 and 2020, the Fed was involved in twenty-two FOIA cases, or twenty-eight percent of the lawsuits in which it was involved over that decade.[187]

ii. Bank Examination Privilege

The bank examination privilege is rooted in common law, and in the power of the courts to make their own rules of procedure. But it is based on the same need for candid disclosure between banks and regulators that animated FOIA Exemption 8, and the same concern about avoiding panics. As the D.C. Circuit has explained:

> [T]he bank examination privilege is firmly rooted in practical necessity. Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. The success of the supervision therefore depends vitally upon the quality of communication between the regulated banking firm and the bank regulatory agency.[188]

As is also the case with Exemption 8, the courts have found that "disclosure of confidential portions of a bank report might breed public misunderstanding and unduly undermine confidence in the bank."[189]

184. Mermelstein v. SEC, 629 F. Supp. 672, 674 (D.D.C. 1986).

185. *See id.*

186. *See id.*

187. *See supra* Section II.B.

188. *In re* Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 633 (D.C. Cir. 1992).

189. Delozier v. First Nat'l Bank of Gatlinburg, 113 F.R.D. 522, 526 (E.D. Tenn. 1986); *see also In re* Franklin Nat'l Bank Sec. Litig., 478 F. Supp. 577, 586 (E.D.N.Y. 1979) ("In some circumstances, revelation of the confidential section might breed public misunderstanding of an examiner's comments, unduly undermining confidence in a bank.").

While not every federal court has signed on to the privilege, those that have characterize it as an evidentiary privilege, one that must be asserted by the government regulator, rather than a bank facing discovery.[190]

Unlike Exemption 8, the privilege can be defeated by a showing of good cause, which an American Bar Association publication has defined as assessed through a multi-factor test, including, "(1) the relevance of the records to the case; (2) whether the party can obtain the same information from other sources; (3) the seriousness of the case; (4) the government's role in the lawsuit, and (5) whether disclosure will have a chilling effect on future bank examinations."[191]

The privilege is rarely invoked—only about 170 federal cases have discussed the privilege since 1944—but the privilege's existence suggests, along with Exemption 8, that there are unique reasons to keep confidential various aspects of the relationship between bank and regulator.[192] Over the ten-year period between 2010 and 2020, the Fed asserted the examination privilege five times, or in six percent of the lawsuits in which it was involved over that decade.[193]

E. Important Banking Policy Is Set Internationally, Rather Than Domestically

Some of the most important rules for banks are set at the global level—it is there where their capital rules that dictate how much of their assets can be financed by bank deposits and how much must be financed by shareholders and other investors are agreed upon. It is at the global level where the most dangerous financial institutions are identified, a process that is meant to result in more rigorous oversight, cross-border consistency in regulation, as well as higher capital levels. However, although global process is getting better, the global-local dynamic reduces opportunities for American banks to affect the rules applied to them. The international process is remote, while the local implantation of the international standards is a *fait accompli.*

The capital rules are set by the Basel Committee on Banking Supervision, a group of regulators from wealthy countries that has been meeting since 1974.[194] The designations of so-called systemically important financial

190. Eric B. Epstein, *Why the Bank Examination Privilege Doesn't Work as Intended*, 35 YALE J. ON REGUL. BULL. 17, 23 (2017) ("Only regulators have the standing to assert the privilege. As such, a bank cannot defend the privilege without a regulator's support.").

191. Eric B. Epstein, David A. Scheffel & Nicholas A.J. Vlietstra, *Ten Key Points About the Bank Examination Privilege*, BUS. L. TODAY, Feb. 2017, at 1–2 (quoting the requirements).

192. This finding is revealed by a search of Westlaw for the terms. For an example of a judicial consideration of the privilege as invoked by the Fed, see *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d at 633–35.

193. *See supra* Section II.B.

194. *See History of the Basel Committee*, BANK FOR INT'L SETTLEMENTS, http://www.bis.org/bcbs/history.pdf [https://perma.cc/2HKJ-CFLB]. For a discussion of the committee's evolution, put

institutions are made by the Financial Stability Board ("FSB"), an entity born in the wake of the financial crisis of 2007 to 2008, and comprised of regulatory groups like the Basel Committee, and international financial institutions like the International Monetary Fund.[195] In the post-crisis settlement, the Basel Committee and its corollaries in other areas of financial supervision were organized as rulemakers in issue-specific areas.[196] The FSB also made policy but managed the work of these rulemakers, and both reported to and took direction from the G-20 heads of state and finance ministers.[197] The resulting regime was not created by any treaty but serves as an increasingly elaborate bureaucracy, with experts at the rulemaking level, a middle management provided by the FSB, and the political head at the top of the process.[198]

These international regulators specify precisely how each bank must maintain capital, how that capital should be measured, and what kind of assets count as capital, stable capital, and short-term financing.[199] The FSB's designation process is essentially an adjudication on a transnational level, with detailed spelled-out metrics and applications of those metrics to individual banks, resulting in the designation of eight American banks as systemically important, and therefore subject to extra supervision.[200] Designation costs large financial institutions dearly, it subjects them to extra capital requirements, and, in the United States, means additional supervision by the Fed.[201]

The capital adequacy rules and systematically important financial institution ("SIFI") designations are not the only important international policymaking regimes about which banks must worry. Broad anti-money laundering and counterterrorism finance rules are also set by an international

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in the context of post-war economic coordination, see Pierre-Hugues Verdier, *The Political Economy of International Financial Regulation*, 88 IND. L.J. 1405, 1455 (2013). And for official history, see generally CHARLES GOODHART, THE BASEL COMMITTEE ON BANKING SUPERVISION: A HISTORY OF THE EARLY YEARS 1974–1997 (2011) (discussing the history of banking supervision and guidelines set forth by the Basel Committee on Banking Supervision).

195. *History of the FSB*, FIN. STABILITY BD. (Dec. 2, 2021), http://www.fsb.org/about/history [https://perma.cc/7LCA-29LW].

196. *See* DAVID ZARING, THE GLOBALIZED GOVERNANCE OF FINANCE 58 (2020).

197. *Id.*

198. *Id.*

199. As a result, the Basel capital adequacy accord "has become even more elaborately cooperative, and has resulted in the creation of complex rule systems that leave little room for domestic discretion." David Zaring, *Legal Obligation in International Law and International Finance*, 48 CORNELL INT'L L.J. 175, 207–08 (2015).

200. David Zaring, *The 28 G-SIFIs, as Selected by the Financial Stability Board*, THE CONGLOMERATE (Nov. 7, 2012), http://www.theconglomerate.org/2012/11/the-28-g-sifis-as-selected-by-the-financial-stability-board.html [https://perma.cc/Q2PV-3ZAQ] ("Lawyers have a term for that sort of determination: it is called an 'adjudication.'").

201. *See* Colleen Baker, *The Federal Reserve as Last Resort*, 46 U. MICH. J.L. REFORM 69, 107–08 (2012) (noting that designation comes with "additional supervision and regulation").

regulatory network, the Financial Action Task Force.[202] Other regulatory networks have adopted international processes that dictate how regulators must act when they return home.[203]

The process offered to banks in this international policymaking is more limited than the degree of process enjoyed by industry vis-à-vis domestic regulators (although the international process is, admittedly, increasingly adopting the values of domestic policymaking, including a form of notice and comment rulemaking[204]). Because of the importance of international standard setting when it comes to financial institutions, this loss might be seen as particularly acute. International regulatory networks play a role that has never been reduced to, or constrained by, a formal treaty, and with it the democratic imprimatur of Senate ratification.[205]

There are few comparable regimes in other areas of regulation, meaning that the international regulations that affect bankers are highly relevant to how banks are obligated to organize themselves, and much less relevant to other industries. Even for classically transnational problems, the regulatory solutions have been left to domestic regulators to develop as they see fit. The Paris Climate Accord, for example, commits nations to meet certain emissions targets, but does not dictate any mechanisms by which those targets should be met.[206] The World Trade Organization accommodates a negotiation process for tariff bindings that set ceilings on the maximum tariff any member can charge other members for thousands of goods.[207] But, with the exception of some modest transparency requirements, it makes no provision for how a

202. Laurel S. Terry & José Carlos Llerena Robles, *The Relevance of FAFT's Recommendations and Fourth Round of Mutual Evaluations to the Legal Profession*, 42 FORDHAM INT'L L.J. 627, 629 (2018) (offering "an introduction to an international intergovernmental body called the Financial Action Task Force ('FATF') and its AML recommendations").

203. For a discussion, see ZARING, *supra* note 196, at 46–122 (reviewing the work and organization of the financial regulatory networks).

204. *See id.* at 5–6 (noting the increasing procedural regularity of international policymaking).

205. *See id.* at 1 ("To create the institutions of international financial regulation, no treaties have been signed. There is no bureaucratic code overseeing things.").

206. *The Paris Agreement: Frequently Asked Questions*, UNITED NATIONS (Sept. 12, 2016), https://www.un.org/sustainabledevelopment/blog/2016/09/the-paris-agreement-faqs [https://perma.cc/QG9W-U5WH] ("The agreement requires all countries to take action, while recognizing their differing situations and circumstances. Under the Agreement, countries are responsible for taking action on both mitigation and adaptation. Countries officially submitted their own nationally determined climate actions."). Banks are, for what it is worth, voluntarily attempting to comply with the Paris climate obligations. Sarah E. Light & Christina P. Skinner, *Banks and Climate Governance*, 121 COLUM. L. REV. 1895, 1896 (2021).

207. Robert Howse & Joanna Langille, *Permitting Pluralism: The* Seal Products *Dispute and Why the WTO Should Accept Trade Restrictions Justified by Noninstrumental Moral Values*, 37 YALE J. INT'L L. 367, 398 (2012) ("Countries are permitted to impose tariffs up to the limit specified in their tariff bindings (based on thresholds agreed to in negotiations with other members). However, the same tariff must apply to imports of all WTO members, unless there is a relevant exception (such as those for tariff-free trade between members of customs unions and free trade areas or for preferential treatment of developing country imports)." (footnote omitted)).

country must operate its customs service.[208] The Migratory Bird Treaty regime protects over one thousand particular species, but that does not spell out how affirmative obligations to support declining bird stocks might or must be implemented.[209] Of course this does not mean that international climate, trade, or environment regulation is insufficiently specific; rather, it means that international financial regulation is an outlier in that it has become a global effort to specify processes as well as regulatory targets.

One problem posed by the important role of international policymaking in setting critical terms of financial regulation of banks concerns the limitations of that sort of regulation. There is, for example, no judicial review on the international level and only voluntarily offered administrative process. The first Basel Capital Accord, passed in 1988, offered no role for participation in the standard-setting process at all.[210] Indeed, one of the values to regulators, apart from global consistency of the international process, is that it is somewhat removed from domestic interest group contestation.[211] The international process thus differs from the domestic one in the following ways:

- Voluntary notice and comment rulemaking
- No procedural requirements for individualized determinations
- No judicial review
- Limited political oversight

Nor is the difficulty of participating on the global level ameliorated by the process enjoyed on the domestic level—at that point, traditional administrative law can offer procedure to regulated banks, but the substantive outcome of those procedures will, for the most part, be a *fait accompli.* By

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208. Article X of the General Agreement on Tariffs and Trade ("GATT") requires countries to adopt some publication and transparency requirements. General Agreement on Tariffs and Trade, art. X, Oct. 30, 1947, 61 Stat. pt. 5, 55 U.N.T.S. 194, https://www.wto.org/english/res_e/publications_e/ai17_e/gatt1994_art10_gatt47.pdf [https://perma.cc/4KFG-3KBE]. For a discussion, see Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government,* 68 L. & CONTEMP. PROBS. 263, 317 (2005); and G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization,* 44 DUKE L.J. 829, 850–51 (1995).

209. Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism,* 79 TEX. L. REV. 1321, 1441 (2001) ("The President and the Senate entered into the Migratory Bird Treaty with Great Britain and agreed that the United States would protect 'many species of birds in their annual migrations' between the United States and Canada." (quoting Missouri v. Holland, 252 U.S. 416, 431 (1920))). The treaty was later expanded to cover migrations of birds from Mexico, see Act of June 20, 1936, ch. 634, §3, 49 Stat. 1556, and Russia, see Fish and Wildlife Improvement Act of 1978, Pub L. No. 95-616, 92 Stat. 3110.

210. *See* ZARING, *supra* note 196, at 47 (noting that the first accord "was concluded in secret by the Basel Committee in 1988 and released in a twelve-page document").

211. As former committee chairman Huib J. Muller observed, "We don't like publicity. We prefer, I might say, our hidden secret world of the supervisory continent." Huib J. Muller, Address to the 5th International Conference of Bank Supervisors (May 16, 1988), *quoted in* TONY PORTER, STATES, MARKETS, AND REGIMES IN GLOBAL FINANCE 66 (1993).

promising at the international level to implement particular rules at the domestic level, American regulators have essentially tied their hands. They can open those rules up to notice and comment when they come home, but they will have already promised to enact a particular kind of rule. The practice is controversial.[212]

Moreover, when agencies approach their foreign counterparts as negotiators over global solutions to cross-border problems, they do so absent warnings in the Federal Register and without any intention of publicizing the contents of their negotiations.[213]

Although this international process has never been reduced to a treaty, and although it took some time, Congress has at least blessed a degree of international coordination by domestic U.S. financial regulators. In 2010, with the passage of the Dodd-Frank Wall Street Reform and Consumer Protection Act,[214] Congress took some steps towards embracing the increasingly important international cooperation that had been practiced since 1974 by American financial regulators.

In particular, one section of the Act invited various American regulators to negotiate regulatory standards with their foreign counterparts. Section 175(a) of the Act allows the President or his designates to "coordinate through all available international policy channels, similar policies as those found in United States law relating to limiting the scope, nature, size, scale, concentration, and interconnectedness of financial companies, in order to protect financial stability and the global economy."[215] Section 175(b) of the Act requires the Chairperson of the Financial Stability Oversight Council ("FSOC") to "regularly consult with the financial regulatory entities and other appropriate organizations of foreign governments or international organizations on matters relating to systemic risk to the international financial system."[216] Section 175(c) requires that the Board of Governors of the Federal Reserve System and the Secretary of the Treasury "consult with their foreign counterparts and through appropriate multilateral organizations to

212. Zaring, *supra* note 78, at 62–66; *see also* Jason Marisam, *The Internationalization of Agency Actions*, 83 FORDHAM L. REV. 1909, 1934–40 (2015) (discussing the effects of domestic administrative law constraints, e.g., judicial review or executive oversight, on international bargaining power and international interagency coordination).

213. As I have put it in the past, "[s]overeignty mismatch is a way of characterizing the fundamental challenge to the growing internationalization of domestic administrative law, putting a negotiated cross-border process, where sovereignty is exercised by dealmaking, on top of a routinized and regulated domestic one, where sovereignty is exercised by rulemaking." Zaring, *supra* note 78, at 62.

214. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 12 U.S.C.).

215. *Id.* § 175(a).

216. *Id.* § 175(b).

encourage comprehensive and robust prudential supervision and regulation for all highly leveraged and interconnected financial companies."[217]

These endorsements by Congress have added a veneer of democratic legitimacy to the increasingly important international coordination that financial regulators do, and this Article is not the place to suggest that there is nothing procedurally regular about the hands that banks are dealt against the government. There is that domestic level of process, however after the fact it is, and no one thinks that American regulators should be prohibited from talking to foreign ones. International financial regulation is trying to add a layer of process to the international level to make up for the frankly secret regulation of the early years.[218] The transparency on display may be suboptimal, but it is not nonexistent.

Moreover, there is much to welcome about a world of increasingly consistent transnational standards for financial firms. Such a regime levels the playing field across markets and has the potential to make regulatory compliance less complex, and perhaps less expensive, for financial institutions. Financial regulation is a tool of diplomacy, much like national security—it has been used to curb the power of Japanese financial might in ways hard to disentangle with the national interest.[219] And national security matters have explicitly been exempted from the APA.[220] So perhaps a case could be made that these foreign affairs efforts by regulators are national security and foreign affairs adjacent. One can see how international discretion may be hard to remove from a regime where American regulators are pushing, not only for sensible global rules, but also for American advantage.

The globalization of financial regulation has its advantages. But it is another brick in the wall of ways that financial institutions are limited in their ability to access and influence the foundational principles of their relationship with the government. The authorization of Dodd Frank has been welcome, but of course, the procedural problems of accessing these international negotiations, to say nothing of the logistical ones, remain salient.

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217. *Id.* § 175(c). For a discussion, see Eric C. Chaffee, *The Dodd-Frank Wall Street Reform and Consumer Protection Act: A Failed Vision for Increasing Consumer Protection and Heightening Corporate Responsibility in International Financial Transactions*, 60 AM. U. L. REV. 1431, 1450 (2011) ("Although the mandates of section 175 are vague, Congress's acknowledgement of the need for international coordination is admirable.").

218. *See generally* ZARING, *supra* note 196 (examining financial systems internationally and discussing their procedural evolution).

219. Ranjit Lall, *From Failure to Failure: The Politics of International Banking Regulation*, 19 REV. INT'L POL. ECON. 609, 610–11 (2012).

220. *See* JARED P. COLE, CONG. RSCH. SERV., R44356, THE GOOD CAUSE EXCEPTION TO NOTICE AND COMMENT RULEMAKING 5 (2016).

F. FINANCIAL REGULATORS DO NOT JUSTIFY THEIR RULES THROUGH COST-BENEFIT ANALYSIS

All executive branch agencies, and some independent agencies, like the SEC, are required to perform some sort of cost-benefit analysis, and occasionally multiple cost-benefit analyses, before promulgating a rule.[221] But here too, this requirement—a real hurdle for rulemakers—does not apply to banking agencies.

As we have seen, because the requirement was issued by the President, cost-benefit analysis applies only to the departments under presidential control.[222] It does not apply to the independent agencies typical in financial regulation—the Fed, OCC, and FDIC.

Executive Order 12291 and its successors have required agencies within the executive branch to conduct cost-benefit analyses to justify major rules.[223] The analysis is subject to review by OIRA; it reviews these rules both pre-solicitation for comments and pre-finalization.[224] Executive branch agencies must satisfy the White House that the rule will result in benefits that can be quantitatively assessed, and that will outweigh the quantitatively assessed costs. As for the SEC, its somewhat controversial cost-benefit mandate comes from judicial interpretation of a 1996 statute requiring the agency to "consider, in addition to the protection of investors, whether the [rulemaking] will promote efficiency, competition, and capital formation."[225] The D.C. Circuit has interpreted this statute to require some sort of a cost-benefit analysis.[226]

Although math is the preferred approach, agencies will on occasion perform a qualitative cost-benefit analysis where a quantitative one is

221. The cost-benefit requirement is set forth in Executive Order 12866. Exec. Order No. 12,866 § 1, 58 Fed. Reg. 51,735, 51,735 (Sept. 30, 1993). The SEC's obligation to consider cost is rooted in the National Securities Markets Improvement Act, Pub. L. 104-290, § 106, 110 Stat. 2416, 3424 (1996) (codified at 15 U.S.C. § 77b(b)). For a discussion, see Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 443–46 (2015).

222. *See* Exec. Order No. 12,866 § 1, 58 Fed. Reg. at 51,735.

223. *See supra* note 126.

224. *Information and Regulatory Affairs*, THE WHITE HOUSE, https://www.whitehouse.gov/omb/information-regulatory-affairs [https://perma.cc/5G4N-SYWA].

225. Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified at 15 U.S.C. § 77b(b) (2012)); Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified at 15 U.S.C. § 78c(f) (2012)). For a discussion, see George S. Georgiev, *Too Big to Disclose: Firm Size and Materiality Blindspots in Securities Regulation*, 64 UCLA L. REV. 602, 659–62 (2017).

226. Bus. Roundtable v. SEC, 647 F.3d 1144, 1150 (D.C. Cir. 2011) (criticizing the SEC because "it did nothing to estimate and quantify the costs it expected companies to incur; nor did it claim estimating those costs was not possible, for empirical evidence about expenditures in traditional proxy contests was readily available"). The interpretation is controversial. *See* Sunstein & Vermeule, *supra* note 221, at 443 ("It is plausible to read this obligation to require the agency to conduct an analysis of how its rules affect efficiency, competition, and capital formation. But there is no reason to read into the ECCF obligation a further, distinct obligation to carry out quantified cost-benefit analysis . . . ." (emphasis omitted)).

impossible.[227] This executive branch review does not include any prescription for deference—there is no sense that the White House should defer to the expertise of the agencies that report to it.[228]

But banking regulators do not have to comply with this process. They are all, with the exception of Treasury, independent agencies located outside the executive branch.[229] Independent agencies do not have to run major rules by OIRA, though sometimes they suggest that they follow some of the "principles" of cost-benefit analysis when making policy.[230] But Congress has never required a cost-benefit analysis on the part of these agencies.[231]

FSOC—the council of agencies assigned to monitor the stability of the financial system—has rejected invitations from industry to perform a quantitative cost-benefit analysis of its rules, or, at least it did until the Trump

227. As OMB has put it, "where no quantified information on benefits, costs and effectiveness can be produced, the regulatory analysis should present a qualitative discussion of the issues and evidence." OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, CIRCULAR A-4: REGULATORY ANALYSIS (2003), https://obamawhitehouse.archives.gov/omb/circulars_a004_a-4 [https://perma.cc/4GA5-YZN5].

228. *See* Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L.J. 1097, 1097 (2006).

229. Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 YALE L.J.F. 263, 268 (2015) ("Insofar as the Department of Treasury is responsible, in whole or in part, for a financial regulation, OIRA will have its ordinary role, because the Department of Treasury is an executive agency. But if independent agencies are the rulemakers, and if no executive agency is involved, then the OIRA process does not apply." (footnote omitted)); *see also* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 352 n.182 (2013) ("Prior to the Dodd-Frank Act, the OCC and the now-defunct Office of Thrift Supervision were subject to cost-benefit analysis as part of OIRA review of proposed regulations. The Dodd-Frank Act designated the OCC, like other federal bank regulators, as an 'independent regulatory agency,' thereby putting it outside of the scope of the Executive Orders on regulatory cost-benefit analysis." (quoting Dodd-Frank Act, Pub. L. No. 111-203, § 315, 124 Stat. 1376, 1524, 2111 (2010))).

230. This is a recent development. However, "prior to the Dodd-Frank Act, all OCC rule making that constituted a significant regulatory action included a formal assessment of the action's costs and benefits, which was submitted to OIRA for review." Robert P. Bartlett III, *The Institutional Framework for Cost-Benefit Analysis in Financial Regulation: A Tale of Four Paradigms?*, 43 J. LEGAL STUD. S379, S385 (2014); Letter from Ben Bernanke, Chairman of the Bd. of Governors of the Fed. Rsrv. Sys., to Cass R. Sunstein, Adm'r, Off. of Info. & Regul. Affs., Off. of Mgmt. & Budget (Nov. 8, 2011), https://www.federalreserve.gov/foia/files/regulatory-burden-reduction-111115.pdf [https://perma.cc/J83J-LGGA] ("While the Executive Order itself recognizes that it does not apply to independent agencies such as the Federal Reserve, we at the Federal Reserve have nonetheless for many years tried to abide by the principles described in the Executive Order . . . .").

231. Robert W. Hahn & Cass R. Sunstein, *A New Executive Order for Improving Federal Regulation? Deeper and Wider Cost-Benefit Analysis*, 150 U. PA. L. REV. 1489, 1506 (2002) ("President Reagan considered subjecting the independent agencies to the new order, but ultimately declined to do so, partly because of concerns about legal authority, but mostly because of fears of an adverse congressional reaction. The independent agencies were asked voluntarily to comply with Executive Order 12,291; all of them declined." (footnote omitted)).

administration.[232] Those agencies have rarely done these analyses in the past.[233] But during the Trump administration, the agencies said that they would give cost-benefit analysis a try.[234]

Cost-benefit analysis, as the Congressional Research Service has put it, "involves the systematic identification of all of the costs and benefits associated with [the] forthcoming regulation, including nonquantitative and indirect costs and benefits, and how those costs and benefits are distributed across different groups in society."[235] Proponents of a cost-benefit requirement preceding any rulemaking praise it on straightforward utilitarian grounds. But financial regulators have always been able to avoid its constraints, although occasionally they have volunteered to consider costs and benefits of their own accord. The result means that this instrument that really matters for executive branch policymaking does not apply to financial regulators.

Its absence means one of the most important modern controls over the growth of the administrative state has been curtailed. Treasury Secretary Timothy Geithner said that in the wake of the financial crisis, the United States got something of value for its regulatory interventions; that value was a saved economy.[236] But just how saved it was, how much the regulations had to do with the saving, and how bad it could have gotten, are counterfactual matters that policymakers have given up estimating.

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232. There are a number of scholars who have called for quantitative cost-benefit analysis to inform as many rules as possible. *See, e.g.*, Eric A. Posner & E. Glen Weyl, *The Case for Cost-Benefit Analysis of Financial Regulations*, 36 REGUL. 30, 32–34 (2013); Cass R. Sunstein, *Is Cost-Benefit Analysis for Everyone?*, 53 ADMIN. L. REV. 299, 303–09 (2001) (favoring, in large part, cost-benefit analysis, but observing that cost-benefit analyses have several drawbacks); RICHARD L. REVESZ & MICHAEL A. LIVERMORE, RETAKING RATIONALITY: HOW COST-BENEFIT ANALYSIS CAN BETTER PROTECT THE ENVIRONMENT AND OUR HEALTH 9–10 (2008). But there are many who disagree. *See, e.g.*, Coates, *supra* note 131, at 997–98 ("[T]he capacity of anyone—including financial regulatory agencies, OIRA, academic researchers, CBA/FR proponents, litigators, and courts—to conduct quantified CBA/FR with any real precision or confidence does not exist . . . ."); Lisa Heinzerling, *Regulatory Costs of Mythic Proportions*, 107 YALE L.J. 1981, 2042 (1998) (decrying "[t]he [p]erils of [p]recision").

233. *See* Henry T. C. Hu, *Financial Innovation and Governance Mechanisms: The Evolution of Decoupling and Transparency*, 70 BUS. LAW. 347, 404 (2015) ("[T]he Federal Reserve Board is generally not required to provide cost-benefit analysis with its rulemaking . . . .").

234. For a discussion, see Christina Parajon Skinner, *Presidential Pendulums in Finance*, 2020 COLUM. BUS. L. REV. 532, 558 ("The Trump Administration also pressed for the adoption of a requirement that FSOC engage in cost-benefit analyses . . . ."). More generally, as Richard Revesz has observed, "[i]n the public policy arena, there have been strong pleas for expanding the use of cost-benefit analysis in the financial regulatory sector." Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE J. ON REGUL. 545, 547 (2017).

235. CAREY, *supra* note 136, at 1.

236. John Cassidy, *No Credit*, NEW YORKER (Mar. 7, 2010), https://www.newyorker.com/magazine/2010/03/15/no-credit-2 [https://perma.cc/WXC9-NR5P] ("My basic view is that we did a pretty successful job of putting out a severe financial crisis and avoiding a Great Depression or Great Deflation type of thing . . . . We saved the economy, but we kind of lost the public doing it." (internal quotation marks omitted)).

Cost-benefit analysis in financial regulation is, as even its proponents admit, a challenge to apply to financial regulators. The value of a financial crisis avoided—the purpose of financial regulation and its safety and soundness mandate—is difficult to value. But making a quantitative measure of this value requires a mountain of assumptions. The numbers chosen for the projections of what a saved economy is worth can vary wildly based on how bad the financial crisis would have been, how quickly the economy would bounce back from it, and how far and how quickly the crisis would have spread.

As John Coates has observed, the benefit side of the ledger—the value of an economy unwrecked by financial disaster—is extremely difficult to quantify and compare to the costs, which are measurable enough as the compliance costs to the banks.[237] John Cochrane—a Chicago economist generally skeptical of regulation—has also acknowledged the problems of cost-benefit requirements, given the difficulties of measuring the benefits, which "focuses on general equilibrium responses—how do regulations affect prices, gross domestic product (GDP), interest rates, industry structure (classic versus shadow banking), runs and bubbles, housing and business investment, business formation, and so on," all benefits and costs that are hard to measure.[238] Cost-benefit analysis in financial regulation might accordingly be a bad idea.

Financial regulators' exemption from the process, however controversial, means they can regulate without interference by the President, or stakeholders who might participate in the cost-benefit analysis process. Although Trump Administration regulators vowed to ensure that financial regulation was cost-benefit justified, their cost-benefit analyses were strained at best—the sorts of analyses that would not pass muster with OIRA were they subject to review by the office.[239] In one of the last actions of the Trump Administration, the OCC finalized a fair access rule designed to prohibit banks from refusing to lend to entire sectors of the economy, such as energy companies or gun

237. Coates, *supra* note 131, at 931 (stating that when passing rules, the Fed has not tried to quantify the benefit in crises avoided, nor has it been asked to do so by the courts). Not everyone agrees. *See, e.g.*, Sunstein, *supra* note 229, at 270–71 ("The universe of financial regulations is very large, and it is far from clear that all such regulations belong in a special category. Some financial regulations do not require especially speculative predictions or present particular challenges in terms of anticipating the behavior of regulated firms. Indeed, financial regulators already engage in a great deal of cost-benefit analysis. As noted, the Department of Treasury is subject to the process of OIRA review, and the regulations that it promulgates have long been accompanied by cost-benefit analyses for economically significant rules.").

238. John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. LEGAL STUD. S63, S68 (2014).

239. Stuart Shapiro, *OIRA and the Future of Cost-Benefit Analysis*, REGUL. REV. (May 19, 2020), https://www.theregreview.org/2020/05/19/shapiro-oira-future-cost-benefit-analysis [https://perma.cc/J9VF-Q8QE].

manufacturers.[240] The OCC did not conduct a cost-benefit analysis in finalizing the fair access rule, suggesting a lack of commitment to the cause.[241]

The disuse of cost-benefit analysis by banking regulators has, as we have seen, some proponents. Nonetheless, the lack of constraint posed by the measure is yet another example of the way that financial regulators have relatively unfettered discretion to pursue their own projects with regard to banks without being a part of the presidential administration that scholars like Justice Elena Kagan thought was a salubrious development in administrative policymaking.[242]

Cost-benefit analysis, like so many requirements of the administrative state, does not apply to financial regulation. Because financial regulation is so different, we next turn to a characterization of how it works and how it is constrained differently.

III. Theorizing Collaborative Governance

The hand that banks are dealt by their regulators is anomalous and unfair, especially when compared to traditional forms of regulation. But no one feels sorry for banks, which have been bailed out repeatedly by the government that does not give them any process protections when it comes to day-to-day supervision. Rather than being abused by the unfettered administrative state, many have argued the banks have been coddled by the government.[243] There is something to this sense, and it turns on the different model of regulation that characterizes the regulation of finance. Finance is provided in this country through a collaborative effort between the government and private institutions, creating less of a need for an adversarial relationship between regulators and regulated industry, given a range of shared goals.

There are two implications that can be drawn from banking regulation's uniqueness. They are followed in this Section by an analysis of the way that financial regulation exemplifies a collaborative approach that draws some inspiration from corporatist models of the appropriate relationship between business and government.

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240. *Proposed Rule Would Ensure Fair Access to Bank Services, Capital, and Credit*, Off. of the Comptroller of the Currency (Nov. 20, 2020), https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-156.html [https://perma.cc/97SQ-WRAH].

241. The OCC stated in its final rule that "agencies are not required by the APA to conduct a cost-benefit analysis." Fair Access to Financial Services, 12 C.F.R. pt. 55 (2021), https://www.occ.gov/news-issuances/news-releases/2021/nr-occ-2021-8a.pdf [https://perma.cc/RV5G-BZYS]. Other financial regulators also committed themselves to cost-benefit analysis. *See* Authority to Require Supervision and Regulation of Certain Nonbank Financial Companies, 84 Fed. Reg. 71,740, 71,742–43 (Dec. 30, 2019) (to be codified at 12 C.F.R. pt. 1310), https://www.federalregister.gov/documents/2019/12/30/2019-27108/authority-to-require-supervision-and-regulation-of-certain-nonbank-financial-companies [https://perma.cc/GCX6-3ZT2].

242. *See* Kagan, *supra* note 133, at 2279, 2331.

243. Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. Cin. L. Rev. 1283, 1292–95 (2013).

First, administrative law is often characterized as a push-pull between those who insist on perfect process and those who tolerate discretion, forgiving procedural checks in the name of deference. Banking regulation exemplifies how the deference perspective, in retreat in the academy and courts, is still an important lens through which to understand collaborative regulation approaches. Second, intense regulation is consistent with industrial success, at least in the collaborative context.

A. *Financial Regulation Platforms Discretion*

The perfectible bureaucracy versus discretion dynamic has led to the extraordinarily lengthy rulemakings that characterize modern American administrative law[244] and the presiding over them by OIRA, technocratic experts who insist on a quantitative demonstration that for all policymaking, the measured benefits exceed the measured costs.[245] "Hard look" judicial review also is meant to put agencies to the test.[246]

But banking regulation suggests that the discretion account is alive and well, even as it is ordinarily expressed through doctrines of judicial review that themselves seem to be under attack.[247] The deference and delegation to experts paradigm turns on the deference afforded by *Chevron v. NRDC*, "the most cited case in administrative law,"[248] and the moribund nature of the nondelegation doctrine, usually the first subject to be covered in any

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244. For worried examples of the consequences of these lengthy rules, see Jacob E. Gersen & Anne Joseph O'Connell, *Deadlines in Administrative Law*, 156 U. PA. L. REV. 923, 927 (2008) ("[D]elay is an increasingly prominent fixture in administrative law."); Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1419 (1992) (arguing that judicial review has scared agencies into an "extremely resource-intensive and time-consuming" effort); and Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) ("[C]ourts have transformed the simple, efficient notice and comment process into an extraordinarily lengthy, complicated, and expensive process . . . .").

245. *See supra* notes 126–28 and accompanying text.

246. *See generally* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins., 463 U.S. 29 (1983) (affirming practice of judicial hard look at agency action).

247. *See infra* notes 250–52 and accompanying text.

248. David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 135, 144 (2010). The standard of review under *Chevron* consists of two steps. For the first step, the reviewing court must ask whether, after "employing traditional tools of statutory construction," it is evident that "Congress has directly spoken to the precise question at issue." Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842, 843 n.9 (1984). If so, the statute is "unambiguous," and the agency must not differ from Congress's clearly expressed command. *Id.* at 842–43. If, however, the court decides that the statute is ambiguous, it then moves to step two of the inquiry. That step requires the court to uphold the agency's interpretation so long as it "is based on a permissible construction of the statute." *Id.* at 843. For one of the leading critiques, see Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992) ("[T]he failure of *Chevron* to perform as expected can be attributed to the Court's reluctance to embrace the draconian implications of the doctrine for the balance of power among the branches, and to practical problems generated by its all-or-nothing approach to the deference question.").

administrative law course in law school.[249] A majority of Supreme Court Justices have announced, however, that they want to reinvigorate the nondelegation doctrine in a way that would reduce the discretion of agencies.[250] Some of those Justices have also called for a revisitation of *Chevron* deference as well.[251] But even if these doctrines were revisited, there would still be havens of discretion left to those regulators unpoliced by judicial review.[252] Banking law exemplifies these havens, which are, unless practice changes, likely immune to the judicial attack on discretion represented by the challenges to *Chevron* and the potential bolstering of the nondelegation doctrine.[253]

Second, the lesson of the strange world of financial regulation is that very intrusive governance is not incompatible with industrial success. This might particularly be the case for "public goods" sectors of the economy. These kinds of sectors are sectors in which the public interest in the provision of services—in the case of banking, a critical service provided is the extension of credit to businesses and individuals—is high, and almost guarantees an elaborate government effort to ensure that access to credit is as available as it reasonably can be. Indeed, financial regulation—one of the earliest forms of regulation, given that the OCC began to charter national banks during the Civil War—is in some ways a stand-in for a traditional, informal, pre-APA regulation that has survived not only in finance, but in other areas where the regulatory environment is different, such as government procurement.

B. *FINANCIAL REGULATION IS A PUBLIC-PRIVATE PARTNERSHIP*

We can make sense of the paradox of a procedurally unprotected financial sector that has prospered only by broadening our understanding of the forms the administrative state can take. In some areas, the traditional adversarial

249. Zaring, *supra* note 152, at 720 ("[A]s every law student learns in the first week of their administrative-law class, the nondelegation doctrine allows Congress to delegate almost any legislative power it likes to almost any government institution.").

250. *See* Gundy v. United States, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) ("The Constitution confers on Congress 'legislative [p]owers,' and does not permit Congress to delegate them to another branch of the Government." (alteration in original)); *id.* at 2143 (Gorsuch, J., dissenting) ("[T]his Court has upheld statutes that allow federal agencies to resolve even highly consequential details so long as Congress prescribes the rule governing private conduct. But it's hard to see how the statute before us could be described as leaving the Attorney General with only details to dispatch."); *see also* Jeannie Suk Gersen, *The Supreme Court Is One Vote Away from Changing How the U.S. Is Governed*, NEW YORKER (July 3, 2019), https://www.newyorker.com/news/our-columnists/the-supreme-court-is-one-vote-away-from-changing-how-the-us-is-governed [https://perma.cc/8STF-72EZ] ("Kavanaugh's absence from the [*Gundy*] case likely changed its outcome.").

251. Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 572 (2018) ("In recent years, various judges and justices, principally on the right side of the political spectrum, have hinted or outright declared that *Chevron* should be reconsidered.").

252. *See supra* Section II.B.

253. *See supra* notes 249–50 and accompanying text.

legalism paradigm applies—environmental and workplace safety may be examples.[254]

But in areas where industry and government have mutual interests—an integrative context—regulatory constraints are less important than the partnership between business and government.[255] Defense contracting is an example. Both the government and defense suppliers have an interest in a well-provisioned defense, and so there is a public-private partnership designed to ensure that the military is indeed supplied with expensive, effective goods and weaponry.[256] Abuses—overcharges, featherbedding by contractors, a bait and switch by the government—are not unheard of, but these abuses are resolved not through transparency and public participation, but through competitive bidding, a robust inspection process, and, if necessary, a contract-oriented dispute resolution process. Like our banks, our military is preeminent, and the result of an extremely complicated relationship between public procurers and private contractors, along with thousands of willing volunteers. Like banking, defense policy is rarely subjected to judicial review and indeed is explicitly exempted from the requirements of the APA.[257] Defense contractors can press their claims in the Court of Federal Claims, but the largest defense contractors rarely do so—much like the case with banks.[258] Those contractors have to be mindful of the need to stay on the side of the Defense Department in general, even if in particular cases, they are willing to press their legal advantage.[259] For integrative governance, the administrative law paradigm—

254. The adversarial legalism paradigm was developed by the brilliant Robert Kagan. *See generally* Robert A. Kagan, *Adversarial Legalism and American Government*, 10 J. POL'Y ANALYSIS & MGMT. 369 (1991) (characterizing American policymaking as characterized by threats of lawsuits, litigation, high penalties, and formal processes).

255. *Cf.* Russell Korobkin, *Against Integrative Bargaining*, 58 CASE W. RSRV. L. REV. 1323, 1324–25 (2008) (discussing integrative bargaining and how it applies for lawyers).

256. For an example of such partnership in the United Kingdom, see Peter R.J. Trim, *Public-Private Partnerships and the Defence Industry*, 13 EUR. BUS. REV. 227, 227 (2001).

257. 5 U.S.C. § 553(a)(1) (exempting "a military or foreign affairs function of the United States" from the APA's rulemaking requirements); C. Jeffrey Tibbels, *Delineating the Foreign Affairs Function in the Age of Globalization*, 23 SUFFOLK TRANSNAT'L L. REV. 389, 390 (1999) ("Essentially, if an administrative agency can justify a rule based upon a 'foreign affairs function' of the United States, it will be excepted from APA requirements of a notice and comment period, delay in rule implementation, and hearing prerequisites." (footnotes omitted) (quoting 5 U.S.C. § 553(a)(1))). The constraint—which only applies to agency rulemaking—can be overinterpreted. Jean Galbraith & David Zaring, *Soft Law as Foreign Relations Law*, 99 CORNELL L. REV. 735, 764 (2014) ("[A]s to the foreign affairs exemption in the APA, we see no reason to apply it solely to the work of the President and his generals and diplomats, given that so many other agencies are necessarily involved in international affairs in their own right.").

258. Steven L. Schooner, *Bid Protests: The RAND Study of DOD Protests at the GAO and the COFC*, 32 NASH & CIBINIC REP. 26, 29 (2018) ("[T]he largest defense contractors (in terms of revenue) almost never bring their protests to the COFC. Protests from these firms were so rare that RAND concluded 'protests at COFC are not part of standard business practice for these firms.'" (emphasis omitted)).

259. *See id.* at 28.

with lawsuits after notice and comment rulemaking and a process-policing judiciary—is much less important.[260] Instead, it is the relationship that matters.

Banking is like defense, where both industry and the government want the same thing: a stable banking system, including profitable banks with strong balance sheets. The paradigm is a public-private partnership.[261] There are other parallels as well. "[W]hat is most striking about the New Deal program of banking regulation" that remains the modern paradigm "is its similarity to the programs of public utility and common carrier regulation," Daniel Fischel, Andrew Rosenfield, and Robert Stillman argued in the 1980s.[262]

In those areas of regulated industry, natural monopolies were thought to exist; it made sense to have only one railway connecting the farmers of the state to a big city market and a limited number of inns in which travelers could stay, and so the solution to monopoly was to insist on common carrier requirements and profit limitations to a reasonable rate of return.[263] By the same token, there was no point in creating two water utilities that would compete on price after building separate connections to every home and business in the region they served.[264] Better in those circumstances to insist that the public service provided be provided to all who wish to partake, including subsidies, if necessary, for those least able to make use of these

260. Rachel E. Barkow, *The Ascent of the Administrative State and the Demise of Mercy*, 121 HARV. L. REV. 1332, 1339 (2008) (describing that paradigm as "a legal culture that is firmly committed to judicial review, wedded to reasoned decisionmaking, and devoted to a fair and regular process"); *see also* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1760, 1765 (2007) (describing these goals as procedural).

261. One recent way of putting this relationship may be found in Saule Omarova's article on disintermediating the relationship between the central bank and the people. Saule T. Omarova, *The People's Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231, 1235 (2021) ("In a franchise-like arrangement, the Fed modulates the supply of sovereign credit-money but outsources the economy-wide allocation of this precious resource to specially licensed and regulated private financial institutions: banks."). For a dissent, see Mark W. Olson, *Why Banks Should Never Become Utilities*, AM. BANKER (Mar. 7, 2016, 12:00 PM), https://www.americanbanker.com/opinion/why-banks-should-never-become-utilities [perma.cc/JR34-7LV7] ("[B]ankers are understandably concerned that a designation—even informally—of large banks as public utilities would lock them into a product mix and capital requirements that would jeopardize the ability of the historic bank business model to achieve the capital returns necessary to attract investors.").

262. Daniel R. Fischel, Andrew M. Rosenfield & Robert S. Stillman, *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 302 (1987).

263. *See* Interstate Com. Comm'n v. Balt. & Ohio R.R. Co., 145 U.S. 263, 275 (1892) ("[T]he principles of the common law applicable to common carriers . . . demanded little more than that they should carry for all persons who applied, in the order in which the goods were delivered at the particular station, and that their charges for transportation should be reasonable.").

264. *See* Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1035–36 (1988) ("Within the neoclassical economic model, there is no equilibrium at which two or more natural monopoly competitors can both behave competitively and earn positive rates of return. Total costs of operating railroads rise as the number of railroads operating between two given points increases, because the large capital costs of building lines must be incurred multiple times, even though one line is capable of carrying all the traffic." (footnote omitted)).

services, and price regulation to constrain the returns to the shareholders of the private industry.[265] The idea was that these private institutions were providing a quasi-public service and so should serve the public convenience and necessity.

Some legal scholars have gone further than the public-private partnership, and have argued that really, banking is an extension of a state activity, and hence that almost any sort of command and control regulation would be appropriate.[266] Even though it is fair to say that public-private partnerships have long existed without being fairly characterized as arms of the state, these scholars, if anything, underscore the public nature of banking. While arms manufacturers, utility companies, and banks all provide public services, they are still, in most contexts, private, regulated entities. This characterization holds true regardless of what differences may exist between their relationship with the government and other kinds of regulated entities such as polluters and private workplaces. As one government contracts lawyer familiar with the defense contracting process has observed, it is better to get along with the government than litigate when it comes to military contracts—"[e]ven if you win, you may find it is a Pyrrhic victory because you have alienated so many gov officials in the process."[267]

A better way to think about the relationship between banks and the regulators is to look to corporatist models of the administrative state. Corporatism is a particular sort of stakeholder governance, one that traditionally emphasizes a collaboration between big companies and the government on policymaking, potentially with a role for unions as well.[268] It does not always have a great reputation, and its downsides—particularly the undemocratic nature of corporatist rule, which is more "one interest group, one vote" rather than "one person, one vote"—have not made it a normatively popular example of a governance approach. As Jody Freeman has put it, "[c]ollaborative processes that rely on shared public-private responsibility for governance would seem to pose some of the dangers of corporatist regimes, including,

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265. On this score, see Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 29 n.84 (2008) ("By constraining the distortionary impact of a monopoly to (i) the facility market and (ii) the form of price, the essential facilities doctrine may force a sort of transparency that provides better signals regarding the need for price regulation (or even government provision/subsidization of infrastructure expansion).").

266. *See e.g.*, Hockett & Omarova, *supra* note 7, at 1145–46; Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361, 1397–414 (2021); Joan Kane, Note, *The Constitutionality of Redlining: The Potential for Holding Banks Liable as State Actors*, 2 WM. & MARY BILL RTS. J. 527, 546–58 (1993).

267. Timothy Sullivan, *Contracting Commandment No. 7: Thou Shalt Avoid Hostility*, FED. NEWS NETWORK (Feb. 17, 2015, 11:41 AM), https://federalnewsnetwork.com/management/2015/02/contracting-commandment-no-7-thou-shalt-avoid-hostility [https://perma.cc/8ZYH-JTDX].

268. For a discussion, see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 84–85 (1997).

'serious difficulties with the fixity of their interest categories and the vestedness of their constituent organizations.'"[269]

When corporatism becomes more narrowly defined, and more focused on corporate organization, some of its tenets can look a little far afield from banking regulation. As Roberta Romano has said, one way of thinking about a regime that gives all stakeholders a voice in governance would be to think of it as "officially sanctioned guild-like organizations [that] are granted representational monopolies in their respective spheres of operation."[270] Those monopolies are granted in exchange for "the state's close association and coordination with the monopolistic functional units."[271]

But the guild is not the best model for thinking about the banking industry, which is competitive in the United States, and does not set prices, outputs, or working conditions, as guilds do.[272] We can instead find some intellectual roots of the foundations of banking regulation in some of the twentieth century's most celebrated debates on the purposes of the corporation in the New Deal era debate between Adolph Berle and E. Merrick Dodd on the obligations owed by corporations to society.

To Berle, although his views evolved over time, corporations owed the state coordination, with a view to improving the lot of workers as well as shareholders.[273] Berle argued that this kind of relationship was necessary because of the overweening power of large modern corporations, which had to be harnessed by the state.[274] If the state did not take charge, he advised in a memorandum to President Franklin Delano Roosevelt, the "handful of people who run the economic system now will get together making an economic government which far outweighs in importance the federal government; or in their struggles they will tear the system to pieces."[275] As he put it, "it is necessary to do for this system what Bismarck did for the German system in 1880," that

269. *Id.* (footnote omitted) (quoting Philippe Schmitter, *The Irony of Modern Democracy and Efforts to Improve Its Practice*, 20 POL. & SOC'Y 507, 509 (1992)).

270. Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 934 (1984).

271. *Id.*

272. Medieval guilds were trade associations that "restricted competition, set prices, . . . controlled entrance and training, and generally developed ordinances touching on the guildsman's relations with fellow members, non-members, members of other guilds, future members, dependent workers, and consumers." JOEL EMERY GERSTL, PROFESSIONS FOR THE PEOPLE: THE POLITICS OF SKILL 2 (Joel Emery Gerstl & Glenn Jacobs eds., 1976) (citation omitted). For further discussion, see Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 671 (1994).

273. *See* A.A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1074 (1931).

274. *Id.*

275. JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 78 (1987). To see the memo and the analysis that was written by Berle, see *id.*

is, coordinate the work of big business with the interests of the state, to avoid this sort of disaster.[276]

The other great corporate theorist of the early twentieth century, Dodd, agreed to an extent, but to him, the coordination was not a matter of intertwining government and industry, but rather corporate managers and their other stakeholders. Dodd made a case for corporations that exhibited "responsibilities to the community," intimating that corporate managers should manage firms in that light.[277]

These two variants of corporatism, as William Bratton and Michael Wachter have noted, both emphasized the importance of support for employees, and by extension their families, though the obligations arose from different duties—for Berle, to the body politic, as expressed by the government, and for Dodd, to the non-shareholder stakeholders in the corporation.[278] The jurisprudence they cited, however, went somewhat further. For both, a critical case was *Munn v. Illinois*, a Supreme Court case decided in 1877, which permitted the state of Illinois to set maximum prices for grain storage because grain storage was "affected with a public interest."[279]

This sort of tasking of a regulated industry with the public interest is best suited for industries where the point of the regulation is to encourage it to produce things we want—in the case of banking, the extension of credit by firms stable enough to survive a shock to the system. To Berle and Dodd, it meant a degree of responsibility adopted by bankers because of a duty owed to the public.

If their regulatory apparatus suggests a collaborative government role, banks would do well to remember their obligations under the role. Cases like *Munn* mean there is support for the partnership steel relations between business and government, and Dodd and Berle recognized, albeit in different ways, that there was a place in the regulation of businesses for the sorts of shared goal arrangements. Although much of this Article has focused on the government's oversight of the banking industry, once the collaborative nature of that oversight is recognized, it can be seen across the regulatory state and the economy it supervises.

276. *Id.* For further discussion, see Fenner Stewart, Jr., *Berle's Conception of Shareholder Primacy: A Forgotten Perspective for Reconsideration During the Rise of Finance*, 34 SEATTLE U. L. REV. 1457, 1488 (2011).

277. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153–54 (1932).

278. William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 122–25 (2008).

279. Munn v. Illinois, 94 U.S. 113, 130 (1876) (quoting SIR MATTHEW HALE, DE PORTIBUS MARIS, IN 1 A COLLECTION OF TRACTS RELATIVE TO THE LAW OF ENGLAND 45, 78 (Francis Hargrave ed., 1787)). *See* Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1017–18 (2019) ("In some cases, the 'public-ness' of an industry correlated to the degree to which it was a public necessity, as was the case, for example, with electricity.").

Corporatism is a better lens for financial regulation than is the adversarial legalism that characterizes other parts of the administrative state. In financial regulation, banks and government work together to extend the access to credit, the payment systems, and the opportunities for savings. Banks and government also share an interest in the safety and soundness of banks, and work through the relatively collaborative supervisory process to ensure that banks are durable and reliable. If this model looks slightly more like Dodd's than Berle's, the interest of the government in turning banks onto more ethical conduct has something of the ESG feel of the latter.[280] If bankers do in fact become ethical partners in the government's efforts to expand access to financial services to all, and to proficiently provide them to those who can productively employ them, then the corporatist foundations of financial regulation will look all the more realized.

IV. BRINGING ADMINISTRATIVE LAW BACK TO FINANCIAL REGULATION

Banking regulation may be a different animal, but that does not mean that it cannot be improved. Three achievable steps could be taken by regulators and by banks to normalize some of the oddities of this novel corner of administrative law. These would not change the essentially collaborative valence of financial regulation but would improve the transparency of the peculiar relationship between banks and the state.

Having celebrated the possibility, and outlined the workability, of corporatist regulatory regimes, in this Section I suggest that corporatist regulation is imperfect and raises some concerns for financial regulation. To be clear about the argument, it is not that corporatist regulatory regimes should always be shunned. In integrative contexts they may be inevitable, and corporatist financial regulation has some appealing characteristics. It is more bipartisan than other kinds of regulation, a feature of its cooperative process. American bank regulators are widely viewed to be smart and competent, too—perhaps not because of their collaborative approach, but the collaborative approach has not dulled their glow.[281] The prior Part of this Article identified other advantages of a corporatist regime, including a possible basis for the sorts of civic responsibilities that commentators and regulators are urging on financial institutions.[282]

So why fix what isn't broken? One reason for concern lies in the mere fact that financial regulation differs so much from the paradigmatic form of administrative law. A cautious conservativism might view the abandonment of

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280. *See generally* David Zaring, *The International Campaign to Create Ethical Bankers*, 3 J. FIN. REGUL. 187 (2017) (introducing the international financial regulators' efforts in building ethical banking norms).

281. *See* Pablo Triana, *Practical Matters: Tracking a True Culprit for the 2008 Crisis*, CORP. FIN. REV., July–Aug., 2012 WL 10235080, at *1, *4 ("Financial regulators are smart people, typically with tons of years at the job . . . .").

282. *See supra* Part III.

adversarial legalism with skepticism. A traditionalist might suggest that a regime of financial regulation perhaps should not be so very different than the sort of administrative law Congress envisioned in the APA, that the D.C. Circuit specializes in, and that forms the basis of legal training in regulatory matters.

A second concern lies in the phenomenon of capture. As William Buzbee has put it, "'capture' theory arises out of concerns with the revolving door between industry and regulators, or regulators who over time become too cozy with the industry they are supposed to monitor."[283] Collaborative governance may create wins for the government, the banking industry, and the public, but it might alternatively deliver rents to bankers who have captured their regulators—rents paid for by the public.[284] Many have worried about this phenomenon, and the adversarial legalism of traditional administrative law is meant to address it.

To be sure, some tensions between political control and independence cannot easily be resolved. We want banking regulators to be able to act against even the most politically connected banks if those banks are engaged in risky behavior. In particular, we want the central bank to be without a doubt uninfluenced by the legislative and executive branches of government when it comes to setting monetary policy.[285] Economists have documented a long history of overly inflationary monetary policy in central banks subject to overt political influence and have concluded that this sort of influence makes it difficult for businesses to plan for the future.[286]

Because monetary policy depends on relationships with so-called primary banks, most of which are supervised by the Fed at the bank holding company level, it probably also makes sense to exempt its supervision from presidential and legislative review, although the case is less certain.[287] There is no doubt, however, that local bankers are likely to be extremely politically connected to their legislators and that separating political influence from the supervisory process mitigates that perhaps overweening influence in legislative

283. William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1609 n.223 (2007).

284. Johnson, *supra* note 119 (positing that banks captured government decision-making during the financial crisis).

285. Note, *Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis*, 124 HARV. L. REV. 550, 562 (2010) ("[A]rguments in favor of central bank independence 'have largely won the day among economists . . . .'" (quoting Harout Jack Samra, *Central Bank Autonomy in Latin America: A Survey and Case Studies*, 13 CHAP. L. REV. 63, 74 (2009))).

286. *See, e.g.*, Alberto Alesina & Lawrence H. Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. MONEY, CREDIT & BANKING 151, 154–59 (1993) (examining the relationship between inflation, central bank independence, economic growth, unemployment, and real interest rates as indicators of effective monetary policy).

287. For the primary dealer list, see *Primary Dealers*, FED. RSRV. BANK OF N.Y., https://www.newyorkfed.org/markets/primarydealers [https://perma.cc/56Y5-PR4Q].

policymaking.[288] The fact that financial regulators do not have to participate in the appropriations process is an undemocratic facet of their arrangement that may be worth preserving.

Even if there are reasons to privilege some aspects of the extraordinary independence that banking regulators have enjoyed from two of the three branches of government identified in the Constitution, other aspects of banking regulation's uniqueness are less salubrious. It is less obvious that courts should never play a role in their supervision, for example, and very unclear that the lack of disclosure associated with various aspects of banking regulation are well-founded.

Three policy reforms—all of which are cultural, although two of which can be solved with regulation—would make a difference. On the other hand, our system is not so broken that we need the oversight Congress would provide through the appropriations process or that the President could provide through OIRA or officer removal. Banks should be willing to sue the regulators, regulators should disclose any "injunctive" order predicted to have an impact of ten million dollars or more on any bank, and transparency in international standard-setting should continue to be improved. These reforms would help the public have faith in our system of financial regulation and add some transparency that it otherwise lacks.

A. More Litigation

The first recommendation is perhaps the most difficult lift. We can assume that banks do things for self-interested reasons, and so, if they do not sue regulators, they must not believe it is in their self-interest. Even apart from the worry about retaliation, perhaps banks worry that courts, if involved in the oversight of the regulation of banks, would reduce the quality of that regulation. Regulators presumably feel the same way.

But a little judicious litigation is not just about shedding some light on the nature of banking supervision for the rest of us. It is very likely that it would improve matters. Regulators would have their edicts put to the test. Banks could learn from public precedents, rather than having to guess at what regulators would find to be acceptable and what they would not.

The culture of non-litigation and banking regulation is just that: a culture. No law requires banks to hold off on standing up for their rights. Nor does administrative law make any provision for super-deference to decisions by bank regulators.[289] Changing the culture requires banks to test their regulators, but that testing already exists in other collaborative regulatory enterprises, such as disputes by government contractors with the agencies that have hired

288. *See* Panagiota Papadimitri, Fotios Pasiouras, Gioia Pescetto & Ansgar Wohlschlegel, *Does Political Influence Distort Banking Regulation? Evidence from the US*, 53 J. FIN. STABILITY, Apr. 2021, at 1, 17 (finding an inverse relationship between the number of enforcement actions filed against a bank and the location of the bank's headquarters in an influential congressperson's district).

289. *But see supra* note 85 and accompanying text.

them that are heard in the Court of Federal Claims.[290] These relationships are imperfect; to be sure, there is some evidence that the largest defense contractors prefer to vindicate their rights more informally.[291] But there is a path for litigation.

It may need to begin with a few brave banks and tolerant supervisors, but if the courts apply ordinary principles of administrative law, then there will no longer be a whole swath of our regulatory state that exists without the possibility of judicial intervention. Courts could contribute to this healthier regulatory culture by making it clear that ordinary principles of judicial review apply to banking regulators, ensuring the broad consistency of the judicial role across the administrative state that helps make that review more rational and consistent.[292] The fact that litigation is so rare in financial oversight is frankly odd, even for collaborative governance schemes.

Moreover, public disputes would educate observers about what exactly bank supervisors require of the banks. That better and more contentious picture, in turn, may convince the public that banks and regulators are not so cozily intertwined, which may save the bank some reputational consequences the next time the government has to bail out the financial system.[293]

B. Disclosing Important Enforcement Actions

The second reform should be adopted by regulators; because it would represent an enforcement practice, it could be done through guidance, or an amendment to an enforcement manual. Regulators should disclose any injunctive sanction projected to add ten million dollars or more in costs to the bank being sanctioned. This rule would cover orders not to grow, most declinations of applications for acquisitions, and MRIAs or MRAs requiring banks to spend money updating their internal controls for compliance related issues identified by regulators.

If regulators disclose more of the painful but hidden sanctions levied on banks, the nature of the relationship between the one and the other will be more transparent to all who wish to look. Banks would get a better sense of what is required of them by examining the sanctions of what their regulators expect of them. The usual basis for nonpublicness—that bank customers will

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290. *See supra* notes 258–59 and accompanying text.

291. *See supra* notes 259–60 and accompanying text.

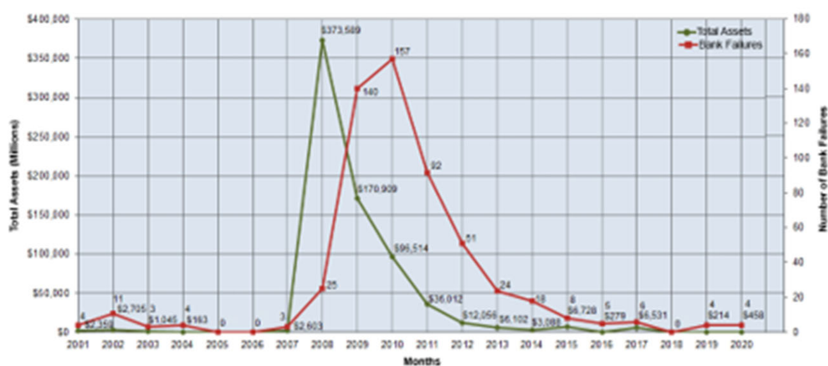
292. *See* U.S. GOV'T ACCOUNTABILITY OFF., HIGHLIGHTS OF GAO-13-101, DODD-FRANK ACT: AGENCIES' EFFORTS TO ANALYZE AND COORDINATE THEIR RULES 1 (2012) (recommending consistency in regulatory analyses).

293. It might be interesting to compare the European and American experiences of financial regulation, given that Europe has a more rules-based and less discretionary approach—although Europe does not have the tradition of litigation that regulated industry in America has.

lose trust in banks and pull their resources when banks need those resources the most—is unpersuasive, given that bank runs are so rare.[294]

Extraordinarily few banks fail outside of a financial crisis. In the last twenty years, only 561 of the country's 4,519 banks (as of 2020) failed,[295] despite going through two great financial crises and a dotcom crisis as well.[296] To put that number in perspective, it is worth noting that far fewer banks go out of business than those who disappear because of consolidation and rationalization. In 2000, there were 8,315 insured banks according to the FDIC. Four banks failed in 2019 and 2020; in only eight out of the twenty years did more than ten banks fail. In three years, no banks failed. The vast majority of the failures occurred in the wake of the 2007–2008 financial crisis, as Figure 4 below indicates.[297]

Figure 4



Moreover, customers know that deposit insurance should cover most of the money they leave with a bank, even if some supervisory problem with that bank has been identified; none of the banks that failed in the recent past resulted in a bank run.[298] There is no reason to think that a bank financed mostly by deposits would be at any risk of destabilization even if an extremely

294. Thomas C. Baxter, Jr. & Joseph H. Sommer, *Liquidity Crises*, 34 INT'L L. 87, 87 (2000) ("Today, bank runs are not only rare, but are unrelated to most modern liquidity crises.").

295. The FDIC tracks this number. *BankFind Suite: Find Annual Historical Bank Data*, FED. DEPOSIT INS. CORP. (2020), https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CBRANCHES%2CNew_Char&selectedEndDate=2020&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=desc [https://perma.cc/W45L-3GQJ].

296. *Id.*

297. The FDIC created this chart, and it is available at *Bank Failures in Brief—Summary 2001 Through 2022*, FED. DEPOSIT INS. CORP. (Feb. 16, 2022), https://www.fdic.gov/bank/historical/bank [https://perma.cc/Q2FZ-X3ZN].

298. JONATHAN R. MACEY & GEOFFREY P. MILLER, BANKING LAW AND REGULATION 54 (Richard A. Epstein et al. eds., 2d ed. 1997) (reviewing the rarity of bank runs, attributing much of it to the protections afforded by deposit insurance).

critical enforcement action were publicized. Nor is it likely that other counterparties—purchasers of their commercial paper, which smooths short term financing, or lenders and bond purchasers, who can finance longer term projects—would be more attentive to enforcement proceedings, and likely to run for that reason. Although these investors in banks do not receive the benefit of deposit insurance, they know that banks fail rarely, unless they are small.

America's largest banks have paid a regular series of large fines to various government agencies.[299] None of them have been exempt, and the big fines were covered by the press. And all of them have maintained their customer base and have grown over the decade.[300] In the meantime, the public, investors, and potential acquisition partners are being deprived of critical information about these firms. The current regime provides all of us with full information about the relationship between banks and the Department of Justice and SEC.[301] It only provides us with some information about the enforcement activities of the primary regulators at the Fed, the OCC, and the FDIC. It is hard to identify a good government reason for the distinction when it comes to major enforcement actions that, in the case of the financial regulators, do not come with a dollar figure attached.

C. Better International Disclosure

Finally, the disclosure process in international financial regulation should be tweaked. In the past decade, there has been a sea change in the opportunity to participate in the regulatory program at the international level. International financial regulatory organizations have developed transparency commitments, and regularly updated websites to inform the public about what they do.[302] Moreover, the process of communication to and from the G-20 gives interested parties insight into the timeline and agenda for future regulatory projects of the FSB and Basel Committee.[303] But there is no reason this process could not be more formalized with something akin to the Unified

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299. Zaring, *supra* note 45, at 1 ("Being a big bank means the regular payment of huge fines to a number of different regulators . . . .").

300. *See* Matt Egan, *Too-Big-to-Fail Banks Keep Getting Bigger*, CNN (Nov. 21, 2017, 3:43 PM), https://money.cnn.com/2017/11/21/investing/banks-too-big-to-fail-jpmorgan-bank-of-america/index.html [https://perma.cc/9ZWE-VW6J].

301. *See, e.g.*, *Litigation Releases*, U.S. SEC. & EXCH. COMM'N (Oct. 18, 2022), https://www.sec.gov/litigation/litreleases.htm [https://perma.cc/K4W4-VRAR] (listing all SEC enforcement actions in federal court); *Reports of Investigations*, U.S. SEC. & EXCH. COMM'N (Oct. 16, 2022), https://www.sec.gov/litigation/investreports.shtml [https://perma.cc/UBX4-AWC4] (publicizing the results of SEC investigations).

302. *See, e.g.*, *The Basel Committee—Overview*, BANK FOR INT'L SETTLEMENTS, https://www.bis.org/bcbs [https://perma.cc/35KT-NLXW].

303. *See* Section II.E.

Regulatory Agenda, which reports the regulatory plans of every American regulator on an annual basis.[304]

Essentially, international financial regulation has voluntarily offered an increasing amount of transparency and process over the course of its development, and since the financial crisis of 2007–2008 in particular.[305] It will likely never be the case that these regulators will have transparency obligations imposed upon them by a treaty regime requiring it—this system of governance is succeeding without a treaty, and multilateral treaties are extraordinarily difficult to conclude.[306]

But systematic international governance and regular process need not depend only upon the passage of a treaty. There are many financial regulatory networks, but if they adopted a common approach to transparency, they would be easier to follow, and the process of welcoming bureaucratization in international financial regulation would likely develop and deepen further.

For these reasons, the G-20 should direct the FSB to adopt common standards for the consultation process that substitutes for notice and comment rulemaking in the international context. But most of all, it should systematize the reporting of the work that the regulatory networks do by having them twice a year identify the rules and principles that they have opened for revision or promulgation, those that they have ceased working on, and those that they plan to address in the next six months—a global version of the Unified Agenda.

The reform would allow these regulatory networks to retain their flexibility but also do even more to avoid the possibility of undue surprise in regulatory initiative and, in a second order way, deepen the interoperability of international financial regulation by putting it all on the same schedule.[307]

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304. *Spring 2022 Unified Agenda of Regulatory and Deregulatory Actions*, OFF. INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/eAgendaMain [https://perma.cc/9GSV-Y848].

305. *See generally* ZARING, *supra* note 196 (summarizing the development of international financial regulation).

306. In a somewhat different context, it has been observed "that in cases of treaties and conventions with a large number of member states, it is quite hard to reach an agreement and conclude such pacts." Akshay Shreedhar, *Software Transactions in Transnational Commercial Law*, 7 GEO. MASON J. INT'L COM. L. 184, 187 (2016).

307. The point is somewhat Weberian, at least if you are persuaded by Joshua Kleinfeld's gloss on Weber: "[B]ureaucratic government operates with a distinct conception of what it means to be rational, a conception Weber thought characteristic of modernity itself, according to which one identifies an end to be maximized and uses the technical apparatus of government to secure that end as efficiently as possible." Joshua Kleinfeld, *Manifesto of Democratic Criminal Justice*, 111 NW. U. L. REV. 1367, 1379 (2017) (emphasis omitted). For a related take, see Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1230 (1987) ("[B]ureaucracies, for reasons related to the rule of law itself, generally value not only correct decisions; they also value the correct management of the decision making process through the exercise of those parts of the 'adjective' law concerned with imperatives such as consistency . . . .").

CONCLUSION

The argument in this Article is that banking regulation is better understood as a public-private partnership, and that this partnership model explains why the traditional components of a fair regulatory system are lacking in financial regulation—financial regulation is corporatist. The financial regulation model can be applied to some of the most important parts of American bureaucracy, including defense, energy production, and other areas. I conclude with a reminder that these sorts of collaborative arrangements imply duties held by the firms that benefit from the relationship. Banks must understand that collaborative administration involves some obligations towards the common good.

Scholars would do well to recognize that there is a different approach to administrative law reflected in financial regulation, but it is one that is shared by other facets of the American government. Recognition of this not so new model of collaborative administration is critical to understanding what administrative law is, as well as, in important cases, what regulatory lawyers do. As for banking regulation itself, the apparent unfairness of the relationship between banks and the government does not make banking law irretrievably broken, but rather reflects a different approach to administrative law. Nonetheless, banking regulators, and the industry itself, could take some practical steps to improve the legitimacy of the regime.