

BANKS, CORPORATISM, AND COLLABORATION IN THE ADMINISTRATIVE STATE

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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 decisionmaking, that judicial review checks regulatory abuses where sunlight and reasoned decisionmaking 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, the government should make public more of its dealings with banks, and that the international aspects of banking regulation should continue their journey towards greater transparency.

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I. INTRODUCTION

Nobody should feel sorry for banks, but they labor under heavy, and in almost every important way, unchecked, regulation.¹ Because one of the fundamental premises of our administrative state is that heavy, processless, and unchecked regulation should be bad news for the industry so regulated, it is worth making sense of why banks prosper, despite their difficult regulatory environment. The fact that they do challenges some of the basic assumptions of American administrative law – that transparency and

¹ 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 Jackson, *Regulation in A Multisectoral Financial Services Industry*, 77 WASH. U. L.Q. 319, 320 (1999) (discussing the “formal regulatory distinctions between banks and insurance companies and securities firms”).

process creates better regulation through sunlight and reasoned decisionmaking, that judicial review checks regulatory abuses where sunlight and reasoned decisionmaking do not, and that a utilitarian assessment of the merits of regulation is essential. 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 a government perspective, and one of its singularly unappealing features.

The appealing aspect lies in the fact that, ever since the beginning of the American experiment, the government has encouraged the widespread provision of banking services, especially the provision of credit.² Banks have a collaborative relationship with the government designed to provide three interrelated public goods to Americans: the ability to save, access to reliable payments, and, perhaps most importantly, the ability to borrow.³ 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 not require government supervision at all. Public goods can be defined as services that are underprovided by markets, and therefore make their own case for government intervention.⁴

The unappealing 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. 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 demise, from the FDIC.⁵ 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 works inside the bank itself.

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³ See, e.g., Abbye Atkinson, *Rethinking Credit As Social Provision*, 71 STAN. L. REV. 1093, 1096 (2019) (“access 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, 1149 (2017) (making the public good point); MEHRSA BARADARAN, *HOW THE OTHER HALF BANKS: EXCLUSION, EXPLOITATION, AND THE THREAT TO DEMOCRACY* 210-25 (2015) (describing ways to expand access to credit).

⁴ 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.”).

⁵ 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).

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.⁶

The normative conclusion of this article would unbundle this close relationship. 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. It means, among other things, that banks should sue the government more, the government should make public more of its dealings with banks, and that the international aspects of banking regulation should continue its journey towards greater transparency.

Before we explore these solutions, 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 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 they cannot keep their disciplinary measures secret.

⁶ Paul Krugman, *Behind the Curve*, N.Y. TIMES, Mar. 9, 2009, at A23, available at <http://www.nytimes.com/2009/03/09/opinion/09krugman.html> (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 “it is unpopular to take the same side as banks” in the wake of a financial crisis)

Financial regulation is therefore not transparent, and if, as Louis Brandeis said, “sunlight is the best disinfectant,” the lack of transparency could mask abuses.⁷

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.⁸ 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.”⁹ Banking regulators were operating on the basis of “secret evidence,” in their decisionmaking, failing to offer findings to support the decisions made, or issuing reasoned opinions, as required by the APA.¹⁰ He considered banking regulation to be broken.

It does not appear that the passage of time has changed much.¹¹

But critically, the strange world of financial regulation is not incompatible with industrial success. Finance is occupying an increasingly

⁷ LOUIS BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 62 (ed. 1933).

⁸ 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).

⁹ Kenneth Culp Davis, *Administrative Procedure in the Regulation of Banking*, 31 L. & CONTEMP. PROBS. 713, 713 (1966).

¹⁰ *Id.* at 713 (“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, 603 (2020).

¹¹ Margaret E. Tahyar, *Are Bank Regulators Special?* 6 BANKING PERSP., no. 1, (2018) at 23 (arguing that Davis’s indictment “remains fresh today”); “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 Administrative Procedure Act (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.” David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 190 (2010).

important role in the American economy.¹² As the government has put it, “Financial markets in the United States are the largest and most liquid in the world. In 2018, finance and insurance represented 7.4 percent (or \$1.5 trillion) of U.S. gross domestic product,” a proportion that has increased over time.¹³ Until the COVID-19 crisis, the return on average assets of all U.S. banks was higher in 2018-2020 than any time since the global financial crisis.¹⁴

Moreover, the high profile, and profitability, of American banks has been matched with high salaries for bankers. As regulation has increased, bank CEO pay has also increased.¹⁵ CEO compensation has grown 52.6 percent since 2009, including options exercised by bank executives.¹⁶ The industry has worked out how to prosper despite being overseen by unchecked regulators.

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. These crises have regularly afflicted the American economy. In the last three decades 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 in 2008–09, and in 2020 coming to the rescue of COVID-19 afflicted firms.¹⁷

¹² For a discussion, see GERALD A. EPSTEIN, *FINANCIALIZATION AND THE WORLD ECONOMY* (2005).

¹³ *Financial Services Spotlight: The Financial Services Industry in the United States*, Select USA, available at <https://www.selectusa.gov/financial-services-industry-united-states>.

¹⁴ Return on Average Assets for all U.S. Banks, Federal Reserve Bank of St. Louis, (updated Dec. 20, 2020), available at <https://fred.stlouisfed.org/series/USROA>.

¹⁵ Gayle Appelbaum, Katrina Gerenz, and Todd Leone, *Bank Compensation Trends: What You Need to Know*, Aon (Nov. 2018), available at <https://rewards.aon.com/en-us/insights/articles/2018/bank-compensation-trends-what-you-need-to-know>.

¹⁶ Lawrence Mishel and Julia Wolfe, *CEO compensation has grown 940% since 1978*, Economic Policy Institute (Aug. 14, 2019), <https://www.epi.org/publication/ceo-compensation-2018/>.

¹⁷ David Zaring & Alexander Platt, *Accidents Happen in Economic Firefighting. That's Why We Need Accountability*, BARRONS, (Dec. 9 2020), <https://www.barrons.com/articles/accidents-happen-in-economic-firefighting-thats-why-we-need-accountability-51607543019>. 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*, in *Brookings Papers on Economic Activity* 1, 1-5 (1993) (reviewing various financial crises in the United States). And as we saw during the financial crisis of 2008, a

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 regimes and workplace safety regimes might be examples.¹⁸ 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 they 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. While some scholars have argued that this important 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.¹⁹ The government controversially chartered two

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.

¹⁸ For example, see Don Fullerton & Erich Muehlegger, *Who Bears the Economic Costs of Environmental Regulations?*, National Bureau of Economic Research (August 2017), <https://www.nber.org/papers/w23677>.

¹⁹ See Phil Davies, *The Bank that Hamilton Built*, FED. RSRV. BANK MINNEAPOLIS, Sept. 1, 2007 <https://www.minneapolisfed.org/article/2007/the-bank-that-hamilton-built#n1> (“One of Hamilton’s primary goals in establishing the bank 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

semi-private Banks of the United States in its first 50 years, and created the national banking system in part to help it finance the Civil War.²⁰ 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.

In Part II, 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 III, 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 IV, 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 V identifies some achievable solutions that would help mitigate the effects of the particularly unaccountable financial regulators and improve the sort of 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 make public more of its dealings with banks, and the international aspects of banking regulation should continue its journey towards greater transparency. I conclude briefly.

preferred stock to the RFC in order to enable the banks to give ‘the credit necessary for the recovery program’’).

²⁰ See MICHAEL BARR ET AL., *FINANCIAL REGULATION: LAW AND POLICY* 40 (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.”).

II. THE INTENSITY OF BANKING REGULATION

Banks are regulated particularly intensely – which is not the same thing as unfair regulation, but it does heighten the concerns about it. The intensity comes from three distinct aspects of banking regulation. The first is the complexity of the rules that their primary regulators apply to ensure that each bank, and the industry as a whole, is “safe and sound.”²¹ 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 their employees are taking on a real time basis.

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.²² 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 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 2009.²³ 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.²⁴ Economically, banks are fragile and

²¹ Both the Federal Reserve and the OCC have described their mission as “[e]nsuring a Safe and Sound National Banking System for All Americans.” OCC, Administrator of National Banks, <http://www.occ.gov>. For a discussion, see Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 101 (2008).

²² As one economist and one financial law expert have put it, “Mounting 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 Cyclical Matters to Access to Mortgage Credit*, 37 B.C.J.L. & SOC. JUST. 361, 365 (2017).

²³ Louise Story et al., *Wall St. Helped to Mask Debt Fueling Europe’s Crisis*, N.Y. TIMES (Feb. 13, 2010), <http://archive.nytimes.com/www.nytimes.com/2010/02/14/business/global/14debt.html>.

²⁴ PERMANENT SUBCOMM. ON INVESTIGATIONS, 113TH CONG., JPMORGAN CHASE WHALE TRADES: A CASE HISTORY OF DERIVATIVES RISKS AND ABUSES (2013).

particularly susceptible to shocks – more than is the rest of the economy.²⁵ 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.²⁶ It took much longer to recover from the financial crisis of 2008.

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.²⁷ 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 training 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.²⁸ 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.²⁹ This

²⁵ The classic account of this tendency may be CHARLES P. KINDLEBERGER, *MANIAS, PANICS, AND CRASHES: A HISTORY OF FINANCIAL CRISES* (1978). But Carmen Reinhart and Kenneth Rogoff have also made the point that crashes are ubiquitous, and we seemingly never learn from them. CARMEN REINHART AND KENNETH ROGOFF, *THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY* (2008).

²⁶ See Kevin L. Kliesen, *The 2001 Recession: How Was It Different and What Developments May Have Caused It?*, 85 FED. RESRV. BANK ST. LOUIS REV. 23, 23 (2003) <https://files.stlouisfed.org/files/htdocs/publications/review/03/09/Kliesen.pdf> (“[T]he 2001 recession, which ended in November 2001, was somewhat shorter than average.”).

²⁷ Stilpon Nestor & Konstantina Tsilipira, *Views from the Steering Room: A Comparative Perspective on Bank Board Practices*, HARV. L. SCHOOL FOR. ON CORP. GOV., Nov. 3, 2019 <https://corpgov.law.harvard.edu/2019/11/03/views-from-the-steering-room-a-comparative-perspective-on-bank-board-practices/> (“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 Risk*, BLOOMBERG, Apr. 21, 2016.

²⁸ *Id.* (“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’”). Geoffrey Colvin, *CEO Super Bowl*, FORTUNE, Aug. 2, 1999, at 238 (showing that McKinsey has produced a large number of CEOs of different major companies).

²⁹ See BANK FOR INT’L SETTLEMENTS, BASEL COMMITTEE

complex array of balance sheet tests have been capped, for most banks of any size, with an annual or biannual stress test,³⁰ designed to simulate adverse economic conditions.³¹ Managing a bank accordingly means mastering difficult balance sheet gymnastics, assessed through a unique-to-banks set of accounting principles, accompanied by 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 their computer budget chasing this problem” according to one financial executive.³²

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.³³

Nor is this regulated industry supervision the only thing that banks must worry about when it comes to compliance. 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.³⁴ In the wake of the financial crisis, large banks

ON BANKING SUPERVISION: BASEL III: THE NET STABLE FUNDING RATIO (2014) <https://www.bis.org/bcbs/publ/d295.pdf> (introducing net stable funding ratio, “one of the Basel Committee’s key reforms to promote a more resilient banking sector”).

³⁰ The larger the bank, the more frequent the test. For explanation of testing, see *Stress Tests and Capital Planning*, The Federal Reserve, Aug. 10, 2020, available at <https://www.federalreserve.gov/supervisionreg/stress-tests-capital-planning.htm>.

³¹ For example of hypothetical scenarios used by the Federal Reserve, see *Federal Reserve Board releases hypothetical scenarios for second round of bank stress tests*, The Federal Reserve, Sept. 17, 2020, available at <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200917a.htm>.

³² 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.html>.

³³ For example, see *Deputy Secretary of the Treasury Wally Adeyemo’s Roundtable Discussion with Bank Policy Institute Members*, U.S. Department of the Treasury (April 20, 2021), available at <https://home.treasury.gov/news/press-releases/jy0136>.

³⁴ For full discussion on compliance-related fines, see *The Biggest Compliance Fines of the Decade*, Planet Compliance (Dec. 28, 2019), available at <https://www.planetcompliance.com/2019/12/28/the-biggest-compliance-fines-of-the-decade/>.

paid a series of enormous fines to the Securities and Exchange Commission for misleading investors about the dangers of products that they structured and sold, particularly products related to the housing market.³⁵ They have paid fines to the Commodities Futures Trading Commission for manipulating various reference rates that affected the prices of derivatives contracts.³⁶ The newly created Consumer Finance Protection Bureau has also sanctioned the banks, if less frequently and expensively than their other secondary regulators.³⁷ 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.³⁸ 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.³⁹

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. 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.⁴⁰

When regulators see something they do not like, they can promptly meet with bank managers and explain their concerns, or send the bank

³⁵ For examples, see *SEC Enforcement Actions Addressing Misconduct that Led to or Arose from the Financial Crisis*, The Securities and Exchange Commission (last updated July 15, 2019), available at <https://www.sec.gov/spotlight/enf-actions-fc.shtml>.

³⁶ For example, see *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*, Commodity Futures Trading Commission Release Number 7794-18 (Sept. 19, 2018), available at <https://www.cftc.gov/PressRoom/PressReleases/7794-18>.

³⁷ For example, see *Consumer Financial Protection Bureau Fines Wells Fargo \$100 Million for Widespread Illegal Practice of Secretly Opening Unauthorized Accounts*, Consumer Financial Protection Bureau (Sept. 6, 2016), available at <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-fines-wells-fargo-100-million-widespread-illegal-practice-secretly-opening-unauthorized-accounts/>.

³⁸ For a classic account of this, see also Kenneth E. Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 STAN. L. REV. 687, 695-734 (1980) (explaining the regulation of banks).

³⁹ See *id.*

⁴⁰ See *id.*

board a confidential letter, accompanied with a list of Matters Requiring Attention (MRAs),⁴¹ or Matters Requiring Immediate Attention (MRIAs).⁴² They may also impose unpublicized sanctions on the bank, as long as those sanctions are not monetary.⁴³ Regulators might prevent a noncompliant bank from engaging in acquisitions.⁴⁴ Or they might restrict its ability to grow until they think that the bank has remedied its unsafe and unsound practices.⁴⁵ 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.⁴⁶ Confidential injunction style restrictions are baked into the supervisory model of banking regulators.

⁴¹ An MRA “constitutes 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.”” Federal Reserve Board, <https://www.federalreserve.gov/supervisionreg/srletters/sr1313a1.pdf>.

⁴² “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 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.” Federal Reserve Board, <https://www.federalreserve.gov/supervisionreg/srletters/sr1313a1.pdf>. For explanation of how the Federal Reserve may communicate supervisory findings to banks, see *Supervisory Considerations for the Communication of Supervisory Findings*, The Federal Reserve, available at <https://www.federalreserve.gov/supervisionreg/srletters/sr1313a1.pdf>.

⁴³ 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.” Federal Reserve Board, *Enforcement*, <https://www.federalreserve.gov/supervisionreg/topics/enforcement.htm>. It may also impose informal enforcement orders that do not do so or ask for civil monetary penalties. See *id.*

⁴⁴ For an opposing view see, Joe Manton, *Banks could get out of M&A penalty box sooner, regulator says*, S&P Global Market Intelligence (Dec. 3, 2018), <https://www.spglobal.com/marketintelligence/en/news-insights/trending/0xcCL6qtXfgKLTa1aWKpmg2>.

⁴⁵ For example, see Michelle Davis, *The U.S. Secretly Halted JPMorgan’s Growth for Years*, BLOOMBERG, October 26, 2018, <https://www.bloomberg.com/news/articles/2018-10-26/jpmorgan-s-secret-punishment-u-s-halted-its-growth-for-years?srnd=premium>.

⁴⁶ Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (requiring that federal agencies engage in cost-benefit analysis as part of the regulatory process).

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 later in this article, 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.

III. 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 one would expect. But, as this section 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 section. This section 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 holders 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.⁴⁷ The funding needs of independent agencies have been thought to make them particularly beholden to the legislature that controls their appropriations.⁴⁸ Few political

⁴⁷ 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) (“the SEC is a single-issue agency, beholden to Congress for funding”).

⁴⁸ 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”).

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.⁴⁹

But 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.⁵⁰ To those licensing fees, the Fed adds its profits earned from seigniorage, the profits it earns from creating money, and net interest income earned by the so-called “open market operations” it 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.⁵¹ “As arguably the most powerful independent agency, and one with self-funding, the Fed illustrates the budgetary independence leaves Congress and the president with the less effective tools to control agencies,” as one observer has put it.⁵²

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.

It does not mean that Congress plays no roles 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.

⁴⁹ *See id.*

⁵⁰ Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 927 (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, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 611 (2010) (noting that “[s]everal 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, 112 n.157 (2013) (discussing the financing of financial regulations).

⁵¹ <https://www.federalreserve.gov/newsevents/pressreleases/other20220114a.htm>

(recounting the net interest income earned by the Fed in 2021).

⁵² 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).

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 the 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.”⁵³ The power of proposing and allocating the budget is its own presidential check on regulators, along with the legislative power to appropriate funds.⁵⁴ 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 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,”⁵⁵ 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 Administrative Procedure Act cases that is used to routinely hale other agencies into court, despite the fact that regulators have so much influence over everything they do.⁵⁶ Moreover, when banks do sue, they do so knowing that courts like to afford banking regulators a great deal of deference.⁵⁷ This section reviews

⁵³ Eloise Pasachoff, *The President's Budget As A Source of Agency Policy Control*, 125 YALE L.J. 2182, 2188 (2016); see also Note, *Independence, Congressional Weakness, and the Importance of Appointment: The Impact of Combining Budgetary Autonomy with Removal Protection*, 125 HARV. L. REV. 1822, 1832 (2012) (“The President can also influence self-funded agencies through legislation.”).

⁵⁴ *See id.*

⁵⁵ *McCulloch v. Maryland*, 17 U.S. 316 (1817).

⁵⁶ 5 U.S.C. §706. get some better data about bank suits v. nonbank suits of regulators, though some appears later in this section.

⁵⁷ *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778 (1984) (establishing that when a statute is silent on a specific issue, the court should not impose its

the doctrinal bases for the lack of litigation, and pairs it with a case study of the Fed's litigation docket from 2010-2020.

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.⁵⁸ 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 than ordinary principles of administrative law to regulatory efforts by the banking supervisors.⁵⁹

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.⁶⁰ The Second

definition of the statute).. Michael S. Barr et al., *Financial Regulation: Law and Policy* 168, at 169 (2d ed. 2018).

⁵⁸ *See, e.g.*, *Kaplan v. OTS*, 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”).

⁵⁹ 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. OCC*, 706 F.3d 481, 488 (D.C. Cir. 2013) (court has “repeatedly pointed to the agencies’ joint administrative authority under [the FDI Act] to justify refusing to defer to their interpretations”); *Grant Thornton, LLP v. OCC*, 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.”).

⁶⁰ “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.” *Raichle v. Fed. Reserve Bank of New York*, 34 F.2d 910, 915 (2d Cir. 1929)

Circuit has gone on to conclude that banking rescues should be reviewed not under an ordinary arbitrary standard, but a “grossly arbitrary” one.⁶¹

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.⁶² 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.”⁶³ The Eighth Circuit upheld a chartering decision that was “certainly not without some support in the record.”⁶⁴ The Fifth Circuit endorsed the idea that “the Comptroller’s decision is entitled to a presumption of regularity.”⁶⁵ Michael Barr, Tahyar, and Howell Jackson have called the review of chartering decisions review practiced with “extraordinary deference.”⁶⁶ 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 from regulatory quiescence.⁶⁷

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 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

⁶¹ “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.” *Huntington Towers, Ltd. v. Franklin Nat. Bank*, 559 F.2d 863, 868 (2d Cir. 1977)

⁶² *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

⁶³ Margaret E. Tahyar, *Are Bank Regulators Special?* THE CLEARING HOUSE (Jan. 1, 2018), <https://www.theclearinghouse.org/banking-perspectives/2018/2018-q1-banking-perspectives/articles/are-bank-regulators-special>.

⁶⁴ *First Nat’l Bank of Fayetteville v. Smith*, 508 F.2d 1371, 1376 (8th Cir. 1974).

⁶⁵ *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).

⁶⁶ MICHAEL S. BARR ET AL., *FINANCIAL REGULATION: LAW AND POLICY* 169 (2d ed. 2018).

⁶⁷ Jeremy Kress has observed that regulators almost never reject bank requests to merge. Jeremy Kress, *Modernizing Bank Mergers*, 37 YALE J. REG. 435, 458 (2020).

grounds⁶⁸ that courts could not review or would not reverse, and that would substantially hamper the business of the bank.⁶⁹ 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.

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 regulations. The Treasury Department is rarely seen in the D.C. Circuit.⁷⁰ Nor are the banking regulators.⁷¹

2. The Fed’s Litigation 2010-2020

The reticence of financial institutions is exemplified by the very light litigation load reported by the Fed since 2010.⁷² That agency reports annually on its litigation burden – and over the decade, the agency reported being sued in approximately eight cases per year. Eighty-three total cases is a small number compared to other federal agencies, let alone an important one like the nation’s central bank. Of those cases, as Figure 1 demonstrates, only 18 percent could be characterized as administrative and constitutional law claims, while eight percent contested Fed enforcement actions (between

⁶⁸ See Julie Andersen Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 Wash. U. L. Rev. 1101 (2015) (pointing out that financial institutions often choose not to appeal as going to court can “take two to five years” and “the regulator continues to examine the bank, making additional material supervisory determinations and requesting or demanding additional changes” during “those two to five years”).

⁶⁹ “Banking regulators enjoy close relationships with banks, and the whole gestalt of banking regulation is quite non-adversarial and rarely results in litigation.” David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1462 (2014). For an example of a rare suit against a supervisory action by a bank regulator, see *Builders Bank v. Fed. Deposit Ins. Corp.*, 846 F.3d 272, 276 (7th Cir. 2017).

⁷⁰ 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.” David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 201 (2010).

⁷¹ *Id.*

⁷² 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.” Annual Report of the Federal Reserve Board (2019). <https://www.federalreserve.gov/publications/2019-ar-litigation.htm>.

2010 and 2020, the Fed announced the commencement of 1265 enforcement actions).⁷³

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”),⁷⁴ and the National Association of Mortgage Brokers, which once challenged an amendment to Regulation Z affecting mortgage loan originators.⁷⁵

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 in an effort to establish that the Consumer Financial Protection Bureau was unconstitutionally constituted for separation of powers reasons.⁷⁶ And, of course, these cases involved some longshot pro se claims, in one case protesting the government’s bailout during the financial crisis of the American International Group, or AIG, which collapsed as a result of its role betting on the creditworthiness of American investments.⁷⁷ In other, more self-evidently meritless cases, plaintiffs invoked the Texas Constitution as a constraint on the central bank,⁷⁸ or complained about monetary policy decisions by the Federal Open Markets Committee, a question that the courts have long held to be unreviewable.⁷⁹

The rest of the lawsuits against the Fed in the past decade were almost extraneous. An additional 5 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. The largest number of

⁷³ The database of enforcement actions may be found at <https://www.federalreserve.gov/supervisionreg/enforcementactions.htm>.

⁷⁴ American Bankers Association, et al., v. Board of Governors, No. 13-cv-02050 (D. District of Columbia, filed December 24, 2013)

⁷⁵ State National Bank of Big Spring v. Bernanke, No. 13-5247 (D.C. Circuit, notice of appeal filed August 2, 2013); TCF National Bank v. Bernanke, No. 10-4149 (D. South Dakota, filed October 12, 2010).

⁷⁶ *Humphrey's Ex'r v. United States*, 295 U.S. 602, 55 S. Ct. 869 (1935); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

⁷⁷ *Murray v. Board of Governors*, No. 08-cv-15147 (E.D. Michigan, filed December 15, 2008).

⁷⁸ *Haase v. Bank of America, et al.*, No. 16-cv-1567 (S.D. Texas, filed April 25, 2016, removed to federal court June 3, 2016).

⁷⁹ *Love v. Federal Reserve Board*, No. 15-cv-1077 (D. Kansas, filed March 16, 2015). The unreviewability began with *Raichle v. Fed. Reserve Bank of New York*, 34 F.2d 910, 915 (2d Cir. 1929) (holding open market purchases to be committed to agency discretion).

cases faced by the Fed involved FOIA, which comprised 27 percent of the total, amounting to 22 separate actions designed to obtain information from the Fed. The Fed also had to deal with 12 cases over the decade claiming discrimination or the denial of job-related benefits by employees of the organization.

And of course, like any agency, the Fed faced a number of idiosyncratic claims by usually not represented members of the public. 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.⁸⁰ These cases, often pro se, were not likely to raise the fear of judicial review inside the agency.

By contrast, EPA during the same decade appeared in 363 cases in the nation's busiest administrative law court, the D.C. Circuit, alone.⁸¹ The litigation risk faced by the environmental regulator is almost unrecognizably different from that faced by the Fed.

Reports by the Fed, EPA, and the OCC should a similar pattern: the banking regulators face less litigation risk than does the environmental regulator.

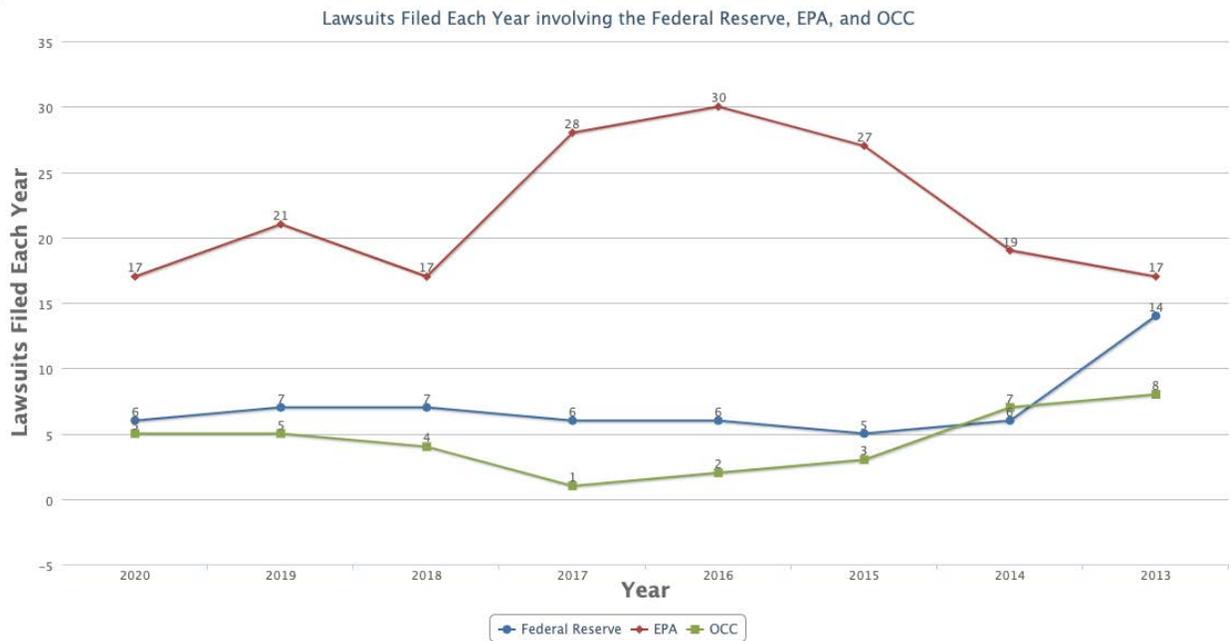
⁸⁰ See, e.g., *Garrett v. PennyMac Loan Services et al.*, No. 18-cv-00718 (M.D. Pennsylvania, filed April 11, 2018); *CitiMortgage, Inc. v. Kokolis*, No. 11-cv-2933-RBH (D. South Carolina, filed in state court August 5, 2011; notice of removal filed October 27, 2011); *Haller v. U.S. Department of Housing and Urban Development et al.*, No. 11-cv-881 MRB-KLL (S.D. Ohio, filed December 16, 2011).

⁸¹ The search may be replicated at [https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20TI\(%22environmental%20protection%20agency%22\)&jurisdiction=CTADC&contentType=CASE&querySubmissionGuid=i0ad604ac0000017aff4e5d0ec91b5bd4&categoryPageUrl=Home%2FCases%2FUSCourtsofAppealsCases%2FDCCircuitCourtofAppealsCases&searchId=i0ad604ac0000017aff4bf953d0c28937&transitionType=ListViewType&contextData=\(sc.Search\)](https://1.next.westlaw.com/Search/Results.html?query=adv%3A%20TI(%22environmental%20protection%20agency%22)&jurisdiction=CTADC&contentType=CASE&querySubmissionGuid=i0ad604ac0000017aff4e5d0ec91b5bd4&categoryPageUrl=Home%2FCases%2FUSCourtsofAppealsCases%2FDCCircuitCourtofAppealsCases&searchId=i0ad604ac0000017aff4bf953d0c28937&transitionType=ListViewType&contextData=(sc.Search)).

Table 1

Lawsuits Filed Each Year involving the Federal Reserve and EPA			
<i>(Notes: the number for the Federal Reserve/the OCC refers to 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)</i>			
	Federal Reserve ⁸²	EPA ⁸³	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

Figure 1



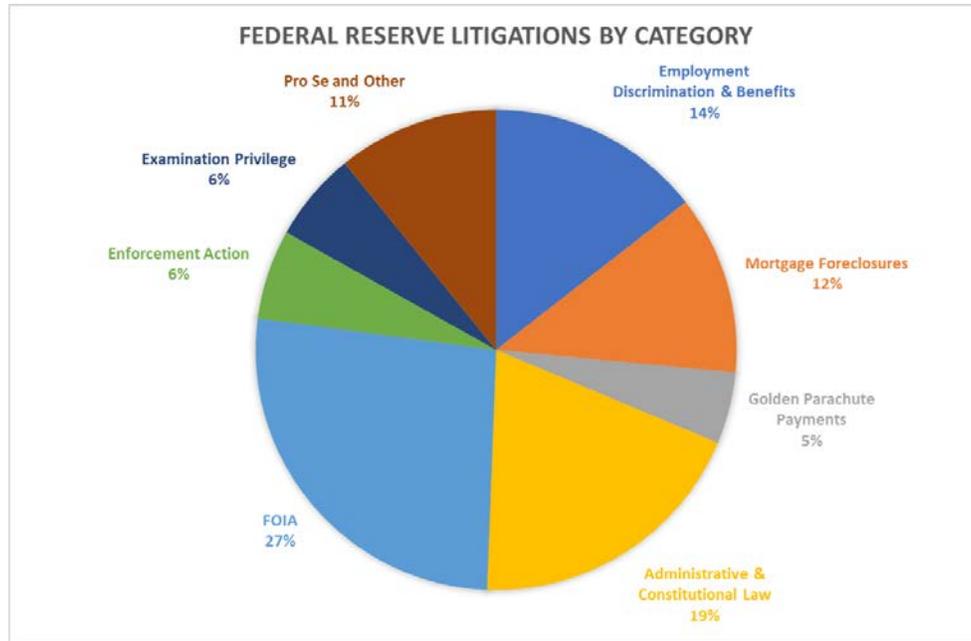
<https://www.federalreserve.gov/publications/annual-report/2014-litigation.htm>; *Annual Report – 2013*, BD. GOVERNORS FED. RSRV. SYS. (July 2, 2014),

<https://www.federalreserve.gov/publications/annual-report/2013-litigation.htm>.

⁸³ *Notice of Intent to Sue the U.S. Environmental Protection Agency (EPA)*, U.S. ENV'T PROT. AGENCY, <https://www.epa.gov/ogc/notices-intent-sue-us-environmental-protection-agency-epa> (last visited Aug. 12, 2021).

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.⁸⁴

Figure 2



3. Implications

Financial regulators, some of whom are among the earliest American administrative agencies ever established, have developed idiosyncratic ways of making policy that preceded the 1946 adoption of the

⁸⁴ 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. See Steven Shavell, *Any Frequency of Plaintiff Victory at Trial Is Possible*, 25 J. LEGAL STUD. 493 (1996). 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.

Administrative Procedure Act (APA), but courts are unable to police those idiosyncrasies to drive them towards traditional administrative law – something that the Supreme Court has recently favored.⁸⁵ The Treasury Department was one of the four original departments in the executive branch, and so can trace its founding back to 1789, the OCC to 1863, the Fed to 1913, the FDIC to 1933.⁸⁶ This historical uniqueness has been exacerbated by internal cultures that simply presume that each agency’s financial regulation is not the sort of thing to be second-guessed by courts.⁸⁷ The dramatic actions of the Fed during the COVID financial crisis,⁸⁸ 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.⁸⁹

Nor are banks able to use their industry representative to do the suing for them. To be sure, one of the reasons for the lack of litigation turns on the close relationship between regulators and regulated industry. Although industry groups like BPI participate in amicus briefs and sue regulators on

⁸⁵ The Supreme Court instructed courts to review tax regulations the same way that they reviewed other regulations promulgated by other agencies in *Mayo Foundation v. United States*, 562 U.S. 44 (2011), for example. 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”).

⁸⁶ See *History Overview*, U.S. DEPARTMENT OF THE TREASURY, <https://home.treasury.gov/about/history/history-overview>; *History of the Federal Reserve*, FEDERAL RESERVE EDUCATION, <http://www.federalreserveeducation.org/about-the-fed/history/>.

⁸⁷ David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 190 (2010) (“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/> (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”).

⁸⁸ 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).

⁸⁹ 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); (d). For a discussion of the general absence of judicial supervision of financial regulation, see David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1421 (2014) (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”).

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.⁹⁰

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, 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 all but impossible to remove from office by the President.⁹¹ 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.⁹² The order, and its successors, subjected rules, both before proposal and after receiving and responding to comments, to a cost-benefit review by the White House’s Office of Information and Regulatory Affairs. Rules for which the benefits could not be demonstrated to exceed the costs would be rejected by OIRA.⁹³ While the adoption of the cost-benefit

⁹⁰ Greg Baer, Welcome to the Bank Policy Institute (Jul. 16, 2018), <https://bpi.com/welcome/>; Re: Permissible Interest on Loans that are Sold, Assigned or Otherwise Transferred (84 Fed. Reg. 64229 - November 21, 2019), <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>

⁹¹ Seila Law, 140 S. Ct. 2183, at 2194 (noting that CFPB’s director is only removable for cause).

⁹² E.O. 12866 applied to major rules, so-called because they would have an impact on the economy of at least \$100 million. Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (requiring that federal agencies engage in cost-benefit analysis as part of the regulatory process).

⁹³ The relevant executive order defines “significant,” or “major,” rules as rules that have at least an annual \$100 million, or otherwise “material [ly]” adverse, effect on the economy. Exec. Order No. 12,866, §3(f). 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, 986 (2008). The Trump OMB extended the major rules definition to include the somewhat amorphous “major guidance” term. See Memorandum from OMB Director

analysis was originally controversial, and largely opposed by environmental and labor groups, the Clinton administration ratified White House review, as has every administration since.⁹⁴ 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. 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.⁹⁵ OIRA review has become a critical mechanism through which the White House has taken a role in coordinating – and thus organizing – policymaking.⁹⁶

Justice Elena Kagan has celebrated coordination by the White House as an opportunity to make executive branch policymaking consistent and uniform through expert oversight,⁹⁷ while scholars like Jennifer Nou have characterized the gatekeeping function as more a mechanism for

Russell Voight, <https://www.whitehouse.gov/wp-content/uploads/2019/10/M-20-02-Guidance-Memo.pdf> (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 twelvemonth period), or that otherwise qualifies as economically significant under Executive Order 12866”).

⁹⁴ “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.” Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. Chi. L. Rev. 1, 6 (1995). 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*, CPR Blog (Center for Progressive Reform), Oct. 2, 2013, available at <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/>.

⁹⁵ John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 Yale L.J. 882 (2015).

⁹⁶ 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.”).

⁹⁷ Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2000).

coordination rather than a daunting and independent hurdle.⁹⁸ But all agree that White House review serves as a substantial constraint on regulatory initiative, whether that constraint comes from mandarins at OMB insisting on high quality technical quantitative analysis, or bureaucrats from other interested agencies fighting for turf, and using OIRA to do it.⁹⁹

Because the OMB review requirement was issued by the president, review applies only to the departments under presidential control.¹⁰⁰ It does not apply to the independent agencies that do financial regulation — the Fed, OCC, and FDIC.¹⁰¹ Moreover, these regulators highly value their independence, perhaps even more so than other independent agencies.¹⁰² Their super-independence has been jealously guarded. Financial regulators have not submitted cost-benefit analyses to the White House.¹⁰³ 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.¹⁰⁴ For the Fed, this independence from presidential control has a long pedigree, and was memorialized and 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.¹⁰⁵ The other financial regulators have successfully traded on this tradition to establish a separation from the executive order for

⁹⁸ Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013).

⁹⁹ Cass Sunstein, *Commentary: The Office of Information and Regulatory Affairs, Myths and Realities*, 126 HARV. L. REV. 1837 (2013).

¹⁰⁰ 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) (“the 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 Maeve P. Carey, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, Congressional Research Service (Dec. 9, 2014), available at <https://fas.org/sgp/crs/misc/R41974.pdf>.

¹⁰¹ *Id.*

¹⁰² See PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* (2015) (describing the intense interest in preserving independence on the part of Fed officials – even though that independence often involves shifting and different meanings).

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ 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”).

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 2010.¹⁰⁶

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 under both law and policy.¹⁰⁷ 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, somewhat atextually, to ensure presidential control over policymaking.¹⁰⁸ 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.¹⁰⁹

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, the “buck stops” with the President.¹¹⁰ One implication of the Take Care Clause concerns removal – the “President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the

¹⁰⁶ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929-Z, 124 Stat. 1376, 1871 (2010) (codified at 15 U.S.C. § 78o).

¹⁰⁷ See Neomi Rao, *Regulatory Review for Independent Agencies*, THE REG. REV., December 14, 2016, <https://www.yalejreg.com/nc/regulatory-review-for-independent-agencies-by-neomi-rao/>.

¹⁰⁸ U.S. CONST. art. II, § 3 (providing that the President “shall take Care that the Laws be faithfully executed”).

¹⁰⁹ Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011) (citing that independent agencies only need to provide OMB with “annual agenda of significant regulatory actions”).

¹¹⁰ *Free Enter. Fund*, 561 U.S. at 484.

faithfulness of the officers who execute them,” as the Court has put it.¹¹¹ 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 privileges. It provides that the “executive power shall be vested in a President of the United States,” 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.¹¹² 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.¹¹³

But the modern application of the removal power has never been used on financial regulators, because of their status as “independent” agencies.¹¹⁴ The heads of independent agencies can only be removed for cause.¹¹⁵ For cause removal in theory is not an insuperable barrier to removal, but in practice 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.¹¹⁶ 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 (1981 – 2021), there have been 20 administrators

¹¹¹ *Id.* at 484.

¹¹² U.S. CONST. art. II, § 1, cl. 1.

¹¹³ *Myers v. United States*, 272 U.S. 52, 106, 47 S. Ct. 21, 22, 71 L. Ed. 160 (1926).

¹¹⁴ For cause removal protections were approved by the Supreme Court in *Humphrey’s Executor v. United States*, 295 U.S. 602, 620, 55 S.Ct. 869, 79 L.Ed. 1611 (1935). Now the Supreme Court infers those protections for all independent agencies, regardless of the statutory language. *Free Enterprise 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.”).

¹¹⁵ *Seila Law*, 140 S. Ct. 2183, 2192-2193 (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, 1198 (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. *Humphrey’s Executor*, 295 U.S. at 620.

¹¹⁶ David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REG. (2020). Available at: <https://digitalcommons.law.yale.edu/yjreg/vol37/iss2/6>.

(including acting administrators; 13 if acting ones are not counted) who have run the Environmental Protection Agency; during that time period, the Fed has had four chairs.¹¹⁷ The President’s control over 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.¹¹⁸

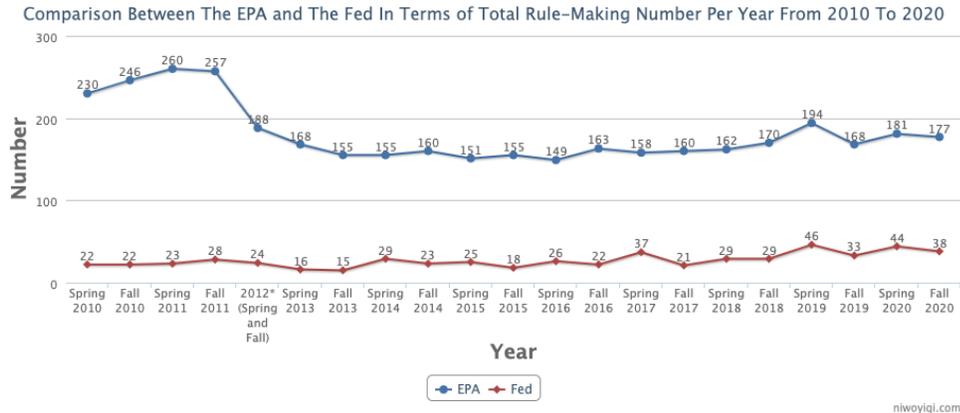
D. Financial Regulation Is Secretive

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 review in the courts of appeals, meaning that agencies who go through the process of rulewriting subject themselves to more judicial supervision and general transparency than those who do not.¹¹⁹

¹¹⁷ The list of EPA Administrators may be found at https://en.wikipedia.org/wiki/Administrator_of_the_Environmental_Protection_Agency, while the list of Fed chairs may be found at https://en.wikipedia.org/wiki/Chair_of_the_Federal_Reserve.

¹¹⁸ Lazarus’s argument may be found at <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4115&context=lcp>, 211 (“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”); <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4114&context=lcp>, 173

¹¹⁹ *Historical Unified Agenda and Regulatory Plan*, OFF. INFO. & REGUL. AFF., <https://www.reginfo.gov/public/do/eAgendaHistory> (last visited Sept. 8, 2021); *But see* Jennifer Nou & Jed Stiglitz, *Strategic Rulemaking Disclosure*, 88 S. CAL. L. REV. 773, 773-774 (2016) (“The resulting findings reveal that agencies substantially underreport their rulemaking activities—about 70 percent of their proposed rules do not appear on the Unified Agenda before publication.”).



However, as we can see, the Fed acts through notice and comment rulemaking relatively rarely.

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 \$10 million. In this section, the nature of the secret regulation of financial institutions will be explained; the proposal will be outlined in more detail in in the next one.

1. Bank Regulation Is Not Transparent.

For financial institutions, nonpublic enforcement has a safety and soundness basis.¹²⁰ Investors and depositors who hear from regulators that their bank has committed some sort of striking wrongdoing might be

¹²⁰ 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" and "to ensure that [banks] continue to cooperate . . . without fear that their confidential information will be disclosed");

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.¹²¹

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.¹²² 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 \$500 million, they must make that penalty public.¹²³ 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.¹²⁴

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 to grow its business – that is, expand the amount of assets under management - for

¹²¹ “Courts have observed that exemption 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.” 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) (citing *Berliner, Zisser, Walter & Gallegos v. SEC*, 962 F. Supp. 1348, 1353 (D. Colo. 1997); *Consumer's Union of U.S., Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978); *Feinberg v. Hibernia Corp.*, No. 90-4245, 1993 WL 8620, at *4 (E.D. La. Jan. 6, 1993)).

¹²² Governor Elizabeth A. Duke; Enforcement of Financial Consumer Protection Laws; Before the Committee On Financial Services, U.S. House Of Representatives, Washington, D.C. (March 20, 2009), BK. COMPL. GD. 6301404 (“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.”).

¹²³ See *infra* notes and accompanying text.

¹²⁴ 12 U.S.C.S. §1818(u).

years during the Obama administration.¹²⁵ 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.¹²⁶ 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.”¹²⁷ 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, 700 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.¹²⁸ Here too, the nature of these applications and the reasons for the denials were not made public.¹²⁹

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.¹³⁰ 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. Firms that come in

¹²⁵ Michelle Davis, *The U.S. Secretly Halted JPMorgan’s Growth for Years*, BLOOMBERG (Oct. 26, 2018 5:00 AM), <https://www.bloomberg.com/news/articles/2018-10-26/jpmorgan-s-secret-punishment-u-s-halted-its-growth-for-years?srnd=premium>.

¹²⁶ 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, 96 S. Ct. 2126, 2132, 48 L. Ed. 2d 757 (1976).

¹²⁷ Press Release, *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*, Federal Reserve Board, Feb. 2 (2018), <https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180202a.htm>.

¹²⁸ OFF. OF THE SEC’Y, U.S. SEC. AND EXCH. COMM’N, *Analysis of Disclosures by Bank Holding Companies for SEC File Number S7-02-17* (May. 8, 2017), <https://www.sec.gov/comments/s7-02-17/s70217-1749647-151707.pdf>.

¹²⁹ *See id.*

¹³⁰ Julie Stackhouse, *The ABCs of CAMELS*, FEDERAL RESERVE BANK OF ST. LOUIS (July 24, 2018), <https://www.stlouisfed.org/on-the-economy/2018/july/abcs-camels>.

with a score of three or lower will be subject to restrictions that limit their ability to engage in mergers or acquisitions.¹³¹ There is accordingly speculation about which of the largest banks would be 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.¹³²

The materiality of these secret sanctions is plain to see. A financial technology firm might explore options for it a strategic partnership with a large bank and yet not know whether some of the firms it courts would even be permitted to bid.¹³³ 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.¹³⁴

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 Freedom of Information Act exemption, and the judicial branch by recognizing a bank examination privilege at common law.

a. FOIA Exemption 8

The Freedom of Information Act generally makes government records availability to anyone who requests them; the idea is that government processes should be transparent.¹³⁵ The Supreme Court has explained that

¹³¹ *CAMELS Rating System*, CORPORATE FINANCE INSTITUTE, <https://corporatefinanceinstitute.com/resources/knowledge/finance/camels-rating-system/>.

¹³² “CAMELS ratings are non-public and always have been.” Heidi Mandanis Schooner, *The Secrets of Bank Regulation A Reply to Professor Cohen*, 6 GREEN BAG 2d 389, 390 (2003).

¹³³ *Id.* (“the CAMELS rating of a bank is material information”).

¹³⁴ FED. DEPOSIT INS. CORP., *Bank Financial Reports* (2020), <https://www.fdic.gov/regulations/resources/call/>.

¹³⁵ *EPA v. Mink*, 410 U.S. 73, 80 (1973) (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

the “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.”¹³⁶ FOIA comes with a number of exceptions, however, that 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.¹³⁷

The exception 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.¹³⁸ Exemption 8 is different.¹³⁹ 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.”¹⁴⁰ 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.¹⁴¹

Courts have viewed this, exemption as applicable to almost any record touching on the regulator-financial institution relationship.¹⁴² As the D.C. Circuit has put it, “Congress has left no room for a narrower interpretation of Exemption 8.”¹⁴³ 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.”¹⁴⁴

The exemption was created to alleviate the concern that there might be “unwarranted runs on banks” caused by the disclosure of “candid

unwilling official hands”). For a discussion of FOIA’s ends, see Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 949 (2006).

¹³⁶ N.L.R.B. v. Robbins Tire & Rubber Co., 437 U.S. 214, 242, (1978).

¹³⁷ John Doe Agency v. John Doe Corp., 493 U.S. 146, 152, (1989).

¹³⁸ See 5 U.S.C. § 552(b)(2), (4) (personnel matters and trade secrets, respectively).

¹³⁹ 5 U.S.C. § 552(b)(8).

¹⁴⁰ 5 U.S.C. § 552(b)(8). For a recent discussion, see James Madison Project v. Dep’t of the Treasury, 478 F. Supp. 3d 8, 13 (D.D.C. 2020).

¹⁴¹ See, e.g., Am. Civil Liberties Union 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.”).

¹⁴² “This exemption received little judicial attention during the first dozen years of the FOIA’s operation.” Department of Justice, *Freedom of Information Act Guide*, Exemption 8, 2004 WL 3775080, at *1.

¹⁴³ Consumers Union of U. S., Inc. v. Heimann, 589 F.2d 531, 535 (D.C. Cir. 1978).

¹⁴⁴ Gregory v. Fed. Deposit Ins. Corp., 631 F.2d 896, 898 (D.C. Cir. 1980).

evaluations of financial institutions.”¹⁴⁵ 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.’”¹⁴⁶

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.¹⁴⁷ Other courts have applied the exemption to communications by brokers and dealers with their regulators.¹⁴⁸ Courts have allowed secondary regulators like the SEC to invoke the privilege, nor are communications with failed banks – that is, no longer banks – subject to disclosure.¹⁴⁹

Exemption eight 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 22 FOIA cases, or 28 percent of the lawsuits in which it was involved over that decade.¹⁵⁰

b. 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, the 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.¹⁵¹

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 the confidence in the bank.”¹⁵²

¹⁴⁵ Nat'l Cmty. Reinvestment Coal., 290 F. Supp. 2d at 135-36.

¹⁴⁶ *McKinley v. F.D.I.C.*, 744 F. Supp. 2d 128, 143 (D.D.C. 2010), *aff'd sub nom. McKinley v. Bd. of Governors of Fed. Reserve Sys.*, 647 F.3d 331 (D.C. Cir. 2011).

¹⁴⁷ *Mermelstein v. S.E.C.*, 629 F. Supp. 672, 674 (D.D.C. 1986).

¹⁴⁸ *See id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See infra* part III.B.

¹⁵¹ *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 633-34 (D.C. Cir. 1992).

¹⁵² *In re Franklin Nat. Bank Sec. Litig.*, 478 F. Supp. 577, 586 (E.D.N.Y. 1979); *see also Delozier v. First Nat. Bank of Gatlinburg*, 113 F.R.D. 522, 526 (E.D. Tenn. 1986).

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.¹⁵³

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.”¹⁵⁴

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.¹⁵⁵

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.¹⁵⁶

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 have been

¹⁵³ “Only regulators have the standing to assert the privilege. As such, a bank cannot defend the privilege without a regulator’s support.” Eric B. Epstein, *Why the Bank Examination Privilege Doesn’t Work As Intended*, 35 YALE J. ON REG. BULL. 17, 23 (2017).

¹⁵⁴ Eric B. Epstein, David A. Scheffel, Nicholas A.J. Vlietstra, Ten Key Points About the Bank Examination Privilege, *Bus. L. Today*, February 2017, at 1, 2 (quoting the requirements).

¹⁵⁵ As revealed by a search of Westlaw for the terms.

¹⁵⁶ See *infra* part III.B.

meeting since 1974.¹⁵⁷ The designations of so-called systemically important financial institutions are made by the Financial Stability Board, an entity born in the wake of the financial crisis of 2007-2008, and comprised of regulatory groups like the Basel Committee, and international financial institutions like the IMF.¹⁵⁸ 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.¹⁵⁹ The FSB also made policy but managed the work of these rule makers, and both reported to and took direction from the G-20 heads of state and finance ministers.¹⁶⁰ 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.¹⁶¹

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.¹⁶² The FSB's designation process is essentially an adjudication on a transnational level, with detailed spelled-out metric 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. Designation costs large financial institutions dearly, it subjects them to extra capital requirements, and in the United States means additional supervision by the Fed.¹⁶³

The capital adequacy rules and 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 regulatory network, the Financial Action Task

¹⁵⁷ See *Basel Comm. On Banking Supervision, Bank For International Settlements, History Of The Basel Committee And Its Membership* 1, <http://www.bis.org/bcbs/history.pdf>. For a discussion of the committee's evolution, put 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 CHARLES GOODHART, *THE BASEL COMMITTEE ON BANKING SUPERVISION* (2011).

¹⁵⁸ Our History, FIN. STABILITY BOARD, <http://www.fsb.org/about/history>.

¹⁵⁹ See DAVID ZARING, *THE GLOBALIZED GOVERNANCE OF FINANCE* (2021).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² 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)

¹⁶³ See Colleen Baker, *The Federal Reserve As Last Resort*, 46 U. MICH. J.L. REFORM 69, 108 (2012) (noting that designation comes with “additional supervision and regulation”).

Force.¹⁶⁴ Other regulatory networks have adopted international processes that dictate how regulators must act when they return home.¹⁶⁵

The process offered banks in this international policymaking is incommensurate with the degree of process enjoyed by industry vis a vis domestic regulators (although the international process is, admittedly, increasingly adopting the values of domestic policymaking¹⁶⁶). The financial industry, when it comes to the production of process, is a net loser when more process moves to the international context. 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.¹⁶⁷

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.¹⁶⁸ 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.¹⁶⁹ But, with the exception of some modest transparency

¹⁶⁴ See *id.*

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ For a discussion, see DAVID ZARING, *THE GLOBALIZED GOVERNANCE OF FINANCE* (2020).

¹⁶⁸ “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.” *The Paris Agreement: Frequently Asked Questions*, THE UNITED NATIONS, <https://www.un.org/sustainabledevelopment/blog/2016/09/the-paris-agreement-faqs/>. Banks are, for what it is worth, voluntarily attempting to comply with the Paris climate obligations. Sarah Light & Christina Skinner, *Banks and Climate Governance*, 121 COLUM. L. REV. (forthcominG-2021).

¹⁶⁹ “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 preferential treatment of developing country imports).” Robert Howse, Joanna Langille, *Permitting Pluralism: The Seal Products Dispute and Why the WTO Should Accept Trade*

requirements, it makes no provision for how a country must operate its customs service.¹⁷⁰ The migratory bird treaty regime protects over thousand particular species, but that does not spell out how affirmative obligations to support declining bird stocks might or must be implemented.¹⁷¹ 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.¹⁷² Although matters have changed, 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.¹⁷³

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 promising at the international level to implement particular

Restrictions Justified by Noninstrumental Moral Values, 37 YALE J. INT'L L. 367, 398 (2012).

¹⁷⁰ Article X of the GATT requires countries to adopt some publication and transparency requirements. For a discussion see Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 263, 317; G. Richard Shell, *Trade Legalism and International Relations Theory: An Analysis of the World Trade Organization*, 44 DUKE L.J. 829, 850 (1995).

¹⁷¹ “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.” Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 TEX. L. REV. 1321, 1441 (2001). The treaty was later expanded to cover migrations of birds from Russia and Mexico, among some other countries. *See id.*

¹⁷² “Some regulatory networks have, for example, adopted principles of process that any American administrative lawyer would find familiar.” Anne-Marie Slaughter & David Zaring, *Networking Goes International: An Update*, 2 ANN. REV. L. & SOC. SCI. 211, 222 (2006).

¹⁷³ 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).

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.¹⁷⁴

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.¹⁷⁵

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 Act, Congress took some steps towards embracing the increasingly important international cooperation that it 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.”¹⁷⁶ 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.”¹⁷⁷ 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 encourage comprehensive and robust prudential supervision and

¹⁷⁴ David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U.L. REV. 59, 62 (2013).

¹⁷⁵ As one observer has put it, “Sovereignty 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.” David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U.L. REV. 59, 62 (2013).

¹⁷⁶ Dodd-Frank Act § 175(a), 12 U.S.C. § 5373(a).

¹⁷⁷ Dodd-Frank Act § 175(b), 12 U.S.C. § 5373(b).

regulation for all highly leveraged and interconnected financial companies.”¹⁷⁸

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. 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.¹⁷⁹ And national security matters have explicitly been exempted from the APA.¹⁸⁰ 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 for both 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.

¹⁷⁸ Dodd-Frank Act § 175(c), 12 U.S.C. § 5373(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) (reasoning that “[a]lthough the mandates of section 175 are vague, Congress’s acknowledgement of the need for international coordination is admirable”).

¹⁷⁹ Ranjit Lall (2012) *From Failure to Failure: The Politics of International Banking Regulation*, REVIEW OF INTERNATIONAL POLITICAL ECONOMY, 19:4, 609.

¹⁸⁰ See Jared P. Cole, *The Good Cause Exception to Notice and Comment Rulemaking: Judicial Review of Agency Action*, Congressional Research Service (Jan. 29, 2016), available at <https://fas.org/sgp/crs/misc/R44356.pdf>.

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. 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. It does not apply to the independent agencies typical in financial regulation — the Fed, OCC, and FDIC.¹⁸¹

Executive Order 12291 and its successors have required agencies within the executive branch to conduct cost-benefit analyses to justify major rules. The analysis is subject to review by OIRA, an agency located within the White House; it reviews these rules both pre-solicitation for comments and pre-finalization.¹⁸² 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.”¹⁸³ The D.C. Circuit has interpreted this statute to require some sort of a cost-benefit analysis.¹⁸⁴

¹⁸¹ *Id.*

¹⁸² *Information and Regulatory Affairs*, THE WHITE HOUSE, <https://www.whitehouse.gov/omb/information-regulatory-affairs/>.

¹⁸³ Securities Act of 1933, 15 U.S.C. § 77b(b) (2012); Securities Exchange Act of 1934, 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 (2017).

¹⁸⁴ *Bus. Roundtable v. S.E.C.*, 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 Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 443 (2015) (“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.”).

Although math is the preferred approach, agencies will on occasion perform a qualitative cost-benefit analysis where a quantitative one is impossible.¹⁸⁵ 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.¹⁸⁶

But banking regulators do not have to comply with this process. They are all, with the exception of Treasury (which handles financial regulation only really to the extent that its secretary chairs the FSOC), independent agencies located outside the executive branch.¹⁸⁷ 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.¹⁸⁸

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 administration.¹⁸⁹ Those agencies have rarely done these analyses in

¹⁸⁵ 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.” Office of Mgmt. and Budget, Circular A-4, at 10 (2003)

¹⁸⁶ Lisa Heinzerling, *Statutory Interpretation in the Era of OIRA*, 33 FORDHAM URB. L. J. 1097, 1097 (2006).

¹⁸⁷ As Adam Levitin has explained, “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.” Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 369 (2013).

¹⁸⁸ 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. LEG. STUDIES S379, S385 (2014); <https://www.federalreserve.gov/foia/files/regulatory-burden-reduction-111115.pdf> (“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”).

¹⁸⁹ There are a number of scholars who have called for quantitative cost-benefit analysis to inform as many rules as possible. See, for example, Eric A. Posner and E. Glen Weyl, *The Case for Cost-Benefit Analysis of Financial Regulations*, 36 Reg. 30, 32–34 (Winter 2013–2014); 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 and Michael A. Livermore, *Retaking Rationality: How Cost-Benefit Analysis Can Better Protect the Environment and Our Health* 9–10 (Oxford 2008). But there are many who disagree. See,

the past.¹⁹⁰ But during the Trump administration, the agencies said that they would give cost-benefit analysis a try.¹⁹¹

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.”¹⁹² 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.¹⁹³ But just how saved it was, how much are the regulations had to do with the saving, and how bad it could have gotten, are counterfactual matters that policymakers have given up estimating.

for example, John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 *Yale L.J.* 882, 1011 (2015) (arguing that the “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 the “[p]erils of [p]recision”).

¹⁹⁰ 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 ...”).

¹⁹¹ For a discussion, see Christina Parajon Skinner, *Presidential Pendulums in Finance*, 2020 *COLUM. BUS. L. REV.* 532, 558 (2020) (“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, “In 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 REG.* 545, 547 (2017).

¹⁹² Maeve P. Carey, *Cost-Benefit and Other Analysis Requirements in the Rulemaking Process*, Congressional Research Service (Dec. 9, 2014), available at <https://fas.org/sgp/crs/misc/R41974.pdf>.

¹⁹³ John Cassidy, *No Credit – Timothy Geithner’s financial plan is working—and making him very unpopular*, *The New Yorker* (Mar. 8, 2010), <https://www.newyorker.com/magazine/2010/03/15/no-credit-2>, (“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,” [Geithner] said. “We saved the economy, but we kind of lost the public doing it.”).

Cost-benefit analysis and financial regulation is, as even its proponents admit, a challenge to apply to financial regulators. It is this benefit — the value of a financial crisis avoided — that is the purpose of financial regulation, and its safety and soundness mandate. But making a quantitative measure of this value requires a mountain of assumptions. The numbers chosen for the projections of what is 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.¹⁹⁴ 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, GDP growth, 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.¹⁹⁵ Cost-benefit analysis in financial regulation might accordingly be a bad idea.

The question as to whether cost-benefit analysis should be applied to financial regulators will rage on. Proponents who want it to apply will have a very difficult time exploring a way around the benefits of the purpose of financial regulation, which is to avoid a financial crisis, a value hard to calculate, especially quantitatively.

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 the Trump administration regulators vowed to ensure that regulation was cost-benefit justified, their cost-benefit analyses were strained at best, the sorts of analyses that would not pass muster with OIRA

¹⁹⁴ John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 931 (2015) (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 every agrees. See, e.g., Cass R. Sunstein, *Financial Regulation and Cost-Benefit Analysis*, 124 YALE L.J.F. 263, 270 (2015), <http://www.yalelawjournal.org/forum/financial-regulation-and-cost-benefit-analysis>.

¹⁹⁵ John H. Cochrane, *Challenges for Cost-Benefit Analysis of Financial Regulation*, 43 J. LEG. STUD. 5 (2014).

were they subject to review by the office.¹⁹⁶ 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 manufacturers.¹⁹⁷ Although the Treasury Department urged financial regulators to conduct cost-benefit analyses to the extent possible during the Trump administration, the OCC did not do one in finalizing the fair access rule, suggesting a lack of commitment to the cause.¹⁹⁸

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.¹⁹⁹

IV. 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.²⁰⁰ 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

¹⁹⁶ Stuart Shapiro, *OIRA and the Future of Cost-Benefit Analysis*, THE REGULATORY REVIEW (May 19, 2020), <https://www.theregreview.org/2020/05/19/shapiro-oira-future-cost-benefit-analysis/>.

¹⁹⁷ Proposed Rule Would Ensure Fair Access to Bank Services, Capital, and Credit, OFFICE OF THE COMPTROLLER OF THE CURRENCY (Nov. 20, 2020), <https://www.occ.gov/news-issuances/news-releases/2020/nr-occ-2020-156.html>.

¹⁹⁸ Other financial regulators also committed themselves to cost-benefit analysis. Financial Stability Oversight Council, “Authority To Require Supervision and Regulation of Certain Nonbank Financial Companies,” Federal Register 84 (249) (2019): 71740, available at <https://www.federalregister.gov/documents/2019/12/30/2019-27108/authority-to-require-supervision-and-regulation-of-certain-nonbank-financial-companies>.

¹⁹⁹ See Kagan, *supra* note __.

²⁰⁰ Art Wilmarth, *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CIN. L. REV. 1283.

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.

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.

The perfectible bureaucracy account has led to the extraordinarily lengthy rulemakings that characterize modern American administrative law,²⁰¹ and the presiding over them by the Office of Information and Regulatory Affairs, technocratic experts who insist on a quantitative demonstration that for all policymaking, the measured benefits exceed the measured costs.²⁰² "Hard look" judicial review also is meant to put agencies to the test.²⁰³

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.²⁰⁴ The deference and delegation to experts paradigm turns on the deference afforded by *Chevron v. NRDC*, the most cited case in administrative law,²⁰⁵ and the moribund

²⁰¹ 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) ("delay 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); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 65 (1995) ("courts have transformed the simple, efficient notice and comment process into an extraordinary lengthy, complicated process").

²⁰² See *infra*, notes ___ and accompanying text.

²⁰³ *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29 (1983) (affirming practice of judicial "hard look" at agency action).

²⁰⁴ See *infra* notes __ and accompanying text.

²⁰⁵ "Chevron ... is the most cited case in administrative law." 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

nature of the nondelegation doctrine, usually the first subject to be covered in any administrative law course in law school.²⁰⁶ 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.²⁰⁷ Some of those justices have also called for a revisitation of *Chevron* deference as well.²⁰⁸ But even if these doctrines were revisited, there would still be havens of discretion left to those regulators unpoliced by judicial review.²⁰⁹ 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.²¹⁰

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

to the precise question at issue.” *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 843 n.9 (1984). If so, the statute is “unambiguous[,]” and the agency must not differ from Congress’ clearly expressed command. *Id.* 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.* For one of the leading critiques, see Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992) (“the 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”).

²⁰⁶ “As 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.” David Zaring, *Toward Separation of Powers Realism*, 37 YALE J. ON REG. 708, 720 (2020).

²⁰⁷ *Gundy v. United States*, 139 S. Ct. 2116, (Alito, J. concurring); *id.* at 2143 (Gorsuch, J., dissenting, with three other justices) (“[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.”). Julie Suk Gersen, *The Supreme Court Is One Vote Away from Changing How the U.S. Is Governed*, THE 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/SP5K-9924>] (“Kavanaugh’s absence from the case [Gundy] likely changed its outcome”).

²⁰⁸ “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.” Ryan D. Doerfler, *High-Stakes Interpretation*, 116 MICH. L. REV. 523, 572 (2018).

²⁰⁹ See *infra* Part III.E.

²¹⁰ See *supra* notes ___ and accompanying text,

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.

We can make sense of the paradox of a procedurally unprotected financial sector that has prospered only by broadening our understanding of what can be accomplished in the administrative state. There are 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 regimes and workplace safety regimes might be examples.²¹¹ 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 in all, 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 business and government. 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.²¹² Abuses — overcharges, featherbedding by contractors, a bait and switch by the government — are common, but these abuses are resolved not through transparency and public participation, but through competitive bidding, a robust inspection process and, if necessary, a

²¹¹ For example, see Don Fullerton & Erich Muehlegger, *Who Bears the Economic Costs of Environmental Regulations?*, National Bureau of Economic Research (August 2017), <https://www.nber.org/papers/w23677>.

²¹² For example of such partnership in the UK, see, Peter R.J. Trim, *Private-public partnerships and the Defence Industry*, EUROPEAN BUSINESS REVIEW (Aug. 2001), available at https://www.researchgate.net/publication/242022915_Public-private_partnerships_and_the_defence_industry.

contract-oriented dispute resolution process. Like our banks, our military is preeminent, and the results 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.²¹³ Defense contractors can press their claims in the Court of Federal Claims, but the largest defense contractor rarely do so – much like the case with banks.²¹⁴ 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.²¹⁵ For integrative governance, the administrative law paradigm, with lawsuits after notice and comment rulemaking and a process-policing judiciary is much less important.²¹⁶ 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, with profitable banks with strong balance sheets. The paradigm is a public-private partnership, as Minneapolis Federal Reserve Bank President Neil Kashkari has put it.²¹⁷

²¹³ 5 U.S.C. 553(a) exempts “a military or foreign affairs function of the United States” from the APA’s rulemaking requirements. “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.” C. Jeffrey Tibbels, *Delineating the Foreign Affairs Function in the Age of Globalization*, 23 SUFFOLK TRANSNAT’L L. REV. 389, 390 (1999) The constraint – which only applies to agency rulemaking – can be overinterpreted. “As 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.” Jean Galbraith & David Zaring, *Soft Law As Foreign Relations Law*, 99 CORNELL L. REV. 735, 764 (2014).

²¹⁴ Steven L. Schooner, *Bid Protests: The RAND Study of DOD Protests at the GAO and the COFC*, 32 NCRNL ¶ 10 (“the 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.’”)

²¹⁵ *See id.*

²¹⁶ 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).

²¹⁷ 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. Omarova, Saule T., *The People’s Ledger: How to Democratize Money and Finance the Economy* (October 20, 2020). Cornell Legal Studies Research Paper No. 20-45, Available at SSRN: <https://ssrn.com/abstract=3715735> (“In a franchise-like arrangement, the Fed modulates the supply of sovereign credit money but outsources the economy-wide allocation of this

There are other parallels as well. “What 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 and Andrew Robert argued in the 1980s.²¹⁸

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.²¹⁹ 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.²²⁰ 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 services, and price regulation to constrain the returns to the shareholders of the private industry.²²¹ The idea was that these private

precious resource to specially licensed and regulated private financial institutions: banks.”) See also Morgan Ricks, *Money as Infrastructure*, 2018 COLUMBIA BUSINESS LAW REVIEW, 757 (2018). Available at: <https://scholarship.law.vanderbilt.edu/faculty-publications/1048>; White, Alan M., Banks as Utilities (January 4, 2016). Tulane Law Review, Vol. 90, 2016, Available at SSRN: <https://ssrn.com/abstract=2847815>. For a dissent, see <https://www.americanbanker.com/opinion/why-banks-should-never-become-utilities> (“bankers 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”).

²¹⁸ Daniel R. Fischel & Andrew M. Robert, *The Regulation of Banks and Bank Holding Companies*, 73 VA. L. REV. 301, 302 (1987).

²¹⁹ As the Supreme Court put it in *Interstate Commerce Commission v. Baltimore & Ohio Railroad Co.*, 145 U.S. 263, 275, 12 S.Ct. 844, 36 L.Ed. 699 (1892), “the 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.”

²²⁰ As Herbert Hovenkamp has explained, “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.” Herbert Hovenkamp, *Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem*, 97 YALE L.J. 1017, 1035–36 (1988).

²²¹ On this score, see Brett Frischmann & Spencer Weber Waller, *Revitalizing Essential Facilities*, 75 ANTITRUST L.J. 1, 65 (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.”).

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).²²² 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 observer of the defense contracting process has observed, it is better to get along with the government than litigate when it comes to military contracts. “Even if you win, you may find it is a Pyrrhic victory because you have alienated so many government officials in the process,” said the government contracts lawyer Timothy Sullivan.²²³

A better way to think about the relationship between banks in 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.²²⁴ 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, “Collaborative processes that rely on shared public-private responsibility for governance would seem to pose some of the dangers of corporatist regimes, including, serious difficulties with the fixity of their interest categories and the vestedness of their constituent organizations.”²²⁵

²²² Hockett, Robert C. and Omarova, Saule T., *The Finance Franchise* (August 8, 2016). 102 CORNELL L. REV. 1143 (2017), Cornell Legal Studies Research Paper No. 16-29, Available at <https://ssrn.com/abstract=2820176> or <http://dx.doi.org/10.2139/ssrn.2820176>

²²³ Timothy Sullivan, *Contracting Commandment No. 7: Thou shalt avoid hostility*, FED. NEWS. NET., Feb 17, 2015, <https://federalnewsnetwork.com/management/2015/02/contracting-commandment-no-7-thou-shalt-avoid-hostility/>.

²²⁴ For a discussion, see Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 84–85 (1997).

²²⁵ Jody Freeman, *Collaborative Governance in the Administrative State*, 45 UCLA L. REV. 1, 84–85 (1997).

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” in exchange for the “state’s close association and coordination with the monopolistic functional units.”²²⁶

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.²²⁷ One can find corporate law precedents urging the sort of non-adversarial approach taken in financial regulation. Some of it appears 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.²²⁸ 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. 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 and importance the federal government; or in their struggles they will tear the system to pieces.”²²⁹ As he put it, “it is necessary to do for the system what Bismarck did for the German system in 1880,” that is, coordinate the work of big business with the interests of the state, to avoid this sort of disaster.²³⁰

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

²²⁶ Roberta Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923, 934 (1984).

²²⁷ Medieval guilds were trade associations that “restricted competition, set prices, ..., controlled entrance, and training, and generally developed ordinances governing ‘every conceivable relationship’ involving members.” JOEL E. GERSTL, PROFESSIONS FOR THE PEOPLE: THE POLITICS OF SKILL 2 (JOEL E. GERSTL & G. JACOBS EDS., 1976). For a discussion, see Amy R. Mashburn, *Professionalism As Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657, 671 (1994).

²²⁸ Adolf A. Berle, *Corporate Powers As Powers In Trust*, 44 HARV. L. REV. 1049 (1931).

²²⁹ To see the memo and the analysis that it was written by Berle, SEE JORDAN A. SCHWARZ, LIBERAL: ADOLF A. BERLE AND THE VISION OF AN AMERICAN ERA 78 (1987).

²³⁰ *Id.* For a 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).

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.²³¹

These two variants of corporatism, as Bratton and 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, for Dodd, to the non-shareholder stakeholders in the corporation.²³² 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 the public interest.”²³³

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.

V. BRINGING ADMINISTRATIVE LAW BACK TO FINANCIAL REGULATION

²³¹ E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1153 (1932).

²³² William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 125 (2008).

²³³ *Munn v. Illinois*, 94 U.S. 113, 130 (1876) (internal quotation marks omitted) (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)). As Lina Kahn has explained, “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.” Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1017–18 (2019).

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.

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.²³⁴ 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.²³⁵

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.²³⁶ 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 policymaking.²³⁷ 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 enjoy 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

²³⁴ Note, *Too Sovereign to Be Sued: Immunity of Central Banks in Times of Financial Crisis*, 124 HARV. L. REV. 550, 562 (2010) (arguments in favor of central bank independence have largely won the day among economists”).

²³⁵ Alberto Alesina and Lawrence H. Summers (1993), ‘Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence,’ *Journal of Money, Credit and Banking*, vol. 25 (May), pp. 151-62.

²³⁶ The primary dealer list may be found at <https://www.newyorkfed.org/markets/primarydealers>.

²³⁷ See Panagiota Papadimitri & Fotios Pasiouras & Gioia Pescetto & Ansgar Wohlschlegel, 2018. *"Does Political Influence Distort Banking Regulation? Evidence from the US,"* Working Papers in Economics & Finance 2018-09, University of Portsmouth, Portsmouth Business School, Economics and Finance Subject Group. (finding an inverse relationship between the number of enforcement actions filed against a bank headquartered in an influential congressperson's district).

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. Banks should be willing to sue the regulators, regulators should disclose any “injunctive” order predicted to have an impact of \$10 million or more on any bank, and transparency in international standard-setting should continue to be improved.

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.²³⁸ 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 them that are heard in the Court of Federal Claims.²³⁹ These relationships are imperfect, to be sure, there is some evidence that the largest defense contractors prefer to vindicate their rights more informally.²⁴⁰ 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

²³⁸ See *infra*, notes ___ and accompanying text.

²³⁹ See *supra* notes ___ and accompanying text.

²⁴⁰ See *supra* notes ___ and accompanying text.

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.²⁴¹ 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.²⁴²

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 the amendment to an enforcement manual. Regulators should disclose any injunctive sanction projected to add \$10 million or more in costs to the bank being sanctioned. This rule would cover orders not to grow, most declinations of applications for acquisitions, and MRIs 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. The usual basis for nonpublicness — that bank customers will lose trust in banks, and pulled their resources when banks need those resources the most — is unpersuasive.

Extraordinarily few banks fail outside of a financial crisis. In the last twenty years, only 561 of the country's 4519 banks (as of 2020)²⁴³ failed, despite going through two great financial crises and a dotcom crisis as

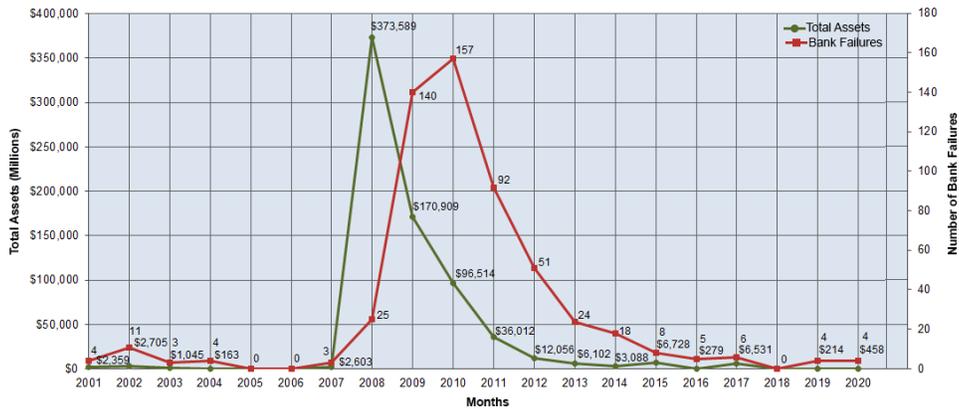
²⁴¹ See U.S. Gov't Accountability Off., Highlights of GAO-13-101, A Report to Congressional Addressees (2012), available at <http://www.gao.gov/assets/660/6509> 48.pdf (recommending consistency in regulatory analyses).

²⁴² 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.

²⁴³ The FDIC tracks this number. https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CB RANCHES%2CNew_Char&selectedEndDate=2020&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=desc.

well.²⁴⁴ 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 8315 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 2 below indicates.²⁴⁵

Figure 2



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 past two decades resulted in a bank run. There is no reason to think that a bank financed mostly by deposits would be at any risk of destabilization even if an extremely 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.

²⁴⁴ The FDIC data may be found at https://banks.data.fdic.gov/explore/historical?displayFields=STNAME%2CTOTAL%2CB RANCHES%2CNew_Char&selectedEndDate=2020&selectedReport=CBS&selectedStartDate=1934&selectedStates=0&sortField=YEAR&sortOrder=descv.

²⁴⁵ The chart was created by the FDIC and is available at <https://www.fdic.gov/bank/historical/bank/>.

America's largest banks have paid a regular series of large fines to various government agencies.²⁴⁶ 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.²⁴⁷ 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. 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.²⁴⁸ 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. But there is no reason this process could not be more formalized, with something akin to the Unified Regulatory Agenda, which reports the regulatory plans of every American regulator on an annual basis.²⁴⁹

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 2007-08 in particular.²⁵⁰ 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

²⁴⁶ Zaring, David T., *Enforcement Against the Biggest Banks* (August 21, 2020). Available at SSRN: <https://ssrn.com/abstract=3678439> or <http://dx.doi.org/10.2139/ssrn.3678439>.

²⁴⁷ 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>.

²⁴⁸ For an example of this, see the Basel Committee on Banking Supervision's website, which may be found at <https://www.bis.org/bcbs/>.

²⁴⁹ The Unified Regulatory Agenda may be found at <https://www.reginfo.gov/public/do/eAgendaMain>.

²⁵⁰ See DAVID ZARING, *THE GLOBALIZED GOVERNANCE OF FINANCE* (2020).

of governance is succeeding without a treaty, and multilateral treaties are extraordinarily difficult to conclude.²⁵¹

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 welcome 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.²⁵²

CONCLUSION

The argument in this article is that banking regulation is better understood as a public-private partnership, that this partnership model explains why the traditional component of a fair regulatory system are lacking in financial regulation. 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

²⁵¹ 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).

²⁵² The point is somewhat Weberian. For a related take, see Perry Dane, *Vested Rights, 'Vestedness,' and Choice of Law*, 96 YALE L.J. 1191, 1230 (1987) (“bureaucracies, 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”). Nelson, Caleb, *Vested Rights, "Franchises," and the Separation of Powers* (November 3, 2020). University of Pennsylvania Law Review, (vol. 169) 2021 Forthcoming, Virginia Public Law and Legal Theory Research Paper No. 2020-60, Available at SSRN: <https://ssrn.com/abstract=3674597>

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.