Major Questions' Quiet Crisis

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Abstract. During the New Deal, President Franklin D. Roosevelt declared that the United States was facing a "quiet crisis." The Supreme Court had struck down his administration's rules governing the petroleum and poultry industries. Unlike the recent banking panic that had caused the Great Depression, there were "no lines of depositors outside closed banks." The situation, Roosevelt said, would nonetheless be "far-reaching in its possibilities of injury to America." The courts ultimately relented, leaving the remainder of the New Deal regulatory settlement largely intact.

Today, the United States confronts another "quiet crisis." The U.S. banking system has experienced a decade and a half of instability, from the financial crisis in 2008 to the failure of Silicon Valley Bank in 2023. Meanwhile, the Supreme Court's decision in West Virginia v. EPA *has called into question the ability of administrative agencies to address pressing social and economic problems. The Court's newly established major questions doctrine restricts administrative agencies' authority to address matters of political or economic importance unless Congress has explicitly enumerated the agency's authority to regulate the specific issue under consideration.*

This Article will argue that the major questions doctrine is a flawed administrative framework that should not be extended to banking law. The major questions doctrine's bias in favor of narrow, inflexible regulatory authority conflicts with Congress's desire that banking regulation adapt to the dynamic nature of

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finance. It also undermines courts' deference to banking agencies' policy judgments in recognition of the specialness of banking and bank regulators' expertise. Applying the major questions doctrine to U.S. banking law demonstrates the doctrine's unworkability as a matter of administrative law. It also reveals the doctrine's consequences for the banking system—ranging from increased banking instability and market uncertainty to reduced policymaking predictability and transparency.

Introduction

Banking and finance have played an important role in the development of U.S. administrative agencies almost since the Founding—from the establishment of the Treasury Department[1] to the creation of the Bank of the United States.[2] The creation of the national banking system during the Civil War and the enactment of the New Deal banking reforms following the Great Depression reinforced this connection.[3] But the New Deal, including the banking reforms enacted to protect investors and consumers from financial excesses, encountered a swift and forceful backlash from conservative economic and business interests.[4] The Supreme Court struck down the Roosevelt administration's New Deal rules governing the petroleum and poultry industries.[5] President Franklin D. Roosevelt referred to the Court's actions as a "quiet crisis."[6] Unlike the banking panic that had caused the Great Depression, there were "no lines of depositors outside closed banks," but Roosevelt argued that the Court's assertion of power would nonetheless be "far-reaching in its possibilities of injury to America."[7] The Court ultimately exercised judicial restraint, leaving much of the New Deal financial regulatory settlement intact.[8]

Today, the United States faces the prospect of another "quiet crisis." Like in the New Deal era, the U.S. banking system has experienced fifteen years of instability from the 2008 financial crisis to COVID-19's financial disruptions to the panic that swept across the banking system after the

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[1] *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 345–46 (2021); *see also* Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS. 129, 129 (2015).

[2] *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 323 (1819).

[3] *See* Saule T. Omarova, *New Tech v. New Deal: FinTech as a Systemic Phenomenon*, 36 YALE ON J. REGUL. 735, 746–50 (2019) (describing the "New Deal settlement" in U.S. financial regulation).

[4] *See generally* KIM PHILLIPS-FEIN, INVISIBLE HANDS: THE MAKING OF THE CONSERVATIVE MOVEMENT FROM THE NEW DEAL TO REAGAN (2009) (describing the rise of conservative politics in postwar America as a reaction to the New Deal).

[5] *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 384–85 (2017); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 551 (1935) (striking down industry codes under the National Industrial Recovery Act, this opinion was joined by progressive Justice Louis Brandeis); Daniel A. Crane, *How Much Brandeis Do the Neo-Brandeisians Want?*, 64 ANTITRUST BULL. 531, 533 (2019).

[6] President Franklin D. Roosevelt, Fireside Chat (March 9, 1937), *in* AMERICAN PRESIDENCY PROJECT, https://perma.cc/5FSQ-SCUE.

[7] *Id.*

[8] *See* Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 J. CONST. L. 251, 257–58 (2010).

failure of Silicon Valley Bank ("SVB").[9] At the same time, courts have, through a series of administrative law decisions, "cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions."[10]

This legal effort is responsible for the "rapid and curious rise" of the major questions doctrine,[11] explicitly recognized for the first time by the Supreme Court in *West Virginia v. EPA*.[12] The Major questions doctrine restricts administrative agencies from addressing issues of significant policy importance unless Congress has explicitly enumerated the agency's authority to address a given issue.[13] Having overturned regulations including public health measures responding to the COVID-19 pandemic, environmental rules, and a student loan forgiveness program,[14] there is growing interest in applying the major questions doctrine to financial regulations.[15] By doing so, courts would limit banking agencies' authority to respond to the immediate issues raised by the SVB panic and take preemptive steps to prevent future banking crises.

The major questions doctrine not only risks a metaphorical crisis of the kind that President Roosevelt warned about, but also a literal financial crisis. While the doctrine presents itself as embodying the simple idea that

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[9] *See* Graham S. Steele, *Banking as a Social Contract*, 22 U.C. DAVIS BUS. L.J. 65, 82–86, 102–20 (2021); *see also* Andrea Shalal, Howard Schneider & Pete Schroeder, *After SVB Failure, US Acts to Shore Up Banking System Confidence*, REUTERS (Mar. 13, 2023, 2:35 PM), https://perma.cc/YVG3-HNCT.

[10] Roosevelt, *supra* note6; *see, e.g.*, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2211 (2020) (finding the Consumer Financial Protection Bureau ("CFPB") director's for-cause removal provision unconstitutional); Collins v. Yellen, 141 S. Ct. 1761, 1787 (2020) (finding the Federal Housing Finance Agency director's for-cause removal provision unconstitutional); Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., 33 F.4th 218, 242 (5th Cir. 2022) (holding the CFPB's non-appropriated funding structure unconstitutional); Jarkesy v. SEC, 34 F.4th 446, 465 (5th Cir. 2022) (invalidating the Securities and Exchange Commission's ("SEC") authority to address securities fraud); *see also* Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 101 (2022) ("The Court has not (yet) gone so far as to dismantle the administrative state. But it is clearly embarked on a project to rein in the power of administrative agencies, at least when they do things the current Court majority doesn't like.").

[11] Adam Liptak, *The Curious Rise of a Supreme Court Doctrine that Threatens Biden's Agenda*, N.Y. TIMES (Mar. 6, 2023), https://perma.cc/5TDW-XRDP.

[12] 142 S. Ct. 2587 (2022); *see* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1013 (2023).

[13] *See infra* Section II.A.

[14] *See id.*

[15] *See* Stefania Palma & Kiran Stacey, *Supreme Court Ruling Casts Doubt on Powers of US Regulators*, FIN. TIMES (July 4, 2022), https://perma.cc/9666-ULPZ.

agencies should "stick to [their] knitting,"[16] this framing is deceptive. The modern world—especially the financial market—is complex. That is why U.S. banking laws provide broad grants of authority for expert agencies to respond to a rapidly changing marketplace.[17] Over 150 years, the meaning of "banking" evolved from redeeming bank notes on the prairies of the United States to dealing complex derivative instruments in London without any material amendments to the "bank powers clause" of the National Bank Act ("NBA").[18] The major questions doctrine threatens to interfere with this and other foundational principles of banking law, upending market expectations and increasing financial instability.[19] This Article argues that these outcomes would do neither the public nor market participants any good.

This Article adds banking law to a growing body of major questions doctrine analysis.[20] This Article does not offer a comprehensive account of the U.S. banking and consumer financial protection laws or the nuance and complexity of administrative law. Instead, this Article uses certain longstanding and contemporary banking law authorities to illustrate the major questions doctrine's unfitness as a tool for reviewing banking regulations. This is not meant to imply that the doctrine is appropriate in other regulatory contexts; indeed, many of its shortcomings apply to other regulatory regimes.[21] Likewise, not all deference to banking agency

[16] Jerome H. Powell, Chair, Bd. of Governors of the Fed. Rsrv. Sys., Central Bank Independence and the Mandate—Evolving Views, Remarks at the Symposium on Central Bank Independence 1 (Jan. 10, 2023).

[17] *See infra* Section I.B.1.

[18] *See infra* Section I.B.1.b.

[19] *See infra* Part III.

[20] *See, e.g.*, Jonas J. Monast, *Major Questions About the Major Questions Doctrine*, 68 ADMIN. L. REV. 445, 447 (2016); Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1937 (2017); Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2025 (2018); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1076 (2019); Alison Gocke, Chevron*'s Next Chapter: A Fig Leaf for the Nondelegation Doctrine*, 55 U.C. DAVIS L. REV. 955, 959 (2021); Deacon & Litman, *supra* note 12, at 1012; Natasha Brunstein & Donald L. R. Goodson, *Unheralded and Transformative: The Test for Major Questions After* West Virginia, 47 WM. & MARY ENV'T L. & POL'Y REV. 47, 49 (2022).

[21] Others have critiqued the major questions doctrine's application to agency authorities including environmental regulation, national security law, and technology policy. *See* Kevin O. Leske, *Major Questions About the "Major Questions" Doctrine*, 5 MICH. J. ENV'T & ADMIN. L. 479, 497–99 (2016); Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 ADMIN L. REV. 217, 250 (2022); Timothy Meyer & Ganesh Sitaraman, *The National Security Consequences of the Major Questions Doctrine*, 122 MICH. L. REV. 55, 78 (2023); Walter G. Johnson & Lucille M. Tournas, *The Major Questions Doctrine and the Threat to Regulating Emerging Technologies*, 39 SANTA CLARA HIGH TECH. L.J. 137, 165–80 (2023).

interpretations, or specific agency interpretations, is necessarily desirable—agencies have often been overly permissive in their interpretations of the scope of banking activities and federal preemption. This Article nonetheless argues that, in contrast to the framework offered by the major questions doctrine, the present regulatory settlement is the product of intentional congressional decision-making and reasoned judicial restraint. Relative to the status quo, the doctrine is unworkable as a matter of administrative law and imprudent as a matter of banking law.

This Article proceeds in the following parts. Part I lays out the special nature of banking, the foundations of banking authorities, and judicial deference to banking agencies' actions. Part II elaborates on the major questions doctrine and its emerging line of cases and applies the doctrine to banking regulation. Part III considers the consequences of the major questions doctrine, both as a general administrative law doctrine and as applied to banking regulation, before concluding that courts should decline to extend it to bank regulation.

While the major questions doctrine has to date only applied to bank regulation in limited circumstances,[22] that could soon change. Claims under the doctrine could gain traction as a path to challenge bedrock principles of U.S. banking law, potentially obstructing banking agencies' responses to the causes of SVB's failure.[23] It could also jeopardize efforts to implement post-financial crisis capital regulations,[24] address risks posed by cryptocurrencies,[25] and confront the financial impacts of climate change.[26] Merely incorporating the theory into popular discourse, accompanied by the threat of litigation, could have a chilling effect.[27]

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[22] *See* Monast, *supra* note 20, at 470–71, 470 n.164 (noting that federal courts have applied the major questions doctrine to interpret the scope of National Bank Act ("NBA") preemption and the definition of "financial institution" under the Gramm-Leach-Bliley Act).

[23] *See generally* Alan Rappeport, Jim Tankersley & Lauren Hirsh, *Powell and Yellen Suggest Need to Review Regulations After Bank Failures*, N.Y. TIMES (Mar. 22, 2023), https://perma.cc/T8XT-GGQU.

[24] *See* Regulatory Capital Rule: Large Banking Organizations and Banking Organizations With Significant Trading Activity, 88 Fed. Reg. 64028 (Sept. 18, 2023).

[25] *See* Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Fed. Deposit Ins. Corp. & Off. of the Comptroller of the Currency, Agencies Issue Joint Statement on Crypto-asset Risks to Banking Organizations (Jan. 3, 2023), https://perma.cc/3VJ6-Y6UD.

[26] *See* Principles for Climate-Related Financial Risk Management for Large Financial Institutions, 87 Fed. Reg. 75267 (Dec. 8, 2022).

[27] *See* Mortenson & Bagley, *supra* note 1, at 288. Scholarship suggests that agency policymakers are generally cognizant of agency deference in the judicial review process. *See* Christopher J. Walker, Chevron *Inside the Regulatory State: An Empirical Assessment*, 83 FORDHAM L. REV. 703, 722–24 (2014); Jonathan H. Choi, *Legal Analysis, Policy Analysis, and the Price of Deference: An Empirical Study of* Mayo *and* Chevron, 38 YALE J. ON REGUL. 818, 851–53 (2021).

Banking agencies may be hesitant to test the bounds of their authority due to fear of political backlash.[28]

The stakes are high. As the 2008 financial crisis and the 2023 banking panic demonstrate, regulatory inaction in the face of emerging financial risks has dire consequences.[29] Even the New Deal Court, when given the chance, did not invalidate the financial regulatory agencies and powers enacted in response to the Great Depression.[30] It would therefore be unwise to risk a judicially created financial crisis.

I. U.S. Banking: Private Corporations, Public Purpose, and Broad Authorities

Beginning with the formation of the First Bank of the United States, continuing in the Civil War era, and culminating in the New Deal reforms, the United States constructed a national banking system using a framework of federal licensure, strict regulation and supervision, government guarantees, and robust liquidity support. The unique structure of banking *regulation* is based upon the special attributes of the banking *business*. Recognizing the highly specialized nature of banking, courts have been loath to second-guess the judgments of expert banking agencies. These "legal and regulatory principles . . . continue to shape the operation of the U.S. financial system today."[31]

A. *The Specialness of Banking*

Banking is a special kind of economic activity.[32] Banks use deposits, credit, payment services, and related activities to provide "liquidity" that ensures households and businesses are able to meet their financial

[28] *See e.g.*, J. Howard Beales, *The FTC's Use of Unfairness Authority: Its Rise, Fall, and Resurrection*, 22 J. PUB. POL'Y & MKTG. 192 (2003) (documenting Congress's response to the FTC's use of its unfairness authority).

[29] *See infra* Section III.B.1; *see also* Jeanna Smialek, *A Big Question for the Fed: What Went Wrong With Bank Oversight?*, N.Y. TIMES (Mar. 21, 2023), https://perma.cc/BN4M-W99J.

[30] While the Court in *Jones v. SEC*, 298 U.S. 1, 28 (1935), compared the SEC's civil investigative tactics to the "intolerable abuses of the Star Chamber," it declined to consider the argument that the Securities and Exchange Act of 1934 was unconstitutional.

[31] Omarova, *supra* note 3, at 746.

[32] *See* FED. RSRV. BANK MINNEAPOLIS, *Are Banks Special?*, *in* ANNUAL REPORT OF 1982, at 5 (1983); Thomas M. Hoenig, *Financial Modernization: Implications for the Safety Net*, 49 MERCER L. REV. 787, 788 (1998); *see also* Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 CORNELL L. REV. 1143, 1158 (2017).

obligations.[33] Recognizing that banks are not like industrial companies, banking law provides unique public supports but also subjects banks to a variety of distinctive pricing regulations, entry and growth restrictions, solvency requirements, and operational supervision.[34] Financial markets and instruments are human-made and their scope is defined largely by federal laws and regulations.[35]

1. Banks Were Created as Public Instrumentalities

The origins of the national banking system began with the creation of the First Bank of the United States, the design of which was inspired in substantial part by the Bank of England.[36] Alexander Hamilton, the first Secretary of the Treasury and the Bank of the United States' chief architect, saw banks as "nurseries of national wealth" and believed the Bank's "intimate connexion of interest [with] the Government" positioned it to serve as an instrument of broader government policy.[37]

Today, national banks are private corporations that can only operate through charters issued by banking agencies as delegated by Congress.[38] These private banks were traditionally viewed as "instrumentalities of the Federal government, created for a public purpose."[39] In addition to their

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[33] *See* Anil K. Kashyap, Raghuram Rajan & Jeremy C. Stein, *Banks as Liquidity Providers: An Explanation for the Coexistence of Lending and Deposit-Taking*, 57 J. FIN. 33, 34–35 (2002); *see also* Nada Mora, *Can Banks Provide Liquidity in a Financial Crisis?*, 95 ECON. REV. 31, 38 (2010).

[34] *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 327–30 (1963); *see also* Noble State Bank v. Haskell, 219 U.S. 104, 111–13 (1911).

[35] *See* Hockett & Omarova, *supra* note 32, at 1155. *See generally* KATHARINA PISTOR, THE CODE OF CAPITAL: HOW THE LAW CREATES WEALTH AND INEQUALITY (2019) (describing how the law is designed toward the interests of asset holders).

[36] *See* Charles J. Reid, *America's First Great Constitutional Controversy: Alexander Hamilton's Bank of the United States*, 14 U. ST. THOMAS L.J. 105, 118–20 (2018) (citation omitted). New York's "free banking" law served as another influence on the federal banking laws. *See* Bray Hammond, *Free Banks and Corporations: The New York Free Banking Act of 1838*, 44 J. POL. ECON. 184, 184 (1936).

[37] Reid, *supra* note 36, at 122–23 (quoting U.S. Dep't of the Treasury, Report on a National Bank, 2 Annals of Cong. 2034 (1790)).

[38] *See* McCormick v. Market Bank, 165 U.S. 538, 551 (1897).

[39] Davis v. Elmira Savings Bank, 161 U.S. 275, 283 (1896); *see also* Farmers' and Mechs.' Nat'l Bank v. Dearing, 91 U.S. 29, 33 (1875) (noting that national banks are "instruments designed to be used to aid the government in the administration of an important branch of the public service"); Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 996–98 (2021). *But see* First Agric. Nat'l Bank of Berkshire Cnty. v. State Tax Comm'n, 392 U.S. 339, 353–56 (1968) (Marshall, J. dissenting) (arguing that banks are distinct from tax-immune federal instrumentalities because they are a privately owned corporations existing for the private profit of shareholders, perform no significant federal governmental function that is not performed equally by

historical role as fiscal agents entrusted with safekeeping public deposits,[40] banks serve a monetary function by creating money through their direct relationship with the central bank.[41]

The history of banking is "the long search for institutions that can ensure a 'sound currency.'"[42] During the era of "free banking," currency was issued by states and bank notes often traded at a discount to their face value due to uncertainty about credit quality and convertibility into government notes.[43] The era was beset by financial instability, including two significant panics.[44]

In 1863, the NBA established the Office of the Comptroller of the Currency ("OCC"), creating a uniform national currency.[45] Only national banks chartered and supervised by the OCC could issue the national currency.[46] The creation of the OCC both ensured the stability of banking but was also a "major victory for the federal government's control of the money supply and authority over the monetary system."[47] Then-Treasury

state-chartered banks, government officials do not run their day-to-day operation, and the Government has no "ownership interest" in a national bank).

40 *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 396–97 (1819). This view is still codified in various sections of the banking laws. National banks "designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, under such regulations as may be prescribed by the Secretary; and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositaries of public money and financial agents of the Government, as may be required of them." 12 U.S.C. § 90. National banks may also apply to the Fed for permission to establish foreign branches "for the furtherance of the foreign commerce of the United States, and to act if required to do so as fiscal agents of the United States." 12 U.S.C. § 601 (1948)

41 *See Phila. Nat'l Bank*, 374 U.S. at 326 ("[B]anks do not merely deal in, but are actually a source of, money and credit . . . ."); *see also* James Tobin, *Financial Innovation and Deregulation in Perspective*, 3 BANK OF JAPAN MONETARY & ECON. STUDIES 19, 19 (1985) ("[B]anks . . . are not just like other industries . . . . [t]hey are the institutions through which central bank operations of monetary control are transmitted to the economy at large.").

42 Gary Gorton, Address at the Federal Reserve Bank of Atlanta's 2009 Financial Markets Conference: Slapped in the Face by the Invisible Hand: Banking and the Panic of 2007, 41 (May 9, 2009).

43 MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY 36 (1st ed. 2016) (noting that the pre-NBA period was an "era of 'wildcat' banks located in remote areas to avoid redemption of banknotes for specie; 'shinplasters,' banknotes of dubious quality; and 'carpetbaggers' who came from the Northeast to the West and South to redeem banknotes"); *see* John Wilson Million, *The Debate on the National Bank Act of 1863*, 2 J. POL. ECON. 251, 264 (1894) ("Failures were frequent; only a short time prior to this the states in the Mississippi Valley had experienced a very severe trial with 'wild-cat' and 'bogus' banks.").

44 *See* BARR, JACKSON & TAHYAR, *supra* note 43, at 36.

45 *See id.* at 37–38.

46 *See id.* at 38.

47 *Id.*

Secretary Salmon Chase described the national banking system as being built on a "foundation of national credit combined with private capital."[48]

Banking is thus largely understood as a public function that Congress has delegated to private banks, subject to oversight by federal banking agencies.[49]

2. Banking is the Lifeblood of the Economy

Banks play a "key role in the national economy" through their power to create money and credit, the proper exercise of which is "indispensable to a healthy national economy."[50] Money and credit are the "lifeblood of communities,"[51] and their stability preserves the proper functioning and growth of the economy.[52] Conversely, breakdowns of banking and payment systems create negative externalities that harm the broader economy.[53]

But banking is unstable. Banks are more fragile than other commercial businesses, and therefore subject to runs and panics that can metastasize into financial crises.[54] As a result, banks have a "safety net" of support through public deposit insurance and central bank liquidity.[55]

Following a banking panic in 1907, triggered by trust companies that made loans and took deposits but were not regulated like banks, the Federal Reserve System was established through the Federal Reserve Act of 1913 ("FRA").[56] The Federal Reserve ("Fed") regulates state-chartered

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[48] Million, *supra* note 43, at 264. The model of the Bank of the United States also envisioned a combination of both public and private capital. *See* Reid, *supra* note 36, at 124.

[49] *See* Van Reed v. People's Nat'l Bank, 198 U.S. 554, 557 (1905) ("National banks are quasi-public institutions . . . ."); *see also* Hockett & Omarova, *supra* note 32, at 1158 ("[Banks are] licensed private purveyor[s] of the public full faith and credit . . . ."); Menand, *supra* note 39, at 974–80 (discussing the "outsourcing model" of banking); Morgan Ricks, *A Regulatory Design for Monetary Stability*, 65 VAND. L. REV. 1289, 1343–54 (2012) (demonstrating that banks operate under a public-private partnership model).

[50] United States v. Phila. Nat'l Bank, 374 U.S. 321, 326–27 (1962).

[51] H.R. REP. NO. 95-1383, at 9 (1978); *see also* H.R REP. NO. 84-609, at 2, (1955).

[52] *See* S. REP. NO. 89-1482, at 5 (1966) ("The vital importance of sound and effective systems of banks . . . to the continued economic growth of the country is clear."); *see also* S. REP. NO. 100-19, at 8 (1987) ("Our free-enterprise economy relies on banks to allocate credit to its most productive use. When bankers make good credit decisions, the entire economy benefits; when bankers make poor credit decisions, economic growth is impaired."); S. REP. NO. 106-44, at 4, (1999) ("The pace of economic growth in this country depends in large part on the ability of the financial services industry to function efficiently.").

[53] *See* Hoenig, *supra* note 32, at 788; *see also* Steele, *supra* note 9, at 73–75.

[54] *See* Steele, *supra* note 9, at 82–86.

[55] *See* Hoenig, *supra* note 32, at 788.

[56] *See* BARR ET AL., *supra* note 43, at 42.

member banks and bank holding companies ("BHCs").[57] The FRA was intended to address the need for both an elastic currency supply as well as a "lender of last resort" to which banks can pledge assets in exchange for liquidity.[58] The Fed implements the nation's monetary policy, executes lender-of-last-resort functions, and administers clearing and payment systems.[59] The Fed has an additional implied purpose of ensuring the stability of the financial system[60] to support the productive functioning of industry and the economy.[61]

The Federal Deposit Insurance Corporation ("FDIC") was conceived in the aftermath of the banking panic of 1929–1933 and the ensuing Great Depression.[62] Today, the FDIC supervises state-chartered banks that are not members of the Federal Reserve System, operates the Deposit Insurance Fund, and resolves troubled banks.[63]

The federal safety net—provided by Fed lending and FDIC insurance—limits the negative externalities from financial instability but also gives rise to moral hazard.[64] The safety net has expanded over time, having been used in recent decades to support a range of financial claims and protect deposits that are not subject to FDIC insurance during times of financial stress.[65]

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57 EDWARD V. MURPHY, CONG. RSCH. SERV., R43087, WHO REGULATES WHOM AND HOW? AN OVERVIEW OF U.S. FINANCIAL REGULATORY POLICY FOR BANKING AND SECURITIES MARKETS 13 (2013). A BHC is a company that owns one or more banks. *See* 12 U.S.C. § 1841(a)(1).

58 BARR ET AL., *supra* note 43, at 41.

59 *See* Murphy, *supra* note 57, at 13.

60 *See* Renee Haltom & John A. Weinberg, *Does the Fed Have a Financial Stability Mandate?*, FED. RSRV. BANK RICHMOND ECON. BRIEF, June 2017, at 1, https://perma.cc/G49Z-HRYP.

61 *See* ROBERT L. OWEN, THE FEDERAL RESERVE ACT: ITS ORIGIN AND PRINCIPLES 43–44, 99 (1919).

62 *See* Mark D. Flood, *The Great Deposit Insurance Debate*, 74 FED. RSRV. BANK ST. LOUIS REV. 51, 53 (1992); Banking Act of 1935, Pub. L. No. 74-305, 49 Stat. 684 (1935).

63 12 U.S.C. § 1821.

64 *See* Hoenig, *supra* note 32, at 788. Moral hazard is "the expectation that, when faced with the prospect of either variant of a major blow to the financial system, government authorities will provide funds or guarantees to the firm to keep it functioning," which means creditors "may not price into their credit or investment decisions the full risk associated with those decisions." Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Rsrv. Sys., Regulating Systemic Risk, Remarks at the 2011 Credit Markets Symposium 2 (Mar. 31, 2011).

65 *See* Steele, *supra* note 9, at 83–86; *see also* Press Release, Fed. Deposit Ins. Corp., Joint Statement by the Department of the Treasury, Federal Reserve, and FDIC (Mar. 12, 2023), https://perma.cc/G39K-XFBK.

3. Banking Is Highly Regulated

Banks have a unique relationship with their regulators.[66] The velocity of money, financial markets, and financial instruments requires financial regulators to be nimbler and more responsive than regulators overseeing less ephemeral industries.[67] Congress has recognized the special nature of banking, and the accompanying need for robust regulation to prevent its misuse.[68]

Banks are subject to restrictions on their activities, affiliations, and conduct.[69] The NBA limits national banks to the "business of banking": permissible activities identified in the "bank powers clause."[70] Provisions of the Banking Act of 1933, known as the "Glass-Steagall" Act, extended federal oversight to all commercial banks and separated commercial and investment banking.[71] The Banking Act also added section 23A to the FRA, creating a separation between banks and their nonbank affiliates operating in a single corporate structure.[72] The law gave the Fed authority to limit the interest rate banks could pay to attract time and savings deposits, and it "prohibited paying interest on demand deposits."[73] The Banking Act also established how state usury laws limiting the interest rate national and state banks charge for credit apply to both national and state-chartered banks.[74] Underscoring the sanctity of traditional banking,

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66 *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 326 (1963).

67 *See* Daniel K. Tarullo, *Bank Supervision and Administrative Law*, 2022 COLUM. BUS. L. REV. 279, 293 (2022); Robert B. Ahdieh, *Notes from the Border: Writing Across the Administrative Law/Financial Regulation Divide*, 66 J. LEGAL EDUC. 64, 71 (2016); *see also* David Aikman, Andrew G. Haldane, Marc Hinterschweiger & Sujit Kapadia, *Rethinking Financial Stability* 3 (Bank of Eng., Working Paper No. 712, 2018).

68 *See, e.g.*, S. REP. NO. 84-1095, at 1 (1955) ("[B]ecause of the importance of the banking system to the national economy, adequate safeguards should be provided against undue concentration of control of banking activities.").

69 *See Phila. Nat'l Bank*, 374 U.S. at 327–29.

70 12 U.S.C. § 24.

71 Banking Act of 1933, 12 U.S.C. § 227.

72 *See* Veryl Victoria Miles, *Banking Affiliate Regulation Under Section 23A of the Federal Reserve Act*, 105 BANKING L.J. 476, 480–81 (1988).

73 *See* Bernard Shull, *The Origins of Antitrust in Banking: An Historical Perspective*, 27 J. REPRINTS ANTITRUST L. & ECON. 75, 84 (1997). The Fed implemented these restrictions through its Regulation Q. *See* Prohibition Against Payment of Interest on Demand Deposits, 76 Fed. Reg. 42015 (July 18, 2011) (codified at 12 C.F.R. pts. 204, 217, 230).

74 *See* Banking Act of 1933, Pub. L. No. 73-66, § 21, 48 Stat. 162, 189 (1933). Many states had usury caps on consumer loans. Deposit interest rate restrictions were intended to ensure that banks were guaranteed certain profit margins on their loans without needing to compete by paying higher deposit interest rates or making riskier loans. *See* Lawrence J. White, *Antitrust and Financial Regulation in*

the Banking Act made it a criminal offense for any institution other than a bank to take deposits.[75]

Two decades later, the Bank Holding Company Act of 1956 ("BHCA") further tightened the restrictions on the use of banking powers.[76] The BHCA requires any BHC to limit its activities and investments to banking, managing or owning banks, or activities determined to be closely related to banking.[77] It also kept depository and commercial lending institutions from conducting commercial activities consistent with the longstanding separation of banking and commerce.[78]

Unlike other administrative fields, banking agencies engage in examination and supervision of banks' operations.[79] The supervisory process is "often more informal, ad hoc, and hidden from public view" than formal regulation,[80] including through its use of supervisory and interpretive letters, agency guidance, and other communications.[81] Supervision allows regulators to communicate that certain practices are disfavored in a more timely and individualized way than broad-based regulations. Supervision is exempt—sometimes expressly, at other times by custom with Congress's implicit blessing—from regulatory procedural requirements.[82]

Supervision is the "most effective weapon of federal regulation of banking," allowing banking agencies to "maintain virtually a day-to-day surveillance of the American banking system."[83] A bank that belongs to the Federal Reserve System cannot change the "general character of its business or in the scope of the corporate powers it exercises" without its supervisor's approval.[84] Information gleaned through supervision, known

the Wake of Philadelphia National Bank*: Complements, Not Substitutes*, 80 ANTITRUST L.J. 413, 421 (2015).

75 *See* Banking Act of 1933, Pub. L. No. 73-66, § 21, 48 Stat. 162, 189 (1933).

76 Bank Holding Company Act of 1956, Pub. L. No. 84-511, § 4, 70 Stat. 133, 135 (1956).

77 *Id.*

78 *See* Saule T. Omarova. *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 274–75 (2013).

79 *See* Noble State Bank v. Haskell, 219 U.S. 104, 112 (1911).

80 Metzger, *supra* note 1, at 130; *see* Tarullo, *supra* note 67, at 281 ("Supervision is an iterative process of communication between banks and supervisors.").

81 *See* Tarullo, *supra* note 67, at 349–63.

82 *See* Menand, *supra* note 39, at 1007–13.

83 United States v. Phila. Nat'l Bank, 374 U.S. 321, 329 (1963).

84 12 C.F.R. § 208.3(d)(2); *see also* Bd. of Governors of the Fed. Rsrv. Sys., Guidance Regarding Significant Changes in the General Character of a State Member Bank's Business and Compliance with Regulation H, SR 02-9 (Mar. 20, 2002).

as "supervisory experience," can also inform agency regulations.[85] Enforcement actions can reinforce supervision, helping to ensure that "recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings."[86]

U.S. banking law "vests substantive control over the allocation of risks and returns in financial markets in private actors operating on a micro-level and assigns the responsibility for ensuring financial stability to public actors operating on a macro-level."[87] Banking agencies have broad powers to enforce statutory limits on the banking franchise and constrain financial institutions' behavior to ensure the solvency of individual institutions and safeguard the stability of the financial system.[88] Bank regulation prevents abuse of banks' special powers and the potential resulting public harms.[89] Banks' close regulation and government backing has allowed bank products to enjoy exemptions from legal protections that otherwise apply to riskier products.[90] Finally, it also generally reinforces the public's confidence in the banking system.[91]

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[85] *See, e.g.*, Transactions Between Member Banks and Their Affiliates, 67 Fed. Reg. 76560, 76584 (Dec. 12, 2002) (codified at 12 C.F.R. pt 223) (noting the Fed's Regulation W's treatment of bank affiliate transfers is "consistent with the Board's supervisory experience"); Definitions of "Predominantly Engaged In Financial Activities" and "Significant" Nonbank Financial Company and Bank Holding Company, 78 Fed. Reg. 20756, 20774 (Apr. 5, 2013) (codified at 12 C.F.R. pt. 242) (noting that in establishing a $50 billion threshold for large Bank Holding Companies ("BHCs"), the Fed "considered its supervisory experience with bank holding companies"); Margin and Capital Requirements for Covered Swap Entities, 85 Fed. Reg. 39754, 39760 (July 1, 2020) (codified at 12 C.F.R. pts. 45, 237, 249, 624, 1221) (noting that "supervisory experience . . . has raised two interrelated concerns at the institution-specific level and the systemic level about the utility of initial margin to address exposures arising from inter-affiliate swap transactions").

[86] *Phila. Nat'l Bank*, 374 U.S. at 330.

[87] Omarova, *supra* note 3, at 749.

[88] *See* Noble State Bank v. Haskell, 219 U.S. 104, 112 (1911).

[89] *See* Steele, *supra* note 9, at 70–75.

[90] *See* Marine Bank v. Weaver, 455 U.S. 551, 559 (1982) ("It is unnecessary to subject issuers of bank certificates of deposit to liability under the antifraud provisions of the federal securities laws since the holders of bank certificates of deposit are abundantly protected under the federal banking laws."); *see also* Legal Certainty for Bank Products Act of 2000, Pub L. No. 106-554, tit. IV, §§ 401-408, 114 Stat. 2763A–457 (2000) (codified at 7 U.S.C. § 27 *et seq.*) (exempting certain "identified banking products" from the jurisdiction of the Commodity Futures Trading Commission).

[91] *See* McCormick v. Market Bank, 165 U.S. 538, 552 (1897) (noting an "important object of Congress" in establishing the NBA's chartering provisions was to "create and maintain public confidence in the new system of national banks").

4. Bank Runs Have Well-Understood Dynamics

The experiences of recurring banking panics have informed the evolution of bank regulation.[92] Despite the introductions of new technologies, products, and services, banking panics in 1929, 2008, and 2023 share many attributes.[93] Bank runs and systemic shocks occur through leverage and liquidity mismatches, creditor and depositor withdrawals, and defaults and asset fire sales.[94] Banking reforms have focused on increasing institutional resilience and providing for more robust government oversight.[95] While Congress has adjusted aspects of the foundational banking statutes over time to address emerging issues, these reforms generally built upon the longstanding regulatory architecture.

In the lead-up to the 2008 financial crisis, banking laws were administratively and legislatively eroded in order to respond to the "continued decline of the franchise value of traditional depository institutions."[96] The Gramm-Leach-Bliley Act ("GLBA") authorized BHCs to engage in a broad range of financial activities, such as securities underwriting and dealing, and engaging in the business of insurance, as well as some nonfinancial commercial activities.[97] The crisis that resulted involved a combustible mixture of large BHCs, lightly regulated nonbank financial companies, complex and unregulated financial instruments, and

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[92] *See* Daniel K. Tarullo, Member, Bd. of Governors Fed. Rsrv. Sys., Remarks at the Distinguished Jurist Lecture at the University of Pennsylvania Law School: Financial Stability Regulation 1 (Oct. 10, 2012).

[93] *See id.*; *see also* FIN. CRISIS INQUIRY COMM'N, FINANCIAL CRISIS INQUIRY REPORT 367 (2011) (noting that in 2008, Wachovia Bank experienced a "'silent run' by uninsured depositors and unsecured creditors sitting in front of their computers, rather than by depositors standing in lines outside bank doors"); Emily Flitter & Rob Copeland, *Silicon Valley Bank Fails After Run on Deposits*, N.Y. TIMES (Mar. 10, 2023), https://perma.cc/8VPU-H2HJ.

[94] *See generally* Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. POL. ECON. 401 (1983); Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the Brookings Institution: Thinking Critically About Nonbank Financial Intermediation 3 (Nov. 17, 2015).

[95] *See* Morgan Ricks, *Regulating Money Creation After the Crisis*, 1 HARV. BUS. L. REV. 75, 115 (2011). *Compare* S. REP. NO. 73-77, at 11 (1933) (noting the responses to the banking panic included strengthening bank capital and closer and stronger supervision) *with* S. REP. NO. 111-176, at 3 (2010) (noting the need for "more stringent capital and liquidity standards for large and complex financial firms").

[96] Daniel K. Tarullo, *Financial Regulation: Still Unsettled a Decade After the Crisis*, 33 J. ECON. PERSPS. 61, 62–63 (2019); *see also* Am. Bankers Ass'n v. SEC, 804 F.2d 739, 740–42 (1986) (describing the OCC's interpretations of the Glass-Steagall Act to allow national banks to engage in a variety of securities activities); Arthur E. Wilmarth, Jr., *The Road to Repeal of the Glass-Steagall Act*, 17 WAKE FOREST J. BUS. & INTELL. PROP. L. 441, 445–46 (2017).

[97] *See* Steele, *supra* note 9, at 75–76.

broad-based use of the federal safety net to support financial institutions and markets.[98]

The legislative response—the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank Act")—was hailed as the "most comprehensive set of reforms to our financial system since the Great Depression."[99] The Dodd-Frank Act invoked the New Deal as its inspiration, and, consistent with prior legislative reforms, conferred enhanced regulatory authority on the banking agencies.[100] The law sought to address the inadequate regulation and supervision of the largest banking organizations that became "Too Big to Fail" when financial panic ensued.[101] The Dodd-Frank Act also addressed the failures, near-failures, and bailouts of under-regulated nonbank financial companies engaging in bank-like activities, including the investment banks Bear Stearns and Lehman Brothers and the insurance company American International Group ("AIG").[102] The Financial Stability Oversight Council ("FSOC") was created to "monitor emerging risks to U.S. financial stability [and] recommend heightened prudential standards for large, interconnected financial companies."[103]

To address the "prevalence of unsound lending practices, including predatory lending tactics, most often in the subprime market,"[104] the Dodd-Frank Act created the Consumer Financial Protection Bureau ("CFPB"), an agency with a mission to "protect consumers from the reckless financial practices that had caused the then-ongoing economic collapse."[105] The CFPB's purpose is to "implement and . . . enforce Federal consumer financial law consistently for the purpose of ensuring that all consumers have access to markets for consumer financial products and

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98 *See id.* at 83–86.

99 U.S. DEP'T OF THE TREASURY, THE DODD-FRANK ACT: REFORMING WALL STREET AND PROTECTING MAIN STREET (2017) (on file with author).

100 *See* Omarova, *supra* note 3, at 754; *see also* Graham S. Steele, *The Tailors of Wall Street*, 93 U. COLO. L. REV. 993, 1000 (2022); Tarullo, *supra* note 94, at 63, 70; Sen. Jeff Merkley & Sen. Carl Levin, *The Dodd-Frank Act Restrictions on Proprietary Trading and Conflicts of Interest: New Tools to Address Evolving Threats*, 48 HARV. J. LEGIS. 515, 538–39 (2011) (framing the so-called "Volcker Rule" provision as the modern successor to Glass-Steagall).

101 *See* U.S. DEP'T OF THE TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 19 (2009).

102 *See* S. REP. NO. 111-176, at 40–42 (2010).

103 *Id.* at 2. The ten voting members of the Financial Stability Oversight Council ("FSOC") include the Treasury Secretary, who serves as its chairperson and the heads of other federal financial regulatory agencies. *Id.* at 47.

104 *Id.* at 43.

105 Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2244 (2020) (Kagan, J., dissenting).

services and that markets for consumer financial products and services are fair, transparent, and competitive."[106]

The Dodd-Frank Act's approach to financial stability expanded upon traditional BHC regulation as the "core element in its new architecture of systemic risk regulation."[107] Its consumer financial protections reorganized and supplemented existing authorities. While the Dodd-Frank Act changed *how* regulators approached their responsibilities, it reaffirmed longstanding statutory frameworks governing bank regulation.[108]

When the banking system experienced instability in 2023, the dynamics and responses were similar, if not identical in some instances, to past episodes. The depositor runs were addressed by backstopping all depositors in failed institutions, and the banking system was provided liquidity support through an emergency Fed lending facility.[109] Subsequent regulatory reform proposals focused on improving the substance of existing BHC regulations.[110]

B. *Banking Agency Authorities and Judicial Deference*

In crafting the banking laws, Congress has recognized the special nature of banking. Courts have appreciated that banking is often highly technical and deferred to banking agencies' expertise. As a result, banking regulators have been delegated significant authority and enjoyed substantial deference.

1. Congress Has Delegated Significant Authority to Banking Agencies

Congress has given bank regulators significant discretion to interpret broad statutory terms. Using their authority, banking agencies restrict

[106] 12 U.S.C. § 5511(a).

[107] Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. OF BANKING & FIN. L. 113, 114 (2012). It also built on section 23A's restrictions on bank transactions with affiliates by extending these restrictions to securities lending and derivatives transactions. *See* Steele, *supra* note 100, at 1022–23, 1023 n.37.

[108] *See* Omarova & Tahyar, *supra* note 107, at 114 (noting in the Dodd-Frank Act, "Congress reaffirmed the central importance of the BHC construct in the regulatory paradigm.").

[109] *See* Press Release, *supra* note 65.

[110] *See Recent Bank Failures and the Federal Regulatory Response: Hearing Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 118th Cong. 21 (2023) (statement of Martin J. Gruenberg, Chairman, Fed. Deposit Ins. Corp.) ("The prudential regulation of [banks with assets of $100 billion or more] merits additional attention, particularly with respect to capital, liquidity, and interest rate risk.").

companies from operating in financial markets absent a demonstration that they can operate in a safe and sound manner. Banks can only engage in activities that are consistent with traditional banking norms, do not threaten financial stability, and are not harmful to consumers, investors, and the public.

a. *Safety and Soundness*

Because instability is a recurring theme of banking, [111] ensuring that banks possess sound finances and risk management is a central goal of banking law and policy.[112] The Federal Deposit Insurance Act ("FDIA") authorizes banking agencies to establish standards, by regulation or guidance, for "unsafe and unsound" practices.[113] It also requires any bank or BHC to cease and desist its engagement in unsafe or unsound practices.[114] The FDIC has the "formidable power" to revoke a bank's deposit insurance for engaging in unsafe and unsound practices,[115] and it can remove and bar officers and directors from participating in the affairs of a bank.[116] The ability to conduct activities in a "safe and sound manner" is intimately linked to whether an activity is permissible for a bank to conduct.[117]

Safety and soundness authority encompasses a broad range of practices.[118] Safety and soundness provides a basis for agencies to issue capital and solvency rules.[119] Agencies have scrutinized a variety of banks' and BHCs' activities on the basis of safety and soundness authority,

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111 *See* Fahey v. Mallonee, 332 U.S. 245, 250 (1947).

112 *See* H. REP. NO. 95-1383, at 9 (1978) ("[T]he public's need for laws to assure a safe, sound, and responsive financial system is obvious.").

113 12 U.S.C. § 1831p–1(b); Standards for Safety and Soundness, 60 Fed. Reg. 35674 (July 10, 1995) (codified at 12 C.F.R. pts. 30, 208, 263, 303, 308, 364, 570). They also have discretion to determine when a bank's failure to meet minimum capital standards constitutes an unsafe and unsound practice. *See* 12 U.S.C. § 3907(b)(1).

114 *See* 12 U.S.C. §§ 1818(b)(1), (b)(3).

115 United States v. Phila. Nat'l Bank, 374 U.S. 321, 329–30 (1963); *see also* 12 U.S.C. § 1818(a).

116 *See* 12 U.S.C. § 1818(e)(1).

117 Chief Counsel's Interpretation Clarifying: (1) Authority of a Bank to Engage in Certain Cryptocurrency Activities; and (2) Authority of the OCC to Charter a National Trust Bank, Off. of the Comptroller of the Currency Interpretive Letter, No. 1179 at 2–3 (Nov. 18, 2021).

118 *See* Tarullo, *supra* note 67, at 281 (highlighting that safety and soundness authority "can include just about anything a bank is doing that may materially affect its financial soundness").

119 *See* Regulatory Capital Rules: Regulatory Capital, Implementation of Basel III, Capital Adequacy, Transition Provisions, Prompt Corrective Action, Standardized Approach for Risk-Weighted Assets, Market Discipline and Disclosure Requirements, Advanced Approaches Risk-Based Capital Rule, and Market Risk Capital Rule, 78 Fed. Reg. 62018, 62026 (Oct. 11, 2013) (codified at 12 C.F.R. pts. 218, 217, 225).

including engaging in fraudulent foreign exchange trading,[120] lacking adequate money laundering and sanctions compliance,[121] and offering payday-type consumer loans.[122] Safety and soundness is also used to enforce prohibitions against unfair, deceptive, and abusive practices against consumers under section 5 of the Federal Trade Commission Act ("FTC Act").[123]

Safety and soundness authority provides regulators with powerful remedies. In 2018, the Fed used its safety and soundness authority to take an enforcement action and impose a cap on Wells Fargo's asset growth for opening unauthorized customer deposit accounts.[124] Section 5 of the BHCA authorizes the Fed to require a BHC to divest of any subsidiary that "constitutes a serious risk to the financial safety, soundness, or stability" of a bank. [125] At times, Congress has cabined the scope of unsafe and unsound practices that are subject to specific remedies,[126] but in most cases it has not.

While the determination that an activity or practice is considered unsafe or unsound has significant implications, it is largely left to the discretion of banking regulators. The term is broad on its face, but it is "widely used in the regulatory statutes and in case law, and one of the purposes of the banking acts is clearly to commit the progressive definition and eradication of such practices to the expertise of the appropriate regulatory agencies."[127]

[120] *See* Written Agreement Between HSBC Holdings PLC and Federal Reserve Board of Governors, Docket Nos. 17-010-B-FB, -B-HC, -CMP-FB, -CMP-HC at 2–4 (Sept. 29, 2017).

[121] *See* Written Agreement Between HSBC Holdings PLC and Federal Reserve Board of Governors, Docket Nos. 12-062-CMP-FB, -CMP-HC at 3 (Dec. 11, 2012).

[122] *See* Guidance on Supervisory Concerns and Expectations Regarding Deposit Advance Products, 78 Fed. Reg. 70552 (Nov. 26, 2013).

[123] *See id.* at 70555.

[124] *See* Written Agreement Between Wells Fargo & Co. and Federal Reserve Board of Governors, Docket No. 18-007-B-HC (Feb. 2, 2018). Safety and soundness authority can be used to "place limitations on the activities or functions of an insured depository institution or any institution-affiliated party." 12 U.S.C. § 1818(b)(7).

[125] 12 U.S.C. § 1844(e).

[126] 12 U.S.C. § 1818(e)(1)(C) (defining the range of unsafe and unsound activities that can result in removal and debarment such as those that involve personal dishonesty or demonstrate willful or continuing disregard for the safety or soundness of a bank); *see also* S. REP. NO. 89-1482, at 8 (1966) (explaining that because "'[u]nsafe' and 'unsound' have no definite or fixed meaning" and "the power to suspend or remove an officer or director of a bank . . . is an extraordinary power," Congress limited the violations subject to removal).

[127] Groos Nat'l Bank v. Comptroller of the Currency, 573 F.2d 889, 897 (5th Cir. 1978).

b. *Permissible Activities*

Banking agencies also determine the scope of permissible banking activities.[128] The NBA's bank powers clause "has remained essentially unchanged since 1864, is well based historically, and well understood by bankers as a statement of the core of bank activities."[129] The "business of banking" encompasses any activity that is "convenient or useful in connection with the performance of one of the bank's established activities pursuant to its express powers under the National Bank Act."[130] It includes activities beyond those expressly enumerated in the bank powers clause, meaning that the OCC has discretion to interpret its meaning within "reasonable bounds."[131] The OCC has used its interpretive authority under the NBA to permit banks to engage in a range of derivative products;[132] standby letters of credit;[133] mortgage-backed securities;[134] and stock index futures.[135] More recently, the OCC created a novel financial technology, or "fintech," bank charter that does not accept deposits.[136]

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[128] *See* Vullo v. Off. of the Comptroller of the Currency, 378 F. Supp. 3d 271, 297–98 (S.D.N.Y. 2019) ("[T]he determination of the outer limit of the phrase 'business of banking' embodies a longstanding ambiguity, as evidenced by the century and a half of case law . . . struggling to define it."), *rev'd sub nom.* Lacewell v. Off. of the Comptroller of the Currency, 999 F.3d 130 (2d Cir. 2021). For more comprehensive discussions of these developments, see Edward L. Symons Jr., *The "Business of Banking" in Historical Perspective*, 51 GEO. WASH. L. REV. 676 (1983). *See also* ARTHUR E. WILMARTH JR., TAMING THE MEGABANKS: WHY WE NEED A NEW GLASS-STEAGALL ACT 158–69 (2020); Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361, 1398–1406 (2021).

[129] Symons, *supra* note 128, at 714.

[130] Arnold Tours, Inc. v. Camp, 472 F.2d 427, 431–32 (1st Cir. 1972).

[131] NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258 n.2 (1995).

[132] *See generally* Saule T. Omarova, *The Quiet Metamorphosis: How Derivatives Changed the "Business of Banking,"* 63 U. MIAMI L. REV. 1041 (2009) (detailing the OCC's interpretation of the National Bank Act of 1863 in the context of bank derivatives).

[133] *See* Kenneth C. Kettering, *Securitization and its Discontents: The Dynamics of Financial Product Development*, 29 CARDOZO L. REV. 1553, 1666–71 (2008).

[134] *See* Sec. Indus. Ass'n v. Clarke, 885 F.2d 1034, 1045, 1052 (2d Cir. 1989).

[135] *See* Inv. Co. Inst. v. Ludwig, 884 F. Supp. 4, 5 (D.D.C. 1995).

[136] *See* Vullo v. Off. of the Comptroller of the Currency, 378 F. Supp. 3d 271, 279 (S.D.N.Y. 2019). The State of New York challenged the OCC's interpretation, with the district court holding that the NBA is "unambiguous," that the OCC's interpretation that the NBA did not require a national bank to hold deposits contradicted the NBA's plain language, history, and legislative context and therefore exceeded its authority, notwithstanding the OCC's contention that its interpretation was entitled to *Chevron* deference. *See id.* at 298. The U.S. Court of Appeals for the Second Circuit reversed and dismissed the case on standing and ripeness grounds. *See* Lacewell v. Off. of the Comptroller of the Currency, 999 F.3d 130, 150 (2d Cir. 2021).

The Fed administers the BHCA and determines the range of permissible BHC activities and acquisitions[137] over which it has broad interpretive authority.[138] Among other restrictions, the BHCA limits BHCs to activities, that are either "financial in nature," "so closely related to banking . . . as to be a proper incident thereto," or "complementary to a financial activity."[139] The Fed has defined what it means to be "primarily engaged" in securities activities, thereby disqualifying officers of securities firms from serving as bank directors.[140] The Fed later interpreted this language to allow BHCs' nonbank affiliates to earn up to twenty-five percent of their revenue from securities activities.[141] It also determined that the limitation in section 20 of the Glass-Steagall Act, prohibiting banks from affiliating with any entity "engaged principally" in the underwriting and distribution of securities, permitted banks to affiliate with retail securities brokerages.[142]

Under its relevant authorities, the Fed has allowed BHCs to deal in municipal bonds, mortgage-backed securities, and commercial paper.[143] It has also allowed BHCs to provide data processing services, data transmission services, and computer software and hardware.[144] Following the passage of the GLBA, weakening many of the Glass-Steagall Act restrictions, the Fed issued orders permitting BHCs to engage in a range of "complementary" nonfinancial activities.[145]

c. *Financial Stability*

While the New Deal banking laws incorporated financial stability concerns,[146] explicit financial stability authority is a more recent development. The Dodd-Frank Act's financial stability provisions are motivated by a desire that agencies possess comprehensive and flexible

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137 *See* Bd. of Governors of the Fed. Rsrv. Sys. v. MCorp Fin., Inc., 502 U.S. 32, 37 (1991).

138 *See* Bd. of Governors of the Fed. Rsrv. Sys. v. Inv. Co. Inst., 450 U.S. 46, 56–57, 57 n.23 (1981).

139 *See* 12 U.S.C. § 1843(k)(1), (4)(F).

140 Bd. of Governors of the Fed. Rsrv. Sys. v. Agnew, 329 U.S. 441, 443 (1947).

141 *See* Wilmarth, *supra* note 96, at 472–73.

142 Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys. (*Bankers Trust I*), 468 U.S. 207, 219, 221 (1984).

143 *See* Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 839 F.2d 47, 50–51 (2nd Cir. 1988).

144 *See* 12 C.F.R. §§ 225.28(b)(14), 225.123(e).

145 *See* 89 FED. RSRV. BULL. 497, 508–09 (2003). This includes trading oil, natural gas, and agricultural products, and "energy tolling" arrangements, meaning long-term energy supply contracts with large-scale commercial and industrial energy users. *See* Order Approving Notice to Engage in Activities Complementary to a Financial Activity, 94 FED. RSRV. BULL. C31, C60–61 (2008).

146 *See* Tarullo, *supra* note 92, at 1.

authorities to keep pace with the rapidly evolving financial marketplace.[147] These tools are intended to be forward looking, requiring agencies to anticipate the possible sources of risk to the stability of the financial system and craft rules that mitigate the potential consequences of destabilizing events.[148]

Section 165 of the Dodd-Frank Act requiring "enhanced prudential standards" for the largest BHCs ties the Fed's BHC regulations to the goal of financial stability.[149] Section 165 authorizes the Fed to establish such standards to "prevent or mitigate risks to the financial stability of the United States that could arise from the material financial distress or failure, or ongoing activities, of large, interconnected financial institutions."[150] The Dodd-Frank Act's drafters believed that "because of the Federal Reserve's expertise and its other unique functions, it should play an expanded role in maintaining financial stability."[151] This authority provides the Fed with significant interpretive discretion. In addition to certain specifically enumerated measures, the Fed can impose any prudential standards that it "determines are appropriate."[152] More recently, the Fed has read into the statute extralegal mandates like efficiency maximization.[153] While Congress enacted legislation in 2018 narrowing the applicability of section 165,[154] it preserved financial stability and safety and soundness powers by including a savings clause stating that "nothing . . . shall be construed to limit" the Fed's authority under section 165 and all three banking agencies' safety and soundness authorities.[155]

The FSOC can designate a nonbank financial company to be supervised by the Fed and subjected to section 165 enhanced prudential standards if the "material financial distress at the U.S. nonbank financial company, or the nature, scope, size, scale, concentration, interconnectedness, or mix of the activities of the U.S. nonbank financial company, could pose a threat to the financial stability of the United States."[156] The FSOC can also recommend that financial regulators apply

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147 *See* S. REP. NO. 111-176, at 40 (2010).

148 *See id.* at 2–3.

149 12 U.S.C. § 5365.

150 12 U.S.C. § 5365(a)(1).

151 S. REP. NO. 111-176, at 28 (2010).

152 12 U.S.C. § 5365(b)(1)(B)(iv).

153 *See* Steele, *supra* note 100, at 1001–02, 1012–21, 1033–36.

154 *See id.* at 1012–14.

155 Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, § 401(b), 132 Stat. 1296, 1357–58 (2018) (codified as amended at 12 U.S.C. § 5365 note).

156 12 U.S.C. § 5323(a)(1). While there are currently no financial companies designated by the FSOC, four companies were previously designated: the captive financing corporation GE Capital and insurers AIG, Prudential, and MetLife. *See* Jeremy C. Kress, *The Last SIFI*, 71 STAN. L. REV. ONLINE 171,

new or heightened standards and safeguards for financial activities or practices that could create or increase risks of significant liquidity, credit, or other problems spreading throughout the financial system.[157] After the FSOC's recommendation, the primary regulator responsible for overseeing the activity must either implement the standards or explain why it has declined to do so.[158]

In prescribing the FSOC's authorities, the Dodd-Frank Act does not define "financial stability,"[159] but offers some relevant criteria.[160] Nonbank financial companies "could pose a threat to . . . financial stability," based upon a set of factors,[161] including the fragility of a company's business model and its importance as a source of liquidity and credit to households, corporations, and financial markets and companies.[162] In addition, the law defines activities that should be regulated "for financial stability purposes" as those which "could create or increase the risk of significant liquidity, credit, or other problems spreading" among financial markets or low-income, minority, or underserved communities.[163] As courts have recognized, the meaning of these terms is open to FSOC's interpretation.[164]

171–72; (2018). MetLife sued to challenge the basis of its designation, while FSOC members voted to de-designate GE Capital, AIG and Prudential. *Id.* at 173–74.

[157] *See* 12 U.S.C. § 5330(a).

[158] *See* 12 U.S.C. § 5330(c)(2). This authority has been used once, in 2012, when the SEC was unable to reach consensus for money market mutual fund ("MMF") reforms. *See* Press Release, Mary Schapiro, Chairman, Securities and Exchange Commission, Statement of SEC Chairman Mary L. Schapiro on Money Market Fund Reform (Aug. 22, 2012), https://perma.cc/6ZY6-26RS. The FSOC proposed a series of MMF reforms, including a floating net asset value ("NAV") and stable NAV alternatives with buffers and additional liquidity and disclosure requirements. *See* Proposed Recommendations Regarding Money Market Mutual Fund Reform, 77 Fed. Reg. 69455, 69456 (Nov. 19, 2012). In response, the SEC implemented less ambitious measures, alternatively requiring institutional MMFs to adopt a floating NAV or imposing a liquidity fee on, or halting, redemptions if a MMF's weekly liquid assets fall below certain thresholds. *See* Money Market Fund Reform; Amendments to Form PF, 79 Fed. Reg. 47736 (Aug. 14, 2014).

[159] *See* Tarullo, *supra* note 92, at 3–9.

[160] *Contra* The Federalist Society [Panel Discussion], *Financial Regulation: The Apotheosis of the Administrative State*, 25 CONN. INS. L.J. 1, 10 (2018) (arguing the Dodd-Frank Act "contains no standards that restrict the discretion of the FSOC . . . no definition of material financial distress, no definition of activities, no definition of threat, or what was meant by 'the financial stability of the United States'").

[161] 12 U.S.C. § 5323(a)(1).

[162] 12 U.S.C. § 5323(a)(2).

[163] 12 U.S.C. § 5330(a).

[164] *See* MetLife Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 227 (D.D.C. 2016) ("The phrase 'could pose a threat to the financial stability of the United States' is open to numerous interpretations."). The FSOC has codified its interpretation of the Dodd-Frank Act at 12 C.F.R. § 1310.

d. *Consumer Protection*

Consumer protection laws provide agencies with substantial latitude to limit the costs to consumers resulting from excessive rates, fees, and other terms. The CFPB may issue rules, orders, and guidance implementing the federal consumer financial laws and perform "such support activities as may be necessary or useful to facilitate" the CFPB's other functions.[165] The CFPB also has authority to grant itself jurisdiction over categories of consumer financial companies by identifying "larger participant[s]" that it would then examine and regulate.[166]

One of the motivations behind the CFPB's creation was the failure of "highly targeted" consumer protection statutes.[167] The CFPB was given authority to prevent "unfair, deceptive, or abusive act[s] or practice[s]" ("UDAAPs") in any financial product or service.[168] The CFPB's UDAAP authority built upon existing authorities, while recognizing that agencies required a "more flexible standard" than the traditionally "restrictive" unfairness authority.[169] The CFPB can declare UDAAPs with respect to the offering of, or transactions involving, consumer financial products or services through enforcement actions or ex ante rulemaking.[170] The CFPB has issued interpretations of consumer lending practices and delineated scenarios wherein payday-type loans may constitute UDAAPs.[171]

Under the Trump administration, the CFPB issued a policy statement defining "abusive acts or practices."[172] Arguing—inaccurately—that the Dodd-Frank Act was the first statute to prohibit abusiveness,[173] the

[165] 12 U.S.C. § 5511; *see also* 12 U.S.C. § 5512(b)(1).

[166] 12 U.S.C. § 5514(a)(1).

[167] Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 84–85 (2008).

[168] 12 U.S.C. § 5531(a).

[169] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2237–39 (2020) (Kagan, J., dissenting).

[170] 12 U.S.C. § 5531.

[171] *See* 12 C.F.R. §§ 1041.3, 1041.7.

[172] *See* Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 85 Fed. Reg. 6733 (Feb. 6, 2020).

[173] *See id.* at 6733; *see also Improving Federal Consumer Protection in Financial Services: Hearing Before the H. Comm. on Fin. Serv.*, 110th Cong. 16 (2007) (statement of Sheila C. Bair, Chairman, Fed. Deposit Ins. Corp.). Unfair or deceptive acts and practices date back to the FTC Act, *see* Beales, *supra* note 28, at 192, to which the Dodd-Frank Act added abusiveness. *See* S. REP. NO. 111-176, at 172 (2010). The concept of abusive financial products was not novel when it was codified in the Dodd-Frank Act. The abusive nature of certain consumer financial products was cited in the Home Ownership and Equity Protection Act and the Fair Debt Collection Practices Act. *See* S. REP. NO. 111-176, at 15, 19 (2010). The Dodd-Frank Act codified specific criteria for determining when a product constitutes an abusive act or practice. *See* 12 U.S.C. § 5531(d)(2) (defining an act or practice as abusive

statement attempted to utilize this purported novelty to justify departing from the enumerated statutory criteria and narrowing its applicability.[174] The CFPB rescinded this interpretation in 2021 and expressed its intent to "exercise the full scope of its supervisory and enforcement authority to identify and remediate abusive acts or practices."[175]

The CFPB subsequently issued a policy statement delineating the framework that it intended to apply when assessing abusiveness, supported by examples of enforcement actions brought under its abusiveness authority.[176] The CFPB defined the conditions of abusive acts or practices as those where a provider either obscures important features of a consumer financial product or service, or leverages gaps in understanding, unequal bargaining power, or consumer reliance to take an unreasonable advantage of a consumer.[177] Thus, the CFPB has the flexibility to interpret its UDAAP authority in a manner that is expansive but consistent with its mission.

Congress has also delegated the authority to determine whether consumer fees are "reasonable and proportional"; for example, in the Credit CARD Act of 2009 governing credit card penalty fees.[178] The law establishes a set of factors to consider, including the cost to the lender, the conduct of the consumer, as well as any other factor that the agency "may deem necessary or appropriate."[179] It also allows for the establishment of a safe harbor fee amount that is presumed to be reasonable and

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if it "takes unreasonable advantage of . . . the inability of the consumer to protect the interests of the consumer in selecting or using a consumer financial product or service").

[174] *See* Statement of Policy Regarding Prohibition on Abusive Acts or Practices, 85 Fed. Reg. 6733, 6736 (Feb. 6, 2020) (creating a new factor in the abusiveness test that a practice is only abusive if the CFPB "concludes that the harms to consumers from the conduct outweigh its benefits to consumers"). The CFPB justified this interpretation by looking to the text of a different statute—the FTC Act—and its interpretation of a different term—unfairness. *See id.* at 6736 n.27. As the CFPB later noted, this was an atextual reading of the Dodd-Frank Act. *See* Statement of Policy Regarding Prohibition on Abusive Acts or Practices; Rescission, 86 Fed. Reg. 14808, 14809 (Mar. 19, 2021).

[175] Statement of Policy Regarding Prohibition on Abusive Acts or Practices; Rescission, 86 Fed. Reg. at 14809.

[176] *See* Consumer Fin. Prot. Bureau, Policy Statement on Abusive Acts or Practices 3 (Apr. 3, 2023).

[177] *Id.* at 4.

[178] *See* Credit Card Accountability Responsibility and Disclosure Act of 2009, Pub. L. No. 111–24, § 102(b)(1), 123 Stat. 1734, 1740 (2009) (codified at 15 U.S.C. § 1665d).

[179] 15 U.S.C. § 1665d(c).

proportional.[180] This authority was transferred to the CFPB,[181] which is reviewing the safe harbor to ensure that it comports with the intent of the CARD Act.[182]

2. Courts Have Deferred to Banking Agencies' Interpretations

While banking agencies' decisions are not infallible, and courts have limited administrative overreach, banking agencies have wide latitude to interpret the authorities delegated by Congress. Before the *Chevron* doctrine, courts had "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer,"[183] including banking regulators.

In *Board of Governors v. Agnew*,[184] the Supreme Court recognized that the financial system is a "highly specialized and technical one, requiring expert and coordinated management in all its phases."[185] As a result, banking agencies' "specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it."[186] The Court upheld the Fed's interpretation that a bank had violated the prohibition against being "primarily engaged" in securities underwriting contained in section 32 of the Glass-Steagall Act, and that the prohibition did not require securities underwriting to constitute a majority of the bank's activity.[187]

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180 *See* 15 U.S.C. § 1665d(e); *see also* Truth in Lending, 75 Fed. Reg. 37526, 37527 (June 29, 2010) (codified at 12 C.F.R. pt. 226). The original safe harbor was $25 for the first violation, $35 for any subsequent violation, and up to 3% of the delinquent balance, with the amounts adjusted for inflation. *Id.*; *see also* 12 C.F.R. § 1026.52(b)(1)(ii).

181 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1011, 124 Stat. 1376, 1974 (2010) (codified at 12 U.S.C. § 5494).

182 *See* Credit Card Late Fees and Late Payments, 87 Fed. Reg. 38679 (June 29, 2022) (codified at 12 C.F.R. pt. 1026).

183 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 844 (1984); *see also* Emerson, *supra* note 20, at 2029–32.

184 329 U.S. 441 (1947).

185 *Id.* at 450 (Rutledge, J., concurring).

186 *Id.*; *see also* SEC v. Chenery Corp., 332 U.S. 194, 209 (1947) (Jackson, J., dissenting) (noting that the SEC's interpretation of the Public Utility Holding Company Act is an "area where administrative judgments are entitled to the greatest amount of weight by appellate courts" as the "product of administrative experience, appreciation of the complexities of the problem, realization of the statutory policies, and responsible treatment of the uncontested facts" which made it the "type of judgment which administrative agencies are best equipped to make").

187 *Agnew*, 329 U.S. at 448–49.

Likewise, in *Fahey v. Mallonee*,[188] the Court upheld the Federal Home Loan Bank Board's authority to appoint a conservator for savings and loan companies.[189] The Court acknowledged that banking is "one of the longest regulated and most closely supervised of public callings."[190] Where the "accumulated experience of supervisors" has resulted in regulations that guide supervisory actions regarding well-defined practices, agency action may be permissible where other actions might not have been otherwise.[191] The Court further noted that chartered banks upon which Congress has conferred the "right to conduct a public banking business on certain limitations" are constrained in their ability to challenge such "limitations intended for public protection."[192]

Finally, in *Investment Co. Institute v. Camp*,[193] ("*Camp*") the Court stated that, in conducting judicial review, "courts should give great weight to any reasonable construction of a regulatory statute adopted by the agency charged with the enforcement of that statute."[194] This decision was "influenced by the principle that courts should defer to an agency's construction of its own statutory mandate, particularly when that construction accords with well-established congressional goals."[195] The *Chevron* Court would later cite *Camp* as an example of its tradition of deferring to regulators' interpretations of the statutes that they administer.[196]

In 1984, the Supreme Court decided the foundational administrative law case *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[197] Under the *Chevron* doctrine, where a statute is "silent or ambiguous with respect to the specific issue, the question for the court is whether the

[188] 332 U.S. 245 (1947).

[189] *Id.* at 258.

[190] *Id.* at 250.

[191] *Id.*

[192] *Id.* at 256.

[193] 401 U.S. 617 (1971).

[194] *Id.* at 626–27.

[195] Bd. of Governors of the Fed. Rsrv. Sys. v. First Lincolnwood Corp., 439 U.S. 234, 251 (1978) (citation omitted); *see also* Bd. of Governors v. Inv. Co. Inst., 450 U.S. 46, 56 (holding that the Fed's "determinations of what activities are 'closely related' to banking [is] entitled to the greatest deference").

[196] *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, 467 U.S. 837, 844 & n.14 (1984). This is the rule where a single agency is responsible for administering a statute. *See id.* at 884. Where multiple agencies are responsible, an agency's interpretation is not entitled to deference, *see* DeNaples v. Off. of the Comptroller of the Currency, 706 F.3d 481, 487 (D.C. Cir. 2013), but agencies' joint interpretations of jointly administered statutes are entitled to deference. S*ee* Loan Syndications & Trading Ass'n v. SEC, 882 F.3d 220, 222 (D.C. Cir. 2018).

[197] 467 U.S. 837 (1984).

agency's answer is based on a permissible construction of the statute."[198] When Congress is silent on an issue, it has implicitly delegated to an agency the responsibility to interpret the law by regulation.[199] Such agency interpretations "are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute."[200] Thus, a court "may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[201]

Agencies are not just required to explain new rules; they must also supply a "reasoned analysis" when rescinding existing rules.[202] The Court later adopted a "step zero" to the two-step *Chevron* test, requiring a threshold determination that "Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[203] More recently, the Court has also deferred to agencies' interpretations of the scope of their own jurisdiction.[204]

Courts' deference to banking agencies' expert interpretations and judgments has been reinforced time and again. In *NationsBank of North Carolina, National Assoc. v. Variable Annuity Life Insurance Co.*[205] ("*VALIC*"), the Court held that the OCC's interpretations of the NBA are generally entitled to deference—extending *Chevron* deference to the Comptroller's opinion letters, not merely formal rulemakings.[206] In *VALIC*, the Court upheld the OCC's decision that annuities were permissible investment products consistent with the business of banking.[207] The Court, in *Securities Industry Assoc. v. Board of Governors of the Federal Reserve System*,[208] similarly stated that "Congress has committed to the [Fed] the primary responsibility for administering" the BHCA and is therefore "entitled to the greatest deference."[209]

[198] *Id.* at 843.

[199] *See id.* at 843–44.

[200] *Id.* at 844.

[201] *Id.* Note, however, that the Supreme Court recently granted cert in a case to consider whether or not to overrule or narrow *Chevron*. *See* Loper Bright Enters., Inc. v. Raimondo, 45 F.4th 359, 365 (D.C. Cir. 2022), *cert. granted*, 143 S. Ct. 2429 (2023) (mem.).

[202] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

[203] United States v. Mead Corp., 533 U.S. 218, 226–27 (2001).

[204] *See* City of Arlington v. FCC, 569 U.S. 290, 296–305 (2013).

[205] 513 U.S. 251 (1995).

[206] *Id.* at 257–58.

[207] *See id.* at 264.

[208] 468 U.S. 207 (1984).

[209] *Id.* at 215–16 (citing Bd. of Governors of the Fed. Rsrv. Sys. v. Inv. Co. Inst., 450 U.S. 46, 56 (1981)).

Federal courts of appeal have held that the Fed's interpretation of ambiguous provisions of the Glass-Steagall Act should be upheld where the Fed's interpretation of the law is reasonable.[210] Courts have deferred to the Fed's interpretation that the BHCA permits BHCs to engage in some investment advisory services on the theory that they are "so closely related to banking or managing or controlling banks as to be a proper incident thereto."[211] The Court also accepted the Fed's interpretation that securities brokerage is an activity that is "closely related" to banking.[212] Finally, the Court has deferred, under *Chevron*, to the FDIC's determination that standby letters of credit are not "deposits" subject to an insurance payout in the event that a bank is placed in receivership.[213]

Courts have not always accepted expansive interpretations of banking powers. The Court in *Camp* rejected the OCC's regulation permitting banks to sponsor collective investment funds on the grounds that it violated the Glass-Steagall Act.[214] The Court also overturned a Fed decision permitting banks to underwrite certain short-term commercial paper under the rationale that it was "more functionally similar to" a short-term loan, notwithstanding sections 16 and 21 of the Glass-Steagall Act.[215] But the "substantial deference" afforded to banking agencies has been observed even when the Court has reversed the Fed's interpretations, which has largely only occurred when its reasoning consisted of "post hoc rationalizations."[216]

Courts have at times rejected agencies' attempts to limit banks' and BHCs' activities and affiliations. The Supreme Court rejected the Fed's attempt to regulate certain nonbank financial companies as "functionally equivalent" to banks by interpreting the BHCA to apply to their loan- and deposit-like activities.[217] Applying *Chevron* deference, the Court held that the Fed's interpretation was inconsistent with the text of the statute and that looking to the "plain" purpose of the law could not supersede the

[210] *See* Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 839 F.2d 47, 52 (2d Cir. 1988); *see also* David Zaring, *Rule by Reasonableness*, 63 ADMIN. L. REV. 525, 543–49 (2011).

[211] Bd. of Governors of the Fed. Rsrv. Sys. v. Inv. Co. Inst., 450 U.S. 46, 48, 54–55 (quoting Bank Holding Company Act of 1956, Pub. L. No. 511-240, 70 Stat. 133 (codified as amended at 12 U.S.C. § 1843(c)(8) (1976))).

[212] *Bankers Trust I*, 468 U.S. at 216 (quoting 12 U.S.C. § 1843(c)(8)).

[213] FDIC v. Phila. Gear Corp., 476 U.S. 426, 439–40 (1986) (quoting 12 U.S.C. § 1813(l)(1) (1982)).

[214] Inv. Co. Inst. v. Camp, 401 U.S. 617, 639 (1971).

[215] *Bankers Trust I*, 468 U.S. at 141, 148, 160.

[216] *Id.* at 142–44.

[217] Bd. of Governors of the Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373–75 (1986).

meaning of the text.[218] The role of these activities in recent banking panics is discussed more below.[219]

Courts have routinely deferred to banking agencies' determinations of the scope of unsafe and unsound acts and practices. Courts have held that the structure of the FDIA "evinces a clear intention that this regulatory process is not to be disturbed by untimely judicial intervention, at least where there is no 'clear departure from statutory authority.'"[220] Reviewing courts have also validated agencies' use of their authorities to provide for "reasonable and proportional" fee limits.[221] Finally, some banking authorities are committed to the agencies' discretion and therefore beyond the scope of judicial review.[222]

As these examples illustrate, there is a clear "trend of deference to the agency's interpretation" of banking statutes stretching back at least five decades.[223]

II. Applying Major Questions to Banking: Narrowing Public Authority and Expanding Private Influence

The recent emergence of the major questions doctrine threatens the New Deal regulatory settlement. The Supreme Court has relied on the doctrine to invalidate agency actions from eviction restrictions to public health measures and environment regulations.[224] Yet material aspects of the doctrine are ill suited for the U.S. banking system due to the unique role of finance within the economy and bank regulators' responsibilities to safeguard this system.

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218 *Id.*

219 *See infra* notes 359–361 and accompanying text.

220 Groos Nat'l Bank v. Comptroller of the Currency, 573 F.2d 889, 895 (1978) (quoting Manges v. Camp, 474 F.2d 97, 99 (5th Cir. 1973)).

221 *See* 15 U.S.C. § 1693*o*–2(a)(2) (amending the Electronic Funds Transfer Act to require merchant interchange fees on debit card transactions be "reasonable and proportional to the cost incurred by the issuer with respect to the transaction"); *see also* NACS v. Bd. of Governors of the Fed. Rsrv. Sys., 746 F.3d 474, 488–89, 496 (D.C. Cir. 2014) (upholding the Fed's interpretation of "reasonable and proportional" debit card interchange costs after applying *Chevron*).

222 *See, e.g.*, Adams v. Nagle 303 U.S. 532, 540–41 (1938) (holding that the Comptroller of the Currency's determination that it is necessary to assess stockholders of a national bank is not reviewable); *see also* Raichle v. Fed. Rsrv. Bank of N.Y., 34 F.2d 910, 915 (2d Cir. 1929) (holding that the Fed's determination of discount rates is not subject to review); FDIC v. Bank of Coushatta, 930 F.2d 1122, 1129 (5th Cir. 1991) (holding that the FDIC's issuance of capital directives is committed to agency discretion).

223 Heidi Mandanis Schooner, *The Role of Rival Litigation in Wilmarth's New Glass-Steagall*, 93 U. COLO. L. REV. 961, 969 (2022).

224 *See* Deacon & Litman, *supra* note 12, at 13–22 (detailing the Supreme Court's recent applications of the major questions doctrine).

A. *The Evolving Major Questions Doctrine*

The major questions doctrine stands for the proposition that, when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" courts should "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[225] The major questions doctrine is described by some proponents as a "clear statement rule"—that "absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds."[226] While proponents trace the doctrine back to Article I of the Constitution, in their telling it first came into operation more than a century later and rose to prominence during the New Deal.[227] Prior to the last decade, however, principles like those under the major questions doctrine had been used in only a handful of cases[228] invalidating agency actions regulating telecommunications,[229] tobacco,[230] drugs used in assisted suicide,[231] and the environment.[232]

The major questions doctrine applies where an agency "interprets a long-extant statute to permit it to regulate in an area of vast economic and political significance."[233] Under the doctrine, courts should "in the absence of clear congressional authorization, greet its announcement with a measure of skepticism."[234] An agency's interpretation of a statute that has been codified for a long time and not used in a particular manner is suspect. At the same time, recently enacted statutes that take new approaches also appear to be suspect. Thus, "[n]either very old, nor very new, statutes are safe."[235]

225 Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159–60 (2000)).

226 West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022) (Gorsuch, J., concurring). *But see* Biden v. Nebraska, 143 S. Ct. 2355, 2336 (2023) (Barrett, J., concurring) (rejecting the argument that the major questions doctrine is a "clear statement" rule).

227 *See West Virginia*, 142 S. Ct. at 2617–19 (Gorsuch, J., concurring).

228 *See* Brunstein & Revesz, *supra* note 21, at 219 (noting that the Supreme Court had invoked the major questions doctrine "in only five cases before the end of the Trump Administration").

229 *See* MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 234 (1994).

230 *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 133 (2000).

231 *See* Gonzales v. Oregon, 546 U.S. 243, 275 (2006).

232 *See* Whitman v. American Trucking Ass'ns, 531 U.S. 457, 468 (2001). *But see* Massachusetts v. EPA, 549 U.S. 497, 533–36 (2007) (rejecting the EPA's argument, based on the major questions doctrine, that it did not have authority to regulate greenhouse gas emissions from motor vehicles).

233 Heinzerling, *supra* note 20, at 1946.

234 *Id.* at 1946.

235 *Id.* at 1961.

The doctrine also posits that courts do not owe an agency deference where the agency is addressing an issue of great economic and political significance and "the agency is not an expert in the matter."[236] The Court can determine whether a particular agency issuing a specific regulation instinctively "raise[s] an eyebrow."[237] This factor requires that "Congress must . . . not only speak clearly about its intended interpretive delegatee, but also pick the right one."[238] Examples where the Court has held that an "agency had strayed out of its lane, to an area where it had neither expertise nor experience" include the "Attorney General making healthcare policy,"[239] "the regulator of pharmaceutical concerns deciding the fate of the tobacco industry,"[240] the Center for Disease Control ostensibly making housing policy,[241] and the Internal Revenue Service ("IRS") administering health insurance policy.[242]

1. Major Questions Cases

In most recent cases, the major questions doctrine analysis has resulted in regulations being overturned. In *Utility Air Regulatory Group v. EPA*,[243] the Court heard a challenge to the Environmental Protection Agency's ("EPA") interpretation that greenhouse gas emissions could be considered pollutants under the Clean Air Act for the purposes of certain business permitting requirements applicable to significant emitters.[244] The Court invalidated the rule, holding that it exceeded the EPA's authority.[245] Among the Court's justifications was the rule's applicability to millions of small businesses, "including retail stores, offices, apartment buildings, shopping centers, schools, and churches."[246]

In *King v. Burwell*,[247] the Court considered whether state-established health insurance exchanges were eligible for federal tax credits under the 2010 Patient Protection and Affordable Health Care Act ("Affordable Care

[236] *Id.* at 1956.

[237] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022). Alternatively, proponents have described this test as evaluating whether or not an agency "regulates outside its wheelhouse." Biden v. Nebraska, 143 S. Ct. 2355, 2382 (Barrett, J., concurring).

[238] Heinzerling, *supra* note 20, at 1962.

[239] *West Virginia*, 142 S. Ct. at 2636 (Kagan, J., dissenting).

[240] *Id.*

[241] *See* Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2488–89 (2021).

[242] *See* King v. Burwell, 576 U.S. 473, 486 (2015).

[243] 573 U.S. 302 (2014).

[244] *Id.* at 314.

[245] *Id.* at 333.

[246] *Id.* at 328.

[247] 576 U.S. 473 (2015).

Act").[248] Because the IRS administered the tax credits, but lacked expertise in health policy, and because the IRS's decision involved billions of dollars in tax credits and affected millions of health insurance consumers, the Court declined to apply *Chevron*.[249] It also implied that the interpretation was a major question, stating that eligibility for the Affordable Care Act's tax credits was "a question of deep 'economic and political significance.'"[250] The Court nonetheless upheld the tax credit scheme as consistent with the overall statutory structure.[251]

There were few significant cases implicating the major questions doctrine until the COVID-19 pandemic and accompanying federal government actions responding to the public health crisis. In *Alabama Realtors v. HHS*,[252] the Court held that the Department of Health and Human Services ("HHS") lacked authority to use the Public Health Service Act to impose a nationwide eviction moratorium.[253] The Court determined that the eviction moratorium implicated the major questions doctrine.[254] It based its conclusion upon the moratorium's: (1) geographic reach and scope of individuals covered; (2) estimated potential economic injury to landlords; and (3) interference with private contractual landlord-tenant relationships.[255]

In *National Federation of Independent Business v. OSHA*,[256] the Court invalidated the Occupational Safety and Health Administration's ("OSHA") COVID-19 workplace vaccination and testing standards as a violation of the major questions doctrine.[257] It reasoned that a global pandemic was not the type of workplace-specific hazard contemplated by OSHA's authorizing statutes.[258] Factors in the Court's analysis included: (1) the number of workers covered by the rule; (2) the costs to states and employers; (3) the nature of the global pandemic; and (4) the fact that OHSA had never issued an order of this nature before.[259]

[248] *Id.* at 478–79.

[249] *Id.* at 485–86.

[250] *Id.* at 486.

[251] *See id.* at 498.

[252] 141 S. Ct. 2485 (2021) (per curiam).

[253] *See* 141 S. Ct. at 2488–89 (2021). The opinion was issued per curiam, on the Court's emergency docket. *See id.* at 2485.

[254] *See id.* at 2489.

[255] *See id.*

[256] 142 S. Ct. 661 (2022) (per curiam).

[257] *See* 142 S. Ct. at 665. This opinion was also issued per curiam, on the Court's emergency docket.

[258] *See id.* at 665–66.

[259] *See id.* On the latter point, it is worth noting that the Occupational Safety and Health Administration was created in 1970, fifty years after the influenza pandemic of 1918. *See id.* at 670;

In *West Virginia v. EPA*, the Court used the doctrine to invalidate the EPA's Clean Power Plan rule regulating power plants' carbon emissions under the Clean Air Act.[260] The Court noted that the rule's system of emissions reductions had never been used before.[261] It also argued that the EPA lacked sufficient expertise to make determinations regarding carbon emissions and concluded that imposing restrictions on power plant emissions involved "basic and consequential tradeoffs . . . that Congress would likely have intended for itself."[262] The Court argued that the reviewing court can simply intuit whether a particular agency issuing a particular regulation "raise[s] an eyebrow."[263] It also likened the emissions reduction scheme to other policy measures, such as a cap-and-trade system or a carbon tax, that Congress has as yet declined to enact, suggesting that the EPA was attempting a backdoor method of enacting these proposals without appropriate congressional delegation.[264]

Most recently, in *Biden v. Nebraska*,[265] the Court invalidated the Department of Education's program to forgive up to a certain amount of federal student loan balances for each borrower under the Higher Education Relief Opportunities for Students Act ("HEROES" Act).[266] The Court rested its reasoning on three of the four factors under the major questions doctrine.[267] The Court first noted that the Secretary of Education had never before asserted that the HEROES Act contained authority of the specific nature being exercised under the forgiveness program.[268] The Court also found that the program was one of "staggering" economic and political significance, due to the program's projected potential cost of between $469 billion and $519 billion and the fact that the program "raises questions that are personal and emotionally charged,

see also NAT'L ARCHIVES, *The Deadly Virus: The Influenza Epidemic of 1918*, https://perma.cc/PD7S-7VW8.

[260] *See* 142 S. Ct. 2587, 2614–16 (2022).

[261] *See id.* at 2610.

[262] *Id.* at 2612–13.

[263] *Id.* at 2613.

[264] *See id.* at 2614.

[265] 143 S. Ct. 2355 (2023).

[266] *See id.* at 2364–65, 2375.

[267] *See id.* at 2372–73 (finding first that "'no regulation premised on' the HEROES Act 'has even begun to approach the size or scope' of the secretary's program," second, that the "'economic and political significance' of the Secretary's action is staggering," and third, that the Secretary's assertion "has 'conveniently enabled him to enact a program' that Congress has chosen not to enact itself" (citations omitted))

[268] *Id.* at 2372.

hitting fundamental issues about the structure of the economy."[269] The Court's ruling extended the application of the doctrine beyond agency regulations, to include agency decisions regarding benefits provision.[270]

2. Related Doctrines and Analyses

The major questions doctrine now sits within a broader ecosystem of administrative doctrines and modes of analysis—some recent and others more established. While *Chevron* cases and major questions cases do not perfectly overlap, they are related in the sense that major questions circumvents *Chevron*'s respect for agency expertise.[271] The major questions doctrine weakens the *Chevron* framework by establishing situations where agencies are not entitled to deference in their interpretations—and even questioning whether they possess the authority to act in the first place.[272] In these instances, the major questions doctrine operates as a step zero analysis, replacing the *Mead* test.[273] Courts' application of the major questions doctrine is not always limited to step zero, and in different cases it can occur at different steps of the *Chevron* analysis.[274] The common theme is that the major questions doctrine operates as an exception to *Chevron* and its progeny, but only for the most consequential exercises of agency power.[275] It places a heightened burden of specificity upon Congress when so-called major questions are involved.[276]

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[269] *Id.* at 2373–74 (quoting Jeff Stein, *Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers*, WASH. POST (Aug. 31, 2022), https://perma.cc/FC98-ZV2M).

[270] *See id.* at 2374–75.

[271] *See* Tortorice, *supra* note 20, at 1130.

[272] *See* Gocke, *supra* note 20, at 978–79; *see also* Emerson, *supra* note 20, at 2036.

[273] *See* Gocke, *supra* note 20, at 978.

[274] *See id.* at 975–76; *see also* Tortorice, *supra* note 20, at 1104; Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 VAND. L. REV. 777, 787, 790 (2017).

[275] Justice Kagan's dissent in *West Virginia v. EPA* argues that the current iteration of the major questions doctrine is invented out of whole cloth through a misreading of the Court's analysis in prior cases, where it was used as a tool to evaluate whether *Chevron* deference was appropriate. *See* 142 S. Ct. 2587, 2634–35 (2022) (Kagan, J., dissenting).

[276] *See* Biden v. Nebraska*,* 143 S. Ct. 2355, 2385 (2023) (Kagan, J., dissenting) ("[T]he Court applies heightened-specificity requirements, thwarting Congress's efforts to ensure adequate responses to unforeseen events."); *see also* Deacon & Litman, *supra* note12, at 39. *But see Biden*, 143 S. Ct. at 2378 (Barrett, J., concurring) ("[The] 'clear statement' version of the major questions doctrine 'loads the dice' so that a plausible antidelegation interpretation wins even if the agency's interpretation is better. While one could walk away from our major questions cases with this impression, I do not read them this way.").

The major questions doctrine evokes the separate, but "closely related," nondelegation doctrine.[277] According to the nondelegation doctrine, the separation of powers restricts Congress's ability to delegate its legislative authority to executive branch entities and a clear Congressional statement of authority is required for certain administrative actions.[278] The major questions doctrine raises nondelegation concerns, but the doctrines theoretically serve different functions. The ostensible purpose of the nondelegation doctrine is to "ensure[] democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials."[279] The major questions doctrine in theory only prevents *unintentional* delegation.[280] Nonetheless, both doctrines are hostile to *Chevron* deference.[281] Nondelegation arguments are directly rooted in the Constitution and the separation of powers,[282] while the major questions doctrine builds on nondelegation principles and applies them as a matter of statutory interpretation.[283] In contrast to the major questions doctrine, which has been used in recent years to overturn several agency actions, the nondelegation doctrine has only been used to strike down two laws,

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[277] Nat. Fed'n Indep. Bus. v. OSHA, 142 S. Ct. 661, 668 (2022) (Gorsuch, J., concurring).

[278] *See id.* at 668–69. Under nondelegation, Congress must establish an "intelligible principle" to which the agency must adhere. J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928). It is "constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority." Am. Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

As with the major questions doctrine, the connection between the nondelegation doctrine and the Constitution is contested, the doctrine was not applied by the Supreme Court until more than a century after the nation's founding, and it did not rise to prominence until the New Deal era. *See* Mortenson & Bagley, *supra* note 1, at 282–85; *see also* Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002). Some have challenged the historical account that the nondelegation doctrine was a meaningful check on executive authority during the New Deal period. *See id.* at 1741–43; *see also* Whittington & Iuliano, *supra* note 5, at 417–21.

[279] *Nat. Fed'n Indep. Bus.*, 142 S. Ct. at 669 (Gorsuch, J., concurring).

[280] *See id.* Whether the major questions doctrine is actually limited to unintentional delegations in practice is discussed further below. *See infra* Section III.A.

[281] *See* Tortorice, *supra* note 20, at 1086.

[282] *See id.* at 1085. For a refutation of the idea that the nondelegation doctrine is rooted in the Constitution, see Mortenson & Bagley, *supra* note 1.

[283] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2380 (Barrett, J., concurring) ("Crucially, treating the Constitution's structure as part of the context in which a delegation occurs is *not* the same as using a clear-statement rule to over enforce Article I's non-delegation principle (which, again, is the rationale behind the substantive-canon view of the major questions doctrine)."); *see also* Emerson, *supra* note 20, at 2024.

both of which occurred in 1935.[284] Like other major questions cases, financial industries, such as cryptocurrencies, have argued that banking agencies' actions violate the nondelegation doctrine.[285]

The major questions doctrine also incorporates antinovelty principles. Antinovelty is the view that "legislative novelty is a mark against a law's constitutionality."[286] The Supreme Court has used antinovelty to invalidate aspects of financial regulatory agencies' structures that it deemed too innovative, including the Public Company Accounting Oversight Board,[287] CFPB,[288] and Federal Housing Finance Agency.[289] While antinovelty initially stood as its own, purportedly constitutional, principle, over time it has been incorporated, *sub rosa*, into aspects of the major questions doctrine through some of the constitutive factors of the doctrine's analysis.[290] Similar to its relationship with the nondelegation doctrine, the major questions doctrine adopts antinovelty precepts as statutory, rather than constitutional, principles. The major questions doctrine is also distinguishable in its application to agencies' substantive actions, in contrast to antinovelty's focus on administrative design.

Finally, the major questions doctrine incorporates a form of cost-benefit analysis ("CBA"), specifically in its assessment of "economic importance." The judicially manufactured principle for applying CBA, as articulated in *Michigan v. EPA*,[291] is that "an agency may not, unless Congress signals otherwise, impose regulatory costs without taking those

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[284] *See* Tortorice, *supra* note 20, at 1088. While the Court recently heard a nondelegation doctrine challenge, it upheld the law in question over the dissent of a three-member conservative bloc. *See* Gundy v. United States, 139 S. Ct. 2116 (2019).

[285] *See* DAVID H. THOMPSON, JOHN D. OHLENDORF, HAROLD S. REEVES & JOSEPH O. MASTERMAN, COOPER & KIRK, OPERATION CHOKE POINT 2.0: THE FEDERAL BANK REGULATORS COME FOR CRYPTO 27 (2023), https://perma.cc/J5K3-PSQX.

[286] Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1415 (2017).

[287] *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 496–98 (2010)

[288] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192 (2020) (holding the CFPB director's removal protections unconstitutional); *see also* Consumer Fin. Prot. Bureau v. All Am. Check Cashing, Inc., 33 F.4th 218, 241 (5th Cir. 2022) (holding the CFPB's funding structure unconstitutional).

[289] *See* Collins v. Yellen, 141 S. Ct. 1761, 1783–84 (2020).

[290] *See* Deacon & Litman, *supra* note 12, at 49. Like the major questions doctrine, the Court's decisions have not applied antinovelty consistently—it has served as either a factor in determining a statute's constitutionality or as a presumption of unconstitutionality. *See* Litman, *supra* note 286, at 1423–24; *see also id.* at 1482–87 (describing administrability concerns with antinovelty). Also similar to both the nondelegation and major questions doctrines, the constitutional foundations of antinovelty are debatable. *See id.* at 1455–59.

[291] Michigan v. EPA, 576 U.S. 743 (2015).

costs into account."[292] The financial industry has argued that CBA should apply to financial regulations, even for statutes that do not explicitly require it.[293] Similar to major questions cases, courts have applied CBA when financial agencies exercise their general statutory authority rather than specific legal mandates.[294] Also like major questions cases, financial agencies have been subject to increasingly stringent court-imposed CBA requirements in recent years.[295] For example, the U.S. District Court for the District of Columbia has argued that FSOC should have considered the cost of regulation as part of its attempted designation of MetLife for enhanced supervision.[296] MetLife challenged the FSOC's designation, which the court then overturned.[297] The court extended the logic of *Michigan v. EPA* to the FSOC's authority to determine that a nonbank financial company poses a risk to financial stability.[298] As discussed below, CBA is often inappropriate for bank regulation. It fails to capture the real-world implications of effective financial regulation, and conversely of deregulation.[299] It prioritizes private costs over public benefits and undervalues societal benefits that are difficult to quantify.[300]

The major questions doctrine has consistently hampered administrative agencies' ability to interpret the laws that Congress has charged them with administering. This and other specific features of the

[292] Heinzerling, *supra* note 20, at 1963; *see Michigan*, 576 U.S. at 752–53.

[293] *See* Arnold & Porter Kaye Scholer LLP, Comment Letter on Proposed Rulemaking Regarding Resolution-Related Resource Requirements for Large Banking Organizations 7 (Jan. 21, 2023) [hereinafter Arnold & Porter Letter], https://perma.cc/N64B-72UU (arguing that the principles of cost-benefit analysis ("CBA") are "not tied to the particular statute or facts at issue in *Michigan v. EPA*; the Court suggested that an agency's interpretation of any ambiguous statutory mandate must take cost into account to be reasonable under *Chevron*").

[294] *See* John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882, 916 (2015).

[295] *See* Chamber of Com. of the U.S. v. SEC, 412 F.3d 133, 144 (D.C. Cir. 2005) (requiring the SEC to consider the cost of rules issued under the Investment Company Act); *see also* Bus. Roundtable v. SEC, 647 F.3d 1144, 1154–55 (D.C. Cir. 2011) (holding that the SEC failed to adequately assess the economic effects of its rule governing proxy voting under the Securities Exchange Act Rule 14a-11); MetLife Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 239 (D.D.C. 2016) (holding that the FSOC is required to consider the costs of its determinations under the Dodd-Frank Act).

[296] *See MetLife*, 177 F. Supp. 3d, at 241.

[297] *See id.* at 242.

[298] *See id.* at 239–42. Specifically, the district court read the FSOC's ability to consider "any other risk-related factors" that it "deems appropriate" as a form of an implicit CBA requirement. *See id.* at 225; *see also* 12 U.S.C. § 5323(a)(2)(K); Heinzerling, *supra* note 20, at 1940–41.

[299] *See* Coates, *supra* note 294, at 894–95.

[300] *See* Nat'l Comty. Reinvestment Coalition v. Consumer Fin. Prot. Bureau, No. 20-2074, 2022 U.S. Dist. LEXIS 174183, at *66–67 (D.D.C. Sept. 23, 2022).

major questions doctrine, as established by the recent major questions cases, present substantial challenges when applied to bank regulation.

B. *Applying Major Questions to Banking Regulation*

In the wake of *West Virginia v. EPA*, various constituencies have argued that aspects of banking regulation trigger the major questions doctrine. The U.S. District Court for the Eastern District of Texas has ruled that the CFPB's interpretation that its UDAAP authority applies to examining banks for fair lending violations is a major question that is beyond the CFPB's authority.[301] Members of Congress have questioned the basis for CFPB's authority to enact consumer protections more broadly, in light of the major questions doctrine.[302] Business lobbying organizations and conservative think tanks have said that bank regulators' guidance to help banks manage financial exposures to climate change may violate the doctrine.[303] Cryptocurrency companies have claimed that the doctrine prevents financial regulators from using existing authorities to regulate their industry.[304] Finally, before SVB's failure, the banking industry signaled a potential major questions doctrine challenge to a joint Fed and FDIC proposal requiring large regional banks like SVB to issue minimum amounts of long-term debt that can be converted into equity in a resolution process.[305]

If courts were to adopt these arguments, they would interfere with some of the foundational bank regulatory authorities. Specifically, the major questions doctrine's framework is a poor fit for banking because: (1) the "political significance" factor does not further the democratic

[301] *See* Chamber of Com. of the U.S. v. Consumer Fin. Prot. Bureau, No. 22-cv-00381, 2023 U.S. Dist. LEXIS 159398, at *13, *18 (E.D. Tex. Sept. 8, 2023).

[302] See Letter from H. Comms. for Fin. Servs. & Oversight & Reform, to Rohit Chopra, Dir. Consumer Fin. Prot. Bureau (Sept. 20, 2022) https://perma.cc/2ZKG-9A7R.

[303] *See* Chamber of Com. of the U.S., Comment Letter on Principles for Climate-Related Financial Risk Management for Large Financial Institutions 2 (Feb. 6, 2023), https://perma.cc/L5YV-RDS5; *see also* Heritage Found., Comment Letter on Principles for Climate-Related Financial Risk Management for Large Financial Institutions (Feb. 6, 2023) [hereinafter Heritage Foundation Letter], https://perma.cc/2UH4-7U4R.

[304] *See* Tomicah Tillemann, J.P. Schnapper-Casteras & James Rathmell, *How the Supreme Court's EPA Decision Could Shape the Future of Web3*, HAUN VENTURES (Aug. 14, 2022), https://perma.cc/K4Y7-4532.

[305] *See* Am. Bankers Ass'n, Comment Letter on Proposed Rulemaking Regarding Resolution-Related Resource Requirements for Large Banking Organizations (Jan. 4, 2022) [hereinafter ABA Letter], https://perma.cc/P8H2-HE26; *see also* Capital One Fin. Corp. et al., Comment Letter on Proposed Rulemaking on Resolution-Related Resource Requirements for Large Banking Organizations 32 n.95 (Jan. 23, 2023), https://perma.cc/6EZ4-LRFH; Arnold & Porter Letter, *supra* note 293, at 2–5.

legitimacy of the bank regulatory process; (2) the "economic significance" factor is incoherent as applied to the $20 trillion banking system; (3) the "novel interpretation" factor undermines the ability of bank regulators to be flexible and adapt to emerging risks; and (4) the "agency expertise" factor obscures the breadth and depth of knowledge required to oversee a banking sector that is interconnected with the entire economy.

1. Political Significance

Skeptics of financial regulation frequently claim that regulators' actions lack democratic legitimacy because they resolve issues of political significance through unaccountable means.[306] The major questions doctrine is framed as a response to this overreach that promotes the will of the democratic populace against the anti-democratic instincts of policymaking elites, encourages democratic participation, and prevents special interest capture.[307] The abstract conceptions of democracy and private economic liberty advanced by proponents of the doctrine do not square with the reality of the political economy of banking. By creating obstacles to regulating the banking system, the major questions doctrine results in counter-majoritarian outcomes and benefits entrenched interests.

a. *Financial Policymaking Involves Political Choices*

The major questions doctrine rests on the flawed premise that some forms of regulation can be apolitical. This is consistent with the popular pre-2008 financial crisis misconception of finance wherein the "ostensible goal of financial regulation is often more to free the market to function properly than to constrain it."[308] This framing "has the effect of obscuring the normative and political dimensions of financial regulation behind the seeming neutrality of the market and economics" and "thereby impl[ies] that economically driven decisions are apolitical."[309]

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[306] *See, e.g.*, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 166 (D.C. Cir. 2018) (Kavanaugh, J., dissenting) (noting that [the CFPB has] "power that is massive in scope, concentrated in a single person, and unaccountable to the President"); *Examining the Dangers of the FSOC's Designation Process and its Impact on the U.S. Financial System: Hearing Before the H. Comm. on Fin. Servs.* 113th Cong. 2 (2014) (statement of Rep. Hensarling, Chair, H. Comm. on Fin. Servs.) (describing the FSOC as "an unaccountable group of agencies that feel they don't need to justify their actions to anyone").

[307] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2617–18 (2022) (Gorsuch, J., concurring).

[308] Metzger, *supra* note 1, at 143.

[309] *Id.* at 144. For a recent example of this framing, see Brendan Pedersen, *Has the OCC Become Too Politicized?*, AM. BANKER (Dec. 30, 2020, 9:00 PM), https://perma.cc/S3ZN-ZZLX.

This view obscures the purpose of banking as the private administration and allocation of money and credit.[310] Banking policy decisions that "often appear to be convoluted and hypertechnical"[311] have the effect of shaping the flow of money and credit, determining the structure and contour of our economy, and impacting the financial lives of millions of people. Ostensibly technocratic judgments about whether an activity constitutes the "business of banking" or is "unsafe or unsound," or an act or practice is "unfair or abusive" have distributional consequences and result in winners and losers among competing constituencies. Banks' misuse of their financial powers has the potential to "remold our fundamental political and social institutions."[312]

Banks are not powerless to influence these choices. The accumulated financial resources of large banking institutions, and the general importance of banking to the broader economy, endow banks with significant political power.[313] In all these senses, most bank regulatory decisions—from the design of prudential rules to the structure of bailouts—involve inherently political choices.[314]

b. *Banking Agencies Are Insulated from Regulatory Capture*

Recognizing the political economy challenges of regulating the banking industry, Congress designed independent banking agencies in a manner that fuses a historical understanding of the special nature of banks with the New Deal appreciation for regulatory expertise. Congress has balanced democratic accountability with the need to "shield[] technical or expertise-based functions relating to the financial system from political pressure (or the moneyed interests that might lie behind

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310 *See supra* Section I.A.1.

311 Zaring, *supra* note 210, at 543.

312 *See* H.R. REP. NO. 84-609, at 2 (1955).

313 *See* Darren Bush, *Too Big to Bail: The Role of Antitrust in Distressed Industries*, 77 ANTITRUST L.J. 277, 308 (2010). Banks can influence Congressional and agency behavior through direct lobbying or by deploying customers, or so-called "end users," to make arguments on their behalf. *See, e.g.*, Noam Scheiber, *The Breakup*, NEW REPUBLIC (June 17, 2010), https://perma.cc/K4CK-BZ36 (describing how banks' nonfinancial corporate clients became the "public face of a well-financed campaign" to weaken derivatives regulations).

314 *See* Omarova, *supra* note 3, at 745–46 ("Financial arrangements are fundamentally shaped by, and in turn shape, broader economic and political structures and choices."); *see also* Coates, *supra* note 294, at 1001; *see also* Metzger, *supra* note 1, at 146–47; *see also* Aikman et al., *supra* note 67, at 38; *see also* Tarullo, *supra* note 92, at 74.

it)."[315] Each banking agency was designed to be "insulated from short-term political pressures so that it could adopt public policies based on expertise that would yield better public policy over the long term."[316] Thus, Congress has sought to ensure that agencies "would be guided by information and not politics."[317]

The independence of these agencies comes from their insulation from special interest influence and short-term political incentives, ensuring that policy outcomes reflect the public interest.[318] Banking agencies have been insulated from direct political control because the balkanized financial regulatory structure, and the closeness of agencies' communications with their regulated entities, can exacerbate the risks of capture.[319] For example, the Dodd-Frank Act's implementation process was hotly contested, with an ambitious regulatory agenda that sought to rebuild a financial oversight apparatus that atrophied over the course of decades.[320] Such agency rulemakings are generally dominated by the banking industry, a group known for holding sway in both the policymaking process.[321] Among other measures, Congress has attempted to insulate regulators from capture, and the appearance of capture, by imposing "cooling off" periods that restrict banking agency officials from working at regulated institutions for a period after leaving their agency.[322]

Ironically, the major questions doctrine gives special interests greater leverage over rulemakings. If regulated industries are unable to prevail

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[315] Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2231 (2020) (Kagan, J., dissenting); *see also* Patricia McCoy, *Constitutionalizing Financial Instability*, 2020 U. CHI. L. REV. ONLINE 66 (2020), https://perma.cc/M29W-QLV8.

[316] Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 20 (2010).

[317] *Id.*; *see also* Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CAL. L. REV. 327, 336–37 (2013).

[318] *See Seila Law*, 140 S. Ct. at 2231 (2020) (Kagan, J. dissenting); *see also* Ahdieh, *supra* note 67, at 69–70.

[319] *See* Metzger, *supra* note 1, at 136–41; *see also* Bar-Gill & Warren, *supra* note 167, at 85.

[320] *See* Haley Sweetland Edwards, *He Who Makes the Rules*, WASH. MONTHLY (Mar. 2, 2013), https://perma.cc/8DL9-WBQX (referring to the Dodd-Frank rulemaking process as "the seventh circle of bureaucratic hell").

[321] *See* Deniz Igan, Prachi Mishra & Thierry Tressel, *A Fistful of Dollars: Lobbying and the Financial Crisis*, 26 NAT'L BUREAU ECON. RSCH. 195, 195 (2012); *see also* Kevin L. Young, Tim Marple & James Heilman, *Beyond the Revolving Door: Advocacy Behavior and Social Distance to Financial Regulators*, 19 BUS. & POL. 327, 357 (2017). For example, 93% of agency contacts during the Dodd-Frank Act's Volcker Rule rulemaking period came from industry trade associations or companies. *See* Kimberly D. Krawiec, *Don't "Screw Joe the Plummer": The Sausage-Making of Financial Reform*, 55 ARIZ. L. REV. 53, 59 (2013).

[322] *See* Financial Institutions Regulatory Act of 1978, H. REP. NO. 95-1383, at 22–23, 95th Cong. 2d Sess. (1978); *see also* 12 U.S.C. §§ 242, 1812(e)(1).

before an agency, they can manufacture political controversy, allowing them to bring a major questions claim—overturning individual rules and, in the process, rewriting underlying statutes.[323] This wrenches decision-making away from agencies that are subject to a range of procedural participation requirements, including seeking public input.[324] Rather than putting power into the hands of the people, the major questions doctrine reduces democratic participation.

c. *Banking Agencies Are Accountable to the Legislature*

In order to be politically accountable, administrative agencies can either be responsive to the President *or* Congress.[325] The major questions doctrine focuses on the Executive's relationship to Congress through the laws that Congress passes and agencies implement. Importantly, delegation by Congress to executive agencies is properly understood not as a "*transfer* of legislative power, but an *exercise* of legislative power"[326] and agencies implementing their statutory responsibilities should be understood as "exercising executive power, not legislative power."[327] The doctrine instead inserts the judicial branch in a policymaking role that displaces *both* the legislative *and* executive branches.[328] It allows the

[323] *See* Deacon & Litman, *supra* note 12, at 40. Indeed, the Court in *Biden v. Nebraska* noted what it called the "sharp debates generated by the Secretary's extraordinary program." 143 S. Ct. 2355, 2374 (2023). In another recent example of this strategy, Republican members of the House Committee on Financial Services alleged that the banking agencies' issuance of a proposed rule to reform bank capital regulations was subject to "political motives," sought to achieve a "partisan goal," and was generally "plagued by politics." Letter from H. Comms. for Fin. Servs., to Michael S. Barr, Vice Chair for Supervision, Bd. of Governors of the Fed. Rsrv. Sys., et al. (Sept. 13, 2023), https://perma.cc/N56T-B9T3.

[324] *See* Emerson, *supra* note 20, at 2081–86.

[325] *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2225 (2020) (Kagan, J. dissenting); *see also Biden,* 143 S. Ct. at 2385 (Kagan, J., dissenting). For example, in *Seila Law*, the Chief Justice argued that the President is politically accountable, while in *Gundy* Justice Gorsuch asserted that only Congress is properly accountable. *See* Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 386–87 (2022).

[326] Posner & Vermeule, *supra* note 278, at 1723.

[327] *Id.*

[328] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2643–44 (2022) (Kagan, J., dissenting); *see also Biden*, 143 S. Ct. at 2385–86 (Kagan, J., dissenting); Gocke, *supra* note 20, at 977–78; Tortorice, *supra* note 20, at 1119–24.

judicial branch to reopen *policy* decisions that have been debated and settled by other branches.[329]

Courts do not need to encroach upon the banking policy process in this way to preserve legislative branch oversight of the executive branch. Congress already oversees banking agencies through hearings, investigations, and, when there is sufficient political will, legislation amending agency rules. In 2018, for example, Congress amended the Dodd-Frank Act, including several provisions legislatively proscribing specific aspects of banking agency rules that it disagreed with.[330] Congress can also respond to agency rules that are inconsistent with its preferences using a "legislative veto."[331] The Congressional Review Act[332] ("CRA") requires agencies to submit "major" agency rules to Congress for review, which Congress can overturn through a privileged resolution subject to a simple majority vote.[333] While the CRA was rarely used in the two decades following its passage,[334] it was resurrected during the Trump administration to overturn Obama administration rules,[335] including two banking and consumer protection rules.[336] In 2017, a Republican Congress overturned a CFPB rule limiting financial companies' use of mandatory pre-dispute arbitration clauses in consumer financial contracts.[337] During

[329] *See Biden*, 143 S. Ct. at 2397–98 (Kagan, J., dissenting) ("[T]he Court becomes the arbiter—indeed, the maker—of national policy. . . . That is no proper role for a court. And it is a danger to a democratic order." (citation omitted)); *see also* Gocke, *supra* note 20, at 1007.

[330] Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, §§ 214, 402–03, 132 Stat. 1296, 1321, 1360–61 (2018) (amending banking agencies' rules regarding capital treatment for high-volatility commercial real estate projects, treatment of treasury securities and central bank reserves under the Enhanced Supplementary Leverage Ratio, and classification of municipal securities under the Liquidity Coverage Ratio).

[331] Daniel A. Farber, Lisa Heinzerling & Peter M. Shane, *Reforming "Regulatory Reform": A Progressive Framework for Agency Rulemaking in the Public Interest*, J. AM. CONST. SOC'Y ISSUE BRIEFS, Oct. 2018, at 19.

[332] 5 U.S.C. § 801.

[333] *See* Farber et al., *supra* note 331, at 19–20. A major rule is one that the Office of Management and Budget has determined would result in an annual effect on the economy of $100 million or more, result in a major increase in costs or prices for various sector or regions of the economy, or have significant adverse effects on the ability of U.S. firms to compete with foreign enterprises. *See id.* at 8. This definition is problematic as applied to finance for the same reason that the major questions doctrine's "economic significance" factor is a problem, as discussed below. *See infra* Section II.B.2.

[334] *See* CONG. RSCH. SERV., INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES 24 (2017) (noting that from 1996 to 2016, only one rule was successfully overturned using the CRA process).

[335] *See* Farber et al., *supra* note 331, at 20.

[336] It has also been used to overturn regulatory guidance. *See infra* note 529.

[337] *See* Arbitration Agreements, 82 Fed. Reg. 55500 (Nov. 22, 2017) (codified at 12 C.F.R. pt. 1040). These arbitration agreements were one example held up by the CFPB's architects as a consumer

the Biden administration, Congress rescinded the Trump-era OCC's "true lender" regulation allowing fintech companies to enter into partnerships with banks, thereby benefitting from the NBA's preemption of certain state consumer protection laws.[338]

Finally, Congress can deprive agencies of interpretive deference. In 2004, the OCC issued a rule preempting national banks and their operating subsidiaries from complying with various state consumer protection laws that might otherwise have applied.[339] Scholars argued that, notwithstanding Supreme Court precedent affording *Chevron* deference to OCC interpretations, its preemption rule was not entitled to deference.[340] After the 2008 financial crisis, Congress concluded that the OCC's preemption rule helped to impede states from enacting laws addressing predatory mortgage lending practices.[341] The Dodd-Frank Act then clarified the preemption standard for national banks and their operating subsidiaries and required the OCC to consult with the CFPB when issuing preemption determinations.[342] It also codified the level of deference for OCC preemption opinions at the less deferential standard established in *Skidmore v. Swift & Co.*[343]

financial contract feature that the CFPB was needed to address. *See* Bar-Gill & Warren, *supra* note 167, at 52, 78.

338 National Banks and Federal Savings Associations as Lenders, 86 Fed. Reg. 42686 (Aug. 5, 2021) (codified at 12 C.F.R. pt. 7); *see* Christopher K. Odinet, *Predatory Fintech and the Politics of Banking*, 106 IOWA L. REV. 1739, 1794–95 (2021) (discussing the true lender rule).

339 *See* Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1904 (Feb. 12, 2004) (codified at 12 C.F.R. pts. 7, 34).

340 *See* Arthur E. Wilmarth Jr., *The OCC's Preemption Rules Exceed the Agency's Authority and Present a Serious Threat to the Dual Banking System and Consumer Protection*, 23 ANN. REV. BANKING & FIN. L. 225, 293–98 (2004).

341 *See* S. REP. NO. 111-176, at 16–17 (2010).

342 *See* 12 U.S.C. § 25b(b). Demonstrating Congress's ability to respond to agencies' adherence to Supreme Court decisions, this provision both codified the preemption standard in *Barnett Bank of Marion County v. Nelson*, 517 U.S. 25 (1996), and the visitorial powers standards in *Cuomo v. Clearing House Ass'n*, 557 U.S. 519 (2009). *See id.* §§ 25b(b)(1)(B), (b)(i)(1).

343 323 U.S. 134, 139–40 (1944). *Compare* 12 U.S.C. § 25b(b)(5)(A), *with Skidmore*, 323 U.S. at 140 (1944). This constituted a codification, rather than a modification, of the existing standard. *See* Lusnak v. Bank of Am., N.A., 883 F.3d 1185, 1192–93 (9th Cir. 2018). Under this standard, the Court of Appeals for the Ninth Circuit held that a California law requiring creditors to pay mortgage borrowers interest in their escrow accounts was not preempted by the NBA or the OCC's 2004 preemption regulation. *See id.* at 1194–97. Due to a circuit split on this issue, cert petitions have been filed in two cases requesting that the Supreme Court resolve the scope of NBA preemption as it applies to state laws governing interest rates on escrow accounts. *See* Petition for Writ of Certiorari, Cantero v. Bank of Am. N.A., No. 21-400 (2d Cir. Dec. 9, 2022); Petition for Writ of Certiorari, Flagstar Bank v. Kivett, No. 21-15667 (9th Cir. May 17, 2022). The Supreme Court granted cert in *Cantero* in October 2023. 144 S. Ct. 324.

As these examples illustrate, Congress has ample tools to react when it disapproves of agency rules and does not need courts to intervene on its behalf. Further, as the Court has recognized, "congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress."[344] Yet, the major questions doctrine allows courts to ostensibly speak for Congress and limit agency power, notwithstanding the lack of any meaningful political consensus to do so expressly through legislation.

d. *Federal Banking Agencies Play an Important Role in the Dual Banking System*

Recent major questions doctrine decisions have also incorporated a federalism principle into the "political significance" factor, arguing that Congress must use "exceedingly clear language" where an agency action "significantly alter[s] the balance between federal and state power."[345] This principle served as one rationale for invalidating the CFPB's reinterpretation of its UDAAP authority.[346] This rationale unravels, however, when applied to the U.S. banking system, which has long maintained a dual state and federal regime.[347]

The contours of the dual banking system have been the subject of vigorous debate and Congress has sought to carefully strike the proper balance between state and federal authority over banks. This ongoing balancing act with respect to bank powers is illustrated by the NBA preemption discussion, above. Today, state banking laws are preempted if they "prevent or significantly interfere with the national bank's exercise of its powers."[348] The Dodd-Frank Act also codified the relationship between states and the CFPB as it relates to laws, regulations, and enforcement authorities.[349] In general, a state consumer protection law is not inconsistent with federal consumer protection law if the protection that

344 NLRB v. Bell Aerospace Co., 416 U.S. 267, 275 (1974).

345 Ala. Ass'n Realtors v. Dep't Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1850(2020)); *see also* West Virginia v. EPA, 142 S. Ct. 2587, 2604 (2022) (Gorsuch, J., concurring).

346 *See* Chamber of Com. of the U.S. v. Consumer Fin. Prot. Bureau, No. 22-cv-00381, 2023 U.S. Dist. LEXIS 159398, at *14 (E.D. Tex. Sept. 8, 2023).

347 *See* Heidi Mandanis Schooner, *Recent Challenges to the Persistent Dual Banking System*, 41 ST. LOUIS U. L.J. 263 (1996).

348 *Lusnak*, 883 F.3d at 1192 (quoting Barnett Bank of Marion Cnty. v. Nelson, 517 U.S. 25, 33 (1996)).

349 *See* Pub. L. No. 111–203, tit. X, subtit. D, 124 Stat. 2012 (2010).

the state law "affords to consumers is greater than the protection provided" by federal law.[350]

As far back as *McCulloch v. Maryland*,[351] the Supreme Court has "held federal law supreme over state law with respect to national banking."[352] It is not clear why the general principle of federalism advocated by the major questions doctrine's proponents should displace the more specific legal principles underlying the dual banking system. Courts unilaterally upsetting this delicate arrangement would unsettle an important foundation of banking law.

As this discussion should make clear, the major questions doctrine's proponents have failed to meet the burden of establishing the claim that agencies are politically unaccountable.[353]

2. Economic Significance

The major questions doctrine's "economic significance" factor fails to account for the unique scale of the financial sector and incorporates a form of CBA that overstates the costs and undervalues the benefits of financial rules. Ironically, this aspect of the doctrine potentially insulates important sectors of the economy—which arguably require *more* regulation based on their systemic significance—from regulation.

a. *Economic Significance Is Context-Specific*

Congress and the courts have traditionally recognized that the importance of the banking sector to the economy has necessitated *closer* regulation and moderation than other industries.[354] The size of a country's financial sector relative to its GDP can inhibit economic growth and increase volatility, thereby leading to greater risks of financial crisis.[355] Under the major questions doctrine, however, the financial sector's importance to the economy makes it *more difficult* to regulate.

[350] 12 U.S.C. § 5551(a)(2).

[351] 17 U.S (4 Wheat.) 316 (1819).

[352] Watters v. Wachovia Nat'l Bank, 550 U.S. 1, 10 (2007).

[353] *See* Posner & Vermeule, *supra* note 278, at 1753 (noting that "show[ing] that delegation has reduced accountability" requires proving "that the agency regulates against the interests of Congress and the public or the interest groups that have influence with Congress, and that Congress does not attempt to discipline the agency").

[354] *See supra* Section I.A.3.

[355] *See* Jean Louis Arcand, Enrico Berkes & Ugo Panizza, *Too Much Finance?*, 20 J. ECON. GROWTH 105, 107 (2015) (finding negative effects on economic growth once a country's financial sector reaches a threshold between 80-100% of GDP).

Major questions cases have cited a variety of financial metrics to evaluate a policy's economic significance. In *Alabama Realtors*, the Court used the $50 billion of federal rental assistance appropriated by Congress to be paid out to landlords as a "reasonable proxy of the [eviction] moratorium's economic impact."[356] In *West Virginia v. EPA*, the Court cited the likelihood that the rule "would entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors."[357] Justice Neil Gorsuch's concurrence cited the fact that the "electric power sector is among the largest in the U. S. economy, with links to every other sector" as a reason to apply the major questions doctrine.[358]

In *Biden v. Nebraska*, the Court cited the student loan forgiveness program's cost to the federal budget of between $469 billion and $519 billion as evidence of its economic significance.[359] It also noted that this cost amounts to roughly one-third of the $1.7 trillion in annual federal discretionary spending and is ten times the estimated "economic impact" of the eviction moratorium.[360] These amounts ultimately led the Court to conclude that "[t]here is no serious dispute that the Secretary claims the authority to exercise control over 'a significant portion of the American economy.'"[361]

The financial sector dwarfs these examples in its absolute size, interconnectedness, and economic importance,[362] suggesting that most financial regulations could trigger the major questions doctrine.[363] Many banking products are sizeable in absolute terms and ubiquitous in their use. U.S. BHCs hold $20 trillion in assets on their balance sheets.[364] There are more than $18 trillion in insured deposits held by 4,796 U.S. banks.[365]

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356 Ala. Ass'n Realtors v. Dep't Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

357 142 S. Ct. 2587, 2604 (2022).

358 *Id.* at 2622 (Gorsuch, J., concurring) (internal quotation marks and citation omitted).

359 143 S. Ct. 2355, 2373 (2023).

360 *Id.*

361 *Id.* (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

362 *See* ABA Letter, *supra* note 305, at 8 (noting the "importance of [large banking organizations] to the provision of credit and other financial services in the economy"); *see also* Arnold & Porter Letter, *supra* note 293, at 4 ("The banking sector is undoubtedly a significant portion of the American economy."); Coates, *supra* note 294, at 999-1001.

363 *Cf.* The Federalist Society, *supra* note 160, at 10–11 (highlighting the FSOC's "ability to stop certain activities can apply to a whole industry, giving FSOC the authority to control whole, entire markets").

364 *See* Steele, *supra* note 9, at 78–79.

365 *See* Fed. Deposit Ins. Corp., *Statistics at a Glance*, (Mar. 31, 2022), https://perma.cc/L7S6-D5LS.

1,291 U.S. banks have $200.4 trillion in notional exposure to financial derivatives.[366] Compared to recent major questions precedents, a rule interpreting whether an activity such as dealing in derivatives constitutes "banking" under the NBA appears to be economically significant. The same logic may apply to determinations of whether an instrument qualifies as a "deposit,"[367] regulations for BHCs issued by the Fed under the BHCA, or bank capital rules issued on the basis of safety and soundness authority.[368] Indeed, the cryptocurrency industry is arguing that the major questions doctrine immunizes it from existing financial regulations on the basis of investor use and market capitalization that pales in comparison to the legacy banking system.[369] Were courts to adopt this view, it could have vast implications for banking, including impeding agency efforts to revisit the system governing U.S. deposit insurance following SVB's collapse.[370]

The major questions doctrine could have particular impacts upon rules that target the most systemic financial institutions. The eight United States-based Global Systemically Important Banks ("GSIBs")—holding two-thirds of the assets at all BHCs—are responsible for over $13 trillion in assets under management, hold over $123 trillion in assets under custody, and process more than $1 quadrillion in global payments annually.[371] Yet, regulating systemically important institutions or activities is economically significant almost by definition. Under this logic, an agency could have *less* ability to regulate a financial activity or institution as it becomes *more* systemic. Applying the major questions doctrine to banking regulation would hinder agencies' ability to exercise their safety and soundness authority to impose a growth restriction upon, or require divestiture of, a GSIB like Wells Fargo for its myriad consumer protection

366 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, QUARTERLY REPORT ON BANK TRADING AND DERIVATIVES ACTIVITIES 1, 10 (June 2022), https://perma.cc/DX7B-TX22.

367 As others have argued, the definition of "deposit" in banking law remains somewhat ambiguous. *See* Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 809–16 (2018).

368 *See* Eric J. Spitler, *The Supreme Court's Major Questions Doctrine: Implications for Responding to Financial Crises*, 27 N.C. BANKING INST. 1, 52–53 (2023); *see also* Letter from H. Comms. for Fin. Servs., *supra* note 323, at 2 (describing the banking agencies' joint Basel III Endgame regulatory capital proposed rule as "economically significant").

369 *See* Tillemann et al., *supra* note 304 (arguing that crypto regulation is a major question because 20% of Americans have invested in or used crypto and the industry has "trillions of dollars in market capitalization"); *see also* Jerry W. Markham, *Securities and Exchange Commission vs. Kim Kardashian, Cryptocurrencies and the "Major Questions Doctrine,"* 14 WM. & MARY BUS. L. REV. 515, 521–27, 550 (2023).

370 *See, e.g.*, *Recent Bank Failures and the Federal Regulatory Response: Hearing Before the S. Comm. on Banking, Hous, & Urb. Affs.*, 118th Cong. 1–3 (2023) (statement of Martin J. Gruenberg, Chairman, Fed. Deposit Ins. Corp.).

371 *See* Steele, *supra* note 9, at 78–79.

and compliance violations. It could also nullify aspects of the enhanced prudential standards issued under section 165 of the Dodd-Frank Act, which differentiates institutions by size, subjects large BHCs to more stringent standards, and increases in stringency as an institution grows larger.[372]

In addition to conflicting with the explicit congressional directive contained in section 165 of the Dodd-Frank Act, this would turn the consensus approach of progressively increasing regulation, generally and in the specific context of financial regulation, on its head.[373] It could also result in a disproportionate regulatory burden on smaller institutions that do not qualify as economically significant under the doctrine.[374] This is analogous to allowing the Department of Energy to regulate the safety of rooftop solar panels but not nuclear power plants.

b. *Major Questions' Cost-Benefit Analysis Is Incomplete*

CBA plays an implicit role in evaluating a rule's economic significance. A major questions doctrine's analysis requires courts to assess the financial ramifications of an administrative action and conduct a cursory economic balancing—essentially a crude form of CBA.[375]

Like other CBAs, the major questions doctrine focuses on the costs that rules impose on private businesses.[376] In *National Federation of Independent Business v. OSHA*, the Court cited the "hefty fines" that OSHA could levy for violating the vaccination and testing policy.[377] Similarly, Justice Gorsuch's concurrence in *West Virginia v. EPA* cites

372 *See* Tarullo, *supra* note 96, at 64; *see also* 12 U.S.C. §§ 5365(a)(1)(B), (b)(3).

373 *See* Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the Federal Reserve Bank of Chicago Bank Structure Conference: Rethinking the Aims of Prudential Regulation (May 8, 2014) (advocating for a regulatory framework that is tailored to the banking organizations' risk profile); *see also* Biden v. Nebraska, 143 S. Ct. 2355, 2399 (2023) (Kagan, J., dissenting) ("Congress allows, and indeed expects, agencies to take more serious measures in response to more serious problems.").

374 *See generally* SEAN HOSKINS & MARC LABONTE, CONG. RSCH. SERV., R4399, AN ANALYSIS OF THE REGULATORY BURDEN ON SMALL BANKS (2015) (analyzing the regulatory burden on small banks).

375 *See supra* notes 291–97 and accompanying text. As with other aspects of this analysis, the major questions doctrine CBA has been applied inconsistently. *See* Brunstein & Revesz, *supra* note 21, at 235–36 (describing the "arbitrary and malleable metrics" employed by the Trump administration in arguing that major questions doctrine should apply to regulatory actions).

376 *See* Chamber of Com. of the U.S. v. Consumer Fin. Prot. Bureau, No. 22-cv-00381, 2023 U.S. Dist. LEXIS 159398, at *13 (E.D. Tex. Sept. 8, 2023) (finding that the CFPB's interpretation of its UDAAP authority is a major question and is "shown by the millions of dollars per year spent by companies attempting to comply with the UDAAP rule at issue "); *see also* Brunstein & Revesz, *supra* note 21, at 237–42 (discussing the application of regulatory costs under the major questions doctrine).

377 Nat. Fed'n Indep. Bus. v. OSHA, 142 S. Ct. 661, 664 (2022).

regulated industries' estimates of the costs of the EPA's Clean Power Plan as evidence that the rule is subject to the doctrine.[378] The fines, restitution, and other penalties that regulators routinely assess upon financial companies dwarf these figures.[379] Indeed, to illustrate the broad nature of the CFPB's powers, the Court in *Seila Law LLC v. Consumer Financial Protection Bureau*[380] described the CFPB as possessing "the authority to bring the coercive power of the state to bear on millions of private citizens and businesses, imposing even billion-dollar penalties through administrative adjudications and civil actions."[381]

Also like the typical CBA approach, the major questions doctrine obfuscates the tangible and intangible benefits of regulation. For example, in *National Federation of Independent Business v. OSHA* the Court set businesses' claims that OSHA's rule would "force them to incur billions of dollars in unrecoverable compliance costs and will cause hundreds of thousands of employees to leave their jobs" against OHSA's estimate that the rule would "save over 6,500 lives and prevent hundreds of thousands of hospitalizations" before concluding that it was not in a position to assess these tradeoffs.[382] Similarly, as Justice Elena Kagan noted in *West Virginia v. EPA*, the CBA in the Court's analysis factored in the costs of the EPA's greenhouse gas emissions regulation without considering any of its benefits, which were likely far greater.[383] In *Seila Law*, Justice Kagan also observed that, rather than tallying the impacts to regulated companies of the CFPB's enforcement actions, "the more relevant factoid for those many citizens might be that the CFPB has recovered over $11 billion for banking consumers."[384]

While an evaluation of the full costs and benefits of banking regulations is a difficult undertaking involving many uncertain variables, it is clear that such regulations provide substantial benefits to the public.

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378 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2609–10 (2023) (Gorsuch, J., concurring).

379 The fines cited in *National Federation of Independent Business v. OSHA* were between $13,653 and $136,532. 142 S. Ct. at 664. By contrast, the six largest U.S. banks have paid more than $198 billion in fines and settlements from 430 enforcement actions between 2000–2022—an average of $431 million per action. *See* BETTER MARKETS, WALL STREET'S ONGOING CRIME SPREE 5 (May 12, 2022). Indeed, Wells Fargo was recently fined $1.7 billion and ordered to pay $2 billion in restitution related to various harmful consumer practices. *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Orders Wells Fargo to Pay $3.7 Billion for Widespread Mismanagement of Auto Loans, Mortgages, and Deposit Accounts (Dec. 20, 2022), https://perma.cc/F8C5-QSVA.

380 140 S. Ct. 2183 (2020).

381 *Id.* at 2200–01.

382 *Nat. Fed'n Indep. Bus.*, 142 S. Ct. at 666.

383 *See West Virginia*, 142 S. Ct. at 2629–30 (Kagan, J., dissenting).

384 *Seila Law*, 140 S. Ct. at 2239 (Kagan, J., dissenting). However, the Trump administration frequently argued that the number of beneficiaries of an action was a relevant metric in determining whether it should be classified as a Major Question. *See* Brunstein & Revesz, *supra* note 21, at 247–49.

For example, banks charge consumers approximately $12 billion in credit card late fees annually and $15 billion in account overdraft fees.[385] The CFPB's regulation of these fees under its UDAAP authority or the Credit CARD Act could potentially save consumers billions of dollars annually.[386] But creating savings for consumers imposes costs for banks in the form of lost revenue.[387] The CFPB's ability to regulate such fees could be jeopardized if financial industry profits are the sole measure of economic significance. The same is true of capital rules that might reduce a bank's return on shareholder equity or constrain shareholder payouts, through dividends and stock buybacks, but which provide safety and soundness and financial stability benefits.[388] The *Biden v. Nebraska* decision illustrates this problematic reasoning, framing the student loan forgiveness program's broad consumer benefit—including "abolish[ing] $430 billion in student loans, [and] completely canceling loan balances for 20 million borrowers"—as evidence suggestive of agency overreach.[389]

Lax financial regulation may arguably increase economic growth over the short run, but it does so unsustainably, permitting the excessive buildup of risk.[390] Over time, this can result in catastrophic events at either an institutional or systemic level.[391] The costs of such events include direct costs in the form of bailouts, implicit subsidies that accompany financial rescues, and indirect costs to the broader economy imposed by financial crises.[392] While these costs can be opaque and difficult to quantify, they are nonetheless substantial, particularly in relation to the narrow costs of industry compliance.[393]

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385 *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Initiates Review of Credit Card Company Penalty Policies Costing Consumers $12 Billion Each Ye*ar* (June 22, 2022), https://perma.cc/879Y-Z9BG; *see also,* Press Release, Consumer Fin. Prot. Bureau, CFPB Research Shows Banks' Deep Dependence on Overdraft Fees (Dec. 1, 2021), https://perma.cc/J6K6-9U3F.

386 *See* Press Release, Consumer Fin. Prot. Bureau, CFPB Initiates Review of Credit Card Company Penalty Policies Costing Consumers $12 Billion Each Year (June 22, 2022), https://perma.cc/879Y-Z9BG.

387 Alison Bennett & Ronamil Portes, *Banks Intend to 'Close the Gap' If CFPB Slashes Credit Card Late Fee Income*, S&P GLOBAL (Feb. 21, 2023), https://perma.cc/ZDW5-TG8M.

388 *See* Steele, *supra* note 100, at 1007, 1043–44.

389 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2373–74 (2023) ("Practically every student borrower benefits, regardless of circumstances.").

390 *See* CONG. BUDGET OFF., FINANCIAL REGULATION AND THE FEDERAL BUDGET 36–37, 43 (2019).

391 *See id.*

392 *See* Jonathan R. Macey & James P. Holdcroft, Jr., *Failure is an Option: An Ersatz-Antitrust Approach to Financial Regulation*, 120 YALE L.J. 1368, 1414–15 (2011).

393 *See, e.g.*, CONG. BUDGET OFF., *supra* note 390, at 35 (estimating that a hypothetical financial crisis would reduce U.S. GDP by $5.4 trillion over a ten-year period).

Importantly, financial crises have significant costs for households in the form of bankruptcies, foreclosures, and lost jobs and income.[394] Financial crises destroy wealth and prosperity on an intergenerational scale.[395] According to one estimate, the 2008 financial crisis reduced economic output by seven percentage points, the equivalent of each American losing $70,000.[396] These impacts are not evenly distributed. They fall the hardest on marginalized communities, such as communities of color.[397] Financial calamities also have negative effects on peoples' health, safety, and wellbeing.[398] Few financial regulations would likely fail on CBA grounds if the analysis incorporated the savings that result from protecting consumers or preventing financial crises.[399]

There are also principled reasons to be skeptical of any judicially imposed CBA requirement. When Congress wants agencies to conduct CBA, it has said so explicitly, including in specific provisions of the Dodd-Frank Act.[400] This suggests that CBA is improper where it has not been clearly required by Congress.[401] Indeed, the FSOC recently declined to include CBA in its process for designating nonbank financial companies for prudential regulation and supervision where the statutory language does not require it.[402] It is also not clear that courts possess the requisite

394 *See id.* at 43.

395 *See* Emma Coleman Jordan, *The Hidden Structures of Inequality: The Federal Reserve and a Cascade of Failures*, 2 U. PA. J.L. & PUB. AFFS. 107, 137 (2017).

396 *See* Regis Barnichon, Christian Matthes & Alexander Ziegenbein, *The Financial Crisis at 10: Will We Ever Recover?*, FRBSF ECON. LETTER (Aug. 13, 2018), https://perma.cc/5L9J-XNE2.

397 *See* Jordan, *supra* note 395, at 109–12.

398 *See* Hilary J. Allen, *A New Philosophy for Financial Stability Regulation*, 45 LOY. U. CHI. L.J. 173, 194 (2013).

399 *See* Steele, *supra* note 100, at 1043–44. For example, the Congressional Budget Office ("CBO") model for estimating the impact of changes in financial regulatory policy combines historical estimates of: (1) the change in likelihood of bank failures and a resulting financial crisis; (2) the macroeconomic impact of the hypothetical crisis; and (3) the impact of those macroeconomic conditions on federal spending and revenues. *See* CONG. BUDGET OFF., *supra* note 390, at 50. As a result, CBO scores deregulatory policies as increasing the federal deficit over a ten-year budget window. *See id.* at 47.

400 *E.g.*, 12 U.S.C. § 5512(b)(2)(A)(i); *see also* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 1100G, 124 Stat. 1376 (codified as amended in scattered sections of 12 U.S.C.).

401 Even where agencies are charged with considering regulatory costs, they may still enjoy discretion in *how* they analyze the relevant costs. *See* Michigan v. EPA, 576 U.S. 782, 785 (2015) (Kagan, J., dissenting) ("[W]hen Congress does not say how to take costs into account, agencies have broad discretion to make that judgment.").

402 *See* Guidance on Nonbank Financial Company Determinations, 88 Fed. Reg. 80110, 80121 (Nov. 17, 2023) (to be codified at 12 C.F.R. pt. 1310) ("The statute instructs the Council to focus on potential threats to financial stability, not the costs of designation to the company under review or to others . . . . Congress determined that when a nonbank financial company meets the statutory

expertise, data, and perspective to conduct a rigorous CBA evaluating highly technical banking regulations with complex consequences.[403]

3. Novel Interpretations

Congress often wants agencies to address "new and big problems."[404] Banking is a particularly dynamic industry.[405] Financial markets are a perpetual source of ostensible "innovations" that present risks that can easily grow to a systemic scale.[406] In the financial sector there is "ample historical experience of risks emerging rapidly in fast-growing sectors if left unchecked."[407]

Financial innovation often tests the limits of banking law and regulation.[408] Banks and other financial institutions have long sought to engage in the "functional amplification and replication of the core banking franchise" but "without paying the 'franchise fees' imposed on banks" in the form of chartering and regulation.[409] Banking regulators must understand the various potential uses—and abuses—of malleable banking instruments and the fine distinctions between "innovative" risk management practices and opportunities for regulatory arbitrage.[410]

Conversely, courts' narrow interpretations can frustrate agency attempts to address regulatory arbitrage and produce unintended consequences. In the *Board of Governors of the Federal Reserve System v.*

standard, designation is justified. The Council declines to second-guess that legislative judgment."). Imposing CBA, through major questions or otherwise, has particular significance for the Dodd-Frank Act. According to one estimate, the Dodd-Frank Act uses the *Michigan v. EPA*-cited phrase "necessary and appropriate" or "appropriate and necessary" eighty times. *See* Richard L. Revesz, *Cost-Benefit Analysis and the Structure of the Administrative State: The Case of Financial Services Regulation*, 34 YALE J. ON REGUL. 545, 548 (2017).

403 *See* Metzger, *supra* note 1, at 153–54.

404 West Virginia v. EPA, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting). Adaptability is not just consistent with the New Deal tradition—its roots date back to the Constitution and the views of the Framers. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2225, 2245 (2020) (Kagan, J., concurring in the judgment with respect to severability and dissenting in part).

405 *See* Dan Awrey & Kathryn Judge, *Why Financial Regulation Keeps Falling Short*, 61 B.C. L. REV. 2295, 2302–08 (2020); *see also* Coates, *supra* note 294, at 1002–03.

406 *See* Omarova, *supra* note 3, at 758; *see also* Bar-Gill & Warren, *supra* note 167, at 10.

407 *See* Aikman et al., *supra* note 67, at 39.

408 *E.g.*, S. REP. NO. 100-19, at 2 (1987).

409 Hockett & Omarova, *supra* note 35, at 1164.

410 For example, the pre-financial crisis credit default swap market was purportedly a tool to help institutions hedge risk, but instead became a means for banks to take on additional risk while minimizing their regulatory capital requirements. *See* Chenyu Shan, Dragon Yongjun Tank, Hong Yan & Xing (Alex) Zhou, *Credit Default Swaps and Bank Regulatory Capital*, 25 REV. FIN. 121, 125, 135–38 (2020).

Dimension Financial Corp.[411] case, for example, the Court rejected the Fed's functional approach to regulating nonbanks' issuance of deposit-equivalent instruments.[412] Later, the proliferation of various deposit substitutes, unaccompanied by commensurate banking regulation, was a contributing factor to the 2008 financial crisis.[413]

Applying the major questions doctrine's bias against novel agency interpretations could prevent regulatory agencies from "attempting an innovative use of . . . regulatory authority, even if the statutory text itself does not prohibit or could even sustain such a reading."[414] This aspect of the doctrine requires a level of omniscience from Congress in crafting statutory language that is unrealistic as a practical matter,[415] and contrary to notions of effective financial regulation.

a. *Banking Activities Evolve Rapidly*

Congress and the courts have, for better or worse, given banking regulators discretion to respond to a rapidly evolving industry and deferred to their expertise. When the NBA was enacted in 1863, its drafters could not have anticipated the creation of mortgage-backed securities, stock index futures, or the fintech industry. Each of these activities was novel and was not permissible for national banks to engage in until the OCC reinterpreted the meaning of the NBA.[416] The major questions doctrine threatens this tradition by incorporating an antinovelty presumption for assessing agency actions.

As a doctrinal matter, this posture conflicts with settled administrative law. Specifically, the Supreme Court has rejected the idea that novel interpretations of longstanding statutes are inherently suspect.[417] For example, the Court has upheld the OCC's interpretation that the NBA preempts states from regulating national banks' credit card

411 474 U.S. 361 (1986).

412 *See id.* at 373–74.

413 *See* John Crawford, *A Better Way to Revive Glass-Steagall*, 70 STAN. L. REV. ONLINE 1, 7–8 (2017), https://perma.cc/V3C3-HQCX. Congress attempted to address the growth of nonbank-banks in the Competitive Equality Banking Act of 1987, with limited success due to definitional issues and grandfathering provisions. *See* Pub. L. No. 100-86, 101 Stat. 552 (1987).

414 Gocke, *supra* note 20, at 972.

415 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2397 (2023) (Kagan, J., dissenting) ("The doctrine forces Congress to delegate in highly specific terms . . . . It is hard to identify and enumerate every possible application of a statute to every possible condition years in the future. So, again, Congress delegates broadly."); *see also* Heinzerling, *supra* note 20, at 1948.

416 *See* WILMARTH, *supra* note 128, at 158–69; *see also* Menand & Ricks, *supra* note 128, at 1398–406.

417 *See* SEC v. Chenery Corp., 332 U.S. 194, 207 (1947).

late fees as interest, thereby allowing national banks to export their home state rules nationwide, in both a change in the agency's position and a novel interpretation of the statute.[418] In doing so, the Court concluded that "neither antiquity nor contemporaneity with the statute is a condition of validity" and "the mere fact that an agency interpretation contradicts a prior agency position is not fatal."[419]

Interpretations that benefit the cryptocurrency industry may be particularly vulnerable to the major questions doctrine's antinovelty principle, as it makes responses to new and emerging technologies more difficult.[420] In 2020, for example, the OCC permitted banks to take custody of customers' cryptographic keys, reasoning that this was analogous to other traditional custody activities.[421] The OCC argued that, "as the financial markets become increasingly technological, there will likely be increasing need for banks and other service providers to leverage new technology and innovative ways to provide traditional services."[422] But the major questions doctrine offers regulators little leeway to make these sorts of interpretations regarding such novel activities, technologies, or financial assets.

Within the current regulatory settlement, Congress retains its prerogative to amend applicable laws to accommodate or address emerging activities and practices. Legislation can respond to regulatory developments or the evolution of markets. For example, Congress intervened when agencies attempted to regulate the derivatives markets in the early 2000s, arguably contributing to the conditions that gave rise to the 2008 financial crisis.[423] More recently, some members of Congress have proposed legislation to change the ways that cryptocurrency is regulated,[424] however, a legislative consensus has not yet emerged.[425]

Not all new products, services, and technologies present as meaningfully different from their legacy analogues. New technologies may change the qualitative manner in which financial products and

418 *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 737, 747 (1996).

419 *Id.* at 740, 742.

420 *See* Johnson & Tournas, *supra* note 21, at 194–95.

421 Authority of a National Bank to Provide Cryptocurrency Custody Services for Customers, Off. of the Comptroller of the Currency Interpretive Letter, No. 1170, at 6 (July 22, 2020).

422 *Id.* at 5.

423 *See* Colleen M. Baker, *Regulating the Invisible: The Case of Over-the-Counter Derivatives*, 85 NOTRE DAME L. REV. 1287, 1310–14 (2010).

424 *E.g.*, Lummis-Gillibrand Responsible Financial Innovation Act, S. 4356, 117th Cong. (as introduced to Senate, June 7, 2022).

425 *See* Timothy G. Massad & Howell E. Jackson, *How to Improve Regulation of Crypto Today—Without Congressional Action—and Make the Industry Pay For It* 1–2 (Hutchins Ctr. Working Paper No. 79, 2022).

services are delivered, without altering the fundamental economic or legal substance of those products and services.[426] Some emerging industries may even attempt to exploit their ostensible novelty as part of a political project to avoid traditional regulatory regimes.[427] In the absence of specifically targeted congressional action, banking laws provide banking agencies with significant discretion to determine the appropriate scope, terms, and conditions of banks' activities and operations, including novel ones.[428]

b. *Effective Banking Regulation Addresses Emerging Risks*

Applying the major questions doctrine's antinovelty principle to bank regulation also risks invalidating important provisions in the Dodd-Frank Act establishing administrative authorities based upon the experience of the 2008 financial crisis.[429] The Dodd-Frank Act was enacted both to prevent "recurrence of the same problems" that gave rise to the crisis, but also to create a "new regulatory framework that can respond to the challenges of a 21st century marketplace."[430] The doctrine could jeopardize the latter congressional goal.

The idea that the CFPB should have broad authority to accomplish its consumer-protection mission was central to the CFPB's conception.[431] In her 2008 article proposing the creation of a CFPB, then-Professor Elizabeth Warren noted that the "main drawback of [consumer protection] statutes is their specificity."[432] Each existing consumer law "identifies specific problems to be addressed and identifies within the statutory framework what practices will be outlawed and what practices will not," which "inhibits beneficial regulatory innovations."[433] This

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426 *See* Omarova, *supra* note 3, at 771–90 (discussing the characteristics of bitcoin, blockchains, and initial coin offerings).

427 *See id.* at 791–92.

428 *See supra* Section I.B; *see also* BD. OF GOVERNORS OF THE FED. RSRV. SYS., SR 22-6, ENGAGEMENT IN CRYPTO-ASSET-RELATED ACTIVITIES BY FEDERAL RESERVE-SUPERVISED BANKING ORGANIZATIONS (Aug. 16, 2022) (requiring any bank seeking to engage in crypto activities to determine that the activity is permissible for the bank to engage in, and notify the bank's supervisor in advance).

429 *See* Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689, 691 (2013).

430 S. REP. NO. 111176, at 42 (2010).

431 *See* Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY J., Summer 2007, at 11 (advocating for the creation of an agency to protect consumers in financial markets and that the agency should have broad tools to address market failures and to "eliminate some of the most egregious tricks and traps in the credit industry").

432 Bar-Gill & Warren, *supra* note 167, at 84.

433 *Id.*

approach was flawed because "[l]egislation targeted to specific practices, with narrowly defined authority delegated to administrative agencies, is incapable of effectively responding to the high rate of innovation in consumer credit markets and the subtle ways in which creditors can exploit consumer misunderstanding."[434]

Congress thus created an "agency with a broad mandate [that] could develop more institutional expertise and quicker responses to new products and practices."[435] The Dodd-Frank Act's drafters wanted the CFPB to have "enough flexibility to address future problems as they arise."[436] They believed that "[c]reating an agency that only had the authority to address the problems of the past, such as mortgages, would be too short-sighted."[437] The CFPB is meant to be both powerful and nimble, because "[e]xperience has shown that consumer protections must adapt to new practices and new industries."[438] Notwithstanding this clear congressional intent, courts applying the major questions doctrine to the CFPB's UDAAP authority under the Dodd-Frank Act have chosen to disregard Congress' explicit choice to provide the CFPB with wide regulatory latitude.[439]

Consumer protection is not the only example of regulatory consensus changing as new practices emerge or difficult lessons are learned. A central post-crisis goal of financial stability regulation is addressing emerging risks.[440] Predicting ex ante systemic events and their impacts requires regulators to anticipate risks and scenarios the "precise parameters of which cannot be fully known."[441] Thus, section 165 of the Dodd-Frank Act is a broad grant of authority that provides the Fed with a great deal of discretion in its implementation.[442] Similarly, as the *MetLife*

434 *Id.* at 99.

435 *Id.*

436 S. REP. NO. 111-176, at 11 (2010).

437 *Id.*

438 *Id.*

439 *See* Chamber of Com. of the U.S. v. Consumer Fin. Prot. Bureau, No. 22-cv-00381, 2023 U.S. Dist. LEXIS 159398, at *18 (E.D. Tex. Sept. 8, 2023) ("Although the 'unfairness' language in the Dodd–Frank Act or the FTC Act might be viewed broadly . . . that language has also been viewed as more narrowly limited to vindicating the sovereignty of individual consumer choice.").

440 *See id.* at 2 (explaining that one of the Dodd-Frank Act's purposes is "establishing an early warning system to detect and address emerging threats to financial stability and the economy"); *see also* Graham S. Steele, *Confronting the "Climate Lehman Moment": The Case for Macroprudential Climate Regulation*, 30 CORNELL J.L. & PUB. POL'Y 109, 142 (2020).

441 *See Establishing a Framework for Systemic Risk Regulation: Hearing Before the S. Comm. on Banking, Hous., and Urb. Affs.*, 111th Cong. 75 (2009) (statement of Daniel K. Tarullo, Member, Bd. of Governors of the Fed. Rsrv. Sys.).

442 *See* Steele, *supra* note 100, at 1001–02.

Inc. v. Financial Stability Oversight Council[443] court recognized, the FSOC's evaluations of potential threats to financial stability rely on "[p]redictive judgment . . . based on reasoned predictions."[444] The major questions doctrine makes such judgments, even ones based upon an agency's substantial subject matter expertise, more difficult, if not impossible.

4. Agency Expertise

The final relevant major questions doctrine factor is whether an action falls within an agency's area of expertise. This factor leaves courts to judge the essential nature of what agencies do against the core purpose of the regulation at issue and conclude whether an agency's action "raises an eyebrow." This aspect of the doctrine essentially provides courts with a pretext to ignore the principle that an agency's decision is not arbitrary and capricious where that decision is the product of the agency's expertise.[445]

The notion of narrow regulatory expertise is contrary to the nature of banking regulation and supervision, which require agencies to evolve and adopt their expertise to address emerging—and pressing—challenges.[446] Banking regulators must evaluate the risks of banks' retail and business customers, the nature of complex financial products,[447] and the broader economic environment in which banks operate.[448] Tools like lending guidance, for example, require an appreciation for the ways that nonfinancial attributes can impact borrowers' creditworthiness.[449] Agricultural lending requires an understanding of the factors that can affect farms' cash flows, including livestock maintenance, commodity prices, weather conditions, and agricultural policies.[450] Lending to oil and gas companies requires awareness of the risks of extractive industries, including the reliability of fossil fuel reserves, environmental laws and policies, and reputational dynamics associated with environmental

443 177 F. Supp. 3d 219 (D.D.C. 2016).

444 *Id.* at 237.

445 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 43 (1983).

446 *See* Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 679 (2021).

447 *See* Awrey & Judge, *supra* note 405, at 2308–11.

448 *See* Steele, *supra* note 100, at 1037–38.

449 *See* Interagency Guidance on Leveraged Lending, 78 Fed. Reg. 17766 (Mar. 21, 2013).

450 *See* Fed. Deposit Ins. Corp., Prudent Management of Agricultural Lending During Economic Cycles, Financial Institution Letter 5-2020 (Jan. 28, 2020).

hazards and accidents.[451] Assessing the risks of banks' international lending and investments in sovereign bonds requires an understanding of how nations' political, legal, and other institutional dynamics could impact the likelihood of repayment.[452]

Allowing BHCs to participate in an array of financial and nonfinancial activities, as enabled by the passage of GLBA, has likewise required regulators and supervisors to develop commensurate expertise in a wide range of financial and nonfinancial activities. Section 4(k) of the BHCA allows BHCs to trade physical commodities and operate nonfinancial businesses through merchant banking investments.[453] To oversee these activities, regulators must understand the risks inherent in banks' ownership and operation of nonfinancial businesses, including catastrophic environmental events.[454] As a result, regulators have adopted specific risk management policies related to permissible activities such as oil transport.[455]

Policymakers responsible for preserving financial stability must also consider a broad set of economic risks.[456] Regulators have had to respond to the financial impacts of wars, volatile oil prices, foreign currency fluctuations, and terrorist attacks.[457] That is why tools like supervisory stress testing incorporate a range of hypothetical market scenarios to tests banks' resilience under extreme conditions.[458] Because the sources of these risks are not specified, stress testing requires supervisors to consider extreme and unlikely events in order to be useful.[459] For example, in response to the worst global pandemic in a century, financial regulators took sweeping acts of regulatory forbearance.[460] As the financial regulatory apparatus swung into motion during the onset of COVID-19, there were rightly few voices arguing that the agencies lacked the expertise

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451 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, OIL AND GAS EXPLORATION AND PRODUCTION LENDING, COMPTROLLER'S HANDBOOK, at 14–17 (2018).

452 *See* BASEL COMM. ON BANKING SUPERVISION, BANK FOR INT'L SETTLEMENTS, THE REGULATORY TREATMENT OF SOVEREIGN EXPOSURES 30–31 (2017), https://perma.cc/B6GM-T9L7.

453 *See* 12 U.S.C. §§ 1843(c), (k); *see also* 12 C.F.R. § 225.28 (2022); 12 C.F.R. subpt. J (2022).

454 *See* Steele, *supra* note 440, at 153–54.

455 *See id.* at 154 n.225.

456 *See* Craig Torres, *For Fed's Disaster Junkie, Pandemic was One of 99 Bad Scenarios*, BLOOMBERG (Sept. 23, 2020), https://perma.cc/2ZF5-LJH3.

457 *See* Steele, *supra* note 100, at 1042.

458 *See* Steele, *supra* note 440, at 146–47; *see also* Tarullo, *supra* note 96, at 66.

459 *See* Steele, *supra* note 440, at 147.

460 *See* Steele, *supra* note 100, at 1026–31.

to use their authority to respond to the financial consequences of a global pandemic.[461]

Some have nonetheless argued that banking agencies are incapable of evaluating novel technologies such as blockchain.[462] Supervisors have long been required to understand, however, the technology underlying banks' operations and activities,[463] from data processing services to cybersecurity and cloud computing.[464] In addition, the logic of this argument does not cut the way that its proponents might like it to, as it could constrain agencies' ability to expand banks' permissible activities, including the OCC's interpretations of the bank powers clause. The OCC has allowed banks to engage in custody of cryptocurrency assets under the NBA by extending the logic that banks are already allowed to take custody of traditional financial assets and engage in data processing.[465] Because bank regulators are not computer scientists or engineers, however, it could be argued that they do not possess the requisite expertise to evaluate these technologies. As a result, these interpretations may run afoul of the major questions doctrine.[466]

The major questions doctrine's proponents have also argued banking regulators are straying beyond their mission by considering financial risks created by climate change.[467] Courts might well be tempted to extend the logic of *West Virginia v. EPA* to climate-related financial risk given its superficial connection to the air pollution regulation at issue in that

461 *E.g.*, Jeanna Smialek, *The Financial Crisis the World Forgot*, N.Y. TIMES (updated Mar. 17, 2021), https://perma.cc/V25X-PB4L (noting that there was "little popular outrage" over the Fed's actions to support the U.S. financial markets in March 2020 during the early stages of the COVID-19 pandemic).

462 *See* THOMPSON ET AL., *supra* note 285, at 29.

463 *See* Bd. of Governors of the Fed. Rsrv. Sys., Guidance Regarding Significant Changes in the General Character of a State Member Bank's Business and Compliance with Regulation H, SR 02-9 (Mar. 20, 2002) ("Changes in the general character of a bank's business would include, for example, becoming a primarily Internet-focused or Internet-only operation . . . These activities can present novel risks for banking organizations, depending on how they are conducted and managed . . . .").

464 *See* U.S. DEP'T OF THE TREASURY, THE FINANCIAL SECTOR'S ADOPTION OF CLOUD SERVICES 31–37 (2023), https://perma.cc/X76N-MCA3.

465 *See* Authority of a National Bank to Provide Cryptocurrency Custody Services for Customers, Off. of the Comptroller of the Currency Interpretive Letter, No. 1170, at 6 (July 22, 2020).

466 West Virginia v. EPA, 142 S. Ct. 2587, 2631–32 (2022) (Kagan, J., dissenting) (arguing—rightly—that laws are on their face technology-neutral and that agencies have discretion to evaluate such things).

467 *See* Heritage Foundation Letter, *supra* note 303, at 2–3; *see also* Letter from Sean Reyes, Att'y Gen. of Utah, et al., to Michael J. Hsu, Acting Comptroller of the Currency, Off. of the Comptroller of the Currency 5–6 (Sept. 29, 2022), https://perma.cc/5TA6-BLLM.

case.[468] This argument is misguided. In evaluating climate risks, financial agencies are not determining climate policies such as establishing a price on carbon or capping emissions.[469] They are attempting to account for the physical and transition-related financial risks to, and emanating from, financial institutions' balance sheets.[470] As the Fed's former vice chair for supervision during the Trump administration has noted, banking regulators have traditionally ensured that supervised banks are able to "manage all material risks, whatever the source—which can include climate risk."[471] The Trump administration's FDIC chair likewise observed that bank supervisors have "long expected financial institutions to consider and appropriately address potential climate risks that could arise in their operating environment as a meaningful safety and soundness concern" including risks that might appear to lie outside a narrow conception of banking.[472]

As these examples demonstrate, evaluating the appropriate scope of a bank regulator's expertise—and what is "outside its wheelhouse"[473]—is not simple or straightforward. Banking regulation requires wide-ranging knowledge, some elements of which may not be intuitive to judges unfamiliar with all that the job requires. It is also not clear what agencies would be better situated to assume the various responsibilities of bank regulation, including supervision of agricultural lending, oil and gas lending, and international lending activities.

III. The Quiet Crisis of Major Questions: Unworkability, Instability, Uncertainty, and Unpredictability

Despite its many shortcomings, the major questions doctrine is becoming the preferred vehicle for challenging administrative actions. By limiting regulators' ability to develop and use their expertise, the major questions doctrine limits Congress's ability to provide for capacious financial regulation. While anticipating the range of prospective impacts

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468 *See* Taryn Zucker, Lauren Lee & Evelyne Kim, *West Virginia v. EPA Casts a Shadow Over SEC's Proposed Climate-Related Disclosure Rule*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Aug. 3, 2022), https://perma.cc/P3YX-4LJW.

469 *See* Powell, *supra* note 16, at 3 (stating that the Fed is "not, and will not be, a 'climate policymaker'").

470 *See* Steele, *supra* note 440, at 114–21 (analyzing the financial risks from climate change).

471 Randal K. Quarles, Vice Chair for Supervision, Bd. of Governors of the Fed. Rsrv. Sys., Remarks to the National Association of Insurance Commissioners International Insurance Forum 7 (May 26, 2021).

472 Jelena McWilliams, Chairman, Fed. Deposit Ins. Corp, Statement at the Financial Stability Oversight Council Meeting (Mar. 31, 2021).

473 Biden v. Nebraska, 143 S. Ct. 2355, 2382 (2023) (Barrett, J., concurring).

of this nascent interpretive theory is challenging, it is nonetheless clear that courts second guessing agency expertise interferes with the essential processes of bank regulation. That, in turn, will have profound consequences for the financial system—and, by extension, the broader economy and society as a whole.

A. *The Unworkability of Major Questions*

At a fundamental level, the major questions doctrine contradicts the longstanding design of banking oversight. The stated purpose of the doctrine is to prevent *unintended* legislative delegations where an agency attempts to "exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[474] In practice, however, the broad application of the doctrine also prevents *intentional* delegations of authority—even to agencies that possess appropriate expertise[475]—especially where Congress wishes for agencies to be flexible and adaptable.[476] The major questions doctrine is "specially crafted to kill significant regulatory action, by requiring Congress to delegate not just clearly but also micro-specifically."[477] The goal of the doctrine is to "[p]revent agencies from doing important work, even though that is what Congress directed."[478] At the very least, it causes agencies to second-guess any potentially innovative or expansive actions.

Because banks are public instrumentalities chartered by the government to perform a quasi-public function, bank regulation implicates more significant governmental interests and diminished private liberty interests.[479] Through the banking laws, Congress has

474 Nat. Fed'n Indep. Bus. v. OSHA, 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring).

475 *See Biden*, 143 S. Ct. at 2398 (Kagan, J., dissenting) ("[T]he authority [the HEROES Act] grants goes only to the Secretary [of Education]—the official Congress knew to hold the responsibility for administering the Government's student-loan portfolio and programs. . . . Student loans are in the Secretary's wheelhouse." (citations omitted)); *see also* Lemley, *supra* note 10, at 100 (noting that the major questions doctrine "seems to be designed to allow the Court to reject significant agency actions that are within their grant of power but that the agency implements in ways the Court doesn't like").

476 *See Biden*, 143 S. Ct. at 2397 (Kagan, J., dissenting) ("The new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation. . . . Congress delegates to agencies often and broadly. And it usually does so for sound reasons. . . . Because times and circumstances change, and agencies are better able to keep up and respond.").

477 *Id.* at 2400 (Kagan, J., dissenting).

478 West Virginia v. EPA, 142 S. Ct. 2587, 2641 (2022) (Kagan, J., dissenting).

479 *See* Fahey v. Mallonee, 332 U.S. 245, 256 (1947) ("It would be intolerable that the Congress should endow an association with the right to conduct a public banking business on certain limitations and that the Court at the behest of those who took advantage from the privilege should remove the limitations intended for public protection. It would be difficult to imagine a more

repeatedly given banking regulators broad powers to define concepts like safety and soundness and clarified when deference should be afforded to agency interpretations. The major questions doctrine contradicts the foundational principle that regulators should enjoy broad authorities and courts should defer to their specialized expertise.[480] At its most basic level, the issue being raised by those major questions doctrine proponents is whether such *intentional* delegations are acceptable. Given that, the nondelegation doctrine would be the more appropriate vehicle for invalidating financial regulators' discretion. Courts have already long recognized, however, that doing so would have dramatic implications for agencies' ability to effectively regulate the banking system.[481] Even when recent court decisions have questioned the validity of the CFPB's structure, they have nonetheless upheld its broad UDAAP authority against a nondelegation doctrine challenge because it is "accompanied by a specific purpose, objectives, and definitions to guide the Bureau's discretion."[482]

The major questions doctrine's role as a "status quo ante principle,"[483] designed to prevent agency action in response to significant developments, has significant implications for banking. Preserving the status quo, whether through action or inaction, is itself a policy choice. The major questions doctrine could, for example, cast doubt on precedents establishing banking regulators' authority to define permissible activities, including the OCC's opinion letters interpreting the "business of banking" under the NBA and the Fed's interpretations of activities that are "closely related" or "complementary" under the BHCA.[484] If a bank were to enter into a new line of business not clearly within the "business of banking," and regulators failed to stop them, then the agency

appropriate situation in which to apply the doctrine that one who utilizes an Act to gain advantages of corporate existence is estopped from questioning the validity of its vital conditions.").

480 *See Biden*, 143 S. Ct. at 2397 (Kagan, J., dissenting) ("Congress delegates to agencies often and broadly . . . . [b]ecause agencies have expertise Congress lacks."); *see also* Lemley, *supra* note 10, at 99 ("[*Chevron*] deference is based on agency expertise, and it has traditionally been at its highest in complex areas where agency expertise is more important.").

481 *See* Bd. of Governors of the Fed. Rsrv. Sys. v. Agnew, 329 U.S. 441, 449 (1947) (rejecting a nondelegation challenge to section 32 of the Glass-Steagall Act because the "limits of administrative action are sufficiently definite or ascertainable"); *see also Fahey*, 332 U.S. at 249–54 (rejecting a nondelegation challenge to the Federal Home Loan Bank Board's authority to issue regulations governing the placement of savings and loans into conservatorship).

482 Cmty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau, 51 F.4th 616, 635 (5th Cir. 2022). While the Court of Appeals for the Fifth Circuit was specifically addressing the CFPB's unfairness authority, it also noted that the abusiveness authority contained specific criteria to guide the CFPB. *See id.* at 634 & n.7.

483 Gocke, *supra* note 20, at 972.

484 *E.g.*, Nationsbank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 257 (1995).

has violated both its obligation to administer the banking laws and the *status quo ante* principle underlying the major questions doctrine. It would also run afoul of the Court's administrative law precedents recognizing that there are consequences to both pro-regulatory *and* deregulatory decisions, and therefore both types of decisions should be subjected to commensurate scrutiny.[485] A competitor industry might well have standing to challenge such actions,[486] but it is not clear why regulatory inaction would be either preferable or lawful where a rule affirmatively allowing the activity might otherwise be struck down.

Under the major questions doctrine, regulatory decisions are made by courts in the first instance, which lack the requisite expertise to second guess agency judgments regarding both highly technical regulatory matters and Congress' intent when crafting U.S. banking laws.[487] Relative to agency actions, imprudent judicial decisions are difficult to rectify when circumstances change or new risks emerge.[488] The legislative branch is the secondary option, but Congress is limited in both its technical expertise and the time available to devote to issues as specialized as banking.[489] Congress is simply not equipped to make the sort of highly technical and consequential policy decisions typically made by agencies, particularly ones involving an industry as innovative as finance.[490] While it has been suggested that the United States could adopt a European

485 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co., 463 U.S. 29, 42 (1983).

486 Many of the seminal bank activities cases were brought by mutual fund, insurance, and other nonbank financial companies on the theory that the injury suffered by allowing banks into nonbanking business put them within the "zone of interest." *E.g.*, Ass'n of Data Processing Svc. Orgs., Inc. v. Camp, 397 U.S. 150, 155–56 (1970); *see also* Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 496–97 (1987). It is generally easier for business competitors to establish standing than public interest organizations challenging deregulatory actions that harm the public, but where a direct showing of injury is more attenuated. *E.g.*, Better Markets, Inc. v. U.S. Dep't of Just., 83 F. Supp. 3d 250, 255 (D.D.C. 2015). For a fulsome discussion of standing issues involved in private litigation challenging financial regulatory interpretations, *see* Schooner, *supra* note 223, at 975–85.

487 *See* Bd. of Governors of the Fed. Rsrv. Sys. v. Agnew, 329 U.S. 441, 450 (1947) (Rutledge, J., concurring) (banking agencies' "specialized experience gives them an advantage judges cannot possibly have, not only in dealing with the problems raised for their discretion by the system's working, but also in ascertaining the meaning Congress had in mind in prescribing the standards by which they should administer it").

488 *See* Coenen & Davis, *supra* note 274, at 820.

489 *See* Emerson, *supra* note 20, at 2090. As a result of a decades-long project of institutional hollowing, there has been a decline in experienced Congressional policy staff to assist in crafting legislation. *See* Paul Glastris & Haley Sweetland Edwards, *The Big Lobotomy*, WASH. MONTHLY, (June 9, 2014), https://perma.cc/48LR-5FG9. The committees of the House of Representatives had fewer professional staff in 2009 than in 1994. *See id.* As of 2014, the bodies constructed to aid Congress in its oversight mission—the Government Accountability Office and the Congressional Research Service—were operating at about 80% of their 1979 staff capacity. *See id.*

490 *See* Bar-Gill & Warren, *supra* note 167, at 85.

Union-style policymaking process, whereby regulations are submitted to the legislature for approval,[491] this is unrealistic. It is true that other jurisdictions have long exercised greater direct political control over the regulatory process than in the United States,[492] however, the U.S. Congress lacks the political urgency to address the myriad pressing regulatory issues of our time. The U.S. legislative process contains unique obstacles[493] making it slow and cumbersome to enact new statutes.[494] Rather than facilitating robust debate and compromise through legislation, the major questions doctrine creates policy gridlock.[495]

Our current system of bank regulation exists because courts have recognized that they lack the proper expertise to evaluate fundamental policy judgments and instead defer to regulatory agencies to make informed decisions. Once courts start down the slippery slope created by a major questions doctrine analysis, they would have to devise a way to establish prudent and coherent distinctions between major and minor banking regulations. But this would be a difficult task given the lack of any broader framework under the doctrine. What are the appropriate numeric thresholds that make a banking issue economically significant? Does the major questions doctrine apply to other banking agency actions besides regulation, such as approval or denial of mergers and acquisitions or enforcement actions?[496] Drawing lines between new and old laws is no simpler. The bank regulatory regime would be unwieldy if specific authorities, activities, and risks were treated with varying levels of scrutiny—for example, if agencies were entitled to deference when determining whether a practice is "unfair" but not "abusive," or if a determination that an activity constitutes "banking" is entitled to deference but not one that implicates "financial stability." Consistent with the broader theme of this major questions doctrine analysis, determining

[491] *See* Kyle Campbell, *Quarles: Supreme Court Ruling Could Lead to European-Style Approach to Bank Regulation*, AM. BANKER (Sept. 7, 2022, 4:03 PM), https://perma.cc/37AC-AZ55.

[492] *See* Gadinis, *supra* note 317, at 375–79.

[493] *See* Litman, *supra* note 285, at 1429–33.

[494] *See id.*

[495] This dynamic has at times been held out as one of the benefits of the major questions doctrine. *See* West Virginia v. EPA, 142 S. Ct. 2587, 2626 (2022) (Gorsuch, J., concurring) ("[T]he Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives.").

[496] *E.g.*, Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 468 U.S. 207, 221 (1984) (holding the Fed's approval of a BHC's acquisition of a retail securities brokerage as "closely related" to the business of banking was a reasonable interpretation section 4 of the BHCA).

the scope of "major" financial questions requires policy decisions that are properly addressed by agencies, not courts.[497]

These unworkable features of the major questions doctrine are likely to have significant implications for the conduct of bank regulation. By extension, the doctrine has the potential to impact the institutions and public that rely upon effective regulation to ensure a stable and vibrant banking system.

B. *The Unintended Consequences of Major Questions*

In addition to its general unworkability as an administrative doctrine, applying the major questions doctrine specifically to bank regulation would have a range of practical—likely unintended—consequences. It would impair the functioning of the banking system by increasing the likelihood and frequency of episodes of instability and uncertainty for businesses and markets. It could also increase policy uncertainty, due to agencies' likely reliance on bank supervisory processes that are more ad hoc and less transparent than formal rules and prospective legislative reforms that are blunter and more structural than technocratic regulation. These outcomes would likely be unwelcome for many major questions doctrine proponents and opponents alike.

1. Major Questions Will Lead to More Financial Instability

The major questions doctrine's interrelated factors bias agency inaction over action,[498] creating a regulatory chilling effect. The result is deregulation through inaction. In prioritizing deregulation over regulation, the doctrine defies the Court's longstanding recognition that deregulatory actions are as consequential as regulatory ones and should therefore be subject to equivalent scrutiny.[499] It also harkens back to the failed model of law and economics regulation that prioritized wealth maximization, transactional efficiency, and private markets over public law.[500] This style of *laissez faire* regulation dominated banking regulation for decades, culminating in the 2008 financial crisis.[501]

497 *See* Blake Emerson, *Major Questions and the Judicial Exercise of Legislative Power*, YALE J. ON REGUL. NOTICE & COMMENT (Feb. 28, 2020), https://perma.cc/HE3B-7JVM.

498 *See* Heinzerling, *supra* note 20, at 1987.

499 *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

500 *See* Steele, *supra* note 100, at 1033–36.

501 *See* Stephen Golub, Ayse Kaya & Michael Reay, *What Were They Thinking? The Federal Reserve in the Run-up to the 2008 Financial Crisis*, 22 REV. INT. POL. ECON. 657, 660–64 (2015).

As Justice Kagan said in *West Virginia v. EPA*, "The stakes here are high."[502] When financial regulators fail in, or are prevented from, doing their jobs, financial crises ensue.[503] Crises have devastating impacts on people and communities—they exacerbate economic and racial inequality and increase social and political instability.[504]

Many of the nation's financial regulatory agencies exist as a result of Congress responding to financial crises by creating robust and independent agencies.[505] Preventing financial regulators from innovating, particularly in response to potential threats to financial stability, would sow the seeds of the next financial crisis. As with the "quiet crisis" decried by President Roosevelt, this crisis would be judicially created.

2. Major Questions Will Lead to More Market Uncertainty

According to conventional wisdom, the efficient operation of financial markets requires a degree of certainty.[506] Financial agencies provide legal certainty to industry participants through the regulations and guidance that establish the parameters of compliance.[507] By reopening previously settled regulatory policies, the major questions doctrine disrupts market participants' expectations,[508] introducing uncertainty into the banking system.

To the extent that the major questions doctrine could apply to agency guidance, it would deprive agencies of an important tool used to provide supervised institutions with views on supervisory matters in a transparent and consistent manner.[509] While this development would likely please

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502 West Virginia v. EPA, 142 S. Ct. 2587, 2644 (2022) (Kagan, J., dissenting). To be clear, the "stakes are high" in many administrative fields, including environmental cases, which involve the fate of a habitable planet or regulations governing standards for food, water, pharmaceuticals, consumer products, and the workplace. *See* Emerson, *supra* note 497.

503 *See* United States v. Phila. Nat'l Bank, 374 U.S. 321, 327 (1963) ("[T]he proper discharge of these functions is indispensable to a healthy national economy, as the role of bank failures in depression periods attests."); *see also* S. REP. NO. 111-176, at 15–17, 166 (2010) (describing prudential banking agencies' consumer financial protection regulatory failures preceding the GFC); Steele, *supra* note 440, at 154–55.

504 *See supra* notes 355–358 and accompanying text; *see also* Manuel Funke, Moritz Schularick & Christoph Trebesch, *Going to Extremes: Politics After Financial Crises, 1870–2014*, 88 EURO. ECON. REV. 227 (2016).

505 *See* McCoy, *supra* note 315, at 69–70.

506 *See* Brief of the Clearing House Association et al. as Amici Curiae Supporting Petitioner at 16, Madden v. Midland Funding LLC, 579 U.S. 927 (2016) (No. 15-610) [hereinafter Clearing House Brief].

507 *See* Emerson, *supra* note 323, at 419–21.

508 *See* Brunstein & Revesz, *supra* note 21, at 219; *see also* Heinzerling, *supra* note 20, at 1982–85.

509 *See* Role of Supervisory Guidance, 86 Fed. Reg. 18173, 18173 (Apr. 8, 2021) (codified at 12 C.F.R. pt. 262).

some critics of these decisions,[510] the resulting uncertainty could inhibit private sector innovation. For example, the doctrine could be used to cabin the OCC's interpretive authority to define permissible banking activities under the NBA, effectively returning to a previous "narrow view" of the "business of banking."[511] This is particularly true in the fields of fintech and cryptocurrency that lack sufficient basis in past agency decisions[512] and potentially lie outside the scope of financial regulators' core expertise. In this sense, it is ironic that cryptocurrency industry advocates are calling for the major questions doctrine to be applied to financial regulation,[513] as it would hinder the broad adoption of these products and services by regulated financial institutions.

The major questions doctrine also raises issues of consistency and predictability. The doctrinal analysis relies on multiple factors, the relative weights of which are unclear, with many remaining open questions about its application.[514] The doctrine effectively delegates policymaking to hundreds of federal judges with a broad spectrum of views and varying degrees of familiarity with the underlying subject matter. Because the major questions doctrine has not been applied uniformly to date[515]—each factor is "suggestive"[516]—it relies upon judges' subjective views of its vague parameters.[517] For market participants, anticipating and reconciling the disparate views of the federal judiciary would lead to inconsistent

[510] *E.g.*, Menand & Ricks, *supra* note 128, at 1398–1406, 1414–17.

[511] *See* Symons, *supra* note 128, at 678-80.

[512] *Cf.* Lacewell v. Off. of the Comptroller of the Currency, 999 F.3d 130, 138–39 (2d Cir. 2020).

[513] *E.g.*, Brief for the Blockchain Association as Amicus Curiae Supporting Defendants, SEC v. Wahi, No. 22-cv-01009 (W.D. Wash. Feb. 13, 2023); see *also* THOMPSON ET AL., *supra* note 285, at 35 ("[The] decision to restrict the use of blockchain technology by private companies . . . is the sort of major policy decision that the elected representatives of the people assembled in Congress must make.").

[514] *See* Biden v. Nebraska, 143 S. Ct. 2355, 2384 (2023) (Barrett, J., concurring) ("[T]he doctrine is not an on-off switch that flips when a critical mass of factors is present . . . ."); see *also* Coenen & Davis, *supra* note 274, at 799 (noting that to develop a consistent application of the major questions doctrine, the Court "would need to identify factors of relevance to the variable of majorness, explain how to evaluate those factors in a given case, develop a mechanism for weighing those factors against one another, define a threshold point at which the weighing process supports a conclusion of majorness or nonmajorness, and so forth").

[515] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2620 n.3 (2022) (Gorsuch, J., concurring) (noting that the major questions doctrine has at times been applied "more like an ambiguity canon"); *see also* Gocke, *supra* note 20, at 967; Tortorice, *supra* note 20, at 1104.

[516] *West Virginia*, 142 S. Ct. at 2622 (Gorsuch, J., concurring).

[517] *See* U.S. Telecom Ass'n v. FCC, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) ("To be sure, determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality."); see *also* Heinzerling, *supra* note 20, at 1986–90; Gocke, *supra* note 20, at 1007.

outcomes that would cloud expectations, at least until a case reaches the Supreme Court.[518]

Using the major questions doctrine to weaken agency deference could also increase the partisanship of judicial review of agency actions. Independent financial agencies exist in part because "political manipulation could wreak havoc on business and the financial system."[519] The use of *Chevron* deference furthers this goal by reducing partisan outcomes in statutory interpretation cases.[520]

Banking industry associations have argued that uncertainty can reduce access to and increase the cost of credit.[521] It wastes the resources that institutions spend to comply with existing rules and leads to additional costs in order to comply with the new, judicially created ones.[522] It can even impact the safety and soundness of banks and other financial institutions and threaten the stability of the financial system.[523]

Uncertainty interferes with the operation of a financial sector that is critical to a well-functioning economy, potentially grinding financial activity to a halt.[524] All of these outcomes conflict with the major questions doctrine's purported goal of ensuring greater clarity and certainty in administrative decision-making.[525] This dynamic helps to explain the recent recognition among some businesses of the stability provided by various forms of regulation.[526]

3. Major Questions Will Encourage Regulation by Supervision

While the major questions doctrine would significantly curtail banking regulators' authority, they would not be entirely powerless. By

518 *See* Brief for the Mortgage Bankers Association et al. as Amici Curiae Supporting Neither Party at 16, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) [hereinafter Mortgage Bankers Ass'n Brief].

519 McCoy, *supra* note 315, at 71.

520 *See* Kent Barnett, Christina L. Boyd & Christopher J. Walker, *Administrative Law's Political Dynamics*, 71 VAND. L. REV. 1463, 1468 (2018).

521 *See* Clearing House Brief, *supra* note 506, at 21–22; *see also* Mortgage Bankers Ass'n Brief, *supra* note 518, at 17–19.

522 *See* Mortgage Bankers Ass'n Brief, *supra* note 518, at 17, 20.

523 *See* Clearing House Brief, *supra* note 506, at 21; *see also* Mortgage Bankers Ass'n Brief, *supra* note 518, at 13; *id.* at 21 (invalidating the CFPB's past actions "would run counter to Congress's stated purpose in the Dodd-Frank Act of promoting financial stability, and therefore should be avoided").

524 *See* Mortgage Bankers Ass'n Brief, *supra* note 518, at 10–13, 15–17.

525 *See* Kisor v. Wilkie, 139 S. Ct. 2400, 2437–38 (2019) (Gorsuch, J., concurring); see *also* Emerson, *supra* note 325, at 392–94.

526 *See* J.S. Nelson, *The Growth in Business Support for Regulation*, REGUL. REV. (Apr. 19, 2023), https://perma.cc/9W38-FBYP.

stymying financial rulemaking, the doctrine could force regulators to utilize other available tools, including the supervisory process.

Supervision is the primary means through which the banking agencies enforce their safety and soundness authority,[527] and the CFPB identifies UDAAPs.[528] Supervision is more institution-specific, but also less transparent, predictable, and reviewable than rulemaking.[529] Agencies could bypass courts' major questions doctrine review of their regulations by making greater use of their examination, supervision, and enforcement powers.

By foreclosing regulation as an option in most circumstances, the major questions doctrine could lead to actions that would normally be handled through public rulemaking, and applied industry-wide, instead being imposed through private supervisory actions taken on an individualized basis and subject to limited judicial review.[530] Supervisory activities can then be reinforced by enforcement actions brought by agencies against institutions on a case-by-case basis—an approach that is sometimes referred to as conducting "regulation by enforcement."[531] Again, it is ironic that the adoption of the major questions doctrine could result in procedural outcomes, and a new financial regulatory settlement, that undermine some of the doctrine's stated goals of increased transparency, predictability, and accountability.

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[527] *See* Menand, *supra* note 39, at 953–55.

[528] *See* CONSUMER FIN. PROT. BUREAU, EXAMINATION MANUAL, UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES (2022).

[529] *See* Metzger, *supra* note 1, at 140. Agencies have already begun narrowing the role of supervisory guidance. *See* Role of Supervisory Guidance, 86 Fed. Reg. 18173, 18173 (Apr. 8, 2021) (codified at 12 C.F.R. pt. 262). The Government Accountability Office has determined that guidance is subject to Congressional Review Act review, resulting in the 2018 repeal of the CFPB's guidance on indirect automotive financing. *See* Letter from Susan Pollig, Gen. Counsel, Gov't Accountability Off., to Sen. Patrick J. Toomey, Chairman, Subcomm. on Fin. Insts. & Consumer Prot. (Oct. 19, 2017), https://perma.cc/9RLB-LNFY; *see also* Joint Resolution of May 21, 2018, Pub. L. No. 115–172, 132 Stat. 1290 (2018).

[530] The Court has acknowledged that agencies "must retain power to deal with . . . problems on a case-to-case basis if the administrative process is to be effective" and thus there is a "very definite place for the case-by-case evolution of statutory standards." SEC v. Chenery Corp., 332 U.S. 194, 203 (1947). While there have been recent attempts to use legal challenges to make supervision into a rote administrative process, analogous to that which applies to regulation, such efforts are unlikely to succeed. *See* Tarullo, *supra* note 67, at 283–85.

[531] *See* Chris Brummer, Yesha Yadav & David T. Zaring, *Regulation by Enforcement*, S. CAL. L. REV. (forthcoming), https://perma.cc/H8XC-HKZQ. Whether or not it is desirable as a policy matter, the Court has recognized that the "choice made between proceeding by general rule or by individual, ad hoc litigation is one that lies primarily in the informed discretion of the administrative agency." *Chenery Corp.*, 332 U.S. at 203.

4. Major Questions Could Lead to More Structural Reforms

The major questions doctrine shifts policy decision–making away from technocrats at administrative agencies to politicians in the legislature. While, as noted above, this is largely a recipe for inaction, such an approach carries some policy risk for industry participants. Namely, the pace of regulation may decline under the major questions doctrine, but the nature of the policies that are enacted could become more volatile.

Rather than fine-tuning regulatory dials and creating complex administrative schema, legislators may enact more sweeping and structural reforms. In this scenario, the regulatory pendulum would be slower moving, but swing more widely. This would introduce an additional form of policy uncertainty, another unwelcome outcome for market participants.

Scholars have argued that legislative financial reforms are born out of forcing events—either a crisis or scandal—combined with moments of political exigency.[532] The Dodd-Frank Act legislative process provides one such example. The most meaningful structural reform, a provision pushing complex derivatives outside of the federal safety net, was included at the behest of a Senate committee chair was facing a competitive primary campaign in which she was being criticized for being too politically moderate and sympathetic to the banking industry.[533] Similarly, the Obama administration adopted the Volcker Rule's structural prohibition against banking entities engaging in proprietary trading in response to the 2010 special election victory of a Republican Senate candidate in the heavily Democratic state of Massachusetts.[534] As these examples highlight, while members of Congress lack the expertise and resources of financial regulators, they may at times adopt populist, anti-Wall Street proposals in response to financial crises or scandals.[535]

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[532] *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1523–26 (2005) (discussing the political environment in which the Sarbanes-Oxley Act was enacted). *But see* Peter Conti-Brown & Michael Ohlrogge, *Financial Crises and Legislation*, 4 J. FIN. CRISES 1, 5 (2022) (finding "roughly 84% of all U.S. securities legislation was passed in the immediate aftermath of equity crises" while "only 36% of U.S. banking legislation was passed in the aftermath of banking crises" suggesting "that the crisis-legislation hypothesis fits well for securities legislation but much more poorly for banking legislation").

[533] *See* Arthur E. Wilmarth, Jr., *The Dodd-Frank Act: A Flawed and Inadequate Response to the Too-Big-to-Fail Problem*, 89 OR. L. REV. 951, 1030–34 (2011) (discussing the legislative history of the "Lincoln Amendment").

[534] *See id.* at 1025–30 (discussing the legislative history of the Volcker Rule).

[535] *See* Federico Favaretto & Donato Masciandaro, *Populism, Financial Crises and Banking Policies: Economics and Psychology*, 69 SCOTTISH J. POL. ECON. 441, 442 (2021).

Extending the major questions doctrine to banking regulation could also lead to legislative reforms that take aim at the courts themselves. To address perceived judicial overreach, Congress could begin imposing more explicit statutory standards of deference,[536] as it did as with the OCC's preemption authority, or Congress could codify a general standard of review like the one established in *Camp* and its progeny.[537] Either approach would cabin courts' future role in statutory judicial review.

Conclusion

The major questions doctrine employs simplistic ideas about democratic norms, selective measures of economic costs, flimsy representations about historical tradition, and anachronistic notions of expertise to unsettle once-settled expectations regarding agencies' powers. As this Article has argued, the factors that comprise the major questions doctrine analysis are ill suited for the banking system. Congress has recognized the importance of banking within our economy, crafted banking statutes containing broad authority for regulators in recognition of their wide-ranging expertise, and repeatedly ratified this arrangement. Courts have generally followed Congress's lead and deferred to financial regulators' expertise. So long as regulators operate within their statutory mandates, courts should not view financial policy decisions as major questions.[538]

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536 *See* Wilmarth, *supra* note 340, at 293 (advocating legislation repealing *Chevron* deference for regulators' interpretation of permissible activities, subjecting them to de novo review); *see also* Menand & Ricks, *supra* note 128, at 1401–06 (arguing the NBA is Federal corporate law, and therefore the OCC's interpretations should be construed in favor of the public and against the corporation).

537 *See supra* notes 193–195, 341–343 and accompanying text.

538 While banking agencies enjoy significant deference, there are clearly times when their actions can exceed any reasonable reading of their authorities. One example is the OCC's proposed "Fair Access" rule. Based upon the provision of the NBA establishing the OCC's purpose, this proposal was a response to banks from making business decisions not to finance certain oil and gas drilling projects by effectively requiring them to fund such projects. *See* Fair Access to Financial Services, 85 Fed. Reg. 75261, 75263 (Nov. 25, 2020) (codified at 12 C.F.R. pt. 55); *see also* 12 U.S.C. § 1(a). The final "Fair Access" proposal was never transmitted to the Federal Register, and thus never took effect. *See* Press Release, Off. of the Comptroller of the Currency, OCC Puts Hold on Fair Access Rule (Jan. 28, 2021), https://perma.cc/S3M4-C3PB. While OCC claimed that its interpretation was entitled to *Chevron* deference, *see* Fair Access to Financial Services, 85 Fed. Reg. at 75264 n.18, traditional judicial review of the OCC's action would likely have resulted in its being struck down for a variety of reasons, including as a rule that was arbitrary and capricious under the Administrative Procedure Act. *See* Graham S. Steele, Comment Letter on Fair Access to Financial Services (Jan. 4, 2021), https://perma.cc/SCD4-ZBTV (arguing that the proposed rule rested on a dubious legal foundation, was based upon a false premise regarding the basis for banks' credit decisions, and was vaguely worded and risked significant unintended consequences); *see also* Tarullo, *supra* note 67, at 394 (describing

Extending the major questions doctrine to banking regulation poses a threat to the legitimacy of the judicial branch. The public's confidence in the courts is low,[539] and the current Supreme Court has developed an especially pro-business reputation.[540] Financial deregulation is similarly unpopular.[541] The combination of these dynamics suggests that the judicial branch would risk further damaging its credibility by injecting itself into technical, but nonetheless high stakes, financial policy decisions.[542]

The major questions doctrine poses a significant reputational risk to the judiciary. Any court that contemplates striking down a financial regulation could later have its decision cited as a proximate cause of a damaging event, from an individual bank failure to a financial crisis. That is why, throughout their reviews of banking law and policy, courts have repeatedly declined to second guess legislative decisions or interfere in agency policymaking, particularly where elected legislators have also declined to do so.[543]

In these ways, expanding the doctrine and ignoring the public interest could further erode the Court's credibility and provoke political backlash like that experienced during the New Deal and other historical periods.[544] Continuing to recognize the limits of their financial acumen, and

the rule as an attempt to "bootstrap a general statutory charge [to] the Comptroller . . . into supervisory guidance pushing banks to lend to specific borrowers or industries").

In another example of an action that exceeded the OCC's statutory authority, in June 2020, the then-Acting Comptroller warned local elected officials that public health measures responding to the COVID-19 pandemic could "threaten the stability and orderly functioning of the financial system" because work-from-home policies could increase vandalism and looting of commercial properties and masking policies could increase the likelihood of bank robberies. *See* Letter from Brian Brooks, Acting Comptroller of the Currency, to Bryan K. Barnett, Mayor of Rochester Hills, Mich., and Tom Cochrane, CEO & Exec. Dir., U.S. Conf. of Mayors (June 1, 2020), https://perma.cc/24SM-2F2C. Both of these risks were highly attenuated from the OCC's mission and responsibilities, and this guidance was generally ignored by local officials and regulated institutions.

539 *E.g.*, Press Release, Marquette Univ., New Marquette Law School Poll Finds National Approval of U.S. Supreme Court's Work Continues to be Lower Than in 2020 (Sept. 21, 2022), https://perma.cc/8TLY-C279 (finding 40% of adults approve of the job the U.S. Supreme Court is doing, while 60% disapprove).

540 *See, e.g.*, Lee Epstein & Mitu Gulati, *A Century of Business in the Supreme Court, 1920–2020*, 107 MINN. L. REV. HEADNOTES 49 (2022) (analyzing how business friendly the Supreme Court has been over the past century).

541 *See* Steele, *supra* note 100, at 1044; see *also* Metzger, *supra* note 1, at 152.

542 *Cf.* Biden v. Nebraska, 143 S. Ct. 2355, 2399–2400 (2023) (Kagan, J., dissenting) ("[The Court] makes itself the decisionmaker on, of all things, federal student-loan policy. And then, perchance, it wonders why it has only compounded the 'sharp debates' in the country?").

543 *Cf.* King v. Burwell, 576 U.S. 473, 498 (2015) ("In a democracy, the power to make the law rests with those chosen by the people . . . . in every case we must respect the role of the Legislature, and take care not to undo what it has done." (citation omitted)).

544 *See* Lemley, *supra* note 10, at 117–18.

respecting the expertise of regulatory agencies, benefits judges by deferring the responsibility for high-stakes financial policy decisions to regulators who are better equipped to assume that responsibility and are more politically accountable.[545] Today's Court should take a lesson from the New Deal era Court, which exercised restraint in the face of the prospect of political blowback from its decisions,[546] and refrain from applying the major questions doctrine to banking.

[545] *See Biden*, 143 S. Ct. at 2397 (Kagan, J., dissenting) ("But this Court? It is, by design, as detached as possible from the body politic. That is why the Court is supposed to stick to its business—to decide only cases and controversies, and to stay away from making this Nation's policy about subjects like student-loan relief." (citation omitted)); *see also id.* at 2399 ("Maybe Congress was wrong to give the Secretary so much discretion; or maybe he, and the President he serves, did not make good use of it. But if so, there are political remedies—accountability for all the actors, up to the President, who the public thinks have made mistakes. So a political controversy is resolved by political means, as our Constitution requires."); *see also* Coenen & Davis, *supra* note 274, at 819–20.

[546] *See* Ginsburg & Menashi, *supra* note8, at 257–58.