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The Administrative State, Financial Regulation, and the Case for Commissions

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THE ADMINISTRATIVE STATE, FINANCIAL REGULATION, AND THE CASE FOR COMMISSIONS

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Administrative law is under attack, with the Supreme Court reviving, expanding, and creating doctrines that limit the authority and autonomy wielded by regulatory agencies. This anti-administrative turn is particularly alarming for financial regulation, which already faces enormous challenges stemming from the dynamism of modern finance, its growing complexity, and fundamental contestability. Yet that does not mean that defending the current regime is the optimal response. The complexity and dynamism of modern finance also undercut the efficacy of established administrative procedures. And the panoply of financial regulators with unclear and overlapping jurisdictional bounds only adds to the challenge. Both these procedural and structural challenges put greater pressure on Congress to act, but partisanship and other challenges are making such action more challenging than ever.

This Article tackles the question of how to enhance the willingness and capacity of even a reluctant Congress to engage in the legislation and oversight that the current judiciary is demanding. It argues that having Congress pre-commit to convening congressional commissions every ten years to survey the changing landscape, identify emerging threats, and propose reforms when appropriate could go a long way in enhancing Congress's capacity to act and serve as a prompt to such action. Like administrative agencies, commissions can be used to harness the specialized insights of experts on a range of technocratic policy issues. They can also incorporate more diverse and independent perspectives on these issues, connect them to broader questions about the role of finance in society, and help galvanize the public and political will needed to bring about regulatory reform. Moreover, unlike administrative agencies, commissions can provide ex ante guidance that informs the political process, enabling a different and complementary way to combine public participation, expert analysis, and congressional oversight. Looking to

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the historical use of commissions in finance and other domains as a guide, the Article shows how institutionalizing decennial commissions can help enhance both the quality and legitimacy of financial regulation. Commissions are no magic bullet, but they could constitute a useful, if modest, step in efforts to enhance the institutional design of Congress within the constitutionally prescribed parameters.

INTRODUCTION

Over six frenetic weeks in early 2023, the U.S. banking system experienced an acute crisis of confidence. The proximate cause of this crisis was the closure of California's Silicon Valley Bank (SVB) on Friday, March 10th.[1] Just two days later, New York's Signature Bank was also forced to close its doors.[2] SVB and Signature shared a number of things in common. Both banks provided financial services to the burgeoning venture capital, technology, and digital asset sectors.[3]

1. *See* Press Release, Cal. Dep't of Fin. Prot. & Innovation, California Financial Regulator Takes Possession of Silicon Valley Bank (Mar. 10, 2023), https://perma.cc/S64Y-LMSB.

2. *See* Press Release, N.Y. Dep't Fin Servs., Superintendent Adrienne A. Harris Announces New York Department of Financial Services Takes Possession of Signature Bank (Mar. 12, 2023), https://perma.cc/3M8Q-2K8U.

3. *See* FED. RSRV. BD., REVIEW OF THE FEDERAL RESERVE'S SUPERVISION AND REGULATION OF SILICON VALLEY BANK 19 (Apr. 28, 2023), https://perma.cc/SGZ7-84M6; FDIC, FDIC'S SUPERVISION OF SIGNATURE BANK 2, 8 (2023), https://perma.cc/97YN-K2UE;

Both relied heavily on uninsured deposits as a source of short-term financing.[4] Neither was sufficiently large or complex to have been deemed a global, systemically important bank by regulators, neither reported large or highly concentrated exposures to other banks, nor did either play the type of key role in the wider financial system typically associated with systemic significance.

Nonetheless, in the immediate aftermath of these closures, a unanimous Federal Reserve Board, a unanimous board of the Federal Deposit Insurance Corporation (FDIC), and the Treasury Secretary, in consultation with the President, determined that using the FDIC's conventional resolution procedures for these two banks "would have serious adverse effects on economic conditions of financial instability."[5] This extraordinary determination gave the FDIC the legal authority to extend blanket protection to SVB and Signature's uninsured depositors. The Federal Reserve Board also announced the creation of a new emergency lending facility, the Bank Term Funding Program, designed to provide banks and other eligible depository institutions with cheap short-to-medium term financing.[6] Yet despite this extraordinary government support, the crisis quickly escalated: triggering deposit outflows from other regional banks,[7] and raising awkward questions about the stability of banks that were perceived to share similar business models with SVB and Signature.[8] Over the next several weeks, these lingering questions contributed to significant market anxiety and the slow motion closure and eventual sale of another bank, First Republic, on May 1st.[9]

Not surprisingly, the crisis has already been the subject of a seemingly never ending parade of hearings in both the Senate and House of Representatives.[10]

Recent Bank Failures and the Federal Regulatory Response: Hearing Before the S. Comm. on Banking, Hous., and Urb. Aff., 118th Cong. 1, 5-11 (2023) (statement of Martin J. Gruenberg, Chairman, FDIC), https://perma.cc/T76K-4XSF.

4. Gruenberg Testimony, *supra* note 3, at 9 (reporting that 88% of SVB's deposits, and 90% of Signature's, were uninsured as of the end of 2022).

5. This determination was made pursuant to 12 U.S.C. §1823(c)(4)(G)(i)(I). *See* Press Release, FDIC, Joint Statement by the Department of the Treasury, Federal Reserve, and FDIC (Mar. 12, 2023), https://perma.cc/4RT7-XHYA.

6. *See* Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Board Announces It Will Make Available Additional Funding to Eligible Depository Institutions to Help Assure Banks Have the Ability to Meet the Needs of All Their Depositors (Mar. 12, 2023, 6:15 PM EDT), https://perma.cc/S4UE-PE4U.

7. *See* Stephan Luck, Matthew Plosser & Josh Younger, *Bank Funding During the Current Monetary Policy Tightening Cycle*, FED. RSRV. BANK OF N.Y.: LIBERTY ST. ECON. (May 11, 2023), https://perma.cc/N8KK-7WZY.

8. *See* Jennifer Hughes, James Fontanella-Khan, Ortenca Aliaj & Brook Masters, *Shares in US Regional Banks Finish Sharply Lower Over Fears of Deposit Flight*, FIN. TIMES (Mar. 13, 2023), https://perma.cc/SQ9R-FT4E.

9. *See* Press Release, FDIC, JPMorgan Chase Bank, National Association, Columbus, Ohio Assumes All the Deposits of First Republic Bank, San Francisco, California (May 1, 2023), https://perma.cc/P5UQ-NYVR.

10. *See, e.g.*, *Hearings to Examine the Failures of Silicon Valley Bank and Signature Bank, Including S.1045, to Amend the Federal Deposit Insurance Act to Clarify that the Federal Deposit Insurance Corporation and Appropriate Federal Regulators Have the Authority to Claw Back Certain Compensation Paid to Executives Before the S. Comm. on Banking,*

The Federal Reserve Board, FDIC, and Government Accountability Office have also each published their preliminary reports on the closures, as has the California Department of Financial Protection and Innovation (DFPI) and New York Department of Financial Services (NYDFS).[11] And of course, scholars, pundits, and other experts have vigorously debated the causes of the crisis and eagerly advanced a variety of blueprints for regulatory reform.[12] Yet absent from this improvised, often chaotic, and largely reactive process is any coordinated attempt to bring these various stakeholders and perspectives together, to evaluate what happened and why, and to lay out, for further debate, potential lessons this crisis can teach us about the structure and fragility of the U.S. banking system, current approach to bank regulation, supervision, and resolution, and whether we can do better.

Financial regulation is hard—and it's getting even harder.[13] In recent decades, financial markets and institutions have become staggeringly complex, as have the opaque and constantly evolving interconnections between them. This complexity has been turbocharged by the relentless dynamism of modern finance: with new markets and institutions emerging, taking root, expanding, and collapsing at almost breathtaking speed. Compounding matters, responsibility for regulating this complex and dynamic financial ecosystem has fallen to a highly fragmented, frequently competing, and often under-resourced assemblage of state and federal regulators.[14] This fragmentation has had the predictable ef-

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Hous. and Urb. Aff., 118th Cong. (2023), https://perma.cc/9767-BC2V; *Hearings on Continued Oversight of Regional Bank Failures Before the H. Fin. Servs. Comm.*, 118th Cong. (2023), https://perma.cc/F35F-5VSR.

11. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., REVIEW OF THE FEDERAL RESERVE'S SUPERVISION AND REGULATION OF SILICON VALLEY BANK (2023), https://perma.cc/DBG9-C237; FDIC, FDIC'S SUPERVISION OF SIGNATURE BANK (2023), https://perma.cc/B6JE-HC2L; U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-106736, PRELIMINARY REVIEW OF AGENCY ACTIONS RELATED TO MARCH 2023 BANK FAILURES (2023), https://perma.cc/LC68-YQSG; CAL. DEP'T OF FIN. PROT. & INNOVATION, REVIEW OF DFPI'S OVERSIGHT AND REGULATION OF SILICON VALLEY BANK (2023), https://perma.cc/DG5L-95N6; N.Y. DEP'T OF FIN. SERVS., INTERNAL REVIEW OF THE SUPERVISION AND CLOSURE OF SIGNATURE BANK (2023), https://perma.cc/2GXS-ZAUF.

12. *See e.g.*, Lev Menand & Morgan Ricks, Opinion, *Scrap the Bank Deposit Insurance Limit*, WASH. POST (Mar. 15, 2023, 7:15 AM EDT), https://perma.cc/X5FU-ZD82; Saule Omarova, Opinion, *Banks Can't Be Trusted. A 'Golden Share' Might Help*, N.Y. TIMES (Mar. 23, 2023), https://perma.cc/RHJ3-NQPC; Peter Conti-Brown, Opinion, *This Bank Proposal Will Damage Our Economy and Make Voters Even More Resentful*, N.Y. TIMES (Apr. 5, 2023), https://perma.cc/NVT4-YHB4.

13. For our own previous work on this subject, see Dan Awrey & Kathryn Judge, *Why Financial Regulation Keeps Falling Short*, 61 B.C. L. REV. 2296 (2020); Kathryn Judge, *Fragmentation Nodes: A Study in Financial Innovation, Complexity, and Systemic Risk*, 64 STAN. L. REV. 657 (2012); and Dan Awrey, *Complexity, Innovation, and the Regulation of Modern Financial Markets*, 2 HARV. BUS. L. REV. 235 (2012).

14. The degree of fragmentation is unique relative to financial regulation in other countries, but such overlaps and ambiguities also arise in other domains in the United States. *See generally* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131 (2012).

fects of impeding the flow of information within the regulatory community, increasing the number and size of information gaps, and contributing to jurisdictional disputes that detract from regulatory objectives and undermine efforts to promote regulatory clarity and accountability.[15] Together, this complexity, dynamism, and regulatory fragmentation make identifying and preventing the next crisis of confidence extremely difficult. It also raises the troubling prospect that financial regulation itself may help sow the seeds of future instability.

Complexity, dynamism, and regulatory fragmentation have always posed challenges for administrative law. Making these challenges harder still is the fact that administrative law itself is now at an important crossroads. The reason that has thus far attracted the most attention is the Supreme Court's growing reluctance to defer to administrative action.[16] By reviving and expanding doctrines that limit the independence and authority of administrative agencies, and interpreting statutes in ways that curtail agency discretion, the Supreme Court has imposed significant new checks on regulators across a wide range of substantive fields: from environmental protection, to veterans affairs, to occupational health and safety.[17] This anti-administrative turn has reignited debates about how best to integrate technocratic expertise and democratic engagement into actual policies.

Yet beyond the headline-grabbing attack on the administrative state, there are a variety of additional reasons why administrative law finds itself at a critical inflection point. A growing number of scholars, and many other members of the policy community, have begun to question whether existing administrative structures and processes actually support regulators in pursuit of their statutory objectives.[18] An important strand of this scholarship explores the limits of these structures and processes in fields—like finance—characterized by significant uncertainty, where the long-term effectiveness of regulation often demands that regulators continuously re-evaluate its impact and incorporate new learning in order to improve policy outcomes.[19] This scholarship has emerged against the backdrop of growing skepticism of technocratic knowledge, both in terms of the competence of so-called experts and whether their expertise can ultimately be

15. *See* Mark D. Flood, Allan I. Mendelowitz & William Nichols, *Monitoring Financial Stability in a Complex World*, *in* FINANCIAL ANALYSIS AND RISK MANAGEMENT 17-19 (Victoria Lemieux ed., 2013).

16. *See infra* Part II.D.

17. *Id.*

18. *See, e.g.*, Nicholas Bagley, The Procedure Fetish, 118 MICH. L. REV. 345, 369-70 (2019); Christine Overdevest & Jonathan Zeitlin, *Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector*, 8 REGUL. & GOVERNANCE 22, 23 (2014).

19. *See, e.g.*, Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L.J. 53, 56 (2011); Sandra Eckert & Tanja A. Börzel, *Experimentalist Governance: An Introduction*, 6 REGUL. & GOVERNANCE 371, 374 (2012).

disentangled from the political battlegrounds on which it is increasingly weaponized.[20] While these disparate strands cannot be distilled into a single movement, they collectively point to meaningful shortcomings in both the theory and practice of administrative law, and the value of finding new ways to combine technocratic expertise with broader democratic engagement.

This inflection point comes at a time when financial regulators are being forced to come to terms with yet another challenge: fundamental contestability. These regulators have increasingly been called upon to tackle a range of contentious and highly politicized policy issues including climate change, institutional racism, and structural inequality. In addition to challenging the traditional competencies of these regulators, these hot button issues have often sowed distrust within the regulatory community and led to growing discord—and even complete breakdown—within the conventional administrative processes governing regulatory agenda setting, policy formulation, and implementation.[21] Without other settings in which to debate these important issues, disagreements about the appropriate objectives of financial regulation have spilled over into presidential appointments and Senate confirmations, resulting in growing delays, high level vacancies, and a process so contentious that it could well deter many otherwise strong candidates from government service.[22] This fundamental contestability has thus thrown yet another wrench into administrative structures and processes that were already struggling under the weight of the complexity, dynamism, and regulatory fragmentation of modern finance.

This Article argues that well-designed and regularly constituted congressional commissions can help us tackle the growing challenges of complexity, dynamism, regulatory fragmentation, and fundamental contestability. They can also help us escape the risks of regulatory paralysis created by the judiciary's anti-administrative turn. Many of the most important turning points in the history of financial regulation have been borne out of commissions. After a century of relatively frequent financial crises, it was the National Monetary Commission, led by Senator Nelson Aldrich, that laid the groundwork for the creation of the Federal Reserve System.[23] During the Great Depression, the Pecora hearings famously served to shine a spotlight on Wall Street misdeeds, provided much

20. *See, e.g.*, Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 655 (2012); K. Sabeel Rahman, *Democracy Against Domination: Contesting Economic Power in Progressive and Neorepublican Political Theory*, 16 CONTEMP. POL. THEORY 41, 56-57 (2017); Jedediah Britton-Purdy, Amy Kapczynski & David Singh Grewal, *How Law Made Neoliberalism*, BOS. REV. (Feb. 22, 2021), https://perma.cc/TSV8-4GM3; Luke Herrine, *Politics and Expertise*, PHENOMENAL WORLD (Sept. 2, 2022), https://perma.cc/23XB-55EM.

21. *See* Emily Flitter, *How Bank Regulators Are Trying to Oust a Trump Holdover*, N.Y. TIMES (last updated Dec. 13, 2021), https://perma.cc/AT5D-F52W.

22. *See* Jeanna Smialek & Emily Cochrane, *Biden to Withdraw Nomination for Fed's Top Bank Cop*, N.Y. TIMES (Mar. 15, 2022), https://perma.cc/ZRK4-6ZYM; Victoria Guida, *Biden Bank Cop Nomination in Doubt After Fiery Hearing*, POLITICO (Nov. 18, 2021, 2:54 PM EDT), https://perma.cc/HL59-JSTX.

23. *See infra* Part III.

needed accountability, and contributed to the groundswell of public support for the sweeping legislative changes introduced as part of the New Deal.[24] And even when commissions have not played a key role in regulatory reform—as was the case in the wake of the global financial crisis of 2008—they can still play a constructive role in compiling and disseminating information, foregrounding important policy issues, and laying the groundwork for more healthy and informed public debate. Institutionalizing the use of commissions thus offers enormous potential benefits, with relatively limited costs, and few downside risks.[25]

The National Monetary Commission, Pecora hearings, and Financial Crisis Inquiry Commission—along with many other examples from both within and outside finance—illustrate the inherent flexibility of the commission structure. Commissions can be used in the wake of a crisis to surface policy problems, investigate their underlying causes, and identify and evaluate the range of available policy responses. They can be used as a platform for exploring bigger picture questions about the structure of the financial system and debating the role of finance in society. And they can be used to gauge the level of public support for important policy proposals, and for building public consensus. More generally, commissions can be used to ensure that congressional decision-making is informed not only by technocratic expertise, but also by the perspectives of a diverse range of other stakeholders. They can also ensure that this expertise is not tainted by jurisdictional turf wars or the internal politics of administrative agencies. In short, commissions can be whatever we need them to be depending on the state of finance and financial regulation.

This Article advances a blueprint for how commissions can complement the administrative law structures and processes that currently govern financial regulation: enabling financial regulators to better respond to the dynamic, complex, and contested nature of modern finance and promoting greater democratic engagement and accountability. This blueprint calls for the institutionalization of a congressionally-authorized decennial commission on the state of finance and financial regulation. Pursuant to this blueprint, Congress would pre-commit to creating a commission every decade and vest it with a core set of statutory responsibilities, including mapping any major changes in the structure of the financial system, evaluating the impact of previous regulatory reforms, and identifying any emerging sources of systemic risk. The commission would thus serve as a platform for framing and debating the most important questions in financial regulation, which it would then synthesize into a written report. At present, there is no systematic way of ensuring that these questions are even raised, much less answered. The decennial commissions would be designed to fill this institutional gap.

To maximize flexibility, the leadership, composition, and specific mandates would be determined with each new commission. For example, Congress could decide to use the inaugural commission to examine new developments like the

24. *Id.*
25. *Id.*

rise of crypto, explore a hotly contested issue like the impact of finance and financial regulation on climate change, or seek to identify lessons from the failures of SVB and Signature about how to improve bank regulation, supervision, and resolution. These specific mandates would then change over time to reflect the emergence of new policy challenges, shifts in government priorities and public opinion, and our own evolving understanding of how the financial system works and sometimes doesn't. Sometimes the commissions would be used as a coordination mechanism to tackle complex but relatively uncontentious problems—to pick low-hanging fruit. Other times they would be used to build consensus that could be translated into concrete policy action. But even where problems were highly politicized, a well-designed, well-led, and well-run commission could still shed new light on the issues at stake, help identify areas of common ground, and perhaps even enable stakeholders to chart a new way forward.

Our crosshairs in this Article are squarely trained on the question of whether commissions can improve how we make financial regulation. Yet the regulatory challenges that motivate it are by no means unique to finance. For this reason, our analysis makes use of case studies from other fields of regulation where commissions have played a constructive role in striking a balance between technocratic expertise and democratic engagement. Similarly, the case for using commissions in financial regulation may hold out important lessons for other fields where complexity, dynamism, or regulatory fragmentation, together with the judiciary's anti-administrative turn, have driven a wedge between the theory and practice of administrative law. Viewed in this light, the policy implications of our analysis may resonate well beyond the narrow and highly technical world of financial regulation.

This Article proceeds in four parts. Part I traces the emergence and growth of the administrative state, with particular focus on the archipelago of federal agencies responsible for regulating the U.S. financial system. It also describes the institutional structures and processes that have emerged to support this state, along with the resulting deference that courts have historically given to the decisions of administrative agencies. Part II identifies the core challenges facing financial regulators today. These challenges stem not only from complexity, dynamism, and regulatory fragmentation, but also—and crucially—from the design of administrative law and the growing reluctance of courts to defer to the decisions of administrative agencies. Using case studies from finance and beyond, Part III then examines the potential benefits, and pitfalls, of using commissions to help address these challenges. Drawing on this examination, Part IV concludes by laying out our blueprint for a decennial commission on finance: how it would work, what it would need to succeed, and why it would complement the administrative structures and processes that currently govern financial regulation.

I. The Administration of Financial Regulation

Before confronting the challenges facing financial regulation today, some historical background is required. This Part provides a brief account of the rise of the modern administrative state, the proliferation of financial regulators, and their role in shaping and administering financial regulation. The rise of the administrative state was motivated, at least in part, by the desire to bring more technocratic expertise into the policymaking arena. To capitalize on this expertise, administrative agencies were often given broad discretion to propose, adopt, amend, and enforce regulation within the scope of their congressional mandates. The exercise of this discretion was then subject to an administrative law framework designed to enhance both the technical quality and democratic legitimacy of the resulting policy decisions. As we shall see, the combination of technocratic expertise, broad discretion, and democratic checks and balances was essential to regulating complex and dynamic fields like finance.

As this background helps illuminate, financial regulation in practice has always been a world of second-bests, at best, and one in which there has never been complete agreement on the desired objectives, much less the best way of achieving them. Alongside the specifics of the current administrative law framework and how it came to be, this framing is key to understanding the challenges facing financial regulation, and the ways that commissions might improve on the current state of affairs.

A. The Rise of Delegated Administration

For as long as there have been democracies, there have been delegations of power to unelected officials and bureaucracies. In recent work, Julian Davis Mortenson and Nicholas Bagley draw attention to meaningful delegations of congressional authority at the time of the founding, showing just how widespread administrative lawmaking has always been.[26] Yet as reflected in the heated debate their article inspired, the appropriate mechanisms, limits, and checks on such delegations have often been deeply contested.[27] Questions about democratic accountability can be particularly thorny in countries, like the United States, that are not based on a parliamentary system: creating fundamental questions about the relationship between Congress's authority to make laws and its power over the purse, the President's constitutional duty to "take Care that the Laws be faithfully executed," and the authority of administrative agencies that carry out executive, legislative, and often even judicial functions.[28] Thanks to the popular musical, people around the world know that Alexander Hamilton, the first Treasury

26. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280 (2021); *see also* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 5 (2012).

27. *Compare* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1493 (2021) (challenging the claims put forth by Mortenson and Bagley), *with* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323, 2325 (2022) (defending their contentions).

28. Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 10 (1994); Adrian Vermeule, *Bureaucracy and Distrust: Landis, Jaffe, and Kagan on the Administrative State*, 130 HARV. L. REV. 2463, 2467 (2017).

Secretary, was a driving force in crafting federal regulation across a wide range of fields, including banking and finance. But more independent agencies soon appeared, and finance often led the way.

To help finance the Civil War, in 1863 Congress authorized the creation of national banks with a view to promoting the use of a single national currency "licensed, manufactured, and guaranteed by the federal government."[29] In order to charter these new banks, and oversee the newly created federal banking system, Congress created the Office of the Comptroller of the Currency (OCC) as an independent body within the Treasury Department.[30] Yet while the creation of the OCC was a key step in the eventual development of a single currency, it did not bring an end to the frequent banking panics that periodically paralyzed the nineteenth century U.S. economy.[31] Indeed, it would be another fifty years before Congress created the Federal Reserve System as the nation's central bank in order to arrest these frequent crises and regulate the wider monetary system.[32]

The New Deal brought new challenges, and with them the need for new regulatory agencies. The scale and scope of the New Deal reforms required far more of the federal government, and a growth in the size and capacity of the administrative state was key to enabling the government to fulfill these new and varied roles. The growth of the administrative state during this period was further accelerated by a growing belief that harnessing the specialized knowledge of experts was key to meeting the policy challenges of the day.

The far-reaching New Deal reforms in the field of financial regulation are an illuminating case in point. Between 1929 and 1933, over one-third of all chartered banks in the United States—more than 9,000 in total—closed their doors.[33] The widespread bank failures exacerbated the Great Depression and the arbitrariness of the economic devastation it inflicted. Individuals who had trusted one of these failed banks with their money often saw their savings disappear. And otherwise successful businesses who had built up a relationship with one of those banks struggled, and often failed, to access needed credit.[34]

In response to this destructive crisis of confidence, Congress introduced a

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29. Charles W. Calomiris & Charles M. Kahn, *The Efficiency of Self-Regulated Payment Systems: Learning from the Suffolk System*, 28 J. MONEY, CREDIT & BANKING 766, 770 (1996).

30. National Bank Act, ch. 343, § 1, 18 Stat. 123 (1874) (codified as amended at 12 U.S.C. § 38); *1863-1865: Founding of the National Banking System*, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://perma.cc/YA33-UL3D (archived Jan. 13, 2024); *see also* Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 953 (2021).

31. For empirical data regarding these periodic panics, see, for example, Asaf Bernstein, Eric Hughson & Marc D. Weidenmier, *Identifying the Effects of a Lender of Last Resort on Financial Markets: Lessons from the Founding of the Fed*, 98 J. FIN. ECON. 40, 42 (2010); and Jeffrey A. Miron, *Financial Panics, the Seasonality of the Nominal Interest Rate, and the Founding of the Fed*, 76 AM. ECON. REV. 125, 131 (1986).

32. Federal Reserve Act of 1913, Pub. L. No. 64-43, 38 Stat. 251 (codified as amended in scattered sections of 12 U.S.C.). For more on the founding of the Fed, see Part III.A below.

33. FDIC, THE FIRST FIFTY YEARS: A HISTORY OF THE FDIC 1933-1983, at 3-4 (1984).

34. Ben S. Bernanke, *Nonmonetary Effects of the Financial Crisis in the Propagation of the Great Depression*, 73 AM. ECON. REV. 257, 257 (1983).

new system of federal deposit insurance.[35] Pursuant to this new deposit insurance scheme, the depositors of failed backs would be entitled to compensation of up to $2,500. This insurance scheme had the virtue of both protecting individual depositors from potentially devastating losses and enhancing the stability of the banking system by deterring destabilizing depositor runs. Yet the virtues of federal deposit insurance also heightened the importance of prudential regulation and supervision to limit excessive risk-taking by insured banks. These concerns were addressed by introducing restrictions on the issuance of bank charters, limitations on the types of activities commercial banks could undertake, and strict prudential supervision to enforce the new rules and otherwise ensure the "safety and soundness" of any insured institution.[36] This in turn necessitated both the creation of a new regulator, the Federal Deposit Insurance Corporation (FDIC), and an increase in the effective authority of existing ones, including the OCC. That the Fed did not do more in response to the economic contraction similarly helped motivate an expansion in its own authority.[37]

Another important feature of the New Deal reforms was the introduction of a comprehensive new federal framework for the regulation of securities offerings, intermediaries, and exchanges.[38] Amongst other matters, this framework required companies that offered their securities to the public to provide potential investors with detailed information about the nature of their business, financial affairs, and securities, and then allowed investors to hold companies liable for any misrepresentations. The framework also imposed new standards designed to promote the integrity and smooth functioning of the secondary markets in which these securities were traded.[39] As with deposit insurance, Congress realized that an expert agency was likely to be key to designing, implementing, administering, and enforcing this new framework, leading to the creation of the Securities and Exchange Commission (SEC).

The creation of the FDIC, SEC, and other new regulators was in part a byproduct of the expanding role of the federal government. Yet their creation also reflected a growing faith in the value of expertise, and in the capacity of technocrats to enhance the quality and efficacy of regulation.[40] No single figure better

35. *See* Banking Act of 1933, Pub. L. No. 73-66, § 8, 48 Stat. 162, 168.

36. Christopher W. Shaw, *"The Man in the Street Is for It": The Road to the FDIC*, 27 J. POL'Y HIST. 36, 49-51 (2015); LEV MENAND, THE FED UNBOUND: CENTRAL BANKING IN A TIME OF CRISIS 79 (2022).

37. PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 25 (2016).

38. Securities Act of 1933, ch. 38, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77bbbb); Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78qq).

39. JOEL SELIGMAN, THE TRANSFORMATION OF WALL STREET: A HISTORY OF THE SECURITIES AND EXCHANGE COMMISSION AND MODERN CORPORATE FINANCE 38-40 (3d ed. 2003).

40. *E.g.*, Sidney Shapiro, Elizabeth Fisher & Wendy Wagner, *The Enlightenment of Administrative Law: Looking Inside the Agency for Legitimacy*, 47 WAKE FOREST L. REV. 463, 465 (2012); THOMAS K. MCCRAW, PROPHETS OF REGULATION 153-209 (1984).

embodied these intertwined aims than James Landis. Landis was a rising star during the early New Deal era, having served as law clerk to Justice Louis Brandeis and a mentee and co-author of Felix Frankfurter.[41] With Frankfurter's support, Landis was tapped to play a key role in drafting the Securities Act of 1933. He would later become the second chair of the SEC, enabling him to lay the groundwork for the fledgling agency.[42]

Both Landis and Frankfurter saw the expertise that technocrats could bring to bear on policy problems as key to successful public administration. Frankfurter advised Landis to approach his chairmanship of the SEC "as though you were still a professor."[43] Some suggest that Landis had a more nuanced belief in the value of expertise, seeing it also as a way of inculcating restraint and professional accountability in ways that could help justify agency independence.[44] Nevertheless, the core notion that expert administrators were to play a central role in carrying out federal policymaking was widely embraced in the New Deal reforms.

The transition to this new world of expert administration was far from smooth. In 1935, the Supreme Court struck down two provisions of the National Industrial Recovery Act, a centerpiece of the New Deal, on the grounds that they delegated too much legislative authority—authority which the Constitution vests in Congress—to administrative agencies.[45] These cases gave teeth to the nondelegation doctrine and threatened much of the New Deal. That same year, the Court also held that commissioners of the Federal Trade Commission could be removed only for cause.[46] This decision frustrated and delayed some of President Roosevelt's plans, but also paved the way for agencies to play meaningful policymaking roles free from direct accountability to the White House. These cases also motivated FDR's proposal to "pack" the Supreme Court, a bold move that proved unnecessary as the judiciary's resistance to the New Deal waned.[47]

B. More Process, Greater Deference

The judiciary's eventual recognition of the constitutionality of these new administrative agencies did little to address the concerns it naturally raised about democratic legitimacy and accountability. To address these concerns, and consider the appropriate role of the judiciary in reviewing agency action, FDR convened a committee under the auspices of the Attorney General to provide a series of detailed reports of existing administrative procedures, along with suggestions

41. MCCRAW, *supra* note 40, at 157.

42. *Id.*; SELIGMAN, *supra* note 39, at 61-62.

43. MCCRAW, *supra* note 40, at 203 (quoting letter).

44. Vermeule, *supra* note 28, at 2466.

45. Panama Refin. Co. v. Ryan, 293 U.S. 388, 432-433 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 549-51 (1935).

46. Humphrey's Ex'r v. United States, 295 U.S. 602, 631-32 (1935).

47. Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318-319, 322 (2000).

for how to standardize these procedures across agencies.[48] These reports were central role to what became the Administrative Procedure Act (APA), adopted into law in 1946.[49] The APA introduced a set of trans-substantive processes that administrative agencies were required to follow in connection with rulemaking, adjudication, and other actions. The APA also set forth standards for judicial review, setting the stage for the judiciary to add texture and teeth to the APA's procedural requirements.

For example, under the APA, an agency seeking to implement a new rule that has the force of law must provide public notice of its intention to issue the rule, explain its reasoning and authority, invite public comments, and respond to significant comments when it issues its final rule.[50] If the agency pivots and the rule it seeks to adopt is not a "logical outgrowth" of its original proposal, it must then go through yet another round of notice, comment, and response.[51]

These types of "notice-and-comment" administrative processes hold out a number of potential benefits. By forcing agencies to reflect on, revise, and defend their proposals in light of public comments, these processes can enhance the quality of the rules they eventually adopt. Public comments and feedback can also help agencies identify potential adverse consequences, better ways of achieving desired aims, or additional interests at play. These processes thus add structure and transparency to the rulemaking process in ways that can promote greater public engagement, ensure that policymakers hear from a diverse range of stakeholders and, thereby, enhance democratic legitimacy and accountability.

Yet almost from the beginning it was clear, and time and experience have subsequently shown, that these processes can also give rise to a range of less desirable consequences. For example, the resource-intensive nature of notice-and-comment rulemaking can make agencies slow to update rules, even when changing circumstances undermine the efficacy of existing rules or create opportunities to improve upon them.[52] The procedures can also tilt the playing field in favor of well-resourced, better-informed, and highly-motivated businesses and industry trade groups—the parties most likely to submit significant comments and, often, the most likely to challenge any shortcoming in an agency's reasoning or process.[53] Whether these procedures promote meaningful transparency is also

48. PAT MCCARRAN, ADMINISTRATIVE PROCEDURE ACT: LEGISLATIVE HISTORY 1944-46, S. Doc. No. 248, at 111 (1946); *see also* Joanna Grisinger, *Law in Action: The Attorney General's Committee on Administrative Procedure*, 20 J. POL'Y HIST. 379, 380 (2008).

49. Administrative Procedures Act, 5 U.S.C. §§ 555–59 (2018) (originally enacted by Pub. L. No. 79-404, June 11, 1946).

50. Am. Min. Cong. v. U.S. EPA, 907 F.2d 1179, 1181-82 (D.C. Cir. 1990); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 243-44 (2d Cir. 1977).

51. 5 U.S.C. § 553 (2018); Long Island Care at Home, Ltd. v. Coke, 551 U.S. 158, 174-75 (2007).

52. Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385 (1992); Richard J. Pierce, Jr., *Seven Ways to Deossify Agency Rulemaking*, 47 ADMIN. L. REV. 59, 60 (1995).

53. Shapiro et al., *supra* note 40, at 464.

contested, as exacting judicial scrutiny has motivated many agencies to undertake much of the heavy lifting that shapes a new rule in the period before the agency even issues a notice of proposed rulemaking.[54]

One of the linchpins of the APA's framework was the deference that courts gave to agencies that followed these procedural requirements.[55] Most importantly, the *Chevron* doctrine provided that where a statute was ambiguous, courts should defer to the agency's interpretation so long as the relevant agency rule had gone through the requisite procedures and that its interpretation was reasonable.[56] Under *Chevron*, statutory ambiguity thus functioned as a delegation of authority that allowed agencies to harness their expertise, and crucially to revise rules when changing circumstances or understandings warranted. Although some judges were always more inclined than others to view statutes as clear or see agency action as arbitrary, *Chevron* and its progeny helped vest agencies with significant authority over matters within their domains.

Just as with the rise of the modern administrative state, this proceduralist shift permeated and shaped financial regulation. Subject to some notable exceptions, the OCC, Fed, FDIC, SEC, and other federal financial regulators must comply with the APA. These regulators have also enjoyed a greater degree of judicial deference, and hence effective power, in the *Chevron* era.[57] At the same time, concerns that these processes may accentuate the tendency of regulators to be overly responsive to the interests of those they regulate—often at the expense of the general public—have proven prescient in the realm of finance.[58]

The proceduralist shift spurred by the enactment of the APA was followed by other important trends that shaped, and sometimes introduced new checks on, administrative power and discretion. More than two decades ago, now-Justice Elena Kagan chronicled how from 1980 onward the White House played an increasingly active role in shaping agency policymaking.[59] In her assessment, this shift helped to justify, as both a legal and normative matter, expansions in agency authority. Yet in many ways, the 1990s and 2000s were a period of relative sta-

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54. *E.g.*, Donald Elliott, *Re-Inventing Rulemaking*, 41 DUKE L.J. 1490, 1492 (1992) (suggesting that the notice-and-comment process is now more about creating a judicial record than actual engagement).

55. THOMAS W. MERRILL, THE *CHEVRON* DOCTRINE: ITS RISE AND FALL, AND THE FUTURE OF THE ADMINISTRATIVE STATE 3 (2022).

56. *Id.* at 2.

57. *Compare* Arnold Tours, Inc. v. Camp, 472 F.2d 427, 437-38 (1st Cir. 1972) (holding that the OCC could not authorize banks to operate full-scale travel agencies), *with* NationsBank of N.C., N.A. v. Variable Annuity Life Ins., 513 U.S. 251, 256 (1995) (holding that under *Chevron*, the Court should defer to the OCC's determination that selling annuities is "incidental" to "the business of banking").

58. *See e.g.*, PATRICIA MCCOY & KATHLEEN ENGEL, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 76-80 (2011); Arthur E. Wilmarth Jr., *Taming the Megabanks: Why We Need a New Glass-Steagall Act*, FINREG BLOG (Sept. 24, 2020), https://perma.cc/S43M-2RHQ.

59. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246-48 (2001).

bility for the administrative state: characterized by broad and bipartisan acceptance of the role of administrative agencies as a key mechanism of governance and as a way of bringing technocratic expertise to bear on a wide range of policy issues.

In finance, this stability was reflected in the central role that federal banking agencies played in both the deregulatory efforts of the 1990s and early 2000s and the pro-regulatory agenda that followed the 2008 financial crisis. After Chevron, bank regulators enjoyed wide latitude to permit banks to engage in a far wider array of activities than had been envisioned by the architects of the New Deal.[60] Accordingly, by the time Congress brought a statutory end to the New Deal divide between commercial and investment banks in 1999, rulemakings had already made the separation so porous as to effectively gut its original function.[61] To be sure, courts and Congress were also taking a deregulatory turn during this period, but agency action was a frequent and highly effective tool for relaxing regulatory burdens.[62]

Yet *Chevron* also meant that when the political winds shifted in the wake of the global financial crisis, Congress could delegate to regulators the difficult task of figuring out how to strengthen bank regulation and supervision and respond to the growing range of threats posed by the emergence of new financial markets, institutions, and instruments. This delegation can be seen throughout the Dodd-Frank Act—the major legislative response to the crisis—in which Congress authorized federal regulators to undertake no less than 243 individual rulemakings and conduct 67 separate studies.[63] This extensive delegation is emblematic of the way Congress had come to rely on regulators, particularly in domains as complex and dynamic as finance, and the expectation that Chevron and its kin would provide these regulators with the flexibility, and a degree of cover, to figure out how best to carry out their statutory mandates.

The global financial crisis drove home what many already knew about the regulatory challenges stemming from complexity, dynamism, and regulatory fragmentation. In the years since, financial regulators have also been forced to confront a growing range of fundamentally contestable issues—from climate change to institutional racism—all while facing growing threats to their discretion from the judiciary's anti-administrative turn. The next Part explores these challenges in greater depth.

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60. *See, e.g.*, Wilmarth, *supra* note 58; Off. Of the Comptroller of the Currency, 12 C.F.R. pts. 7, 34 (2023).

61. *See, e.g.*, Wilmarth, *supra* note 58.

62. Joseph D. Kearney & Thomas W. Merrill, *The Great Transformation of Regulated Industries Law*, 98 COLUM. L. REV. 1323, 1325 (1998).

63. DAVIS POLK & WARDWELL, LLP, SUMMARY OF THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT, ENACTED INTO LAW ON JULY 21, 2010, at 1 (2010), https://perma.cc/A364-547W (select "Read the full update").

II. THE CHALLENGES FACING FINANCIAL REGULATION TODAY

The rise of the administrative state was in many ways necessary to meet the demands of regulating modern economic life. Yet the combination of technocratic expertise and democratic accountability and legitimacy—at least as envisioned by the APA—created its own unique challenges. Broadly speaking, these challenges fall into two categories. The first set of challenges stems from the procedural and structural mismatch between the complexity and dynamism of modern finance and the increasingly outdated administrative architecture and processes that govern financial regulation. The second stems from the growing politicization of finance and the corresponding need for financial regulators to navigate both a wide range of fundamental contestable issues and the judiciary's anti-administrative turn.

A. The Procedural Mismatch

Financial regulators face a Herculean task. The challenge starts with the complexity of modern finance. The largest global banks, investment firms, and insurance companies now manage trillions of dollars, operate in dozens of jurisdictions, and offer a dizzying array of financial products and services.[64] These products and services include sophisticated financial instruments (like derivatives) and financing techniques (like securitization) that slice, dice, and redistribute risk—creating complex and heterogeneous bundles of new rights and obligations.[65] And at the systemic level, these complex financial institutions, instruments, and techniques combine to create dense, opaque, and often overlapping networks of legal and economic exposures. This makes it difficult for anyone to construct an accurate or complete picture of the location, nature, or size of potential risks.[66] The resulting information gaps make it extremely costly—and sometimes impossible—for regulators to gather and analyze the entire universe of available data, let alone use this data to design, implement, and enforce effective regulation.

The complexity of modern finance is compounded by its relentless dynamism. In our own lifetimes, we have witnessed the emergence of a variety of new financial institutions: from money market funds and hedge funds, to peer-to-peer lenders and crowdfunding platforms, to stablecoin issuers and cryptocurrency exchanges. We have also witnessed the development and breathtaking growth of new forms of financial intermediation, along with an explosion of new

64. *See* Judge, *supra* note 13, at 209, 214-16; *see also* Richard J. Herring & Jacopo Carmassi, *The Corporate Structure of International Financial Conglomerates: Complexity and Its Implications for Safety and Soundness*, *in* THE OXFORD HANDBOOK OF BANKING 195, 197-201 (Allen Berger, Philip Molyneux & John O. S. Wilson eds., 2012) (reporting that the average number of subsidiaries controlled by the largest global banks roughly doubled—to more than 1,000—between 2002 and 2013).

65. *See* Judge, *supra* note 13, at 658-63.

66. *Id.* at 661-63.

financial instruments, that have fundamentally transformed how banks and other financial institutions do business. And we have gone from banking at physical branches, using cash and paper checks, to having our entire financial lives at the tip of our fingers: available on our smartphones twenty-four hours a day, seven days a week, 365 days a year.

This dynamism has been driven by a range of factors: from new theoretical insights to ongoing advances in information technology. It is also a function of the inherent cyclicality of finance, where periods of relative stability breed greater confidence, leading to greater financialization, and ultimately sowing the seeds of future instability.[67] Yet one of the most important drivers has often been regulation itself: with new rules driving market participants to find new ways of minimizing the potential impact on their bottom line.[68] Accordingly, not only does dynamism exacerbate existing information gaps, it often leaves financial regulators in the frustrating position of constantly chasing their own tails.

The APA's notice-and-comment procedures have always struggled to keep pace with the complexity and dynamism of modern finance. As a preliminary matter, these procedures are not designed to proactively scan the horizon for emerging risks. Instead, they are typically initiated only after a risk has materialized, thereby revealing a potential market or regulatory failure. Once the process has been initiated, the forces of complexity and dynamism also mean that financial institutions will typically have more and better information than regulators about both the nature of this failure and the costs and benefits of available policy alternatives. This puts regulators at a distinct disadvantage when it comes to accurately predicting the impact of new regulation and how regulated institutions will respond to it. It also increases the chances that the process will fail to surface and examine important issues. Lastly, the APA does not envision a mechanism whereby regulators can revisit previous regulatory interventions to evaluate their impact, effectiveness, and how the financial system evolved in their wake. The result is a highly reactive, myopic, and path dependent process in which incomplete information can lead to poorly designed regulation, and where there is no systematic way for regulators to learn new lessons about what works, what doesn't, and why. This has a predictable impact on both the quality of regulation and the extent to which it is viewed as legitimate by the public and other stakeholders.

The SEC's efforts to reform money market mutual funds after the 2008 crisis

67. HYMAN MINSKY, FINANCIAL INSTABILITY REVISITED: THE ECONOMICS OF DISASTER 39-51 (1970). Perhaps the best example are the bank capital requirements known as Basel II. For more information on these requirements, see Anil K Kashyap & Jeremy C. Stein, *Cyclical Implications of the Basel II Capital Standards*, 28 FED. RSRV. BANK OF CHI. ECON. PERSPS. 18 (2004).

68. *See* Robin Greenwood, Jeremy C. Stein, Samuel G. Hanson & Adi Sunderam, *Strengthening and Streamlining Bank Capital Regulation*, BROOKINGS PAPERS ON ECON. ACTIVITY, Fall 2017, at 33 ("There is no set of ex ante rules, no matter how granular or how sophisticated, that can satisfactorily tackle the problem of regulatory arbitrage.").

exemplify these challenges.[69] One of the key mechanisms through which the failure of investment bank Lehman Brothers in September 2008 contributed to broader market dysfunction was in causing a money market mutual fund to "break the buck," in turn triggering a run on other money market mutual funds, a systemic contraction in the provisioning of liquidity and unprecedented support from the Federal Reserve to backstop other money market funds in an effort to stem the runs. The intervention worked but created concerns about moral hazard—in contrast to bank accounts, money market funds were not supposed to have a government backstop. In a process that took years of analysis, and a proposed and final rulemaking that ran hundreds of pages, the SEC in 2013 purported to reform institutional money market mutual funds to address the problem. Unfortunately, subsequent experience revealed the SEC's approach to have been doubly flawed.

For one thing, the fixes failed to actually make prime, institutional money market mutual funds—the target of the reforms—more stable. In March 2020, investors again fled such funds and the Fed once again intervened, revealing that the fundamental flaws in the design had not been addressed, and may have been exacerbated, by the reforms.[70] The notice-and-comment process thus failed to provide the type of insights that the SEC needed to design a reform that would actually accomplish the main aim of the reforms. Just as importantly from an accountability perspective, the notice-and-comment process also failed to reveal important collateral consequences of the reforms. According to the SEC's analysis, the diversity of institutional investors in money market mutual funds meant that investors would likely move their money to a dozen different types of investments in response to the reforms. In fact, most moved them to government mutual funds, a move made possible because the Federal Home Loan Banks—a government-sponsored entity not discussed at all in the SEC's proposal or final rulemaking—massively increased its issuance of short-term debt, which it could do by simultaneously increasing its lending to banks. The net effect of the reforms and the institutional response was thus to shift much of the maturity mismatch that had occurred in a largely private, market-based ecosystem onto a government-sponsored entity that is itself the subject of much heated debate.[71] Yet this consequence was never subject to public debate.

To their credit, policymakers are aware of this procedural mismatch and often take steps to minimize it. For example, financial regulators are among the many administrative agencies that have turned to informal guidance in an effort

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69. For further discussion of the background circumstances and immediate impact of this reform, see Awrey & Judge, *Why Financial Regulation Keeps Falling Short*, *supra* note 13.

70. KENECHUKWU ANADU, MARCO CIPRIANI, RYAN M. CRAVER & GABRIELE LA SPADA, THE MONEY MARKET MUTUAL FUND LIQUIDITY FACILITY (2021), https://perma.cc/D3UR-FBYE.

71. *See* Kathryn Judge, *The Unraveling of the Federal Home Loan Banks*, 41 YALE J. ON REGUL. (forthcoming 2024) (manuscript at 14), https://perma.cc/W2DU-BQRV (select "Download This Paper").

to sidestep the APA's requirements for more formal regulatory action.[72] In the wake of the financial crisis, federal banking regulators have also institutionalized forward-looking "stress-testing" exercises. In theory, these stress tests involve the use of a hypothetical set of adverse macroeconomic and financial conditions to evaluate the resilience of a bank's balance sheet and risk management systems and identify potential institutional weaknesses.[73] Yet in practice, current approaches to stress testing have not fully embraced the challenges posed by complexity and dynamism. First, these stress tests only apply to banks. Accordingly, they do not shed any light on the resilience of the wider financial system or any looming threats to systemic stability. Nor do they incorporate the complex interconnections and feedback loops that are often central to financial crises. Second, in the absence of timely, accurate, and complete information, these stress tests rely on assumptions about the structure and dynamics of the financial system that inevitably fail to capture how financial markets and institutions actually work, how they are evolving, and thus how they are likely to behave in the thick of a real-world crisis.

B. The Structural Mismatch

The expansion of the regulatory state in the late nineteenth and early twentieth centuries resulted in a highly fragmented financial regulatory architecture. Building on this architecture, Congress has subsequently created several new agencies in response to the emergence of new markets and institutions, new policy priorities, and new challenges. In addition to the OCC, Federal Reserve, FDIC, and SEC, the federal regulatory landscape today includes the Consumer Financial Protection Bureau (CFPB), Commodity Futures Trading Commission (CFTC), National Credit Union Association (NCUA), and Federal Housing Finance Agency (FHLA). These federal agencies are joined by the regulatory authorities responsible for banking, securities, insurance, and consumer financial protection in each of the fifty states. Yet as financial markets and institutions have become more interconnected, this historically contingent, path dependent, and disparate jumble of administrative agencies has started to look increasingly at odds with the structure of the financial system.

This fragmented regulatory architecture is the source of a second—structural—mismatch between finance and financial regulation. The effects of this mismatch can be observed across several dimensions. As a preliminary matter, this fragmentation has had a predictable effect on the flow of information within the U.S. regulatory community: increasing the number and size of information gaps and making it more difficult to construct a timely, accurate, or complete

72. Nicholas R. Parillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REGUL. 165, 167-72 (2019).

73. *See generally* HANDBOOK OF FINANCIAL STRESS TESTING (J. Doyne Farmer, Alissa M. Kleinnijenhuis, Til Schuermann & Thom Wetzer eds., 2022).

map of even the most critical components of the financial system.[74] This fragmentation has also increased the likelihood of disputes arising between regulators over jurisdictional boundaries, objectives, and approaches to substantive policy issues.

More fundamentally, this fragmented regulatory architecture is simultaneously both over- and under-inclusive. Despite the growing number of administrative agencies, the dynamism of modern finance has inevitably meant that there are still significant gaps in regulatory oversight, particularly at the federal level. Insurance companies, for example, are generally regulated and supervised at the state level. So too are a large and growing array of technology-driven lenders, payment platforms, trust companies, and cryptocurrency exchanges.[75] At the same time, this fragmented architecture has meant that each agency only has a fraction of the information necessary to evaluate the health of the wider financial system, and often only limited authority or incentives to address possible threats to its stability. Traditionally, market regulators like the SEC and CFTC have focused primarily on market integrity and investor protection, while bank regulators like the OCC and FDIC have focused on the microprudential "safety and soundness" of banks and other deposit-taking institutions. Yet as highlighted by the global financial crisis, this historical distinction between "banks" and "markets" has been blurred by the emergence of a market-based "shadow banking" system that replicates the credit, maturity, and liquidity transformation that has long characterized the business of banking, but channels it through longer and more complicated intermediation chains that connect banks, commercial paper markets, mortgage-backed securities markets, and money market mutual funds.[76] In the end, while each agency faithfully pursued its own mandate, the U.S. regulatory community as a whole failed to detect these opaque and constantly evolving interconnections, or take meaningful action to prevent the build-up of the risks that eventually imperiled the stability of the global financial system.

Once again, policymakers have tried to minimize this structural mismatch. After the global financial crisis, the United States joined many other countries in establishing a new coordinating body explicitly responsible for identifying, monitoring, and responding to emerging threats to financial stability.[77] This Financial Stability Oversight Council (FSOC) is chaired by the Treasury Secretary and consists of ten voting members: the Treasury Department, Federal Reserve, FDIC, OCC, SEC, CFTC, NCUA, FHFA, CFPB, and a presidentially-appointed insurance specialist.[78] Although the FSOC is only endowed with a relatively narrow range of regulatory powers, the hope was that it would help mitigate the

74. *See* Flood et al., *supra* note 15, at 3-4.

75. *See* Dan Awrey, *Bad Money*, 106 CORNELL L. REV. 1, 6 (2020).

76. *See* ZOLTAN POZSAR, TOBIAS ADRIAN, ADAM ASHCRAFT & HAYLEY BOESKY, SHADOW BANKING 4 (2010), https://perma.cc/HQK7-8JX4.

77. Rochelle M. Edge & J. Nellie Liang, *New Financial Stability Governance Structures and Central Banks*, (Hutchins Ctr. on Fiscal & Monetary Pol'y at Brookings, Working Paper No. 50, 2019), https://perma.cc/C8HK-R5A7.

78. The FSOC also has five non-voting members: three rotating between state banking,

structural shortcomings inherent in the current regulatory architecture by enhancing coordination and communication among its members in an institutional environment specifically focused on identifying and addressing potential threats to financial stability. Yet more than a decade after the FSOC was created, legal setbacks and oscillating political priorities have meant that these aspirations remain largely unfulfilled.[79]

C. Fundamental Contestability

The challenges of complexity, dynamism, and regulatory fragmentation were thrust into the spotlight by the global financial crisis. But in the years since, financial regulators have increasingly been forced to grapple with another important challenge: fundamental contestability. The challenge of fundamental contestability stems from growing disagreement about what the objectives of financial regulation are and should be, the best ways of achieving these objectives, and whether they can be disentangled from other pressing policy challenges. To be clear, this type of contestation is often a fundamental part of policymaking—and has long been so in financial regulation. Like many domains, financial regulation often entails perceived and sometimes real tradeoffs between competing values or objectives: e.g., between personal autonomy and consumer protection, market access and market integrity, or long-term financial stability and short-term economic growth. These tradeoffs often make it difficult for policymakers to reach a consensus around what objectives to prioritize and, as a result, the most desirable course of action.

Yet even against this baseline level of contestation, the recent fights in financial regulation stand out as exhibiting a striking degree of acrimony and divisiveness. Two issues illustrate these dynamics, and some of the collateral damage they can create. The first is climate change. Conventional approaches to financial regulation often view environmental degradation as external to the regulation of financial markets and institutions.[80] Yet many are now coming to appreciate the complex feedback effects between finance, the physical environment, and policies designed to slow the rate of climate change.[81] To take one

securities, and insurance regulators, plus the director of the Office of Financial Research and head of the Federal Insurance Office; 12 U.S.C. § 5321(b)(2).

79. GLENN HUBBARD, DONALD KOHN, LAURIE GOODMAN, KATHRYN JUDGE, ANIL KASHYAP, RALPH KOIJEN, BLYTHE MASTERS, SANDIE O'CONNOR & KARA STEIN, TASK FORCE ON FINANCIAL STABILITY 101-16 (2021), https://perma.cc/4S62-DHU7.

80. Reflecting this, the leading textbooks on financial regulation typically do not mention climate change. *See, e.g.*, MICHAEL S. BARR, HOWELL E. JACKSON & MARGARET E. TAHYAR, FINANCIAL REGULATION: LAW AND POLICY (2018); *see also* JOHN ARMOUR, DAN AWREY, PAUL DAVIES, LUCA ENRIQUES, JEFFREY N. GORDON, COLIN MAYER & JENNIFER PAYNE, PRINCIPLES OF FINANCIAL REGULATION (2016).

81. *See e.g.*, Jeremy C. Kress, *Banking's Climate Conundrum*, 59 AM. BUS. L.J. 679, 680 (2022); Graham S. Steele, *Confronting the "Climate Lehman Moment": The Case for Macroprudential Climate Regulation*, 30 CORNELL J.L. & PUB. POL'Y 109, 113 (2020); Madison Condon, *Market Myopia's Climate Bubble*, 2022 UTAH L. REV. 63, 114 (2022).

obvious example, the financial system facilitates the allocation of capital, including investment in carbon-intensive industries that damage the environment. Conversely, resource scarcity, changing and more volatile weather patterns, and shifts away from fossil fuels, along with the policies adopted to combat climate change, could also very well pose threats to the stability of financial markets and institutions.[82] Accordingly, many see climate change not as external to finance, but rather as fundamentally intertwined with it.

Outside the United States, leading financial regulators are already taking these risks seriously. Christine Lagarde, President of the European Central Bank (ECB), for example, has declared her intention "to explore every avenue available in order to combat climate change."[83] Yet fears that President Biden's nominee to serve as the Federal Reserve's Vice Chair for Supervision, Sarah Bloom Raskin, who had sailed through previous Senate confirmations, might follow a similar course triggered harsh criticisms and ultimately scuttled her confirmation.[84] This outcome was not only a disappointment for Raskin herself, it also had the effect of leaving a critical policymaking position vacant for a lengthy period, delaying efforts to tackle different—even if far more technical and less controversial—issues like bringing the U.S. in line with the revised Basel III international bank capital standards. Whether having this post filled earlier might have helped avert or better contain the failure of SVB is a question that will remain forever unanswered.

There are also other shadow effects from such failed nominations. Watching someone get bruised and battered can deter otherwise qualified candidates from wanting to serve in key regulatory roles. It can also deter broader public engagement on these issues. For example, a New York Times op-ed Raskin penned in 2020, critical of the Fed's decision to provide backstops to risky oil and gas companies, played a central role in her failed confirmation.[85] And Raskin was not the only female candidate to a top bank regulatory position to face harsh criticism, and ultimately a doomed nomination process, by virtue of previously being outspoken on matters of public importance.[86] Over the long term, sidelining these types of highly qualified candidates, and thereby stifling the important issues

82. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., FINANCIAL STABILITY REPORT (2022); Steele, *supra* note 81, at 109.

83. *See* Roula Khalaf & Martin Arnold, *Lagarde Puts Green Policy Top of Agenda in ECB Bond Buying*, FIN. TIMES (July 8, 2020), https://perma.cc/AYN5-7ABZ.

84. *See* Kate Aronoff, *Why Joe Manchin Sank Sarah Bloom Raskin's Nomination*, NEW REPUBLIC (Mar. 15, 2022), https://perma.cc/BK82-PHL3.

85. Sarah Bloom Raskin, Opinion, *Why Is the Fed Spending So Much Money on a Dying Industry*, N.Y. TIMES (May 28, 2020), https://perma.cc/4TSZ-BU6S.

86. David Gura, *Saule Omarova Gets Candid: Banks Sank Her Nomination to Become a Key Regulator*, NPR: MORNING ED. (Dec. 13, 2021), https://perma.cc/TF8P-ZCJ9. Among the many virulent attacks that prevented President Biden's nominee for Comptroller, Saule Omarova, from being conformed by the Senate were highly inaccurate claims that her proposals to reform the banking system reflected "communist" tendencies. Matt Stieb, *Saule Omarova, Smeared as a Communist, Withdraws Nomination*, N.Y. MAG. (Dec. 7, 2021), https://perma.cc/NT2X-ZFEF.

they seek to highlight, is not only bad for the quality of financial regulation but also undercuts the perceived legitimacy of the process by which the leadership of these agencies are vetted, selected, and confirmed.

Candidates for key regulatory posts are not the only ones feeling the heat. Financial institutions have also faced intense public criticism for their decisions to support "brown" and "green" projects, businesses, and industries.[87] In the absence of federal leadership, several states have also sought to leverage their powerful position as both regulators and users of financial services to influence these decisions. For example, the Texas state legislature passed a bill in 2022 prohibiting state pension investments from going to businesses divesting from fossil fuels.[88] These ongoing debates about the role of finance in contributing to, and potentially mitigating, climate change may be a necessary and even healthy part of a democratic system. Yet there can be little doubt that the forums in which these debates are currently taking place—whether it be state legislatures, the opinion pages of major newspapers, or congressional confirmation hearings—will never be sufficient to tackle challenges of the nature and scale of global climate change.

Structural inequality is another important and yet fundamentally contested issue in financial regulatory circles. The Black Lives Matter movement refocused public attention on racial disparities in the United States and rekindled important debates about the role of finance in contributing to economic inequality. As with global climate change, the potential causal arrows flow in several different directions and cannot easily be disentangled from other dynamics. One important set of concerns stems from the ways finance may contribute to the well-documented racial wealth gap.[89] To address this gap, several high ranking members of Congress proposed legislation in August 2020 that would expand the Federal Reserve's mandate to include "the elimination of disparities across racial and ethnic groups with respect to employment, income, wealth, and access to affordable credit."[90] At the same time, recent studies examining the economic cost of racism—including one by Citigroup suggesting that racism has cost the U.S. economy $16 trillion since 2000—have raised broader questions about whether combating systemic racism may be an important part of promoting greater macroeconomic resilience.[91]

As with climate change, there are reasons to think that establishing more constructive forums for highlighting, debating, and building consensus around

87. Loukia Gyftopoulou, Silla Brush & Francine Lacqua, *Larry Fink Says ESG Narrative Has Become Ugly, Personal*, BLOOMBERG (last updated Jan. 17, 2023, 9:40 PM GMT+9), https://perma.cc/LS4V-42H5.

88. Brad Johnson, *Texas Pension System Voted for Environmentalist Proposals Prohibiting Loans to Fuel Companies*, TEXAN (May 3, 2022), https://perma.cc/9QGE-2PMQ.

89. *See, e.g.*, MEHRSA BARADARAN, THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP 141 (2017); *Racism and the Economy*, FED. RSRV. BANK OF MINNEAPOLIS, https://perma.cc/5MN8-K22L (archived Jan. 13, 2024).

90. *See* Federal Reserve Racial and Economic Equity Act, S. 4464, 116th Cong. (2020).

91. *See* DANA M. PETERSON & CATHERINE L. MANN, CITI, CLOSING THE RACIAL INEQUALITY GAPS 7 (2020), https://perma.cc/62YD-ZTX8 (select "Download").

how to tackle racism and structural inequality—even if also imperfect and incomplete—can make a real difference. But as in the case of climate change, what is missing is a coordinated process for bringing the myriad concerns, data, and proposals together, for asking the important questions they raise, and for clearly framing what is at stake amongst the various paths for moving forward. Without such a forum, these debates have tended simply to entrench the deeply divided status quo, contributing to an increasingly sclerotic policymaking process that is fundamentally failing to address some of the most critical challenges that we now face as a society.

Importantly, the challenges posed by fundamental contestability are not entirely divorced from the procedural and structural mismatches that we have already encountered. Financial regulators are often forced to prioritize amongst competing objectives. In the process, they may understandably choose to prioritize those issues that lie within their existing competencies or fall neatly within their jurisdictional bounds. Yet where issues—like climate change or structural inequality—cut across multiple jurisdictions, objectives, or domains, there will often be no single regulator that has the right incentives and resources to successfully tackle them. Similarly, the significant resources agencies must often expend engaging in administrative processes like notice-and-comment rulemaking limits their capacity to look beyond the immediate horizon. And neither congressional oversight as currently exercised nor increasing executive control has done much to shift attention away from current problems and toward longer-term challenges, opportunities, and threats. Instead, these processes are typically geared toward solving immediate, discrete, and highly technical policy problems—often at the expense of more fundamental "big picture" questions about the structure and functions of the financial system, the role of regulation in supporting and shaping it, and its impact on broader society.

D. The Anti-Administrative Turn

Together, complexity, dynamism, regulatory fragmentation, and fundamental contestability pose enormous challenges for financial regulators. To confront these challenges, regulators have often relied on the wide discretion afforded them under the APA and Chevron doctrine. In many cases, this discretion has given agencies the flexibility to respond to the relentless dynamism of modern finance, and to fill the inevitable gaps in the fragmented regulatory architecture. At times, it has also enabled them to work creatively and constructively in areas of fundamental contestability. Yet it is precisely this discretion that is now the target of a growing judicial backlash. Echoing the 1930s, courts are once again flexing their muscle to impose new limits on agency authority and independence.

This anti-administrative turn can be observed on several major fronts. The first and most high-profile manifestation is the Supreme Court's development and increasingly expansive understanding of the "major questions doctrine"—the notion that some questions are so "major" that they cannot be given to an agency to resolve absent a clear delegation of authority from Congress. It was only in 2022, in *West Virginia v. Environmental Protection Agency*, a decision holding that the EPA had exceeded its regulatory authority, that a majority opinion used the phrase "major questions doctrine" for the first time.[92] But the traces of the doctrine go back further, and it has been building steam in recent years.[93] By expanding the range of questions it sees as "major" and sometimes effectively requiring a delegation be specific to the policy issue at stake, the Supreme Court has significantly expanded the range of cases in which courts should not defer to agency action. And it is doing so irrespective of an agency's expertise, function, or the rigor of the processes it used to arrive at its decision.[94] Further, by invoking shifting approaches to the characteristics that render a question "major," the growth of the doctrine casts a shadow on agency authority in ways that could deter agency action in a far greater swathe of cases.

Another way the Supreme Court has narrowed agency discretion is by stripping existing administrative law doctrines of their power to actually compel deference. For example, *Auer v. Robbins*, a relative of *Chevron* with even older forefathers,[95] has long provided that courts should defer to agency interpretations of their own regulations unless that interpretation is plainly erroneous or inconsistent with the regulation.[96] In 2019, in a 5-4 decision, the Court narrowly opted not to overrule *Auer*, while still gutting it of the much of the deferential heft it once carried. The Court achieved this by replacing what had been an easy to apply and highly deferential standard with a much more rigorous, multi-step process for determining whether a particular interpretation merited deference.[97]

Chevron itself, the bedrock on which regulators have relied for decades, may soon face a similar fate. Although the Supreme Court has yet to explicitly overrule *Chevron*, the Court has very noticeably not relied on it to resolve a single case since 2016.[98] In 2018, Justice Alito, writing in dissent, observed that "the Court, for whatever reason, is simply ignoring *Chevron*,"—which he described as "an important, frequently invoked, once celebrated, and now increasingly maligned precedent."[99] The Court has continued the pattern in the years that followed.[100] Although lower courts have continued to apply *Chevron*, whether and how long they will continue to do so when the Supreme Court has seemingly abandoned the doctrine is an open question.

More important than any one of these jurisprudential developments is their

92. 142 S. Ct. 2587, 2614 (2022).

93. *See* Daniel T. Deacon & Leah M. Litman, *The New Major Questions Doctrine*, 109 VA. L. REV. 1009, 1023 (2023).

94. *Id.*

95. *Auer* deference is sometimes known as *Seminole Rock* deference in recognition of a much earlier Supreme Court case that initially held that courts should defer to agency interpretations of their own rules. Bowles v. Seminole Rock & Sand Co., 325 U.S. 410 (1945).

96. Auer v. Robbins, 519 U.S. 452, 461-64 (1997).

97. Kisor v. Wilkie, 139 S. Ct. 2400, 2414-18 (2019).

98. MERRILL, *supra* note 55.

99. Pereira v. Sessions, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting).

100. Thomas W. Merrill, *Re-Reading* Chevron, 70 DUKE L.J. 1153 (2021); MERRILL, *supra* note 55.

aggregate impact on agency action. As early as 2017, Gillian Metzger was sounding the alarm about the "contemporary anti-administrativism" including a "strong rhetorical condemnation of administrative government."[101] Metzger acknowledged that "[t]he presence of such rhetorical anti-administrativism in the political sphere is not surprising," but, even then "its appearance in judicial opinions is more striking."[102] And both the rhetoric and substance have become more pervasive and biting in the intervening years.

At least some of the high-profile cases have meaningfully hobbled the ability of agencies to carry out what they see as their congressionally-mandated functions. In early 2022, for example, the Court held that even though Congress gave the Occupational Safety and Health Administration (OSHA) very broad powers to promulgate an emergency standard in response to new workplace hazards that pose a "grave danger"[103] to employees, and even though OSHA had undertaken a rigorous process in assessing whether and how to implement its vaccinate-or-test mandate, OSHA lacked the authority to issue the mandate.[104]

Just as importantly, the shadow cast by the anti-administrative turn can have a powerful impact on agency action, limiting both their willingness and capacity to act. For example, in *West Virginia v. EPA*, the Court identified "political significance" as a factor in determining whether a question is sufficiently "major" so as to fall outside the agency's otherwise clear authority.[105] This could well discourage agencies from tackling important issues they may feel they should rightly prioritize. Nick Bagley has raised similar concerns about the shadow impact of another way the Court may yet narrow the scope of agency authority: reviving the nondelegation doctrine that the Court used in 1935 to strike down key pieces of the New Deal.[106] Although the majority of the Court has yet to rely on the nondelegation doctrine to strike down legislation, a number of justices have espoused support for resuscitating this long dormant principle. In 2019, Justice Gorsuch authored a dissent taking the position that a law should be struck down on this basis.[107] He was joined by Justices Roberts and Thomas, and, writing separately, Justice Alito expressed his openness to reviving the doctrine. Although the issue has become less pressing with the growing reach of the major questions doctrine, subsequent turnover in the Court could set the stage for its possible revival.

Although financial regulation is not yet center stage in this anti-administrative turn, it has still felt the impact of this shift. One of the early salvos in the

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101. Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 4 (2017).

102. *Id.*

103. 26 U.S.C. § 655(c)(1) (2018).

104. NFIB. v. Dep't of Lab., Occupational Safety & Health Admin., 142 S. Ct. 661, 662 (2022).

105. West Virginia v. EPA, 142 S. Ct. 2587, 2595-96 (2022).

106. Nicholas Bagley, *I'm Still Worried: A Post on Law and Leviathan*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 15, 2021), https://perma.cc/N5SP-VUJW.

107. Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

judicial effort to impose greater accountability around the administrative state was a series of decisions limiting the ability of Congress to shield key appointments from being removable at the will of the President. In 2010, the Court struck down removal protections shielding members of the Public Company Accounting Oversight Board, created pursuant to the Sarbanes-Oxley Act of 2002.[108] A decade later, the Court struck down for-cause removal protections for the leaders of the CFPB and, soon thereafter, the FHFA.[109] Each of these decisions reflected not only an effort to bring greater accountability to the administrative state, but also echoed a theme common of "contemporary anti-administrativism," as voiced by courts, other government actors, and many academics. This theme is seemingly grounded in nostalgia for a tripartite scheme of government that more closely resembles the vision one might conjure upon reading the Constitution, while giving limited consideration to subsequent experience and the ways the administrative state grew out of, and at the behest of, these three branches.

The impact of anti-administrative turn has also been felt by financial regulators in lower courts. For example, in 2010, the D.C. Circuit Court employed a robust reading of the cost-benefit-analysis requirement imposed on rulemaking by the SEC to strike down an agency rule that had been years in the making and that aimed to make it easier for shareholders to propose their own nominees to a corporation's board of directors.[110] Even though Congress had expressly clarified the SEC's authority to adopt such a rule in the Dodd-Frank Act, the SEC proved once-bitten, twice shy and has yet to make any effort to revive the rulemaking. More recently, the Fifth Circuit vacated an action by an administrative law judge at the SEC, casting doubt on the constitutionality of a central mechanism through which the SEC enforces securities laws.[111]

Another striking example is the 2016 D.C. District Court decision overturning a determination by the FSOC that MetLife was a "systemically important financial institution" (SIFI), thus subjecting the venerable insurance giant to enhanced prudential regulation and supervision.[112] Introduced as part of the Dodd-Frank Act, the FSOC's power to designate non-bank financial institutions as systemically important was a response to the failure of Lehman Brothers and the near-failure of Bear Stearns and AIG—all entities that had operated outside the perimeter of federal oversight despite having grown in ways that potentially posed systemic risks and rendered them too-big-to-fail. The aim of this new designation authority was thus to enable the regulatory perimeter to evolve in accordance with changes in the universe of financial institutions that may pose a threat to financial stability.

108. Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513-14 (2010).

109. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2211 (2020); Collins v. Yellen, 141 S. Ct. 1761, 1789 (2021).

110. Bus. Roundtable v. SEC, 647 F.3d 1144, 1155-56 (D.C. Cir. 2011).

111. Jarkesy v. SEC, 34 F.4th 446, 465-66 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 2688 (2023).

112. MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 242 (D.D.C. 2016).

After a dozen meetings between FSOC staff and MetLife officials, the detailed review of more than 20,000 pages of documentation, and a time-consuming evaluation process, FSOC concluded in December 2014 that MetLife was a SIFI and should be regulated accordingly.[113] Two years later, taking the view that the FSOC had not adhered to its own (voluntarily created) standards and had failed to adequately consider the costs and benefits of the designation, the court rescinded that determination.[114] The Trump administration subsequently withdrew the government's effort to appeal the decision, with the result that it never reached an appellate court and the decision was allowed to stand. In part because of that decision, there are no currently designated SIFIs and little prospect that any financial institution will be designated as one in the foreseeable future.

The challenge remains ongoing. After the failure of four regional banks in the spring of 2023, the Fed, FDIC, and OCC collectively issued proposals—that they had been working on even prior to those failures—to simplify and enhance the capital requirements imposed on very large banks.[115] Banks and their trade groups recognized that at least some of the updates embodied in the proposals was necessary to bring the United States in line with international standards, but the banks nonetheless had hoped that the implementation would be less demanding than what the bank regulators proposed. Despite the recent failures, in the United States and abroad, the banks—through their primary trade organization, the Bank Policy Institute (BPI), initiated an aggressive plan to fight back. This includes a possible lawsuit challenging the proposed reforms and a new effort that could result in legal challenges to the way the Federal Reserve conducts its stress tests, a critical component of bank regulation since 2010.[116] Although the outcome remains uncertain, even outside observers have noted that the BPI has been far more aggressive in its attacks than it typically is in response to regulatory reforms, and the ant-administrative turn seems to be playing a role contributing to their stance and strategy.[117]

The anti-administrative turn compounds the challenges posed by the complexity, dynamism, and contestability of modern finance and the poorly designed processes and structures currently governing financial regulation. As a preliminary matter, agencies like the SEC and CFTC rely on discretion to police the regulatory perimeter, responding to new industry developments—like the emergence and rapid growth of crypto—that fall within the scope of their jurisdiction.

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113. Drita Dokic, *Challenging Nonbank SIFI Designations: GE, MetLife, and the Need for Reform*, 11 BROOK. J. CORP. FIN. & COM. L. 565, 577 (2017).

114. *MetLife*, 177 F. Supp. 3d at 223.

115. Press Release, Bd. of Governors of the Fed. Rsrv. Sys, FDIC & Off. of the Comptroller of the Currency, Agencies Request Comment on Proposed Rules to Strengthen Capital Requirements for Large Banks (July 27, 2023), https://perma.cc/SK33-FJ8L.

116. *E.g.*, Sean Oblack, *Banking Trade Associations Call on Banking Agencies to Re-Propose Basel Rule*, BANK POL'Y INST. (Sept. 12, 2023), https://perma.cc/KN3M-MRXR; Sean Oblack, *BPI and ABA Seek Transparency Around Fed Supervisory Models and Stress Scenarios*, BANK POL'Y INST. (July 25, 2023), https://perma.cc/T25U-KH54.

117. Kyle Campbell, *Banking Industry Goes on Offensive Against Basel III Endgame Proposal*, AM. BANKER (Sept. 13, 2023, 10:17 AM EDT), https://perma.cc/DG24-ZE2B.

Within the bounds of existing procedural requirements, these agencies also use discretion to design and implement regulatory frameworks that respond to these new developments, and to channel new learning and experience into incremental improvements to existing frameworks. Viewed in this light, the expectation of heightened judicial review of agency decision-making can have a chilling effect on agency action—resulting in less vigorous enforcement of the regulatory perimeter and fewer and more modest attempts to expand or update regulatory rulebooks in response to new industry developments or risks. Given the dynamism of modern finance, this chilling effect may only further undermine the effectiveness of financial regulation.

Over the long term, the anti-administrative turn may also undermine the legitimacy of financial regulation. As we have already seen, financial regulators are increasingly being asked to help tackle policy challenges that—at least in the eyes of some observers—reside outside their historical jurisdictional remit and core competencies. Prominent examples include the proposed changes to the mandate of the Federal Reserve that would require it to address racial and ethnic inequality[118], along with proposed SEC rules designed to enhance public company reporting of climate-related risks.[119] Yet as we have also seen, existing administrative processes and structures are not well-suited to examining, debating, or successfully implementing effective policy responses to these issues. In particular, the highly fragmented structure of the U.S. regulatory architecture makes mounting a timely, coordinated, and comprehensive policy response to society-wide and highly contestable issues extremely difficult. Compounding matters, individual agencies may seek to grasp the reins on these issues in order to expand the scope of their jurisdiction and seek more resources from Congress.

The problem here is not the anti-administrative turn itself. Indeed, this turn may at times help constrain potential administrative overreach. Rather, the problem is that the chilling effect of this turn on agency action may mean that important and highly contestable issues like the impact of finance on climate change or structural inequality are simply left off the regulatory agenda. This reduces opportunities for much-needed public debate in settings designed to promote healthy, informed engagement and makes it more likely that agencies will not be held to account for their failure to put these issues on the agenda. By compelling agencies not to put their head above the parapet, the anti-administrative turn may thus undermine public confidence in the willingness of financial regulators to acknowledge their potential role in addressing a range of important and pressing social issues.

Of course, there are ways that financial regulation remains distinct. Some of the most important regulatory actions, such as the Fed's decisions on monetary

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118. *See* Heather Long, *Democrats Introduce Bill to Give the Federal Reserve a New Mission: Ending Racial Inequality*, WASH. POST (Aug. 5, 2020, 12:08 PM EDT), https://perma.cc/4NXY-NSK.

119. *See* Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://perma.cc/AQ5S-EAUY.

policy, remain free from judicial review.[120] Prudential supervision, which has long played a central role in bank oversight, operates under a different—although still vulnerable—legal paradigm.[121] In addition, there have often been distinct "precepts and framing principles" distinguishing financial regulation from the rest of the administrative law.[122] Nevertheless, all that matters for our analysis is that the general headwinds currently facing administrative law are sufficiently strong that they have already started to raise questions about the authority and autonomy of financial regulators in ways that could hinder their ability to carry out longstanding functions and tackle the new challenges that inevitably arise.

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This Part shows not only that financial regulation is hard, but that the current procedures and structures through which such regulation is promulgated in the United States often run counter to the twin aims of efficacy and legitimacy. Processes meant to promote learning and engagement are now so full of landmines that can undermine the entire undertaking that regulators often engage too little and too late to make that engagement productive. Making matters worse, the high cost and risk of adopting new regulations can perpetuate suboptimal status quos and preclude action even in the face of new and evolving threats. The fragmented regulatory architecture occasionally helps to surface issues in productive ways, but it can also accentuate the uncertainty and gamesmanship.

A natural instinct when a valuable and longstanding institution is under attack, even when it's far from perfect, is to defend it. Indeed, a measure of defense is understandable, and likely necessary for the government to function well, given the myriad of critical roles that administrative agencies now play. Yet as others have started to recognize, rather than reflexively defending these institutions, sometimes the best response is to regroup, rethink, and try to find a new path forward. Perhaps the best articulation of this reasoning comes from Charles Sabel and Jeremy Kessler. Sabel and Kessler take as their starting point the growing importance of uncertainty—"the inability to anticipate future states of the world with enough confidence to assign them probabilities"—to administrative decision-making.[123] In their assessment, current efforts to defend the administrative state too often rely on a vision of the "progressive synthesis" in which presidentialism and professionalism are the cornerstones of administrative legitimacy. Building on a thread that connects recent contributions by scholars such

120. David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 LAW & CONTEMP. PROBS. 157, 175 (2015).

121. Daniel K. Tarullo, *Bank Supervision and Administrative Law*, 2022 COLUM. BUS. L. REV. 279, 318 (2022).

122. Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 L. & CONTEMP. PROBS. 129, 129 (2015).

123. Jeremy K. Kessler & Charles F. Sabel, *The Uncertain Future of Administrative Law*, 150 DÆDALUS 188, 189 (2021).

as Adrian Vermeule and Nick Parillo,[124] Sabel and Kessler propose ways that the judiciary could help enable the measured action, experimentation, and other approaches they believe regulators need to successfully tackle today's most pressing policy challenges. Although we make a different, more concrete, more field-specific, and in many ways more limited claim, the next two Parts—outlining the case for commissions and articulating our own proposal for a Decennial Commission for Finance—follow in the spirit of this earlier scholarship. Having charted the dangers posed by both the shortcomings of existing administrative structures and processes and the judiciary's anti-administrative turn, we can now start to plot a new course.

III. THE CASE FOR COMMISSIONS

We have seen how complexity, dynamism, and regulatory fragmentation make it difficult for regulators to identify, evaluate, and take timely and effective action in response to a growing litany of policy challenges. The importance of these challenges, combined with the limits of existing administrative structures and processes, provide a compelling rationale for seeking new ways to reduce information gaps, promote wider horizon scanning, enshrine cross-agency communication and coordination, and build the capacity both to foster ongoing learning and, importantly, incorporate this new learning into regulatory frameworks. Given the expanding range of fundamentally contestable issues that financial regulators are being forced to confront, any new structures and processes must also seek to combine traditional technocratic expertise with a wider universe of stakeholders and perspectives. The remainder of this Article focuses on one concrete example—the institutionalization of periodic commissions—of how we might achieve these goals. Our claim is not that commissions are a silver bullet that can somehow solve all the problems currently afflicting administrative law and financial regulation. Nevertheless, we believe that a well-designed, well-led, and well-run commission could play a valuable role in improving both the technocratic quality and democratic legitimacy of financial regulation.

We use the term "commission" broadly. For our purposes, the key characteristics are that it is a temporary, multi-member body, made up of individuals who bring varying types of expertise, diverse perspectives, or other attributes useful to the undertaking, and serves in an advisory capacity, with no authority to make or enforce law.[125] Given the expansiveness of this definition, we look not only at self-labeled congressional commissions but also other bodies that have performed similar functions and, accordingly, might serve as inspiration.

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124. *See, e.g.*, CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW AND LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE (2020); Parillo, *supra* note 72.

125. This is a rough subset of how congressional committees were defined by the GAO. *See* CONG. RSCH. SERV., CONGRESSIONAL COMMISSIONS: OVERVIEW, STRUCTURE, AND LEGISLATIVE CONSIDERATIONS 2-4 (2017), https://perma.cc/YM9F-BBVX.

A. A Brief History of Commissions in Finance

For over a century, public commissions, hearings, and investigations have played an important role in the trajectory of U.S. financial regulation. Historically, many commissions, hearings, and investigations have taken place in the immediate aftermath of major financial crises. Each of the three biggest financial crises of the modern era—the Panic of 1907, the Great Crash of 1929, and the global financial crisis—have been followed by congressional action giving public officials the power to investigate their underlying causes, identify the principal protagonists and, in most cases, develop a blueprint for reform. Looking back at these episodes provides a starting point for understanding the virtues, costs, and limits of commissions and related structures.

1. The Founding of the Fed

For much of the nation's history, the United States operated without a fully-fledged central bank. Recognizing that a strong national bank could both improve the federal government's perilous finances and help spur economic growth, Alexander Hamilton successfully lobbied Congress to charter the First Bank of the United States in 1791. Despite playing a central role in quelling the panic of 1792, concerns about the centralization of power inherent in the existence of such an institution nevertheless contributed to its demise when the Republican-led Senate allowed its charter to expire twenty years later.[126] Almost immediately, however, a series of financial crises and the need to manage the government's ballooning debts following the War of 1812 spurred Congress to create the Second Bank of the United States.[127] Yet twenty years later, the Second Bank would meet the same fate as the First when its federal charter was allowed to expire despite the challenges the country had faced during the interregnum between 1812 and 1816.

The costs of not having a central bank were real and significant. Between 1857 and 1907, the United States was gripped by no less than eight major banking crises.[128] In the absence of a central bank, the U.S. money supply was vulnerable to bouts of paralyzing inelasticity during widespread banking panics—thus fanning the flames of incipient crises.[129] This vacuum also meant that responsibility for providing liquidity during these panics fell largely to a small group of private clearinghouses and financiers such as J. Piermont Morgan.[130] It

126. Charles W. Calomiris, Marc Flandreau & Luc Laeven, *Political Foundations of the Lender of Last Resort: A Global Historical Narrative* 28-29 (Columbia Bus. Sch., Research Paper No. 16-51, 2015).

127. *See* RALPH CATTERALL, THE SECOND BANK OF THE UNITED STATES 1 (1903); Raymond Walters, Jr., *The Origins of the Second Bank of the United States*, 53 J. POL. ECON. 115, 115-16 (1945).

128. Calomiris et al., *supra* note 126, at 28.

129. For a detailed history of this inelasticity and the resulting crises, see O.M.W. SPRAGUE, HISTORY OF CRISIS UNDER THE NATIONAL BANKING SYSTEM (1910).

130. *Id*.

was the Panic of 1907—in which Morgan played a central role in organizing a private bailout of struggling New York trust companies—that ultimately helped spur Congress to examine how the federal government might play a more proactive role in promoting financial and monetary stability.[131] Even with these series of panics, however, and the outsized power they inadvertently placed in J.P. Morgan's hands, reform was far from guaranteed.

The key first step toward the creation of a modern central bank was Congress's establishment of the National Monetary Commission—better known as the Aldrich Commission, reflecting the contributions of Senator Nelson Aldrich in shaping the commission's work and impact.[132] The commission was charged with studying the U.S. banking system, comparing it with the equivalent systems in the United Kingdom and Continental Europe, and developing recommendations for reform.[133] This was followed by an investigation of the House Committee on Banking and Currency, then under the chairmanship Arsène Pujo, into the so-called "money trust": the concentration of financial and economic power in the hands of J.P. Morgan and a small network of other Wall Street firms.[134] Both would leave an indelible mark on the structure and regulation of the U.S. financial system.

For its part, the Aldrich Commission provided both valuable background information about central banks in England and Europe and proposed the beginnings of a structure that could be molded into something that was politically viable.[135] The commission was composed entirely of members of Congress, half from the Senate and the other half from the House of Representatives. As a practical matter, a handful of bankers and the President of Harvard functioned as ex officio members, providing expert insights and helping to arrange for visits to banks and central banks as Senator Aldrich and others undertook a four-month tour of Europe.[136] Seeing that many European countries had more sophisticated financial systems, and that having a central bank seemed to play a pivotal role in enabling this, convinced Aldrich that the United States needed a central bank.[137] The findings were compiled alongside expert reports solicited by the commission, resulting in more than thirty reports over a span of three years. The commission also issued recommendations for reform—proposing a system of central

131. For a description of these trust companies, clearinghouses, and their role in the Panic of 1907, see ROGER LOWENSTEIN, AMERICA'S BANK: THE EPIC STRUGGLE TO CREATE THE FEDERAL RESERVE 59-76 (2015).

132. William G. Dewald, *The National Monetary Commission: A Look Back*, 4 J. MONEY, CREDIT & BANKING 930, 931 (1972).

133. The complete collection of the commission's publications is available from the Federal Reserve Bank of St. Louis, *Publications of the National Monetary Commission Series*, https://perma.cc/2EQX-K4P8 (archived Jan. 13, 2024).

134. *See* H.R. Rep. No. 62-1593 (1913).

135. For a history of the Aldrich Commission and its influence in the design of the Federal Reserve System, see LOWENSTEIN, *supra* note 131.

136. JAMES LIVINGSTON, ORIGINS OF THE FEDERAL RESERVE SYSTEM: MONEY, CLASS, AND CORPORATE CAPITALISM, 1890-1913, at Ch. 7 (1989).

137. LOWENSTEIN, *supra* note 131, at 77-79.

banking that placed the center of power in New York and that operated, much like the Bank of England, as a cooperative controlled by private banks. This proved a helpful starting point, but one that was altered in meaningful ways by the political processes that followed and ultimately authorized the founding of the Fed.

The Pujo investigation, by contrast, sought to illuminate the dangers and drawbacks stemming from the centralization of financial power. The Pujo investigation "frightened the nation with its awesome, if inconclusive statistics on the power of Wall Street over the nation's economy"[138], paving the way for sweeping legislative reforms that included the Clayton Antitrust Act, Federal Trade Commission Act, and the Federal Reserve Act of 1913.[139] The Pujo investigation would also become etched in the public consciousness—and go on to inspire future generations of policymakers—following the publication of Louis Brandeis's popular and influential book, *Other People's Money*, which meticulously chronicled the investigation's findings.[140]

Although the analysis, conclusions, and proposals of the Aldrich Commission were more formative in shaping federal policy objectives and, to a lesser degree, the design of the Federal Reserve System, both bodies undeniably helped to stir public debate and galvanize support for the new central bank.[141] Moreover, the thoughtful and thorough process undertaken by the Aldrich Commission—as evidenced by its European fact-finding mission, its voluminous reports, detailed policy proposals, and the six years that passed between the Panic of 1907 and the enactment of the Federal Reserve Act—make it clear that the process was not simply an effort by elected officials to respond quickly to the crisis of the day. Instead, the process was designed from the start to help policymakers better understand the reasons why the U.S. money supply was so chronically inelastic, investigate how other countries had addressed this problem, and compare a wide range of potential policy solutions—including wholesale structural reforms. Viewed in this light, the Aldrich Commission illustrates how, rather than supplanting politics, commissions can serve as a valuable complement to it: making sure that Congress is armed with more and better information, analysis, and options as it attempts to thread the difficult needle between technocratic, political, and other considerations.

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138. Mark J. Roe, *A Political Theory of American Corporate Finance*, 91 COLUM. L. REV. 10, 38 (1991) (citing GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916, at 220 (1963)).

139. *See* Andrew W. Hartlage, *"Never Again," Again: A Functional Examination of the Financial Crisis Inquiry Commission*, 111 MICH. L. REV. 1183, 1185 (2013).

140. *See* LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY: AND HOW THE BANKERS USE IT (1914).

141. PAUL M. WARBURG, THE FEDERAL RESERVE SYSTEM: ITS ORIGIN AND GROWTH, at viii (1930); Dewald, *supra* note 132, at 932.

2. The SEC and other New Deal Reforms

The impact of the Pujo investigation and Brandeis's exposé was still reverberating almost two decades later when the Senate Banking and Currency Committee launched an investigation into the conduct and practices within the U.S. securities industry that had contributed to the Great Crash of 1929.[142] Best known for its chief counsel, Ferdinand Pecora, the subsequent hearings exposed a wide variety of Wall Street misdeeds: from undisclosed loans to senior bank officers, to clandestine operations designed to support the price of bank stocks, to deeply ingrained conflicts of interest between commercial banks and their affiliated securities dealers.[143]

The Pecora hearings made national headlines[144] and shocked the nation with "its unseemly association of money and power."[145] The success of these hearings in capturing the public's attention has been attributed to Pecora's "skill at collecting, analyzing, and assimilating large quantities of data,"[146] along with his "expert and often withering questioning"[147] of the witnesses called to testify before the committee. Pecora also benefited from impeccable timing.[148] The hearings took place at the nadir of the Great Depression. Charles Mitchell, the controversial chairman of National City Bank, testified a week after the governor of Michigan declared a state-wide bank holiday that triggered the banking crisis of 1933.[149] Unlike the Pujo investigation, the Pecora hearings also benefited from broad subpoena powers and the enthusiastic support of President Roosevelt.[150] The confluence of these factors kept the Pecora hearings in the public spotlight for over a year and helped galvanize support for Roosevelt's New Deal reforms.

As we have seen, the New Deal era was a formative period for both the administrative state generally and financial regulation in particular. Yet it was also a period of deep contestation regarding the appropriate roles of these new administrative agencies and the scope of their authority. Industry vigorously fought against ambitious reforms, despite the devastation wreaked by the Great Depression.[151] The Pecora Hearings were critical in generating and channeling public outcry, and transforming it into the political will necessary to compel Congress

142. For a history of the Pecora hearings, see MICHAEL PERINO, THE HELLHOUND OF WALL STREET: HOW FERDINAND PECORA'S INVESTIGATION OF THE GREAT CRASH FOREVER CHANGED AMERICAN FINANCE (2010).

143. *See* S. Rep. No. 73-1455 (1934).

144. Donald A. Ritchie, *The Pecora Wall Street Exposé*, *in* CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974 (Arthur Schlesinger & Roger Bruns eds., 1975).

145. Ron Chernow, Opinion, *Where Is Our Ferdinand Pecora?*, N.Y. TIMES (Jan. 5, 2009), https://perma.cc/6ZM3-TYCT.

146. Ritchie, *supra* note 144, at 2569.

147. Chernow, *supra* note 145.

148. PERINO, *supra* note 142.

149. *Id.* at 113, 141.

150. Ritchie, *supra* note 144, at 2256.

151. SELIGMAN, *supra* note 39.

to enact major legislative reforms designed to prevent future crises. No less important, the Pecora hearings also contributed to the public perception that the powerful were being held to account for their greed, incompetence, and recklessness.

When signing the Securities Act of 1933, President Roosevelt directly referenced the hearings and the way they had illuminated "the private exploitation of the public's money."[152] Alongside experts such as Landis, several members of Pecora's staff played direct roles in the design of the Securities Acts of 1933 and 1934.[153] The unsavory conduct and pervasive conflicts of interest exposed by Pecora also helped drive several specific New Deal reforms: including the prohibition against loans to bank officers, expanded federal authority to remove bank directors and, most importantly, the structural separation of commercial and investment banking under the Glass-Steagall Act.[154] By shining a spotlight on Wall Street's complex and opaque inner workings, the Pecora hearings played an important role shaping what became the central pillars of U.S. financial regulation for most of the twentieth century. And though the role of Landis and other experts was less transparent to the public than the role played by the Aldrich Commission, there was a similar complementarity in efforts to promote accountability and harness expertise in laying the groundwork for these reforms.

3. The Global Financial Crisis of 2008

The Pecora hearings were viewed by many as a model for the Financial Crisis Inquiry Commission (FCIC) authorized by Congress to identify and analyze the causes of the global financial crisis.[155] The commission was made up of private citizens with relevant experience and expertise in finance and financial regulation,[156] including a former senator, a former member of the House of Representatives, a former CFTC Chair, and other politically connected experts. Democratic leadership selected the Chair and five other members, while Republicans chose the Vice Chair and the remaining three members.

Over two years, commencing in 2009, the FCIC engaged in a massive fact-

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152. *See* LANCE COLE & STANLEY BRAND, CONGRESSIONAL INVESTIGATIONS AND OVERSIGHT: CASE STUDIES AND ANALYSIS 30-31 (2011).

153. Although both Pecora and his staff were reportedly "bitterly disappointed" with the final result. Ritchie, *supra* note 144, at 2576.

154. Roe, *supra* note 138 at 38-39; PERINO, *supra* note 142, at 289.

155. *See, e.g.*, Chernow, *supra* note 145; *see also* Tom Borgers, *Financial Crisis Inquiry Commission is Biggest Financial Investigation Since 1930s' Pecora Commission*, FRAUD MAG. (Nov./Dec. 2009), https://perma.cc/8AMK-ASSD ("The FCIC, in part, is modeled after the Pecora Commission of 1933 and 1934"). For an opposing view, see Michael Perino, *The Financial Crisis Inquiry Commission and the Politics of Governmental Investigations*, 80 UMKC L. REV. 1063 (2012).

156. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, § 5(b)(2)(A), 123 Stat. 1617, 1626 (2009); FIN. CRISIS INQUIRY COMM'N, FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES OF THE FINANCIAL AND ECONOMIC CRISIS IN THE UNITED STATES, at xi (2011).

finding exercise. The FCIC interviewed more than 700 witnesses and held nineteen days of public hearings, ultimately producing "250 cubic feet of paper records and 13 terabytes of electronic records."[157] The testimony and other materials gathered have functioned as a rich and lasting resource for research. A large staff and adequate financial resources were key to enabling this production. The final report also succeeded in promoting some public debate and garnering media attention—with the report itself spending two weeks on the *New York Times* Best Sellers List. But its impact on financial regulation was far more muted and potentially even counterproductive.

One challenge was timing. Shortly after Congress authorized the creation of the FCIC, the Obama Administration released a white paper that became the starting point for the Dodd-Frank Act—which was passed almost six months before the FCIC was slated to issue its final report.[158] By the time the report was issued, the window for congressional action had closed, and little in the report changed prevailing narratives about the crisis in a way that could have shaped the ongoing process of implementing the Dodd-Frank Act. Further muting the FCIC's impact, the report reflected, and in many ways entrenched, partisan conflict over the root causes of the crisis. The politically appointed members were divided cleanly along partisan lines. All six of the Democratic appointees, and not a single Republican appointee, joined the majority report. The remaining four issued two separate dissents, which provided quite different accounts of the causes of the crisis and the role of regulation in contributing to it.

Yet, even in this episode, congressional oversight in the hands of outside experts did play a role in shaping post-crisis reforms. Long before the creation of the FCIC, Congress—when it authorized the Treasury Department to spend up to $700 billion stabilizing the financial system in the fall of 2008—required the creation of an oversight panel to monitor and report on how Treasury used these public funds. Elizabeth Warren, then a Harvard Law School professor and an expert in consumer protection, was asked to chair the oversight panel. Through a series of reports, solicited testimony, and speeches, now-Senator Warren laid out a vision of the many ways that banks, mortgage brokers, and other financial institutions had engaged in abusive lending activities, helping to fuel the housing bubble and contributing to the financial crisis that followed. Through both her work chairing the oversight panel and her ongoing work as an academic, she made the case for what would ultimately become the CFPB. Lacking any real legal authority, Warren used her power of fact-finding and persuasion to show that the banking and other financial regulators often treated consumer protection as secondary to their prudential aims, and thus that a new regulator was key to ensuring robust, consistent protection of consumers when they take out loans and engage in other financial activities.

157. Press Release, Nat'l Archives, National Archives Opens Financial Crisis Inquiry Commission Records (Mar. 11, 2016), https://perma.cc/VA7V-366K.

158. *See* Press Release, White House, President Obama to Announce Comprehensive Plan for Regulatory Reform (June 17, 2009), https://perma.cc/NM9C-YD2M.

The Permanent Senate Investigations Subcommittee also took a deep, bipartisan dive into the causes of the crisis. The result of the two-year investigation was a 646-page report, known as the "Levin-Coburn Report On the Financial Crisis," reflecting both the Democratic and Republican leadership's endorsement of the report's analysis and conclusions.[159] Like the FCIC Report, the Levin-Coburn Report was issued in 2011, almost a year after Dodd-Frank had been passed. Yet by building bipartisan consensus, and including recommendations targeted to financial regulators still in the process of implementing Dodd-Frank, the report played a constructive role enhancing Congress's traditional role in agency oversight.

Looking back at these three commissions, it seems fair to say that both their individual and collective impact was decidedly mixed. The myriad investigations required considerable investment of public and private resources. Yet the overall cost paled in comparison to both the economic devastation of the crisis itself, and the public and private costs of implementing the Dodd-Frank Act and other post-crisis reforms. The benefits are similarly hard to measure. Many see the CFPB as the most valuable innovation in Dodd-Frank, while others see it as the most reviled. Either way, the line between Senator Warren's role leading the congressional oversight panel and the creation of the CFPB is far from direct. The extensive testimony, documents, and records collected and produced by these commissions played a valuable role in shaping and informing an ongoing discussion around the causes of the financial crisis. According to Google Scholar, the final FCIC Report has been cited more than 1,600 times, and that is not including the many ways academics, policymakers, and others have utilized the massive record the FCIC compiled.[160] In short, even the lackluster FCIC probably did produce benefits that justified its costs, even if those benefits were modest. And the two other Congressional commissions seem to have played helpful roles in shaping the legislative and regulatory reform efforts, even if none brought about broad consensus regarding the path forward.

Putting the three episodes and myriad commission-like structures together illustrates that commissions can perform a variety of useful functions. First, commissions can engage in valuable fact-finding exercises on a wide range of issues: from the causes of financial crises, to potential misconduct by financial institutions, to how other jurisdictions tackle common regulatory challenges. Second, they can identify, evaluate, and compare various proposals for regulatory reform, presenting lawmakers with a menu of different policy options. Third, they can

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159. *See* PERM. SUBCOMM. ON INVESTIGATIONS, U.S. SENATE, WALL STREET AND THE FINANCIAL CRISIS: ANATOMY OF A FINANCIAL COLLAPSE (2011), https://perma.cc/JKG5-64LY (select "PDF" next to "Activities of the Permanent Subcommittee on Investigations—112th Congress (2011-2012)").

160. Google Scholar search for "Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: The Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States," GOOGLE SCHOLAR, https://perma.cc/VKL5-CJAY (search for "Financial Crisis Inquiry Commission, The Financial Crisis Inquiry Report: The Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States").

help inform and shape public opinion about important policy issues, thereby enabling a broader range of stakeholders and constituencies to meaningfully participate in the reform process. Of course, stirring up public controversy can be a mixed bag. And the more powerful the set of tools given to a commission—particularly when subpoena powers come into play—the greater the risks surrounding how that power will be exercised. Nevertheless, by performing these functions, commissions can help improve Congressional oversight of both finance itself and the agencies responsible for financial regulation. As reflected in all three features, they can also help disrupt the dangerous tendency of allowing far from optimal status quos to persist despite the associated and often significant costs.

B. Looking Beyond Finance

Our focus to this point has been on the use of commissions in connection with some of the most formative episodes in the history of financial regulation. Yet to fully understand the myriad functions commissions can and have played, along with the design choices that influence whether they achieve their intended aims, it is necessary to look beyond finance. As a starting point, the Congressional Research Service (CRS) has compiled a treasure trove of information about the historical use of Congressional commissions. In a series of three reports, issued between 2017 and 2022, the CRS provided a detailed analysis of recent practices regarding the uses of commissions, key design choices, funding models, and their total costs.[161] Focusing on the period starting with the 101st Congress (1989-1990) and spanning the fifteen to twenty years that followed, the reports provide a broad overview of the use of commission, the array of functions commissions can serve, and the range of design considerations at play.

According to the CRS reports, Congress authorizes an average of roughly ten commissions a year to explore a wide range of issues: from commemorating important events, to investigating scandals or crises, to conducting deep dives on difficult policy issues like food scarcity, long-term care for an aging population, the trade deficit, and the future of the military. These commissions vary in size from five to thirty-three members, with the members themselves drawn either from the ranks of Congress or, more often, individuals selected by members of Congress via specified procedures. The commissions are bipartisan, although the mechanisms by which this bipartisanship is ensured vary from commission to commission. They also vary greatly in the scope of their legal authority, their primary functions, and funding models.[162] The costs of the commissions covered

161. *See* CONG. RSCH. SERV., CONGRESSIONAL COMMISSIONS: FUNDING AND EXPERTISE (2019), https://perma.cc/L2N7-2R5M; CONG. RSCH. SERV., CONGRESSIONAL COMMISSIONS: OVERVIEW, STRUCTURE, AND LEGISLATIVE CONSIDERATIONS (2017), https://perma.cc/ZU37-UT2F; CONG. RSCH. SERV., DESIGNING CONGRESSIONAL COMMISSIONS: BACKGROUND AND CONSIDERATIONS FOR CONGRESS (2022), https://perma.cc/VF9T-JCNK.

162. Whereas just over 40 percent of commissions are appropriated funds in the statute

in the CRS studies varied from a low of just a few hundred thousand dollars to a high of just under $14 million for a three-year commission on veterans' disabilities.[163]

Most, although not all, of these commissions employ staff that are often critical to enabling them to carry out their congressionally-mandated functions. Nevertheless, the size of a commission's staff, who can make hiring and compensation decisions, whether staff can be seconded from other governmental posts, and other factors can vary considerably. They also vary in terms of whether a commission is authorized to retain, and importantly in a position to pay for, outside experts and consultants.[164] These human resource decisions are one of the many mechanisms through which Congress can exercise meaningful control on a commission-by-commission basis. In particular, while the ability to retain outside experts can facilitate the work of a commission, it can also introduce potential conflicts of interest and raise concerns about undue industry influence.

Another key set of issues is the nature and extent of the powers given to a specific commission. Most commissions hold public hearings. But whether they can call witnesses, pay travel expenses, solicit other materials from private parties, and use subpoena powers to elicit testimony or records depends on the commission. Internal operating procedures, both formal and informal, can also play a meaningful role in shaping a commission's work and how power is effectively allocated and wielded. While some of these procedures are often mandated in the commission's authorizing legislation, many are determined by the commission itself once it has been established and its commissioners appointed.

Collectively, the CRS reports show that Congressional commissions are used regularly and for good reason. Congress has successfully used commissions for a variety of aims, from gathering new information, to surveying options for policy reform, to making recommendations regarding highly technical or politicized issues. At times, commissions have been criticized for creating a democratic deficit: particularly when they are granted significant power, operate outside public view, and tasked with high stakes and controversial issues like recommending military base closures.[165] Yet more often than not, the absence of actual authority, and the way their power lies solely in their ability to persuade, mean that commissions serve an important role in promoting public discourse and democratic engagement. Overall, the CRS reports also highlight the flexibility of the commission structure, and just how much depends on their leadership, authority, and other design choices.

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authorizing their creation, the remainder receive funds via existing structures or through private donations.

163. For a comprehensive breakdown of the amounts allocated for non-commemorative commissions and the identified expenditures, see CONG. RSCH. SERV., FUNDING AND EXPENDITURES, *supra* note 161, at 8-12 tbl. 2, 16-18 tbl. 4.

164. CONG. RSCH. SERV., DESIGNING CONGRESSIONAL COMMISSIONS, *supra* note 161, at 23-25.

165. CONG. RSCH. SERV., MILITARY BASE CLOSURES: A HISTORICAL REVIEW FROM 1988 TO 1995, at 1-4 (2004), HTTPS://PERMA.CC/2H6P-U8K4.

Given the regular use of commissions in the United States, there exists no shortage of specific case studies upon which to draw. The remainder of this Part explores two case studies that demonstrate the value, flexibility, and limits of the commission structure: the 1969 American Bar Association (ABA) commission created to study the Federal Trade Commission (FTC), and two commissions—one established in 1970, the other in 1994—created to explore possible reforms to the U.S. Bankruptcy Code.

1. Shaking Things Up at the FTC

Our first case study involves a commission that helped to channel public controversy, light a fire under Congress, and fundamentally change how an administrative agency worked—all without requiring any change in the law. In the late 1960s, the FTC was the subject of widespread scorn, with even FTC commissioners questioning the institution's mission and structure. Ralph Nader, both responding to and amplifying these concerns, was dismayed by what he saw as a history of failure. In 1968, law students working inside the FTC—deemed "Nader's raiders" because they were operating at his behest—published an influential report cataloging what they viewed as significant deficiencies at the agency.[166] These deficiencies ranged from not adequately protecting consumers, to failing to hold large corporations to account, to covering up these and a great many other shortcomings.

The Nader Report was sufficiently damaging that it prompted President Richard Nixon to establish his own commission to examine just how well the FTC was carrying out its congressionally-mandated tasks and what might be done to enhance the agency's performance. The commission, created under the aegis of the ABA, was comprised of sixteen members and was a far more technocratic affair than the Nader Report. The commissioners included five law professors, two economists, seven attorneys in private practice, a counsel to a major labor union, and a counsel to a major civil rights organization. Yet like the Nader Report, the ABA Report found significant deficiencies in the operations of the FTC, including a tendency to squander its finite resources through informal and sometimes haphazard approaches to enforcement.[167] Amongst other recommendations, the report suggested that the FTC should set forth clear priorities, assess the expected returns from enforcement initiatives relative to their cost, ensure more resources were devoted to more complex, economically significant challenges, and otherwise take steps to enhance the efficiency of the agency's operations.

The sole dissent from the ABA Report came from Richard Posner, who thought the recommendations did not go nearly far enough. As Posner saw it, the

166. *See* EDWARD F. COX, ROBERT C. FELLMETH & JOHN E. SCHULZ, THE NADER REPORT ON THE FEDERAL TRADE COMMISSION (1969).

167. *See* Miles W. Kilpatrick, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 ANTITRUST L.J. 43, 53-54 (1989).

ABA Report was merely the latest iteration of six reports, including the Nader Report, that over a period of forty-five years had consistently found the FTC's performance wanting. To him, this pattern of failure suggested that rather than merely offering internal fixes to the structure of the FTC, the better approach was to question the very assumptions underlying its existence. And in his view, given the role that both the Department of Justice Antitrust Division and courts could and had played in protecting consumers, the FTC should be abolished in its entirety.

By all accounts, and contrary to Posner's concerns—as he later conceded—the FTC underwent a meaningful transformation in how it operated following the publication of the commission's report. The causal arrows are myriad. As a starting point, Nixon appointed Miles Kirkpatrick, who chaired the commission, to chair the FTC. This ensured the strong leadership that the commission called for and reflected executive support for a major overhaul in how the FTC operated in line with its recommendations. Congress too supported this shift. As William Kovacic, also a later FTC Chair, recounted: "From the date of its release, the ABA Report became a congressionally-accepted standard for measuring the Commission's antitrust performance."[168] Congress thus used its regular budgetary and oversight hearings to encourage FTC leadership to experiment and engage in bold enforcement actions. Confirmation hearings too were replete with calls to avoid shyness and restraint and to engage in robust efforts to protect consumers. And, most importantly, against this background, the FTC underwent significant internal reforms that had the intention and effect of transforming the body into something more akin to the bold, strategic regulator that the commission's report had envisioned and endorsed.

This shake-up did not last long. By 1980, the FTC was again under attack. A better organized business community, broader anti-regulation sentiment, and a series of missteps by the FTC—of the type to be expected when an agency is bold and experimental—led Congress to change tack. Moreover, some of the policy changes instituted during this period, including the adoption of the so-called "consumer welfare" model to the exclusion of considering other types of consumer harms that can flow from concentrated economic power, are today inspiring renewed debate and, increasingly, backlash. But by all accounts, the 1969 ABA Report, alongside the work by Nader and Posner that highlighted the agency's shortcomings and made it feel that its very existence could no longer be assumed, adding a sense of urgency to the reform efforts, brought about lasting and meaningful changes in how the FTC operated. In this respect, the ABA Report was a pivotal point that fundamentally transformed and strengthened the once maligned agency.

Taking a step back, there are a number of lessons from this episode. First, the ABA Report was the product of an executive commission, not a congressional commission. This was possible because the issues at play revolved entirely

168. William Kovacic, *The Federal Trade Commission and Congressional Oversight of Antitrust Enforcement*, 17 TULSA L.J. 587, 630 (1982).

around how a single agency used the significant authority vested in it. Yet the lack of impact of previous, similar reports suggests more was needed. As the Nader Report and Posner article reflect, it probably helped that the ABA Report was issued at a time when the FTC had few defenders and many, many critics. Moreover, subsequent analyses suggest that the ABA Report was so impactful because it persuaded elected officials, both in Congress and the White House. That consensus was reached among 15 of the 16 commissioners also mattered. This is also a striking episode because the group was composed largely, although not exclusively, of technocrats and included many private lawyers, who today may be seen as conflicted or overly beholden to industry. Yet the mechanism of the report's impact lay largely in its power to persuade—suggesting that in some circumstances, expertise and inside knowledge can go a long way in producing a persuasive diagnosis and prescription.

2. Bringing Bankruptcy Up to Code

Bankruptcy is another field where commissions have historically played an influential role in shaping policy debates. Unlike antitrust, it is also a field where they have had a more direct impact on the trajectory of legislative reform. The first bankruptcy commission of the modern era, and most successful by any conventional metric, was the Bankruptcy Commission of 1970.[169] The scope of the 1970 Commission was far reaching, as was its impact. The commission functioned as the cornerstone for a massive overhaul of the entire U.S. Bankruptcy Code, implemented by Congress through the Bankruptcy Reform Act of 1978.[170] Aside from this impact, one of the most striking features of the commission is that, unlike previous revisions to the Bankruptcy Code, it was not established in response to any immediate crisis.[171] Instead, Congress was motivated by a number of indications that bankruptcies were on the rise, and that the existing bankruptcy regime was falling short.

The composition of the 1970 Commission included representation from all three branches of government: with three members—including the Chair—appointed by the President; a Senator and member of the House of Representatives from each party, and two district court judges chosen by the Chief Justice of the Supreme Court. The commission was chaired by Harold Marsh, a prominent Los Angeles bankruptcy attorney who had also been a law professor at UCLA. The commission was authorized to choose and determine compensation for its staff, subject to an aggregate cap on total expenses, and could also utilize voluntary

169. *See* Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

170. Robert Jacobvitz, *A Relatively Short History of the Bankruptcy Laws in the United States*, NCBJ: NCBJ 93D ANNUAL CONFERENCE BLOG (Feb. 27, 2019), https://perma.cc/YTH7-58JY; Glenn E. Pasvogel, Jr., *The Bankruptcy Reform Act of 1978–A Review and Comments*, 3 UNIV. ARK. LITTLE ROCK L. REV. 13, 13 (1980).

171. Frank Kennedy, *Foreword: A Brief History of the Bankruptcy Reform Act*, 58 N.C. L. REV. 667, 668 (1980).

service.[172] This enabled the commission to hire a sizable and very capable staff that included a number of bankruptcy scholars and other experts in the field. The commission also had broad authority to demand information, data, and advice from any governmental body. The commission used these financial, human, and other resources to produce an array of reports examining particular issues in bankruptcy law and practice.[173] The commission was given two years to produce its final report, which included a detailed proposal for legislative reform, and supplemented section-by-section analyses of the proposed changes and their rationales. This proposal served as an influential foundation as Congress took up the baton to re-write the Bankruptcy Code.

Despite its breadth and expertise, not everyone was happy with the commission's findings and recommendations. Among the most notable discontents was the National Conference of Bankruptcy Judges. Bankruptcy judges, who had been upset not to have direct representation on the commission, were sufficiently dissatisfied that they issued their own series of recommendations, which came before Congress in a separate, competing bill.[174] However, rather than dooming the commission's work, this return volley served to keep the ball in the air. The two sides agreed on much, even if also disagreeing on key points, and the competing bills helped Congress appreciate all the more the shortcomings of the current bankruptcy regime, even if the path forward was less than clear-cut.

This led to three years of hearings, during which subcommittees of both the Senate and House Judiciary Committees and their staffs probably learned more than they ever expected to know about the ins and outs of bankruptcy.[175] Yet it also provided a meaningful opportunity for broad engagement about the strengths and weaknesses of the commission's proposals, and an opportunity for Congress to hear from the array of stakeholders who would be impacted by any revision to the Bankruptcy Code. In this sense, the process brought to life the ways that commissions can serve as a way for technocratic expertise to shape public and political debate. Also consistent with politics as it is often carried out in practice, the hearings spurred compromises outside the public spotlight, as a key player from the commission held meetings in Atlanta with influential members of the National Conference of Bankruptcy Judges, hammering out key issues between them and further shaping the hearings and reforms that followed.[176]

The ultimate reforms brought about a massive transformation in the Bank-

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172. *See* Act of July 24, 1970, Pub. L. No. 91-354, 84 Stat. 468.

173. *See* Am. Bar Ass'n, *Report of the Commission on the Bankruptcy Laws of the United States*, 29 BUS. LAW. 75, 76, 79-80 (1973).

174. Kennedy, *supra* note 171, at 673. For a thorough overview of the political history of bankruptcy regimes in the United States, see DAVID A. SKEEL, JR., DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA (2001).

175. *See* Kennedy, *supra* note 171, at 674 and sources cited therein (describing how, over fifty days of hearings, more than 160 witnesses, and voluminous records were produced subsequent to, although building on, the commission's proposal).

176. SKEEL, *supra* note 174, at 140-41.

ruptcy Code and bankruptcy practice. The Bankruptcy Reform Act of 1978 included revisions to more than three hundred sections and half the titles in the U.S. Code in addition to effectively repealing and rewriting Title 11, which governs bankruptcy, in its entirety.[177] Looking back on the impact of the reforms, bankruptcy scholars identify the 1978 reforms as ushering in "the modern era of bankruptcy law"[178] and "produc[ing] a complete revitalization and expansion of U.S. bankruptcy law."[179] The reforms did not go as far as the commission recommended in some regards, and some subsequent scholars believe that the law would have been better served if more of the recommendations had been followed.[180] Nonetheless, by any metric, the 1978 reforms were transformative, positive, and meaningfully shaped and informed by the work of the 1970 Commission.[181]

Much of the structure, but not the success, of the 1970 Commission was replicated the next time Congress sought to update the Bankruptcy Code. Congress initiated what was intended to be a less comprehensive review of the bankruptcy regime in 1994 and did so once again by authorizing the creation of the Bankruptcy Review Commission to assess shortcomings and propose potential reforms.[182] Like its predecessor, the 1994 Commission was given substantial funding, reasonably broad authority, and two years to complete its task. This authority included the ability to demand an array of data and other information and support from across the federal government.[183] The new commission's leadership structure was chosen in largely the same way as the 1970 Commission, with the same number of commissioners, although elected officials themselves were not permitted to serve. The original chair was forced to resign for health reasons, leading to turnover at the top part way through the 1994 Commission's work. Nevertheless, the commission was once again supported by staff that included a number of law professors and other experts. Most prominent and influential among them was then-Harvard Law Professor Elizabeth Warren, who served as the Reporter/Consultant as well as a Senior Advisor for the commission. Following the lead of the 1970 Commission, the 1994 Commission identified different topic areas that merited attention and created working groups and reports on those topics.[184] Its final report weighed in at more than 1,300 pages

177. Kennedy, *supra* note 171, at 668.

178. Robert J. Landry III, *Ten Years After Consumer Bankruptcy Reform in the United States: A Decade of Diminishing Hope and Fairness*, 65 CATH. U. L. REV. 693, 696 (2016).

179. SKEEL, *supra* note 174, at 4.

180. *See* Jeb Barnes, *Bankrupt Bargain? Bankruptcy Reform and The Politics of Adversarial Legalism*, 13 J.L. & POL. 893, 893-96 (1997).

181. SKEEL, *supra* note 174, at 141 (explaining that "the 1973 commission report provided both the intellectual underpinning and much of the framework for the reforms that Congress eventually adopted").

182. *See* Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106.

183. *See National Bankruptcy Review Commission Fact Sheet*, NAT'L BANKR. REV. COMM'N, https://perma.cc/QW4B-HUE9 (archived Jan. 13, 2024).

184. NAT'L BANKR. REV. COMM'N, BANKRUPTCY: THE NEXT TWENTY YEARS 61-62 (1997), https://perma.cc/A2T9-VJL9.

and included an array of proposals for revamping and improving the bankruptcy regime.[185]

Yet almost from the beginning, there were also signs of trouble. For example, although Congress authorized access of up to $1.5 million to support its work, the 1994 Commission was not actually able to tap into this needed funding for the first year of its operations.[186] And in stark contrast to the 1970 report, which brought about robust discussion, some disagreement, and then meaningful reforms, the report produced by the 1994 Commission produced more partisan controversy than reform. The reasons are many and overdetermined. Some see the reporters of the two commissions as key factors. Frank Kennedy, the University of Michigan law professor who was the reporter for the 1970 commission, has been described as "saintly" and remains best known for his technocratic and technical expertise.[187] Warren was just as prominent, if not more so, yet she also came to the project as someone who had achieved prominence as a leading voice on one side of a vociferous academic debate—arguing repeatedly and forcefully against claims that the interests and dynamics at stake in consumer bankruptcy could ever be captured adequately in a law-and-economics frame.[188] Her central role on the commission was seen by many as central to explaining the dearth of reports from scholars using the concepts and methodologies of law-and-economics, despite its central role in much of the scholarship of the era and the belief, held by some, that incorporating such reasoning into the report may have made it more palatable to the newly-Republican Congress to which it was delivered.[189]

Yet these decisions could not have been, and were not made, by Warren alone. And whether they were causes or consequences of the era in which the commission was working is hard to disentangle. The proximity in time between the work done by the commissions on the FTC and bankruptcy reform in the late 1960s and early 1970s is striking. By contrast, by the time the 1994 Commission issued its report, Newt Gingrich had taken over leadership of the House of Representatives and partisan divisiveness had become the new normal. Consistent with this observation, the release of the 1994 Commission's report in October 1997 roughly coincided with the time at which one important metric of how well Congress is functioning—its ability to override judicial decisions—started to decline.[190] Accentuating the challenge, the congressional committee that typically oversees bankruptcy, the House Judiciary Committee, was the same committee that had just overseen the Clinton impeachment proceedings, a partisan raucous if there ever was one. And as is so often the case, businesses whose interests

185. Heidi A. Ritter, *Symposium Editor's Note*, 102 DICK. L. REV. 677, 677 (1998).

186. *See* NAT'L BANKR. REV. COMM'N, THE COMMISSION: ITS HISTORY AND PROCESS 51-52 (1997), https://perma.cc/D827-VD7P.

187. SKEEL, *supra* note 174, at 201.

188. *Id.*

189. *Id.*

190. Matthew R. Christiansen & William N. Eskridge Jr., *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967-2011*, 92 TEX. L. REV. 1317, 1325 (2014).

would be impacted were quick to invest money and other resources into spinning a counternarrative, one that shifted the focus from addressing the needs of those facing bankruptcy to those seeking access to credit and the companies that were all too willing to provide it. It may thus come as little surprise that while the 1994 Commission succeeded in sparking debate, framing issues, and compiling some quite useful reports, many viewed its impact as doing more to stir controversy than to help pave the way for substantive bankruptcy reforms.

One could be forgiven for concluding that the negligible legislative impact of the 1994 Commission—like the FCIC—meant that the process was a failure. Indeed, both commissions sparked controversy, both became embroiled in partisan politics, and neither was immediately successful in bringing about legislative or regulatory reform. Yet both also yielded constructive outputs in terms of information production, issue framing, and public engagement that had real value. And in many ways, the 1994 Commission may have helped plant the seeds for the robust debates underway today about the virtues—and limits—of consumer debt.[191] These less tangible but potentially quite important outputs illustrate how the case for commissions is not solely about immediate legislative action, but also their potential to shape the longer-term historical arc around the evolving policy ideas, debates, and reform.

In recent years, the Clinton administration has increasingly been seen as the fulcrum of the "neoliberal" movement, the point at which even the Democrats that had initially fought deregulation and promoted workers' rights embraced market-based reasoning in ways that contributed to the growth of the financial sector, rising financial inequality, and increasing corporate concentration.[192] Looking back at the work of the 1994 Commission serves as a reminder that the period was more textured, and that the work done decades ago may have been pivotal in keeping alive the ideas that helped to spark the recent shift toward new paradigms for understanding economic policy. And having congressional commissions, rather than just the ivory tower of academia, serve as a platform for developing and debating ideas can accelerate consideration of the tough questions about what's really at stake and who is most likely to gain and to lose from different paradigms and paths forward.

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It is impossible to draw simple or universal lessons from these case studies. Each commission was the product of a unique confluence of factors: including the impetus for their creation, their mandates and powers, the personalities of their leadership, the prevailing political climate, and the identity, interests, and agendas of other stakeholders. Nor is it straightforward to catalog all of the costs

191. *See, e.g.*, Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1438-39 (2020).

192. GARY GERSTLE, THE RISE AND FALL OF THE NEOLIBERAL ORDER 1-12 (2022).

and benefits of these commissions, let alone quantify them. This frames an important point: there is no single model for how commissions should be structured, how they should work, or what they can be designed to achieve.

There are far more, and far less, successful commissions, but the specific successes and failures of each commission must be judged on their own terms. Some commissions—like the Aldrich Commission—will be expressly designed to inform the process of legislative reform. Others—like the FCIC—will not. Some commissions will be designed principally to lever technocratic expertise, while others will be designed to engage with a broader cross-section of public and private stakeholders. Some will seek to build consensus, while others will seek to harness existing consensus to bring about meaningful changes in law and policy. And even in the same domain, the approach taken by different commissions can change over time. For example, whereas the 1970 Commission sought to avoid controversy, the 1994 Commission sought it. There was a time and place for both in bankruptcy—and there's likely to be a time and place for both in financial regulation. This inherent flexibility should be embraced by policymakers as a valuable feature of the commission structure, rather than as a potential bug.

In addition to this inherent flexibility, our five case studies cautiously point to a number of other potential benefits. As a threshold matter, commissions can often provide Congress and administrative agencies with valuable information about the nature and size of policy problems, who is most impacted by them and, where necessary, the range of potential legislative and regulatory reforms. Additionally, as perhaps best evidenced by the founding of the Fed and bankruptcy reform, commissions can provide a valuable platform for bringing technocratic expertise to bear in understanding these problems and in evaluating the best path forward. By the same token, by shining a public spotlight on these problems, and encouraging a more diverse community of stakeholders to participate in the discussion about how to resolve them, commissions can also provide an effective counterweight to the shortsightedness and entrenched interests often associated with technocratic governance.

Further, by widening the aperture through which they view policy problems, commissions can provide Congress and administrative agencies with an opportunity for systemic reflection. As we have seen, existing administrative law processes tend to focus on relatively short-term and narrow technical problems. They also often lack any systemic mechanism for evaluating the impact of previously implemented regulatory reforms. In the realm of financial regulation, the resulting blind spots are exacerbated by legal path dependency and the highly fragmented regulated architecture. These procedural and structural mismatches can make it extremely difficult for policymakers to engage in more sustained and holistic evaluations of important issues like the structure and stability of the financial system, the lessons from systemic regulatory failures, or the ways that finance contributes to climate change, institutional racism, or structural inequality. Viewed in this light, commissions can serve as an important complement to existing administrative processes: enabling Congress and regulators to ask bigger questions, and to explore longer-term, deeper, and more durable answers.

Notably, there are already other domains where this type of systematic reflection takes place. The process for updating the U.S. Dietary Guidelines is a prime example. Although there are meaningful differences between them, public health—like finance—is a domain where there is ongoing learning by academics and other experts that can usefully help inform the policy process. This is one reason why Congress requires the U.S. Dietary Guidelines, which provide dietary advice to Americans and shape other federal, state, and local food policies, to be updated every five years.[193] Importantly, a key input in this process is a report from Dietary Guidelines Advisory Committee (DGAC), comprised of doctors and public health officials from a diverse range of specialties. Every five years, the DGAC is responsible for reviewing the Guidelines and making recommendations based on new research and evolving understandings. The 2015 DGAC, for example, spent nearly two years compiling a 400-plus page report summarizing research and making recommendations on a range of issues. This report is not the final word on the revisions to the Guidelines. There are subsequent processes that, for better and worse, allow more political and other considerations to come into play. But the DGAC plays an active role in shaping the revisions, and its report is publicly available, leading to far more informed public debate. The DGAC recommendations, for example, can make it easier to spot when industry has influenced the final guidelines in self-serving ways, as many suspect has happened on issues such as sugar and meat consumption.[194]

Commissions may also have an important role to play in helping to address the particular governance challenges arising from the judiciary's anti-administrative turn. One effect of this heightened judicial scrutiny has been a chilling effect on agency action, with important and contestable issues sometimes failing to make it onto the regulatory agenda. Alternatively, it may result in action through enforcement, which, even when justified by the current law, may not be the optimal vehicle for addressing a new issue, innovation, or threat. Even where agency inaction is ultimately the most desirable outcome—which it sometimes will be—these tendencies can shield new issues from being subject to rigorous analysis and public debate with engagement from diverse stakeholders. Such results can both undermine the effectiveness of financial regulation and make regulators seem unresponsive or inappropriately responsive to new and important issues, undermining legitimacy.

The question of how best to navigate the tradeoffs at play when financial regulators tackle difficult and controversial policy issues has already received some attention from scholars. One of the most important contributions comes from Peter Conti-Brown and David A. Wishnick. Writing about the Fed, they

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193. *See* U.S. DEP'T OF AGRIC. & U.S. DEP'T OF HEALTH & HUM. SERVS., DIETARY GUIDELINES FOR AMERICANS 2020-2025, at 3 (9th ed. 2015).

194. Julia Belluz, *Michael Pollan on How America Got So Screwed Up About Food*, VOX (Jan. 7, 2016, 8:50 AM EST), https://perma.cc/RBJ6-WYM4.

advance a framework built around the idea of "technocratic pragmatism."[195] This framework is explicitly designed to address the tension between "the need for the Fed to develop expertise to attack complex problems" such as cyber threats, the scope of its emergency lending authority, and climate change, and "the requirement that democratic governance select the values and problems that deserve the Fed's scarce resources to combat."[196] Viewed from this perspective, commissions offer yet another mechanism for foregrounding these tradeoffs and promoting a diverse, well-informed, and public debate. In some cases, this debate will yield a clear and compelling case for agency action. In other cases, it will not. Yet in either case, Congress, regulators, and the public will have more and better information than they would otherwise possess. This information can be used by Congress to clarify or expand the authority it has delegated to regulators, by regulators to design and implement any new regulation, and by the public to determine whether Congress and regulators have taken decisions that ultimately reflect their values and interests. Where this process reveals a broad consensus, commissions can also help galvanize the public and political will necessary to undertake important regulatory reforms.

Ultimately, our five case studies are just a small fraction of the hundreds of instances in which Congress has turned to commissions, and there is no doubt that other examples can shed additional light on their potential benefits and costs. There is also no guarantee that any given commission will be able to realize these benefits, or avoid the many potential pitfalls. Nevertheless, even this cursory overview shows that commissions are used broadly for good reason, and that their benefits can help address the specific challenges facing financial regulation today.

IV. A DECENNIAL COMMISSION FOR FINANCE

In both their successes and failures, our five case studies provide valuable insights into how regularly constituted commissions could enhance Congress's ability to play the myriad roles, from passing legislation to confirming nominees to overseeing agencies, that it plays in regulating finance. Perhaps most importantly, the analysis here suggests that periodic examinations of the state of finance and financial regulation could provide Congress, and regulators, a valuable opportunity to evaluate recent developments, proactively identify and address potential risks, and create space to examine and debate fundamentally contestable issues. Particularly given the rate of change and rate of learning that happens in finance, commissions should be used exclusively or even primarily in the wake of financial scandals or crises. They should also serve as a regular feature of financial regulation. To this end, we propose that Congress should pass

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195. Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 639-41 (2021); *see also* Omarova, *supra* note 20, at 633.

196. Conti-Brown & Wishnick, *supra* note 195, at 641.

legislation pre-committing to the authorization of a commission every ten years to examine and report on the health of the financial system and any other issues that Congress identifies as pressing and substantial. In addition to this Decennial Finance Commission, the legislation could also create a framework that facilitates the creation of ad hoc—or "off-the-shelf"—commissions to address more time-sensitive issues, such as investigations into significant market or regulatory failures.

The Decennial Finance Commission could help further each of the functions typically served by commissions and synthesized above: producing new information, laying out alternative courses of action in response to new learning or new developments and, finally, enhancing legitimacy, often by helping to spur debate and action. Examining each in turn helps make plain how Decennial Finance Commissions could help Congress fulfill its many roles.

First, each commission would serve as a focal point for efforts to improve data gathering and analysis within the fragmented U.S. regulatory community. Like the Aldrich Commission, the FCIC, and many of the commissions regularly used outside of finance, the commission would frame questions for research, commission and produce reports on various substantive topics, and engage with policymakers, industry representatives, advocacy groups, and other key stakeholders. As reflected in the extensive records created by many of these commissions, even a commission without subpoena power can often compile an incredibly useful record of recent developments and interactions among them.

The objective of this process would be to marshal a body of facts that would then enable the commission, Congress, regulators, and the wider public to meaningfully evaluate the resilience and stability of the financial system, the role of regulation in advancing or undermining public policy objectives, and the contributions of finance to society. Given the complexity of modern finance and the frequency with which new innovations or regulatory interventions can generate unpredicted spillover effects that transcend the jurisdiction of any single regulator, this type of broad fact-finding could be incredibly useful for congressional oversight and enhance regulatory efficacy even without further reforms.

Of course, these types of fact-finding exercises do not take place in a vacuum. Perhaps most importantly, the capacity of these exercises to shape policymaking, whether by Congress or regulators, will often depend on the political narrative through which facts are presented. This makes the leadership of each commission extremely important—with the right leader depending on the circumstances. In some circumstances, a strong leader may be key to countering industry resistance to needed change, even if this reduces the probability of building consensus among commission members. In others, it may be useful to seek out a leader who has a track record of technocratic expertise and consensus building.

Second, the commission would create a formal process for identifying, prioritizing, and responding to new developments. This would likely entail a multistage process. First, the commission would invite stakeholders to submit evidence and analysis on matters such as the resilience and stability of the financial system, along with emergent opportunities and threats. Next, the commission would likely seek to narrow down the field: identifying specific opportunities and challenges about which it would like to gather further information. In addition to calls for further evidence, this stage would involve public hearings designed to ensure that the commission, policymakers, and the wider public hear from a diverse range of stakeholders. The commission would then produce a preliminary report explaining its rationale for selecting specific issues for further consideration. Finally, if appropriate and if time allows, the commission would solicit views on the appropriate regulatory response to these issues. Depending on the circumstances, this multistage process could culminate in either specific recommendations for regulatory reform, or a summary of the available policy options and a comparison of their strengths, weaknesses, and potential tradeoffs.

The ability of each commission to undertake this type of process, analyze the information it gathers, and produce useful reports and recommendations will depend greatly on its staff. Although each Congress should select the mix of commissioners that will oversee this process, it may be appropriate to have a permanent secretariate of staff supporting the commission structure.[197] In addition to serving as an important source of institutional memory, this secretariate could make it easier for Congress to establish "off-the-shelf" commissions in response to specific crises, scandals, or other major developments. This would enable Congress to respond more quickly to new developments as they unfold, which could be particularly useful when Congress identifies problems that transcend the jurisdiction or competence of any single agency.

Third, a well-designed, regularly constituted commission on financial regulation could enhance the legitimacy of the policy process. The commission's approach of rigorously gathering and analyzing data, engaging with a broad cross-section of stakeholders, and publicly reporting its findings—while leaving decisions about whether and how to use that information to elected officials and their appointees—may improve public confidence in how financial regulation is made. This process could also help identify issues on which there is broad, bipartisan agreement about the nature of a specific problem or opportunity, its importance, or the best course of action, encouraging the type of modest, bipartisan legislation that used to be more common.[198] The legitimacy of the policy process would be further enhanced by the fact that the commission's deliberations would generally not take place in the thick of the politically charged atmosphere that typically follows a financial crisis, potentially reducing concerns about the distortive impact of the regulatory sine curve and "quack" regulation.[199] Lastly, by

197. This proposal is consistent with the broader trend of an ever-expanding, and often quite helpful, bureaucracy supporting Congress's work more generally. *See* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541, 1544-49 (2020).

198. *See generally* Abbe R. Gluck, Anne Joseph O'Connell & Rosa Po, *Unorthodox Lawmaking*, *Unorthodox Rulemaking*, 115. COLUM. L. REV. 1789 (2015).

199. John C. Coffee Jr., *Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019, 1022-23

explicitly grounding the rationale for the commission in the dynamism, complexity, and contestability of modern finance, the process would reinforce the view that—rather than signaling a policy failure—periodic re-examination, followed as necessary by thoughtful and measured reform, is a feature of a healthy financial and regulatory system.

The design and implementation of the Decennial Finance Commission will demand that Congress carefully consider a range of questions, some of which should be answered in the legislation committing to the creation of future commissions and some of which should likely lie in the hands of the appropriate committees when the time comes to constitute a new commission. Key issues include: How big should the commission be? How should commissioners be selected, and to what extent should the processes vary between commissions? How can the commission ensure that it hears from a diverse range of stakeholders? How should it prioritize opportunities and threats? And, perhaps most importantly, what can the commission do to ensure that it is viewed as a highly legitimate and integral part of the policy process? There are no "right" answers to these questions, but the case studies help shed light on some of the tradeoffs at play in ways that can inform the "right" answer given the specific objectives of a commission.

Consider, for example, the issue of whether to grant the commission subpoena authority and, if so, how broad that authority should be. Depending on the commission members and other stakeholders involved, such authority may be critical to enabling a commission to gather the information it needs to assess how finance is changing, where risks may lie, and who may be affected. It may be particularly vital when a commission is expected to play a role exposing bad behavior or holding powerful actors to account, as commission-like structures often have at critical junctures in the past. At the same time, a core justification that makes institutionalizing commissions such an easy step forward is that the potential upside so exceeds any potential downside. Broad subpoena authority is inherently risky—bringing possibly significant upsides but also real downsides, as such power can be abused. We are inclined to think that the enhanced upside potential of such authority outweighs these downside risks, but these are precisely the type of tradeoffs that are up to Congress to resolve and which may play out differently at different points in time.

Size is another characteristic that is of vital importance but where there are real tradeoffs. A smaller commission and commissions of people who share common professional norms may well be better able to reach consensus. This can be good and bad. If a new development has rendered the current law suboptimal by just about any measure, it could well be that any reform would be a welcome development and unanimity may increase the likelihood of that reform going through. By contrast, other new innovations—such as the spread of digital as-

(2012); *see also* Roberta Romano, *The Sarbanes-Oxley Act and the making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1526-27 (2005).

sets—raise a host of issues on which people may have very different perspectives. A small commission that purports to come up with the best way to regulate digital assets without airing the myriad views that might exist is unlikely to have much positive impact, and the consensus in that instance may undermine rather than enhance the commission and its conclusions.

It is also important to recognize that even apart from exception authority, commissions are not a risk-free undertaking. They could make bad recommendations, for example. This risk is mitigated by virtue of their power being limited: In contrast to Congress and regulators, they cannot make, enforce, or change any law, so Congress always has a check on their impact. But given that the aim is to accelerate consideration and action, mistakes could be impactful. They could also accentuate rather than blunt partisanship in ways that may reduce the probability of congressional action precisely when action is needed. Sometimes disagreement may serve important aims, helping to lay out the range of contested views on issues that are important and inadequately understood. But sometimes, strident views can perpetuate division and do as much to reduce as enhance actual understanding of the issues and tradeoffs at play.

Putting together a commission can also be a delay tactic, one that forestalls consideration of important policy issues without really advancing the ball. And depending on how the commission carries out its work, the status of the commissioners as unelected officials could lead to even more public distrust, contrary to the aim of enhancing legitimacy. Even with respect to the purported benefits, none can be assured. The capacity for any particular commission to realize any particular benefit will vary.

Looking at the array of possible benefits and drawbacks, however, both logic and experience suggest that some type of regularly constituted commission is likely to do more harm than good when current conditions are taken as the baseline. A Decennial Finance Commission could provide quite influential and constructive, at least some of the time. And the known costs of these commissions, such as the investment of time, money, and political capital, are modest in comparison with the import of the issues at stake. While striking the right balance between these costs and benefits will be an important determinant of a commission's success, it is for precisely this reason that it is also one best struck by Congress when authorizing each individual commission.

The problems revealed by the Covid crisis, the failures of SVB and Signature Bank, and the elevation of debates about whether financial firms and regulators should be doing more to address the threats posed by climate change and structural inequality suggest that now is the right time to establish an inaugural commission. These issues are complex, raise difficult questions, and present no clear or straightforward policy solutions. Any meaningful reform to tackle these issues would also trigger structural changes to the financial system and, at least in the short term, pose significant uncertainty. Ultimately, however, these are precisely the type of issues that the Decennial Finance Commission would be designed to address.

CONCLUSION

The judiciary's increased skepticism of administrative authority and independence has spurred many to come to its defense. This defense is entirely understandable, as administrative agencies have come to play an important role in a wide range of fields—including finance. But charting a better path forward requires us to also acknowledge the many shortcomings of existing administrative structures and processes. For decades, financial regulation has failed to rise to the challenges posed by the complexity of modern finance, its dynamism, or the fragmentation of the regulatory architecture. It has also failed to find adequate ways to promote healthy public engagement on fundamentally contestable issues that should not be left exclusively to technocrats. Acknowledging financial regulation as part of the problem is not a white flag of surrender but the foundation needed to introduce structures and processes better suited to the task at hand. It means acknowledging the limits of what is and can be known, and the corresponding desirability of regulatory frameworks designed to generate new learning and to continually apply this learning to improve financial regulation. It also means promoting, rather than stifling, public debate about the appropriate objectives of financial regulation and how best to achieve them. This Article shows how commissions can help promote these aims, and better withstand judicial scrutiny. While they are not a silver bullet, commissions are a practical and yet potentially transformative policy tool, and an important first step towards a more reflective, responsive, forward-looking, and integrated approach to financial regulation.