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ESSAY

JUDICIAL REVIEW OF EMERGENCY POWERS IN BANKING AND FINANCIAL REGULATION

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Banking and finance are arcane industries that often elude popular understanding, so courts, Congress, and the American public have largely delegated their regulation to federal agencies with considerable decision-making autonomy, affecting trillions of public and private dollars. Some regulatory powers, however, have the potential to destabilize the financial system. Yet for forty years, courts deferred to these agencies under the Chevron *doctrine.*

Over the past three years, the Supreme Court of the United States has generally curtailed the administrative state's role in policy-making by overturning Chevron *and enunciating the major questions doctrine. Deference to agencies plays a special role in banking and financial regulation as open-ended emergency provisions facilitate crisis response. But on several occasions since the 2008 financial crisis, agencies have misused these powers by invoking them routinely or when an emergency is not really afoot. If these regulators "cry wolf"*

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too often, they create perverse incentives that heighten the risk of financial turmoil.

This Essay argues that the Court's recent skepticism toward the administrative state is a positive development for banking and financial regulation. While courts should not totally abrogate regulatory discretion in this field of law, a stronger threat of judicial review could encourage agencies to reserve emergency powers for genuine crises. This will deter them from "crying wolf" to abuse their emergency powers, promote stability and transparency in regulatory decision-making, and better prepare the country for future financial crises.

INTRODUCTION

"Let us control the money of a country and we care not who makes its laws."[1]

The Roberts Court's scrutiny of the administrative state escalated in June 2024 when it overturned the forty-year-old doctrine of *Chevron* deference[2] in *Loper Bright Enterprises v. Raimondo*.[3] This decision reaffirmed the Court's skeptical stance on executive agencies in line with

[1] Investigation of the Money Trust: Hearings on H.R. 314 and H.R. 356 Before the H. Comm. on Rules, 62d Cong. 40 (1912) (statement of Mr. T. Cushing Daniel, author of "Daniel on Real Money"). The maxim is frequently—probably apocryphally—attributed to Mayer Amschel Rothschild (1744–1812), founder of the Rothschild banking dynasty. Id. But its sentiment—that money is more powerful than even law itself—rings true today. In 2011, just shy of one hundred years since it was spoken in a congressional hearing on regulating Wall Street, see id., a variation of the maxim appeared scrawled on a cardboard sign at the Occupy Wall Street protest. Photograph of Cardboard Sign (OWS_190b), in N.Y. Hist. Soc'y Shelby White & Leon Levy Digit. Libr., Occupy Wall Street Signs and Posters (2011), https://digitalcollections.nyhistory.org/islandora/object/nyhs%3A169816 [https://perma.cc/NQA6-DRBT].

[2] Amy Howe, Supreme Court Strikes Down *Chevron*, Curtailing Power of Federal Agencies, SCOTUSblog (June 28, 2024, 12:37 PM), https://www.scotusblog.com/2024/06/supreme-court-strikes-down-chevron-curtailing-power-of-federal-agencies/ [https://perma.cc/YUF7-FASL]. "*Chevron* deference" refers to the Supreme Court's 1984 decision to defer to agencies' interpretations of ambiguous statutes. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024). Some commentators predict the Court may soon go further in this direction by holding that broad delegations to agencies are altogether unconstitutional. Cydney Posner, Will SCOTUS Revive the Nondelegation Doctrine?, Harv. L. Sch. F. on Corp. Governance (Dec. 19, 2024), https://corpgov.law.harvard.edu/2024/12/19/will-scotus-revive-the-nondelegation-doctrine/ [https://perma.cc/RU5U-UQX7].

[3] *Loper Bright*, 144 S. Ct. 2244.

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its decisions in *Biden v. Nebraska*[4] in 2023 and *West Virginia v. EPA*[5] the year before. Many legal commentators join Justice Kagan, who wrote a foreboding dissent in *Loper Bright*, in predicting that *Chevron*'s overturn will disrupt the legal system for the worse.[6] And they may well be right. But for at least one area of the law—banking and financial regulation—*Chevron*'s demise is a positive development.[7]

Principal regulators in this field include the Federal Reserve ("Fed"), the Federal Deposit Insurance Corporation ("FDIC" or "Corporation"), and the Financial Stability Oversight Council ("FSOC" or "Council"). Congress granted these agencies elaborate statutory mandates aimed at safeguarding the stability of the United States financial system. Since the 2008 financial crisis, however, regulators have exploited broad provisions buried in these mandates to take risky and unprecedented action. But the Supreme Court's new stance on the administrative state may halt that trend.

This Essay argues that stronger judicial review of banking and financial regulators will make the financial system sounder by encouraging wiser use of regulatory tools. Part I discusses why excessive agency involvement poses risks to the financial system, primarily by creating moral hazard. Part II covers three statutory provisions regulators questionably invoked during and after the 2008 financial crisis to justify more frequent intervention. Part III examines some judicial levers the Supreme Court has pulled to limit agency discretion in other contexts, and it predicts how and when the Court may use them to check banking and financial regulators in the future.

[4] 143 S. Ct. 2355, 2368 (2023) (characterizing the Secretary of Education's interpretation of the HEROES Act as an attempt to "rewrite that statute from the ground up").

[5] 142 S. Ct. 2587, 2614 (2022) (rejecting the Environmental Protection Agency's "newly uncovered" interpretation that would have "conveniently enabled it to enact a program" that Congress had rejected).

[6] See, e.g., Michael M. Epstein, Agency Deference After *Loper*: Expertise as a Casualty of a War Against the "Administrative State," 89 Brook. L. Rev. 871 (2024); see also Loper Bright, 144 S. Ct. at 2295 (Kagan, J., dissenting) ("In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden—involving the meaning of regulatory law.").

[7] For an argument that *Chevron* helped cause the 2008 financial crisis by letting regulators expand "the business of banking," see Todd Phillips, Chevron and Banking Law: What's Good for the Goose Isn't Good for the Gander, Yale J. on Regul.: Notice & Comment (May 2, 2024), https://www.yalejreg.com/nc/chevron-and-banking-law-whats-good-for-the-goose-isnt-good-for-the-gander/ [https://perma.cc/G7KN-PJJW].

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I. RISKS OF EXCESSIVE INTERVENTION

What is the danger of frequent agency intervention in banking and finance? A basic economic tenet applies: "People respond to incentives."[8] In the short run, zealous intervention may stabilize a troubled market. But in the long run, it can encourage risky behavior and create the conditions for future crises.

Regulators distort incentives when they make decisions without transparency, as it becomes hard for market actors to predict when an intervention is coming and whom it will impact.[9] So when regulators step in consistently, the market starts to view intervention as the norm rather than the exception. Some actors may even begin to rely on this safety net. The belief that regulators will always come to the rescue encourages profitable risk-taking or, in economic terms, moral hazard.[10]

A. Mechanics of Banking

Banks trade on risk.[11] Uninitiated readers may excusably believe a bank is just a safe place to store money, but that is not the full picture. Legally speaking, a bank deposit is not a bailment, which would impose on the banker a duty of safekeeping,[12] but rather a loan.[13] Accordingly,

[8] N. Gregory Mankiw, Principles of Economics 7 (Jane Tufts ed., 7th ed. 2015).

[9] The cardinal example is Lehman Brothers, an investment bank that the Fed infamously let fail in 2008. After the Fed bailed out Bear Stearns in March, it was widely believed that Lehman would receive the same assistance. Instead, Lehman went bankrupt in September. See James B. Stewart & Peter Eavis, Revisiting the Lehman Brothers Bailout That Never Was, N.Y. Times (Sept. 29, 2014), https://www.nytimes.com/2014/09/30/business/revisiting-the-lehman-brothers-bailout-that-never-was.html.

[10] See Richard Scott Carnell, Jonathan R. Macey, Geoffrey P. Miller & Peter Conti-Brown, The Law of Financial Institutions 205 (7th ed. 2021) (finding "[m]oral hazard arises in banking" because "banks have deposit insurance, which undercuts the market discipline depositors would otherwise exert," and "ad hoc government rescues . . . have protected uninsured depositors and other creditors and further reduced market discipline").

[11] Kent Matthews, John Thompson & Tiantian Zhang, The Economics of Banking 381 (4th ed. 2024) ("Banks make profit by taking risk and managing risk.").

[12] See Jesse Dukeminier, James E. Krier, Gregory S. Alexander, Michael H. Schill & Lior Jacob Strahilevitz, Property 57 n.2 (10th ed. 2022) (noting that the modern view holds that bailees owe bailors a duty of reasonable care in safeguarding the latter's possessions).

[13] Murray N. Rothbard, The Mystery of Banking 92–93 (2d ed. 2008) (finding "[t]he classic case" to be Foley v. Hill (1848) 9 Eng. Rep. 1002 (HL), which "[a]ssert[ed] that the bank customer is only its creditor, 'with a superadded obligation arising out of the custom . . . of the bankers to honour the customer's cheques' " (quoting *Foley*, 9 Eng. Rep. at 1002)); see also *Foley*, 9 Eng. Rep. at 1005 ("Money, when paid into a bank, ceases altogether to be the

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banks generally have "carte blanche"[14] to use deposits as their own money and not be guilty of embezzlement.[15] So they make their own loans—sometimes risky ones—to earn interest.[16] They therefore have a private incentive to lend as much as possible.[17]

But there are strong public incentives to reel in bank lending.[18] If a bank lends out its deposits too freely and too many customers attempt to withdraw from their accounts in a short time span, the bank could collapse and leave many customers empty-handed. On top of that, one bank's failure may spread "financial contagion" to another bank, setting off a cascading chain of failures.[19] In sum, banks profit from exposing the wider financial system to risk, so there is a good reason to regulate them.

B. Regulatory Tools

Regulators have many means with which to quell systemic risk. Most bluntly, the Federal Reserve bails out banks that are "too big to fail."[20] That term may sound like it refers to a bank that is too robust to go under

money of the principal . . . ; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it.").

[14] Rothbard, supra note 13, at 92.

[15] *Foley*, 9 Eng. Rep. at 1005–06 ("The money placed in the custody of a banker is, to all intents and purposes, the money of the banker, to do with it as he pleases; he is guilty of no breach of trust in employing it; he is not answerable to the principal if he puts it into jeopardy, if he engages in a hazardous speculation . . . .").

[16] Moorad Choudhry, The Principles of Banking 6 (2d ed. 2023) ("[T]he vast majority of loans made by the vast majority of the world's banks are funded in exactly this way: by raising deposits and then using those deposits to fund loans.").

[17] Rothbard, supra note 13, at 130 ("[E]xcess reserves beyond the legal or customary fraction is burning a hole in the bank's pocket; banks make money by creating new money and lending it out.").

[18] Matthews et al., supra note 11, at 313 ("[T]he case for regulation of banks and other financial institutions hinges on the Coase (1988) argument that unregulated private actions create outcomes whereby social marginal costs are greater than private marginal costs.").

[19] Martin Brown, Stefan T. Trautmann & Razvan Vlahu, Understanding Bank-Run Contagion 2 (Eur. Cent. Bank, Working Paper No. 1711, 2014), https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp1711.pdf [https://perma.cc/N97F-YCPH] ("Financial contagion, i.e., the situation in which liquidity or insolvency risk is transmitted from one financial institution to another, is viewed by policy makers and academics as a key source of systemic risk in the financial sector.").

[20] See generally Andrew Ross Sorkin, Too Big to Fail: The Inside Story of How Wall Street and Washington Fought to Save the Financial System from Crisis—and Themselves (2009) (covering the internal operations of multiple U.S. actors involved in bailing out financial institutions in the 2008 financial crisis).

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(as the *R.M.S. Titanic* was once said to be[21]), but it really refers to the bank's place in the financial system—the bank is too big *to be allowed* to fail, as its collapse would devastate the economy.[22] So when a "too big to fail" bank teeters on insolvency, regulators may find they have no choice but to funnel public funds into the breach with a bailout.

Bailouts are politically unpopular to say the least. The investment bank bailouts of the 2008 financial crisis helped spawn the Occupy Wall Street movement,[23] and bailouts continue to be a political flash point.[24] They are no doubt the nuclear option of monetary policy. That is why since 2008, regulators have favored preventative measures.[25]

One such measure is deposit insurance, administered by the Federal Deposit Insurance Corporation. Banks fail because of bank runs. Many customers want their money at once, but the bank has lent out too much of it. When enough customers realize this, they panic and bleed the bank dry overnight.[26] Deposit insurance, in theory, eliminates the "phantom of fear" that drives customers to partake in a run.[27] If enough customers are

[21] The belief that the *Titanic* was unsinkable might actually be overstated in popular telling, as it was ironically "only after the ship's demise that the 'unsinkable' moniker really took off, presumably for dramatic effect." Did Anyone Really Think the Titanic Was Unsinkable?, Encyc. Britannica (Apr. 5, 2019), https://www.britannica.com/story/did-anyone-really-think-the-titanic-was-unsinkable [https://perma.cc/U653-CXHM].

[22] Too Big to Fail, Legal Info. Inst., https://www.law.cornell.edu/wex/too_big_to_fail [https://perma.cc/E8ZN-LK5L] (last updated Aug. 2021).

[23] Howard Wial, Wall Street, Main Street, and Wages After the Bailouts, Brookings Inst. (Dec. 15, 2011), https://www.brookings.edu/articles/wall-street-main-street-and-wages-after-the-bailouts/ [https://perma.cc/ZJW2-C8R5] ("'Banks got bailed out, we got sold out!' [was] a common protest chant in the Occupy Wall Street movement . . . .").

[24] John H. Cochrane & Amit Seru, Preventing Bailouts Is Simple, but It Isn't Easy, Wall St. J. (May 13, 2024, 4:32 PM), https://www.wsj.com/articles/preventing-bailouts-is-simple-but-it-isnt-easy-bank-run-8d409dcd.

[25] Arthur Long, Revised Section 13(3) of the Federal Reserve Act, Bus. L. Today, Mar. 2019, at 2, https://www.gibsondunn.com/wp-content/uploads/2019/11/Long-Revised-Section-13-3-of-the-Federal-Reserve-Act-Business-Law-Today-ABA-3-22-2019.pdf [https://perma.cc/YM24-EDBF] ("The Dodd-Frank Act instead takes a *prophylactic* approach to single financial company issues or issues raised by a number of financial companies contemporaneously affected . . . .").

[26] See supra notes 18–19 and accompanying text.

[27] Franklin D. Roosevelt, U.S. President, Fireside Chat on the Banking Crisis (Mar. 12, 1933) (transcript available at the University of Virginia Miller Center), https://millercenter.org/the-presidency/presidential-speeches/march-12-1933-fireside-chat-1-banking-crisis [https://perma.cc/9EYN-S9LQ] ("It needs no prophet to tell you that when the people find that they can get their money—that they can get it when they want it for all legitimate purposes—the phantom of fear will soon be laid.").

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dissuaded, the run never occurs.[28] Deposit insurance is like a nuclear deterrent in that its mere presence makes the world safer.

Another way to mitigate systemic risk is to directly hinder an institution from engaging in risky activity, like a nuclear nonproliferation treaty. One means of doing so is for the Financial Stability Oversight Council to designate financial institutions as "systemically important," flagging them for enhanced regulatory oversight.[29] Designation lets the Fed impose on these systemically important financial institutions ("SIFIs") various "prudential standards" outlined in the Dodd-Frank Act of 2010.[30] These standards include heightened capital requirements, compulsory reporting of credit exposure and plans to manage financial distress, and even limits on the size of loans the institution can issue.[31] The prudential standards target both the amount of risk an institution poses to the system ("exposure") and the likelihood of that risk being realized ("vulnerability").

C. Moral Hazard and Other Risks

While some regulation is necessary given the role these institutions play in society, heavy-handed intervention can be counterproductive. In line with the economic principle that people respond to incentives, excessive agency involvement weakens a financial institution's incentives to avoid risk-taking. Alternatively, an intervention can be so poorly devised that it creates risk directly.

For example, the threat of a bank run is a strong incentive against risk-taking. With the prospect of insolvency on the horizon, a bank's managers may reconsider holding, for instance, large quantities of "subprime" residential mortgage-backed securities. For if the mortgages underlying the securities default or underperform, the bank—and the managers' careers—could be in peril.

But regulators dilute the fear of bank failure when they grant bailouts too consistently. Major banks and financial institutions are sophisticated

[28] Matthews et al., supra note 11, at 316.

[29] Noah Berman, What Is the Dodd-Frank Act?, Council on Foreign Rels. (May 8, 2023, 1:21 PM) https://www.cfr.org/backgrounder/what-dodd-frank-act#chapter-title-0-5 [https://perma.cc/DVJ9-BCQ6].

[30] Dodd-Frank Act § 115(c)–(g), 12 U.S.C. § 5325(c)–(g).

[31] Id. § 5365(e)–(g).

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(and politically connected) entities.[32] As "too big to fail" institutions, they know regulators may have no choice but to bail them out when the alternative is a financial crash. This creates a tacit safety net, which emboldens financial institutions to make riskier—and more profitable—decisions.[33] Indeed, many recipients of the notorious 2008 Fed bailouts were involved in risky subprime mortgage markets, arguably in reliance on "too big to fail" protection.[34]

Deposit insurance has a similar effect on market discipline by weakening incentives to monitor bank riskiness.[35] While a bailout protects the banker who lent to risky borrowers, deposit insurance protects the customer who kept funds at a risky bank. Without deposit insurance, a customer must think carefully about where he keeps his assets because if he entrusts his money to a banker who makes questionable loans, he may lose his savings.[36] Therefore, without insurance, depositors have strong incentives to closely monitor bank lending activity.

However, moderate deposit insurance comes with desirable trade-offs. The bank failures of the Great Depression wiped out the savings of regular households.[37] Today, like back then, households lack the sophistication

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[32] See Lori Butterfield, Power and Politics in Banking, Stanford Bus. Corps. & Soc'y Initiative (Feb. 1, 2024), https://casi.stanford.edu/news/power-and-politics-banking [https://perma.cc/23LP-T8V5]; Commercial Banks Top Contributors, Open Secrets, https://www.opensecrets.org/industries/contrib?cycle=2024&ind=F03 [https://perma.cc/Q2HR-4SCK] (last updated Dec. 9, 2024) (listing political contributions from individuals or organizations affiliated with commercial banks, including PACs, individual members, employees, or owners); Finance/Insurance/Real Estate Sector Summary, Open Secrets, https://www.opensecrets.org/industries/indus?cycle=2024&ind=F [https://perma.cc/7N97-RCST] (last updated Dec. 9, 2024) ("The financial sector is far and away the largest source of campaign contributions to federal candidates and parties . . . .").

[33] See Carnell et al., supra note 10, at 205.

[34] See id. at 52, 205. But see Juan Ospina & Harald Uhlig, Mortgage-Backed Securities and the Financial Crisis of 2008: A Post Mortem 1–2, 11–12 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24509, 2018), http://www.nber.org/papers/w24509 [https://perma.cc/Y3UP-5Z3R] (arguing that AAA-rated subprime mortgage-backed securities were not as risky as conventionally believed).

[35] Matthews et al., supra note 11, at 321 ("[A]n important side-effect [of deposit insurance] is the development of moral hazard on the part of the insured bank.").

[36] Id. ("Once depositors are insured, they no longer have an incentive to monitor the bank they keep their deposits in.").

[37] Americans React to the Great Depression, Libr. of Cong., https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/great-depression-and-world-war-ii-1929-1945/americans-react-to-great-depression [https://perma.cc/JLU8-PQKC] (last visited Jan. 23, 2025).

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and leverage to oversee or influence a bank's activities.[38] So insuring household deposits entails a minimal sacrifice of market discipline in exchange for great financial security.[39] When deposit insurance covers only customers who would not have monitored their banks anyway, the resulting moral hazard is small.

To this end, the Federal Deposit Insurance ("FDI") Act limits coverage to $250,000 per depositor, per bank, per account.[40] Accounts above this threshold are often held by businesses or large investors with the means to monitor or sway bank decision-making.[41] Typically, these big depositors *are* going without insurance—their deposits beyond $250,000 are vulnerable. So they have a strong reason to seek out banks with sound reputations. Meanwhile, risky banks lose out on interest-generating deposits and must either change their ways or shut their doors.[42]

Two hundred and fifty thousand dollars may not be a magic number, but some cap is essential to prevent deposit insurance from creating moral hazard. If the FDIC could somehow ignore the cap, deposit insurance would be effectively unlimited. In that world, sophisticated depositors would lack any incentive to avoid risky banks. On the contrary, they would have every reason to seek out risk-taking banks to get the highest interest returns on their deposits. Limitless deposit insurance would make the financial system riskier.

Finally, shortsighted use of SIFI designation may increase risk. Another principle of economics is instructive: "People [f]ace [t]rade-offs."[43] When FSOC and the Fed impose Dodd-Frank's prudential standards on an institution, their actions likely curtail some systemic risk

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[38] See Matthews et al., supra note 11, at 315 (finding retail, as opposed to wholesale, depositors are more likely to lack sophistication to monitor bank activities); see also Nat'l Credit Union Admin., Study of Further Possible Changes to the Deposit Insurance System 5 (2007), https://ncua.gov/files/testimonies/DepositInsuranceStudyReporttoCongress-Ver6-4.pdf [https://perma.cc/5SRD-VFMZ] (finding deposit insurance important to protect small and unsophisticated depositors).

[39] See Matthews et al., supra note 11, at 314–15.

[40] 12 U.S.C. § 1821(a)(1)(E).

[41] Marc Labonte, Cong. Rsch. Serv., IF12378, Bank Failures: The FDIC's Systemic Risk Exception (2024) [hereinafter Labonte, Bank Failures], https://crsreports.congress.gov/product/pdf/IF/IF12378 [https://perma.cc/2BNR-UJGE] ("Congress set a deposit insurance limit in part because there is an expectation that depositors above the limit should be financially sophisticated enough to monitor their banks' riskiness (i.e., impose market discipline).").

[42] On the flip side, "[t]he moral hazard created by deposit insurance will drive even conservative banks to take on extra risk when faced with competition from bad banks." Matthews et al., supra note 11, at 327.

[43] Mankiw, supra note 8, at 4.

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by minimizing the institution's credit exposure. But this does not happen in a vacuum. If regulators overlook compliance costs when designating an institution, they could inadvertently increase systemic risk by raising that institution's vulnerability to financial distress, thereby undermining Dodd-Frank's purpose.[44]

Sometimes safety nets are desirable, as with moderate deposit insurance. Other times they are unavoidable, as with "too big to fail" bailouts in an active crisis. But excessive regulatory intervention is perilous. Uncapped deposit insurance and routine bailouts foster moral hazard, the consequences of which remain hidden until a future crisis unfolds. The dangers of agency over-involvement are more immediately clear when the policy itself is self-defeating, as when regulators edge sound institutions toward failure by imposing outsized compliance costs on them. Banking and financial regulators need an external check to remind them to consider the full and long-term consequences of their policies. Stronger judicial review could be the solution.

II. QUESTIONABLE USES OF EMERGENCY PROVISIONS

The risks outlined in Part I are not just theoretical: regulators have created them as recently as 2023. This Part examines instances since 2008 in which agencies stretched their statutory authority to justify more frequent intervention into the financial system. Since financial crises often arise rapidly, regulators may feel pressure to act swiftly and deal with the fallout later. While this style of regulatory involvement has short-term advantages, it risks undermining intentional legislative efforts to limit agency power and may give way to future financial crises.

A. Emergency Lending

The Federal Reserve is a key banking regulator—some even call it "the most powerful economic institution in the United States, and perhaps the world."[45] Among the Fed's policy tools is the discount window, an

[44] See Brief of Amicus Curiae Cato Institute in Support of Appellee at 10, MetLife, Inc. v. Fin. Stability Oversight Council, No. 16-5086, 2018 WL 1052618, at *1 (D.C. Cir. dismissed Jan. 23, 2018).

[45] James McBride, Anshu Siripurapu & Noah Berman, What Is the U.S. Federal Reserve?, Council on Foreign Rels. (Aug. 15, 2024, 2:00 PM), https://www.cfr.org/backgrounder/what-us-federal-reserve [https://perma.cc/G76K-3YRY].

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instrument that lets it lend to banks in times of financial distress.[46] These loans—popularly known as "bailouts"—are meant to prevent bank failures and promote stability in the financial system.[47] The Fed's lending power is typically limited to banks, but the failure of other financial institutions, like insurance companies, can badly hurt the economy. So the Fed also has an interest in bailing out those businesses during a crisis.

How can the Fed bail out non-banks? Before 2010, it did so by exploiting a crisis provision tucked away in its statutory mandate. If "unusual and exigent circumstances exist[ed]," the Fed could bail out "any individual, partnership, or corporation" if the Board of Governors deemed it "necessary to prevent, correct, or mitigate serious harm to the economy or the stability of the financial system of the United States."[48] In 2008, the Fed used this emergency lending power—known as Section 13(3)[49]—to make the largest loan in its history, providing $85 billion to the massive insurance and financial services conglomerate American International Group ("AIG").[50]

The bailout was unprecedented for another reason: in consideration for the loan, the Fed took a 79.9 percent equity interest in AIG—a private company—and turned it over to the Department of the Treasury.[51] The Fed's authority to acquire an equity stake in a private company is nowhere explicitly recognized in the Federal Reserve Act.[52] Instead, the Act implies charging interest is the appropriate form of consideration for a

[46] The Discount Window, Fed. Rsrv. (June 7, 2024), https://www.frbdiscountwindow.org/Pages/General-Information/The-Discount-Window [https://perma.cc/VK9F-2W6X].

[47] See Rothbard, supra note 13, at 133.

[48] Andrew P. Atkins, The AIG Bailout: Constraining the Fed's Discretion, 14 N.C. Banking Inst. 335, 340–41 (2010) (quoting 12 U.S.C. §§ 247–48).

[49] Federal Reserve Act § 13(3), 12 U.S.C. § 343(3).

[50] Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Board, with Full Support of the Treasury Department, Authorizes the Federal Reserve Bank of New York to Lend Up to $85 Billion to the American International Group (AIG) (Sept. 16, 2008, 9:00 PM), https://www.federalreserve.gov/newsevents/pressreleases/other20080916a.htm [https://perma.cc/L2MM-LJE9]; Principal and Response Brief for the United States at 46, Starr Int'l Co. v. United States, 856 F.3d 953 (Fed. Cir. 2017) (No. 15-5103). Under Section 13(3), Fed lending peaked at $710 billion in outstanding credit in November 2008. See Marc Labonte, Cong. Rsch. Serv., R44185, Federal Reserve: Emergency Lending 2 (2020) [hereinafter Labonte, Federal Reserve], https://crsreports.congress.gov/product/pdf/R/R44185 [https://perma.cc/GAH2-5W56]. Over one trillion dollars were lent in total. Carnell et al., supra note 10, at 193.

[51] Bd. of Governors of the Fed. Rsrv. Sys., American International Group (AIG), Maiden Lane II and III (Feb. 12, 2016), https://www.federalreserve.gov/regreform/reform-aig.htm [https://perma.cc/22FU-K523].

[52] Eric A. Posner, Last Resort: The Financial Crisis and the Future of Bailouts 90 (2018).

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discount window loan.[53] Similarly, the Supreme Court established in 1897 that national banks lack the power to purchase corporate stock.[54] There is a good reason for that. As one economist warns, "by venturing into equity markets, central banks would take a dangerous step towards state capitalism and in turn towards the destruction of a democratic, free-market system."[55] Today, as in 1897, national banks are generally "prohibited from taking equity as consideration for a loan," and "the Fed had never before taken equity in a corporation . . . for any purpose."[56] Nevertheless, the Fed did so in 2008 to justify a massive bailout.[57]

AIG's shareholders, whose stock was diluted by the Fed's new equity stake, challenged the bailout's legality, but *Chevron* deference helped the Fed defend it. In *Starr International Co. v. Federal Reserve Bank of New York*,[58] a shareholder argued unsuccessfully that the Fed lacked statutory authority to base its bailout on an equity purchase.[59] In its decision, the U.S. District Court for the Southern District of New York reasoned that "the Court owes deference to the Federal Reserve's determination that its incidental powers include the ability to take a participatory interest in the AIG rescue," and it cited Supreme Court precedent applying *Chevron* to approve discretionary action by another bank regulator.[60]

But earlier that year, in *Starr International Co. v. United States*, the U.S. Court of Federal Claims ruled that the Fed lacked the power to take

[53] Id.; Starr Int'l Co. v. United States, 106 Fed. Cl. 50, 85 (2012) ("Starr maintains that the 'only consideration for a loan prescribed by' Section 13(3) 'is an interest rate subject to the determination of the Board of Governors.' The Court agrees." (citation omitted)), *vacated in part*, 856 F.3d 953 (Fed. Cir. 2017).

[54] See Cal. Bank v. Kennedy, 167 U.S. 362, 369 (1897) ("The power to purchase or deal in stock of another corporation . . . is not expressly conferred upon national banks, nor is it an act which may be exercised as incidental to the powers expressly conferred.").

[55] Patrick Eisele, No Limits—How Central Banks Are Venturing into Stock Markets, Portfolio Institutional (July 27, 2020), https://www.portfolio-institutional.co.uk/features/no-limits-how-central-banks-are-venturing-into-stock-markets/ [https://perma.cc/F9B2-DZPG].

[56] Posner, supra note 52, at 90.

[57] Principal and Response Brief for the United States at 46, Starr Int'l Co. v. United States, 856 F.3d 953 (Fed. Cir. 2017) (No. 15-5103).

[58] 906 F. Supp. 2d 202 (S.D.N.Y. 2012), *aff'd*, 742 F.3d 37 (2d Cir. 2014).

[59] Id. at 241 ("Starr argues[] FRBNY's actions . . . were outside its statutory power. . . . [T]hat argument is unavailing.").

[60] Id. at 240 n.31.

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equity as consideration for an emergency loan.[61] On appeal, however, the Federal Circuit dismissed Starr's case for a lack of standing.[62]

Back in the Southern District of New York, the court resolved the question of the Fed's power to acquire equity with a deferential tone, but the Fed's arguments have holes after *Loper Bright*. Alongside its emergency lending power, the Fed enjoys additional "incidental powers as shall be necessary to carry on the business of banking within the limitations prescribed by [the Federal Reserve Act]."[63] The Fed leaned on these powers in its *Starr v. Federal Reserve Bank of New York* brief to justify its equity purchase, arguing that "an agency's interpretation of a bank's incidental powers should be accepted so long as it is within 'reasonable bounds.' "[64] But after *Loper Bright*, this argument is tenuous. It is no longer enough that an agency's interpretation "is within reasonable bounds," or, in other words, "based on a permissible construction of the statute."[65] Rather, when a statute is ambiguous, the reviewing court's duty is to "use every tool at [its] disposal to determine the *best* reading of the statute and resolve the ambiguity."[66] As the government admitted in its *Starr v. United States* reply brief, "[t]he scope of the Federal Reserve's authority under [S]ection 13(3) is a question of law to be resolved through statutory interpretation."[67]

The statutory ambiguity in the *Starr* cases was similar to that in *Chevron* itself. In *Chevron*, the Clean Air Act had not expressly defined what a "stationary source" of pollution was.[68] The EPA adopted a novel interpretation of the Act, allowing multiple pollution emitters within a single facility to qualify as one source for emissions-permitting

[61] Starr Int'l Co. v. United States, 106 Fed. Cl. 50, 85 (2012) ("The plain text of Section 13(3) does not expressly authorize a Federal Reserve bank to demand stock in a corporation in return for discounted paper.").

[62] Starr Int'l Co. v. United States, 856 F.3d at 957.

[63] 12 U.S.C. § 341 (Seventh).

[64] Brief for Defendant-Appellee Federal Reserve Bank of New York at 37, Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y., 742 F.3d 37 (2d Cir. 2014) (No. 12-5022) (quoting NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 258 n.2 (1995)).

[65] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984), *overruled by* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

[66] *Loper Bright*, 144 S. Ct. at 2247 (emphasis added).

[67] Principal and Response Brief for the United States at 52, Starr Int'l Co. v. United States, 856 F.3d 953 (No. 15-5103).

[68] *Chevron*, 467 U.S. at 840.

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purposes.[69] This policy ostensibly undermined the purpose of the Act, which was to *reduce* pollution.[70]

Likewise, the Federal Reserve Act did not expressly authorize the Fed to acquire a private company's stock. But the Fed adopted a broad and novel interpretation of its incidental powers which, in conjunction with Section 13(3), allowed it to do so to justify a huge bailout. This interpretation enabled unchecked lending, which threatened to undermine the purpose of the discount window by *reducing* the long-term soundness of the financial system through moral hazard.

In both *Chevron* and *Starr v. Federal Reserve Bank of New York*, judicial deference broadened agency discretion by giving force to novel interpretations that did not flow naturally from the statutory text. *Loper Bright* restores to the reviewing court the authority to reject such readings in favor of the most natural interpretation of the law. If the *Starr* cases were tried today, the reviewing court would not be bound to accept the Fed's claim that it could take equity as consideration for an emergency loan simply because that was a permissible reading of the agency's incidental powers.

Beyond *Loper Bright*, the Fed would also face new statutory obstacles if it sought to invoke Section 13(3) today. Seemingly in recognition of the fact that the Fed went too far in 2008, "[t]he Dodd-Frank Act put some (mostly procedural) constraints" on emergency lending.[71] But that is not to say that Section 13(3) has disappeared. On the contrary, the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 "endorsed [a] muscular view of the Fed's emergency lending role,"[72] making up to $454 billion available for Fed lending programs.[73] But unlike in 2008, the CARES Act provided clearer congressional authorization for these actions.

AIG was but one of many entities to receive a Section 13(3) bailout during the financial crisis. The Fed seldom used Section 13(3) before 2008,[74] yet it set expectations for future bailouts by using the provision

[69] See id.
[70] See id. at 842.
[71] Carnell et al., supra note 10, at 193.
[72] Id. at 196.
[73] U.S. Gov't Accountability Off., GAO-21-180, Federal Reserve Lending Programs: Use of CARES Act-Supported Programs Has Been Limited and Flow of Credit Has Generally Improved 1 (2020), https://www.gao.gov/products/gao-21-180 [https://perma.cc/Z99K-4GQ5].
[74] Long, supra note 25, at 2.

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like a "fire hose"[75] during the crisis. While the Dodd-Frank hurdles perhaps should have existed before 2008,[76] the judiciary should have served as a guardrail to stop the Fed from exceeding its statutory authority by lending too freely. Even during the *Chevron* era, commentators recognized that the Fed was sensitive to the risk of costly judicial scrutiny when it strayed too far from its run-of-the-mill maneuvers.[77] Perhaps the Fed would have reconsidered its exuberant bailout policy were *Chevron* not a roadblock to judicial review.

B. Systemic Risk Exception

More recently, in 2023, a discretionary provision in the FDI Act enabled the FDIC and the Treasury to insure deposits at Silicon Valley Bank and Signature Bank beyond the statutory maximum of $250,000.[78] Unlike the Fed with the Federal Reserve Act, the Corporation never received *Chevron* deference in its interpretation of the FDI Act since it shared the administration of that statute with the Treasury.[79] Still, courts historically deferred to co-administrators of the Act under a *Skidmore* standard discussed below in Section III.A, under which agency interpretations carry persuasive weight.[80] But because *Loper Bright* puts all interpretive questions to the "independent judgment"[81] of courts, the Corporation's influence may be diminished in this regard. Thus, if the Corporation seeks to invoke a provision in the Act, it can no longer stretch that provision's meaning to fit the circumstances but must provide factual findings that align with the textual requirements instead.[82]

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[75] Christian A. Johnson, From Fire Hose to Garden Hose: Section 13(3) of the Federal Reserve Act, 50 Loy. U. Chi. L.J. 715, 716–17 (2019).

[76] Cf. id. at 739 (describing the new Dodd-Frank hurdles as "superior to the regulatory tools that were in place prior to the Great Financial Crisis").

[77] See Steffi Ostrowski, Judging the Fed, 131 Yale L.J. 726, 767 (2021).

[78] Labonte, Bank Failures, supra note 41.

[79] Dodge v. Comptroller of Currency, 744 F.3d 148, 155–56 (D.C. Cir. 2014); Calcutt v. Fed. Deposit Ins. Corp., 37 F.4th 293, 325 n.14 (6th Cir. 2022), *rev'd on other grounds*, 143 S. Ct. 1317 (2023); Web Arnold, Bank Regulators Lose Shield if Chevron Falls Next Term, Bloomberg L. (July 5, 2023, 5:00 AM), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-bank-regulators-lose-shield-if-chevron-falls-next-term [https://perma.cc/YKC5-T9MT].

[80] *Dodge*, 744 F.3d at 155–56.

[81] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2262 (2024).

[82] Id. at 2267 ("And although an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'" (quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 98 n.8 (1983))).

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In early 2023, Silicon Valley Bank ("SVB") suffered a bank run when its depositors—which were primarily "businesses and wealthy individuals" including billionaire Mark Cuban[83]—realized its assets had plummeted in value.[84] These depositors had accounts well above the statutory cap of $250,000. In fact, 90–97% of SVB's deposits were uninsured,[85] so if the bank failed under normal circumstances, its depositors would have lost most of their money. Around the same time, Signature Bank, "a politically connected bank that served private equity firms, law firms and the crypto world," faced similar difficulties.[86]

The FDIC's statutory mandate is clear: "[T]he Corporation may not take any action, directly or indirectly . . . that would have the effect of increasing losses to the Deposit Insurance Fund by protecting . . . depositors for more than the insured portion of deposits."[87] In fact, the Corporation is generally "required" to pursue the resolution that "is the least costly to the Deposit Insurance Fund of all possible methods."[88] Usually, the least-cost resolution involves auctioning off the failed bank to a bigger bank and using the proceeds to pay depositors.[89] Rarely, uninsured depositors may take surplus funds if the auction price is high enough.[90] But providing total coverage of all deposits, directly from the Deposit Insurance Fund, was both unprecedented[91] and in tension with the plain language of the FDI Act. To overcome this reality,

[83] Matt Stoller, The Silicon Valley Bank Bailout: What You Need to Know, Am. Econ. Liberties Project (Mar. 16, 2023), https://www.economicliberties.us/our-work/the-silicon-valley-bank-bailout-what-you-need-to-know/#_ftnref1 [https://perma.cc/G284-HVWY].

[84] SVB held many long-term Treasury bonds. When interest rates rose in late 2022, the market price of these bonds fell sharply. Id.

[85] Id.

[86] Id.; Hannah Lang, Signature Bank Failure Due to 'Poor Management,' US FDIC Report Says, Reuters (Apr. 28, 2023, 1:02 PM), https://www.reuters.com/markets/us/signature-bank-failure-due-poor-management-us-fdic-report-says-2023-04-28/ [https://perma.cc/BK72-4KHV].

[87] 12 U.S.C. § 1823(c)(4)(E)(i).

[88] Id. § 1823(c)(4)(A).

[89] Brit McCandless Farmer, What the FDIC Does When a Bank Fails, CBS News (Mar. 19, 2023, 7:38 PM), https://www.cbsnews.com/news/what-the-fdic-does-when-a-bank-fails-60-minutes-2023-03-19/ [https://perma.cc/9974-DCB3].

[90] Fed. Deposit Ins. Corp., Deposit Insurance FAQs, https://www.fdic.gov/resources/deposit-insurance/faq [https://perma.cc/H8E5-UGSN] (last updated Apr. 1, 2024) ("If a depositor has uninsured funds (i.e., funds above the insured limit), they may recover some portion of their uninsured funds from the proceeds from the sale of failed bank assets.").

[91] In re SVB Fin. Grp., No. 23-cv-07218, 2023 WL 8622521, at *10 (S.D.N.Y. Dec. 13, 2023) (citing Labonte, Bank Failures, supra note 41, at 2) ("[T]he Exception has never been deployed as it was here.").

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the Corporation would need to stretch an emergency provision to meet the needs of the moment, much like the Fed did with Section 13(3)'s lending power.

The FDI Act includes such an exploitable provision. If complying with the $250,000 cap and least-cost resolution requirements "would have serious adverse effects on economic conditions or financial stability," then the Corporation has the discretion to "take other action or provide assistance" to the failing bank "as necessary to avoid or mitigate such effects."[92] This is known as the systemic risk exception to the least-cost resolution rule. Unlike the Fed's pre-Dodd-Frank emergency lending power, the FDIC must gain approval from both the Fed and the Treasury to invoke the systemic risk exception.[93] Still, the language is broad and open to interpretation. What are "serious adverse effects"? What are the boundaries—if any—of the "other action" the Corporation may take, however "necessary" it may be?

Confronting these hard questions, the FDIC, Fed, and Treasury quickly determined the situations at SVB and Signature Bank satisfied the systemic risk exception.[94] But was this a reasonable interpretation of the exception's scope, or merely a permissible one, motivated by factors besides systemic risk? On the eve of its collapse, SVB was the sixteenth largest bank in the nation.[95] Signature was the nineteenth.[96] While that may sound large, the only other time regulators even planned to invoke the systemic risk exception to assist individual institutions was during the 2008 financial crisis, to bail out the second, third, and fourth largest banks in the country.[97] Even then, they only pulled the trigger in one of those instances.[98] At least one macroeconomic policy expert argued that the

[92] 12 U.S.C. § 1823(c)(4)(G).

[93] Id. § 1823(c)(4)(G)(i).

[94] Special Assessment Pursuant to Systemic Risk Determination, 88 Fed. Reg. 83329, 83330 (Nov. 29, 2023) ("[T]he Secretary of the Treasury, acting on the recommendation of the Board and Board of Governors, and after consultation with the President, invoked the statutory systemic risk exception to allow the FDIC to complete its resolution of both Silicon Valley Bank and Signature Bank in a manner that fully protects depositors.").

[95] Ken Sweet, One of Silicon Valley's Top Banks Fails; Assets Are Seized, AP News (Mar. 11, 2023), https://apnews.com/article/svb-fed-bonds-rates-banks-inflation-a24b28b3caeede91c76cd120aa9b7966 [https://perma.cc/9LW7-Q3FH].

[96] Press Release, Signature Bank, Signature Bank Reports 2022 Fourth Quarter and Year-End Results (Jan. 17, 2023), https://web.archive.org/web/20230316155513/https://investor.signatureny.com/pme/press-releases/news-details/2023/Signature-Bank-Reports-2022-Fourth-Quarter-and-Year-End-Results/default.aspx.

[97] Labonte, Bank Failures, supra note 41, at 2.

[98] Id.

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failures of "two mid-sized banks [SVB and Signature], in isolation, posed little risk to the economy or financial system."[99]

Still, these "depositor bailouts" proceeded without judicial scrutiny. Under the *Chevron* regime, it would have been hard to imagine a court second-guessing the judgment of three major banking regulators on what qualifies as "systemic risk," even on such a weak record. But the finding of systemic risk in this case proved rather fortuitous for the wealthy, politically connected depositors whom the exception saved.[100]

Loper Bright at least unlocks the door for courts to question whether policy actions like the SVB and Signature Bank depositor bailouts were motivated by appropriate concerns. It achieves this by compelling agencies like the FDIC to back up their interpretations with facts. For if Congress meant for "systemic risk" to encompass such mild circumstances as the failure of two mid-sized banks, the Corporation should have no problem showing, as a factual matter, how such a pair of bank failures could actually endanger the broader financial system.

Additionally, *Loper Bright* gives the Corporation room to make this showing: the Supreme Court accepted the Administrative Procedure Act's directive that "judicial review of agency . . . factfinding be deferential."[101] Moreover, the Court wrote that "an agency's interpretation of a statute," while not binding, "may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'"[102] So the FDIC's permissive interpretation of "systemic risk" would withstand scrutiny under *Loper Bright* if the Corporation could factually demonstrate how the failure of two mid-sized banks would lead to "serious adverse effects on economic conditions or financial stability."[103] While courts may justifiably err toward deference in borderline cases to avoid a crisis, *Loper Bright* roots out the most dubious uses of the systemic risk exception.

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[99] Id.

[100] Lizette Chapman & Jason Leopold, The FDIC Has Accidentally Released a List of Companies It Bailed Out for Billions in the Silicon Valley Bank Collapse, Fortune (June 23, 2023), https://fortune.com/2023/06/23/fdic-accidentally-released-list-of-companies-it-bailed-out-silicon-valley-bank-collapse/ [https://perma.cc/L5UM-JCAX]; see also supra note 32 and accompanying text (detailing political donations of major financial institutions, including those with deposits at Silicon Valley Bank).

[101] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024).

[102] Id. at 2267 (quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 98 n.8 (1983)).

[103] 12 U.S.C. § 1823(c)(4)(G)(i)(I).

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C. Systemically Important Designation

Since 2008, Congress has taken several measures to avert future financial crises.[104] One measure was the formation of FSOC, a body tasked with identifying financial companies, including non-bank institutions, that are important to the stability of the financial system and designating them "for stricter oversight by the Fed."[105] However, complying with regulatory oversight is costly, so companies have a strong reason to resist "systemically important financial institution," or "SIFI," designation.[106]

In *MetLife, Inc. v. Financial Stability Oversight Council*,[107] insurance giant MetLife argued that SIFI designation of its company might actually *increase* the risk it could fail and harm the financial system.[108] To compensate for compliance costs, MetLife said, it would have to leave certain insurance markets.[109] By the nature of their business models, large insurance companies are "not particularly susceptible to market distress,"[110] so reducing the diversity of MetLife's portfolio in this way would only make the company more vulnerable. While many of MetLife's counterparties would be impacted if the company became insolvent, the Council failed to consider whether insolvency was likely.[111] In prior rulemaking, the Council had drawn this distinction between exposure and vulnerability, but it conflated the two concepts to justify designating MetLife.[112]

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[104] Berman, supra note 29.

[105] Id.

[106] Thomas L. Hogan, Costs of Compliance with the Dodd-Frank Act, Baker Inst. for Pub. Pol'y (Sept. 6, 2019), https://www.bakerinstitute.org/research/dodd-frank-costs-compliance [https://perma.cc/CU43-7L5S].

[107] 177 F. Supp. 3d 219 (D.D.C. 2016), *appeal dismissed per stipulation*, No. 16-5086, 2018 WL 1052618, at *1 (D.C. Cir. Jan. 23, 2018).

[108] Id. at 239.

[109] Id.

[110] Brief for the Chamber of Commerce of the United States as Amicus Curiae in Support of Plaintiff Metlife, Inc. at 11, *MetLife*, 177 F. Supp. 3d 219 (No. 15-cv-00045).

[111] U.S. Dep't of the Treasury, Basis for the Financial Stability Oversight Council's Final Determination Regarding MetLife, Inc. 2, https://home.treasury.gov/system/files/261/MetLife%2C%20Inc..pdf [https://perma.cc/5QSY-5XVR] ("The Council's final determination does not constitute a conclusion that MetLife is experiencing, or is likely to experience, material financial distress. Rather, consistent with the statutory standard . . . of the Dodd-Frank Act, the Council has determined that material financial distress at the company, if it were to occur, could pose a threat to U.S. financial stability.").

[112] See *MetLife*, 177 F. Supp. 3d at 233–34.

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In this case, the court actually ruled against the agency. The U.S. District Court for the District of Columbia held that under the statutory framework, the Council had to consider private compliance costs as one factor in determining whether subjecting MetLife to increased oversight would reduce systemic risk overall.[113] The court based this cost-benefit analysis requirement on Supreme Court precedent and the language of the Dodd-Frank Act.[114]

To combat MetLife's argument that it had to consider compliance costs, FSOC wielded *Chevron* as a sword.[115] Before the Council may designate an institution, Dodd-Frank says it "shall consider . . . any other risk-related factors that [it] deems *appropriate*."[116] The Council maintained that this passage did not require it to consider compliance costs to MetLife because the statute explicitly mentioned cost in other provisions but was silent as to cost here.[117] The Supreme Court famously applied similar reasoning to interpret a provision of the Clean Air Act fifteen years earlier.[118]

But the *MetLife* court did not let this interpretation stand. Even under *Chevron*, the court found it did not need to defer to the Council's reading since the statute unambiguously required cost-benefit analysis. In other words, the court ruled that *Chevron*'s first step—statutory ambiguity—was not satisfied. But the court essentially read this requirement into the law: it cited *Michigan v. EPA* (which in turn cited an opinion by then-U.S. Court of Appeals judge Brett Kavanaugh) for the proposition that "'appropriate' is 'the classic broad and all-encompassing term that naturally and traditionally includes consideration of all the relevant factors.'"[119] "In the end," the court continued, "cost must be balanced against benefit because '[n]o regulation is "appropriate" if it does significantly more harm than good.'"[120] So, to be faithful to Dodd-Frank's

[113] Id. at 239.
[114] See id. at 239–42.
[115] Id. at 239.
[116] 12 U.S.C. § 5323(a)(2)(K) (emphasis added).
[117] *MetLife*, 177 F. Supp. 3d at 239.
[118] See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 467 (2001) (remarking that "[o]ther provisions explicitly permitted or required economic costs" to be considered while the provision at issue was silent on cost).
[119] *Metlife*, 177 F. Supp. 3d at 240 (quoting Michigan v. EPA, 576 U.S. 743, 752 (2015) (quoting White Stallion Energy Ctr., LLC v. EPA, 748 F.3d 1222, 1266 (D.C. Cir. 2014) (Kavanaugh, J., concurring in part and dissenting in part))).
[120] Id. (quoting *Michigan*, 576 U.S. at 752).

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risk-reducing aims, cost was an essential factor for the Council to consider.

In *Loper Bright*, the Supreme Court addressed in dicta the specific issue of statutes that let agencies decide what factors are "appropriate" to consider.[121] "[A]s always," the Court said, a reviewing court must "independently interpret the statute and effectuate the will of Congress."[122] The Court explained that this approach coheres with the judiciary's traditional and exclusive power to resolve questions of law.[123] Still, *Loper Bright* left room for agencies like FSOC to make factual determinations, like whether the results of a cost-benefit analysis warrant SIFI designation.[124] To be sure, if the *MetLife* court considered the Dodd-Frank provision ambiguous, it may well have deferred under *Chevron*. But the *MetLife* opinion is characteristic of judicial hostility to agencies engaging in statutory interpretation, as the court went to lengths to avoid *Chevron* entirely by reading in an implied cost-benefit analysis requirement.

FSOC eventually abandoned its campaign to designate MetLife, but the agency refused to concede that it had to consider compliance costs going forward. Its ensuing rulemaking insisted that the cost-benefit analysis was "not in the list of considerations Congress specifically required the Council to consider in a designation," so the Council could safely ignore it.[125] But after *Loper Bright*, a court would presumably owe this interpretation even less weight than the *MetLife* court did, so cost-benefit analysis likely remains an essential factor in SIFI designation.

Still, FSOC likely retains a say over whether designation is merited based on its factfinding. It is a factual question whether the reduced diversity of MetLife's portfolio would outweigh the systemic risk reductions from increased oversight, but this is exactly the type of inquiry the Council must conduct to determine if designation of that company would indeed fulfill Dodd-Frank's purpose "to prevent or mitigate risks

[121] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2263 (2024).
[122] Id.
[123] Id.
[124] See id. at 2267 ("[A]lthough an agency's interpretation of a statute 'cannot bind a court,' it may be especially informative 'to the extent it rests on factual premises within [the agency's] expertise.'" (quoting Bureau of Alcohol, Tobacco & Firearms v. FLRA, 464 U.S. 89, 98 n.8 (1983))).
[125] Guidance on Nonbank Financial Company Determinations, 88 Fed. Reg. 80110, 80111 (Nov. 17, 2023) https://www.federalregister.gov/d/2023-25053/page-80111 [https://perma.cc/WWC2-H7G6].

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to the financial stability of the United States."[126] Certainly, a regulatory intervention that *increases* net risk fails to achieve this purpose. But because "FSOC refused to undertake that analysis itself," the court was unable to evaluate whether MetLife actually posed a threat to the financial system.[127] *Loper Bright* ensures the Council actively fulfills its factfinding role in this regard.

The *MetLife* decision offers a glimpse into the future of judicial review of financial regulation, as the court condemned an agency's shifting position, much like the Supreme Court would do eight years later in *Loper Bright*. Lower courts are already implementing this skeptical approach to administrative law cases by prioritizing the statute's original intent when addressing ambiguities. This approach has allowed courts to select the reading that best advances "the remainder of the statutory scheme" rather than the "semantically plausible" reading that suits the regulator's current position.[128]

III. JUDICIAL SOLUTIONS FOR AGENCY OVERREACH

Without *Chevron*, some commentators fear courts will lack guidance when evaluating regulatory actions affecting subject matter beyond the judicial expertise and that judges will have to wade into policy-making themselves.[129] But *Loper Bright* did not completely abrogate the agency's role in statutory interpretation, as it preserved a modified *Skidmore* standard that gives interpretive weight to *consistent* agency interpretations.[130] Moreover, *Chevron* had a narrower character than some

[126] 12 U.S.C. § 5365(a)(1).

[127] MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 237 (D.D.C. 2016) ("FSOC never projected what the losses would be, which financial institutions would have to actively manage their balance sheets, or how the market would destabilize as a result.").

[128] U.S. Sugar Corp. v. EPA, 113 F.4th 984, 993 (D.C. Cir. 2024).

[129] See, e.g., Charles A. Bower, Balancing *Chevron*, *Skidmore*, and Major Questions, 89 Brook. L. Rev. 1185, 1189 ("By stripping agencies of the authority to interpret statutes, the Supreme Court would place the judiciary in a policymaking position that the Constitution does not contemplate as in the hands of our nation's judges.").

[130] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2267 (2024) ("In an agency case in particular, the court will go about its task with the agency's 'body of experience and informed judgment,' among other information, at its disposal." (quoting Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944))).

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suppose, as it had limited applicability to cases in which agencies based sweeping actions on flimsy text.[131]

Additionally, one hurdle remains: whether the presence of an ongoing financial crisis should affect a court's decision to conduct judicial review. Though there may be merit to the view that courts should let the nimbler executive branch handle such emergencies unfettered, the Roberts Court finds that to be no excuse to abandon the rule of law. By canonizing all of the above principles in doctrine, the Supreme Court's recent decisions will reduce moral hazard and support stability and transparency in banking and financial regulation.

A. Skidmore *Deference*

Chevron's overturn is no doubt a landmark judicial maneuver, but the decision will probably not turn judges into "administrative czar[s]"[132] as the *Loper Bright* dissent warns. Instead, courts will probably default to some form of *Skidmore* deference when agency powers are at issue.[133] Laid down in *Skidmore v. Swift & Co.*,[134] *Skidmore* deference allows agencies to retain some sway in statutory interpretation. *Loper Bright* endorsed *Skidmore* but arguably modified it to require that agencies be consistent in their rulemaking to levy that persuasive weight. This change will likely enhance the stability and transparency of banking and financial regulation by invalidating novel policies that justify excessive intervention into the financial system.

Under the traditional *Skidmore* standard, "courts may extend respectful consideration to another branch's interpretation of the law, but the weight due those interpretations must always 'depend upon the[ir] thoroughness . . . , the validity of [their] reasoning, [their] consistency

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[131] See MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 229 (1994) ("[A]n agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." (citing Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984))); FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("As in *MCI*, we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.").

[132] *Loper Bright*, 144 S. Ct. at 2295 (Kagan, J., dissenting).

[133] See id. at 2259, 2262 (noting *Skidmore* deference as a more appropriate alternative to *Chevron* deference); Michael Asimow, Teaching Skidmore in the Post-Loper Bright World, Yale J. on Regul.: Notice & Comment (July 26, 2024), https://www.yalejreg.com/nc/teaching-skidmore-in-the-post-loper-bright-world-by-michael-asimow/ [https://perma.cc/9SYW-NGZW] (arguing that courts will now default to *Skidmore* deference).

[134] 323 U.S. 134, 140 (1944).

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with earlier and later pronouncements, and all those factors which give [them] power to persuade.' "[135] The *Loper Bright* majority signaled its approval of *Skidmore*'s "consistency" criterion when it chastised *Chevron* for granting each agency "a license . . . to change positions as much as it like[d]."[136] The Court expressed its preference for agency interpretations that remain consistent after a statute's enactment.[137] One commentator agrees that *Loper Bright* preserved *Skidmore* as an interpretive guidepost rather than a rule of deference.[138] Agency interpretations will now likely serve as weighty indicators of a statute's meaning, but only if they cohere with past interpretations.[139]

But agencies that suddenly change their interpretations "will be given a kind of negative deference."[140] In the case of Section 13(3), a court discredited the Fed's claim that it could purchase corporate stock by pointing to the Fed's own policies from the 1930s that suggested otherwise.[141] Similarly, the *MetLife* court refused to defer to FSOC's reading of Dodd-Frank's systemic risk factors since the Council's stance contradicted its own prior rulemaking.[142] Because it did so in the past, the court said, the Council had to consider MetLife's vulnerability to financial distress separately from its exposure, or the magnitude of the damage if MetLife in fact went bankrupt.[143] Admittedly, the *MetLife* court found the Council's reversal on this issue arbitrary and capricious, condemning it even under *Chevron*.[144] But similar checks on banking and financial regulators will likely become more frequent in *Chevron*'s absence.

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[135] *Loper Bright*, 144 S. Ct. at 2284 (2024) (Gorsuch, J., concurring) (quoting *Skidmore*, 323 U.S. at 140).

[136] Id. at 2272.

[137] Id. at 2248.

[138] Daniel Deacon, Loper Bright, Skidmore, and the Gravitational Pull of Past Agency Interpretations, Yale J. on Regul.: Notice & Comment (June 30, 2024), https://www.yalejreg.com/nc/loper-bright-skidmore-and-the-gravitational-pull-of-past-agency-interpretations/ [https://perma.cc/BP3L-AWFF].

[139] *Loper Bright*, 144 S. Ct. at 2284 (Gorsuch, J., concurring) (citing *Skidmore*, 323 U.S. at 140).

[140] Deacon, supra note 138.

[141] Starr Int'l Co. v. United States, 106 Fed. Cl. 50, 85–86 (2012).

[142] See MetLife, Inc. v. Fin. Stability Oversight Council, 177 F. Supp. 3d 219, 233–34 (D.D.C. 2016). Neither did the *MetLife* court's other findings align with *Skidmore*: the Council was not thorough because it failed to conduct a cost-benefit analysis for designating MetLife. Nor was its reasoning valid, for if cost of designation increased the risk MetLife posed to financial stability, then designation of the company would defy Dodd-Frank's purpose. Id.

[143] See id. at 237.

[144] Id. at 236.

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B. Major Questions Doctrine

Another judicial device to limit agency discretion is the major questions doctrine. *Loper Bright* acknowledged that *Chevron* never applied to questions of "deep economic and political significance."[145] In line with that reasoning, the Supreme Court held in *West Virginia v. EPA* that when such "major questions" are at issue, "something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims."[146] In the following term, in *Biden v. Nebraska*, the Court again spoke on the major questions doctrine, which suggests it will become a mainstay of the judicial toolkit.[147]

In considering how significant an agency action must be to trigger the doctrine in *Biden v. Nebraska*, the Court cited *Alabama Ass'n of Realtors v. Department of Health & Human Services*, which found an economic impact of around $50 billion sufficient.[148] The *Alabama Ass'n of Realtors* Court did, however, look beyond mere financial cost in deciding whether to invoke the doctrine.[149] For example, it also considered an action's effect on "the power of the Government over private property."[150]

Banking and financial regulators often take actions that enter the ballpark of tens of billions of dollars: the Fed's bailout of AIG cost taxpayers $85 billion, and the FDIC's payouts to SVB and Signature Bank customers depleted the Deposit Insurance Fund by $23 billion.[151] And as discussed, both maneuvers proceeded under less than clear congressional authorization.

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[145] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2269 (2024) (quoting King v. Burwell, 576 U.S. 473, 486 (2015)).

[146] West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[147] See Biden v. Nebraska, 143 S. Ct. 2355, 2374 (2023).

[148] Id. at 2373; Ala. Ass'n of Realtors v. Dep't. of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021).

[149] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

[150] Id. (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1850 (2020)); see also Daniel T. Deacon & Leah M. Litman, The New Major Questions Doctrine, 109 Va. L. Rev. 1009, 1012–13 (2023) (identifying "three indicia of majorness" the Supreme Court relies on besides cost: political significance, novelty, and implications for future agency actions).

[151] Bd. of Governors of the Fed. Rsrv. Sys., supra note 50; Katherine Doherty, Hannah Levitt & Katanga Johnson, FDIC Considers Forcing Big Banks to Pay Up After $23 Billion Hit, Bloomberg (Mar. 29, 2023, 4:12 PM), https://www.bloomberg.com/news/articles/2023-03-29/fdic-mulls-squeezing-big-banks-hard-to-plug-23-billion-hole.

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In the Fed's case, Congress never explicitly permitted the agency to purchase equity stakes in private companies.[152] Doing so was thus an "excess[] not contemplated in legislation creating" the Fed's powers.[153] What is more, congressional disapproval of the AIG bailout was implied by the swift amendment of Section 13(3) after the 2008 crisis. Among other reforms, the amendments specifically prohibited emergency lending to individual entities like AIG.[154]

Moreover, the Fed's use of Section 13(3) marked a historical shift reminiscent of prototypical major questions doctrine case law. In *West Virginia v. EPA*, the case that first enunciated the doctrine,[155] the Supreme Court refused to accept an EPA interpretation of Section 111(d) of the Clean Air Act that would have enabled the Agency to essentially mandate a shift away from coal power.[156] Section 111 let the Agency set emissions standards for existing sources based on the "best *system* of emission reduction" available.[157] "Prior to 2015," the Court found, the "EPA had always set Section 111 emissions limits based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly."[158] The Agency's contemporaneous rulemaking reflected the view that "system," as used in the Clean Air Act, referred to technological measures like scrubbers, facility design, or employee training.[159]

But the Agency changed course when it began considering another type of "system" of emission reduction: a permit trading system, with which coal-fired plants could comply only by shutting down or switching to other fuel sources.[160] In rejecting the EPA's reading, the Court recognized that Section 111(d) had been characterized by an architect of key

[152] Posner, supra note 52, at 90.

[153] Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2261 (2024) (quoting United States v. Morton Salt Co., 338 U.S. 632, 644 (1950)).

[154] 12 U.S.C. § 343 ("Such policies and procedures shall be designed to ensure that any emergency lending program or facility is for the purpose of providing liquidity to the financial system, and not to aid a failing financial company . . . ."); Labonte, Federal Reserve, supra note 50, at 16–19.

[155] Rachel Reed, What Critics Get Wrong—and Right—About the Supreme Court's New 'Major Questions Doctrine,' Harv. L. Today (Apr. 19, 2023), https://hls.harvard.edu/today/what-critics-get-wrong-and-right-about-the-supreme-courts-new-major-questions-doctrine/ [https://perma.cc/DVN2-57EC].

[156] West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).

[157] Id. at 2592 (emphasis added).

[158] Id. at 2595.

[159] Id. at 2600–01, 2610–11.

[160] See id. at 2614–15.

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amendments to the Clean Air Act as an "obscure, never-used section of the law" and had been invoked "only a handful of times since the enactment of the [Clean Air Act]."[161]

Section 13(3) was no different. It was a provision that "long lay dormant, known only to a few lawyers and Fed officials."[162] And like the EPA, the Fed invoked the "previously little-used backwater"[163] of a provision to great effect, wielding it "to lend more than a trillion dollars" during the 2008 financial crisis.[164] Moreover, the Fed's expansive reading of Section 13(3) and its incidental powers contradicted its historical operating circulars,[165] the policy documents governing the terms of the Fed's financial services.[166] Like the EPA, the Fed acknowledged the broad interpretation only when it set out to assert "extravagant statutory power over the national economy."[167]

Nor were the FDIC's depositor bailouts grounded in "clear congressional authorization."[168] It remains unclear whether the FDI Act's general prohibition on covering uninsured deposits cabins the systemic risk exception to tamer measures than blanket insurance, or whether two mid-sized bank failures posed a "serious" threat to financial stability within the meaning of the exception. The systemic risk exception resembles the emergency provision at issue in *Biden v. Nebraska*, a 9/11-era statute that the Secretary of Education tried to invoke to cancel around $430 billion in student loan debt near the end of the coronavirus pandemic.[169] It said the Secretary could "waive or modify any statutory or regulatory provision applicable to the student financial assistance

[161] Id. at 2602 (quoting Clean Air Act Amendments of 1987: Hearing on S. 300, S. 321, S. 1351 & S. 1384 Before the Subcomm. on Env't Prot. of the S. Comm. on Env't & Pub. Works, Part 2, 100th Cong. 13 (1987) (statement of Sen. Durenberger, Member, Subcomm. on Env't Prot.)); id.

[162] Carnell et al., supra note 10, at 193.

[163] *West Virginia*, 142 S. Ct. at 2613.

[164] Carnell et al., supra note 10, at 193.

[165] Starr Int'l Co. v. United States, 106 Fed. Cl. 50, 85–86 (2012).

[166] Operating Circulars, Fed. Rsrv. Fin. Servs., https://www.frbservices.org/resources/rules-regulations/operating-circulars.html [https://perma.cc/J5H9-2LD6] (last visited Feb. 10, 2025).

[167] *West Virginia*, 142 S. Ct. at 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)); Posner, supra note 52, at 90–93 (discussing how the Fed's interpretation of its incidental powers would allow it to avoid illegal exaction claims, thus expanding circumstances under which it could make Section 13(3) loans to include AIG's $85 billion bailout).

[168] *West Virginia*, 142 S. Ct. at 2609 (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

[169] Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

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programs . . . of the [Education Act] as the Secretary deem[ed] necessary in connection with a . . . national emergency."[170] The Supreme Court ruled the terms "waive or modify" did not reasonably permit the Secretary to cancel debts in their entirety.[171] While the Court did not explicitly resort to the major questions doctrine in *Biden v. Nebraska*, it used the doctrine to "reinforce[]" its holding.[172] The Court reasoned that if Congress had intended to authorize the Secretary to undertake blanket debt cancellations amounting to hundreds of billions of dollars, it would have done so explicitly.[173]

Likewise, the FDIC's power to assist failing banks in exceptional cases is far from explicit permission to perform a blanket bailout of uninsured depositors on a dubious theory of financial contagion. Surely, had the Corporation truly possessed such broad authority to bail out depositors, it would have boldly exercised it in the past when it faced much graver circumstances.[174] Moreover, had Congress intended for the failure of two mid-sized banks to allow circumvention of the FDI Act's explicit prohibition on covering uninsured deposits, it likely would have stated that intention more clearly. Instead, like in *Biden v. Nebraska*, the agency relied on a sparse emergency provision, diverging from Justice Scalia's axiom that "Congress . . . does not . . . hide elephants in mouseholes."[175]

C. Judicial Review During Crisis

The judicial tools covered in this Part are far from deferential. But sometimes—like during an evolving crisis—judicial review may be unwise. Historically, when the crisis was war, the Supreme Court's mantra was deference with few exceptions.[176] Less clear is whether the Court would be comfortable intervening during lesser emergencies like

[170] 20 U.S.C. § 1098bb(a)(1).
[171] Biden v. Nebraska, 143 S. Ct. at 2368–69.
[172] Id. at 2376 (Barrett, J., concurring).
[173] Id. at 2368.
[174] Instead, the Corporation sought other resolutions when possible, despite the clearer presence of systemic risk. See Labonte, Bank Failures, supra note 41 (finding FDIC planned to use the systemic risk exception to bail out depositors at three of the four largest banks during the 2008 financial crisis, but only one of the banks in the end received FDIC assistance).
[175] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001).
[176] Amanda L. Tyler, Judicial Review in Times of Emergency: From the Founding Through the Covid-19 Pandemic, 109 Va. L. Rev. 489, 496 (2023).

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financial crises. Its rulings during the coronavirus pandemic suggest that it would be.[177]

In the same case that set the $50 billion ballpark for the major questions doctrine, *Alabama Ass'n of Realtors*, the Supreme Court, "as an emergency matter, without full briefing or argument,"[178] blocked a Centers for Disease Control and Prevention ("CDC") moratorium on evictions of poor tenants meant to stem the spread of the virus. It did so despite a broad grant of statutory power to the Surgeon General, pending approval from the Secretary of Health and Human Services, to take "other measures, as in his judgment may be necessary" to prevent "the introduction, transmission, or spread of communicable diseases."[179] Even under *Chevron* and during an emergency, the Court did not defer.[180]

Instead, it relied on the chestnut of executive power doctrine in *Youngstown Sheet & Tube Co. v. Sawyer* for the proposition that "even the Government's belief that its action 'was necessary to avert a national catastrophe' could not overcome a lack of congressional authorization."[181] This holding suggests the Court would intervene during an ongoing financial crisis if it believed an agency was acting unlawfully. The 2008 financial crisis was undoubtedly a "national catastrophe" that regulators sought to mitigate at all costs. Regardless, the Court would say, agencies are not exempt from judicial review, "even in pursuit of desirable ends."[182]

As discussed throughout this Essay, regulators in banking and finance, like the CDC in the field of public health, enjoy open-ended powers designed for crisis response. For example, the systemic risk exception empowers the FDIC to "take other action or provide assistance . . . as necessary" to prevent or lessen "serious adverse effects on economic conditions or financial stability."[183] Plainly, this power resembles the

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[177] Id. at 524–25.

[178] Ala. Ass'n of Realtors v. Dep't. of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021); id. at 2490 (Breyer, J., dissenting).

[179] 42 U.S.C. § 264(a).

[180] See also Tyler, supra note 176, at 530–31 (recounting the Court's justifications for intervening in other cases during the coronavirus pandemic).

[181] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 582 (1952)). Significantly, the crisis in *Youngstown* was war. *Youngstown*, 343 U.S. at 579.

[182] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490.

[183] 12 U.S.C. § 1823(c)(4)(G).

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Surgeon General's authority to take "other measures[] as in his judgment may be necessary"[184] to stem the spread of disease.[185]

Despite the statutory leeway, the Court rejected the CDC's expansive interpretation, even though that stance may have helped address the emerging delta variant of the coronavirus.[186] So perhaps with *Chevron*'s official overturn, the Court would enjoin further use of the systemic risk exception, even amid a shifting financial crisis.

The Supreme Court's precedents also reveal its sensitivity toward property rights during crises. In both *Youngstown* and *Alabama Ass'n of Realtors*, the Court refused to read ambiguous text in a way that would grant the government emergency powers over private property.[187] Property rights also play a role in emergency financial regulation. Indeed, in both *Starr* cases, the company brought Fifth Amendment takings claims, arguing that the Fed lacked the authority to deprive it of its equity stake in AIG without compensation.[188] Similarly, the Court disqualified the CDC's moratorium in *Alabama Ass'n of Realtors* in part because it "intrude[d] on one of the most fundamental elements of property ownership—the right to exclude."[189]

Although financial crises can arise quickly and shift abruptly, the Supreme Court remains able to step in during emergencies to stop regulators from overstepping their authority. The specter of judicial review may discourage regulators from relying on ad hoc expansions of authority and instead encourage them to petition Congress to revise the statutory scheme. With the advent of new laws or the amendment of old ones, an agency may adopt a contemporaneous interpretation that carries

[184] 42 U.S.C. § 264(a).

[185] The FDIC's power is even geared toward containing financial "contagion." See Martin J. Gruenberg, Chairman, Fed. Deposit Ins. Corp., Successfully Managing Systemic Risk: Deposit Insurance in a Turbulent World (Sept. 28, 2023), https://www.fdic.gov/news/speeches/2023/spsept2823.html [https://perma.cc/G8JM-2FG8] (justifying SVB and Signature Bank assistance with repeated references to "contagion" effects).

[186] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2490 (Breyer, J., dissenting).

[187] See Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 639 (1952) (Jackson, J., concurring) (stating that the President lacked the power to seize private property in absence of clear congressional authorization); *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." (quoting U.S. Forest Serv. v. Cowpasture River Pres. Ass'n, 140 S. Ct. 1837, 1849–50 (2020))).

[188] Starr Int'l Co. v. United States, 106 Fed. Cl. 50, 67 (2012); Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y., 906 F. Supp. 2d 202, 252 (S.D.N.Y. 2012).

[189] *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

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great persuasive weight under *Skidmore*. What results is transparency and consistency. The Court's willingness to exercise judicial review, even in the midst of a financial crisis, puts a stabilizing check on the administrative state.

CONCLUSION

Loper Bright's rule—that courts have the final say in interpreting ambiguous statutory provisions—mitigates the risk that financial regulators will "cry wolf" to invoke sweeping emergency powers. It does so by compelling them to present facts showing that the emergencies of which they forewarn actually exist and meet the textual requirements. Before *Loper Bright*, agencies could stretch emergency provisions beyond their reasonable scope so long as they were not arbitrary and capricious in their rulemaking. But now they must contend with statutes that have fixed meanings. The credible threat of judicial review means agencies will be less able to take frivolous regulatory action that creates moral hazard or otherwise makes the financial system riskier.

Reining in the administrative state will also likely promote stability and transparency in banking and finance. Less unilateral agency discretion will minimize the opportunities for ad hoc bailouts, limit arbitrary exceptions to the deposit insurance cap, and demystify the factors governing SIFI designation. These developments will encourage market actors to avoid risk rather than rely on regulators to bail them out after that risk becomes a reality. Financially sound businesses will not be punished by heightened oversight solely due to their size. And everyone can count on an agency's authority matching what the law actually says. *Chevron*'s overturn in the context of banking and financial regulation makes the system more stable.

Banking and financial regulation pose unique challenges for legislators and jurists. On the one hand, these rapidly evolving sectors demand a degree of deference to allow for decisive action in emergencies. On the other hand, excessive regulatory intervention, facilitated by broad deference, is perilous. Loath to bear the blame for the next crisis, courts and Congress may opt to let regulators take responsibility for the financial system in every sense of the term. But with lessons learned from the 2008 financial crisis, it may be time for these branches of government to take on a more active role in this area of the law, one that is so crucial to the

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American livelihood.[190] At least in the domain of banking and financial regulation, the Roberts Court's recent decisions are steps in the right direction.

[190] As this Essay was nearing publication, the Trump Administration issued an executive order titled Ensuring Accountability for All Agencies, which instructs that "[t]he President and the Attorney General . . . will interpret the law for the executive branch, instead of having separate agencies adopt conflicting interpretations." Exec. Order No. 14,215, 90 Fed. Reg. 10447 (Feb. 18, 2025); The White House, Fact Sheet: President Donald J. Trump Reins in Independent Agencies to Restore a Government That Answers to the American People (Feb. 18, 2025), https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-reins-in-independent-agencies-to-restore-a-government-that-answers-to-the-american-people/ [https://perma.cc/73JP-PKSF]. The Order expressly applies to the Fed "in connection with its conduct and authorities directly related to its supervision and regulation of financial institutions" and the FDIC by reference to the definition of "independent regulatory agency" in 44 U.S.C. § 3502(5). 90 Fed. Reg. at 10447–48. Since FSOC is not designated by statute as an independent agency and is chaired by a cabinet-level official, it likely falls beyond the letter of the Order. See 12 U.S.C. § 5321(b)(1)(A) (not mentioning "independence" and establishing the Secretary of the Treasury as chair). But since many voting members have removal protections, and the Order targets agencies that "issue rules and regulations that cost billions of dollars and implicate some of the most controversial policy matters . . . without the review of the democratically elected President," it may fall within the Order's spirit. The White House, Fact Sheet, supra; see also 12 U.S.C. § 5321(b)(1)(A) (listing FSOC voting members who can only be removed for "cause," such as the Chair of the Board of Governors of the Federal Reserve System); Peter Conti-Brown, What Happens if Trump Tries to Fire Fed Chair Jerome Powell?, Brookings Inst. (Sept. 19, 2019), https://www.brookings.edu/articles/what-happens-if-trump-tries-to-fire-fed-chair-jerome-powell/ [https://perma.cc/7VVY-M5JD] ("To remove a member of the Board of Governors, the president has to have a reason—a 'cause,' to quote the statute . . . .").