

VIRGINIA LAW REVIEW ONLINE

VOLUME 112

JUNE 2026

117–134

ESSAY

CLARITY BEFORE CRISIS: DESIGNING LEGIBLE EMERGENCY POWERS IN FINANCIAL REGULATION

*Rohan N. Menon**

This Essay responds to Samer Saffarini’s argument that post-Loper Bright judicial scrutiny can serve as a necessary check on regulatory overreach in financial crises. While that view is intuitively appealing, this Essay contends that it places too much weight on courts and too little on Congress. Emergency powers in financial regulation are often at their most consequential when they are least constrained—and judicial review, though valuable, is no substitute for statutory design. Drawing on institutional theory and recent crises, the Essay argues that Congress should enact “legible emergency powers”: frameworks that define factual triggers, constrain the scope of agency tools, and require transparency from the moment action begins. It then extends the conversation beyond federal law, outlining complementary mechanisms—state-based and private—that may serve as failsafes when federal intervention falters. In the end, the Essay offers a design-based model for emergency governance: one that enables swift action without sacrificing legitimacy and clarity without surrendering capacity.

* J.D., University of Virginia School of Law, expected 2027. I thank Professor Jason S. Johnston for his mentorship, guidance, and inspiration. I thank my beloved mother, father, and sister—and our cherished dog Blossom—for their unending support and encouragement. And I thank the editors of the *Virginia Law Review* for their thoughtful contributions to this Essay.

INTRODUCTION

For the better part of a century, the American administrative state's power expanded largely unchecked. Agencies spent decades extending their reach “to solve the Nation’s expanding problems,” developing their own forms of quasi-legal decision-making across “thousands of orders, opinions, statements, and instructions.”¹ But the old consensus—under which regulation was presumed automatically wise—has eroded.² Today, concern over regulation’s stifling effects on innovation and production has reshaped both political culture and judicial doctrine.³ The political culture, for one, is increasingly less willing to defer to expert insistence that a given rule is “necessary.”⁴ Courts, too, are less willing to defer to an agency’s interpretation of a statute it administers. In *Loper Bright Enterprises v. Raimondo*, for example, the Supreme Court held that “courts need not and under the [Administrative Procedure Act] may not defer to an agency interpretation of the law simply because a statute is ambiguous.”⁵

In the realm of financial regulation, the trouble is that laws are often at their most consequential when they are least precise. Indeed, in moments of crisis, agencies like the Federal Reserve (“Fed”) and the Federal Deposit Insurance Corporation (“FDIC”) turn to statutory provisions drafted for speed and flexibility—emergency authorities designed to prevent collapse before Congress can act. These powers are often vague by design: words like “unusual and exigent”⁶ or “serious adverse effects”⁷ substitute for clear triggers or hard constraints. And when invoked, these provisions can shift trillions of dollars, shape market expectations, and redefine the balance of power between the public and private sectors.

¹ Ginsburg, Feldman & Bress v. Fed. Energy Admin., 591 F.2d 717, 719 (D.C. Cir. 1978).

² See, e.g., Ezra Klein & Derek Thompson, *Abundance* 8 (2025).

³ *Id.*

⁴ See, e.g., Jason Scott Johnston, *Restoring Objectivity and Balance to Regulatory Science: A Comment on Dudley and Peacock*, 24 *Sup. Ct. Econ. Rev.* 101, 102 (2016) (discussing the problem of the “Scientist King”—an agency expert who is “confident that [their] expert knowledge of *the evidence* makes [them] the best judge of *the policy* based on that evidence” (emphasis added)); Cary Funk, *Key Findings About Americans’ Confidence in Science and Their Views on Scientists’ Role in Society*, Pew Rsch. Ctr. (Feb. 12, 2020), <https://www.pewresearch.org/short-reads/2020/02/12/key-findings-about-americans-confidence-in-science-and-their-views-on-scientists-role-in-society/> [<https://perma.cc/6LTH-7AQS>].

⁵ 144 S. Ct. 2244, 2273 (2024).

⁶ Federal Reserve Act § 13(3)(A), 12 U.S.C. § 343(3)(A).

⁷ 12 U.S.C. § 1823(c)(4)(G).

For decades, courts treated this ambiguity with deference. But in *Loper Bright*, the Court signaled that this era was over. Instead, a new era—one characterized by skepticism toward regulatory discretion, particularly in high-stakes domains like finance—was to begin. Some commentators have welcomed this shift. A recent piece by Samer R. Saffarini in the *Virginia Law Review Online* argues that stronger judicial review of banking and financial regulators will deter the misuse of emergency powers and reduce the long-term risk of financial instability.⁸ As the theory goes, discouraging agencies’ impulse to “cry wolf” will force them to act more cautiously, preserving market discipline and insulating the economy from moral hazard.⁹

But while concerns about regulatory overreach are well taken, this new regime presents issues of its own. Courts are not designed to govern emergencies in real time, nor are they well-positioned to second-guess the economic judgments of financial regulators under stress.¹⁰ Relying on judicial veto power alone to discipline emergency action risks producing the opposite of what critics intend: not deliberation, but hesitation; not modesty, but paralysis. In a post-*Chevron* world, the legal system must offer more than skepticism.

This Essay responds to Saffarini by arguing that financial emergency powers should be restructured ex ante for legibility: statutes should define the factual triggers, scope, and duration of emergency interventions before crisis arrives. Rather than relying on courts to filter good uses from bad, Congress should clarify upfront when and how regulators may act under conditions of financial stress. Legible emergency powers reduce moral hazard, bolster accountability, and enable swift action that is both effective and democratically authorized. They advance both the long-standing rule-of-law goal of checking discretionary power and the modern institutional goal of building a state capable of responding to real systemic threats.

This Essay proceeds in four parts. Part I describes how emergency provisions in financial law—particularly § 13(3) of the Federal Reserve Act and the systemic risk exception to the Federal Deposit Insurance Act’s least-cost resolution rule—enable regulators to act quickly in times

⁸ Samer R. Saffarini, Note, *Judicial Review of Emergency Powers in Banking and Financial Regulation*, 111 Va. L. Rev. Online 134, 164 (2025).

⁹ *Id.*

¹⁰ *In re Abbott*, 954 F.3d 772, 801 (5th Cir. 2020) (Dennis, J., dissenting) (explaining that “courts must not act as super-executives in an emergency”).

of stress, but often without clear legal or factual constraints. It argues that the core problem is not emergency power itself, but the lack of ex ante statutory design to structure its use. Part II engages with Saffarini's argument that judicial review, especially in the wake of *Loper Bright*, offers a sufficient check on regulatory overreach. While judicial scrutiny may help deter opportunistic agency action, this Part contends that courts alone cannot reliably assess crisis conditions in real time and are poorly positioned to serve as gatekeepers during moments of economic uncertainty. Part III outlines a model of "legible emergency powers," in which Congress defines emergency conditions, permissible actions, and accountability mechanisms in advance. This structure enables fast and legitimate regulatory action while preserving both democratic oversight and market discipline. Part IV, meanwhile, outlines possible alternatives to federal regulatory action that may just as effectively aid in financial crisis management. In the end, the Essay argues that clarity before crisis—rather than discretion policed after the fact—offers the soundest foundation for emergency financial governance.

I. DISCRETION WITHOUT DESIGN

Financial crises often demand rapid intervention. When market confidence erodes, liquidity evaporates, or contagion begins to spread, regulators must often act within hours to prevent collapse. To meet these demands, Congress has equipped financial regulators with extraordinary powers designed specifically for emergencies. The Federal Reserve, for example, may extend credit under § 13(3) of the Federal Reserve Act "[i]n unusual and exigent circumstances," when markets seize or financial institutions face imminent collapse.¹¹ Similarly, the Federal Deposit Insurance Corporation may invoke the "systemic risk" exception to override the normal resolution rules and provide enhanced protections to depositors when compliance with ordinary constraints would cause "serious adverse effects" to the financial system.¹² These provisions are designed for speed and flexibility—and in moments of acute danger, that flexibility can be indispensable.

But these tools are also among the most vague and open-ended in the financial regulatory arsenal. Section 13(3), for one, does not define what makes circumstances "unusual" or "exigent." And the systemic risk

¹¹ Federal Reserve Act § 13(3)(A).

¹² 12 U.S.C. § 1823(c)(4)(G).

exception does not establish how severe an “adverse effect” must be to justify extraordinary action. The statutes offer no objective triggers, no thresholds, and no metrics. In practice, they vest regulators with sweeping authority to declare an emergency and act on it—with few textual limits, and often little contemporaneous oversight.

This legal ambiguity gives rise to several problems. First, it permits agencies to invoke emergency powers in circumstances that do not clearly merit them. During the 2008 financial crisis, for example, the Federal Reserve used § 13(3) not only to provide liquidity to banks, but also to extend an \$85 billion bailout to the insurance conglomerate AIG—justified in part by the Fed’s acquisition of an unprecedented 79.9% equity stake in the company.¹³ That equity purchase lacked clear authorization in the Federal Reserve Act, yet courts deferred under the then-prevailing *Chevron* framework.¹⁴ In more recent years, the FDIC and the U.S. Department of the Treasury relied on the systemic risk exception to insure all deposits—well beyond the statutory \$250,000 limit—at Silicon Valley Bank (“SVB”) and Signature Bank, even though both institutions ranked only sixteenth and nineteenth in national size.¹⁵ These interventions were justified after the fact, but the statutes themselves offered little guidance as to whether such actions were legally appropriate in the first place.

Second, this lack of legal structure can introduce a different kind of systemic risk: that of regulatory improvisation.¹⁶ Agencies forced to respond to crises without clear statutory direction often fall back on ad hoc reasoning and political expedience.¹⁷ This not only undermines the legitimacy of emergency action but also creates uncertainty for markets.¹⁸ If regulators invoke extraordinary powers inconsistently or unpredictably, private actors have no clear basis to anticipate how future crises will be

¹³ Saffarini, *supra* note 8, at 144 (citing Andrew P. Atkins, *The AIG Bailout: Constraining the Fed’s Discretion*, 14 N.C. Banking Inst. 335, 340–41 (2010)).

¹⁴ *Id.* at 145 (citing *Starr Int’l Co. v. Fed. Rsv. Bank of N.Y.*, 906 F. Supp. 2d 202, 241 (S.D.N.Y. 2012), *aff’d*, 742 F.3d 37 (2d Cir. 2014)).

¹⁵ *Id.* at 150.

¹⁶ Kathryn Judge, *Stress Testing During Times of War*, in *Handbook of Financial Stress Testing* 224, 225–26 (J. Dooyne Farmer, Alissa M. Kleinnijenhuis, Til Schuermann & Thom Wetzer eds., 2022).

¹⁷ See Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. Chi. L. Rev. 1613, 1641 n.125 (2009).

¹⁸ See Kathryn Judge, *Interbank Discipline*, 60 UCLA L. Rev. 1262, 1271 (2013) (explaining how consistent and predictable regulatory safeguards like preset “deposit insurance” promote stability by removing incentives for panic).

handled.¹⁹ That unpredictability can distort risk pricing, encourage moral hazard, or erode confidence in the regulatory system itself.

Finally, legal ambiguity creates a vacuum of accountability.²⁰ Without clear constraints on when and how emergency powers may be used, neither Congress nor the courts can meaningfully evaluate whether those powers were exercised appropriately.²¹ Post hoc review—especially by courts—is ill-suited to assess fast-moving economic judgments made under stress.²² And Congress, while politically responsive, is rarely positioned to conduct timely or granular oversight during or immediately after a crisis.²³ The result is a regime in which the most consequential financial interventions in recent history—the AIG bailout, the pandemic-era Fed credit facilities, the SVB depositor backstops—were all executed under ambiguous statutory language, often with limited *ex ante* deliberation and limited *ex post* constraint.

In short, the problem is not emergency power itself. In a modern financial system, some form of crisis authority is essential. The problem is that these powers operate without a framework—that is, without design. They are broad enough to allow bold action, but vague enough to lack constraint. And as the next Part explains, courts alone cannot reliably supply the missing structure.

II. THE LIMITS OF JUDICIAL REVIEW

In the wake of *Loper Bright*, some scholars have argued that judicial skepticism can supply the discipline that vague emergency statutes lack.²⁴ As the theory goes, courts can deter agencies from invoking expansive emergency powers too readily by interpreting ambiguous provisions narrowly and demanding clear statutory authority for major regulatory

¹⁹ See *id.*

²⁰ Posner & Vermeule, *supra* note 17, at 1663 (discussing accountability problems where broad emergency powers are used as authority).

²¹ *Id.*

²² See Aziz Z. Huq, *Binding the Executive (by Law or by Politics)*, 79 U. Chi. L. Rev. 777, 803–04 (2012) (discussing the view that judges are “ill-equipped to second-guess executive policy judgments” (citing Eric A. Posner & Adrian Vermeule, *The Executive Unbound: After the Madisonian Republic* 30–31 (2010))).

²³ See, e.g., Posner & Vermeule, *supra* note 17, at 1660 (discussing the Patriot Act, where the theoretical oversight permitted by the law’s sunset clause resulted in essentially nothing but a permanent renewal of the “bulk of the provisions”).

²⁴ Saffarini, *supra* note 8, at 164; Nathaniel Glass, Note, *Partisan Emergencies*, 111 Va. L. Rev. 379, 402–03 (2025) (discussing *Loper Bright*).

actions.²⁵ Saffarini, for example, contends that this judicial scrutiny “reduce[s] moral hazard and support[s] stability and transparency in banking and financial regulation.”²⁶ On this view, the judiciary need not rewrite the law—it need only enforce it faithfully. But while that position is intuitively attractive, it overstates the judiciary’s institutional competence and underestimates the consequences of relying on courts to govern financial emergencies. Judicial review may constrain discretion, but it cannot replace statutory design. And when courts become the primary check on agency crisis action, the result may not be greater stability, but instead costly hesitation.

A. The Judicial Deterrence Argument

To critics of agency emergency powers, the most effective remedy lies not in statutory reform but in judicial resolve. On this view, courts—freed from the constraints of *Chevron*—can restore discipline to financial regulation by enforcing the statutory limits that agencies have too often treated as flexible.

Saffarini, for example, argues that the looming prospect of judicial review will encourage regulators to think twice before invoking extraordinary powers.²⁷ Agencies may remain free to act in emergencies, but they will now bear the burden of showing that an emergency truly exists and that their chosen intervention fits within the statute’s text.²⁸ When that burden cannot be met, the agency will lose—publicly, and with consequences.²⁹ This threat, Saffarini contends, is likely to deter agencies from “crying wolf” and from treating vague emergency clauses as blank checks.³⁰

To Saffarini’s credit, the recent trajectory of administrative law lends support to his approach. In *Starr International Co. v. United States*, the U.S. Court of Federal Claims found that the Federal Reserve lacked statutory authority to take equity in AIG as consideration for a loan, noting that such action had no clear basis in § 13(3).³¹ In *MetLife, Inc. v. Financial Stability Oversight Council*, a federal district court invalidated

²⁵ Saffarini, *supra* note 8, at 164.

²⁶ *Id.* at 156.

²⁷ *Id.* at 164.

²⁸ *Id.*

²⁹ See *infra* note 46.

³⁰ Saffarini, *supra* note 8, at 135.

³¹ 106 Fed. Cl. 50, 85 (2012).

the Financial Stability Oversight Council’s designation of MetLife as a “systemically important financial institution” for failing to consider compliance costs and for conflating financial “exposure” with “vulnerability.”³² And most recently, in *Loper Bright*, the Supreme Court made explicit what cases like *Michigan v. EPA*³³ had already implied: statutory ambiguity is no longer an invitation for agency creativity. It is now a question for courts to resolve directly.³⁴

For those concerned about agency overreach, this shift marks a welcome change. Emergency provisions like § 13(3) and the systemic risk exception were never intended to operate as ongoing grants of discretionary authority. They are supposed to be narrow, temporary, and rare. By demanding more from agencies—clear findings, narrow interpretations, and textual fidelity—courts may be able to enforce those limits. And where agencies cannot meet them, the judiciary can send a clear message: emergency powers are not exempt from law.

B. *The Structural Limits of Courts in Crisis*

Judicial review may serve as a useful check on regulatory discretion in ordinary contexts, but it is a poor substitute for legal structure in a financial emergency. To begin with, the judiciary is neither designed nor positioned to govern fast-moving crises. While the executive was established with “[e]nergy” in mind,³⁵ the Framers valued careful deliberation in judicial decision-making.³⁶ Indeed, from its very inception, the judiciary was considered the “least dangerous” branch precisely because it exercised “neither force nor will but merely judgment.”³⁷ Forcing judges to decide weighty issues on a “short fuse” in an emergency context would be at odds with this foundational design.³⁸ By their very nature, courts must “operate[] retrospectively,” through

³² Saffarini, *supra* note 8, at 152 (citing *MetLife, Inc. v. Fin. Stability Oversight Council*, 177 F. Supp. 3d 219, 233–34 (D.D.C. 2016)).

³³ 576 U.S. 743 (2015).

³⁴ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

³⁵ *The Federalist* No. 70, at 423 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³⁶ See *The Federalist* No. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (citing as one of the reasons for giving judges life tenure the “long and laborious” nature of legal study).

³⁷ *Id.* at 465 (emphasis omitted).

³⁸ *Trump v. Wilcox*, 145 S. Ct. 1415, 1418 (2025) (Kagan, J., dissenting from the grant of the application for stay) (quoting *Does 1–3 v. Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief)).

deliberative procedures, and with limited access to real-time information.³⁹ By the time a case reaches review, the crisis has often passed, the relevant facts have changed, and the agency's judgment has already been implemented—or foregone. As a result, meaningful oversight becomes difficult, and regulatory decisions that required speed and tailoring are scrutinized through slow-moving, generalist frameworks.

Additionally, financial crises in particular resist the timeline and methods of adjudication. When market actors panic, liquidity can vanish in hours.⁴⁰ A delay of even a day or two in a major intervention—such as a Fed liquidity injection or FDIC guarantee—can be enough to trigger widespread collapse. Yet judicial review, even in its most expedited form, is unlikely to produce a meaningful check at that speed. Even if courts could act in real time, they often lack the technical expertise to evaluate complex market dynamics or the credibility to guide expectations during instability.⁴¹ It is exactly for that reason “courts must not act as super-executives in an emergency.”⁴²

The nature of statutory ambiguity also further complicates the matter. When courts are asked to interpret terms like “unusual and exigent” or “serious adverse effects,” they are not merely determining what the law permits—they are making implicit judgments about the scope of permissible executive discretion in the face of uncertainty.⁴³ Indeed, the whole premise of the major questions doctrine (which Saffarini points to as one “judicial device to limit agency discretion”⁴⁴) is that “assertions of ‘extravagant statutory power over the national economy’” should be greeted with “skepticism.”⁴⁵ But what constitutes an “extravagant” versus

³⁹ *In re Sarelas*, 360 F. Supp. 794, 799 (N.D. Ill. 1973) (citing Benjamin N. Cardozo, *The Nature of the Judicial Process* 119–21 (1921)).

⁴⁰ See, e.g., Jill Treanor, *The 2010 ‘Flash Crash’: How It Unfolded*, *Guardian* (Apr. 22, 2015), at 13:43 ET, <https://www.theguardian.com/business/2015/apr/22/2010-flash-crash-new-york-stock-exchange-unfolded> [<https://perma.cc/KGL9-KHKC>] (discussing how erratic trading activity by automated traders spurred panic by other automated traders and human actors alike, causing a rapid stock market crash in 2010).

⁴¹ Cf. *United States v. Gushlak*, 728 F.3d 184, 203 (2d Cir. 2013) (discussing the “inexpertness of most judges in most technical matters,” and, in particular, “the forces afoot in the securities markets and their impact on the prices for any particular security at any particular time”).

⁴² *In re Abbott*, 954 F.3d 772, 801 (5th Cir. 2020) (Dennis, J., dissenting).

⁴³ See *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2609 (2022).

⁴⁴ Saffarini, *supra* note 8, at 158.

⁴⁵ *West Virginia*, 142 S. Ct. at 2609 (quoting *Util. Air Regul. Grp. v. Env’t Prot. Agency*, 573 U.S. 302, 324 (2014)).

non-extravagant assertion of statutory power over the national economy is a largely subjective question. The judiciary's institutional legitimacy derives from its neutrality and constraint; forcing it to rule on contested economic policy in the middle of a financial panic risks undermining both.

Ultimately, courts are ill-suited to play the role of frontline crisis manager. They are too slow to intervene before damage is done, too far removed to credibly second-guess complex economic assessments, and too structurally cautious to offer real-time governance. Whatever their virtues in *ex post* review or in clarifying statutory meaning over time, courts cannot reliably ensure that emergency powers are used appropriately in the moment. And as the next Section explains, relying on them to do so may have costs of its own.

C. The Risks of Overcorrection

The deepest danger presented by judicial involvement in financial crises lies in the ways it may affect the behavior of financial regulators from the outset. As the risk of judicial intervention rises, agencies may begin to hesitate—not because they doubt the urgency of the crisis or the efficacy of their tools, but because their legal footing is uncertain and the institutional consequences of overstepping are high.⁴⁶ In a post-*Loper Bright* environment, regulators can no longer invoke ambiguous statutes and expect deference.⁴⁷ They must instead anticipate the possibility of searching judicial review—and may respond by narrowing their actions, delaying their interventions, or avoiding the use of emergency powers altogether.⁴⁸ The result is not a disciplined-but-effective administrative state, it is one that is legally paralyzed when speed matters most.

⁴⁶ Devoting time and effort to a solution on shaky ground necessarily means devoting less time and effort to other solutions with a firmer legal footing. Even if the less legally certain path is the “better” solution, the uncertainty may lead the agency to spend their limited time and effort capital on the “worse” approach. Moreover, an intervention comes with political risks. If an agency were to take large, decisive action to stabilize the market, only for it to be unwound by a court finding that the agency acted unlawfully, the agency would take the political blame for the resulting turmoil. This is a potentially perilous position for federal employees to find themselves in.

⁴⁷ *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2273 (2024).

⁴⁸ Cf. Desirée LeClercq, *Judicial Review of Emergency Administration*, 72 *Am. U. L. Rev.* 143, 172–96 (2022) (discussing the high invalidation rate of COVID-19 pandemic-era rules and the eventually decreasing rate of replacement promulgation).

This effect, importantly, is not at all what Saffarini advocates in his piece. As Saffarini himself acknowledges, “Banking and financial regulation . . . demand a degree of deference to allow for decisive action in emergencies.”⁴⁹ Without such “decisive action,” market collapse may very well be a legitimate risk.⁵⁰ Saffarini argues that the main effect of increased judicial review is that “agencies will be less able to take frivolous regulatory action,” but will continue to be able to respond decisively to emergencies that “actually exist.”⁵¹ But this seems suspect.

Consider again just the example of the major questions doctrine. Under the doctrine, the threshold question is not whether an emergency “actually exists”—it is whether the agency’s action carries vast economic significance. Recall that the *West Virginia* Court talked about “extravagant” action vis-à-vis the national economy being inherently suspect.⁵² And at the time of *West Virginia*, Justice Gorsuch even characterized the doctrine by saying “administrative agencies must be able to point to clear congressional authorization when they claim the power to make decisions of vast economic and political significance.”⁵³ If courts treat emergency interventions involving large sums or systemic actors as inherently suspect absent “clear congressional authorization,” then the stakes of action become legally—and politically—fraught. Indeed, emergency statutes are rarely clear. Their value lies in flexibility, not specificity. If regulators believe that any forceful use of emergency power might be cast as “extravagant”—and struck down accordingly—they may opt not to act until it is too late. The doctrine that purports to protect democratic accountability may end up paralyzing democratic governance.

It is precisely this risk of overdeterrence that the judicial deterrence model fails to account for. In Saffarini’s framing, the cost of judicial review is that agencies may lose some freedom to act opportunistically. But, in practice, the cost may be far greater: that agencies lose the ability to act at all, for fear that their good-faith response will be second-guessed, invalidated, or politically weaponized. The result is not regulatory modesty—it is institutional paralysis. And while moral hazard is a real

⁴⁹ Saffarini, *supra* note 8, at 164.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *West Virginia v. Env’t Prot. Agency*, 142 S. Ct. 2587, 2609 (2022) (quoting *Util. Air Regul. Grp. v. Env’t Prot. Agency*, 573 U.S. 302, 324 (2014)).

⁵³ *Id.* at 2616 (Gorsuch, J., concurring) (citation omitted) (internal quotation marks omitted).

concern, so too is the risk of systemic collapse when government actors are chilled from using the tools Congress gave them to avert disaster.

III. A BETTER MODEL: CLARITY BEFORE CRISIS

It seems overly simplistic to propose that the answer to all of this is for Congress to simply “be clearer” when drafting emergency powers, but it turns out it may actually be that simple. Indeed, while there is no solution without its tradeoffs, the likely arguments against more specifically drafted legislation turn out to be fairly weak. Take two of the most common ones. First, some may argue that if Congress speaks with too much precision in the name of legibility, it may risk giving too little flexibility to financial regulators navigating crisis.⁵⁴ But that view is mistaken. It is quite easy for Congress to be more specific than “unusual and exigent”⁵⁵ or “serious adverse effects”⁵⁶ without sacrificing *needed* flexibility (even if some flexibility in general might be lost). This Part proposes a model for attaining that clarity.

Second, some may argue that even if Congress *could* legislate more clearly, it should refrain from doing so, because it lacks the institutional expertise to competently design detailed legislation in areas of technical complexity.⁵⁷ As the argument goes, if Congress avoids speaking too specifically, agency experts, who *do* have that level of institutional expertise, can helpfully “fill up details.”⁵⁸ The trouble with this argument is at the premise level. Two critical premises—that in the modern executive branch, it would be agency experts (rather than White House politicians) setting the policy direction, and that Congress could not just as easily itself rely on expert advice in drafting legislation—seem obviously incorrect. This Part demonstrates that concerns about Congress’s relative expertise do not justify blank checks to executive agencies under the president’s ultimate control.

⁵⁴ Cf. Graham S. Steele, Major Questions’ Quiet Crisis, 31 *Geo. Mason. L. Rev.* 265, 326–27 (2024) (discussing how “limiting regulators’ ability to develop and use their expertise” might impede “Congress’s ability to provide for capacious financial regulation”).

⁵⁵ Federal Reserve Act § 13(3)(A), 12 U.S.C. § 343(3)(A).

⁵⁶ 12 U.S.C. § 1823(c)(4)(G).

⁵⁷ See, e.g., Rachel E. Barkow, The Wholesale Problem with Congress: The Dangerous Decline of Expertise in the Legislative Process, 90 *Fordham L. Rev.* 1029, 1043–56 (2021) (discussing the decline of congressional reliance on expertise in the legislative process and the attendant harms).

⁵⁸ *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting).

A. Clarity and Flexibility

It is possible to design emergency powers that are clear as to their trigger, scope, and accountability mechanisms without sacrificing needed flexibility. We know this because we have done it before.

Consider, for example, the Robert T. Stafford Disaster Relief and Emergency Assistance Act.⁵⁹ The statute provides a framework for federal assistance in the case of a “major disaster” or “emergency,” and makes available to the president certain emergency powers that enable a coordinated response in the “affected area.”⁶⁰ Had Congress left those critical trigger terms—“major disaster” and “emergency”—undefined, the Stafford Act may have functioned similarly to § 13(3), where access to emergency powers depends upon the finding of some vaguely-defined problem. But in designing the Stafford Act, Congress took care to outline more specific triggers based on more detailed executive findings. Specifically, for the president to declare a “[m]ajor disaster,” he would need to actually find (1) a “natural catastrophe,” which specifically includes “any hurricane, tornado, storm, high water, winddriven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought,” and (2) that it “causes damage of sufficient severity and magnitude to warrant [federal] disaster assistance.”⁶¹ Similarly, to declare an “[e]mergency,” the president would need to find that federal assistance is actually needed either (1) “to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety,” or (2) “to lessen or avert the threat of a catastrophe in any part of the United States.”⁶² In both cases, the trigger set by Congress for the executive branch to access emergency powers is based on specific or otherwise largely quantifiable findings. When a statute has that degree of clarity, it enables better judicial review because courts can better assess whether the trigger for action was actually met. And more importantly, the executive actor can respond to the crisis with confidence, knowing that they are operating with a firm statutory backing.

The Stafford Act also provides a good example of an emergency powers statute that clearly defines and limits the powers it grants. Unlike § 13(3), which leaves it to the Federal Reserve to “establish . . . the

⁵⁹ Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121–5208.

⁶⁰ *Id.* § 5143(a).

⁶¹ *Id.* § 5122(2).

⁶² *Id.* § 5122(1).

policies and procedures governing emergency lending,”⁶³ the Stafford Act sets forth a detailed scheme that explains precisely how a major disaster or emergency should be handled. For example, the Stafford Act directs that “[i]mmediately upon his declaration of a major disaster or emergency, the President shall appoint a Federal coordinating officer to operate in the affected area.”⁶⁴ The statute then lays out exactly what that coordinating officer is to do, including “an initial appraisal of the types of relief most urgently needed,” the establishment of “field offices,” and the coordination of efforts by both public and private relief groups.⁶⁵ In section after section, the Stafford Act describes how the whole disaster relief process must unfold from start to finish, and what rules govern the use of emergency resources.⁶⁶

Statutes like the Defense Production Act of 1950 (“DPA”) are similarly instructive.⁶⁷ Like the Stafford Act, the DPA ties specific emergency powers to tightly defined triggers. For example, the DPA provides that the president “shall not” use powers granted by the statute “to control the general distribution of any material in the civilian market” without first finding that the material is (1) “scarce,” (2) “critical,” and (3) “essential to the national defense,” and that (4) “the requirements of the national defense for such material cannot otherwise be met without creating a significant dislocation of the normal distribution of such material in the civilian market to such a degree as to create appreciable hardship.”⁶⁸ Those four findings required to access that one very specific power go to both the types of materials that may be regulated under it and the market justification for such an intervention. That such specificity can be found in a statute designed to endow the president with emergency powers “to ensure the vitality of the domestic industrial base” for national defense purposes should illustrate the point that clarity does not automatically compromise flexibility.⁶⁹

Just as in these two statutes, Congress could plausibly redraw financial emergency powers for greater legibility. A good starting place would be clearer triggers. Just as Congress listed out in excruciating detail the

⁶³ Federal Reserve Act § 13(3)(B), 12 U.S.C. § 343(3)(B).

⁶⁴ 42 U.S.C. § 5143(a).

⁶⁵ *Id.* § 5143(b)(1)–(3).

⁶⁶ *See id.* §§ 5121–5208.

⁶⁷ 50 U.S.C. §§ 4501–4568.

⁶⁸ *Id.* § 4511(b).

⁶⁹ *Id.* § 4502(a)(2).

different kinds of “natural catastrophe[s]” that can give rise to a “[m]ajor disaster” in the Stafford Act,⁷⁰ it may, for example, list out the types of financial events that present an “unusual and exigent circumstance[]” for purposes of § 13(3).⁷¹ And just as Congress diligently set forth the specific processes the president must follow in responding to a major disaster, it may “establish . . . the policies and procedures governing emergency lending” itself, rather than delegating that task to the agency those policies and procedures are meant to govern.⁷²

None of this is to say that these reforms would leave crisis-response flexibility completely unchanged. Inherently, they would not. Because financial regulators would need to find that specific triggers are met, they would no longer have the flexibility to pursue action where those triggers are not satisfied. And because the policies and procedures governing their intervention would be laid down in statute, they would not have the flexibility to act outside those predefined channels. In return, however, agencies would—when they act—be able to act with confidence. Because their actions would be firmly rooted in specific and explicit legislative text, there would be no question that their intervention was lawful as a statutory matter. That is a worthwhile tradeoff.

B. The Expertise Problem

Despite the fact that it is *possible* for Congress to enact legible financial emergency power statutes, some may nevertheless argue that Congress should not try its hand at doing so. In the view of this camp, it may actually be *preferable* that Congress speak broadly, because doing so leaves it to more qualified agency experts to sort out the details.⁷³ This view is implicitly based on two premises. First, the argument assumes that if Congress does not speak clearly, it is politically independent agency experts who will take the lead in shaping the executive’s use of the assigned emergency powers. Second, the argument assumes that the only way Congress can work experts into the process is by granting broad

⁷⁰ 42 U.S.C. § 5122(2).

⁷¹ Federal Reserve Act § 13(3)(A), 12 U.S.C. § 343(3)(A).

⁷² *Id.* § 13(3)(B).

⁷³ See Joseph A. Grundfest & A.C. Pritchard, Statutes with Multiple Personality Disorders: The Value of Ambiguity in Statutory Design and Interpretation, 54 *Stan. L. Rev.* 627, 640 (2002) (noting that “Congress may lack the foresight and expertise needed to specify every last jot and tittle of a rule in the text” and arguing that “it could be inefficient for a legislature even to try”).

powers to agencies and leaving it to agency experts to figure out when to use them. Both premises are likely wrong.

To begin with, whatever one's views on expert-led governance, it seems difficult to maintain that agency experts presently direct the policy of the executive branch, as opposed to vice versa. The executive branch recently reclassified career federal employees who are in "policy-determining, policy-making, or policy-advocating" roles as part of the Excepted Service, requiring them to work to "implement administration policies to the best of their ability" and to do so without civil service protections.⁷⁴ If fully implemented, this change could make it "easier to fire scientists whose work doesn't align with an administration's political goals."⁷⁵ At least as far as the executive branch in general, it seems unlikely that powers granted by Congress with the intention of expert stewardship will operate that way in practice.

The same may be true even in the realm of financial regulation, despite Congress having established many of these regulators with independence in mind. Take the Consumer Financial Protection Bureau, for instance. When Congress established the Bureau, it instructed that the agency's Director would serve a five-year term and be removable by the president only for "inefficiency, neglect of duty, or malfeasance in office."⁷⁶ In 2020, however, the Supreme Court held those removal protections unconstitutional, leaving the Bureau's broad powers to be exercised by an agency head directly controlled by the president.⁷⁷ Even the Federal Reserve, an agency whose independence has long been thought of as exceptionally important in American politics, may not in fact be as independent as once thought.⁷⁸ Given all of this, it seems hardly valid to argue that Congress should abdicate detail to agency experts—it likely would not be the experts deciding anyway.

⁷⁴ Exec. Order No. 14,171, § 1, 3(f)(ii)(b), 90 Fed. Reg. 8625, 8625–26 (Jan. 31, 2025).

⁷⁵ Joseph Reed, *Schedule F by Another Name Is Still a Threat to Science*, *The Equation* (June 30, 2025, at 07:30 ET), <https://blog.ucs.org/joseph-reed/schedule-f-by-another-name-is-still-a-threat-to-science/> [<https://perma.cc/8LEJ-7GA5>].

⁷⁶ 12 U.S.C. § 5491(c)(1), (3).

⁷⁷ *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (“[W]e find the Director’s removal protection severable from the other provisions of Dodd-Frank that establish the CFPB . . .”).

⁷⁸ See *Complaint for Declaratory and Injunctive Relief* at 18, *Cook v. Trump*, 804 F. Supp. 3d 14, No. 25-cv-02903 (D.D.C. 2025) (alleging the termination of a Federal Reserve Governor was in furtherance of an executive branch “agenda to undermine the independence of the Federal Reserve”).

In any event, to the extent expert input would be helpful in drafting legible legislation, there is certainly no reason to think passing broad language and hoping experts employed by the executive branch will figure out the rest is the best way of getting it. Indeed, there is a precedent for Congress establishing legislative agencies “tasked with providing Congress with nonpartisan [expert] analysis.”⁷⁹ In the 1970s, Congress created the Office of Technology Assessment to provide analysis “of issues related to technology and science.”⁸⁰ And entities like the “[Congressional Budget Office] continue to play an important role in the congressional process.”⁸¹ Congress could just as easily employ financial experts to assist in the drafting of comprehensive and legible emergency powers for financial regulators.

IV. THE POSTFEDERAL FAILSAFE

Although legible emergency powers will generally be sufficient to ensure a confident federal response in cases of financial crisis, it is worth emphasizing that in even those situations where federal agencies are unable to act, nonfederal alternatives exist that may be just as effective. Indeed, a reduction in federal executive flexibility by no means entails total collapse in case of crisis. Both state and local interventions remain plausible, and in some circumstances private-sector alternatives may be salutary as well. These might be termed the “postfederal failsafes.”

Consider first the possibility of state or local interventions. Indeed, as polarization deepens in the United States, some legal commentators have argued “a new era of [local] self-sufficiency” may be on the horizon.⁸² This is particularly true in those parts of the country not “align[ed] with Washington’s new priorities.”⁸³ Indeed, as “[p]opulist anti-urbanism” becomes more prominent in the Nation’s capital, the country’s financial hubs may need to “assume a hostile federal administrative state going forward.”⁸⁴ As a result, state and local governments overseeing financial hubs should begin investing in efforts to manage crises affecting their

⁷⁹ Barkow, *supra* note 57, at 1041.

⁸⁰ *Id.*

⁸¹ *Id.* at 1071.

⁸² Richard Schragger, *Is It Time for Cities to Go It Alone?*, *Vital City* (Apr. 29, 2025), <https://www.vitalcitynyc.org/articles/is-it-time-for-cities-to-go-it-alone> [<https://perma.cc/2CYE-BTVW>].

⁸³ *Id.*

⁸⁴ *Id.*

economies themselves. This may be in the form of tailored resolution frameworks, liquidity contingency plans, or even state-level deposit insurance enhancements—tools that enable swift response even when federal regulators stall.

Likewise, in the present environment, private actors may have an interest in investing in failsafes of their own. Just as firms anticipate cyberattacks or supply chain shocks, large financial institutions—especially those critical to payments, clearing, and credit intermediation—may benefit from planning for regulatory paralysis. That could mean building internal liquidity buffers not merely for solvency, but for operational continuity in the absence of Federal Reserve backstops. It could also involve establishing contingent resolution protocols, shared liquidity agreements with peer institutions, or marketwide risk communication channels that activate when state or federal authorities fail to act. These measures would not eliminate the need for public intervention in a systemic crisis. But in a world where even well-designed federal powers may go unused—due to litigation risk, political gridlock, or administrative drift—privately constructed redundancies could offer a crucial layer of institutional resilience. In effect, they would function as a hedge against the state’s own hesitation.

CONCLUSION

Financial crises demand speed, but legitimacy requires structure. The problem with emergency financial statutes today is not that they authorize discretion—it is that they do so without design. Courts alone cannot fix that problem, and, contrary to Saffarini’s view, unchecked judicial skepticism may only make it worse. What the law needs is clarity before crisis: statutory frameworks that trigger authority based on facts, constrain it through defined tools, and reinforce it through transparency. And when federal law fails to deliver, alternative actors—states, markets, and institutions—must be ready to step in. In a system built on interdependence, resilience depends on redundancy. The best way to prepare for the next emergency is to make sure the rules are clear before it begins.