Legislating for the Future

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Public policy must address threats that will manifest in the future. Legislation enacted today affects the severity of tomorrow's harms arising from biotechnology, climate change, and artificial intelligence. This Essay focuses on Congress's capacity to confront future threats. It uses a detailed case study of financial crises to show the limits and possibilities of legislation to prevent future catastrophes. By paying insufficient attention to Congress, the existing literature does not recognize the full nature and extent of the institutional challenges in regulating systemic risk. Fully recognizing those challenges reveals important design insights for future-risk legislation.

We first examine Congress as an institution to show that forces are stacked against its ability to enact legislation addressing future harms. Features of Congress's internal organization and procedures, incentives of legislators and industry actors, the evolving complexity of many regulated industries, and the reality that statutes tend to erode in effectiveness over time collectively mean that lawmakers will tend to underproduce legislation aimed at preventing future harms. The stars will occasionally align for landmark legislation, like after the financial crises that generated new regulatory statutes in the 1930s and 2010. But as a general matter, the playing field is tilted against Congress taking action.

This tilted playing field, we argue, points toward a roadmap for how Congress should seek to regulate the risk of major crises when it periodically does have the opportunity to do so. We posit several possible answers to this question, each informed by the institutional features that will generally make it hard for Congress to adjust or strengthen certain future-risk legislation once passed. Congress ought to use automatic triggers so that its legislation updates itself in response to changing conditions; extend expansive authority to agencies with explicit discretion for agencies to address threats that may have been unforeseen at the time of earlier legislation; create strong regulatory minimums that agencies can increase but not decrease, as a safeguard against agency capture or inaction; and encourage enforcement efforts by a diverse range of federal, state, and private actors. Better understanding Congress's institutional limitations, in short, can provide a roadmap for how to enact more effective regulatory legislation in the future.

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INTRODUCTION

Public policy must address threats that will manifest in the future. Climate change is undoubtedly reshaping our physical world in the present, but the worst harms of climate change will come in the decades ahead. Biotechnology innovation holds the promise of curing disease, but it also gives rise to risks that are not fully understood. And many warn that artificial intelligence, for all its promise, also holds profound risks. In each of these areas, the need for regulation exists long before harms materialize, and long before the full nature and extent of future harms are certain.

These newer risks share much in common with a centuries-old challenge: the risk of financial crises. For all its benefits, finance has long raised the possibility of systemic meltdowns. Economic history is rife with financial crises that have had immense human, economic, and political costs.[1] Regulation aimed at

[1] *See generally* CIHAN BILGINSOY, A HISTORY OF FINANCIAL CRISES: DREAMS AND FOLLIES OF EXPECTATIONS (2015); CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY (2009).

preventing financial crises provides a case study of how government performs in the face of a particular type of risk: a likelihood of private sector actors causing large-scale societal harms at some point in the future, but when the timing, character, and magnitude of those harms are at least somewhat unpredictable.

In this Essay, we focus on how one part of government—Congress—can, does, and should respond to these sorts of risks. We do so through an extended examination of Congress as an institution and the incentives that its members face. This approach reveals several reasons why financial regulatory legislation is difficult to enact. Members of Congress focus on their immediate reelection prospects, while regulating to prevent future harms usually means imposing costs in the present. The private sector interests that bear those costs will often mobilize against reform. The uncertainties that necessarily surround future harms also make it easier to argue against proposed legislation. A study of the intersection of Congress's features with these and other features of financial regulation yields a disquieting conclusion: lawmakers are structurally incentivized to underproduce legislation aimed at preventing financial crises.[2]

Despite these dynamics, Congress sometimes does legislate to promote a systemically sound financial system, often in the aftermath of a crisis when the dynamics just described can be temporarily overcome.[3] The question then becomes *how* Congress

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[2] *See infra* Part I.

[3] Examples of such legislation include the Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (codified as amended in scattered sections of 12 U.S.C.); Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended in scattered sections of 15 U.S.C.); Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended in scattered sections of 15 U.S.C.); Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C.); and Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 2, 5, 7, 11, 12, 15, 18, 20, 22, 26, 28, 31, 42, and 44 U.S.C.). Empirical work has sought to document the extent of postcrisis booms in legislation. *See, e.g.*, Roberta Romano, Are There Empirical Foundations for the Iron Law of Financial Regulation? 16–20, 23–25 (Feb. 4, 2024) (Yale L. & Econ. Rsch. paper) (available at https://perma.cc/5LH3-7MEC) (finding that postcrisis financial regulatory legislation has significantly greater regulatory content than other financial regulatory legislation, but noting that the impact differs across crises). *See generally* Peter Conti-Brown & Michael Ohlrogge, *Financial Crises and Legislation*, 4 J. FIN. CRISES 1 (2022) (finding that the crisis-legislation hypothesis is a better fit for securities statutes than for banking statutes). In a normative register, scholars disagree about whether postcrisis legislation tends to lead to desirable or undesirable policy changes. *Compare generally, e.g.*, John C. Coffee, Jr., *The Political Economy of Dodd-Frank: Why Financial Reform Tends to be Frustrated and Systemic Risk Perpetuated*, 97 CORNELL L. REV. 1019 (2012) (taking a positive view of postcrisis legislation), *with* Roberta Romano,

should seek to regulate when the opportunity arises. We suggest that Congress ought to use automatic triggers so that its legislation updates itself in response to changing conditions; extend expansive authority to agencies with explicit discretion for the agency to address threats that may have been unforeseen at the time of the legislation's enactment; create strong regulatory minimums that agencies can increase but not decrease, as a safeguard against agency capture; and encourage enforcement by a diverse range of federal, state, and private actors.

Each of these prescriptions follows from our general diagnosis: Congress should legislate under the assumption that future Congresses and regulatory agencies will underproduce—in the creation of new legal rules and their enforcement—relative to the risks of future harms. This diagnosis should prompt Congress, when it does enact legislation to promote financial stability, to legislate more expansively than it would in a world in which future Congresses could be relied upon to act.[4]

It may seem counterintuitive to propose that Congress seek to push further than what seems necessary. Overregulating is undesirable. It can stifle economic growth and reduce social welfare. But realism demands weighing the risk and probability of overregulation against the risk and probability of underregulation. We argue that central features of the contemporary Congress make underregulation more likely than overregulation. This should not be taken to minimize the potential harms of excessive or wrongheaded regulatory mandates. It is only to say that Congress's structure makes it more likely that Congress does too little than too much to address future risks.

Before proceeding, a few words are in order about our focus on a particular actor (Congress) and a particular type of policy intervention (legislation aimed at preventing financial crises). Existing legal scholarship on financial regulation often considers the role of administrative agencies,[5] but Congress, as the author

Regulating in the Dark and a Postscript Assessment of the Iron Law of Financial Regulation, 43 HOFSTRA L. REV. 25 (2014) (taking a negative view of postcrisis legislation) [hereinafter Romano, *Regulating in the Dark*].

4 *See infra* Part II. We focus on Congress's legislative power, but Congress's other powers (such as oversight powers or the Senate's advice-and-consent role) can also influence financial regulatory policy.

5 *See generally, e.g.*, Jacob E. Gersen, *Administrative Law Goes to Wall Street: The New Administrative Process*, 65 ADMIN. L. REV. 689 (2013); Gillian E. Metzger, *Through*

of the statutes that give agencies their authority, is the first mover. Congress writes primary rules and also creates, empowers, structures, and funds federal agencies.[6]

We focus on regulation aimed at mitigating the risk and severity of financial crises for two reasons. First, and most obvious, is the critical importance of the topic. Financial crises can cause great societal turmoil and cost millions of people their jobs and homes. Financial institutions are ubiquitous, touching every area of economic life, and interconnected, with problems in one part of the system quickly reaching others. These features make the stakes of financial regulation especially high.

Second, financial crises have historically posed a distinctive challenge for Congress. Many areas of regulation address frequently recurring harms—such as automobile accidents, air or water pollution, or dangerous consumer products. These recurring harms differ from those, like financial crises, that are always a possibility but only sometimes materialize. The risk of a financial crisis more closely resembles "tail risks" like pandemics, terrorist attacks, or catastrophic harms arising from technological change. Understanding the dynamics of legislation aimed at preventing financial crises can shed light on the dynamics of legislation focused on future risks of other sorts.

Our thesis does not depend on seeing financial regulation as unique. To the contrary, financial regulation holds important lessons for these other domains. But financial regulation is a strong case study of how to legislate in the face of private sector actors that at once provide great social benefits and risk imposing widespread social harms. Financial markets, carbon-emitting activities, and new technologies all pose challenging regulatory questions precisely because they are so central to our lives, and the question for regulators is how to preserve their benefits while protecting society from their risks.

I. CONGRESS: POLITICS, ORGANIZATION, AND INCENTIVES

How does Congress perform in legislating to prevent financial crises? On one account, Congress underproduces legislation that would mitigate systemic risks, and in doing so opens the door

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the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation, 78 LAW & CONTEMP. PROBS. 129 (2015); Daniel K. Tarullo, *Bank Supervision and Administrative Law*, 2022 COLUM. BUS. L. REV. 279.

6 *See infra* Part II.B–C.

to future crises.[7] On another, Congress overregulates, and in so doing stifles innovation, imposes excessive compliance costs, and restricts the productive flow of capital.[8] These dueling accounts raise the question of Congress's performance in legislating to mitigate systemic risk.

The features of Congress as an institution can provide answers. Insights from political science about the structural design of Congress and the incentives of its members allow us to draw lessons for how that body is likely to perform in the domain of financial regulation and other areas involving future risks.

Our conclusion is simple: institutional features of Congress, the motivations and incentives of its members, and the nature of the subject matter all suggest that it is more likely that Congress will underproduce rather than overproduce legislation meant to reduce the likelihood of financial crises and other future risks. This does not suggest that Congress will never legislate in this domain, or even that it will never overlegislate. But it does suggest that, in the *aggregate*, there is a greater risk that Congress will do too little as compared to too much.

Scholars have recognized that financial regulatory legislation faces hurdles on Capitol Hill.[9] But without tying concerns about

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7 *See, e.g.*, Coffee, *supra* note 3, at 1020 (arguing that "only after a catastrophic market collapse can legislators and regulators overcome the resistance of the financial community and adopt comprehensive 'reform' legislation").

8 *See, e.g.*, Romano, *Regulating in the Dark*, *supra* note 3, at 93 (arguing that financial crises prompt legislators to "adopt preferred policy entrepreneurs' 'off-the-rack' solutions, which are often not well-matched to the problems at hand" and can have "adverse unintended consequences").

9 Legal scholars who have focused on the challenges of congressional action in this domain have correctly identified some key impediments to action but have typically discussed congressional politics only briefly. *See, e.g.*, Coffee, *supra* note 3, at 1030–32 (discussing interest group dynamics); Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2044–45, 2052–53, 2062, 2065–66 (2014) (discussing interest group dynamics and timing problems); Dan Awrey & Kathryn Judge, *Why Financial Regulation Keeps Falling Short*, 61 B.C. L. REV. 2295, 2315–16 (2020) (discussing veto points in the legislative process).

Professors Peter Conti-Brown and Brian Feinstein take a more optimistic view of Congress, presenting case studies describing a "flourishing of congressional experimentation" on financial topics. *See* Peter Conti-Brown & Brian D. Feinstein, *The Contingent Origins of Financial Legislation*, 99 WASH. U. L. REV. 145, 145, 167–212 (2021). Important as their analysis is, their focus differs from ours. While we examine how the institutional features of the contemporary Congress bear on its ability to enact new regulatory mandates, their broader range of case studies includes legislation from earlier eras, during which Congress looked quite different (e.g., Banking Act of 1933); legislation that loosened rather than strengthened regulatory requirements (e.g., Financial Services Modernization Act of 1999); and legislation that focused on spending rather than regulation (e.g., CARES Act of 2020). Moreover, their optimism that major financial legislation is more possible financial regulators to the structure of Congress, there is a danger of underappreciating the extent of the institutional problem—and thus of underestimating what legislative changes will be needed moving forward.

A. Concentrated Costs of Regulatory Legislation

A first set of challenges results from the allocation of the costs of legislation aimed at preventing future crises. Put simply, the costs of such policies will fall on financial institutions—and, disproportionately, large financial institutions. These are precisely the sorts of institutions well positioned to mobilize to defeat legislation that harms their short-term interests.[10]

Political economists have long emphasized the difficulty of enacting legislation that imposes concentrated costs on industry, because regulated entities have strong incentives to oppose policy changes and face minimal coordination costs in doing so.[11] To see how concentrated costs characterize much of financial regulation, especially regulation focused on systemic risk, consider some of the reforms enacted in the Dodd-Frank Wall Street Reform and Consumer Protection Act.[12] Some of Dodd-Frank's key reforms apply only to a relatively small number of firms. A system of enhanced oversight (such as capital buffers and stress) applied only to institutions with over $50 billion in assets.[13] The Financial Stability Oversight Council is empowered to designate institutions other than banks, such as large insurance companies, as systemically important and thus requiring regular monitoring.[14]

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than others believe is not inconsistent with our position that there are structural reasons to think that congressional intervention will be insufficiently frequent and robust.

10 While we focus on industry lobbying against regulatory mandates, firms will sometimes acquiesce to or even support regulatory mandates, especially when one type of firm sees new mandates as providing it with an advantage in the marketplace over another type of firm.

11 *See* JAMES Q. WILSON, THE POLITICS OF REGULATION 369–70 (1980) (discussing the difficulty of enacting legislation with concentrated costs and diffuse benefits, and concluding that "it may seem astonishing that regulatory legislation of this sort is ever passed").

12 Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of 2, 5, 7, 11, 12, 15, 18, 20, 22, 26, 28, 31, 42, and 44 U.S.C.).

13 *See* MARC LABONTE, CONG. RSCH. SERV., R42150, SYSTEMICALLY IMPORTANT OR "TOO BIG TO FAIL" FINANCIAL INSTITUTIONS 19 (2018).

14 Systemic importance refers to the "concept that a firm's disorderly failure would cause widespread disruptions in financial markets that could not easily be contained." *Id.* at 1.

These and other provisions were targeted at a well-defined group of large firms.[15]

When proposed legislative provisions would impose costs only on a relatively small number of large firms, public choice theory suggests that those firms are ideally suited to lobby against those provisions.[16] In practice, financial firms have often successfully mobilized to block provisions that would have imposed new regulatory requirements.[17] Firms also sometimes successfully lobby to roll back existing regulatory mandates. On this score, consider Congress's 2018 partial rollback of Dodd-Frank.[18] The rollback loosened federal oversight rules and capital requirements for all but the very largest banks.[19] It passed both chambers by wide margins, with some Democrats joining the Republican majority to support the bill.[20] This broad support was driven by a major lobbying campaign from midsized banks.[21] In one Senator's words: "The lobbyists were everywhere. You couldn't throw an elbow

15 Systemic risk is closely tied to size—think here of the shorthand "too big to fail"—though precisely what makes a financial institution systemically important has been the subject of debate and scholarship. *See, e.g.,* Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 198–204 (2008) (discussing definitions of systemic risk).

16 *See, e.g.*, Randall S. Kroszner, *The Economics and Politics of Financial Modernization*, 6 FED. RSRV. BANK N.Y. ECON. POL'Y REV. 25, 26–27 (2000).

17 *See* Arthur E. Wilmarth, Jr., *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 938–39 (2012) (listing examples); *see also, e.g.*, Coffee, *supra* note 3, at 1068, 1072 (noting that financial institutions lobbied to weaken § 956 of Dodd-Frank, which requires disclosure of incentive-based executive compensation packages); Alison K. Gary, *Creating a Future Economic Crisis: Political Failure and the Loopholes of the Volcker Rule*, 90 OR. L. REV. 1339, 1351, 1363 (2012) (noting Wall Street's success "in weakening the Volcker Rule by inserting loopholes").

18 Economic Growth, Regulatory Relief, and Consumer Protection Act, Pub. L. No. 115-174, 132 Stat. 1296 (2018) (codified as amended in scattered sections of 12, 15, 20, 31, 38, 42, and 50 U.S.C.).

19 *See* Labonte, *supra* note 13, at 19 (explaining the Economic Growth, Regulatory Relief, and Consumer Protection Act of 2018 raised the asset threshold at which banks are automatically subject to regulation from $50 billion to $250 billion).

20 *See* Alan Rappeport & Emily Flitter, *Congress Approves First Big Dodd-Frank Rollback*, N.Y. TIMES (May 22, 2018), https://www.nytimes.com/2018/05/22/business/congress-passes-dodd-frank-rollback-for-smaller-banks.html; *House OKs Bill Rolling Back Landmark Dodd-Frank Banking Rules*, PBS NEWS (May 22, 2018), https://www.pbs.org/newshour/politics/house-oks-bill-rolling-back-landmark-dodd-frank-banking-rules.

21 By contrast, congressional Democrats avoided potential pushback from community banks and credit unions in initially enacting Dodd-Frank. *See, e.g.*, ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN'T 109–10, 159–64 (2013).

without running into one."[22] These lobbyists backed up advocacy with campaign contributions, especially targeting vulnerable Democrats facing reelection challenges.[23] A banking industry trade group spent $125,000 on advertisements thanking one senator for helping shepherd the bill to passage.[24] Major backers of the rollback included Silicon Valley Bank and Signature Bank, both of which would later fail, in part due to a lack of oversight and low capital reserves.[25] Dozens of senators received contributions affiliated with the two banks during the bill's consideration.[26] Although it is difficult to directly link these efforts to the bill's passage, this flood of lobbying and campaign cash presumably smoothed the way to the rollback's enactment.

Similar advocacy enabled the inclusion of the so-called "Enron loophole" in the Commodity Futures Modernization Act of 2000[27] (CFMA). The Act is best known for deregulating financial derivatives, and it specifically included a provision deregulating energy derivatives.[28] This provision was largely the result of efforts by Senate Banking Committee Chairman Phil Gramm (R-TX), who received campaign contributions from Enron and whose wife served on the company's board.[29] Documents released after Enron's collapse showed that the company successfully lobbied Gramm to

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22 Brian Slodysko & Ken Sweet, *Hundreds of Lobbyists Pushed Government to Water Down Banking Regulations*, PBS NEWS (Mar. 21, 2023), https://perma.cc/CEJ3-KH6T (quoting Senator Elizabeth Warren (D-MA)).

23 *See id.*

24 *See id.* (referencing Senator Jon Tester (D-MT)).

25 On advocacy by the banks, see, for example, Rebecca Burns, David Sirota, Julia Rock & Andrew Perez, *SVB Chief Pressed Lawmakers to Weaken Bank Risk Regs*, THE LEVER (Mar. 10, 2023), https://perma.cc/G4PP-D9AX; and Karl Evers-Hillstrom, *Silicon Valley, Signature Banks Lobbied Hard to Loosen Bank Rules*, THE HILL (Mar. 14, 2023), https://thehill.com/policy/technology/3898389-silicon-valley-signature-banks-lobbied-hard-to-loosen-banking-rules/. On reasons for the bank failures, see generally, for example, BD. OF GOVERNORS OF THE FED. RSRV. SYS., REVIEW OF THE FEDERAL RESERVE'S SUPERVISION AND REGULATION OF SILICON VALLEY BANK (2023); John Turner, *Why Did Silicon Valley Bank Fail?*, ECON. OBSERVATORY (Mar. 17, 2023), https://perma.cc/EA2C-JZP4; and Hannah Lang, *Signature Bank Failure Due to 'Poor Management,' US FDIC Report Says*, REUTERS (Apr. 28, 2023), https://www.reuters.com/markets/us/signature-bank-failure-due-poor-management-us-fdic-report-says-2023-04-28/ (noting that "poor management" and "rapid, unrestrained growth" caused Signature Bank's failure).

26 *See* Evers-Hillstrom, *supra* note 25.

27 Pub. L. No. 106-554, 114 Stat. 2763 (codified as amended in scattered sections of 7 and 12 U.S.C.).

28 *See* MARK JICKLING, CONG. RSCH. SERV., RS22912, THE ENRON LOOPHOLE 1 (2008).

29 *See* Eric Lipton, *Gramm and the 'Enron Loophole'*, N.Y. TIMES (Nov. 14, 2008), https://www.nytimes.com/2008/11/17/business/17grammside.html.

ensure that favorable carve-outs for energy derivatives remained in the final version of the CFMA.[30]

Asymmetric advocacy is somewhat unavoidable, but it is exacerbated by contingent policy choices. The culprits here are familiar—lax regulation of campaign finance, lobbying, and the revolving door of personnel between government and industry—and other scholars have documented in detail how those features of federal law and legislative politics have allowed for financial industry influence on Capitol Hill.[31]

In sum, financial institutions have the incentive and ability to resist congressional legislation that would seek to make the financial system more systemically sound while imposing concentrated costs on industry. This is the first major dynamic that makes it challenging for Congress to regulate to mitigate the risk of financial crises. The obvious counterweight to the dynamics just discussed would be political or institutional forces pushing for stricter regulatory legislation. But those countervailing forces are often weak, for reasons we turn to next.

B. Benefits of Regulatory Legislation: Diffuse, Long Term, and Hard to Trace

Interest group dynamics look very different when we turn to the benefits of legislation aimed at promoting financial stability. Three features of those regulatory benefits make congressional action challenging: the diffuse character of regulatory beneficiaries, the timing of regulatory benefits, and the difficulty of tracing positive changes in the world to particular regulatory interventions.

First, the diffusion of regulatory beneficiaries makes collective action difficult. The benefits of fewer financial crises are widely shared. It might seem that this common interest would promote

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30 *See id.*

31 *See* Arthur E. Wilmarth, Jr., *Turning a Blind Eye: Why Washington Keeps Giving in to Wall Street*, 81 U. CINCINNATI L. REV. 1283, 1283–84 (2013) (describing how "the financial industry has spent massive sums on lobbying and campaign contributions, and its political influence has expanded"); *see also* KAISER, *supra* note 21, at 127–41 (discussing the role of interest groups in the context of Dodd-Frank). These investments often bear fruit for industry: empirical work has found evidence that spending on lobbying by the financial industry is at times associated with legislators favoring deregulatory bills. *See* Deniz Igan & Prachi Mishra, *Wall Street, Capitol Hill, and K Street: Political Influence and Financial Regulation*, 57 J.L. & ECON. 1063, 1065 (2014) (finding evidence that both lobbying expenditures by affected financial firms and connections between legislators and lobbyists are associated with legislative votes). Though wholesale campaign finance, lobbying, and revolving door reforms would reduce the influence of finance on Capitol Hill, such reforms are unlikely in the short-to-medium term, so we do not analyze them here.

effective policy, but interest group theory suggests that diffuse benefits can disincentivize mobilization. Each individual's stake in a well-functioning financial system is small enough that it provides little incentive to organize in favor of stricter regulation.[32]

Second, a timing issue also poses a challenge to legislation that promotes a sound financial system. The costs of financial regulation are realized in the present, when firms must pay compliance costs and forgo the profits they would have made from prohibited conduct. But the benefits of avoiding financial crises are realized in the future: today's regulation might prevent (or ameliorate) a crisis years or decades down the road. This timing problem has implications for both regulatory beneficiaries and for legislators. For beneficiaries, it compounds the difficulty of mobilizing: the absence of present benefits of financial-soundness legislation makes organizing difficult. This contrasts with many other sorts of regulatory legislation—legislation to promote clean water, ensure safe consumer products, or bar discrimination—that can have more immediate benefits. For members of Congress, the fact that regulatory benefits accrue in the future can make financial soundness a lower priority than those issues for which regulation has a short-term impact.[33]

Third, it can be hard to trace the impacts of financial stability legislation. In some other contexts, the effect of a regulatory intervention is easily traceable: a ban on lead paint and pipes causes the phasing out of those products and, ultimately, better health outcomes. By contrast, it is virtually impossible to trace the precise impact of Dodd-Frank's providing for increased supervision of big banks or the creation of the Financial Stability Oversight Council (FSOC). Proponents have credibly claimed that those reforms made the financial system sounder, but it is hard to prove that

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32 *See* WILSON, *supra* note 11, at 370 (arguing that, for legislation with concentrated costs and diffuse benefits, "[s]ince the incentive to organize is strong for opponents of the policy but weak for the beneficiaries, and since the political system provides many points at which opposition can be registered, it may seem astonishing that regulatory legislation of this sort is ever passed").

33 *See* CHARLES W. CALOMIRIS & STEPHEN H. HABER, FRAGILE BY DESIGN: THE POLITICAL ORIGINS OF BANKING CRISES AND SCARCE CREDIT 212 (2014) (arguing that "the power of a political coalition is precisely the power to get a public official to go along with something that he knows is not in the long-run public interest" and noting that, with regard to 1990s financial regulatory policy, "the costs that society would bear were in the future, while the benefits of acquiescing [to interest groups] were immediate").

definitively.[34] The presence and severity of any financial crisis will always be multicausal. Legislative interventions can reduce the risk or magnitude of a crisis, but it will almost always be contestable precisely what impact those interventions had.

This traceability problem poses a particular challenge for legislators. Reelection-seeking members of Congress aim to claim credit for tangible accomplishments that benefit their constituents.[35] It is much harder to claim this sort of tangible benefit for financial regulatory legislation. This hurdle can be overcome when, in Professor Douglas Arnold's words, "an issue is salient or potentially salient" to the public and "there are talented leaders in Congress who will champion the interests of inattentive citizens" in the legislative process.[36] These conditions, especially public salience, will typically not hold for financial regulatory legislation, except perhaps in the aftermath of crises.

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All of this amounts to a lopsided interest group environment when it comes to legislation aimed at preventing or mitigating the severity of financial crises. The costs of such legislation are incurred by financial institutions that have the means, motive, and opportunity to oppose them, while the benefits of such legislation can be diffuse, long-term, and hard to trace—all of which dampens advocacy in their favor.

C. Congressional Organization and Procedure

Congressional organization and procedure could, hypothetically, be a force that eases the enactment of legislation to promote a stable financial system and guard against other sorts of future risks. In practice, however, the organization of Congress makes financial regulatory legislation difficult to enact. The culprits

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34 *Cf.* Martin Neil Baily, Aaron Klein & Justin Schardin, *The Impact of the Dodd-Frank Act on Financial Stability and Economic Growth*, 3 RUSSELL SAGE FOUND. J. SOC. SCIS. 20, 22–31 (2017) (discussing benefits and costs of Dodd-Frank).

35 *See* DAVID R. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 53 (2d ed. 2004) (arguing that "much of congressional life is a relentless search for opportunities to engage in [credit claiming]").

36 R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 128 (1990).

here are many, including committee size,[37] the seniority system,[38] and even bicameralism itself.[39] Reforms to any of these could make the legislative process more friendly to legislation addressing future threats, including financial crises.

Perhaps the most important institutional feature of Congress that impedes regulatory legislation is the Senate filibuster. A defining feature of the contemporary Congress is that the Senate can proceed to a final vote on most legislation only with the support of a three-fifths supermajority.[40] It has been extremely rare in the modern Senate for either party to control sixty seats.[41] As a result, the supermajority requirement allows a unified minority party in the Senate to block legislation, even if that legislation is favored by the President, the House, and a majority of the Senate. The filibuster thereby makes it difficult to enact regulatory legislation of many sorts, including financial regulatory legislation.

Consider, in this regard, the fate of Dodd-Frank. The final Senate vote tally on the legislation was 60–39.[42] This is a wide margin in numerical terms, but the narrowest possible margin given Senate rules. The legislation was possible only because of large Democratic majorities elected on the heels of the Global Financial Crisis. The bill was supported by fifty-seven Democrats and Democrat-aligned Independents[43]—a significantly larger majority than either party typically controls in the contemporary Senate. Dodd-Frank won the support of only three Senate Republicans, all hailing from blue states.[44] This vote tally shows that, even in the

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37 *See* KAISER, *supra* note 21, at 44–45 (noting that the House Financial Services Committee is known as a "money committee"—i.e., one that aided members in fundraising—and that its popularity among members has made it large and "unwieldy").

38 *See id.* at 373 (describing a counterfactual world in which the seniority system could have easily doomed Dodd-Frank, given that the next-in-line legislators for the chairmanships of the key committees lacked the "personal standing, political skills, or intellectual capacity to lead such a complicated legislative effort").

39 *See id.* at 96 (describing Representative Barney Frank (D-MA) viewing the Senate as an "appeal body" wherein interest groups could water down provisions of House regulatory bills).

40 *See* STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, at r. XXII(2) (2013) (requiring, for cloture to be invoked, an affirmative vote of "three-fifths of the Senators duly chosen and sworn").

41 *See Party Division*, U.S. SENATE, https://perma.cc/P4DV-P7HT (documenting party divisions over time).

42 *See Roll Call Vote 111th Congress—2nd Session*, U.S. SENATE (July 15, 2010), https://perma.cc/4XKW-NHTF (summarizing the votes on the conference report to accompany H.R. 1473, the bill that became Dodd-Frank).

43 *See id.*

44 *See id.*

wake of a financial crisis and with an unusually wide Democratic majority, Senate rules would have doomed Dodd-Frank if even one Senator had voted differently. It is no surprise that in more ordinary times, the filibuster renders most financial regulatory legislation a nonstarter.

Intraparty dynamics also make financial regulatory legislation difficult. Majority-party leadership in both the House and Senate play key roles in setting Congress's agenda and determining which bills come to the floor.[45] Party leaders often seek to avoid bringing forth issues that divide their caucuses. In Professors James Curry and Frances Lee's words, by "encouraging their members to hold the party line . . . , congressional parties help clarify the lines of political conflict for the public."[46] Raising issues that divide party caucuses can jeopardize the leadership position of a House Speaker or Senate Majority Leader or create electoral risk for caucus members.[47]

Party leaders' general aversion to pursuing agendas that divide their caucuses helps explain why financial regulatory legislation is often a low priority. Today, Democrats are the far more likely party to pursue financial regulatory legislation.[48] But the issue divides Democrats: progressives largely favor greater regulation of the financial sector, while moderates often resist and have sometimes supported regulatory rollbacks.[49] In the late 2010s, one journalist described Democratic members of Congress as "hopelessly divided over which direction to head" on the issue, noting Democrats' hesitancy around calling for votes that would

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45 *See* WALTER J. OLESZEK, MARK J. OLESZEK, ELIZABETH RYBICKI & BILL HENIFF, JR., CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS 12 (11th ed. 2020).

46 James M. Curry & Frances E. Lee, *Non-Party Government: Bipartisan Lawmaking and Party Power in Congress*, 17 PERSPS. ON POL. 47, 60 (2019).

47 *See* Steven Pearlstein, *Forget McConnell. Forget Pelosi. In a Divided Congress, Biden Needs to Build His Own Coalition*, WASH. POST (Nov. 9, 2020), https://www.washingtonpost.com/business/2020/11/09/congress-mcconnell-pelosi-biden/ (arguing that electoral and political risks incentivize party leaders to avoid actions that would divide their caucuses).

48 *See* Emily Flitter, Jeanna Smialek & Stacy Cowley, *How the White House Rolled Back Financial Regulations*, N.Y. TIMES (Nov. 6, 2020), https://www.nytimes.com/2020/11/06/business/trump-administration-financial-regulations.html (discussing the Trump Administration's pro–Wall Street policies).

49 *See infra* notes 69–74 and accompanying text (discussing rollbacks of financial regulatory legislation); Tory Newmyer & Paulina Firozi, *The Finance 202: Democrats Are More Divided than Ever over Wall Street Regulations*, WASH. POST (July 26, 2017), https://www.washingtonpost.com/news/powerpost/paloma/the-finance-202/2017/06/26/the-finance-202-democrats-are-more-divided-than-ever-over-wall-street-regulations/59501700e9b69b2fb981de47/.

"forc[e] their own finance-friendly members onto the record."[50] In 2023, two bank failures prompted debate about whether Congress had been right to repeal key provisions of Dodd-Frank five years earlier, highlighting "internal divisions among Democratic senators, who usually pride themselves on policy unity."[51]

In the face of such divisions, it is no surprise that Democratic leaders prefer to focus on issues that unite the party. The early Biden Administration, for example, featured successful legislative efforts on climate, infrastructure, and social safety net policy.[52] Each of these initiatives largely unified the Democratic coalition. For topics about which that is not the case—including certain aspects of financial regulation—party leaders will have less incentive to raise the issue, since doing so risks exposing divisions in the caucus and falling short on votes if a bill were to come to the floor.

D. Policy Complexity and Congressional Capacity

Another key challenge for regulatory legislation designed to prevent financial crises is that the complexity of the topic can outstrip Congress's capacity and expertise. The problem of congressional capacity is a general one, but it is especially acute for many future threats. These difficulties make it challenging for Congress to craft regulatory legislation to prevent financial crises.

The core problem is Congress's lack of policy expertise. Members devote much of their time to nonlegislative activities, such as fundraising and campaigning.[53] Even when legislating, members are nearly all generalists who lack deep expertise.[54] The search for expertise then shifts to congressional staff. But "[s]ince 1980, Congress as an institution has been steadily divesting itself of its own resources" through reduced staffing levels, increased turnover and shorter tenures, and less time in session.[55] At any

50 Newmyer & Firozi, *supra* note 49.

51 Burgess Everett & Eleanor Mueller, *Bank Failures Revive Bitter Senate Democratic Infighting*, POLITICO (Mar. 14, 2023), https://www.politico.com/news/2023/03/14/svb-senate-democrat-infighting-00087097.

52 *See* Dustin Jones, *Despite Infighting, It's Been a Surprisingly Productive 2 Years for Democrats*, NPR (Jan. 1, 2023), https://perma.cc/T2WY-QCGT.

53 *See generally* Ciara Torres-Spelliscy, *Time Suck: How the Fundraising Treadmill Diminishes Effective Governance*, 42 SETON HALL LEGIS. J. 271 (2018) (discussing this issue).

54 *See, e.g.*, KAISER, *supra* note 21, at 104 (discussing why legislators rarely develop policy expertise).

55 *See* Timothy M. LaPira, Lee Drutman & Kevin R. Kosar, *Overwhelmed: An Introduction to Congress's Capacity Problem*, *in* CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY 1, 1–2 (Timothy M. LaPira, Lee Drutman & Kevin R. Kosar

given time, many young congressional staffers will not have professional experience responding to a financial crisis—and some will not even have any memory of the last crisis. Some staff members (especially committee staff) have deep backgrounds in technical subject matter, but committees are less important to the legislative process than they once were.[56] Internal expertise shortfalls often prompt Congress to rely on the expertise of regulated industries and their representatives, which can provide Congress with valuable information that can aid in policy formulation. But that information comes at a cost, since firms have incentives to present information in ways that further their own interests.

These general dynamics can be particularly pronounced with respect to future threats. Such threats present uncertainty along at least four dimensions. First, there is uncertainty about the probability of a given harm coming to pass. (What is the likelihood of a crisis within a given time horizon?) Second, there is uncertainty about the magnitude of harm if it does come to pass. (How bad would the crisis be?) Third, there is uncertainty about whether a proposed policy intervention would reduce the probability and magnitude of harm and, if so, by how much. (What difference would the policy intervention make?) And fourth, there is uncertainty about whether an effort to reduce risk in one domain might accidentally create spillover risk in another. (Would such spillover exist, and how bad would it be?) Each of these types of uncertainty characterizes financial stability legislation. Similar uncertainties exist for other sorts of future harms—like natural disasters, acts of terrorism, or harms arising from artificial intelligence. These uncertainties either do not exist or exist to a much lesser degree when the subject matter at issue is a present harm.

Moreover, several features of the financial sector make Congress's information problem particularly acute, even relative to other future harms. Scholars have identified complexity as a defining feature of modern finance.[57] Alongside this complexity is

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eds., 2020); *see also* Molly E. Reynolds, *The Decline in Congressional Capacity*, *in* CONGRESS OVERWHELMED, *supra*, at 34, 34–50 (documenting declines in congressional capacity over time on the axes of personnel, financial resources, and internal expertise).

56 *See, e.g.*, Curry & Lee, *supra* note 46, at 47 (arguing that contemporary party leaders "take a much more central role in the legislative process," including through "bypassing committees").

57 *See e.g.*, Awrey & Judge, *supra* note 9, at 2310 (arguing that "[t]he ongoing globalization of finance, the constantly shifting structure of the financial system, and the fact that market participants can often extract rents from greater opacity make complexity

dynamism: constant innovation in the financial system. As Professors Daniel Awrey and Kathryn Judge have noted, financial innovation includes "theoretical insights (like the Black-Scholes option pricing model), technological developments (like massive increases in computing power), and the emergence of new financial markets, institutions, and instruments (like derivatives and structured finance)."[58] The emergence and rapid spread of fintech provides further dynamism and complexity to the world of finance.[59]

In sum, the complexity and dynamism of contemporary finance, whatever its other advantages and disadvantages, makes it especially challenging for Congress to hold a deep understanding of risks to financial stability and possible policy responses to mitigate those risks. One response to these challenges is for Congress to take steps to increase its capacity. Congress can improve staffing in general, build greater internal expertise, and take more particular steps to better predict future threats and understand how to prevent them.[60] Unless those steps are taken, however, Congress will continue to face a structural shortfall.

E. (Lack of) Substitutable Spending

Across domains, the difficulty of enacting regulatory legislation often prompts Congress to turn to spending as a substitute. But spending is limited in its ability to prevent financial crises before they occur. Spending can help stabilize the system during or after a crisis, but regulatory mandates to ensure the soundness of the financial system—mandates that so often seem beyond Congress's reach—are necessary to fend off crises in the first instance.

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endemic to today's financial system"); Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211, 213 (2009) (describing complexity as "the greatest financial-market challenge of the future").

58 *See* Awrey & Judge, *supra* note 9, at 2305. Often, multiple forces will converge to lead to innovation in particular domains. *See, e.g.*, *id.* at 2306 (noting that innovations allowing the rise of the "shadow banking" system "included creative new uses of legal structures, new modeling techniques, and massive increases in computing power").

59 *See generally* Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232 (2018).

60 *See generally* CONGRESS OVERWHELMED, *supra* note 55 (discussing the problem of congressional capacity); Rory Van Loo, *Stress Testing Governance*, 75 VAND. L. REV. 553 (2022) (discussing hiring practices, future-oriented simulations, and other institutional tools focused on future threats).

Several forces can push Congress toward preferring spending money to regulatory mandates.[61] We have already seen the political economy story on why enacting regulatory legislation is often difficult—concentrated harms, diffuse beneficiaries—but a parallel story is that spending is often more politically feasible because it typically creates concentrated beneficiaries (fund recipients) while diffusing costs (among taxpayers as a whole). Further, Congress operates under a bifurcated system of legislative procedure that allows some spending measures to bypass the filibuster and be enacted by a simple majority vote.[62]

A playing field tilted toward spending and against regulatory legislation impedes financial regulatory legislation. The private nature of U.S. banking means that regulatory interventions—first by Congress, and then typically via additional action by administrative agencies—must be a central part of safeguarding against future crises.[63] Indeed, most financial regulatory legislation aimed at promoting stability imposes binding obligations on banks and other financial institutions. The fact that Congress's institutional rules and public choice dynamics encourage Congress to make policy through spending tilts the playing field against financial regulatory legislation, making it difficult (though not impossible) to legislate on issues of financial stability.

To be sure, Congress spends massive amounts of money to respond to financial crises, but response is different from prevention. Perhaps most famously, Congress in 2008 created the $700 billion Troubled Asset Relief Program (TARP), which stabilized the financial system in the midst of a crisis but created a moral hazard problem moving forward.[64] One could imagine a range of

61 This paragraph's arguments are developed in detail in Jonathan S. Gould, *A Republic of Spending*, 123 MICH. L. REV. 209, 231–34, 242–48 (2024).

62 *See* David Wessel, *What Is Reconciliation in Congress?*, BROOKINGS INST. (Feb. 5, 2021), https://perma.cc/7C6Y-VXUF (explaining the reconciliation process, in which certain fiscal legislation is not subject to supermajority cloture rules). Other factors, such as the political incentives of the two parties and the differential standards of judicial review, also ease the path toward spending over regulatory legislation. *See* Gould, *supra* note 61, at 234–42, 248–54.

63 Indeed, even public banks can create systemic risk. *See generally, e.g.*, Viral V. Acharya & Nirupama Kulkarni, *State Ownership and Systemic Risk: Evidence from the Indian Financial Sector During 2007–09* (Int'l Growth Ctr., Working Paper, 2012) (available at https://perma.cc/TPZ7-WVHJ).

64 *See* David M. Herszenhorn, *Congress Approves $700 Billion Wall Street Bailout*, N.Y. TIMES (Oct. 3, 2008), https://www.nytimes.com/2008/10/03/business/worldbusiness/03iht-bailout.4.16679355.html. Despite what many regard as TARP's success as a policy, it became infamous for bailing out big banks whose behavior had contributed to the financial crisis. *See, e.g.*, John Maggs, *Criticism of TARP Persists*, POLITICO (Oct. 1, 2010),

other government responses to crisis that rely on spending: bailouts, stimulus, buying debt, or even buying banks. Each of these, however, is a possible response to crisis, not a means of averting crisis in the first instance.[65]

In this sense, promoting financial stability poses an especially hard problem for Congress. For some types of risks, spending can at least partially substitute for regulation: massive green energy investments can help tackle climate change,[66] and spending can promote pandemic preparedness.[67] In the financial stability context, by contrast, spending can less easily substitute for regulation. When the policy objective is the need to prevent financial crises before they happen, the fact that spending is not an effective substitute for regulation provides another reason why it is challenging for Congress to act.

F. Postenactment Erosion

The institutional factors just described account for why Congress might fail to legislate to address the risk of financial crises. But even when Congress does enact such legislation, its output is not the last word. Legislation is often rendered less effective by subsequent action by later Congresses, agencies, and the courts.[68]

First, Congress might roll back its earlier efforts. We have already discussed how only eight years after enacting Dodd-Frank, as memory of the last crisis faded, Congress repealed some of the statute's key provisions relating to bank soundness.[69] Similarly, only ten years after enacting the Sarbanes-Oxley Act of 2002,[70] Congress enacted new legislation that exempted certain

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https://www.politico.com/story/2010/10/criticism-of-tarp-persists-042995; John Dunbar & David Donald, *The Roots of the Financial Crisis: Who Is to Blame?*, CTR. FOR PUB. INTEGRITY (May 6, 2009), https://perma.cc/YNT4-UMPC.

65 Spending is of course critical to ensuring agency capacity to engage in monitoring and enforcement, as we discuss in Part II, but spending on those activities is a supplement to a robust regulatory framework, not a substitute for it.

66 *See* Gould, *supra* note 61, at 227–30.

67 *See generally* Brendon Sen-Crowe, Mark McKenney & Adel Elkbuli, *Public Health Prevention and Emergency Preparedness Funding in the United States: Are We Ready for the Next Pandemic?*, 59 ANNALS MED. & SURGERY 242 (2020).

68 *See* John C. Coffee, Jr., *The Regulatory Sine Curve: What Explains the Retreat from Systemic Risk Regulation (and Why It Was Predictable)*, *in* AFTER THE CRASH: FINANCIAL CRISES AND REGULATORY RESPONSES 281, 281 (Sharyn O'Halloran & Thomas Groll eds., 2019) (noting that since 2012, "regulatory and legislative movement has been almost entirely in the direction of deregulation" and citing examples).

69 *See supra* notes 18–26 and accompanying text.

70 Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15, 18, 28, and 29 U.S.C.).

companies from some of the law's requirements with respect to internal controls.[71] While on a longer time horizon, Congress in 1999 repealed parts of the Banking (Glass-Steagall) Act of 1933[72] requiring the separation of commercial and investment banking.[73] Interest groups lobbied hard for these rollbacks, each of which Congress enacted on a bipartisan basis.[74] These rollbacks show that outside of the immediate aftermath of a crisis, Congress may undo regulatory legislation that it previously imposed.

Second, agency action (or inaction) can render regulatory legislation less effective. Agency inaction is a major challenge in financial regulation, as in other regulatory spheres.[75] Scholars have documented in detail the distinct features of the financial sector, and the agencies regulating that sector, that can give rise to industry capture. These features include revolving doors of personnel between agencies and regulated entities, agency reliance on regulated entities for nonpublic information, some agencies' dependence on regulated entities for fees to fund agency operations, competition between regulators in certain contexts that can lead to laxity, the need for financial regulators (unlike regulators in many other fields) to worry about the possible failure of regulated entities, and the prevalence of supervision and "soft law" rather than more formal notice-and-comment rulemaking in many financial regulatory contexts.[76] The exact causes and character of regulatory capture are beyond our scope here. But from Congress's standpoint, one plausible lesson from the capture scholarship is that agency action will at times render financial regulatory statutes less effective than those statutes' designers would have hoped.

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71 *See* Jumpstart Our Business Startups (JOBS) Act of 2012, Pub. L. No. 112-106, § 103, 126 Stat. 306, 310 (codified as amended in scattered sections of 15 U.S.C.).

72 Pub. L. No. 73-66, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.).

73 *See* Financial Services Modernization (Gramm-Leach-Bliley) Act of 1999, Pub. L. No. 106-102, § 101, 113 Stat. 1338, 1341 (codified as amended in scattered sections of 12, 15, 16, and 18 U.S.C.) (repealing the Glass-Steagall Act of 1933, §§ 20 and 32).

74 *See, e.g.*, Michael Rapoport, *Tallying the Lobbying Behind the JOBS Act*, WALL ST. J. (May 25, 2012), https://www.wsj.com/articles/BL-WB-34693 (noting there were more than three times as many lobbyists for the JOBS Act as there were lobbyists against it).

75 *See, e.g.*, CONGRESSIONAL OVERSIGHT PANEL, SPECIAL REPORT ON REGULATORY REFORM 18–19 (2009) (concluding that "[i]n too many cases, regulators had the tools but failed to use them" prior to the 2008 crisis).

76 For discussions of these features, see Levitin, *supra* note 9, at 2042–44; Metzger, *supra* note 5, at 133–37; and Saule T. Omarova, *Bankers, Bureaucrats, and Guardians: Toward Tripartism in Financial Services Regulation*, 37 J. CORP. L. 621, 629–32 (2012).

Third, opponents of regulatory statutes or agency regulations implementing those statutes can turn to the courts. Empirical evidence shows that financial institutions sue their regulators less often as compared to firms in other industries.[77] But courts have the potential to trim the sails of financial regulators. Doctrinal developments—including the demise of *Chevron* deference,[78] the rise of the major questions doctrine,[79] and restrictions on agency adjudication[80]—each make it harder, at the margins, for financial regulatory agencies to act.

Finally, even without subsequent action, what political scientists have called policy drift or decay tends to make regulatory statutes less effective over time. On this view, "policies designed for today's world are unlikely to provide a perfect fit tomorrow," and in fact, over time, "the fit of policy to the world around it worsens."[81] Even when regulatory provisions remain on the books, financial innovation may reduce their effectiveness. The rise of shadow banking, a system that some scholars have argued "specifically evolved to evade regulatory restrictions on banking,"[82] provides one example. Even if the formal scope of banking laws was to be held constant, the increasing importance of nonbank financial institutions would have the effect of reducing the share of overall financial activity that those laws cover. Technological

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77 *See* David Zaring, *The Corporatist Foundations of Financial Regulation*, 108 IOWA L. REV. 1303, 1322–29 (2023). Professor Zaring argued that judicial review "is largely absent when it comes to financial regulations," *id.* at 1324–25, and showed that the low frequency of lawsuits against the Federal Reserve and the Comptroller of the Currency as compared to the Environmental Protection Agency, *id.* at 1327 tbl.1.

78 *See* Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2264–70, 2273 (2024) (overruling Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984)).

79 *See* Jody Freeman & Matthew C. Stephenson, *The Anti-Democratic Major Questions Doctrine*, 2022 SUP. CT. REV. 1, 2–20 (tracing the rise and evolution of the major questions doctrine).

80 *See* SEC v. Jarkesy, 144 S. Ct. 2117, 2139 (2024) (holding that the Seventh Amendment bars the SEC from imposing civil penalties for securities fraud without a jury trial).

81 Steven Callander & Gregory J. Martin, *Dynamic Policymaking with Decay*, 61 AM. J. POL. SCI. 50, 51 (2017) (emphasis omitted); *see also, e.g.*, Daniel J. Galvin & Jacob S. Hacker, *The Political Effects of Policy Drift: Policy Stalemate and American Political Development*, 34 STUD. AM. POL. DEV. 216, 217 (2020) (describing how "[d]rift occurs when a policy or institution is not updated to reflect changing external circumstances").

82 Brett McDonnell & Daniel Schwarcz, *Regulatory Contrarians*, 89 N.C. L. REV. 1629, 1630 n.2 (2011).

changes, in banking and more broadly, can likewise create regulatory gaps.[83]

The bottom line from all of this is that it is challenging for a regulation-minded Congress to have the last word. The full contours of the law will be shaped by policy drift and future action by a combination of later Congresses, agencies, and the courts. Those forces will typically push policy in the direction of less strict, rather than more strict, regulation. The result is that existing legislation addressing future harms will often weaken over time.

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This Part has shown that legislating to address risks of future harms is difficult, as illustrated by the case of financial regulation to address systemic risk. In the face of these hurdles, how should Congress approach financial regulation? What, if anything, can it do to mitigate the dynamics just described? We turn to these questions next.

II. FUTURE-ORIENTED LAWMAKING

The preceding discussion showed the difficulty of Congress legislating to address future harms, with financial crises as the paradigm case. We turn next to how Congress should proceed when it *does* legislate.[84] Our overarching answer is that, during such moments, Congress should act with self-awareness of the high likelihood of its own future inaction.

In concrete terms, this points toward four approaches to legislating for the future. First, Congress can pass legislation with provisions that automatically go into effect when certain conditions are met, obviating the need for frequent congressional action. Second, rather than trusting agencies to act, Congress can impose mandates on agencies or pass provisions with strong default rules. Third, Congress can better empower agencies to address emergent or fast-moving harms, so that agencies that have

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83 *Cf.* Jason Brett, *Congress Creates a Storm of Crypto Legislation*, FORBES (Aug. 3, 2023), https://www.forbes.com/sites/jasonbrett/2023/08/03/congress-creates-a-storm-of-crypto-legislation/ (discussing proposed cryptocurrency legislation in response to this problem).

84 We recognize that our pivot from diagnosis to recommendations risks a version of the "inside/outside fallacy," under which our (external) critique of Congress undermines our (internal) prescriptions. *See generally* Eric A. Posner & Adrian Vermeule, *Inside or Outside the System?*, 80 U. CHI. L. REV. 1743 (2013). Our response is that Part I examined why Congress will *often* fail to act, but not always, and Part II examines how Congress should act when a window of opportunity arises.

the will to act also have the ability to do so effectively. Finally, Congress can empower other actors—backup federal agencies, state agencies, and private litigants—in case the primary federal agency declines to act.

This analysis is both descriptive and prescriptive. In a descriptive register, it helps explain why parts of financial regulatory law take the forms that they do. In a prescriptive register, we suggest various means of legislating that are sensitive to the limitations described in Part I. The following proposals would all help allow Congress to enable effective regulation in the face of its structural limitations. Some suggestions are also more precisely tailored to address the threat of future congressional inaction.

We aim to offer a menu of legislative design tools, rather than a specific proposal. Our focus is not on particular policies, but on the many types of tools in Congress's toolbox. We are under no illusion that Congress will soon pass new comprehensive regulatory legislation seeking to address financial crises or any other future risk. But our hope is that this Part shows ways that Congress can (and sometimes does) act that reflect an awareness of the realities and constraints described in the previous Part.[85]

A. Automatic-Updating Mechanisms

To account for possible inaction by a future Congress or agency, legislative provisions can update automatically in the future. Such provisions become operational only if certain specified conditions are met, which allows them to go into effect, adjust their content, or cease operating altogether without further government action.

One version of such legislation involves triggers keyed to economic or other events in the world. A long-standing challenge of financial regulation is that when the economy is booming, regulators tend to relax restrictions, thereby feeding the economic boom.[86] Yet in such moments, precisely the opposite is often what is needed.[87] This challenge was evident in the early 2000s, when

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[85] A corollary of the fact that our discussion here follows from the congressional dynamics described in Part I is that if those dynamics were to change, a different set of legislative policy tools may be appropriate.

[86] *See, e.g.*, Jeremy C. Kress & Matthew C. Turk, *Rethinking Countercyclical Financial Regulation*, 56 GA L. REV. 495, 499 (2022) (summarizing this challenge).

[87] For scholarly discussions of "countercyclical" financial regulation, see generally Jonathan S. Masur & Eric A. Posner, *Should Regulation Be Countercyclical?*, 34 YALE J. ON REGUL. 857 (2017); and Patricia A. McCoy, *Countercyclical Regulation and Its Challenges*, 47 ARIZ. ST. L.J. 1181 (2016).

regulators facilitated financial innovation in mortgage lending that contributed to a housing bubble.[88] When that bubble burst, regulators exacerbated the ensuing financial crisis by implementing policies that discouraged banks from lending at a moment when the economy needed more credit.[89] In other words, financial regulation encouraged risky behavior, and then when the economy began to plummet, regulators exercised authority in ways that worsened the recession.

Dodd-Frank responded by directing regulators to establish rules requiring that banks hold a level of capital that "increases in times of economic expansion and decreases in times of economic contraction."[90] The resulting rules were not sufficiently directive to ensure automatic adjustments,[91] as Dodd-Frank provided that regulators "shall seek to make such requirements countercyclical."[92] A stronger approach sensitive to the dynamics of regulatory policymaking would have mandated adjustment of capital as an automatic mathematical function of one or more objective indicators of economic well-being, rather than assuming a future Congress or agency will proactively adjust the rule.

Automated legislation can help to bypass lawmakers' disagreements about what is likely to happen in the future and thereby build consensus in the present. For instance, members of Congress might disagree about the likely effects of artificial intelligence—say, on employment rates or personal finance. But if lawmakers agree on what should happen under specific conditions, they may authorize additional regulatory provisions (whether statutory mandates on private parties or delegations to administrative agencies) to kick in only when certain conditions are met, such as when the unemployment rate rises above a given threshold or when a certain percentage of consumers rely on digital advisers to automatically manage their savings.

The main advantage of using automatic-adjustment mechanisms is that such mechanisms can, in Professor David Kamin's words, "respond quickly and predictably to new information—often, more quickly and more predictably than relying on the later

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88 *See* Daniel Schwarcz & David Zaring, *Regulation by Threat: Dodd-Frank and the Nonbank Problem*, 84 U. CHI. L. REV. 1813, 1825–30 (2017).

89 *See* Gabriel Rauterberg & Joshua Younger, *What Is the Law's Role in a Recession?*, 135 HARV. L. REV. 1351, 1356, 1380 (2022) (book review).

90 Dodd-Frank Act § 616(a)(2), 124 Stat. at 1615.

91 *See* 12 C.F.R. § 217.11 (2024).

92 12 U.S.C. § 1844(b).

discretion of some combination of Congress, agencies, or courts."[93] Because the enacting Congress knows that its successors or other governmental actors might be unable or unwilling to act later, a legislative provision that kicks in when specified conditions obtain is an effective way of overcoming inertia. To be sure, imperfectly designed triggers might lead to either an excessive or insufficient government response to future conditions. But neither problem should count as much of a strike against triggers. With respect to the possibility of insufficient regulatory strictness, that possibility always exists and is more likely to come to pass without triggers than with. Conversely, the problem of an excessive response is mitigated by the fact that Congress is structurally well situated to weaken or repeal overly stringent regulation, for the reasons set forth in Part I.

Another category of triggers is based not on conditions but instead on time. Most prominently, scholars concerned about overregulation have proposed sunset clauses (expiration dates) in some contexts such as securities regulation.[94] Sunsets make sense if Congress is prone to overlegislating—the opposite of the problem that we have identified for financial regulation and other future risks. When the problem is instead a bias toward congressional inaction, the solution could be the opposite approach: "sunrise" provisions that do not go into effect until some amount of time has elapsed.[95] By way of example: it has become standard for state regulations banning the sale of new gasoline cars to go into effect years into the future so that firms and consumers have ample time to adjust to the new regulatory environment.[96]

Sunrise laws offer a promising application in the context of innovative industries. Sunrises could provide a grace period to allow time for an industry in its infancy to develop. Sunrises might

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93 David Kamin, *Legislating for Good Times and Bad*, 54 HARV. J. ON LEGIS. 201, 206 (2017).

94 *See generally, e.g.*, Romano, *Regulating in the Dark*, *supra* note 3 (advocating for the use of sunset clauses in financial regulatory legislation). We take no position on whether such proposals are warranted in the context of corporate governance and investor protection. Those areas have a different political economy than financial stability because regulations in those other areas sometimes protect groups (typically investors) that have considerable influence.

95 *See generally* Daniel E. Herz-Roiphe & David Singh Grewal, *Make Me Democratic, but Not Yet: Sunrise Lawmaking and Democratic Constitutionalism*, 90 N.Y.U. L. REV. 1975 (2015) (discussing examples of these sorts of provisions and their virtues and vices).

96 *See, e.g.*, Coral Davenport, Lisa Friedman & Brad Plumer, *California to Ban the Sale of New Gasoline Cars*, N.Y. TIMES (Aug. 24, 2022), https://www.nytimes.com/2022/08/24/climate/california-gas-cars-emissions.html.

even be more politically palatable because the costs to industry will arrive later. For emergent industries, the lag may allow firms to become better established and better able to afford compliance costs in the future. For all industries, the time lag may reduce the incentive to organize against regulatory legislation.

B. Mandating Agency Action

Although automated legislation can reduce the need to rely on agencies, delegation to agencies will often still be necessary and desirable. Agencies often fail to exercise the power that Congress has given them, however, even when doing so would be in the public interest.[97] To address this problem, Congress can seek to force agency action. One way of doing so is to legislatively mandate minimums, or floors, such as requiring at least one annual inspection for each regulated entity. Another way is to legislatively impose a strict backup rule if an agency fails to act.

On the enforcement side, Congress sometimes mandates minimum action levels for agencies. Historically, after beginning by simply authorizing agencies to monitor firms, Congress has often realized that it needed to impose minimums on how often agencies monitor.[98] For instance, in the late 1900s, following disastrous oil spills, deadly food poisoning outbreaks, and fatal mine shaft collapses, Congress ordered regulators to inspect offshore oil platforms, risky food manufacturing facilities, and underground mines at least once every year or on some other minimum timeline.[99] Decades prior, Congress authorized bank regulators to conduct examinations, and within a year it realized that it needed to require two annual examinations of each bank and amended the statute accordingly.[100]

Congress should set floors when empowering agencies to engage in monitoring. In the wake of the 2008 financial crisis, Congress seems to have come to this conclusion. It authorized a

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97 *See, e.g.*, HOWARD DAVIES, THE FINANCIAL CRISIS: WHO IS TO BLAME? 5, 57–64 (2010) (noting regulators had, but did not use, the power to require that banks hold more capital and larger reserves).

98 *See* Rory Van Loo, *Regulatory Monitors: Policing Firms in the Compliance Era*, 119 COLUM. L. REV. 369, 426–28 (2019) [hereinafter Van Loo, *Regulatory Monitors*].

99 *See id.*

100 *See id.* at 386 (discussing the National Currency Act, ch. 58, 12 Stat. 665 (1863) (repealed 1864) and the National Bank Act of 1864, ch. 106, 13 Stat. 99 (codified as amended in scattered sections of 12 U.S.C.)).

new regulatory tool: stress testing the largest banks, which provides information on which banks might be at risk of failing.[101] However, Congress did not simply authorize such tests. Instead, it required the biggest banks to conduct such a test at least once every two years under Federal Reserve supervision.[102] Whatever the limitations of stress tests as a policy tool, Congress rightly recognized that the only way to guarantee that they were used was to make them mandatory.

Enforcement minimums are not limited to gathering information. Following years of savings and loan fraud that threatened the stability of the banking system, Congress in 1991 passed a statute that would automatically punish financial institutions that became undercapitalized, through heightened oversight including a limitation on growth absent regulatory approval.[103] This sort of rule does not give the agency the discretion to decide when it takes control, which denies the possibility of harmful agency inaction.

Congress can also use automatic mechanisms to incentivize timely agency rulemaking. Even when ordered to write rules by a specific date, agencies often delay for years beyond the deadline.[104] Congress can prevent these delays by providing for strong statutory default rules. A default rule could become law if the agency fails to write a different rule by a certain date, or if the agency's rule becomes inoperable (such as if it is vacated by a court).

Dodd-Frank shows the power of this approach. With respect to mortgage consumer-protection provisions, the law would have imposed new requirements on financial institutions if the Consumer Financial Protection Bureau (CFPB) failed to write rules by a specific date.[105] This contrasts with other issues on which Dodd-Frank gave agencies more discretion, which led to long delays.[106]

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101 *See* 12 U.S.C. § 5365(i)(2).

102 *See id.*

103 *See* Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 38(d)–(i), 105 Stat. 2236, 2255–63 (codified as amended in scattered sections of 12 and 15 U.S.C.).

104 *See generally* KEVIN J. HICKEY, CONG. RSCH. SERV., R45336, AGENCY DELAY: CONGRESSIONAL AND JUDICIAL MEANS TO EXPEDITE AGENCY RULEMAKING (2018).

105 *See* Dodd-Frank Act § 1400(c)(3), 124 Stat. at 2136.

106 *See, e.g.*, Arbitration Agreements, 82 Fed. Reg. 33,210, 33,210–11 (July 19, 2017) (to be codified at 12 C.F.R. pt. 1040) (seven-year delay on arbitration rule).

Congress could have instead imposed a default rule, automatically effectuated after a short period, perhaps two years, unless the relevant agency wrote an alternative rule before then.

Environmental law provides models of how Congress can use default rules to spur agency action. After the EPA failed to meet rulemaking deadlines for the Resource Conservation and Recovery Act,[107] Congress passed amendments to spur action.[108] The amendments provided that if the EPA failed to meet a rulemaking deadline, a tough default rule would go into effect (the "soft hammer").[109] If the EPA missed a later final deadline, an even stricter rule would go into effect (the "hard hammer").[110]

An advantage of this approach is that it can flip industry motivations. In the EPA case, Congress was aware that the agency had missed deadlines partly because industry had slowed the agency down through lawsuits.[111] After the amendments, however, slowing the EPA down meant harsher default rules. Unsurprisingly, following the amendments, the EPA faced fewer lawsuits and met its deadlines.[112]

Although the agency could theoretically water down such rules later, the starting point of strong regulation would anchor the agency's subsequent actions. To weaken the rule, the agency would need to dedicate scarce time and staff resources, produce a plausible cost-benefit analysis, and go through notice-and-comment rulemaking.[113] It would also have to produce an alternative proposal that could survive arbitrary and capricious review, since courts' general posture of deference toward agency inaction does not extend to rulemakings that weaken or repeal existing regulatory requirements.[114]

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107 Pub. L. No. 94-580, 90 Stat. 2795 (1976).

108 *See* Land Disposal Program Flexibility Act of 1996, Pub. L. No. 104-119, §§ 2, 4(2)–(5), 110 Stat. 830, 830–31, 833 (codified at 42 U.S.C. § 6924).

109 *See id.* § 6924(f)–(g); Richard J. Lazarus, *Super Wicked Problems and Climate Change: Restraining the Present to Liberate the Future*, 94 CORNELL L. REV. 1153, 1225–26 (2009) (discussing the default standard created by amendments to the Resource Conservation and Recovery Act).

110 *See* 42 U.S.C. § 6924(f)–(g); Lazarus, *supra* note 109, at 1226.

111 Lazarus, *supra* note 109, at 1225.

112 *See id.* at 1226.

113 *See* MAEVE P. CAREY, CONG. RSCH. SERV., RL32240, THE FEDERAL RULEMAKING PROCESS: AN OVERVIEW 2 fig.1 (2013).

114 *See* Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29, 42 (1983) ("[A]n agency changing its course by rescinding a rule is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance.").

These examples show how Congress can do far more than just delegate to agencies. Congress can compel certain types of agency action or impose regulatory mandates that remain in force absent agency action to the contrary. Either of these approaches provides a means of overcoming the inertia—by both agencies and future Congresses—that can prevent effective regulatory action.

C. Empowering Agencies

Empowered agencies are not sufficient for an effective regulatory regime, since there is no guarantee that agencies will in fact use the power that they hold. But empowered agencies are necessary. There are several ways in which Congress can shape agency effectiveness, including effectiveness in addressing future risks such as financial crises. Agencies must have sufficient resources and capacity to accomplish their goals, sufficient information access to monitor and respond to emerging risks, and the flexibility to pursue both rulemakings and enforcement actions. We take up each of these in turn.[115]

1. Funding and capacity.

Agency effectiveness depends on capacity. Agencies need funding and personnel to be effective, including in addressing future risks.[116] Congress holds significant sway over agency capacity. Congress determines whether an agency can hire and retain more officials, pay salaries to attract and retain talent in competitive labor markets, and otherwise have the resources to do their jobs effectively.[117] Yet regulators' budgets often stagnate

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115 A critical feature of agency design, but one that is beyond our scope here, is how Congress should design agencies to reduce the likelihood of capture. Important as this topic is, it is not our focus for three reasons. First, Congress will much more often be able to intervene at the level of individual policies—such as by deciding whether or not to tie an agency's hands or use an automatic trigger, by granting or denying an agency power over a particular domain, or by increasing the flow of information or federal dollars to agencies—than it will be to restructure agencies in more fundamental ways. Second, there is already a voluminous literature on preventing agency capture. Third, many of the techniques that Congress has historically used to seek to insulate agencies from capture—such as insulating agency heads or civil servants from political control—are potentially vulnerable to constitutional challenges under the contemporary Supreme Court's jurisprudence.

116 *See generally* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585 (2021) (taxonomizing different aspects of agency capacity and showing ways in which capacity affects effectiveness).

117 *Cf.* STEPHEN G. BREYER, RICHARD B. STEWART, CASS R. SUNSTEIN, ADRIAN VERMEULE & MICHAEL E. HERZ, ADMINISTRATIVE LAW AND REGULATORY POLICY 101–06

over time, even as the industries they oversee expand considerably.[118] The result is that agencies often lack the ability to engage in the rulemakings, monitoring, and enforcement actions to adequately guard against future risks.

For Congress, the obvious response to these challenges is to provide agencies with greater resources. Most simply, this means appropriating adequate funds to support agency operations. But the annual nature of the appropriations process means that Congress must decide, each year, to adequately fund a given type of enforcement. The interest group dynamics described in Part I can make this challenging. The question emerges, then, what sorts of more creative funding mechanisms may be available that do not require Congress to continuously reaffirm its commitment to financial regulation.

Congress has devised a powerful solution to this problem: it allows many financial regulatory agencies to collect funds through fees, rather than through the annual appropriations process, which in turn makes funding more stable over time. The Federal Reserve, for example, is self-funded outside the appropriations process, through both its own market activities and fees assessed on banks.[119] Congress likewise provided the CFPB with an independent source of funding by allowing it to draw on the Federal Reserve's budget.[120] However, Congress imposed caps on the CFPB's future annual budget[121] that neglect the fact that greater resources might be needed depending on future financial innovations.[122]

Congress could also design funding streams to be more adaptive. For instance, lawmakers might link funding and agency personnel levels for activities like inspections or monitoring to the

(9th ed. 2022) (discussing tools of congressional control over the bureaucracy, including budgetary tools).

118 *See* James B. Stewart, *As a Watchdog Starves, Wall Street Is Tossed a Bone*, N.Y. TIMES (July 15, 2011), https://www.nytimes.com/2011/07/16/business/budget-cuts-to-sec-reduce-its-effectiveness.html (describing cuts to the SEC's budget even as it took on new statutory responsibilities).

119 *See* CONG. RSCH. SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES 30 (2023) (listing six agencies not subject to annual appropriations).

120 *See* 12 U.S.C. § 5497(a)(1). The Supreme Court recently rejected an Appropriations Clause challenge to this funding mechanism. *See* Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am., 144 S. Ct. 1474, 1479 (2024).

121 *See* 12 U.S.C. § 5497(a)(2).

122 *Cf., e.g.*, Tom C.W. Lin, *Artificial Intelligence, Finance, and the Law*, 88 FORDHAM L. REV. 531, 543–50 (2019) (discussing the implications of integrating AI with financial services).

size of the regulated industry as a default—ideally outside of the appropriations process—on the logic that more or larger firms require more resources for effective oversight. Another, albeit less powerful, approach would be requiring regulated entities to bridge the funding gap if Congress does not allocate funding proportional to the size of the industry. This arrangement would put financial institutions in the distinctive position of needing to use their influence in Congress to advocate for more funding for regulatory agencies if they want to avoid having to foot the bill.

Further creative funding arrangements that might also incorporate concerns about regulatory inaction are worth considering. One possibility would be linking an agency's funding to the number of examinations undertaken, so that an agency could increase its budget as the reasonable need for examinations grows. In such an arrangement, there is a risk of creating counterproductive incentives to overexamine. Linking funding to examinations thus makes sense only under the assumption that the risks of underexamining are greater than the risks of overexamining. That may be a safe assumption not only in light of agency incentives, but also because insufficient use of bank regulatory monitoring has historically been a problem in financial regulation.[123]

The broader takeaway is that a Congress wishing to promote agency capacity has tools for doing so. Congress can seek to secure funding on a long-term basis, outside of the annual appropriations process, and ensure funding commensurate with the scale of the agency's work. All of these are tasks for the legislative branch and areas in which a Congress wishing to enhance agency capacity is able to do so.[124]

2. Information access.

A second pillar of agency capacity is information. Without access to relevant information, agencies cannot act effectively. This holds across all regulatory domains, but it is perhaps especially

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123 *See, e.g.*, Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REGUL. 91, 94 (2012); Isaac Chotiner, *The Regulatory Breakdown Behind the Collapse of Silicon Valley Bank*, THE NEW YORKER (Mar. 19, 2023), https://www.newyorker.com/news/q-and-a/the-regulatory-breakdown-behind-the-collapse-of-silicon-valley-bank.

124 Congress has at times also exempted financial regulators from ordinary government salary scales in hopes of attracting and retaining first-rate personnel. *See, e.g.*, Paul Kupiec, *Guess Who Makes More Than Bankers: Their Regulators*, WALL ST. J., (Apr. 21, 2014), https://www.wsj.com/articles/SB10001424052702304311204579507512375765276.

true for agencies tasked with addressing future harms. Financial regulation shows the importance of information provision for regulatory agencies and the risks that attend to underinformed agencies.

Financial regulatory agencies have fairly expansive access to business information. Congress authorized regulatory monitoring of banks in 1863.[125] This authority has long been unusually extensive, with bank examiners able to look at any document.[126] As one former examiner depicted it in 1904, after an examiner "inserted an official-looking card between the bars of the cashier's window[,] . . . [f]ive minutes later the bank force was dancing at the beck and call of a national bank examiner."[127] Today, bank examiners still can access most any information they need, even without suspicion of wrongdoing by the bank.[128] At the largest banks, regulators have examiners onsite year-round.[129]

This information access does not mean that regulators always identify issues, of course. Prior to the 2008 financial crisis, prudential regulators had little visibility into the rise of mortgage-backed securities and credit default swaps.[130] Although it is impossible to know the counterfactual, financial regulators' blindness to the accruing risks is consistent with them being too focused on banks' traditional measures of safety and soundness, and not focused enough on credit rating agencies, financial innovation, and predatory consumer lending.[131]

Despite these failings, however, agencies' expansive access to bank information can help prevent bank failures or even full-blown financial crises. Moreover, even when regulators fail to prevent an adverse event, the information they have on hand can still prove valuable in containing its scope. Regulators failed to

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125 *See* National Currency Act, ch. 58, 12 Stat. 665.

126 *See* Eugene N. White, *Lessons from the History of Bank Examination and Supervision in the United States, 1863–2008*, *in* FINANCIAL MARKET REGULATION IN THE WAKE OF FINANCIAL CRISES 15, 21–22 (Alfredo Gigliobianco & Gianni Toniolo eds., 2009).

127 O. Henry, *A Call Loan*, *in* HEART OF THE WEST 257, 258 (1907); *see* John D. Hawke, Jr., Comptroller of the Currency, Remarks Before a Conference on Credit Rating and Scoring Models 4 (May 17, 2004) (available at https://perma.cc/4ZPG-GWA5) (confirming as accurate O. Henry's account, which was originally written as fiction).

128 *See* Van Loo, *Regulatory Monitors*, *supra* note 98, at 371, 384–89.

129 *See* Levitin, *supra* note 9, at 2044.

130 *See* Barr, *supra* note 123, at 93–96 (discussing the origins of the 2008 financial crisis, including regulatory failures).

131 *See id.*; Leonard J. Kennedy, Patricia A. McCoy & Ethan Bernstein, *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141, 1144–45 (2012) (describing regulatory failures that contributed to the 2008 financial crisis and led to the creation of the CFPB).

prevent the failure of Silicon Valley Bank in 2023.[132] But regulators' knowledge of depositors at Silicon Valley Bank and elsewhere informed their decisions—both about which deposits to treat as insured and whether to shut down another bank, Signature Bank—and may have helped prevent a broader crisis.[133]

The challenge that financial regulators have faced historically, and still face to some extent, is that those agencies monitoring for systemic risk—such as the Federal Reserve and the Office of the Comptroller of the Currency (OCC)—lack the authority to monitor nonbanks. This was a significant problem that contributed to the 2008 crisis.[134] Today, similar blind spots arguably exist for fintech firms that are increasingly providing automated advice, alternative credit, and other digital services to consumers.[135] One way for Congress to promote regulatory effectiveness in the face of future risks is to incentivize broad information gathering by agencies, so agencies can better identify (and address) risks before they materialize.

3. Expansive remedies and rulemaking authority.

Congress has given financial regulators significant authority.[136] Regulators can revoke a bank's license out of concerns about the financial system's soundness, amounting to a death sentence for a business.[137] They can cap growth, a severe penalty in a corporate world that prioritizes growth as a core value.[138] They can

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132 *See* Max Zahn, *Silicon Valley Bank: How a Digital Bank Run Accelerated the Collapse*, ABC NEWS, (Mar. 14, 2023), https://perma.cc/C94T-E48Z.

133 *See* Chotiner, *supra* note 123; Jeanna Smialek & Alan Rappeport, *Regulators Close Another Bank and Move to Protect Deposits*, N.Y. TIMES (Mar. 12, 2023), https://www.nytimes.com/2023/03/12/business/janet-yellen-silicon-valley-bank.html.

134 *See* KATHLEEN C. ENGEL & PATRICIA A. MCCOY, THE SUBPRIME VIRUS: RECKLESS CREDIT, REGULATORY FAILURE, AND NEXT STEPS 167–225 (2011) (discussing the origins of the 2008 financial crisis and regulatory failures).

135 *See* Rory Van Loo, *Digital Market Perfection*, 117 MICH. L. REV. 815, 824–30 (2019) (identifying this blind spot).

136 *See* Matthew C. Turk, *Overlapping Legal Rules in Financial Regulation and the Administrative State*, 54 GA. L. REV. 791, 800–07 (2020) (noting critiques that the Dodd-Frank Act and overlapping financial jurisdiction award financial regulators unrestricted discretion in their rulemaking authority).

137 *See* 12 U.S.C. § 92a(k).

138 *See, e.g.*, Emily Flitter, Binyamin Appelbaum & Stacy Cowley, *Federal Reserve Shackles Wells Fargo After Fraud Scandal*, N.Y. TIMES (Feb. 2, 2018), https://www.nytimes.com/2018/02/02/business/wells-fargo-federal-reserve.html.

impose fines for wrongdoing.[139] Alongside these more formal remedies, regulators can also ramp up examinations, which are costly for financial institutions and risk exposing additional violations.[140] All of these tools give regulators considerable leverage in negotiations with the institutions that they regulate.

Though Congress has already given financial regulatory agencies considerable power, the need for legally empowered agencies bears emphasis for two reasons. First, agencies addressing other sorts of risks do not always have—at least expressly—the expansive authority that Congress has given the financial regulatory agencies. A full survey is beyond our scope here, but agencies almost certainly lack the power necessary to adequately address other future threats, from climate change to biotechnology innovation to artificial intelligence.

Further, even if statutes give financial regulators expansive authority, limits on that authority have at times prevented government from addressing important risks. An important cause of the 2008 financial crisis, for example, was conduct by nonbanks that were beyond the regulatory reach of prudential regulators like the Federal Reserve.[141] This fact led Congress, in creating the CFPB, to give it authority to police consumer financial products even if offered by nonfinancial businesses.[142] Similarly, concerns that existing regulatory frameworks did not adequately address the possibility of institutions that were "too big to fail" led Congress to create FSOC and vest it with the authority to designate institutions (such as hedge funds or insurance companies) as "systemically important."[143] This designation makes the institution subject to heightened supervision by the Federal Reserve, which would otherwise lack authority.[144] The successes

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139 *See generally* VAL SRINIVAS, DANIEL BYLER, RICHA WADHWANI, ALOK RANJAN & VAMSI KRISHNA, DELOITTE CTR. FOR FIN. SERVS., ENFORCEMENT ACTIONS IN THE BANKING INDUSTRY (2015) (available at https://perma.cc/4KZT-JB93).

140 *See, e.g.*, Van Loo, *Regulatory Monitors*, *supra* note 98, at 416–17 (describing the potential for regulatory monitoring to serve as informal punishment).

141 More precisely: prudential regulators have authority over depository institutions, which includes not only banks but also credit unions regulated by the National Credit Union Administration. *See* MARC LABONTE, CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK 9–10 (2023).

142 *See* 12 U.S.C. § 5491(a) (describing the CFPB as "regulat[ing] the offering and provision of consumer financial products or services under the Federal consumer financial laws").

143 *Id.* § 5461; *see also* Metzger, *supra* note 5, at 146–47 (describing the creation of the FSOC).

144 *See* 12 U.S.C. § 5323.

and failures of FSOC are beyond our scope, but the key point for present purposes is that Congress felt the need to create FSOC because of gaps in existing regulatory statutes.[145]

Finally, the contemporary Supreme Court's jurisprudence should prompt Congress, when it enacts new delegations to administrative agencies to engage in rulemakings, to do so with specificity. In an ideal world, Congress could give agencies open-ended delegations, recognizing that the complex and dynamic nature of finance demands agencies that can issue new rules to serve the public interest in financial stability. But given changes in the Court's jurisprudence,[146] broad delegations run the risk of being narrowly construed (at best) or struck down altogether (at worst). A Congress wishing to prevent such outcomes should delegate rulemaking power in as precise a manner as possible, perhaps with express instructions that any ambiguities be construed in favor of agency authority.[147]

D. Encouraging Pluralistic Action

A central challenge associated with regulating future risks is that even when Congress acts, future Congresses or regulatory agencies might chip away at those actions. Congress can hedge against this risk by diffusing power. The theory behind this diffusion, from Congress's standpoint, is simple: if there is a worry that one institution will fail to act, empowering another actor can serve as a valuable backstop. We here focus on three sorts of actors: state governments, "backup" administrative agencies, and private litigants. None are perfect substitutes for effective federal regulation by Congress and the main regulatory agencies, but each shows how other actors can at times step in to partially (if imperfectly) fill regulatory gaps.

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[145] *See* Schwarcz & Zaring, *supra* note 88, at 1815–16; Jeremy C. Kress, Patricia A. McCoy & Daniel Schwarcz, *Regulating Entities and Activities: Complementary Approaches to Nonbank Systemic Risk*, 92 S. CAL. L. REV. 1455, 1506–10 (2019).

[146] *See supra* notes 79–81 and accompanying text.

[147] The Supreme Court has at times suggested that the major questions doctrine is grounded in an understanding of congressional intent to not delegate on major issues without doing so expressly. *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2609 (2022). The Court has not weighed in on whether Congress can meet this requirement of an express delegation with a blanket statement instructing courts to construe ambiguous statutes in favor of agency authority.

1. State governments.

One choice that Congress faces in regulating risks is how to view state governments. Are the states potential partners in regulation, or potential impediments to effective national-level regulation? For a Congress worried about insufficient regulatory action on the federal level, strategic empowerment of state governments can be an important policy tool.

In the financial regulation context, lawmakers faced this issue in drafting Dodd-Frank. When Congress sought to address the consumer protection weaknesses that led to the mortgage crisis—and by extension, the financial crisis—lawmakers needed to decide to what degree to preempt state laws. Dodd-Frank sought to maximize both state and federal abilities to intervene in consumer financial protection by establishing federal legislation as the floor above which states could add additional protections.[148] That model allows for states to fill gaps that future Congresses do not. Additionally, under Dodd-Frank, a majority of states can force the CFPB to undertake rulemakings to either establish or modify a CFPB regulation.[149] This model of allowing state regulation and even allowing states to force federal action is responsive to the structural limitations of Congress outlined in Part I.

The main downside of this model is the costs of firms complying with multiple states' regulatory regimes. Those costs sometimes make preemption appropriate, either entirely or with regard to certain types of entities (say, small firms that would have greater difficulty bearing the costs of regulation). In other instances, it might lead Congress to create a default rule of preemption but allow states to obtain exceptions upon offering evidence of a harm against which federal rules do not protect.[150] Yet another approach would be to use certain statutory triggers, such as providing that when a given number of states have implemented a requirement, a federal requirement goes into automatic effect.[151]

Another intervention is for Congress to empower state entities to enforce federal laws related to systemic risk. Dodd-Frank authorized states to enforce some federal consumer protection

148 *See* 12 U.S.C. § 5551(a).

149 *See id.* § 5551(c).

150 *See* Lazarus, *supra* note 109, at 1229; *see also* 42 U.S.C. § 7543(e)(2) (authorizing the EPA Administrator to allow California to adopt and enforce its own emissions standards).

151 *Cf.* Lazarus, *supra* note 109, at 1229 (discussing related approaches for climate change). Such an approach would have to be carefully designed to avoid possible nondelegation or other constitutional challenges.

laws, but that is not the case for laws related to systemic risk.[152] The possibility of uncoordinated or even conflicting suits filed by federal and state officials provides a reason to hesitate before empowering state enforcement of federal law. Additionally, states are less well situated to view the entire financial system's risk than is the federal government. But even private individuals have at times identified systemic risk concerns that federal regulators missed.[153] The risk of underenforcement by the federal government might at times lead the benefits of state-level enforcement to exceed the costs.

2. Overlapping agency jurisdiction.

Overlapping agency authority provides another option for increasing the number of entities that might fill the gap created by Congress's structural limitations. Congress often delegates related or overlapping authorities to multiple agencies.[154] This sort of overlap is especially common in financial regulation. For instance, the Federal Reserve, Federal Deposit Insurance Corporation (FDIC), and OCC all have some overlapping authority to ensure that Citigroup is not engaging in risky behavior—the Federal Reserve because Citigroup is a bank holding company, the OCC because one of its subsidiaries is a national bank, and the FDIC because some of Citigroup's deposits are insured.[155]

Overlapping agency authority offers several benefits. First is the simple numerical increase in the number of entities that might act when Congress fails to do so. Second, it is more difficult for industry to capture multiple agencies than solely one.[156] Third, overlapping agencies might influence one another in valuable ways, either through competition or through lobbying.[157] Indeed, a system in which agencies with overlapping authority "compete against each other can bring policy closer to the preferences of

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[152] *See* 12 U.S.C. § 5552(a)(1).

[153] *See, e.g.*, Harry Bradford, *Former Countrywide Whistleblower: Mortgage Fraud 'Systemic'*, HUFFPOST (Dec. 5, 2011), https://perma.cc/QCP5-WPY4.

[154] *See generally* Jacob E. Gersen, *Overlapping and Underlapping Jurisdiction in Administrative Law*, 2006 SUP. CT. REV. 201.

[155] *See* MARC LABONTE, CONG. RSCH. SERV., R47876, ENHANCED PRUDENTIAL REGULATION OF LARGE BANKS 8 tbl.1 (2023).

[156] *See* Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1185–87 (2012) (arguing that dispersed authority makes capture more costly).

[157] *See id.* at 1155 n.103 (citing sources on this point).

Congress than would delegation to a single agent."[158] Though overlapping agency jurisdiction comes with downsides like coordination costs and the potential for wasted resources,[159] these downsides will sometimes be outweighed by the benefits of overlap as a safeguard against agency inaction.

Congress has several ways of empowering multiple agencies. One approach is simply giving overlapping authority. This already partly happens in financial regulation, such as when the Federal Reserve and the OCC at times examine the same large bank for safety and soundness.[160] A more purposeful model would task the Federal Reserve or OCC with occasionally independently conducting the same examination and then comparing the results afterwards. Both agencies would have access to the results of the two examinations to see how they differ. This sort of overlap implicates a trade-off between minimizing errors and conserving resources. Duplicate work will not always be worthwhile, but if the cost of errors is high enough—which will often be the case if the downside risk is a bank failure or worse—then Congress may be wise to task agencies with duplicating work.

Another approach would be for Congress to enable agencies to audit each other's work. Congress could require one agency to share relevant data and other documents with another, so the second can review materials and ensure that the appropriate action is being taken. Congress can mitigate the risk of harmful agency inaction by tasking the second agency with assessing whether the initial agency made the right decision in light of the data. This structure can check agency inaction: if one agency decides not to pursue an inspection, impose a fine, or commence an enforcement action, another agency can second guess that decision. This sort of auditing role might also have ex ante effects on agency action: if inaction is likely to be called out, agencies might be more active in the first instance. (A more ambitious version of this proposal would be to allow the second agency to compel action by the first.[161])

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158 Gersen, *supra* note 154, at 212.

159 *See* Freeman & Rossi, *supra* note 156, at 1145–51.

160 *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., THE FEDERAL RESERVE SYSTEM: PURPOSE & FUNCTIONS 77 (10th ed. 2016) (available at https://fraser.stlouisfed.org/title/federal-reserve-system-5298) ("The Federal Reserve shares supervisory and regulatory responsibility for domestic banks with the OCC.").

161 Currently, some agencies have veto authority over other agencies' decisions, but that tends to mean blocking action, rather than compelling it. *See, e.g.*, Eric Biber, *Too Many Things to Do: How to Deal with the Dysfunctions of Multiple-Goal Agencies*, 33 HARV.

Congress can also seek to promote coordination through mechanisms that bring multiple agencies together. As noted above, Congress in 2010 created FSOC, a council comprised of the leaders of the CFPB, the Securities and Exchange Commission (SEC), the prudential regulators, and representatives from state regulatory agencies.[162] FSOC's primary job is to monitor for systemic risk through a broader lens than any individual prudential regulator might.[163] It is tasked with producing an annual report to Congress on emerging and unaddressed systemic risks.[164] The council also is tasked with collecting data and providing nonbinding recommendations to its members.[165] Beyond FSOC's current role, one could imagine additional roles that a convening agency or meta-agency might play, whether through monitoring the work of existing regulatory agencies or through facilitating interagency coordination, joint rulemakings, or joint enforcement efforts. A rational Congress, knowing of the limitations of individual agencies, might reasonably conclude that encouraging agencies to serve as checks on each other in some circumstances and to coordinate in others could further the public welfare.

3. Harnessing private parties.

While the discussion to this point has focused on how Congress can empower (or compel) other governmental actors, Congress can also enlist private parties. Different sorts of policies will make sense in different circumstances, but private parties can play a key role in operationalizing federal regulatory schemes.

First, Congress can enable private enforcement. As Professor Sean Farhang has observed, Congress may be motivated to create private enforcement regimes because such regimes "provide a form of auto-pilot enforcement, via market incentives, that will be difficult for future legislative majorities, or errant bureaucrats pursuing their own goals, to subvert."[166] Citizen suits have become

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ENVTL. L. REV. 1, 45–59 (2009) (providing an example from the Endangered Species Act context).

[162] *See* Dodd-Frank Act § 111(a)–(b), 124 Stat. at 1392–93.

[163] *See id.* § 112(a), 124 Stat. at 1394–96.

[164] *See id.* § 112(a)(2)(N), 124 Stat. at 1396.

[165] *See id.* § 112(a)(2)(A), (F), 124 Stat. at 1395.

[166] SEAN FARHANG, THE LITIGATION STATE: PUBLIC REGULATION AND PRIVATE LAWSUITS IN THE U.S. 5 (2010).

central to environmental law,[167] and private enforcement of various sorts exists in the civil rights, securities regulation, antitrust, and government procurement contexts.[168] Private rights of action play a more limited role, however, in much of financial regulation. Individual consumers cannot bring systemic risk lawsuits.[169] Nor can consumer advocacy nonprofits or other citizen groups bring private attorney general lawsuits against financial institutions.[170] There are several possible justifications for this absence; most notably, private parties will often lack the expertise and motivation to weigh the broader societal interests at stake in any suit implicating systemic risk (and the courts might be similarly ill-equipped). When available, however, these citizen suits have filled regulatory gaps when agencies were hesitant to act.[171]

Second, Congress can encourage third-party monitoring to augment regulatory capacity. For instance, regulators require banks to monitor third parties for systemic risk and consumer protection. Banks must, for instance, make sure that any independent call centers, mortgage brokers, or IT service providers do not act in ways that introduce systemic risk.[172] Prudential regulators like the Federal Reserve have thereby managed to exert influence against entities outside their direct jurisdictions.[173] This approach has the advantage of leveraging the expertise of sophisticated and well-resourced private parties (big banks) to help oversee a larger universe of private actors whose business models may be unfamiliar to regulators.[174] Similar arrangements could be imagined for artificial intelligence, for instance, if large platforms (such as Microsoft and Google) were required to play a role

[167] *See* David E. Adelman & Robert L. Glicksman, *Reevaluating Environmental Citizen Suits in Theory and Practice*, 91 U. COLO. L. REV. 385, 387–88 (2020) (describing environmental citizen suits as an "essential legal innovation" that function as a check on lax administrative agencies).

[168] Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 551–52, 661–64 (2000) (noting that independent third parties act as private attorneys general in these contexts).

[169] *See* Heidi Mandanis Schooner, *Private Enforcement of Systemic Risk Regulation*, 43 CREIGHTON L. REV. 993, 1008–11 (2010) (summarizing the lack of a private cause of action).

[170] *See id.*

[171] *See* Adelman & Glicksman, *supra* note 167, at 400–06 (providing examples from the environmental context).

[172] *See* Rory Van Loo, *The New Gatekeepers: Private Firms as Public Enforcers*, 106 VA. L. REV. 467, 485–87 (2020).

[173] *See id.* at 485 n.115.

[174] *See id.* at 485–87.

in monitoring third-party small businesses that use their artificial intelligence technologies.

Third, Congress can legislate to encourage actors within regulated entities to come forth with valuable information. Most importantly, Congress can provide bounties to encourage whistleblowing and protections for the whistleblowers who might otherwise face employer retaliation. Bounties for whistleblowers who bring to light issues relating to financial stability are not as generous as bounties in other areas. For securities regulation, for instance, whistleblowers earn substantial bounties for sharing information that leads to successful lawsuits, with the average payout amounting to $6.2 million.[175] And securities regulation also forces various disclosures of information, partly with the goal of allowing markets to police problematic conduct.[176] Similarly strong whistleblower protections and incentives could encourage more people to expose conduct that risks financial instability, a role played by past whistleblowers such as Eileen Foster, a former high-ranking bank official who exposed conduct at Countrywide Financial that helped give rise to the financial crisis.[177]

One explanation for this lower reliance on public information in the context of systemic risk is that public panic can cause even otherwise solvent banks to collapse, thereby sparking a financial crisis.[178] Thus, releases of public information designed to reduce the risk of financial crises could, in a worst-case scenario, have precisely the opposite effect. A full discussion of the trade-offs implicated by information disclosure in the financial regulation context is beyond our scope here. We emphasize only that financial regulation goes less far than other areas of law in encouraging disclosure.

CONCLUSION

We have argued that the playing field is tilted against federal legislation that effectively promotes financial stability. The incentives of legislators and industry, features of Congress's internal

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[175] *See* 15 U.S.C. § 78u-6 (authorizing lawsuits); Alexander I. Platt, *The Whistleblower Industrial Complex*, 40 YALE J. ON REGUL. 688, 721 (2023) (providing figures on payouts).

[176] *See* CONG. RSCH. SERV., IF11256, SECURITIES DISCLOSURE: BACKGROUND AND POLICY ISSUES 1 (2019) (stating that "[d]isclosure requirements are the cornerstone of federal securities regulation" and providing an overview of such requirements).

[177] *See* Bradford, *supra* note 153.

[178] On the problem of bank runs driven by depositor panic, see generally Douglas W. Diamond & Philip H. Dybvig, *Bank Runs, Deposit Insurance, and Liquidity*, 91 J. POL. ECON. 401 (1983).

organization and procedures, the complexity of many regulated industries, and the reality that existing statutes tend to erode in effectiveness over time all make it difficult to enact and sustain sufficient regulation of the financial sector to prevent crises. Our diagnosis of Congress's limitations has led to a set of prescriptions for how Congress, when it does act, can ensure that its interventions are effective. By enacting statutes with automatic-updating mechanisms, empowering agencies and at times mandating agency action, and diffusing power among varied actors, Congress can effectively legislate with knowledge of its own limitations.

This framework matters in its own right, given the importance of financial regulation in preventing crises with catastrophic economic, social, and political impacts. But it also provides a way of thinking about how Congress should legislate to address other sorts of future harms. What Congress does in the present will affect the future devastation from climate change, the next pandemic, or the growth of artificial intelligence. Each of these threats is of course different—they implicate different existing statutory frameworks, different private sector actors with different incentives, and different substantive trade-offs. But each involves harms that will materialize either entirely or primarily in the future, which makes each at least partially analogous to the financial stability context that has been our focus. In each instance, the core question is how to get Congress to focus, when times are good (or relatively good), on the threats that lie ahead.

The most important lesson in that regard is that when Congress acts, it can and should design its legislation to counter future inaction, by later Congresses and agencies. The risk of erring on the side of going too far is limited as long as congressional incentives and powerful private institutions push toward inaction. In contrast, the risks of not going far enough are increasingly high. Inevitable pressures toward saving costs today must not block legislation with the power to protect the public from greater catastrophes tomorrow.