STANDING — FINANCIAL REGULATION — D.C. CIRCUIT LIMITS PROSPECTS FOR CHALLENGING DODD-FRANK'S ORDERLY LIQUIDATION AUTHORITY. — *State National Bank of Big Spring v. Lew*, 795 F.3d 48 (D.C. Cir. 2015).

In the wake of a financial crisis marked by unconventional policymaking, commentators have noted uncertainty about the adequacy of checks on governmental emergency financial powers.[1] The concern remains particularly acute since the post-crisis upheaval of the Dodd-Frank Wall Street Reform and Consumer Protection Act[2] (Dodd-Frank). Recently, in *State National Bank of Big Spring v. Lew*,[3] the D.C. Circuit considered one of the law's most controversial powers, the Orderly Liquidation Authority (OLA), and added new wrinkles to an already crumpled picture. In a case involving various objections to Dodd-Frank, the court set a high bar for creditor standing to challenge the OLA and left unresolved when, if ever, suits of this and similar kind can be heard. This decision not to decide reflects a larger trend of judicial reluctance to preconstrain emergency actions.

Following the turmoil of 2008, Congress passed Dodd-Frank, legislation that created new financial regulators and vested them with various powers.[4] Among these bodies, the Consumer Financial Protection Bureau (CFPB) writes and enforces rules addressing issues in consumer products and services.[5] The Financial Stability Oversight Council (FSOC) can designate firms as systemically important financial institutions (SIFIs; colloquially, "too big to fail"), a label subjecting affected institutions to increased supervision and higher capital requirements.[6] Finally, the OLA — less flashy but perhaps more significant — permits regulators led by the Federal Deposit Insurance Corporation to order a failing firm into receivership, restructure or repudiate its external obligations, and wind it down.[7]

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[1] *See, e.g.*, David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405, 1420–34 (2014) (discussing failed challenges to government actions); Todd Zywicki, *Economic Uncertainty, the Courts, and the Rule of Law*, 35 HARV. J.L. & PUB. POL'Y 195 (2012) (normatively arguing for judicial checks). For a broader argument about the limits of judicial review in emergencies, see Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095 (2009).

[2] Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified as amended in scattered sections of the U.S. Code).

[3] 795 F.3d 48 (D.C. Cir. 2015).

[4] *See* ROBERT G. KAISER, ACT OF CONGRESS (2013) (discussing the bill's history).

[5] 12 U.S.C. §§ 5481–5603 (2012); *see also* Leonard J. Kennedy et al., *The Consumer Financial Protection Bureau: Financial Regulation for the Twenty-First Century*, 97 CORNELL L. REV. 1141 (2012) (describing the CFPB).

[6] 12 U.S.C. §§ 5321–5333; MARC LABONTE, CONG. RESEARCH SERV., R42150, SYSTEMICALLY IMPORTANT OR "TOO BIG TO FAIL" FINANCIAL INSTITUTIONS 23–24 (2015).

[7] 12 U.S.C. §§ 5381–5394; *see also* LABONTE, *supra* note 6, at 27–32.

Objecting to Dodd-Frank on several grounds, the State National Bank of Big Spring, Texas, along with other private plaintiffs and eleven states,[8] filed suit in the U.S. District Court for the District of Columbia. The private plaintiffs asserted that the CFPB unconstitutionally vested power in a single director rather than a board,[9] that its broad mandate violated nondelegation requirements by lacking an intelligible principle,[10] and that the circumstances of its director's recess appointment violated the Appointments Clause.[11] The private plaintiffs also challenged the FSOC's authority to designate institutions as systemically important, stating that such expansive autonomy contravened nondelegation and separation of powers principles.[12] Separately, the state plaintiffs objected to the OLA, asserting that its ability to restructure debt in liquidation violated the Bankruptcy Clause's guarantee of uniform treatment[13] and that OLA's particular vulnerability to arbitrary exercise posed due process concerns.[14] Because all of the plaintiffs' objections centered on federal regulators' powers rather than on a specific unconstitutional act, their claims proved largely anticipatory: pleading risk of future harm rather than present injury.[15]

Judge Huvelle granted the government's motion to dismiss.[16] The court considered these preemptive challenges to be "unusual," since the "plaintiffs have not faced any adverse rulings nor has agency action been directed at them."[17] Citing hesitation about "endors[ing] standing theories that require guesswork as to how independent decisionmakers will exercise their judgment,"[18] Judge Huvelle ultimately saw the suit as premature for judicial assessment and held that no claim met the requirements for standing and ripeness.[19]

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[8] State plaintiffs joined only — and were the only parties in — the OLA challenge.

[9] *State Nat'l Bank*, 795 F.3d at 51 (citing Humphrey's Ex'r v. United States, 295 U.S. 602, 624, 631–32 (1935)). Plaintiffs had argued that the need for the "moderating influence of other commissioners" was amplified by the CFPB's self-funding, as well as its "quasi-legislative" and "quasi-judicial" powers. Second Amended Complaint for Declaratory and Injunctive Relief at 32, State Nat'l Bank of Big Spring v. Lew, 958 F. Supp. 2d 127 (D.D.C. 2013) (No. 12-cv-01032).

[10] *State Nat'l Bank*, 795 F.3d at 51 (citing J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)).

[11] *Id.* at 52 (citing NLRB v. Noel Canning, 134 S. Ct. 2550, 2566–67 (2014)).

[12] *Id.*

[13] *Id.*; *see also* U.S. CONST. art. I, § 8 ("The Congress shall have Power," *id.* cl. 1, "[t]o establish . . . uniform Laws on the subject of Bankruptcies throughout the United States," *id.* cl. 4.). Courts have found that "uniformity requires that federal bankruptcy laws apply equally in form (but not necessarily in effect) to all creditors and debtors." *In re* Applebaum, 422 B.R. 684, 692 (B.A.P. 9th Cir. 2009).

[14] *State Nat'l Bank*, 795 F.3d at 52.

[15] *See id.* at 51–52.

[16] State Nat'l Bank of Big Spring v. Lew, 958 F. Supp. 2d 127, 166 (D.D.C. 2013).

[17] *Id.* at 132.

[18] *Id.* at 134 (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1150 (2013)).

[19] *Id.* at 166.

The D.C. Circuit affirmed in part and reversed in part. Writing for a unanimous panel, Judge Kavanaugh[20] began by holding that the private plaintiffs' claims about the CFPB's purportedly unconstitutional design and its director's erroneous appointment met standing and ripeness prerequisites.[21] As the court reasoned, the CFPB's clear jurisdiction to regulate the plaintiffs sufficed to permit adjudication.[22] The court acknowledged that, although "'there is ordinarily little question' that a regulated individual or entity has standing,"[23] here "[t]he Bank is not challenging an agency rule . . . but . . . the legality of the regulating agency itself."[24] Even so, the court held, a directly regulated plaintiff like the Bank could press such a claim; the alternative of requiring a violation of a purportedly unlawful regulation would inappropriately "require plaintiffs to bet the farm."[25]

The court saw less room to adjudicate the Bank's challenge to the FSOC's allegedly unconstrained capacity to label institutions "systemically important." Judge Kavanaugh noted that none of the plaintiffs had been designated as such.[26] Unlike the plaintiffs' challenge to the CFPB's direct regulatory powers, the court observed that the FSOC claim involved "the 'too big to fail' designation of someone else."[27] Rejecting what it labeled the Bank's "novel theory," and stating that a firm "labors under a *greater* regulatory burden" as a result of a SIFI designation, the court decided that the Bank's claim that the SIFI label was actually beneficial was "simply too attenuated and speculative to show the causation necessary to support standing."[28]

Finally, the court rejected the state plaintiffs' challenges to the OLA.[29] The states had asserted that the OLA would deprive them of a Bankruptcy Clause right to uniform treatment, alleged a present injury in a bond portfolio purportedly depressed by fear of appropriation, and claimed a violation of a previous statutory right to uniform bondholder

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[20] Judge Kavanaugh was joined by Judges Rogers and Pillard.

[21] *State Nat'l Bank*, 795 F.3d at 54.

[22] *See id.* at 53.

[23] *Id.* (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)).

[24] *Id.* at 54.

[25] *Id.* (quoting Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3151 (2010)).

[26] *See id.* at 55. The plaintiffs asserted that the SIFI designation of GE Capital created a "reputational subsidy" benefiting GE Capital's borrowings, a claim pursued by the Bank under the doctrine of competitor standing. *See* Opening Brief of Private Plaintiffs-Appellants at 46–51, *State Nat'l Bank*, 795 F.3d 48 (No. 13-5247). As the D.C. Circuit explained, competitor standing permits suit over benefits to competitors accruing from regulatory action, even when (as here) an economic injury is latent. *See* New World Radio, Inc. v. FCC, 294 F.3d 164, 170 (D.C. Cir. 2002).

[27] *State Nat'l Bank*, 795 F.3d at 55.

[28] *Id.*

[29] *Id.* at 56–57.

treatment under the Bankruptcy Code.[30] The court found neither sufficient standing nor ripeness for any of these OLA claims.[31] Judge Kavanaugh wrote: "It is premature for a court to consider the legality of how the Government *might* wield the orderly liquidation authority in a *potential* future proceeding."[32] The court saw the OLA's alleged diminution of current investment values as "not sufficiently alleged or demonstrated."[33] Turning to the threat of future injury, the court expressed concern that to adopt the state plaintiffs' theory of standing would mean "virtually any investor could raise a pre-bankruptcy constitutional challenge to any bankruptcy-related statute."[34] Unfavorably contrasting this case with other alleged deprivations of statutorily created rights, the court viewed the plaintiffs as essentially objecting that "Congress enacted a new statute that superseded an old statute."[35] The D.C. Circuit thus dismissed the FSOC and OLA claims and remanded the CFPB challenges for further consideration.[36]

On its face, *State National Bank* might appear relatively marginal: a case about timing rather than substance.[37] Yet within the short pages of the opinion lurk some more profound implications. If the reasoning in this case guides future decisions involving the OLA, legal and practical aspects unaddressed by the opinion present serious questions for future challenges.[38] Thus applied, the case could severely crimp chances for constraining the OLA in the courts, paralleling a larger judicial trend of limiting adjudication for similar crisis powers.

To start, the decision sets hurdles for anticipatory OLA challenges probably above the reach of the average creditor and leaves unanswered questions of when other parties (notably, financial institutions) may bring cases. Judge Kavanaugh objected to what he viewed as excess uncertainty in claims concerning "how the Government *might* wield the [OLA] in a *potential* future proceeding."[39] Yet as Professor Thomas Merrill and Margaret Merrill assert in an article preceding the

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[30] *See id.*

[31] *Id.*

[32] *Id.* at 56; *see also id.* ("State plaintiffs will be affected . . . only *if* a company in which they are invested is liquidated or reorganized by the Government, and only *if* the States are then treated differently from other similarly situated creditors.").

[33] *Id.*

[34] *Id.*

[35] *Id.* at 57 (contrasting plaintiffs' challenge with Zivotofsky *ex rel.* Zivotofsky v. Sec'y of State, 444 F.3d 614, 617–19 (D.C. Cir. 2006); and FEC v. Akins, 524 U.S. 11, 21–25 (1998)).

[36] *Id.*

[37] *See id.* at 53 (noting the issue presented was not necessarily *whether* the Bank could sue financial regulators, but rather "*when* the Bank may bring its claim").

[38] Dodd-Frank allows review of specific OLA actions after the process commences, *see* 12 U.S.C. § 5382 (2012); however, as explained below, such a suit will almost certainly prove ineffectual. In addition, the law has no room for *preemptive* challenges, the issue here.

[39] *State Nat'l Bank*, 795 F.3d at 56.

decision, the alternative is hardly compelling.[40] As they note, the OLA is by its terms an *emergency* power; private actors likely "cannot demonstrate that action by the government is threatened or 'certainly impending'" until it is inevitable.[41] Nonetheless, while advocating for ex ante suits, the Merrill article expresses doubts that any creditor claim "support[s] standing to challenge the OLA's constitutionality prior to the actual commencement of an OLA receivership."[42] This decision, and its lack of guidance, likely amplifies such concerns.

In particular, while the court found that the facts in this case failed to meet both standing and ripeness inquiries — questions it viewed as effectively interchangeable[43] — the latter potentially poses a distinctive problem, even for more direct future suits.[44] For example, the OLA applies only if no "private sector alternative" is available.[45] In previous crises, however, such alternatives have changed unpredictably, sometimes at government instigation.[46] To the extent that ripeness requires showing "likelihood that the alleged harm would come to pass,"[47] future challengers could face a perpetual risk of failing to do so.

The court did not address what would be required for financial firms, OLA subjects, to proceed with anticipatory challenges. In theory, the same object-of-regulation logic allowing the Bank's CFPB claim should permit such suits. Notably, Dodd-Frank's Title I requires SIFIs to prepare (pricey) living wills for liquidation;[48] a firm so affected could use this burden to overcome procedural thresholds in a way the less-obliged Bank could not. Nevertheless, commentators have recognized

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[40] *See* Thomas W. Merrill & Margaret L. Merrill, *Dodd-Frank Orderly Liquidation Authority: Too Big for the Constitution?*, 163 U. PA. L. REV. 165, 171 (2014) ("Whether or not the D.C. Circuit allows [*State Nat'l Bank*] to proceed in its present posture, the plaintiffs' arguments on the merits are surprisingly strong."). The D.C. Circuit cited this article to say that investors may not make prebankruptcy challenges to statutes. *See State Nat'l Bank*, 795 F.3d at 56. However, the article asserts that dismissing ex ante claims means "the constitutional arguments are likely to reemerge at the worst possible time" — during a financial crisis. Merrill & Merrill, *supra*, at 171.

[41] Merrill & Merrill, *supra* note 40, at 198 (quoting Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1147 (2013)).

[42] *Id.* at 200.

[43] *See State Nat'l Bank*, 795 F.3d at 56–57 ("[I]n certain circumstances [standing and ripeness] can 'boil down to the same question.'" (quoting Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2341 n.5 (2014))).

[44] Commentators have noted how ripeness requirements shield actions from judicial review, an effect particularly trenchant in financial regulation. *See, e.g.*, Carolyn Sissoko, Note, *Is Financial Regulation Structurally Biased to Favor Deregulation?*, 86 S. CAL. L. REV. 365, 402–04 (2013).

[45] 12 U.S.C. § 5383(b)(3) (2012).

[46] Given the obvious incentive for private firms to try to play pass-the-buck, it may never be certain until after the final collapse whether an apparent lack of a private alternative is real or just a negotiating ploy. *See* ROGER LOWENSTEIN, WHEN GENIUS FAILED 185–218 (2000).

[47] *Susan B. Anthony List*, 134 S. Ct. at 2340.

[48] *See* Nizan Geslevich Packin, *The Case Against the Dodd-Frank Act's Living Wills: Contingency Planning Following the Financial Crisis*, 9 BERKELEY BUS. L.J. 29, 34–35, 84–85 (2012) (explaining the requirement and citing costs associated with living wills).

that living wills may not offer a guide to actual crisis decisions.[49] As a result, even a more procedurally acceptable SIFI challenge would still face issues of substantive uncertainty so troublesome here.

Even where a party might be able to show an injury beforehand, the real-world aspects of the case's standards could leave claims practically, if not legally, infeasible. For creditors, filing a preemptive suit stating expected insolvency would likely prove a self-fulfilling prophecy.[50] The court also explicitly considered and rejected the plaintiffs' attempt to sidestep their standing problems by pleading a practical alternative, that "future uncertainty over how such a proceeding would unfold affects the current value of their investments."[51] Had the court allowed this claim, the complexity of modern financial markets could still have left future courts debating questions of proof.[52]

By disfavoring ex ante suits, the court delayed decision until a clearer injury appears.[53] Yet the experience of ex post challenges to emergency government actions suggests that such suits would also suffer limitations, to a degree unaddressed by the court.[54] Take, for example, the challenge to the government-mandated restructuring of Chrysler, a case with obvious comparisons to a future OLA use.[55] There, the Second Circuit held that a creditor objection to a plan favoring other claims (mostly from unions and pensions) over the creditor's nominally senior rights lacked standing for want of injury, given that the alternative to accepting those terms was liquidation.[56] Other cases have found that, even if a government bailout action was illegal, the impact of the emergency funds meant the plaintiffs had suffered no damages.[57]

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[49] *See* Mehrsa Baradaran, *Regulation by Hypothetical*, 67 VAND. L. REV. 1247, 1310–18 (2014).

[50] *Cf.* Adam M. Samaha, *Regulation for the Sake of Appearance*, 125 HARV. L. REV. 1563, 1577–80 (2012) (discussing the role of expectations in financial scenarios).

[51] *State Nat'l Bank*, 795 F.3d at 56.

[52] *Cf.* Steven L. Schwarcz, *Regulating Complexity in Financial Markets*, 87 WASH. U. L. REV. 211, 231–36 (2009) (discussing how "nonlinear feedback effects," *id.* at 232, combined with informational uncertainties may make changes in prices not proportionally reflect changes in information).

[53] *See State Nat'l Bank*, 795 F.3d at 57 n.2 ("If the State plaintiffs are injured at some point in the future . . . under the Government's orderly liquidation authority, the State plaintiffs can seek to raise their constitutional arguments then . . . ."). Indeed, the OLA seems to contemplate that individual case review will serve systemic needs (or effectively eliminate review). *See* Merrill & Merrill, *supra* note 40, at 214–15.

[54] *See generally* Zaring, *supra* note 1, at 1421–24 (analyzing financial crisis cases).

[55] *See In re* Chrysler LLC, 576 F.3d 108, 111 (2d Cir.), *vacated as moot sub nom.* Ind. State Police Pension Tr. v. Chrysler LLC, 558 U.S. 1087, 1087 (2009) (mem.).

[56] *Id.* at 123. Opponents charged that federal officials used their authority to prioritize the interests of politically favored constituencies. *See, e.g.*, Todd Zywicki, *The Auto Bailout and the Rule of Law*, NAT'L AFF., Spring 2011, at 66, 76–78.

[57] *See, e.g.*, Starr Int'l Co. v. United States, 121 Fed. Cl. 428, 436 (2015) ("Any time the Government saves a private enterprise from bankruptcy through an emergency loan, as here, it can essentially impose whatever terms it wishes without fear of reprisal."); *see also* Recent Case, 129

If an ex post determination thus merely inquires whether an OLA plan beats a likely crisis alternative of nothing, even a ruthless use of the OLA would apparently meet that threshold.[58] Yet such a result works only to the extent it dismisses a crucial question in ex ante claims: whether the OLA *itself* contributed to that lack of alternatives.[59] After all, government powers shape market expectations,[60] and there are concerns that the OLA could implicitly dissuade potential alternatives.[61] In other words, a court might think it very possible to calculate injury ex post: the difference between the amount received by creditors, shareholders, or the firm under the OLA versus a "normal" bankruptcy proceeding. To the extent that the OLA unintentionally (or intentionally) shapes what a "normal" option entails, though, the court could set its calculations on an artificially depressed base.

It is possible that a way out could lie in another Dodd-Frank section: the "living will" demand for institutions to plan emergency resolutions.[62] The value of a firm's planned disposition nominally offers a baseline for future suits; if a creditor or another party receives less under the OLA than it would under the plan, an injury-in-fact exists.[63] Still, as others have noted, uncertainty about what living wills actually contain makes it difficult to say this answer is definitive, particularly since such plans may value assets well above their crisis worth.[64] It is not clear that the desire to place future litigation on solid ground is best met by turning to a fantasy scenario. And others more practically object that even ex post monetary compensation may prove insufficient; there's no judicial power to reverse a bank run.[65]

State National Bank thus raises serious doubts about the viability of OLA challenges, ex ante and ex post. In this sense, the case speaks

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HARV. L. REV. 859 (2015); *cf.* Zaring, *supra* note 1, at 1430–31 (analyzing challenges to the Fannie Mae takeover).

[58] *Cf.* Merrill & Merrill, *supra* note 40, at 168 (asserting that the financial crisis taught observers that "the only alternative to bankruptcy . . . was government bailouts of financial firms").

[59] In the auto deals, for instance, opponents later charged that government bailouts inhibited private alternatives. *See, e.g.*, Zywicki, *supra* note 56, at 70–72 (discussing General Motors).

[60] And vice versa. *See* Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991 (2014) (book review).

[61] *See* Dwight Smith et al., *Orderly Liquidation Authority: FDIC Announces Its Strategy*, MORRISON & FOERSTER 4 (May 16, 2012), http://media.mofo.com/files/Uploads/Images/120516-Orderly-Liquidation-Authority-FDIC-Announces-Its-Strategy.pdf [http://perma.cc/JQK5-4RAP] (stating that government decisions could "deter unsecured creditors generally, making liquidity more expensive or difficult to obtain").

[62] *See* Thomas H. Jackson & David A. Skeel, Jr., *Dynamic Resolution of Large Financial Institutions*, 2 HARV. BUS. L. REV. 435, 445–51 (2012) (comparing living wills with usual bankruptcy).

[63] *Cf. In re* Chrysler LLC, 576 F.3d 108, 118 (2d Cir.) (discussing the alternative of firm liquidation), *vacated as moot sub nom.* Ind. State Police Pension Tr. v. Chrysler LLC, 558 U.S. 1087, 1087 (2009) (mem.).

[64] *See* Packin, *supra* note 48, at 75–77.

[65] *See* Merrill & Merrill, *supra* note 40, at 203 (discussing "irreparable harm").

to a larger trend observed by many scholars: the insulation of executive powers from judicial review.[66] Whether this effect in the financial context is positive, negative, or just the natural progression of regulation remains an issue of some controversy.[67] The court did not reach — it may not have considered — such consequences, but the case could provide grist for both positive and normative arguments.

In particular, *State National Bank* could be read less as defining the judicial role and more as acquiescing to the reality of crisis policymaking,[68] a result potentially compelled by the OLA's features. To start, the pace of judicial action may belie crisis needs; during 2008, the judiciary notably proved the least responsive branch.[69] Even if the plaintiffs had won limits on OLA's powers ex ante, they would still have needed to find a court capable of applying those limits before all of the firm's value drained away. Similarly, financial crises often occur at the cutting edges of industry practice, places where courts are particularly likely to lack expertise.[70] In the OLA case especially, a suit could turn on interpretations of bank balance sheets — hardly ever a welcome exercise. To the extent that a crisis case would thus require a court to adjudicate in an area where it lacks capacity, perhaps removing courts from the picture is less concerning than it first appears.

To be sure, there is a normative argument the other way: any OLA exercise is likely to be among the most significant of government actions, and great powers deserve proportionate checks.[71] Yet ultimately, *State National Bank* may suggest that those alternatives are no alternatives at all. After all, given the immense consequences of a failing financial firm, future regulators may seek to stretch their powers as much as possible and deal with litigation as it comes. To the extent that *State National Bank* implies that this is the direction courts may be heading, the end result could be to liquidate what the courts never would have possessed.

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[66] *See* Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 COLUM. L. REV. 1097, 1109–11 (2013).

[67] *See, e.g.*, Paul L. Lee, *The Dodd-Frank Act Orderly Liquidation Authority: A Preliminary Analysis and Critique — Part II*, 128 BANKING L.J. 867, 903 (2011).

[68] For one former policymaker's perspective on the crisis, see Michael S. Barr, *The Financial Crisis and the Path of Reform*, 29 YALE J. ON REG. 91, 93–97 (2012); for a discussion of regulatory approaches to crises, see Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J 193, 213–34 (2008). In broader administrative law, meanwhile, courts have been reluctant to impede executive emergency powers. *See* Vermeule, *supra* note 1; *see also* Eric A. Posner & Adrian Vermeule, *Accommodating Emergencies*, 56 STAN. L. REV. 605 (2003). And the arguments about emergencies may be particularly compelling here — a failing financial institution endangers the global economy.

[69] *See* Zaring, *supra* note 1, at 1405–06.

[70] *See id.* at 1433 (arguing for a distinction between intervening in "emergency government action" and areas for review "more within [courts'] areas of expertise").

[71] *See* Merrill & Merrill, *supra* note 40, at 246–47.