CAPITAL REQUIREMENTS' SAFE AND SOUND DELEGATION

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INTRODUCTION

The nation's federal banking agencies (FBAs)[1] are engaged in the highest-profile rulemaking in the history of bank regulation. The banking industry has blanketed Washington, D.C. with ads—including in subway stations and during the Super Bowl—decrying the proposal's "real costs for everyday Americans"[2] and claiming that the proposal, if finalized, will "mak[e] it harder for lower- and middle-income families to buy a car or their first home,

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1. The federal banking agencies (FBAs) are the Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (FRB), and the Federal Deposit Insurance Corporation (FDIC). 12 U.S.C. § 1462(5).

2. STOP BASEL ENDGAME, BANK POL'Y INST., https://stopbaselendgame.com/ [https://perma.cc/AMA7-8PXA] (last visited Nov. 25, 2024); Austin Anton, *New BPI Ad Campaign Encourages Americans to Demand Accountability from Regulators for Higher Loan Prices*, BANK POL'Y INST. (Sept. 5, 2023), https://bpi.com/new-bpi-ad-campaign-encourages-americans-to-demand-accountability-from-regulators-for-higher-loan-prices/ [https://perma.cc/WG26-JYXB].

for small businesses to secure essential funding to hire more workers, and for farmers to take out loans for next year's crops."[3] Yet regulators describe the rule, known as "Basel III Endgame"[4] or simply "Endgame," as simply making minor tweaks to regulatory capital requirements to better "enable[] banks to support the economy."[5]

Yet, what has started as a dispute about optimal regulation has turned into something much more pernicious. In criticizing the Endgame proposal, opponents have gone beyond simply criticizing regulators' policies and the process by which the rule was proposed to threatening lawsuits that would, if successful, upend a decades-old regulatory regime.

The opponents of Endgame argue that it violates the nondelegation doctrine because it "shift[s] to the agencies the authority to make the fundamental 'policy judgment'" in a way that "is at odds with the text and structure of the Constitution . . . ."[6] But on this score, Endgame is indistinguishable from

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3. *Americans Can't Afford: Washington's Capital Regulation Plan*, FIN. SERVS. F., https://americanscantaffordit.com/ [https://perma.cc/2NES-226X] (last visited Nov. 25, 2024).

4. *Id.*; *see* Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity, 88 Fed. Reg. 64,028 (Sept. 18, 2023). Basel III Endgame is a series of measures adopted first by the Basel Committee on Banking Supervision after the 2007–2009 global financial crisis and put forward by the FBAs in 2023 for comment as proposed changes to domestic capital rules. David Wessel, *What is Bank Capital? What is the Basel III Endgame?*, BROOKINGS INST. (Mar. 7, 2024), https://www.brookings.edu/articles/what-is-bank-capital-what-is-the-basel-iii-endgame/ [https://perma.cc/P9HP-NCC6]. If enacted, the FBAs' proposal would align large banks' operational risk-based capital requirements with those of the international community. *Id.*

5. Michael S. Barr, Vice Chair for Supervision, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the American Bankers Association Annual Convention: Capital Supports Lending (Oct. 9, 2023) ("The estimated increase in capital required for lending activities on average . . . is limited.").

6. ROBERT HENNEKE & TRENT MCCOTTER, TEX. PUB. POL'Y FOUND., THE CONSTITUTIONALITY OF THE PROPOSED CAPITAL ADEQUACY RULE UNDER THE NONDELEGATION DOCTRINE 3–4 (Dec. 2023), https://www.texaspolicy.com/wp-content/uploads/2023/12/2023-12-Capital-Adequacy-Rule-Report-HennekeMccotter.pdf [https://perma.cc/8GKR-HYR8] (quoting *Development of New Basel Capital Accords: Hearing Before the S. Comm. on Banking, Hous. & Urb. Affs.*, 109th Cong. 90 (2005) (statement of Daniel K. Tarullo, Professor, Georgetown University Law Center)); *see also* Greg Baer, Kevin Fromer, Kenneth E. Bentsen, Jr. & Tom Quaadman, Comment Letter on Regulatory Capital Rule: Large Banking Organizations and Banking Organizations with Significant Trading Activity 51–52 (Jan. 12, 2024) [hereinafter Comment Letter], https://bpi.com/wp-content/uploads/2024/01/Joint-Trades-Legal-Comment-on-Basel-III-Endgame-Proposal-FINAL.pdf [https://perma.cc/M9EE-WKX8] ("If it is indeed the agencies' view that there are no meaningful limits to what they can do, and no standards to guide them, then their governing statutes cannot be reconciled with the non-delegation doctrine.").

most capital regulations; the FBAs rely on the same statutory authorizations to promulgate the Endgame rule as existing capital rules. If courts find that the underlying statutory authorities violate the nondelegation doctrine, that holding will undermine the FBAs' authority to issue *any* capital rules at all.

Fortunately, this is not the case; the statutes permitting the FBAs to enact capital requirements for the institutions they regulate satisfy both the intelligible principle standard and more stringent rearticulations of the nondelegation doctrine. This article puts the threat to rest by examining the evolution of banking laws and identifying the source of regulators' authority in statutes that allow regulators to prohibit "unsafe or unsound" practices, which is more than adequate delegation to satisfy any constitutional concerns.[7]

I. WHAT'S SO SPECIAL ABOUT BANK REGULATION ANYWAY?

Banks are of unique importance to the real economy.[8] Unlike with most competitive industries, a bank failure has "consequences distributed well beyond [its] investors and managers."[9] Bank failures may leave individual depositors without their life savings or firms without the capital to remain in operation. Banks also allow customers to use deposits and credit for payments and function as the base layer of common payment networks, such that losing access to one's bank means they have effectively lost access to commerce. The Federal Reserve relies on banks to transmit monetary policy throughout the economy; that transmission is hampered with every bank failure. Banks are so intertwined with the real economy that their existence can benefit—and their failures can cause collateral damage to—unaffiliated entities in ways that other firms cannot.[10] Financial crises cause the economy to seize in ways that crises in other industries cannot.

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7. *See, e.g.*, 12 U.S.C. § 1818(b)(1) (generally prohibiting banks from engaging in any "unsafe or unsound practice").

8. *See generally* E. GERALD CORRIGAN, FED. RSRV. BANK OF MINNEAPOLIS, ANNUAL REPORT: ARE BANKS SPECIAL? 11–12 (1982) (describing banks' unique contributions to the economy); Mark W. Olson, Governor, Fed. Rsrv. Bd., Address at the Annual Washington Conference of the Institute of International Bankers: Are Banks Still Special? (Mar. 13, 2006), https://www.federalreserve.gov/newsevents/speech/olson20060313a.htm [https://perma.cc/8ZVP-KNJU] (describing banks' unique contributions to the economy in light of changes in finance).

9. David Zaring, *The Corporatist Foundations of Financial Regulation*, 108 IOWA L. REV. 1303, 1306 (2023).

10. *See* Jeanne Gobat, *Banks: At the Heart of the Matter*, INT'L MONETARY FUND: FIN & DEV. MAG., https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Banks [https://perma.cc/DCQ6-JMSP] (last visited Nov. 25, 2024).

Thanks to banks' outsized impacts, Congress gave them a variety of special privileges. Deposit insurance helps banks stay solvent by limiting depositors' incentive to run.[11] The Federal Reserve's discount window allows solvent-but-illiquid institutions to obtain capital needed to remain in operation.[12] A variety of statutes make clear that bailouts (using competitors' or taxpayers' capital) are possible.[13] Each of these interventions distorts financial markets and creates moral hazard in ways that are highly beneficial to banks and the banking industry. The way Congress has opted to regulate this is to require banks to internalize market distortions through prohibitions against unsafe or unsound practices and the maintenance of mildly profitable operations.[14]

The concept of "safety and soundness" was widely used in state banking laws,[15] but was first incorporated into federal law in 1933, when Congress gave the Board of Governors of the Federal Reserve System (FRB) authority to remove any bank officer or director who "continued unsafe or unsound practices" after being warned.[16] Its importance expanded in 1966, when Congress enacted legislation making a bank's engaging in an "unsafe or unsound practice" the primary source of the FBAs' regulatory and enforcement authority,[17] and today, the concept of safety and soundness infuses regulators' every action.[18] In most circuits, activities may generally be considered unsafe

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11. *See, e.g.*, *Understanding Deposit Insurance*, FED. DEPOSIT INS. CORP., https://www.fdic.gov/resources/deposit-insurance/understanding-deposit-insurance [https://perma.cc/NN2Y-VLEF] (Apr. 1, 2024).

12. *See Discount Window Lending*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., https://www.federalreserve.gov/regreform/discount-window.html [https://perma.cc/ZP6A-2DS3] (Sept. 30, 2024).

13. *See* Anthony J. Casey & Eric A. Posner, *A Framework for Bailout Regulation*, 91 NOTRE DAME L. REV. 479, 494 (2015).

14. *See, e.g.*, H.R. REP. NO. 102-157, pt. 1, at 118 (1991) ("The best way to reduce taxpayer exposure is to build a safe banking system so that fewer banks fail."); *id.* ("The objective of building a safer system can be served by increasing bank profitability.").

15. *See, e.g.*, N.Y. BANKING LAW § 19 (Consol. 1910) (permitting proceedings if "the superintendent shall have reason to conclude that such corporation or individual banker is in an unsound or unsafe condition to transact the business for which it is organized").

16. Banking Act of 1933, ch. 89, Pub. L. No. 73-66, § 30, 48 Stat. 162, 193 (codified as 12 U.S.C. § 227); *see* Thomas L. Holzman, *Unsafe or Unsound Practices: Is the Current Judicial Interpretation of the Term Unsafe or Unsound?*, 19 ANN. REV. BANKING L. 425, 428 (2000) ("The term 'unsafe or unsound practice' made its first appearance in federal banking law in 1933.").

17. *See* Financial Institutions Supervisory Act of 1966(b)(1), Pub. L. No. 89-695, § 202(b)(1), 80 Stat. 1028, 1046 (codified at 12 U.S.C. § 1818).

18. *See* MARC LABONTE, CONG. RSCH. SERV., R44918, WHO REGULATES WHOM? AN

or unsound if they are "contrary to accepted standards of banking operations which might result in abnormal risk or loss . . . ."[19]

One of the most significant regulations imposed under the safety and soundness framework is that of capital requirements (with both risk- and leverage-based flavors) that make bank failures less likely. At their simplest, capital requirements ensure bankers fund loans with some amount of shareholders' money, ensuring that shareholders are in first-loss positions ahead of their depositors should their banks run into trouble.[20] Banks are subject to a total capital ratio of at least 8%—that is, all investments generally must be funded with at least 8% shareholder capital, with borrowed funds comprising the subsequent 92%.[21] Heightened requirements are imposed on larger, more complex, and systemically riskier institutions.[22] If banks become less than adequately capitalized, regulators must require them to increase their capital levels.[23]

OVERVIEW OF THE U.S. FINANCIAL REGULATORY FRAMEWORK 5 (2023) ("The purpose of [bank] regulation is to ensure an institution's safety and soundness."); PUB. EDUC. & OUTREACH, FED. RSRV. SYS., THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES 70 (11th ed. 2021) ("In overseeing the institutions under its authority, the Federal Reserve seeks primarily to promote their safe and sound functioning . . . .").

19. Greene Cnty. Bank v. FDIC, 92 F.3d 633, 636 (8th Cir. 1996) (quoting First Nat'l Bank of Eden v. Dep't of the Treasury, 568 F.2d 610, 611 (8th Cir. 1978)); *see also In re* Seidman, 37 F.3d 911, 928 (3d Cir. 1994) ("The imprudent act must pose an abnormal risk to the financial stability of the banking institution."); Gulf Fed. Sav. & Loan Ass'n v. Fed. Home Loan Bank Bd., 651 F.2d 259, 264 (5th Cir. 1981) (stating that "unsafe or unsound practice[s]" are those "with a reasonably direct effect on an association's financial soundness"); Hoffman v. FDIC, 912 F.2d 1172, 1174 (9th Cir. 1990) (requiring "abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds" (quoting *Gulf Fed. Sav. & Loan Ass'n*, 651 F.2d at 264)). *But see* Blanton v. Off. of the Comptroller of the Currency, 909 F.3d 1162, 1172 (D.C. Cir. 2018) (describing unsafe or unsound practices as those that "pose[] a 'reasonably foreseeable undue risk'" (quoting Landry v. FDIC, 204 F.3d 1125, 1138 (D.C. Cir. 2000))); Franklin Sav. Ass'n v. Off. of Thrift Supervision, 934 F.2d 1127, 1145 (10th Cir. 1991) ("[A]n unsafe or unsound condition exists where a financial institution is operated in such a manner as to cause unacceptable levels of risk to its depositors' funds.").

20. ANDREW P. SCOTT & MARC LABONTE, CONG. RSCH. SERV., R47447, BANK CAPITAL REQUIREMENTS: A PRIMER AND POLICY ISSUES 6 (2023).

21. *See, e.g.*, 12 C.F.R. § 3.10. Higher capital requirements mean that, at the margin, banks are restricted in the volume of loans they can offer. A bank with $100 and an 8% capital requirement can make up to $1,250 in loans, whereas the same bank with a 4% capital requirement can make up to $2,500 in loans. At the same time, a better capitalized bank is less likely to fail and cause less collateral damage to the wider economy if it does.

22. *See* SCOTT & LABONTE, *supra* note 20, at 23 fig.2 (demonstrating the FBAs' tiered approach to capital requirements).

23. *See* 12 U.S.C. § 1831o(e)(1)–(3) (requiring the FBAs to impose restrictions on banks deemed undercapitalized).

Implementing such a regime is easier said than done; for example, every investment is assigned a risk-weight, and assets with higher risk weights are required to be funded with higher percentages of shareholder capital.[24] In addition, regulating finance is "a cat and mouse game," wherein institutions have practically unlimited capacity for arbitrage.[25] Financial products may be structured in various ways that provide the same economic effect, and bankers may rapidly respond to regulations in ways that "raise[] a whole new set of unanticipated issues."[26] As a result, ensuring banks' safe and sound operation requires continued policy adjustment, and Congress created a regulatory regime in which the FBAs have wide latitude under broad delegations to set policy details more quickly than Congress can manage.

II. THE EVOLUTION OF STATUTORY AUTHORIZATIONS TO IMPOSE REGULATORY CAPITAL REQUIREMENTS

When Congress enacted its first generalized bank regulatory statute, the National Bank Act of 1864, it fixed banks' capital requirements in statute.[27] The Act generally prohibited the Office of the Comptroller of the Currency (OCC) from providing bank charters to firms with "less capital than one hundred thousand dollars," with higher and lower thresholds for banks in cities larger than 50,000 people and smaller than 6,000 people, respectively.[28] It also prohibited banks from reducing shareholder equity below these statutory requirements.[29] When Congress enacted the Federal Reserve Act of 1913, which for the first time brought state-chartered banks under federal regulation by permitting membership in the newly created Federal Reserve System, it required these firms to comply with the National Bank Act's minimum

24. SCOTT & LABONTE, *supra* note 20, at 8.

25. Stanley Fischer, Vice Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Conference Remarks: The Importance of the Nonbank Financial Sector (Mar. 27, 2015); PAUL TUCKER, UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE 469 (2018).

26. Daniel Tarullo, *Bank Supervision and Administrative Law*, 2022 COLUM. BUS. L. REV. 279, 371. For example, banks engage in so-called "capital relief trades," whereby banks achieve "cosmetic improvement[s]" to their balance sheets using derivatives, and therefore obtain lowered capital requirements, while facing similar economic risks. Elisa Martinuzzi, *Beware Banks Dipping Into This Murky Trade*, BLOOMBERG (Sept. 9, 2019, 1:00 AM), https://www.bloomberg.com/view/articles/2019-09-09/beware-banks-and-capital-relief-trades?sref=S5RPfkRP [https://perma.cc/N5NV-YLKR].

27. Act of June 3, 1864, ch. 106, Pub. L. No. 38-106, § 7, 13 Stat. 99, 101.

28. *Id.*; *see also id.* § 33, 13 Stat. at 109 (requiring banks chartered under the Act to maintain a "surplus fund" of 20% of capital stock to cover withdrawals).

29. Act of June 3, 1864, ch. 106, § 38, 13 Stat. at 110–11.

requirements,[30] but also permitted the newly-created FRB to enact "rules and regulations . . . in pursuance thereof . . . ."[31] In 1917, Congress permitted the FRB to consider, among other things, "the financial condition of the applying bank " in deciding whether to approve membership applications.[32]

The 1929 stock market crash and resulting bank failures soon put an end to the flat capitalization regime.[33] Congress enacted the Banking Acts of 1933 and 1935, creating the FDIC and giving it, the FRB, and the OCC authority to condition Federal Reserve System membership and deposit insurance on "whether or not the assets of the applying bank are adequate to enable it to meet all of its liabilities to depositors and other creditors . . . ."[34]

The FRB was the first FBA to prescribe capital ratios by requiring state banks applying for membership in 1933 to agree to the following "condition" of membership in the Federal Reserve System:

> Such bank shall maintain an amount of paid-up and unimpaired capital and unimpaired surplus which, in the judgment of the [FRB], will be adequate in relation to its total deposit liabilities, having due regard to the general principle that a bank's capital and surplus ordinarily should not be less than one-tenth of the average amount of its aggregate deposit liabilities and, in some circumstances, should be more than one-tenth of such amount.[35]

The FRB formally promulgated this requirement in 1936.[36] Simultaneously, the FDIC and OCC made statements explaining that they generally saw 10% capital as a minimum requirement.[37]

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30. *See* Federal Reserve Act, ch. 6, Pub. L. No. 63-43, § 9, 38 Stat. 251, 259 (1913) ("No applying bank shall be admitted to membership in a Federal reserve bank unless it possesses a paid-up unimpaired capital sufficient to entitle it to become a national banking association in the place where it is situated, under the provisions of the national banking Act.").

31. *Id.*

32. Federal Reserve Act Amendments, ch. 32, sec. 3, § 9, 40 Stat. 232, 233 (1917).

33. *See* Gary Richardson, Banking Panics of 1903–31, FED. RSRV. HIST., https://www.federalreservehistory.org/essays/banking-panics-1930-31 [https://perma.cc/5NCN-LNVE] (Nov. 22, 2013).

34. Banking Act of 1933, ch. 89, sec. 8, §§ 12A, 12B(e), 48 Stat. 162, 168–70; *see also* Banking Act of 1935, ch. 614, sec. 101, § 12B(f)(2), 49 Stat. 684, 687 (providing that the FDIC "shall determine . . . that its assets in excess of its capital requirements are adequate to enable it to meet all its liabilities to depositors and other creditors").

35. Roland I. Robinson, *The Capital-Deposit Ratio in Banking Supervision*, 49 J. POL. ECON. 41, 44 (1941).

36. *Id.* at 45; *see also* Membership of State Banking Institutions in the Federal Reserve System (Regulation H), 12 C.F.R. § 208.7(a)(2) (1959) (providing that "[t]he net capital and surplus funds of such bank shall be adequate in relation to the character and condition of its assets and to its deposit liabilities and other corporate responsibilities," and a bank's capital shall not be reduced except with the permission of the FRB).

37. *See, e.g.*, FED. DEPOSIT INS. CORP., ANNUAL REPORT 27 (1936),

Between 1864 and 1966—for over a century—there was little regulators could do if banks decreased their capitalization ratios after being admitted to the Federal Reserve System or granted deposit insurance. The Federal Reserve Act and Banking Act of 1935 prohibited banks from reducing capital levels unless approved by their regulators, but these statutes did not prohibit banks from taking risks beyond what their capital would safely allow.[38] The available penalties during this era were of a "binary and potentially draconian nature," wherein regulators had no authority other than to revoke banks' charters, deposit insurance, and Federal Reserve System membership—all death sentences ill-suited to address anything other than catastrophic safety concerns.[39] What occurred instead was the informal resolution of differences between regulators and banks that "avoid[ed] forcing the [regulators] to either seek the heavy sanction or allow banks to continue operating in ways that caused concern."[40] The only exception was for bank holding companies (BHCs), for which Congress, in the Bank Holding Company Act of 1956 (BHCA), "authorized [the FRB] to issue such regulations and orders as may be necessary to enable it to administer and carry out the purposes of this Act and prevent evasions thereof."[41]

This changed with the Financial Institutions Supervisory Act of 1966 (FISA), when Congress granted the FBAs authority to penalize insured depository institutions (IDIs)—and later on, BHCs and uninsured national banks—improper behaviors without forcing their closures.[42] The Act

https://www.fdic.gov/system/files/2024-07/fdic-ar-1936.pdf [https://perma.cc/8JLM-B7QL] ("The minimum desired by the Corporation is . . . in no case equal to less than 10 percent of total deposits . . . ."); *see also* Robinson, *supra* note 35, at 46 (For the OCC, "[r]etirements of preferred stock are permitted or rejected on the basis of the capital-deposit position, and, although no specific standard is rigorously applied, the one-to-ten ratio apparently is a minimum.").

38. *See* Federal Reserve Act, ch. 6, Pub. L. 63-43, § 28, 38 Stat. 251, 274 (1913) (prohibited national and state member banks from reducing capital "until the amount of the proposed reduction has been reported to the [appropriate regulator] and such reduction has been approved by" that regulator); Banking Act of 1935, sec. 101, § 12B(v)(4), 48 Stat. at 701–02 (prohibiting insured nonmember banks from "reduc[ing] the amount or retir[ing] any part of its common or preferred capital stock" without the FDIC's consent).

39. Tarullo, *supra* note 26, at 370.

40. *Id.*; *see also* Margaret E. Tahyar, *Are Banking Regulators Special?*, BANKING PERSPS., Q1 2018, at 23, 26 (describing this as "behind-the-scenes moral suasion and 'jawboning'").

41. Bank Holding Company Act of 1956, ch. 240, Pub. L. No. 84-511, § 5(b), 70 Stat. 133, 137. Bank holding companies are firms that own or control banks. *See id.* § 2(a).

42. Congress later amended the provision to apply to bank holding companies (BHCs), see Financial Institutions Regulatory and Interest Rate Control Act of 1978, Pub. L. 95–630,

contained provisions, codified throughout 12 U.S.C. § 1818, permitting the FBAs to impose cease-and-desist orders, collect civil money penalties, remove IDIs' officers and directors, and revoke deposit insurance coverage "[i]f, in the opinion of the appropriate [FBA]," IDIs violate statutes, regulations, or "condition[s] imposed in writing by" regulators, or "engage[] in an unsafe or unsound practice."[43] Though the term unsafe or unsound is not defined in federal statute, courts, and the FBAs generally adopted the so-called "Horne Standard:"

> Generally speaking, an "unsafe or unsound practice" embraces any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds.[44]

These enforcement actions would be brought in formal adjudications conducted pursuant to the Administrative Procedure Act (APA), subject to final determination by the agency heads, appeals of which were reviewable by the federal courts of appeals.[45] The FBAs could bring action in federal district court to enforce the orders once final.[46]

Following FISA's amendment of § 1818, the FBAs enforced capital requirements through this process, deeming IDIs' maintenance of deficient capital levels as an "unsafe and unsound practice."[47] The FBAs did not enact regulations mandating particular capital ratios, but in 1981, they did issue policy statements providing "framework[s] for assessing the capital of well-managed" institutions, which generally set minimum "acceptable" capital ratios at 5% or 6% depending on the institution.[48] The regulators noted,

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sec. 101, § 29(b), 92 Stat. 3641, 3641, and to uninsured national banks. *See* Garn-St. Germain Depository Institutions Act of 1982, Pub. L. 97–320, sec. 404, § 5169(c), 96 Stat. 1469, 1511–12.

43. Financial Institutions Supervisory Act of 1966, Pub. L. No. 89-695, secs. 102, 202, §§ 407(b)(1), 407(*l*)(5), 8(b)(1), 8(e)(1), 80 Stat. 1028, 1036, 1043, 1046–47 (codified at 12 U.S.C. § 1818).

44. 112 CONG. REC. 26,474 (1966) (quoting Memorandum from the Chairman of the Federal Home Loan Bank Board on "Unsafe or Unsound Practices" as a Basis for Insurance of a Cease-And-Desist Order, entered into the record by Senator Robertson); *see also supra* note 19; Holzman, *supra* note 16 (describing the creation and interpretation of the phrase).

45. *See* 12 U.S.C. § 1818(h).

46. *See id.* § 1818(i)(1).

47. *See, e.g.*, *In re* Nat'l Bank, 1977 WL 33741, at *7 (OCC 1977) (enforcement action decision) (full party name and decision date redacted) ("The Comptroller concluded that Respondent Bank was engaging in unsafe and unsound practices because of the circumstances noted above, including the equity capital deficiency.").

48. *Announcements: Capital Adequacy Guidelines*, 68 FED. RES. BULL. 33, 33–34 (1982); *see also*

however, that any bank's specific ratio would depend on its individual characteristics.[49]

This framework of declaring deficient capitalization an "unsafe or unsound practice" worked until 1983, when, in *First National Bank of Bellaire v. Comptroller of the Currency*,[50] a Fifth Circuit panel concluded that "the Comptroller's finding that the Bank's capital level was unsafe and unsound was not supported by substantial evidence."[51] Reviewing the evidence, a panel majority explained, among other things, that the OCC's reliance on an expert witness was misplaced, as that witness's analysis that the bank poses "an abnormal risk, damage, and/or loss to the institution, to the depositors, shareholders, and to the insurance fund of the FDIC. . . . does not support his conclusion."[52] The panel held that "[t]he Comptroller's finding was unreasonable because there was no rational relationship between the evidence, when looked at as a whole, and the finding."[53] Importantly, this was not an issue of the OCC attempting to enforce its 1981 policy—the FBA's cease-and-desist order would have required the bank to increase its capital levels to 7%, not 5% or 6%, as its policy statement would suggest.[54]

Congress quickly responded to *Bellaire* in the International Lending Supervision Act of 1983 (ILSA), a reaction to the Latin American debt crisis already proceeding through the legislative process.[55] In its report on the legislation, the Senate Banking Committee explained that the Fifth Circuit's decision "clouded the authority of the [FBAs] to exercise their independent discretion in establishing and requiring the maintenance of appropriate levels of capital," and that "establishing adequate levels of capital is properly left to

Statement of Policy on Capital Adequacy, 46 Fed. Reg. 62,693, 62,694 (Dec. 28, 1981). Banks were expected to maintain ratios above these minimums, and enforcement actions would be brought if ratios fell below those numbers. *See id.* (explaining that the FDIC "fully intends to utilize its authority to withhold approval of applications of various types and . . . to initiate administrative actions").

49. Statement of Policy on Capital Adequacy, 46 Fed. Reg. at 62,694 (noting that the minimum to avoid enforcement actions "is 5% or some higher limit as determined through an analysis of the overall condition of the institution").

50. 697 F.2d 674 (5th Cir. 1983).

51. *Id.* at 684.

52. *Id.* at 686.

53. *Id.* at 685.

54. *See id.* at 684 (noting that the OCC's order directed the Bank to increase its "equity capital to total assets ratio . . . to not less than seven percent").

55. International Lending Supervision Act § 904, 12 U.S.C. § 3903; Lyle B. Vander Schaaf, Comment, *The International Lending Supervision Act of 1983: Has It Had an Effect on the Latin American Debt Crisis?*, 2 AM. U. INT'L L. REV. 689, 689 (1987).

the [FBAs'] expertise and discretion."[56] To that end, ILSA included a provision, codified at 12 U.S.C. § 3907, declaring that the FBAs "shall have the authority to establish such minimum level of capital" as each agency, "in its discretion, deems to be necessary or appropriate"—which, when combined with provisions of the APA, prohibited judicial review of the FBAs' capital requirements.[57]

In addition, the statute required the FBAs to use that authority to affirmatively "establish[] minimum levels of capital" for banks.[58] It also clarified that banks' failures to meet their minimum capital levels is a de facto unsafe or unsound practice in APA adjudications, and allowed the FBAs to issue orders requiring banks to increase their capital to required levels without requiring APA adjudications.[59] In the words of the Senate Banking Committee, § 3907 was an effort "to clarify the authority of the banking agencies to establish adequate levels of capital requirements, to require the maintenance of those levels, and to prevent the courts from disturbing such capital."[60]

The FBAs' first industry-wide capital requirements were promulgated in 1985 and codified that "[a] bank must have and maintain total capital equal to a least 6 percent of adjusted total assets and primary capital

56. S. REP. NO. 98-122, at 16 (1983).

57. 12 U.S.C. § 3907(a)(2); *see also* 5 U.S.C. § 701(a)(2) (providing that the Administrative Procedure Act's judicial review provisions apply "except to the extent that . . . agency action is committed to agency discretion by law."); Frontier State Bank Okla. City v. FDIC, 702 F.3d 588, 597 (10th Cir. 2012) ("Section 3907 of [the International Lending Supervision Act of 1983] forecloses our review of the FDIC's imposition of capital requirements because it commits the setting of capital levels to the FDIC's discretion without giving us any standard to determine the correctness of the FDIC's decision."); FDIC v. Bank of Coushatta, 930 F.2d 1122, 1129 (5th Cir. 1991) (same finding). Note also that by its text, § 3907 does not apply to BHCs. *See* 12 U.S.C. § 3907 (referring generally to "banking institutions"); *id.* § 3902(2) (defining "banking institution" as a variety of depository institutions and not BHCs). Although it is possible that courts could find they have the capacity to review the FRB's capital requirements for BHCs, the issue has never been litigated.

58. 12 U.S.C. § 3907(a)(1).

59. *See id.* § 3907(b)(1)–(2) (providing that the "[f]ailure of a banking institution to maintain capital at or above its minimum level . . . may be deemed by the appropriate [FBA], in its discretion, to constitute an unsafe and unsound practice" and that "the appropriate [FBA] may issue a directive to a banking institution that fails to maintain capital at or above its required level," which "shall be enforceable . . . to the same extent as an effective and outstanding order issued pursuant to [FISA]").

60. S. REP. NO. 98-122, at 16 (1983).

equal to at least 5 ½ percent of adjusted total assets."[61] They were updated again in 1989 to implement international capital standards.[62]

These capital standards came too late to stop the Saving and Loan Crisis of the late 1980s, which saw thousands of banks and thrifts fail, the Thrift Insurance Fund fail, and the Bank Insurance Fund (BIF) nearly turn insolvent.[63] On the understanding that the FBAs' delay in closing failing banks resulted in unnecessary losses to the BIF,[64] Congress enacted the Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) and with it, a statutory regime, codified at 12 U.S.C. § 1831o, requiring regulators' prompt corrective action (PCA) when IDIs drop below certain capital levels.[65] In enacting § 1831o, Congress made clear that the purpose of the legislation was to narrow regulatory discretion to protect the BIF and require the regulators to engage in the prompt corrective action of firms they had been neglecting.[66]

FDICIA required the FBAs to enact regulations dictating the levels at which IDIs are considered "well capitalized," "adequately capitalized,"

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61. OCC Minimum Capital Ratios; Issuance of Directives, 50 Fed. Reg. 10,207, 10,216–17 (Mar. 14, 1985); *see also* FDIC Capital Maintenance, 50 Fed. Reg. 11,128 (Mar. 19, 1985) (same); FRB Membership of State Banking Institutions; Bank Holding Companies and Change in Bank Control; Capital Maintenance; Rules of Procedure, 50 Fed. Reg. 16,057 (Apr. 24, 1985) (same).

62. *See generally* FRB Capital; Risk-Based Capital Guidelines, 54 Fed. Reg. 4,186 (Jan. 27, 1989); OCC Risk-Based Capital Guidelines, 54 Fed. Reg. 4,168 (Jan. 27, 1989); FDIC Capital Maintenance; Final Statement of Policy on Risk-Based Capital, 54 Fed. Reg. 11,500 (Mar. 21, 1989).

63. *See* Timothy Curry & Lynn Shibut, *The Costs of the Savings and Loan Crisis: Truth and Consequences*, YALE SCH. MGMT., PROGRAM ON FIN. STABILITY 26–27 (2000), https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=12223&context=ypfs-documents [https://perma.cc/TG62-PLEH]; *see also* U.S. GEN. ACCT. OFF., GAO/GGD-91-69, BANK SUPERVISION: PROMPT AND FORCEFUL REGULATORY ACTIONS NEEDED 14 (1991) [hereinafter BANK SUPERVISION].

64. S. REP. NO. 102-167, at 32 (1991) ("The Committee is concerned that regulators have too often delayed in resolving the problems of troubled institutions."); *see also* U.S. GEN. ACCT. OFF., BANK SUPERVISION, *supra* note 63, at 3 ("GAO's analysis showed that bank regulators did not always use the most forceful actions available to correct unsafe and unsound banking practices. When they did, the enforcement process produced better results in terms of improving the condition of the bank.").

65. H.R. REP. NO. 102-157, at 121 (1991) ("One of the keys to protecting the Federal deposit insurance funds is early identification of problems at troubled institutions so prompt corrective action may be taken before an institution becomes a threat to the [Bank Insurance Fund] . . . .").

66. Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, sec. 131, § 38(a), 105 Stat. 2236, 2253 (codified at 12 U.S.C. § 1831o(c)(2)).

"undercapitalized," "significantly undercapitalized," and "critically undercapitalized,"[67] with the last requiring tangible equity of "not less than 2 percent of total assets."[68] The law then placed activity limitations on undercapitalized IDIs[69] and required such IDIs to submit to their regulators and follow "capital restoration" plans that specify how they intend to become adequately capitalized.[70] The FBAs were authorized to issue directives requiring IDIs to take specific action to those failing to follow their plans without requiring administrative law judge (ALJ) hearings.[71] For critically undercapitalized IDIs, regulators could jump straight to issuing directives.[72] The FBAs may apply to federal district court to enforce these directives and impose civil money penalties for violating them.[73] This PCA regime required the FBAs to closely monitor undercapitalized IDIs and take action if their capitalization levels were not improving.[74]

Congress's next and most recent changes to capital rules followed the 2008 financial crisis. The Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank) required the FBAs to enact "minimum leverage capital requirements" and "minimum risk-based capital requirements" for IDIs, BHCs, and nonbanks regulated by the FRB and required that those requirements "not be less than" those under the PCA regime as of Dodd-Frank's enactment.[75] It also amended the BHCA to clarify that the FRB could issue "regulations and orders relating to the capital requirements for [BHCs],"[76] and in many places, required existing capital regulations to be "countercyclical, so that the amount of capital required . . . increases in times of economic expansion and decreases in times of economic contraction."[77]

67. 12 U.S.C. § 1831o(c)(3).

68. *Id.* § 1831o(c)(3)(B)(i); *see* H.R. REP. NO. 102-157, at 126 (1991) (explaining that "regulatory discretion to allow an insolvent institution to remain open is narrowed, and a system of tripwires and timetables is established to guide the regulators in how to handle a failing or insolvent institution").

69. *See, e.g.*, *id.* § 1831o(e)(4) (imposing limitations on growth and requiring "[p]rior approval . . . for acquisitions, branching, and new lines of business").

70. *Id.* § 1831o(e)(2).

71. *See id.* § 1831o(f) (allowing action against an insured depository institution (IDI) that "fails in any material respect to implement a plan accepted by the agency").

72. *See id.* (allowing action against an IDI that "is significantly undercapitalized").

73. *See id.* § 1818(i)(1) (allowing the FBAs to apply to federal district courts "for the enforcement of any effective and outstanding notice or order issued under . . . section 1831o").

74. *See id.* § 1831o(e)(1)(A) ("Each [FBA] shall . . . closely monitor the condition of any undercapitalized [IDI]"); *id.* § 1831o(a)(2) ("Each [FBA] . . . shall carry out the purpose of this section by taking prompt corrective action to resolve the problems of [IDIs].").

75. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 171(b)(1)–(2), 124 Stat. 1376, 1436 (2010) (codified at 12 U.S.C. § 5371(b)(1)–(2)).

76. *Id.* § 616(a), 124 Stat. at 1615 (codified at 12 U.S.C. § 1844(b)).

77. *See, e.g.*, *id.*

III. THESE REQUIREMENTS DO NOT VIOLATE THE NONDELEGATION DOCTRINE

A. *What is the Nondelegation Doctrine Anyway?*

The nondelegation doctrine flows from Article I, Section One of the Constitution, which grants to Congress "[a]ll legislative powers herein granted."[78] Under the nondelegation doctrine, Congress cannot grant other actors the authority to exercise legislative power.[79] Although the doctrine first appears in mid-nineteenth-century state court cases,[80] federal courts did not use the doctrine to invalidate federal statutes until much later.[81] Even when the Supreme Court finally adopted the doctrine in 1892, it upheld the statute at issue.[82] Famously, the doctrine had "one exceptional year,"[83] 1935, after which the Supreme Court has never declared that a statute violates the doctrine.[84] Before and after 1935, Congress built up the administrative state in reliance on the nondelegation doctrine with various drafting conventions.[85]

Since 1928, nondelegation challenges have been governed by the intelligible principle standard, which requires courts to "constru[e] the challenged statute to figure out what task it delegates and what instructions it

78. U.S. CONST. art. I, § 1.

79. *See, e.g.*, Jennifer L. Mascott, Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine*, 26 GEO. MASON L. REV. 1, 1 (2018) ("The nondelegation doctrine consequently posits that Congress may not even consent to permitting another federal entity to exercise its exclusively held legislative power—that is, Congress may not 'delegate' its legislative power to another federal entity . . . .").

80. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 283 (2021).

81. *See* Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 381 (2017) ("[T]here was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power."); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) ("Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so.").

82. Mortenson & Bagley, *supra* note 80, at 283 (citing Field v. Clark, 143 U.S. 649, 692 (1892)).

83. *Id.* at 278.

84. Sunstein, *supra* note 81, at 315.

85. *See generally* Beau J. Baumann, *The Turney Memo*, 97 NOTRE DAME L. REV. REFLECTION 170 (2022) (providing primary source documentation proving the existence of the "force of law" drafting convention that Congress adopted because of the nondelegation doctrine).

provides."[86] Under that standard, the Court has "over and over upheld even very broad delegations."[87] The Court has upheld statutes empowering an agency to regulate in the "public interest,"[88] to set "fair and equitable" prices,[89] and to establish regulations that are "requisite to protect the public health."[90] While some have lamented the nondelegation doctrine's toothless status quo,[91] most agree that the doctrine today is little more than a paper tiger.[92]

The most recent demonstration of the intelligible principle standard came in *Gundy v. United States*.[93] *Gundy* involved a nondelegation challenge to the federal Sex Offender Registration and Notification Act (SORNA).[94] SORNA requires sex offenders to register in the jurisdictions where they live, work, or study.[95] But the challenged provision within SORNA, § 20913(d), is silent on whether SORNA's registration requirements apply retrospectively to sex offenders who were convicted before the statute's enactment.[96] Instead, SORNA provides the Attorney General with broad authority to "specify the applicability of the requirements" in SORNA "to sex offenders convicted before the enactment" of the statute and "prescribe rules for the registration[.]"[97]

Justice Elena Kagan, writing for the Court, avoided the charge that SORNA grants the Attorney General unchecked authority with a kitchen-

86. Gundy v. United States, 139 S. Ct. 2116, 2123 (2019) (plurality opinion); *see, e.g.*, J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

87. *Gundy*, 139 S. Ct. at 2129 (plurality opinion).

88. Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943).

89. Yakus v. United States, 321 U.S. 414, 422 (1944).

90. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001).

91. *See, e.g.*, Douglas H. Ginsburg, *Delegation Running Riot*, REG., Winter 1995, at 83–84 (reviewing DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993)) (lamenting the intelligible principle standard as part of the "Constitution-in-exile").

92. *See id.* (agreeing with others that the intelligible principle standard is effectively toothless).

93. 139 S. Ct. 2116 (2019).

94. *Id.* at 2121.

95. 34 U.S.C. § 20913(a).

96. *Id.* § 20913(d).

97. *Id.*

sink approach to statutory interpretation. She emphasized text,[98] context,[99] purpose,[100] history,[101] and—importantly— judicial precedent that the Attorney General also relied upon.[102] In the end, Kagan concluded that the Attorney General is limited under SORNA to "considering and addressing feasibility issues."[103] In so doing, Kagan reaffirmed the long-running rule for resolving nondelegation challenges under the intelligible principle standard—use *all* evidence at your disposal to narrow underdetermined statutes.

Notwithstanding its case law, a majority of the Court has communicated a desire to revive the doctrine.[104] These calls for reform are related to a long-simmering political morality suggesting that the intelligible principle standard is fueling a democracy deficit.[105] For example, Justice Neil Gorsuch's dissent in *Gundy* argued that Article I requires Congress to make the "policy judgments" (including judgments that have been routinely delegated to federal agencies for generations).[106] Citing precedent, Gorsuch noted that prior

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98. *See Gundy*, 139 S. Ct. at 2127 (emphasizing the Sex Offender Registration and Notification Act's (SORNA's) definition of "sex offender").

99. *See id.* at 2127–28 (discussing SORNA's legislative history).

100. *See id.* at 2126 (analyzing SORNA's purpose statement).

101. *See id.* at 2128 (discussing regulatory antecedents under the relevant provision).

102. *See id.* at 2123–24 (citing Reynolds v. United States, 565 U.S. 432 (2012)).

103. *Id.* at 2124.

104. *See id.* at 2139–41 (Gorsuch, J., dissenting) (disapproving of the intelligible principle standard); *id.* at 2131 (Alito, J., concurring in the judgment) (communicating some interest in reviving the nondelegation doctrine); Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (praising Justice Gorsuch's "scholarly analysis of the Constitution's nondelegation doctrine").

105. *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) (describing his concern that delegation of legislative power to the executive branch threatens "a structure designed to protect their liberties, minority rights, fair notice, and the rule of law"); Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 669 (2022) (Gorsuch, J., concurring) ("The nondelegation doctrine ensures democratic accountability by preventing Congress from intentionally delegating its legislative powers to unelected officials. Sometimes lawmakers may be tempted to delegate power to agencies to 'reduc[e] the degree to which they will be held accountable for unpopular actions." (quoting Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL'Y 147, 154 (2017))). For a critique of this political morality, see generally Beau J. Baumann, *Americana Administrative Law*, 111 GEO. L.J. 465, 468–70 (2023) (arguing that Justice Gorsuch is deploying arguments premised on congressional decline to justify judicial self-aggrandizement).

106. *See Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., joined by Roberts, C.J. & Thomas, J., dissenting) (arguing that the "Constitution demands" that "Congress, and not the Executive Branch, make the policy judgments"); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 85 (2021) (noting that "Congress delegates a wealth of policy

Court opinions "seemed to indicate that [a] statute supplied an 'intelligible principle' [when] it assigned an essentially fact-finding responsibility to the executive" or "authorize[d] another branch to 'fill up the details.'"[107] On this view, the executive's role is "to find facts" and "resolve even highly consequential details" to allow for application of Congress's rule.[108] Gorsuch envisioned a nondelegation doctrine that would allow agencies significant sway in conducting factfinding to implement congressional policies.[109]

So far, the intelligible principle standard and the *Gundy* plurality opinion remain good law.

B. Congress Lawfully Delegated to the FBAs the Authority to Impose Capital Requirements

Critics of Endgame rulemaking claim that Congress may have violated the nondelegation doctrine if it "failed to lay down with sufficient specificity its own policies and limitations to ensure that banking agencies merely carry out the rules set by Congress, rather than establishing their own rules and then demanding compliance."[110] Some claim that ILSA's directive in § 3907 that the FBAs "require banking institutions to 'achieve and maintain adequate capital by establishing minimum levels of capital'" is an insufficient policy directive because "[a]ll the work is done by the word 'adequate,' but Congress did not define that term, nor is it pegged to any particular formula, rate, or cap."[111] Others, taking a more tentative approach, explained that the FBAs' Endgame rulemaking "reflects the agencies' evident assumption that these statutes provide no rule of law limiting the agencies' discretion[,]" which would violate the nondelegation doctrine if true.[112]

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decisions to the Executive Branch" and suggesting that Justice Gorsuch's approach "casts doubt on countless regulatory statutes that delegate power" to federal agencies).

107. *Gundy*, 139 S. Ct. at 2136, 2141 (Gorsuch, J., dissenting).

108. *Id.* at 2143, 2145 (Gorsuch, J., dissenting).

109. *See id.* at 2136–37 (Gorsuch, J., dissenting) (indicating that once Congress "prescribes [a] rule governing private conduct, it may make the application of that rule depend on executive fact-finding").

110. HENNEKE & MCCOTTER, *supra* note 6, at 14; *see also id.* ("There is a strong argument that Congress gave the banking agencies too much leeway in making determinations that are 'heavily laden (or ought to be) with value judgments and policy assessments' that only Congress can make." (quoting Mistretta v. United States, 488 U.S. 361, 414 (1989) (Scalia, J., dissenting))).

111. HENNEKE & MCCOTTER, *supra* note 6, at 14 (quoting 12 U.S.C. § 3907(a)(1)); *see also id.* at 15 (claiming that the FBAs wield "unconstrained power to both set capital requirements with no upper bound and determine how capital is risk-weighted" in a way that "allow[s] them to centrally plan bank lending through the back door").

112. Comment Letter, *supra* note 6, at 52.

Allegations that Congress did not delegate, or may have unconstitutionally delegated, to the FBAs the authority to set capital requirements fail to understand the history and evolution of the banking statutes explained in Part I. The various statutes authorizing the FBAs to issue capital regulations[113] are best thought of as effectuating § 1818's prohibition on unsafe or unsound practices as it relates to capital—a principle as intelligible as those previously upheld by the Supreme Court.

When Congress amended § 1818 in FISA, it allowed the FBAs to bring enforcement actions against a bank if, "in the [regulator's] opinion," the bank engaged "in an unsafe or unsound practice."[114] While this amendment authorized the FBAs to impose institution-specific capital requirements through cease-and-desist orders, it also permitted them to promulgate industry-wide capital regulations through authorization "to make rules and regulations with respect to any such proceedings."[115]

Although § 3907 appears as a stand-alone statute authorizing capital rules, the legislative history demonstrates that it is merely a clarification of § 1818. Congress enacted § 3907 as a direct response to the *First National Bank of Bellaire v. Comptroller of the Currency* decision in which the Fifth Circuit overturned the agency's determination that the bank had engaged in an unsafe or unsound practice by being insufficiently capitalized.[116] By including provisions requiring the FBAs to institute minimum capitalization levels for banks and prohibiting courts from second-guessing those levels, Congress made clear that the FBAs, not the courts, would decide what capitalization levels constitute unsafe or unsound practices while still expecting adherence to the Horne Standard.[117] Indeed, the Senate Banking Committee even noted that the legislation was meant to "clarify the authority" of the regulators, not to give them entirely new authority.[118] Further reflecting the fact that § 3907 was a mere clarification is how it addressed banks' failure to comply with their capital requirements. The statute provides that a bank's failure to meet capital requirements may "constitute an

113. *See, e.g.*, 12 U.S.C. § 1831o.

114. *Id.* § 1818(b)(1).

115. *Id.* § 1818(n); *see also* Indep. Bankers Ass'n of Am. v. Heimann, 613 F.2d 1164, 1169 (D.C. Cir. 1979) (explaining that "[t]he Comptroller was given authority to promulgate regulations in order to facilitate execution of his statutory powers" and that "[i]t would undermine the regulatory purpose of Congress to assume that the Comptroller must proceed solely by separate 'cease and desist' cases").

116. *See* First Nat'l Bank of Bellaire v. Comptroller of the Currency, 697 F.2d 674, 684 (5th Cir. 1983); *see also supra* text accompanying note 56 (discussing the case and Congress's response).

117. *See supra* text accompanying note 44 (describing the Horne Standard as the test for unsafe or unsound practices).

118. S. REP. NO. 98-122, at 16 (1983).

unsafe and unsound practice within the meaning of section 1818," which the FBAs could then enforce via the same method it had attempted in *Bellaire*.[119]

That § 3907 exempted the FBAs' capital requirements from judicial review did not change the underlying safety-and-soundness standard the FBAs applied—it only allowed the FBAs to make determinations of banks' unsafe or unsound practices related to capital without having those determinations subject to judicial review.[120] One court acknowledged that "this choice leaves banks in the position of enduring any vicissitude attending the exercise of the regulator's discretion," but it also recognized that "Congress is permitted to prioritize the safety of the banking system over banks' interest in avoiding subjective or even harsh agency decisions."[121] Indeed, Congress has a long history of committing decisions to agency discretion while still requiring regulators to adhere to statutory standards.[122]

The PCA regime (codified in § 1831o) created by FDICIA is similarly related to § 1818's unsafe or unsound framework. Recall that FDICIA was enacted in part on the recognition that the FBAs were too slow to act against undercapitalized banks, resulting in harm to the BIF; in other words, it was Congress's impression that the FBAs failed to adequately use their authority to prosecute regulatory violations or unsafe or unsound practices.[123] Section 1831o's imposition of restrictions on IDIs deemed "undercapitalized," "significantly undercapitalized," or "critically undercapitalized" by the FBAs[124]

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119. 12 U.S.C. § 3907(b)(1). Reflecting a recognition that capital delinquencies must quickly be addressed and on-the-record hearings are overkill for that task, Congress also allowed the FBAs to issue directives requiring banks with capital delinquencies to increase their capital without administrative law judge hearings. *See id.* § 3907(b)(1)–(2); *see also* FDIC v. Bank of Coushatta, 930 F.2d 1122, 1131 (5th Cir. 1991) (explaining that "if a hearing were required, the directive would be delayed; by the time the matter was resolved, a bank's financially troubled status, requiring issuance of a directive, may have deteriorated substantially").

120. *See* 12 U.S.C. § 3907(b)(1)–(2).

121. Frontier State Bank Okla. City v. FDIC, 702 F.3d 588, 597 (10th Cir. 2012).

122. *See, e.g.*, Sugarman v. Forbragd, 405 F.2d 1189, 1190 (9th Cir. 1968) (deciding that a statute prohibiting the import of "adulterated" or "misbranded" food and drugs commits unreviewable discretion to the Secretary of the Treasury); Lutzenhiser v. Udall, 432 F.2d 328, 332 (9th Cir. 1970) (deciding that a statute authorizing the lease or sale of land "not exceeding five acres" commits unreviewable discretion to the Secretary of the Interior); Gregory Elec. Co. v. U.S. Dep't of Lab., 268 F. Supp. 987, 989–92 (D.S.C. 1967) (deciding that 29 U.S.C. § 50 commits unreviewable discretion to the Secretary of Labor to "promote the furtherance of labor standards necessary to safeguard the welfare of apprentices"). *See generally* Kenneth Culp Davis, *Administrative Arbitrariness Is Not Always Reviewable*, 51 MINN. L. REV. 643 (1967) (discussing this phenomenon).

123. *See supra* note 64 and accompanying text (explaining Congress's understanding of the FBAs' activities during the Savings and Loan Crisis).

124. 12 U.S.C. § 1831o(c)(2)–(3).

must be understood as Congress's effort to *require* the FBAs to act against IDIs engaged in unsafe or unsound practices.[125] Though this provision permitted the FBAs to issue capital directives directly and avoid § 1818's ALJ hearings, the enforcement mechanism is just an evolution from § 3907's capital directives and not something entirely new.

The last major enactment of statutory provisions ostensibly authorizing capital requirements, made by Dodd-Frank, is similarly an evolution of existing statutory authority based on the unsafe or unsound standard.[126] The Act made three specific changes. Dodd-Frank, for example, amended the BHCA to provide that the FRB may issue "regulations and orders relating to the capital requirements for [BHCs] . . . consistent with the safety and soundness of the company."[127] In its report on the legislation, the Senate Banking Committee made clear that the intention was not to provide the FRB new authority but to clarify authority that the FRB already had.[128]

Similarly, Dodd-Frank's provision requiring the FRB to enact "risk-based capital requirements and leverage limits" for the largest BHCs is not a new source of authority but instead a directive from Congress to use existing authority in a new way.[129] That provision is one of several included in a section enacted "to prevent or mitigate risks to the financial stability of the United States . . . [arising from] large, interconnected financial institutions," and which requires the FRB to tailor its regulations to firms based on a variety of factors.[130] The FRB already had authority to enact capital regulations to ensure the safety and soundness of BHCs; through this statute, Congress only intended to require the FRB to use that authority to impose capital rules that are tailored and crafted with the financial system—not just institutions and the institutions' customers—in mind.[131]

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125. *See* H.R. REP. NO. 102-157, at 118 (1991) ("Although the Committee did not set actual capital standards, this legislation intends that banks should be well-capitalized."). Note also that § 1818 was the only enforcement statute that covered all IDIs and was the FDIC's only enforcement authority prior to the Federal Deposit Insurance Corporation Improvement Act of 1991's enactment.

126. Although the Dodd-Frank Act included a provision providing that the FRB "shall have authority to issue regulations to implement" new requirements, *see* 12 U.S.C. § 5368, this provision was not needed for enhanced capital requirements for BHCs.

127. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, sec. 616(a), § 5(b), 124 Stat. 1376, 1615 (2010) (codified at 12 U.S.C. § 1844(b)).

128. *See* S. REP. NO. 111-176, at 88 (2010) ("This section clarifies that the Federal Reserve may adopt rules governing the capital levels of bank and savings and loan holding companies.").

129. 12 U.S.C. § 5365(b)(1)(A)(i).

130. *Id.* § 5365(a)(1); *see also id.* § 5365(a)(2).

131. *See* Robert Hockett, *The Macroprudential Turn: From Institutional 'Safety and Soundness' to Systematic 'Financial Stability' in Financial Supervision*, 9 VA. L. & BUS. REV. 201, 206 (2015)

Finally, its provision requiring the FBAs to enact for IDIs, BHCs, and nonbanks regulated by the FRB "minimum leverage capital requirements" and "minimum risk-based capital requirements" that are "not . . . less than" those under the PCA regime as of Dodd-Frank's enactment—known as the Collins Amendment—should be read not as an independent source of regulatory authority, but as directives that the FBAs use authority found elsewhere.[132] Note that the PCA regime applies only to IDIs, whereas the Collins Amendment applies to a much broader array of institutions. The provision recognized the (more or less) adequate capitalization of IDIs during the 2008 Financial Crisis but *inadequate* capitalization of BHCs and was intended to bring non-IDIs up to the level of IDIs.[133] The Collins Amendment, therefore, is best read as a directive to the FBAs in the use of their existing statutory authority already based on the concept of safety and soundness.

The statutes explicitly authorizing bank capital rules—§§ 3907, 1831o, 1844, and 5365—do not just satisfy the existing intelligible principle standard, but they also satisfy the new test envisioned by Justice Gorsuch. Whereas Endgame rulemaking's detractors claim that these statutes do not provide the level of specificity necessary to greenlight regulations—requiring only "adequate" capital requirements, for example[134]—they miss that Congress's goal with each was to better effectuate its longstanding prohibition on unsafe or unsound practices.[135] To that end, it is easy to intuit "what instructions" the statutes provide, as the plurality opinion in *Gundy* framed the test.[136] Congress clearly instructed the FBAs to enact capital rules that

(describing these changes as "a shift from exclusive attention to the safety and soundness of individual financial institutions to a focus upon the health and stability of the financial system as a whole").

132. 12 U.S.C. § 5371(b)(1)–(2).

133. *See* Press Release, Sen. Susan Collins, Senator Collins Introduces Amendment to Impose Strong Capital Requirements on Financial Institutions to Help Prevent Future Economic Crises (May 7, 2010), https://www.collins.senate.gov/newsroom/senator-collins-introduces-amendment-impose-strong-capital-requirements-financial [https://perma.cc/32VL-NMVW] (providing a letter from FDIC Chair Sheila Bair in support of this provision and noting that "[d]uring the crisis, FDIC-insured subsidiary banks became the source of strength both to the holding companies and holding company affiliates" and explaining that BHCs should not be permitted to "operate under consolidated capital requirements that are numerically lower and qualitatively less stringent than those applying to insured banks").

134. 12 U.S.C. § 3907.

135. *See* Gundy v. United States, 139 S. Ct. 2116, 2141 (2019) (Gorsuch, J., dissenting) (suggesting that the intelligible principle turns on whether Congress has assigned an executive, fact-finding role that allows an agency to flesh out a broader mandate).

136. *Id.* at 2123 (plurality opinion).

preserve "generally accepted standards of prudent operation" that minimize "abnormal risk or loss or damage to" the banks they regulate.[137]

Likewise, Gorsuch's emphasis on factfinding and filling in details is satisfied here.[138] Section 1818(b) required the FBAs to conduct adjudications to determine if a bank was, "in the [regulator's] opinion," engaged "in an unsafe or unsound practice."[139] These adjudications certainly require examiners to engage in factfinding to determine whether an unsafe or unsound practice has occurred, and the fact that Congress and the Supreme Court permit the FBAs to enact capital regulations "to resolve certain issues of general applicability" in these otherwise "individualized determinations" does not negate that requirement.[140] Further, the statutes that build upon § 1818 and *require* the FBAs to enact capital regulations merely compel the agencies to "resolve [the] highly consequential details" of Congress's goal of safe, sound, and well-capitalized banks—efforts that themselves require fact-intensive work on the FBAs' part.[141]

CONCLUSION

Even under the most exacting standard, the statutes that enable the Endgame rule pass constitutional muster. Over the next several years, we may see regulated entities push the nondelegation doctrine beyond even what Justice Gorsuch envisioned. This strategy is one of perceived necessity. Courts have only rarely reviewed the FBAs' capital decisions because ILSA "forecloses our review of the [FBAs'] imposition of capital requirements."[142] One court noted that "[w]hile this choice leaves banks in the position of enduring any vicissitude attending the exercise of the regulator's discretion, Congress

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137. 112 CONG. REC. 26,474 (1966) (quoting Memorandum from the Chairman of the Federal Home Loan Bank Board on "Unsafe or Unsound Practices" as a Basis for Insurance of a Cease-And-Desist Order, entered into the record by Senator Robertson); *see also* cases cited *supra* note 19; Holzman, *supra* note 16 (describing the creation and interpretation of the phrase).

138. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

139. 12 U.S.C. § 1818(b).

140. Am. Hosp. Ass'n v. NLRB, 499 U.S. 606, 612 (1991); *see* United States v. Storer Broad. Co., 351 U.S. 192, 205 (1956); Fed. Power Comm'n v. Texaco, Inc., 377 U.S. 33, 44 (1964); Heckler v. Campbell, 461 U.S. 458, 467 (1983); *see also* 12 U.S.C. § 1818(n) (allowing the FBAs "to make rules and regulations with respect to any [§ 1818] proceedings").

141. *Gundy*, 139 S. Ct. at 2143 (Gorsuch, J., dissenting); *see supra* Part II (discussing the background of congressional actions).

142. Frontier State Bank Okla. City v. FDIC, 702 F.3d 588, 597 (10th Cir. 2012); *see also* FDIC. v. Bank of Coushatta, 930 F.2d 1122, 1129 (5th Cir. 1991) ("The legislative history and language of the statute do not leave a court with a meaningful standard against which to judge the agency's exercise of its discretion.").

is permitted to prioritize the safety of the banking system over banks' interest in avoiding subjective or even harsh agency decisions."[143]

Regulated entities will almost certainly use the nondelegation doctrine as a hook for judicial review. After all, the case law makes clear that courts can hear cases that involve constitutional questions, notwithstanding the APA. Future scholarship should follow Endgame developments to see whether the well-resourced actions of regulated entities can distort the nondelegation doctrine in federal court.

143. *Frontier*, 702 F.3d at 597.