# Introduction to *Yale Journal on Regulation* Symposium on Financial Regulation

**Jonathan R. Macey**[†]

There are about 4600 FDIC insured banks in the United States as of June 2023.[1] Sometimes deposit insurance prevents bank failures and sometimes it does not. There were four very small bank failures in 2020.[2] There were no bank failures in 2021 or 2022.[3] In 2023, after more than two years without a bank failure (called "the longest stretch without a failure in more than 15 years"[4]), five banks failed,[5] but three of these, First Republic Bank, Signature Bank and Silicon Valley Bank, were mid-sized financial institutions, with billions of dollars in assets. And Silicon Valley Bank was the second largest bank failure in the nation's history.[6] Moreover, 2023 was notable because Silicon Valley Bank and Signature Bank were, respectively, the second and fourth largest U.S. bank failures in history, measured by total assets.[7] So, not surprisingly, we are once more focusing our attention on banking regulation.

Still, U.S. banks appear to be pretty safe, at least from a historical perspective. Between 1930 and 1933, more than 9,000 banks failed.[8] Be-

---

† Sam Harris Professor of Corporate Law, Corporate Finance and Securities Regulation.

1. *Statistics at a Glance*, FDIC (June 30, 2023), https://www.fdic.gov/analysis/quarterly-banking-profile/statistics-at-a-glance/2023jun/industry.pdf [https://perma.cc/GA3A-QVG7].

2. The banks that failed were Almena State Bank, Almena, KS, First City Bank of Florida, Fort Walton Beach, FL, The First State Bank, Barboursville, WV, and Ericson State Bank, Ericson, NE. None of these banks had assets of more than $200 million and none had deposits of more than $150 million. *Bank Failures: 2020 in Brief*, FDIC, https://www.fdic.gov/bank/historical/bank/bfb2020.html [https://perma.cc/SDJ5-ENYG].

3. *Bank Failures: 2021 in Brief*, FDIC, https://www.fdic.gov/bank/historical/bank/bfb2021.html [https://perma.cc/3Y4N-N8M8]; *Bank Failures: 2022 in Brief*, FDIC, https://www.fdic.gov/bank/historical/bank/bfb2022.html[https://perma.cc/9RX4-BZYT].

4. Kevin Wack, *Dramatic Collapses Made 2023 the Biggest Year Ever for Bank Failures*, AM. BANKER (Dec. 13, 2023), https://www.americanbanker.com/list/dramatic-collapses-made-2023-the-biggest-year-ever-for-bank-failures [https://perma.cc/HE3F-V7Y9].

5. The banks that failed were Citizens Bank, Sac City, IA, Heartland Tri-State Bank, Elkhart, KS, First Republic Bank, San Francisco, CA, Signature Bank, New York, NY, and, of course, Silicon Valley Bank, Santa Clara, CA. *Bank Failures: 2023 in Brief*, FDIC, https://www.fdic.gov/bank/historical/bank/bfb2023.html [https://perma.cc/K8DC-PGL5].

6. Drew DeSilver, *Most U.S. Bank Failures Have Come in a Few Big Waves*, PEW RSCH. CTR. (Apr. 11, 2023), https://www.pewresearch.org/short-reads/2023/04/11/most-u-s-bank-failures-have-come-in-a-few-big-waves [https://perma.cc/37HQ-U4B7].

7. Wack, *supra* note 4.

8. DeSilver, *supra* note 6.

tween 1980 and 1995, more than 2,900 banks and thrifts, with assets of more than $2.2 trillion, failed.[9] What is notable about the 2023 bank failures is how embarrassing they were for regulators. It appeared as if nothing had been learned from our vast prior experience with bank instability.

Silicon Valley Bank failed because it was unable to manage its balance sheet. The Bank had a mismatch between the long-term bonds on its balance sheet and its short-term liabilities, which came in the form of demand deposits, 93% of which were uninsured.[10] That failure alone cost the FDIC $16.1 billion.[11]

Signature Bank, which marketed itself to the cryptocurrency industry, also had significant uninsured deposits, and, like Silicon Valley Bank, experienced "a surge of panicked withdrawals" as concerns emerged about the slump in digital currencies.[12] 90% of Signature Bank's deposits were uninsured as of the end of 2022.[13] The failure cost the FDIC approximately $2.5 billion.[14] Like Silicon Valley Bank and Signature Bank, First Republic also was funded disproportionately by uninsured deposits, and when its uninsured depositors, who accounted for 68% of its total deposits, exited the bank, failure soon followed.[15] This failure cost the Deposit Insurance Fund (DIF) an estimated $15.6 billion.[16]

It turns out that what protects banks from suffering from debilitating bank runs is deposit insurance, and developing plausible strategies for preventing bank failures for banks with significant uninsured deposits has eluded bank regulators forever. It also appears clear that the only meaningful strategy for keeping banks safe is to construct a market-based regulatory system that provides strong private incentives, carrots and sticks, to bank shareholders and managers. When the FDIC deposit insurance fund loses money, as they did in the three recent bank failures described above, shareholders and managers should incur meaningful costs, as they

---

9. *Id.*

10. Tamar Gubins & Christopher Pippett, *The Extraordinary Silicon Valley Bank Collapse: What We Know*, FOX ROTHSCHILD (Mar. 10, 2023), https://www.foxrothschild.com/publications/the-extraordinary-silicon-valley-bank-collapse-what-we-know [https://perma.cc/YD6Z-9FG7].

11. Wack, *supra* note 4.

12. Max Abelson, *'Old-School' Signature Bank Collapsed After Its Big Crypto Leap*, BLOOMBERG (Mar. 14, 2023), https://www.bloomberg.com/news/articles/2023-03-14/why-did-signature-bank-fail-inside-the-old-school-new-york-bank [https://perma.cc/EU3R-QA8].

13. Press Release, FDIC, FDIC's Supervision of Signature Bank (Apr. 28, 2023), https://www.fdic.gov/news/press-releases/2023/pr23033a.pdf [https://perma.cc/XVU7-EGKP].

14. *Id.* at 2.

15. Karl Evers-Hillstrom, *Bidding for First Republic Lasts Into the Night: A Guide to the Latest Banking Crisis*, THE HILL (Apr. 30, 2023, 11:02 PM ET), https://thehill.com/business/3911002-what-to-know-about-first-republic-bank [https://perma.cc/UFG8-GZK2].

16. FDIC, *Insured Institution Performance*, 17 FDIC Q. 1, 31 (2023). https://www.fdic.gov/analysis/quarterly-banking-profile/qbp/2023jun/qbp.pdf [https://perma.cc/85TA-NBSK].

did in the past.[17] Put simply, deposit insurance should be viewed as a supplement to market-based mechanisms for disciplining excessive risk-taking, rather than as a substitute for such mechanisms.

Rather amazingly, no matter how often traditional, non-incentive-based regulation fails to function as intended, the reaction to bank failures in academic circles is to call for still more of the same.

The important contributions by Kathryn Judge, Saule Omarova, Edward Janger, Adam Levitin, Raúl Carrillo, and Hilary Allen to this Symposium further our understanding of the regulatory environment of banks. Interestingly, however, none of these authors offers any hope that the regulatory failures that led to the bank failures of 2023 can be easily fixed, or that it is at all likely that there will be significant changes in the way that bank regulation is approached in the future.

In a major contribution to scholarship, Kathryn Judge points out that few people understand or appreciate the Federal Home Loan Bank System. She seeks to remove "the veil of ignorance that has allowed the FHL Bank system to use public backstops to serve largely private aims with minimal accountability for the last half century."[18] Professor Judge observes that Federal Home Loan Banks are the second leading issuer of U.S. dollar-denominated debt, and that their decisions about how to use the vast sums they raise appear to be misguided.[19] In particular, in 2022, Federal Home Loan Banks provided cash to four struggling banks, Silicon Valley Bank, Signature Bank, First Republic Bank and Silvergate Bank, all of which had failed by the spring of 2023. Interestingly, Professor Judge points out that the Federal Home Loan Banks also funneled cash to banks that ultimately failed in the past, particularly during the Savings and Loan crisis of the 1980s and during the 2007-09 financial crisis.[20]

In her essay, Professor Judge explains how the Federal Home Loan Bank system historically worked to further the policy goal of expanding home ownership. She argues that "changes in housing finance and financial markets preclude it from ever again having the impact it once did on housing finance."[21] Nevertheless, Professor Judge persuasively argues that "understanding the conditions that allowed the FHLBanks to work so well during their first few decades . . . provides a template that can be

17. Jonathan R. Macey & Geoffrey P. Miller, *Double Liability of Bank Shareholders: History and Implications,* 27 WAKE FOREST L. REV. 31 (1992) (providing a historical analysis of the regime of double liability for bank shareholders that existed in the U.S. between the Civil War and the Great Depression, pursuant to which shareholders would be required to make additional capital contributions to satisfy depositors' claims against failed banks).

18. Kathryn Judge, *The Unraveling of the Federal Home Loan Banks*, 41 YALE J. ON REGUL. 1011, 1013 (2024).

19. *Id.*

20. *Id.* at 1014.

21. *Id.*

used to identify domains where that original design could still have a positive impact."[22]

Historically, the Federal Home Loan Banks supported very small financial institutions that were focused on providing housing finance. Professor Judge points out that the Federal Home Loan Banks have become "unmoored from their original purpose" such that they now "disproportionately benefit members and introduce troubling distortions in the banking system."[23] The story that Professor Judge tells is essentially that other government programs and institutions, particularly the Federal National Mortgage Association (now Fannie Mae and Ginnie Mae) have transformed the mortgage market.[24] While problems remain, "access to financing on reasonable terms—relative to income, home value and prevailing interest rates—is no longer the primary obstacle standing in the way of a typical middle-class family and the dream of home ownership."[25] However, the role played by Federal Home Loan Banks in providing financing for homes "pales in comparison to the role of other GSEs."[26]

Professor Judge ably documents the decades-long process that resulted in the eradication of the distinction between commercial banks and thrifts institutions, such that, as of today, we have "functionally one system" of bank regulation for both banks and thrifts.[27] It also turns out that it's not just thrifts. Banks in general are playing an increasingly minor role in originating mortgages, as specialized non-banks such as Rocket Mortgage and United Wholesale Mortgage have come to dominate the market.[28] In short, the Federal Home Loan Bank system is no longer needed because housing finance is "robust" without any support from the system.[29] Worse, by the late 1980s, the thrift industry itself was bankrupt, and the now-defunct Federal Savings and Loan Insurance Corporation did not have the resources to resolve all of the thrifts that were insolvent but still in operation.[30]

Professor Judge argues that merely because the Federal Home Loan Bank system is no longer needed and is no longer serving its original purpose of providing low-cost financing for homeowners "does not necessarily mean that it should be eliminated."[31]

22. *Id.*
23. Judge, *supra* note 18, at 1030.
24. *Id.* at 1031.
25. *Id.* at 1032.
26. *Id.* at 1033.
27. *Id.* at 1036.
28. Judge, *supra* note 18, at 1036.
29. *Id.* at 1038.
30. *Id.* at 1039.
31. *Id.* at 1043.

The argument for elimination appears strong, however. As Professor Judge observes, Congress provides the Federal Home Loan banks with "a host of benefits that no private company enjoys."[32] These include the implicit government guarantees of their debt, a host of regulatory and tax exemptions, including exemptions from local, state and federal income tax, as well as an exemption on the interest paid on Federal Home Loan bank debt from state income tax. And, when a Federal Home Loan bank makes a loan to a federally insured depository institution, that loan must be paid off in full before any depositor or the FDIC is repaid. These regulatory subsidies are worth billions of dollars.

Professor Judge ably catalogues the panoply of benefits conferred on Federal Home Loan Banks by the government and shows that the claims that such banks are "private" are somewhat misleading.[33] Professor Judge makes the interesting observation that now that thrifts have access to the Federal Reserve discount window, and banks have access to the Federal Home Loan Bank's liquidity channels, the Federal Home Loan Bank system now serves as a "lender of second to last resort," loaning money to struggling financial institutions, notwithstanding the fact that such institutions also have access to the Fed's discount window.[34]

Professor Judge shows that the Federal Home Loan Banks do not just make loans, they make very bad loans.[35] Failed institutions such as IndyMac, Washington Mutual, Countrywide, Merrill Lynch, First Republic Bank, Signature, Silvergate, Silicon Valley Bank and Wachovia, all received significant financing from Federal Home Loan Banks. Essentially, Federal Home Loan Banks "don't just step up to provide liquidity to healthy banks during times of stress, they consistently provide the most money to troubled institutions."[36] Professor Judge makes a compelling case that the Fed, not the Federal Home Loan Banks should be the nation's lender of last resort.[37] In light of the massive costs these bank failures imposed on the FDIC, it is impossible to avoid the conclusion that the Federal Home Loan Banks operations impose more costs than benefits on the financial system.

Professor Judge advocates reorienting the focus of Federal Home Loan Banks away from their traditional role of supporting housing finance, and towards supporting small banks and small businesses by "providing further support for small banks to engage in small business lending."[38] Reorienting the Federal Home Loan Banks in this way is a

32. *Id.* at 1052.
33. Judge, *supra* note 18, at 1052-55.
34. *Id.* at 1055.
35. *Id.* at 1055-56.
36. *Id.* at 1061.
37. *Id.* at 1061-64.
38. Judge, *supra* note 18, at 1071.

noble sentiment. The reality, however, as Professor Judge recognizes, is that the Federal Home Loan banks are in it for the money, and lending money to large banks is where the money is, particularly in light of the priority that these Federal Home Loan banks have over other creditors' claims.[39] As Professor Judge puts it, "[i]n exchange for becoming FHL-Bank members, financial institutions receive benefits, which have grown in variety and value over time."[40] So, too, are the benefits bestowed on the well-paid managers of the FHL Banks.

A practical challenge to implementing Professor Judge's proposal to redirect the Federal Home Loan banks is expertise. Lending requires a considerable amount of expertise about the borrowers' business, and there is no evidence that the Federal Home Loan Banks have the expertise to be successful at the daunting challenge inherent in identifying the risks and rewards of small business lending. Finally, Professor Judge does not explain how Federal Home Loan banks could be incentivized to make the changes to their business model that she advocates.

This Article reflects solid research and exemplary analysis. In my view, however, the inevitable implication of this research and analysis is that, "given how far the Federal Home Loan Bank system has veered from its original design" and in light of the significant costs that the system poses, we should pursue one policy option mentioned but not seriously considered by Professor Judge, which is to "eliminate the system entirely."[41] One sign of a strong paper is that its research and analysis are so strong and fairly presented that different readers can reach different normative conclusions about the implications of the analysis. And that is what we have with this paper.

Professor Omarova is in favor of public banking. She points out that the banking services provided by the private sector do not fully meet the needs of the poor and disadvantaged. Moreover, the current system appears borderline dysfunctional from a public policy perspective because when banks are profitable their shareholders win, but when banks fail the public inevitably comes to their rescue. These are powerful points. But they are not arguments that public banking is effective or efficient. Rather, the premise of the article is that establishing public banks presents "an institutional design project."[42]

Professor Omarova posits that the term "public" can refer either to the question of who owns the bank, or to the question of whose interests the bank serves.[43] Professor Omarova acknowledges that one generally

39. *Id.* at 1072.

40. *Id.* at 1024.

41. *Id.* at 1073.

42. Saule T. Omarova, *Public Banking as an Institutional Design Challenge*, 41 YALE J. ON REGUL. 1128, 1128 (2024).

43. *Id.* at 1137.

thinks of a public bank as one owned by the government.[44] In a fascinating turn, Professor Omarova asserts that the "definitional choice" of defining a public bank as one owned by the government is not "ideologically neutral" because "equating 'publicness' with government ownership made it easier for generations of neoliberal economists to dismiss public banks as a form of inherently inefficient and corrupt state-owned enterprises."[45] This seems unfair. The hypothesis that public-sector firms are less efficient that private-sector firms is based on empirical evidence, not (just) ideology,[46] as anybody who has spent time in a Social Security office or a Department of Motor Vehicles office is well aware. The efficiency gains of privatization are significant, with most of those gains attributable to the increased productivity of firms that have transitioned from the public sector to the private sector.[47]

Professor Omarova seems to argue that being suspicious of public banks is bad because it is not "ideologically neutral."[48] But fair is fair: If being *suspicious* of public banks is not ideologically neutral, then *trusting* public banks is not ideologically neutral either. Support for public banks, like support for private banks, should be based on evidence. And as the OECD has observed, "data provide a strong indication that the threat of corruption and irregular practices in and around SOEs (State Owned Enterprises) is real."[49] To the extent that concerns about public banking are based on evidence about the failures of government-controlled enterprises to allocate capital efficiency and to succumb to corruption, suspicions about public ownership are not merely ideological.

Professor Omarova is right that many scholars are skeptical about government ownership of banks.[50] Banks do, after all, play a central role in allocating capital to individuals and businesses. The historical record indicates pretty clearly that the government is not good at doing this, and that it is not unreasonable for a fair-minded person to worry about inefficiency and corruption in the public sector. All of this is simply to say that

44. *Id*.

45. *Id.* at 1138 n.25.

46. Ann P. Bartel & Ann E. Harrison, *Ownership Versus Environment: Disentangling the Sources of Public-Sector Inefficiency*, 87 REV. ECON. & STAT. 135, 135 (2005) ("most studies find that public-sector plants perform poorly relative to their private-sector counterparts, others get mixed or ambiguous results").

47. Most of these gains associated with privatization are attributable to productivity gains, but 5% are attributable to price increases, and 31% are attributable to transfers from laid-off workers. Rafael La Porta & Florencio López-de-Silanes, *The Benefits of Privatization: Evidence From Mexico*, 114 Q. J. ECON. 1193 (1999).

48. Omarova, *supra* note 42, at 1138 n.25.

49. OECD, STATE OWNED ENTERPRISES AND CORRUPTION: WHAT ARE THE RISKS AND WHAT CAN BE DONE? (2018), https://www.oecd-ilibrary.org/governance/state-owned-enterprises-and-corruption_9789264303058-en [https://perma.cc/NQB3-U42L].

50. Omarova, *supra* note 42, at 1138 n.25.

Professor Omarova is right that if an economy is to have public banks, the institutional design of such banks is of paramount importance.

Interestingly, government ownership of businesses in general and banks in particular is viewed with such suspicion that in arguing for public banking one must not bring attention to the fact that government ownership is generally a feature of public banking. Professor Omarova indicates that, while public banks are owned by the government, one should not focus too much on that inconvenient fact. Instead, she emphasizes that "[w]hat separates a 'public' bank from a private banking firm is not simply its ownership structure, but more important its principal organizational purposes and the resulting incentive structure." A public bank, then, is a bank whose business model is "geared explicitly towards providing some publicly beneficial service and meeting some public need." Thus, while not at all ruling out the idea of government ownership, Professor Omarova would expand the definition of public ban to include "certain types of cooperatively or mutually owned banking entities." This is a somewhat subtle distinction, as Professor Omarova recognizes that a public bank is a "government instrumentality."[51]

Traditional "profit-seeking commercial banks," it seems are excluded from the definition of public banks, apparently on the grounds that a firm cannot simultaneously pursue profits and provide a "publicly beneficial service" or meet "some public need."[52] But private banks, which supply capital to businesses that provide goods and services that people want, and employ most a lot of people while doing so, are performing a public service. On the other hand, it seems clear that private-sector banks do not solve all of society's needs, and, in particular, have not resolved the growing problem of income wealth disparities among the population. As such, it seems clear that alternative institutional arrangements should be considered.

Professor Omarova goes on to discuss what the balance sheet of a public bank might look like. On the liability side of the balance sheet, the money can come from almost anywhere. Likely sources of funds are deposits, government funds, private borrowing, and internal revenues. I say almost anywhere, because private equity contributed by stockholders is not an option. On the asset side of the balance sheet, a public bank could acquire equity in qualifying businesses,[53] or government debt, loans, debt securities issued by "qualifying businesses, cooperatives, various nonprofit organizations," and municipalities.[54]

51. *Id.* at 1138-39.
52. *Id.* at 1138.
53. *Id.* at 1150-52.
54. *Id*. at 1151.

As long as the business operations of the public bank are characterized by "affordability and financial inclusion," anything goes.[55] Professor Omarova, of course, understands that banks focused exclusively on affordability and financial inclusion "are likely to carry significant risks."[56] But I agree that achieving financial inclusion and affordability are worthy goals, and that it makes sense to accept risk to achieve that goal.

Corporate governance will be critical to the success or failure of any bank, public or private. It would be helpful if Professor Omarova provided more detail about how to govern a public bank. Surely she is right, however, that "running a successful banking business requires technical expertise, clearly defined lines of authority and functional divisions, and a streamlined procedural framework for the exercise of investment discretion by designated finance professionals."[57] Professor Omarova observes that a public bank could be managed in a wide "variety of ways,"[58] some resembling a traditional hierarchical structure and others looking more like a "democratic polity."[59] Surely some of these ways will be more effective than others, and before starting a public bank it would be helpful to know what governance structure would be best.

Professor Omarova identifies universally available and affordable deposit and payments services, the provision of "reliable and unbiased access to safe money," along with "financial inclusion and 'banking the unbanked'" as critical features of public banks.[60] An alternative to this approach would be for the government simply to condition its provision of state-backed, FDIC-administered deposit insurance on banks' willingness to offer free checking account services to the public.

As for loans, Professor Omarova maintains that public banks should make loans to borrowers who are "typically considered high credit risk."[61] Professor Omarova recognizes that the fact that these borrowers are high risk explains "private banks' unwillingness to lend to them and alternative lenders' ability to charge them predatory rates."[62] Professor Omarova implausibly suggests that public sector banks might be better at identifying credit-worthy borrowers than private sector borrowers. She asserts that "[m]ore sophisticated and fine-tuned credit underwriting tools could improve the public bank's assessment of the actual risks presented by non-traditional borrowers."[63] Further, "[a]sset diversification

55. Omarova, *supra* note 42, at 1151.
56. *Id.*
57. *Id.* at 1152-53.
58. *Id.* at 1153.
59. *Id*.
60. Omarova, *supra* note 42, at 1155.
61. *Id*. at 1159.
62. *Id.*
63. *Id.*

(both in the bank's portfolio of loans and it its overall portfolio) and dynamic risk hedging could lower its exposure to losses,"[64] according to Professor Omarova. This analysis is somewhat puzzling. If asset diversification and more sophisticated credit underwriting tools can improve a *public bank's* assessment of the risks of making a loan to borrowers, then such tools also could improve a *private bank's* assessment of such risk. And if such tools could make lending profitable, then presumably private, for-profit banks would be eager to do it.

For Professor Omarova, the appeal of public banking is that commercial banks have "abandoned" their part of a "bargain" to serve as "agents of public interest."[65] This is a valid point. But if the government is not going to require that private banks act more in the public interest, then one must wonder why it would do any better for public banks. Professor Omarova suggests one possibility. Because public banks are "[n]ot wired for private profit maximization" they "are seen as potentially more appropriate institutional vehicles for delivering critical financial services without imposing excessive costs on the public."[66] Professor Omarova thus recognizes that bank managers respond to incentives, and that the pursuit of profits creates powerful incentives for people running banks. It is not as clear what incentives motivate the managers of public banks, but it seems likely that monetary compensation and desire for promotion will loom large.

Professor Omarova is of the view that there are "well-articulated" reasons for entrusting the core banking functions of deposit-taking, lending, and public investment and development finance to public institutions.[67] She assumes that public banks will be non-discriminatory and non-predatory. Inevitably, however, banks, whether they are public or private, are going to reflect the values of the societies in which they operate. Thus, while it is possible to imagine a world in which public banks (and private banks for that matter) do more to meet the needs of the most-disadvantaged members of society, this happy ending is not inevitable. After all, as we saw during the Trump administration, and as political scientists have known for centuries, "enlightened statesmen will not always be at the helm"[68] of public institutions. Consequently, just as private institutions need governance structures that incentivize the people in charge of them to do the right thing, so too do public institutions need appropriate governance structures.

64. *Id.* at 1160.
65. Omarova, *supra* note 42, at 1141.
66. *Id.*
67. *Id*. at 1142.
68. THE FEDERALIST NO. 10 (James Madison).

One cannot simply assume that public banks will do better without providing some insight into how the people managing these institutions will be incentivized to do the good work that Professor Omarova imagines them doing. That is why Professor Omarova is so right that institutional design is critical. As Susan Rose-Ackerman pointed out long ago, "an organizational designer must find the mixture of behavioral rules and discretion which assures that officials will be both competent and motivated."[69] Specifying those rules in detail is very hard work that has yet to be done.

For-profit institutions are terrific at creating wealth. They do not always excel at distributing that wealth once it is created. It is not clear what public institutions excel at. Public institutions tend to exist where markets fail to generate acceptable outcomes. Getting public institutions to act in the public interest is a design problem of epic and historic proportions.

Professor Hilary Allen is worried about deposit insurance. Specifically, she is worried that we "may be expecting too much of deposit insurance" because deposit insurance "cannot be relied upon to eliminate all bank runs."[70] She therefore proposes bank holidays as a supplementary "tool" to be used to address the problems of bank runs.[71]

The case for bank holidays rests on the argument that there are limitations on the ability of deposit insurance to eliminate runs. It is clear, as Professor Allen appears to acknowledge, that some form of bank holiday may be necessary only if deposit insurance alone cannot reliably prevent bank runs.[72] Happily, however, I am not aware of any case in history in which a country with a robust, credible deposit insurance scheme found it necessary to declare a bank holiday.

Significantly, all of the cases that Professor Allen cites as examples of bank runs, particularly Continental Illinois and Silicon Valley Bank involved runs by uninsured depositors. As Professor Allen notes, Continental Illinois "experienced an electronic run by its largely uninsured deposit base,"[73] as did Washington Mutual, which experienced a "'silent run' by uninsured depositors and unsecured creditors."[74] Incredibly, with 93.8% of its deposits uninsured, Silicon Valley Bank ranked first in percentage

69. Susan Rose-Ackerman, *Reforming Public Bureaucracy through Economic Incentives?*, 2 J. L. ECON. & ORG. 131 (1986).

70. Hilary J. Allen, *Digital Bank Holidays*, 41 YALE J. ON REGUL. 856, 856 (2024).

71. *Id.*

72. *Id.*

73. *Id.* at 862.

74. *Id.* at 863 (quoting FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 366-67 (2011).

of uninsured deposits among banks with more than $50 billion in assets.[75] The reality seems to be that properly insured depositors don't run.

A major problem with closing a bank is that it imposes significant costs on depositors. It is far from clear why they, rather than shareholders, should be punished for bank failures. In fact a major premise of deposit insurance is that depositors should be protected from the consequences of the insolvency of their banks. And the available evidence appears to indicate that deposit insurance works and that insured depositors do not run.

Thus, I think that Professor Allen's assertion that deposit insurance "has made some banking systems *more* vulnerable to bank runs"[76] is subject to doubt. While it is true that deposit insurance creates a moral hazard problem that manifests itself in the form of increased risk-taking by the institutions that receive such insurance, there is no evidence whatsoever that deposit insurance increases the likelihood of *bank runs*. In fact, "[e]mpirically, deposit insurance is highly effective at preventing bank runs" and "a higher share of insured deposits in bank funding structure makes banks individually – and the banking system as a whole – less susceptible to runs."[77]

Thus it is clear, at least to institutions like the FDIC, the IMF and the World Bank that deposit insurance reduces the likelihood of bank runs. As the World Bank has observed, "deposit insurance helps ensure depositors' confidence in the financial system and *prevents contagious bank runs*."[78]

As the IMF has observed, the role played by deposit insurance:

> is to stabilize the financial system in the event of bank failures by assuring depositors they will have immediate access to their insured funds even if their bank fails thereby reducing their incentive to make a "run" on the bank. *By discouraging bank runs, deposit insurance can prevent panic from spreading through a financial system.*[79]

---

75. David Hayes, *SVB, Signature Racked up Some High Rates of Uninsured Deposits*, S&P Global (Mar. 14, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/svb-signature-racked-up-some-high-rates-of-uninsured-deposits-74747639 [https://perma.cc/NR68-87GZ].

76. Allen, *supra* note 70, at 866.

77. FDIC, OPTIONS FOR DEPOSIT INSURANCE REFORM 26-27 (May 1, 2023), https://www.fdic.gov/analysis/options-deposit-insurance-reforms/report/options-deposit-insurance-reform-full.pdf [https://perma.cc/8XMV-BNH2].

78. Deniz Anginer & Asli Demirgüç-Kunt, *Bank Runs and Moral Hazard: A Review of Deposit Insurance* (World Bank Pol'y Rsch., Working Paper No.8589, 2018) (emphasis added), https://documents1.worldbank.org/curated/en/548031537377082747/pdf/WPS8589.pdf [https://perma.cc/K8PP-QFGB].

79. Ricki Tigert Helfer, *What Deposit Insurance Can and Cannot Do*, 36 FIN. & DEV. (1999) (emphasis added), https://www.imf.org/external/pubs/ft/fandd/1999/03/tigert.htm [https://perma.cc/G7NS-BVE7].

Of course, to be effective at discouraging bank runs, a deposit insurance scheme has to be credible.[80] Professor Allen appears to approve of, and even "draws lessons, particularly from the experience of Cyprus . . . during the Eurozone crisis."[81] However, the bank runs in that country were actually caused by a failure in the country's deposit insurance scheme.[82] In particular, when the IMF and European banking authorities agreed on a bailout package for Cyprus they undermined the credibility of the Cyprus deposit insurance scheme by imposing losses of 9.9% on deposits above 100 euros and losses of 6.7% on deposits below the 100 euro threshold.[83] It is hardly surprising that there was a flight to safety under those circumstances.

There are two very important distinctions between deposit insurance and bank holidays that must be recognized before we conclude that bank holidays are a complement for deposit insurance. First, unlike deposit insurance, bank holidays (or any other restrictions on depositors' access to their cash) "interfere with payments and economic activity, and cause significant disruption, loss of depositor/investor confidence, and economic damage."[84]

The second, and perhaps more important distinction between deposit insurance and bank holidays is that, while the promise of deposit insurance *lowers* the probability of a bank run, the threat of bank closure from a regulatory bank holiday *increases* the probability of a bank run. This is because rational depositors will attempt to avoid the disruption caused by a bank holiday by preemptively moving their funds to money market funds or foreign banks or other firms that will not be closed in the bank holiday. On the other hand, deposit insurance reduces depositors' incentives to withdraw their funds from a bank that is experiencing financial distress.

Strong support for the argument that bank holidays are a very bad idea that should be avoided is found in recent work on circuit breakers. Professor Allen finds support for the use of bank holidays from the use of stock market circuit breakers which are market-wide trading halts.[85] Consistent with the argument made here, however, it appears that the use of

80. Diana Bonfim & João A. C. Santos, *The Importance of Deposit Insurance Credibility*, 154 J. BANKING & FIN. 281 (2020).

81. Allen, *supra* note 70, at 860.

82. Bonfim & Santos, *supra* note 80, at 8.

83. *Id.*

84. Marc C. Dobler, Marina Moretti & Alvaro Piris, *Managing Systemic Banking Crises: New Lessons and Lessons Relearned*, INT'L MONETARY FUND MONETARY & CAP. MKTS. DEP'T, No. 20/05, at 43 (2020).

85. Allen, *supra* note 70, at 875-76.

circuit breakers tends to increase risk by increasing volatility and accelerating the probability that the circuit breaker will have to be used.[86]

It is worth noting that Professor Allen's acceptance of bank holidays as a policy tool for regulators represents a dramatic departure from current and long-standing practice of acting "quickly" when banks fail to avoid any interruption in service.[87]

Ultimately, however, Professor Allen is correct that, if bank holidays are to be imposed on depositors, it is a good idea to give serious thought and planning as to precisely how this should be done.[88] In particular, as Peter Conti-Brown and Sean Vanatta have ably demonstrated, the most important policy issue presented by bank holidays is what happens *during* the bank holidays.[89] As soon as the bank holiday was declared, bank supervisors evaluated the condition of the closed banks and determined which ones should be reopened and which ones should remain closed.[90]

Conti-Brown and Vanatta observe that, "[b]y closing some banks, supervisors made credible Roosevelt's claims that banks that reopened were sound."[91] Of course, if the bank supervisors are doing their jobs effectively on an ongoing basis, they should know whether a failed bank is fundamentally sound or not before they take action to resolve the bank, and no bank closure will be required. As such, bank holidays appear to be a sign of failure of a bank regulatory system, not a feature of such a system.

Professor Adam Levitin argues for reinvigorating the source-of-strength doctrine, which is the principle that bank holding companies should serve as a "source of strength" for their depository subsidiaries. A holding company is a company whose primary assets consist of shares of stock in other corporations. A bank holding company is a company that has a controlling equity interest in one or more banks. Professor Levitin provides careful and important documentation of the history of the source of strength doctrine. Of particular interest is his account of the efforts of the FDIC to recover funds from the bank holding companies of failed banks after the 2008 financial crises when these holding companies filed for bankruptcy protection in the wake of the failures of their subsidiary banks.

86. Hui Chen, Anton Petukhov, Jiang Wang & Hao Xing, *The Dark Side of Circuit Breakers*, 79 J. FIN. 1405, https://ssrn.com/abstract=4397958 [https://perma.cc/2GVY-4HRG].

87. *When a Bank Fails – Facts for Depositors, Creditors, and Borrowers*, FDIC (July 27, 2010), https://www.fdic.gov/consumers/banking/facts/payment.html [https://perma.cc/EQE3-ZQ7D].

88. Allen, *supra* note 70, at 882-83.

89. Peter Conti-Brown & Sean H. Vanatta, *The Logic and Legitimacy of Bank Supervision: The Case of the Bank Holiday of 1933*, 1 BUS. HIST. REV. 87 (2021).

90. *Id.*

91. *Id.*

Professor Levitin studies the bankruptcies of IndyMac Bank, Washington Mutual, Inc., and The Colonial BancGroup, Inc., three large bank holding companies that failed during the financial crisis. The FDIC attempted, with extremely limited success, to wrestle funds from each of these holding companies in order to offset the losses it incurred in resolving the failed banks owned by these holding companies. Professor Levitin convincingly shows that the source-of-strength doctrine is a "completely ineffective doctrine that has resulted in virtually no recovery for the FDIC."[92]

Professor Levitin notes that, in passing the Dodd-Frank Wall Street Reform and Consumer Protection Act, Congress "sort of" codified the source of strength doctrine.[93] This sort of codification took the form of directing the appropriate bank regulatory agency to require holding companies to serve as sources of strength for their subsidiary depository institutions.[94] In fulfilling their statutory obligation to require bank holding companies to serve as a source of strength, the Federal Reserve Board began to require that bank holding companies "serve as a source of financial and managerial strength to its subsidiary banks."[95] Bank holding companies must also develop capital plans that require such holding companies to discuss how they will "maintain capital commensurate with its risks, maintain capital above the regulatory capital ratios, and serve as a source of strength to its subsidiary depository institutions."[96]

Professor Levitin observes that these regulations do not seem to create any actual obligations for bank holding companies.[97] Rather, he observes "[a]t best, this language gives the Board the ability to exert supervisory pressure on BHCs to support their bank subsidiaries, but it is hard to imagine that it would create an enforceable obligation in the BHC's bankruptcy."[98] And, he points out that even if the regulations were interpreted as creating a financial obligation for a BHC, "it is not clear who would have power to enforce" such an obligation.[99]

An exception to the general failure to implement an operational source-of-strength policy, the Board of Governors of the Federal Reserve System did impose some meaningful obligations on the eight bank holding companies (out of approximately 3,500) that are classified as global systematically important banks ("G-SIBs"). These G-SIBs are required

---

92. Adam J. Levitin, *Samson's Toupeé: Banking Law's Source-of-Strength Doctrine*, 41 YALE J. ON REGUL. 1078, 1107.

93. *Id.* at 1085.

94. *Id.*; 12 U.S.C. § 1831o-1(a).

95. 12 C.F.R. § 225.4(a)(1).

96. 2 C.F.R. § 225.8(e)(2)(ii)(A).

97. Levitin, *supra* note 92, at 1114-15.

98. *Id.* at 1115.

99. *Id.*

to issue debt and raise equity, and to accept some restrictions on paying dividends.[100]

Professor Levitin points out, however, that, while there is "no requirement beyond the general source-of-strength regulation that the G-SIB BHC ever actually prop up distressed subsidiaries,"[101] in practice, "the BHCs of G-SIBs will back the G-SIBs obligations, as long as it has the ability to recapitalize the troubled G-SIB."[102] But there is still no requirement for any bank, G-SIB or not to make good on the liabilities of a failed bank subsidiary.[103] The bottom line is that the source-of-strength doctrine is a "deceptively aspirational doctrine that lulls Congress, regulators, and the public into thinking that it makes BHCs legally bound sources of capital support for their subsidiary banks."[104]

Professor Levitin argues forcefully in favor of a meaningful source-of-strength doctrine. He acknowledges that investors in bank holding companies will view the possibility of having to provide capital to the subsidiaries of the holding company as a risk, and will charge more for providing capital to a holding company that is a source of strength to its subsidiary banks. Professor Levitin's suggestion that bank holding companies performing neutral or positive functions for their nonbank subsidiaries "will not be tagged with a higher cost of capital from its investors"[105] seems wrong. The source of the higher cost of capital has nothing to do with the functions that the holding company provides for its nonbank subsidiaries. The source of the higher cost of capital is the riskiness of the bank. The riskier the bank, the higher the cost of capital for the holding company that serves as the bank's source of strength.

In other words, I disagree with the assertion that a source-of-strength requirement taxes only negative affiliations with nonbanks, but not positive affiliations with nonbanks.[106] Imagine a bank holding company that has a positive affiliation with a nonbank operating in a regulatory system with no source-of-strength doctrine. The holding company's exposure to the losses of the bank are limited to the equity capital already placed with the bank. If a source-of-strength requirement is suddenly imposed on the bank holding company, then rational investors will suddenly view their investment in the bank holding company as riskier, and the cost of capital for the bank holding company will increase.

However, Professor Levitin is correct in his basic observation that "deeming the BHC a guarantor of the bank's obligations will not only

100. *Id.* at 1116.
101. *Id.* at 1117.
102. Levitin, *supra* note 92, at 1118.
103. *Id.* at 1121.
104. *Id.* at 1121-22.
105. *Id.* at 1125.
106. *Id.*

improve market discipline, it will improve information for regulators, giving them data against which they can cross-check their own supervisory efforts."[107] This is particularly true for bank holding companies that have debt or equity securities that are publicly traded. If bank holding companies were required to guarantee the debts of their subsidiary banks, the market price of the holding companies' publicly traded securities would factor in these risks to the holding companies of having to make good on these potential future obligations. This would send valuable information to regulators about the financial condition of the banks within the holding company structure.

Professor Edward Janger's essay analyzes the role that bankruptcy courts and other resolution institutions play in protecting the stability of the financial system when the instability of a financial intermediary threatens to spread contagion throughout the system.[108]

Professor Janger makes two main claims. First, he argues that, because "contagion can originate anywhere, so the tools for stemming it, and the regulatory policies for avoiding it must be implemented across financial ecosystems."[109] Second, Professor Janger argues that bankruptcy courts and the institutions that oversee the bankruptcies of banks, play a crucial role in stopping runs and in preserving enterprise value so that it can be distributed equitably.[110]

It should be noted that in the United States, banks are not eligible for bankruptcy, so that neither banks nor a bank's creditors can place a bank in bankruptcy. [111] Bankruptcy courts are the venues for bank holding companies. They are not venues for insolvent banks, so they play no direct role in resolving the problems of those firms.

Professor Janger's main claim is that bankruptcy courts and other resolution institutions "stop runs" by stopping the rush of creditors to dismember the debtors by grabbing assets.[112] This is not remotely true for banks for two reasons. First, it is deposit insurance and not bankruptcy that stops bank runs. Second, bank runs are what cause bank failures. Bank runs are well underway by the time a bank enters an insolvency proceeding. And to the extent that depositors are concerned that a bankruptcy proceeding will cause delays or impose costs in accessing their funds, the prospect of bankruptcy will lead to runs and bank failures. Further, Professor Janger does not confront the reality that uninsured depos-

107. Levitin, *supra* note 92, at 1126.

108. Edward J. Janger, *Equity for Intermediaries: The Resolution of Financial Firms in Bankruptcy and Bank Resolution*, forthcoming, 41 YALE J. ON REGUL. 965, 965 (2024).

109. *Id.* at 1009.

110. *Id.*

111. 11 U.S.C. §§109(b), 109(d); Richard M. Hynes & Steven D. Walt, *Why Banks are Not Allowed in Bankruptcy*, 67 WASH. & LEE L. REV.985, 987 n.2 (2010).

112. Janger, *supra* note 108, at 1009.

itors who manage to remove their funds from an insolvent bank even moments before that bank is officially declared insolvent do not appear to be at risk of having those funds clawed back in the subsequent insolvency proceeding.

Professor Janger also worries that competition among creditors to "grab value" from a bankrupt debtor will "destroy value."[113] However, bank depositors, unlike many other classes of creditors, make deposits at banks with the explicit understanding that they have the right to access their funds on demand. Professor Janger's analysis does not fully take that reality into account. In other words, an insolvency process that impedes the ability of depositors to gain immediate access to their funds is not a feature of a properly functioning economic or regulatory system. It is a flaw in such a system. Put differently, Professor Janger's analysis does not adequately recognize the rather special nature of the deposit contract: depositors with demand deposit accounts have a legitimate, contract-based expectation that they will have immediate access to their funds for any reason, at any time, without notice or explanation. Depositors are led to expect that their deposits are, in a very real sense, actually money. This makes depositors different from other sorts of creditors.

Contrary to the notion that bankruptcy serves to stop runs, in the context of banking it is deposit insurance, not bankruptcy that stops runs. In the bankruptcy context, absent deposit insurance, the mere threat of bankruptcy causes runs. By the time a bank is bankrupt, the run is already well underway.

More fundamentally, Professor Janger's essay urges a functional approach to financial intermediary regulation.[114] The idea that similarly situated firms should be treated similarly in legal proceedings has great appeal. And surely there are a lot of institutions that provide services that closely resemble the services provided by banks that are not banks. But expanding the vast regulatory safety net that protects banks is a very expensive and risky proposition, which is unlikely to find much support in regulatory or policy circles. Many observers, including myself, favor limiting, rather than expanding, any special regulatory treatment that banks receive, in or out of bankruptcy. For example, does Professor Janger really believe that customers of the crypto-intermediary Celsius, who deposited crypto in so-called Earn accounts earning 20 percent interest, and who had signed contracts agreeing to transfer title in their crypto to Celsius,[115] should be entitled to the same deposit insurance protections as those who have placed U.S. fiat currency in accounts at FDIC-insured depository institutions? Professor Janger does not go this far, thankful-

113. *Id.* at 1005.

114. *Id.* at 967.

115. *Id.* at 1000-01.

ly.[116] But he seems to indicate that this treatment is a failure of "the underlying regulatory scheme" that has generated "inequities" of some unspecified kind.[117]

Professor Carrillo is worried about "digital wallets," smartphone applications which "store consumer balances outside banks" to "enable free, faster, fairer balance transfers and payments."[118] While digital wallet companies like Venmo, Coinbase Wallet and Cash App hold uninsured customer balances, "the FDIC does not insure the balances, and consumers lack standard bank account protections."[119] Professor Carrillo worries that deposits in these digital wallets threaten the public, particularly because of the risk of runs.

Digital wallets are used to make payments and to store cryptocurrency. As Professor Carrillo points out, digital wallets like PayPal and Venmo "offer wallets that store consumer balances outside the insured, regulated, and supervised banking system to enable faster and cheaper payments and money transfers."[120] But the companies that manage digital wallets do not lend money, and thereby avoid being categorized and regulated like banks. Professor Carrillo argues that these "[p]latform money companies could suffer classic runs, along the same lines as Silicon Valley Bank and consumers would have minimal recourse for loss of funds."[121] In addition, we should worry about data security and privacy on these platforms.[122]

Of course, data security is an important issue, and it seems clear that all firms that hold consumer data should be responsible for protecting that information.

The major player in this world is Plaid, which dominates the financial data brokerage industry. Plaid provides technology that connects customers' bank accounts with an app, service or company. Customers choose to share their account information in order to get access to services provided by companies like Venmo, Chime, Acorns, Truebill or NerdWallet's app. In other words, as the company announces on its website, Plaid's business is "connecting your bank to your apps."[123]

Professor Carrillo puts it well when he writes that "while the current regulatory perimeter is relatively successful at keeping banks from "venturing outside" the boundary to engage in general commercial activity, it

---

116. *Id.* at 1010 ("creditors should share with others pro rata (as in *Celsius*)").
117. Janger, *supra* note 108, at 1009.
118. Raúl Carrillo, *Platform Money*, 41 YALE J. ON REGUL 894, 894 (2024).
119. *Id.* at 908.
120. *Id.* at 898-99.
121. *Id*. at 912.
122. *Id.* at 918-19.
123. *What is Plaid?* PLAID, https://plaid.com/what-is-plaid [https://perma.cc/CMZ4-ZSNN].

lacks the same ability to keep firms outside the perimeter from "engaging in bank-like activity, without bank-like regulation and supervision."[124]

Thus, like Professor Janger, Professor Carrillo is worried that people who are customers of non-banks may not fall under the same regulatory umbrella as those who are customers of similar businesses that operate with bank charters. But there is an easy solution to the problem that Professor Carrillo identifies. CFPB Regulation I already requires that depository institutions obtain a written acknowledgement from depositors regarding the institution's lack of deposit insurance, and has the following powerful notice requirement:

> Depository institutions lacking Federal deposit insurance must include a notice disclosing clearly and conspicuously that the institution is not federally insured, and that if the institution fails, the Federal Government does not guarantee that depositors will get back their money, in all periodic statements of account, on each signature card, and on each passbook, certificate of deposit, or share certificate. For example, a notice would comply with the requirement if it conspicuously stated: "[Institution's name] is not federally insured. If it fails, the Federal Government does not guarantee that you will get your money back." The disclosures required by this section must be clear and conspicuous and presented in a simple and easy to understand format, type size, and manner.[125]

Unfortunately, as Professor Carrillo observes, the definition of "depository institution" is narrow, and does not include digital wallets. This loophole should be closed. Any firm that offers uninsured liquidity services that a retail customer could confuse with a deposit account should be required clearly and emphatically to disclose that customer funds kept in the firm are not FDIC insured. Beyond this, I do not think that a plausible case should be made that the deposit insurance umbrella should be stretched beyond its current broad scope. To the extent that some payment apps do not keep users' funds in federally insured accounts at banks, those apps should be under a strict obligation to make that fact clear to customers.

Interestingly, there does not seem to be much of a problem here, after all. Professor Carrillo points out that "Cash App is especially popular among Black, Hispanic, and low-income consumers."[126] Funds kept on Cash App are FDIC insured for up to $250,000 per customer.[127] As recognized on its website:

124. Carrillo, *supra* note 118, at 911.

125. 12 C.F.R. § 1009.3.

126. Carrillo, *supra* note 118, at 900.

127. Ana Staples, *What is Cash App and How Does it Work?*, CNBC (Jan. 12, 2024), https://www.cnbc.com/select/what-is-cash-app [https://perma.cc/9MXM-B22V].

> The Federal Deposit Insurance Corporation (FDIC) insures eligible deposits (up to $250,000) in the event the bank holding the funds fails. If you have been issued a Cash Card as described in Section VIII of this agreement, your Cash App Balance and your Savings Balance are covered by FDIC insurance on a pass-through basis through our partner bank Wells Fargo Bank, N.A., Member FDIC ("pass-through insurance"). Additionally, if you sponsor one or more Sponsored Account(s), your and the Sponsored Account's Cash App Balances and Savings Balances are covered by FDIC pass-through insurance, regardless of whether you or the Sponsored Account has been issued a Cash Card. If you have multiple accounts, and/or multiple Sponsored Accounts, they are included under the same insurance coverage.[128]

The Cash App "Stored Balance Long Form Disclosure" form says that "[s]tored balances of Cash Card customers are eligible for FDIC insurance through our partner bank. These funds are insured up to $250,000 by the FDIC if our partner bank that holds your funds fails and specific deposit insurance requirements are met."[129] Of course, it is possible that Cash App is committing fraud, and if so, there probably will be legal repercussions.

Clearly, Professor Carrillo is correct in arguing that digital wallets pose problems and challenges related to customer privacy and data security. But these problems and challenges do not stem from the fact that these businesses offer deposit-substitutes. Rather, they stem from the fact that these companies have a lot of financial information about their customers, and there is a risk that they will share it or sell it or have it compromised in ways that harm those customers. Thus, whatever rules we apply for dealing with customer privacy and data security should not be limited to banks, and it should not be limited to banks and to companies that offer digital wallets. Insurance companies, credit rating agencies, payday lenders and every other company that stores customer data should be subject to the same standards.

It is clear that consumers must be protected from fraud. But it is far from clear that the government either can or should protect all consumers from any and all losses associated with poor investments or bad choices. Professor Carrillo voices concern that data brokers "collect, use, and retain more data than necessary to transfer funds, to use for their own purposes."[130] To deal with this problem, Professor Carrillo argues for an "enhanced data minimization standard."[131] Such a standard would, hope-

128. *Cash App Terms of Service*, CASH APP, https://cash.app/legal/us/en-us/tos#cash-account [https://perma.cc/7KVK-54MN].

129. *Stored Balance Long Form Disclosure*, CASH APP, https://cash.app/legal/us/en-us/longformdisclosure [https://perma.cc/2UZ7-GNKE].

130. Carrillo, *supra* note 118, at 901.

131. *Id.* at 956.

fully, at least mitigate the problem that "[g]overnment agencies, including law enforcement agencies, abuse financial data collected by companies."[132]

Interestingly, Professor Carrillo points out that not only are consumers unaware of the nature and scope of the data about them that is being collected by data brokers and their partners, but the companies collecting all of this data seem unaware of why they are collecting the data or how it might ultimately be used.[133] As such, Professor Carrillo undoubtedly is correct in observing that, since we don't know how the massive amounts of data being collected is being used, we can't deny that it might be used in ways that harm consumers and the public.

There is much that we do not know about the data that is being collected by data brokers and their partners. On the other hand, our ignorance about data collection is not total. Presumably, while we may not know why the data is being collected, and we do not know how the data is being used, we do know the sort of data that is being collected. The best approach to regulating data collection might be to describe in detail the data that is being collected. Some data may be more susceptible to abuse than others.

Interesting questions emerge from the contributions in this Symposium. Professor Judge's insights on the Federal Home Loan banks raises the interesting question of what sort of political conditions might emerge that would make it possible to reorient the Federal Home Loan banks in the interesting ways she proposes. Professor Omarova's advocacy in favor of public banks challenges those of us who agree with her diagnosis (that the banking system in its current form does not meet the needs of the poor, the marginalized and the disenfranchised), to ponder how public-sector actors can be incentivized to meet those needs.

Professor Janger's essay about the role of bankruptcy law in the legal ecosystem that regulates banks and other financial intermediaries leads us to wonder why a separate bankruptcy regime exists for banks and non-banks, if in fact the role of the courts in non-bank and bank bankruptcies is the same: stop runs on a firm, and thereby preserve value and the ability to distribute that value equitably. Professor Levitin's convincing observations that the source-of-strength doctrine is "completely ineffective"[134] and "deceptively aspirational"[135] leads one to wonder whether anyone is really fooled into thinking that the source of strength doctrine actually requires non-bank affiliates in a bank holding company

132. *Id.* at 902.
133. *Id.* at 942.
134. Levitin, *supra* note 92, at 1107.
135. *Id.* at 1121.

structure to provide support for the banks in the corporate group that find themselves in financial distress.

Professor Raúl Carrillo's essay raises interesting and important questions about the nature and scope of regulation. In particular, while the argument that the people who have "billions of dollars . . . stored by technology companies in digital wallets"[136] should have government-sponsored protection for these funds, one wonders whether any coherent, general policies for determining which non-FDIC insured assets should qualify for government protection and which should not ever be developed.

And last but not least, Professor Allen's essay about the virtues of bank holidays harkens back to the famous quotation from February 1968 (attributed to an unnamed major in the U.S. Army during the Viet Nam war), who said that "[i]t became necessary to destroy the town to save it."[137] If, heaven-forfend, regulators should find it necessary to impose a bank holiday on depository institutions in the United States, careful thought should be given to figuring out which of the shuttered banks should be reopened, and which should remain closed. As frightening as the prospect of a bank holiday is, the good news is that Professor Allen is surely mistaken in claiming that deposit insurance has failed in making banking systems less susceptible to bank runs. Rather, the FDIC, the IMF and the World Bank are surely correct in their views that deposit insurance discourages bank runs. On the other hand, the specter of regulators closing banks for a "bank holiday" would certainly make banks more vulnerable to runs, as depositors rush to access their funds before a holiday can be declared.

---

136. Carrillo, *supra* note 118, at 964.

137. *Major Describes Move*, N. Y. TIMES (Feb. 8, 1968), https://timesmachine.nytimes.com/timesmachine/1968/02/08/88924930.pdf?pdf_redirect=true&ip=0 [https://perma.cc/HHG5-UM53]. The quotation quickly was rendered as "[w]e had to destroy the village in order to save it." Stephen L. Carter, *Destroying a Quote's History in Order to Save It*, BLOOMBERG, (Feb. 9, 2018, 2:50 PM EST) https://www.bloomberg.com/opinion/articles/2018-02-09/destroying-a-quote-s-history-in-order-to-save-it [https://perma.cc/5HH2-2S7X].