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Article II and the Federal Reserve

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ARTICLE II AND THE FEDERAL RESERVE

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The Supreme Court has twice held since 2020 that statutory restrictions on the President's removal power violate Article II of the U.S. Constitution. Because such removal restrictions create a measure of policy independence from the President, these cases have prompted discussion about the future of independent agencies generally, with special attention to the Federal Reserve in particular. The Federal Reserve is the most powerful central bank on earth and, arguably, the most important independent agency in the United States. A presidential removal power over Federal Reserve officials calls into question the independence of monetary policy.

Drawing on overlooked documents and congressional debates, this Article offers a comprehensive assessment of the Federal Reserve's constitutionality under Article II. We conclude that under the Court's modern precedent, which requires Congress to clearly state when it wishes to restrict removal, the President likely already enjoys a great deal of statutory authority to remove the Federal Reserve's leaders. Beyond that, in light of the Federal Reserve's current structure and functions, the President might have constitutional authority to do so. To the extent the Federal Reserve exercises inherently "executive power"—such as initiating enforcement actions, issuing fines, and promulgating consumer-protection rules—precedent suggests that Congress cannot prevent the President from freely removing the Federal Reserve Chair, members of the Board of Governors, and perhaps other senior officials.

But Congress could render the Federal Reserve's monetary independence constitutional. That is because the President's power to fire the Federal Reserve's leaders does not stem from its primary mission: monetary policy. Congress can use private bank operations to influence monetary policy, which is why the First and Second Banks of the United States were understood to be lawful even though the President could not

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unilaterally remove all their officers. Thus, Congress should be able to vest monetary policy in a central bank that operates independently from the President. At present, however, Congress has also tasked the Federal Reserve with sovereign functions that fall squarely under the heading of "executive power" in a manner that implicates the Court's modern Article II precedent. We therefore conclude that if Congress wishes to preserve the Federal Reserve's monetary independence, it should remove those regulatory functions that are inherently executive from the Federal Reserve's ambit.

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INTRODUCTION

Since 2020, the U.S. Supreme Court has twice held that Article II of the Constitution empowers the President to remove—that is to say, *fire*—agency leaders for any reason even when statutory law protects them from being removed at the President's will.[1] In *Collins v. Yellen* (decided in 2021) and *Seila Law LLC v. CFPB* (decided in 2020), the Court concluded that notwithstanding a contrary statutory provision, Article II does not allow "a *de facto* fourth branch of Government" with "no accountability to either the President or the people."[2] *Collins* and *Seila Law* identified two exceptions—which the Court accepted as a matter of precedent, rather than first principles—to the rule that the President can freely remove executive branch officers, "one for multi-member expert agencies that do not wield substantial executive power, and one for inferior officers with limited duties and no policymaking or administrative authority."[3] The full implications of *Collins* and *Seila Law* for other "independent" agencies whose heads cannot be fired by the President based on policy disagreement alone[4] remain unclear. The cases, however, have already prompted a large literature,[5] with one prominent judge predicting that the Court will overrule *Humphrey's Executor v. United States*[6]—the key precedent for agency independence—within a decade.[7]

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1 Collins v. Yellen, 141 S. Ct. 1761, 1783 (2021) (following Seila Law LLC v. CFPB, 140 S. Ct. 2183 (2020)).

2 *Seila Law*, 140 S. Ct. at 2212.

3 *Id.* at 2200; *see also id.* at 2192 ("Our *precedents* have recognized only two exceptions to the President's unrestricted removal power." (emphasis added)).

4 *See* JENNIFER L. SELIN & DAVID E. LEWIS, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 43–44 (2d ed. 2018).

5 *See, e.g.*, Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023); Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1 (2023); Aaron L. Nielson & Christopher J. Walker, *The Early Years of Congress's Anti-Removal Power*, 63 AM. J. OF LEGAL HIST. 219 (2023); Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 85 (remarking that *Seila Law* "throw[s] the independence of most of the current independent agencies . . . into grave doubt"); Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 355, 390 (2020).

6 295 U.S. 602 (1935).

7 *See* Justin Walker, *The Kavanaugh Court and the* Schechter*-to-*Chevron *Spectrum: How the New Supreme Court Will Make the Administrative State More Democratically Accountable*, 95 IND. L.J. 923, 971 (2020) ("After a number of years—my guess is no more than a decade—the Court will be in a position to [overrule most or all of] *Humphrey's Executor*.").

The future of one agency, the Federal Reserve, overshadows the entire debate.[8] Almost exactly two centuries ago, the economist David Ricardo argued that "[g]overnment could not be safely entrusted with the power of issuing paper money," because "it would most certainly abuse it."[9] The Federal Reserve—known colloquially as just "the Fed"—*is* the federal agency that controls the paper money supply, and Congress has declared it to be "independent."[10] Because of its preeminent role in setting monetary policy, the Fed is in many respects the most important of all independent agencies, sitting "atop the global financial system and, indeed, the global economy, in a way that no institution has ever done before."[11] Congress has provided the members of the Fed's Board of Governors with 14-year terms of office—one of the longest tenures in the U.S. Code—and with protection from removal.[12] Congress also has given the Fed independent funding, freeing it from the need to rely on Congress or the White House during appropriations battles.[13] And although the Fed's Chair and Vice Chairs enjoy no express tenure protection,[14] in practice they too have

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8 *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2224, 2245 (2020) (Kagan, J., dissenting) (listing the Fed as the first example of an independent agency); STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 6 (2008) (listing the Fed first among the "important independent agencies"); Steffi Ostrowski, Note, *Judging the Fed*, 131 YALE L.J. 726, 732, 739–40 (2021) (explaining that lawyers "tend to cast the Fed as the paradigmatic technocratic agency that requires independence from the Executive," yet observing that "time will tell" whether the Fed will survive future judicial challenges).

9 David Ricardo, *Plan for the Establishment of a National Bank* (1824), *reprinted in* THE WORKS OF DAVID RICARDO—WITH A NOTICE OF THE LIFE AND WRITINGS OF THE AUTHOR 506 (J.R. McCulloch ed. 1871).

10 *See* 44 U.S.C. § 3502(5) ("[T]he term 'independent regulatory agency' means the Board of Governors of the Federal Reserve System . . . .").

11 PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE x (2016).

12 *See* 12 U.S.C. § 242.

13 *See infra* section I.D (discussing the Fed's independent funding authority); *see also Seila Law*, 140 S. Ct. at 2204 (explaining that "Presidents frequently use" fights during "the appropriations process" to exert control over independent agencies) (citing, *inter alia*, Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182, 2191, 2203–04 (2016)). The Court has recently clarified that funding independence does not necessarily raise constitutional concerns. *See* CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 441 (2024) ("The statute that authorizes the Bureau to draw money from the combined earnings of the Federal Reserve System to carry out its duties satisfies the Appropriations Clause.").

14 *See* Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REGUL. 257, 257 (2015) ("Removability protection does not exist for the Fed Chair."); *cf.* Kirti Datla & Richard L. Revesz, *Deconstructing Independent*

significant independence.[15] Indeed, in the agency's own words, although the Fed "has frequent communication with executive branch and congressional officials, its decisions are made independently."[16]

Members of the Court have recognized that the Fed's future looms over debates about the President's removal power. In *Seila Law*, Chief Justice Roberts's majority opinion speculated that perhaps "the Federal Reserve can claim a special historical status."[17] But he offered no obvious doctrinal hook for such speculation. For her part, Justice Kagan's dissent wielded the Fed as a sword against a broad Article II removal power, stressing that "Congress gave the Governors of the Federal Reserve Board for-cause protection to ensure the agency would resist political pressure and promote economic stability."[18] One year later, in *Collins*, Justice Alito's majority opinion tiptoed around the Fed and other multimember agencies with for-cause restrictions, observing that they were not "before us."[19] Decades ago, Justice O'Connor appeared to indicate for pragmatic reasons that independence for the Fed is constitutional.[20] And before he became a justice, then-Judge Kavanaugh remarked, albeit without accompanying legal reasoning, that the nature

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Agencies (and Executive Agencies), 98 CORNELL L. REV. 769, 832 (2013) (asserting that for cause protections should not be implied where not expressly granted by statute). Whether the Fed Chair enjoys implied removal protection, especially after *Collins*, is addressed below. *See infra* note 323.

15 *See* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1196 (2013) (contending that "there is a strong unwritten norm protecting the Fed Chair from removal," and that "[w]hatever the relevant statutes say, it is currently unimaginable that a President would fire the Fed Chair because of disagreements over macroeconomic policy"); Caroline W. Tan, *What the Federal Reserve Board Tells Us About Agency Independence*, 95 N.Y.U. L. REV. 326, 327 (2020) (noting that President Trump said he was "stuck" with the Fed Chair).

16 THE FED EXPLAINED: WHAT THE CENTRAL BANK DOES 2 (11th ed. 2021).

17 *Seila Law*, 140 S. Ct. at 2202 n.8.

18 *Id.* at 2232–33 (Kagan, J., concurring in part and dissenting in part); *id.* at 2237 ("Consider, for example, how the Federal Reserve's independence stops a President trying to win a second term from manipulating interest rates.").

19 Collins v. Yellen, 141 S. Ct. 1761, 1787 n.21 (2021); *cf.* Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 102 VA. L. REV. 765, 813 n.276 (2016) ("[M]any unitary executive proponents are reluctant to question" the constitutionality of "the Federal Reserve").

20 *See, e.g.*, Bernard Schwartz, *"Shooting the Piano Player"? Justice Scalia and Administrative Law*, 47 ADMIN. L. REV. 1, 4 (1995) ("[T]he Solicitor General told the Justices that counsel arguing in favor of the challenged statute were trying to 'scare' them with the argument that upholding the lower court on the constitutional issue would endanger independent agencies such as the FTC and the Federal Reserve Board (FRB). At this, Justice O'Connor interposed, 'They scared me with it.'").

of monetary policy may justify differential treatment for the Fed.[21] The Court never has squarely addressed the Fed's constitutionality.

This lacuna in the Court's analysis is significant, especially in light of the Fed's historical and contemporary importance. Consider the Fed's centrality to the historical development of the American administrative state. Writing in 1941—nearly three decades after the Fed's creation in 1913[22]—Robert Cushman described the Fed as "[t]he second independent regulatory commission"[23] following the Interstate Commerce Commission's creation in 1887.[24] Understanding the Fed's history thus allows us to understand the nature of the development of American administration more generally.

But the nature of Fed independence is not merely historically significant. It is also a matter of contemporary concern. No better illustration of the importance of the question can be found than a speech by the current Fed Chair, Jerome Powell, delivered at a symposium on central bank independence.[25] Powell argued that "monetary policy independence is an important and broadly supported institutional arrangement that has served the American public well," because the "absence of direct political control" insulates monetary policy and bank supervision decisions that may not be "popular in the short term" from

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21 *See* Brett M. Kavanaugh, *Separation of Powers During the Forty-Fourth Presidency and Beyond*, 93 MINN. L. REV. 1454, 1474 (2009) ("[I]t may be worthwhile to insulate particular agencies from direct presidential oversight or control—the Federal Reserve Board may be one example, due to its power to directly affect the short-term functioning of the U.S. economy.").

22 Federal Reserve Act, Pub. L. No. 63–43, 38 Stat. 251 (1913).

23 ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 146 (1941). To be sure, Cushman might have left out some entities we might regard as "independent" in his enumeration—such as, for example, the Board of General Appraisers, which was created in 1890, a quarter century before the Fed. *See* Aditya Bamzai, *Taft, Frankfurter, and the First Presidential For-Cause Removal*, 52 U. RICH. L. REV. 691 (2018). As we will discuss below, the statutes governing the ICC and the Board of General Appraisers included a provision limiting removal to "inefficiency, neglect of duty, and malfeasance in office." The removal protection conferred on the Fed Board was phrased differently—permitting removal "for cause." We will explain below how this came to be and what it portends. *See infra* Section III.B.1. But for present purposes, the point remains: The Fed was one of the earliest independent agencies created by Congress and maintains a uniquely interesting and important status in the development of American administrative governance.

24 Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379.

25 Jerome H. Powell, Chair, Board of Governors of the Federal Reserve System, *Remarks on a Panel on "Central Bank Independence and the Mandate—Evolving Views*" (Jan. 10, 2023), https://www.federalreserve.gov/newsevents/speech/powell20230110a.htm [https://perma.cc/Y6F4-EHHJ] (last visited Jan. 19, 2023).

"political considerations."[26] This reasoning reflected the leading academic justification—termed the "time-inconsistency" problem—for central bank independence. According to that theory, monetary policymakers seek both price stability and sustainable employment, but the actions they pursue today have economic effects with substantial time lags. Political actors, however, may seek immediate popularity and economic gratification for their constituencies. Short-term, readily observable gains for politicians thus may lead to long-term, hidden losses for society.[27] Powell's remarks echoed those of one of his predecessors, Ben Bernanke, delivered over a decade ago.[28] Speaking in the wake of the financial crisis of 2008, Bernanke remarked that "both theory and experience strongly support the proposition that insulating monetary policy from short-term political pressures helps foster desirable macroeconomic outcomes and financial stability."[29]

Thus, according to Powell and Bernanke, the case for central bank independence is premised on theories about optimal institutional design and suppositions about the relative motivations of political actors and bureaucrats. But according to *Collins* and *Seila Law*, the *Constitution* speaks to institutional design and the relationship between political actors and bureaucrats. The need to confront the implications of these cases for the Fed is stark and apparent.

This Article therefore seeks to address whether the Fed's structure comports with *Collins*, *Seila Law*, and other cases

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26 *Id.* For the academic literature cited by Powell on this topic, *see* PAUL TUCKER, UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE (2018); Christopher Crowe & Ellen E. Meade, *Central Bank Independence and Transparency: Evolution and Effectiveness*, 24 EUR. J. POL. ECON. 763 (2008); Alberto Alesina & Lawrence H. Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. MONEY, CREDIT, & BANKING 151 (1993); Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q.J. ECON. 1169 (1985).

27 *See, e.g.*, CONTI-BROWN, *supra* note 11, at 2 (explaining that "[p]oliticians" seek to "take credit" for prosperity, and "when there is no prosperity to be had," they may "resort to goosing the economy artificially by running the printing presses").

28 Ben S. Bernanke, Chair, Board of Governors of the Federal Reserve System, *Central Bank Independence, Transparency, and Accountability* (May 26, 2010), https://www.federalreserve.gov/newsevents/ speech/bernanke20100525a.htm [https://perma.cc/J5PA-DUKN] (last visited Jan. 21, 2023).

29 *Id.* In this Article, we do not address in any detail whether the independence of monetary policy from presidential control is a sound policy idea. Instead, we address here the constitutionality of monetary policy independence.

about the meaning of Article II such as *Lucia v. SEC*[30] and *Free Enterprise Fund v. Public Company Accounting Oversight Board*.[31] Although those decisions are still subject to scholarly debate, this Article takes the correctness of the Court's holdings and reasonings as given and assesses the Fed's structure within that precedent.

As an initial matter, *Collins* suggests that a statutory provision that protects an officeholder only "for cause" does not prevent removal for disobeying a superior's order.[32] In addition, *Collins* also casts doubt on inferring removal protections where Congress has not squarely enacted them.[33] This rule of construction matters for the Fed because Congress has not provided its Chair with any express removal protection, and the statutory language it has used to protect the Fed's governors ("for cause") may not prohibit removal for policy disagreements.[34] Thus, if Congress wishes to preserve the Fed's independence after *Collins*, statutory amendments may be necessary even before directly addressing Article II.

Second, under modern Article II precedent, whether Congress can constitutionally confer policy independence through a removal protection on the Fed's Governors and leadership depends on the functions of the Fed. That is because only some powers—those that fall within the "executive power"—must be subject to the President's control.[35] The Court has not definitively demarcated the meaning of "executive power."[36] It has reasoned, however, that the constitutionality of a provision

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30 Lucia v. SEC, 138 S. Ct. 2044 (2018) (holding that administrative law judges are officers subject to the Appointments Clause of Article II).

31 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477 (2010) (holding that two layers of removal insulation from the President violates Article II).

32 *See* Collins v. Yellen, 141 S. Ct. 1761, 1786–87 (2021).

33 *See id.* at 1784.

34 12 U.S.C. § 242; *see infra* Part IV.A.

35 *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020) ("Under our Constitution, the 'executive Power'—all of it—is 'vested in a President,' who must 'take Care that the Laws be faithfully executed.'") (quoting U.S. CONST. art. II, § 1, cl. 1 & § 3); *see also* MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 162–63 (2020) (explaining that the Vesting and Take Care clauses might support a presidential removal power).

36 *Compare, e.g.*, *Collins*, 141 S. Ct. at 1785–87 (explaining that "[i]nterpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law" but suggesting that traditional conservators and receivers—who also interpret laws to ensure legal compliance—do not exercise "executive power"), *with* Buckley v. Valeo, 424 U.S. 1, 138–39 (1976) (holding that not all offices that engage in "investigative" functions exercise executive power). The scope of "the executive power" is also debated by scholars. *See, e.g.*, Ilan Wurman, *The Removal Power: A Critical Guide*, 2019–2020 CATO SUP. CT. REV. 157,

restricting the removal of a head of an agency with a structure different from the agencies at issue in prior caselaw depends, in critical part, on whether the restriction has a "foothold in history or tradition" and comports with "our constitutional structure."[37]

Here, such sources have important implications for the Fed. As early as 1790, Alexander Hamilton contended that Congress can establish a national bank with authority for monetary policy as a *private* institution.[38] Similarly, Chancellor James Kent argued in his *Commentaries on American Law* that so long as private persons hold stock in a bank, the bank is private, even if the federal government chartered the bank and owned shares in it, and even if the bank's "objects and operations partake of a public nature."[39] The nation's experience with the First and Second Banks of the United States—both of which would have been hopelessly unconstitutional otherwise—demonstrates that private banks can play a role in monetary policy.[40] Indeed, the Supreme Court reasoned in 1824 that even though the federal government chartered these banks, it nonetheless "la[id] down its sovereignty" with respect to them, thus allowing Congress to structure the banks in ways that it could not have if they were part of the Executive Branch.[41] Consistent with *Seila Law* and *Collins*, a private bank presumably can implement monetary policy without direct presidential control.

This justification for Fed independence, however, requires particular attention to the Fed's functions. Although the Fed's core monetary duties may not offend Article II under the Court's modern framework, Congress has given the Fed regulatory functions, including increasingly a consumer-protection

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160–67 (2019) (surveying scholarly debate on the meaning of Article II's vesting of "executive power").

37 *Seila Law*, 140 S. Ct. at 2201–02.

38 *See* Alexander Hamilton, Report on a National Bank (Dec. 13, 1790), in 1 REPORTS OF THE SECRETARY OF THE TREASURY 65 (1828) ("To attach full confidence to an institution of this nature, it appears to be an essential ingredient in its structure, that it shall be under a *private* not a *public* Direction, under the guidance of *individual interest*, not of *public policy*; which would be supposed to be, and in certain emergencies, under a feeble or too sanguine administration would, really, be, liable to being too much influenced by *public necessity*.").

39 JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 222 (1827).

40 *See infra* Part III.A.

41 Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904, 908 (1824); *see also* Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control over National Financial Policy, 1787 to 1867*, 87 GEO. WASH. L. REV. 1299, 1347 (2019).

mission like that of other agencies.[42] If such authorities are not closely linked to the Fed's monetary functions, their allocation to the Fed might convert the agency into an ordinary executive branch entity, thereby triggering the full panoply of requirements imposed by Article II.[43] Accordingly, policymakers should ensure that the Fed does not take on regulatory powers attenuated from its monetary functions.

This Article thus intervenes in a pressing, current debate over the constitutionality of "independent" agencies generally and the Fed in particular.[44] But it also intersects with a broader reassessment of the Fed from a variety of methodological perspectives. In recent years, historians, political scientists, and economists have broken new ground on the origins of the Fed.[45] Although those prior treatments are important, this Article serves a different purpose. Specifically, it fits history to doctrine, and, in the process, discovers and surfaces weighty but overlooked debates about monetary policy and the Constitution that predated the Fed's creation, that surrounded the passage of the Federal Reserve Act, and that have echoed through the decades ever since. The issues are certainly complex, and the nature of the Fed is by no means straightforward. Nevertheless, the upshot of revisiting these debates is a path forward that may be able to resolve the long-festering tension between monetary independence and constitutional law.

I
THE FEDERAL RESERVE

The Fed is one of the most important yet least understood federal entities—indeed, collection of entities. Here, we describe

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42 *See infra* Part I.C.

43 *See, e.g.*, Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2191 (2020) (explaining that the Consumer Financial Protection Bureau's "rulemaking, enforcement, and adjudicatory authority" functions are an exercise of the executive power); Buckley v. Valeo, 424 U.S. 1, 140–41 (1976) (holding that initiating enforcement actions as well as "rulemaking, [issuing] advisory opinions, and [making] determinations of eligibility for funds" are an exercise of the executive power because each "represents the performance of a significant governmental duty exercised pursuant to a public law").

44 For further evidence of the pressing nature of the debate, consider the Office of Legal Counsel's 2019 opinion addressing the constitutionality of the structure of the Federal Open Marketing Committee (which we discuss in further detail below). *See Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee*, 43 Op. O.L.C. 1, slip op. at 1–2 (Oct. 23, 2019).

45 *See, e.g.*, ELMUS WICKER, THE GREAT DEBATE ON BANKING REFORM: NELSON ALDRICH AND THE ORIGINS OF THE FED 8 (2005) (describing the scholarly community's "revival of interest in the origins of the Federal Reserve System").

the Fed's purpose, structure, specific functions, and sources of funding—all to provide the necessary backdrop for an assessment of whether the Fed's current structure comports with Article II. The picture that emerges is one in which the Fed is in part both a familiar command-and-control regulator but also, in important respects, a *sui generis* mishmash of the public and private sectors.

A. The Purpose of Independent Central Banking

Before explaining the Fed's particular features, it is important to understand what central banks—of which the Fed may be the world's most well-known example—do. For centuries, these institutions have existed to help influence "policies that affect a country's supply of money and credit."[46] By directing monetary policy through control of a nation's money supply and the price of borrowing, central banks play a significant role in creating and sustaining domestic and even global economic conditions.[47]

A common (though not necessary) characteristic of central banking is independence from political actors. Economists have argued that political decisionmakers may not produce optimal monetary policy.[48] Not only are elected politicians, according to this theory, "unlikely to understand monetary policy and the workings of the macroeconomy," but they may "use their control over monetary policy opportunistically, stimulating the economy by lowering interest rates shortly before elections even when doing so is inappropriate in the longer term."[49] For this and other reasons, "all wealthy democracies cede

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46 Michael D. Bordo, *A Brief History of Central Banks*, FED. RSRV. BANK CLEVELAND (Dec. 1, 2007); *see also id.* (explaining that "[t]he story of central banking goes back at least to the seventeenth century," and that the famous Bank of England was founded in 1694 "as a joint stock company to purchase government debt"); JONATHAN R. MACEY, GEOFFREY P. MILLER, RICHARD S. CARNELL & PETER CONTI-BROWN, THE LAW OF FINANCIAL INSTITUTIONS (2021) (describing purposes and history of central banks).

47 *See, e.g.*, Yair Listokin & Daniel Murphy, *Macroeconomics and the Law*, 15 ANN. REV. L. & SOC. SCI. 377, 384 (2019) ("If, in the short run, prices are fixed and the rate at which money turns over is relatively steady, then changes in the money supply, *M*, translate into changes in output, *Y*, and unemployment. . . . As a result, a decrease in the money supply causes output to decline and unemployment to increase, even if the economy's underlying productive capacity remains unchanged.").

48 *See, e.g.*, Rogoff, *supra* note 26.

49 Listokin & Murphy, *supra* note 47, at 385–86.

control over monetary policy to central banks with varying degrees of independence."[50]

B. Structure

The Federal Reserve System has operated as the U.S. central bank for more than a century. Its structure is surprisingly complex. Indeed, although colloquially known as "*the* Fed"—singular—in reality "the Fed" is not a single entity at all. Instead, it is a collection of entities, each with its own characteristics.[51]

The Board of Governors: Although the Fed Chair receives the most attention, the Fed's primary governing body is the Board of Governors—known colloquially as the Federal Reserve Board or just "the Board."[52] The Board oversees "all aspects of the operation of the Federal Reserve system" and "reviews and approves the budgets of each of the Reserve Banks."[53] Board members are nominated by the President and confirmed by the Senate to 14-year (staggered) terms "unless sooner removed for cause"—an undefined term—"by the President."[54] By statute, the Board is composed of seven members who represent the nation's varied commercial and geographic interests.[55]

One of the Board of Governors' most distinguishing characteristics is the fact that it is a *board*. At least in theory, multiple individuals work together so that no one person can control the Fed's activities. Congress might have adopted this structure on the theory that "it is 'easier to protect a board from political control than to protect a single appointed official.'"[56] Because the Board has a culture of unanimity in its decisions and the

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50 *Id.* at 386.

51 In addition to the entities discussed in this section, the Federal Reserve System also has advisory bodies. We do not focus on them because they do not directly make operative decisions. *See generally* Brian D. Feinstein & Daniel J. Hemel, *Outside Advisers Inside Agencies*, 108 GEO. L.J. 1139 (2020).

52 *See, e.g.*, CONTI-BROWN, *supra* note 11, at 71 (explaining that the Chair has "just eight duties" while the "the Board of Governors as a governing body is cited in the Federal Reserve Act over *four hundred times*").

53 FED EXPLAINED, *supra* note 16, at 7–8.

54 12 U.S.C. § 242.

55 *See id.* § 241.

56 Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2243 (2020) (Kagan, J., concurring in part and dissenting in part) (quoting CUSHMAN, *supra* note 23, at 153); *cf.* PHH Corp. v. CFPB, 881 F.3d 75, 165 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting) (arguing that a board structure disperses power and prevents arbitrariness).

Chair rarely dissents, it can be difficult to assess the influence of individual Governors on the Fed's decisions.[57]

The Chair: The Chair is a member of the Board of Governors who is separately nominated by the President and confirmed by the Senate to a four-year term but can be nominated and confirmed to additional four-year terms.[58] By statute, the Chair cannot be removed by the President from a position on the *Board of Governors* absent "cause," but the Chair enjoys no additional express tenure protections *as Chair*.[59]

The Chair has a great deal of real-world influence. Indeed, "investors hang on the Chair's every word, and markets instantly react to the faintest clues on interest rate policy."[60] Yet the position has few formal duties. By statute, the Chair must (among other things) appear before Congress, conduct the Board's meetings, act for the Fed "subject to" the Board's "supervision," and decide whether to release certain information if "such disclosure would be in the public interest . . . ."[61] The Chair also can delegate the Board's functions to staff, but any member of the Board can require full-Board review of any delegated decision. Furthermore, although the Chair's agenda-setting role can be significant,[62] there are also "soft restraints" on what the Chair can do.[63]

The Vice Chairs: Congress has also created two "Vice Chair" positions. One is tasked with filling in for the Chair.[64] The other serves as the Vice Chair for Supervision (a new position created

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57 *See generally* Daniel L. Thornton & David C. Wheelock, *Making Sense of Dissents: A History of FOMC Dissents*, 96 FED. RSRV. BANK ST. LOUIS REV. 213 (2014).

58 12 U.S.C. § 242. *See also Structure of the Federal Reserve System*, BD. OF GOVERNORS, https://www.federalreserve.gov/aboutthefed/structure-federal-reserve-board.htm [https://perma.cc/BCH3-XPCR] (last updated Apr. 1, 2024).

59 12 U.S.C. § 242. Courts sometimes infer the existence of removal restrictions, even when they are not written in statutory law, but the Court has recently cast significant doubt on that line of cases. *See infra* pp. 127–28.

60 *See* James McBride, Anshu Siripurapu & Noah Berman, *What is the U.S. Federal Reserve?*, COUNCIL ON FOREIGN RELS., https://www.cfr.org/backgrounder/what-us-federal-reserve [https://perma.cc/H562-L9KR] (last updated Nov. 8, 2022).

61 12 U.S.C. §§ 242, 248(s)(3).

62 *See, e.g.*, Henry W. Chappell Jr., Rob Roy McGregor & Todd Vermilyea, *Majority Rule, Consensus Building, and the Power of the Chairman: Arthur Burns and the FOMC*, 36 J. MONEY, CREDIT, & BANKING 407 (2004) (concluding that "the impact of the Chairman is . . . different from that of rank-and-file members of the Committee").

63 Kathryn Judge, *The Federal Reserve: A Study in Soft Constraints*, 78 L. & CONTEMP. PROBS. 65, 85 (2015); *see also id.* at 86–87 (explaining that Chairs looking to avoid criticism tend to follow established norms).

64 *See* 12 U.S.C. § 242.

in 2010 as part of the Dodd-Frank Act),[65] who "shall develop policy recommendations for the Board regarding supervision and regulation of depository institution holding companies and other financial firms supervised by the Board and shall oversee the supervision and regulation of such firms."[66] These supervisory powers are significant. In fact, at least formally, the Vice Chair for Supervision enjoys "the broadest grant of authority to an individual in the Federal Reserve Act—greater than even the explicit authority given to the [Fed] Chair" and with the power to "set the tone for the Fed's entire regulatory apparatus."[67]

As with the Chair, the Vice Chair positions are filled by Federal Reserve Governors who have been separately nominated by the President and confirmed by the Senate to four-year terms.[68] And like the Chair, they too lack any express statutory protections against removal in their capacity as Vice Chairs (as opposed to members of the Board).[69]

The Federal Reserve Banks: There are twelve Federal Reserve Banks spread out across the nation.[70] These banks are "the operating arms of the Federal Reserve System"[71] and have become "more and more like public regulatory institutions."[72] The Reserve Banks, for example, "examine and supervise financial institutions, act as lenders of last resort, and provide U.S. payment system services, among other things."[73] Yet, reflecting their origins, they are still often considered "private corporations in which the [g]overnment has an interest" rather than "departments of the Government."[74] Private commercial banks

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65 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

66 12 U.S.C. § 242. The Vice Chair for Supervision also appears semi-annually before two congressional committees. *See id.* § 247b.

67 Peter Conti-Brown & Simon Johnson, *Governing the Federal Reserve System after the Dodd-Frank Act*, PETERSON INST. FOR INT'L ECON., Oct. 2013, at 2.

68 *See Structure of the Federal Reserve System*, BD. OF GOVERNORS, *supra* note 58; *see also* 12 U.S.C. § 242.

69 *See* 12 U.S.C. § 242.

70 *See* FED EXPLAINED, *supra* note 16, at 3.

71 *See id.* at 8.

72 CONTI-BROWN, *supra* note 11, at 104.

73 *See, e.g.*, FED EXPLAINED, *supra* note 16, at 7.

74 Emergency Fleet Corp. v. W. Union Tel. Co., 275 U.S. 415, 426 (1928). Although often characterized as private corporations, Reserve Banks also supervise financial institutions under delegations from the Board of Governors. *See* 12 U.S.C. § 248(k). For that reason, some courts have described Reserve Banks as "plainly and predominantly fiscal arms of the federal government." Fed. Rsrv. Bank of Boston v. Comm'r of Corps. & Tax'n, 499 F.2d 60, 62 (1st Cir. 1974); *see also* Fed. Rsrv. Bank of St. Louis v. Metrocentre Imp. Dist., 657 F.2d 183, 186

are stockholders of the Reserve Banks but lack the powers and rights typically associated with the shareholders of a private corporation, and if a Reserve Bank is liquidated, the "surplus becomes the property of the United States."[75]

Each Reserve Bank is subject to the "supervision and control" of a nine-member board of directors, three of whom are in "Class A," "Class B," or "Class C."[76] The member banks elect Class A and Class B directors (with Class A directors representing the interests of the member banks and Class B directors representing the public), while the Fed's Board of Governors appoints Class C directors.[77] These directors serve staggered three-year terms.[78] Each Reserve Bank has a president who is "appointed by the Class B and Class C directors of the bank, with the approval of the Board of Governors" for a five-year term[79] yet "all the directors from all classes vote together to fire the president of the local Federal Reserve Bank, for any reason they deem necessary."[80] The Board of Governors designates a board chair and deputy chair from the Class C directors.[81] Most Reserve Banks also have branches, each with their own board of directors of either five or seven members, who also serve staggered three-year terms.[82] A majority of the board of each Branch is appointed by the relevant Reserve Bank, but "the remaining directors on the board are appointed by the Board of Governors."[83] Members of these boards choose a chair from the directors chosen by the Board of Governors.[84]

The President has no statutory power to remove the officers of the Reserve Banks. The Board of Governors, however, may "remove any officer or director of any Federal reserve bank" by communicating "the cause of such removal . . . to the removed

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(8th Cir. 1981); 12 U.S.C. § 391. By contrast, other courts have treated Reserve Banks as private entities for certain statutory purposes. *See* Scott v. Fed. Rsrv. Bank of Kan. City, 406 F.3d 532 (8th Cir. 2005); Lewis v. United States, 680 F.2d 1239 (9th Cir. 1982).

75 *Fed. Rsrv. Bank of Boston*, 499 F.2d at 62–63; *see* 12 U.S.C. §§ 289–90.

76 12 U.S.C. §§ 301, 302.

77 *Id.* §§ 302, 304, 305.

78 *Id.* § 308.

79 *Id.* § 341; *see, e.g.*, FED EXPLAINED, *supra* note 16, at 9.

80 CONTI-BROWN, *supra* note 11, at 104.

81 FED EXPLAINED, *supra* note 16, at 9.

82 *Id.* at 10.

83 *Id.*

84 *Id.*

officer or director and to said bank."[85] A Reserve Bank's directors may also dismiss its officers "at pleasure."[86] It thus appears that both the Fed's Board of Governors and a Reserve Bank's own directors can remove these officers.[87]

The Federal Open Market Committee: Created in 1933 and restructured in 1935, the FOMC manages the Fed's "open market operations," discussed below.[88] The FOMC consists of the seven-member Board of Governors, plus "five representatives of the Federal Reserve banks," who shall be "presidents or first vice presidents" of those banks.[89] One of the bank representatives is chosen by the board of directors of the Reserve Bank of New York, while the others are chosen by the combined boards of other Reserve banks (e.g., the directors of the banks in Atlanta, Dallas, and St. Louis together elect a single representative).[90] The FOMC meets "at least four times each year upon the call of the chairman of the Board of Governors of the Federal Reserve System or at the request of any three members of the Committee."[91] Each of the Reserve Bank presidents attends, even if they cannot vote.[92] The FOMC "direct[s] open market operations that set[] U.S. monetary policy."[93]

As with the positions of Chair or Vice Chair, no statute provides for removal of a member of the FOMC apart from that individual's role as a member of the Board of Governors or as an officer of a Reserve Bank.

In 2019, the constitutionality of the FOMC's structure was the subject of analysis by the Office of Legal Counsel ("OLC"). OLC concluded that the "statutory procedures for appointing and removing Federal Reserve Bank members of the Federal

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85 12 U.S.C. § 248(f).

86 *Id.* § 341.

87 *See Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee*, *supra* note 44, at 18 (reasoning "that the removal authority of the boards of directors may constitutionally be exercised only with the approbation of the Board of Governors" and that "the relevant removal provisions may be read to require such approbation"); *cf.* Conti-Brown, *supra* note 14, at 303 ("Would a court charged with construing the statute give the Reserve Bank presidents two masters? The question is difficult to answer").

88 *See, e.g.*, Structure of the Federal Reserve System: Federal Open Market Committee, https://www.federalreserve.gov/aboutthefed/structure-federal-open-market-committee.htm [https://perma.cc/HK8H-GMC4] (last updated Oct. 28, 2016); *see also* David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 L. & CONTEMP. PROBS. 157, 163 (2015).

89 12 U.S.C. § 263(a).

90 *Id.*

91 *Id.*

92 *See* FED EXPLAINED, *supra* note 16, at 13.

93 *Id.* at 7.

Open Market Committee are consistent with the Constitution."[94] OLC reasoned that the Reserve Bank representatives on the FOMC are "Officers of the United States" under Article II of the Constitution, who are constitutionally appointed to their positions because the Board of Governors, as the "head of [the] department," approves their appointments.[95] OLC also reasoned that "Reserve Bank FOMC members are subject to plenary removal and supervision by the Board of Governors."[96] Equally significant, OLC rejected the view that Reserve Bank FOMC members are private individuals not subject to the Appointments Clause, because they "exercise permanently delegated federal statutory functions in continuing positions."[97] At a minimum, OLC's reasoning nods toward the challenging constitutional questions that the FOMC raises.

The Staff: The Fed has a large staff,[98] but the "Barons"—the heads of the Fed's Monetary Affairs, Research and Statistics, and International Finance divisions—are particularly important.[99] Other key staff members include the General Counsel, who is responsible "not just for interpreting law, but also making policy," and the director of the Division of Bank Supervision, both of whom "have authority to supervise the Reserve Banks in reaching consent agreements in banks' enforcement proceedings."[100] In general, civil servants enjoy at least some statutory protection from at-will removal.[101]

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94 *See Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee*, *supra* note 44, at 1. The impetus for OLC's analysis was a proposed amendment to H.R. 6741, the Federal Reserve Reform Act of 2018, which would have expanded the FOMC's authority and altered its structure for the first time in decades. *See id.*

95 *Id.* at 2. In reaching this conclusion, OLC said that "the boards of directors [of reserve banks] that select them for FOMC membership may not make appointments under the Appointments Clause." *Id.*

96 *Id.* OLC reasoned that the additional removal authority granted to Reserve Bank boards of directors to fire presidents and vice presidents "does not unconstitutionally interfere with the removal authority of the Board of Governors, because the statute can be read and administered to require the Board to approve any removal of an FOMC Reserve Bank member." *Id.* at 2–3.

97 *Id.* at 7–8. Although that reasoning might suggest that the Reserve Bank presidents are officers, apart from their membership on the FOMC, OLC did not address this question. *Id.* at 8 n.3.

98 The Fed has over 23,000 employees. *See Annual Report: Federal Reserve System Budgets*, BD. OF GOVERNORS. OF FED. RSRV. SYS. (2022).

99 CONTI-BROWN, *supra* note 11, at 86.

100 *See id.* at 93; *see also id.* at 98 ("[The Fed's general counsel] is a major player in everything. You can't overstate his role.") (quoting Jesse Eisinger, *The Power Behind the Throne at the Federal Reserve*, N.Y. TIMES (July 31, 2013), https://archive.nytimes.com/dealbook.nytimes.com/2013/07/31/the-power-behind-the-throne-at-the-federal-reserve/ [https://perma.cc/EXB8-XMNG]).

101 *See* 5 U.S.C. § 7513(a).

C. Functions

As described below, the constitutionality of the Fed's structure depends in part on what it does. Its functions fall into five main categories.[102]

Monetary Policy: The Fed's most visible—and most important—task is to conduct national monetary policy.[103] Congress has directed the Board of Governors and the FOMC to "maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."[104] This instruction is known as the Fed's "dual mandate," which assumes that if employment is robust and prices are stable, "interest rates [will] settle at moderate levels."[105] The Fed conducts monetary policy (largely) by shaping current and expected short-term interest rates, which in turn "affects overall financial conditions including longer-term interest rates, stock prices, the exchange value of the dollar, and many other asset prices . . . thus affecting overall spending, investment, production, employment, and inflation."[106]

The Fed has numerous tools to sway monetary policy. Its primary method is to influence interest rates—the price of money. The FOMC, for example, "raises and lowers its target range for the policy rate, which is the federal funds rate (the rate at which depository institutions lend to each other)."[107] The FOMC primarily does this through open-market operations—that is, the buying and selling of securities in the open market.[108] It can also raise or lower the interest on reserve balances placed by depository institutions in Reserve Banks, which effectively "sets a floor on the rates at which banks are willing to lend excess cash in their reserve balance accounts . . . to

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102 *See, e.g.*, FED EXPLAINED, *supra* note 16, at 1.

103 *See id.* at 21–22.

104 12 U.S.C. § 225a.

105 *Monetary Policy Principles and Practice*, BD. OF GOVERNORS OF FED. RSRV. SYS. (July 29, 2021), https://www.federalreserve.gov/monetarypolicy/monetary-policy-what-are-its-goals-how-does-it-work.htm [https://perma.cc/G6NM-9UWW].

106 FED EXPLAINED, *supra* note 16, at 21; *see also* N. GREGORY MANKIW, MACROECONOMICS 348 (7th ed. 2009) ("[A]n increase in the money supply . . . put[s] downward pressure on the domestic interest rate, [and] capital flows out of the economy . . . causing the domestic currency to depreciate in value . . ., stimulating net exports and thus total income."); *id.* at 369.

107 FED EXPLAINED, *supra* note 16, at 12.

108 *See id.* at 36; *see also* CONTI-BROWN, *supra* note 11, at 132.

private counterparties."[109] The FOMC can also use "discount window lending," which can help "damp upward pressures on the federal funds rate" and the like.[110] Each of these mechanisms affects interest rates. In addition, the FOMC influences behavior by offering "forward guidance" about what its target rate may be in the future, which in turn affects long-term private-market planning.[111]

The Federal Reserve Board can also change reserve requirements for depository institutions, i.e., the amount of funds that such institutions must hold to meet potential liabilities.[112] As a regulator, it "establishes reserve requirements that apply for all banks."[113] At least in recent years, this has not been a significant tool; in relevant respects, reserve requirements are currently zero.[114] In times of emergency, the Board of Governors—with the approval of the Treasury Department—can also "establish broad-based lending facilities" to "provide a backstop source of funding to targeted markets."[115]

Promote Systemic Financial Stability: Congress has also tasked the Fed with ensuring that financial markets can "provide households, communities, and businesses with the resources, services, and products they need to invest, grow, and participate in a well-functioning economy," even during economic "shocks."[116] The Fed does this by taking a "macroprudential approach" to supervision and regulation, focusing its efforts on monitoring risks that develop "*across and between*

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109 *See* FED EXPLAINED, *supra* note 16, at 35–36.

110 *See id.* at 38.

111 *See id.* at 32; *see also id.* at 24 ("[M]edium-and longer-term interest rates are affected by how people expect the federal funds rate to change in the future.").

112 *See* 12 U.S.C. § 461(b)(2)(A) ("Each depository institution shall maintain reserves against its transaction accounts as the Board may prescribe by regulation[.]"); 12 C.F.R. § 204.5(a)(1) (implementing that provision).

113 FED EXPLAINED, *supra* note 16, at 38; *see also* 12 U.S.C. § 3105(a)(1) (giving the Board authority to impose reserve requirements on federal branches of foreign banks and state branches of foreign banks); 12 C.F.R. § 204.1(c) (imposing reserve requirements on, *inter alia*, insured banks, savings banks, mutual savings banks, insured credit unions, and domestic branches of foreign banks).

114 *See* FED EXPLAINED, *supra* note 16, at 38–39.

115 *Id.* at 39; *see also* MARC LABONTE, CONG. RSCH. SERV., R44185, FEDERAL RESERVE: EMERGENCY LENDING 7–10, 14–17 (2020) (overviewing the Fed's emergency powers); Chad Emerson, *The Illegal Actions of the Federal Reserve: An Analysis of How the Nation's Central Bank Has Acted Outside the Law in Responding to the Current Financial Crisis*, 1 WM. & MARY BUS. L. REV. 109, 128–29 (2010) (arguing the Fed exceeded its authority).

116 FED EXPLAINED, *supra* note 16, at 47, 53.

markets and institutions."[117] Such regulatory supervision includes a regular assessment of "system vulnerabilities": asset valuations and risk appetite, leverage in the financial system, funding risks, and borrowing by businesses and households.[118] These vulnerabilities inform the Fed's internal decision-making, as well as its interactions with domestic and international organizations such as the Financial Stability Oversight Council (FSOC), a multi-agency council chaired by the Secretary of the Treasury, and the Financial Stability Board (FSB), an international monetary body.[119] The Fed also monitors risks facing so-called systemically important financial institutions (SIFIs)[120] "to mitigate spillover of distress into the broader economy."[121] Much of this monitoring is done through "stress testing"—an annual process in which the Fed assesses the vulnerability of participating institutions by simulating a recession.[122]

Ensure Financial Soundness: Congress has tasked the Reserve Banks with supervising and examining state member banks, thrift holding companies, and "non-bank financial institutions that have been designated as systemically important under authority delegated to them by the Board."[123] Reserve Banks also lend money to depository institutions such as banks and credit unions.[124] For its part, the Board of Governors "drafts, proposes, and invites public comment on [soundness] regulations," finalizes such regulations, and "issues and disseminates publicly the procedures Reserve Bank examiners will use to evaluate institutions' compliance with laws and regulations."[125]

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117 *Id.* at 48–49.

118 *See id.* at 49.

119 *See id.* at 50.

120 *See* Jeremy C. Kress, *The Last SIFI: The Unwise and Illegal Deregulation of Prudential Financial*, 71 STAN. L. REV. ONLINE 171, 172–73 (2018) ("By law, any firm that FSOC designates as a SIFI becomes subject to consolidated supervision and regulation by the Federal Reserve, including risk-based capital, leverage, liquidity, and risk-management requirements."). Common SIFIs include "large bank holding companies, the U.S. operations of certain foreign banking organizations, and financial market utilities." FED EXPLAINED, *supra* note 16, at 55.

121 FED EXPLAINED, *supra* note 16, at 56.

122 *See id.* at 56–57.

123 *Id.* at 10–11.

124 *Id.* at 11; *see also Lending to Depository Institutions*, FED. RES., https://www.federalreserve.gov/monetarypolicy/bst_lendingdepository.htm [https://perma.cc/2Y8E-2D25] ("[D]epository institutions have, since 2003, had access to three types of discount window credit—primary credit, secondary credit, and seasonal credit.") (last updated May 13, 2021).

125 FED EXPLAINED, *supra* note 16, at 63.

Facilitate Financial Transactions: The Fed also "has a wide range of responsibilities related to paper money, from ensuring an adequate supply of currency to protecting and maintaining confidence in the currency[,]"[126] including working with various federal agencies to prevent Federal Reserve notes from being counterfeited and ensuring the right amount of such notes remain in circulation.[127] The Reserve Banks further "distribut[e] the nation's currency and coin to depository institutions, clear[] checks, operat[e] the Fed-Wire and automated clearinghouse (ACH) systems, and serv[e] as a bank for the U.S. Treasury[.]"[128] The Reserve Banks charge fees to banks for the same sorts of service that banks provide ordinary customers.[129]

Consumer Protection and Community Development: The Fed also has a consumer-protection function,[130] including promulgating consumer protection and "community reinvestment" regulations.[131] For example, under the Fair Credit Reporting Act, the Fed may "prescribe regulations" requiring banks to prevent identity theft,[132] and under Dodd-Frank, may regulate "any person who issues a debit card[] or [a] credit card,"[133] which allows the Fed, among other things, to regulate the fees that credit card companies can charge.[134] The Fed also "ensure[s] that financial institutions under its jurisdiction comply with applicable . . . laws and regulations" regarding these subjects.[135] This includes "issuing cease-and-desist orders[,]" "assessing civil money penalties," and "ordering remedies or restitution to consumers[.]"[136]

The Fed's regulatory functions have important implications *both* from an Article II perspective *and* because they may provide a hook by which a party can bring such an Article II

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126 *Id.* at 99; *see also* Christopher M. Bruner, *The Changing Face of Money*, 30 REV. BANKING & FIN. L. 383, 395 (2010) ("The label 'Federal Reserve Note' refers to the fact that our paper money is a creation of the Federal Reserve System . . . .").

127 *See* FED EXPLAINED, *supra* note 16, at 99–100.

128 *Id.* at 11.

129 *Id.*

130 *See id.* at 113.

131 *See, e.g.*, *id.* at 121, 123 ("The Federal Reserve Board has rulemaking responsibility under specific statutory provisions of the consumer financial services laws. The Board issues regulations to implement those laws and also . . . official interpretations and compliance guidance[.]").

132 15 U.S.C. § 1681m(e)(1).

133 15 U.S.C. §§ 1693o–2(a)(1), (c)(9)

134 *See, e.g.*, 12 C.F.R. § 235.4 (limiting fees for fraud-prevention services).

135 *See* FED EXPLAINED, *supra* note 16, at 113.

136 *Id.* at 120.

challenge. It may be that no party has standing to challenge the Fed's monetary functions. In *Committee for Monetary Reform v. Board of Governors*, for example, the D.C. Circuit held that a committee of private individuals and companies lacked standing to challenge the FOMC's structure on separation-of-powers grounds (in particular, the inclusion of Reserve Bank presidents) because their alleged injuries were not sufficiently traceable to the FOMC's activities and, regardless, were merely "'generalized grievances' shared in substantially equal measure by all or a large class of citizens[.]"[137] Without reaching the merits, the D.C. Circuit has also rejected challenges to the FOMC brought by members of Congress.[138] But even if it is difficult to show a particularized injury from the FOMC's open-market activities, it is not hard for the subject of a regulation to challenge the Fed's *regulatory* decisions.[139] Regulated parties frequently challenge regulatory decisions, and as part of such a challenge, the constitutionality of the Fed's structure could arise.

D. Funding

The Fed also has an unusual funding system. Unlike most agencies, it "is not funded by congressional appropriations[,]" but instead is "financed primarily from the interest earned on the securities it owns—securities acquired in the course of the Fed's open market operations."[140] The Fed also receives funding from fees it charges for services like check clearing, which cover the costs of those services.[141] After paying expenses and funding a surplus account, "all the net earnings of the Reserve

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137 766 F.2d 538, 543–44 (D.C. Cir. 1985) (quoting Warth v. Seldin, 442 U.S. 490, 499 (1975)).

138 *See* Melcher v. FOMC, 836 F.2d 561, 562, 565 (D.C. Cir. 1987) (rejecting challenge by U.S. Senator to Federal Reserve Bank presidents serving on the FOMC); Reuss v. Balles, 584 F.2d 461, 462 (D.C. Cir. 1978) (similar, involving member of the House).

139 *See, e.g.*, Loan Syndications & Trading Ass'n v. SEC, 882 F.3d 220, 221, 229 (D.C. Cir. 2018) (ruling against SEC and the Fed in challenge to jointly issued rule); Ostrowski, *supra* note 8, at 780 ("Judicial review of the Fed, though rare, has continually occurred throughout the Fed's history."). This is especially true after *Collins*, which makes it relatively easy for private litigants to bring Article II challenges. *See, e.g.*, Collins v. Yellen, 141 S. Ct. 1761, 1779 (2021); Ostrowski, *supra* note 8, at 739.

140 *See, e.g.*, FED EXPLAINED, *supra* note 16, at 4; *see also* CONTI-BROWN, *supra* note 11, at 208 ("The Fed's budgetary autonomy is thus without equal in the federal government.").

141 FED EXPLAINED, *supra* note 16, at 4.

Banks are transferred to the U.S. Treasury."[142] This freedom from the appropriations process is broadly understood to help enhance the Fed's independence.[143]

II
The President's Removal Power

Whether Article II gives the President power to remove executive branch officials that Congress has chosen to protect is a significant constitutional question. The story of that question intersects in various ways with Congress's attempts to create a banking system. Here, we briefly outline the contours of the doctrine, with a specific eye to how Congress created the Fed against the backdrop of the Court's jurisprudence. We also observe that although the Supreme Court in recent years has taken a robust view of the President's removal power, it has carefully avoided opining on what that view means for the Fed.

A. The Basis and Basics of the Removal Power

Article II of the Constitution creates the office of the President, vests "[t]he executive Power" in that office, and sets forth, among other things, the President's powers and obligations, including a duty to "take Care that the Laws be faithfully executed."[144] Article I provides Congress with authority to create "Department[s]" within the Executive Branch.[145] Once Congress has created such Departments, however, Article II directs how those Departments are staffed, at least at the leadership

142 *Id.* at 4–5. Every year, the Federal Reserve System pays tens of millions of dollars into the U.S. Treasury. *Id.* Beyond funding itself, the Fed also funds the CFPB. As part of Dodd-Frank, Congress created the CFPB as an "independent bureau" within the Fed and ordered the Board of Governors to "transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the [CFPB] Director to be reasonably necessary to carry out the authorities of the Bureau." 12 U.S.C. §§ 5491(a), 5497(a)(1). The Supreme Court has recently concluded that this feature of the CFPB does not violate the Appropriations Clause. *See* CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 441 (2024).

143 *See* Juliana B. Bolzani, *Independent Central Banks and Independent Agencies: Is the Fed Super Independent?*, 22 U.C. Davis Bus. L.J. 195, 226 (2022) (explaining that this "budgetary independence increases the Fed's independence not only from the legislative branch but also its independence from the President"); *cf.* Aziz Huq, *Will the Supreme Court Torpedo the Financial System?*, Politico, Jan. 18, 2023.

144 U.S. Const. art. II, §§ 1, 3.

145 *Id.* art. I, § 8, cl. 18.

level.[146] Specifically, Article II includes the Appointments Clause, under which the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States . . . [b]ut the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[147]

By contrast, Article II does not contain a clause expressly allowing the President to fire executive branch officials. Article II provides at least one way to remove officers: impeachment and conviction. Not only are the President and Vice President subject to impeachment and conviction, but so are "all civil Officers of the United States."[148]

The question whether the President has an Article II authority to remove executive branch officials prompted one of the first major constitutional debates in the history of the United States.[149] In the so-called "Decision of 1789,"[150] while considering bills to create early cabinet offices for the Treasury, War, and Foreign Affairs, the First Congress engaged in a lengthy debate over whether Article II provides the President with a removal power. The specific trigger for the debate was proposed language authorizing the President to remove the Secretary of Foreign Affairs.[151] Numerous positions regarding removal were advanced. James Madison was the leading advocate for a strong Article II removal power, arguing that it was compelled by Article II's Vesting and Take Care Clauses, which create a scheme in which "the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community."[152] Eventually, the statute

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146 The Appointments Clause applies to "Officers of the United States." Under current doctrine, employees—that is to say, those individuals who do not "exercis[e] significant authority pursuant to the laws of the United States"—are not subject to the Appointments Clause. Buckley v. Valeo, 424 U.S. 1, 5, 125–26 (1976); *see also* Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN. L. REV. 443 (2018) (exploring the meaning of the term "Officers of the United States").

147 U.S. CONST. art. II, § 2.

148 *Id.* art. II, § 4.

149 *See* Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1022 (2006).

150 *See, e.g.*, *id.* at 1072.

151 *See id.* at 1029–30.

152 1 ANNALS OF CONG. 499 (Joseph Gales ed., 1834).

was modified in a way that seemed to imply a preexisting Article II removal power.[153] Although scholars continue to debate the Decision of 1789, many jurists came to see it as resolving the question, at least for principal officers.[154] As the Court explained in 1839, "it was very early adopted, as the practical construction of the Constitution, that this power was vested in the President alone."[155]

B. Early Legislative and Judicial Precedent

Following the Decision of 1789, Congress did not impose express statutory limits on the President's removal power until 1863, when—as part of the National Bank Act of 1863—Congress decreed that the Comptroller of the Currency would serve a five-year term and could only be "removed by the President, by and with the advice and consent of the Senate."[156] That provision, however, was short-lived. The next year, as part of the National Bank Act of 1864, Congress repealed that statutory limit on removal and replaced it with a rule that the President could remove the Comptroller "upon reasons to be reported by him to the Senate."[157] In 1867, Congress—in an effort to hinder President Andrew Johnson—enacted over his veto the Tenure of Office Act, which required the Senate's advice and consent to remove an officer confirmed by the Senate and so "was a generalized version of the 1863 statute that Congress had enacted to protect the Comptroller of the Currency."[158] Congress repealed the Tenure of Office Act in 1887.[159]

In the decades that followed, the Supreme Court upheld Congress's authority to limit the removal of certain inferior officers appointed by heads of departments[160] and concluded that any attempt to limit the President's ability to remove a Senate-confirmed officer would "require very clear and explicit language."[161] But the Court otherwise avoided grand

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153 Prakash, s*upra* note 147, at 1042.

154 *See*, e.g., *id.*

155 *Ex parte* Hennen, 38 U.S. 230, 259 (1839).

156 National Bank Act of 1863, ch. 58, § 1, 12 Stat. 665, 665–66 (repealed 1864).

157 *See* Bamzai, *supra* note 41, at 1378–79 (quoting 12 U.S.C. § 2).

158 *Id.* at 1380 (discussing Act of Mar. 2, 1867, ch. 154, 14 Stat. 430 (repealed 1887)).

159 *See* Act of Mar. 3, 1887, 24 Stat. 500 (1887).

160 United States v. Perkins, 116 U.S. 483, 485 (1886).

161 Shurtleff v. United States, 189 U.S. 311, 315 (1903).

pronouncements on the President's removal authority. Against this legal backdrop, Congress enacted the Federal Reserve Act of 1913—which we will discuss in more detail below.[162]

When the constitutional question finally (in 1926) reached the Supreme Court in *Myers v. United States*, Chief Justice Taft authored a 122-page majority opinion declaring that a statue requiring the President to obtain the Senate's advice and consent before removing a postmaster violated the President's removal authority.[163] As part of the Court's analysis, Taft—relying on the Decision of 1789 and the practice "followed by the legislative department and the executive department continuously for seventy-three years[]" afterwards—endorsed a robust removal power.[164] He explained that the Vesting and Take Care Clauses presumptively provide the President with a removal power, and that no provision of the Constitution strips the President of that power.[165] Thus, Taft concluded, "as his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing those for whom he can not continue to be responsible."[166]

Although the Fed was not the subject of *Myers*, the case may have had implications for its organization. Congress enacted the Federal Reserve Act of 1933 (discussed below) against this legal backdrop.[167]

C. The Removal Power's Decline and Revival

Less than a decade after *Myers*, the Court held in *Humphrey's Executor v. United States* that Article II did not confer on the President the power to remove at will a commissioner of the Federal Trade Commission ("FTC").[168] Upholding a statute that allowed presidential removal of the commissioner only "for inefficiency, neglect of duty, or malfeasance in office[,]" the Court reasoned that the FTC, by design, was supposed to be "nonpartisan" and to "act with entire impartiality[,]" and that "[i]ts duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative."[169] The Court dismissed

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162 *See infra* section III.B.1.

163 272 U.S. 52, 176 (1926).

164 *Id.* at 175.

165 *Id.* at 117–18.

166 *Id.*

167 *See infra* section III.B.2.

168 295 U.S. 602, 627, 629 (1935).

169 *Id.* at 623–24.

some of *Myers* as dicta applicable only to the President's removal of "a postmaster of the first class, without the advice and consent of the Senate as required by act of Congress[,]" which was irrelevant in assessing the FTC because "[a] postmaster is an executive officer restricted to the performance of executive functions."[170]

The Federal Reserve Act of 1935 was adopted against the backdrop of *Humphrey's Executor's* blessing of restrictions on the President's removal power—a blessing that seemingly took on a life of its own far beyond the case's specific reasoning.[171] By the time of *Morrison v. Olson* in 1988, the Court—over Justice Scalia's dissent—would conclude that the President could not freely fire an independent counsel, even if the office was purely executive in character.[172] The Court explained that the "real question" for removal purposes is not whether the official exercises "quasi-legislative" or "quasi-judicial" authority, but instead "whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[173] In the wake of *Morrison*, the Court felt comfortable concluding that Congress could craft laws "to prevent the President from exercising 'coercive influence' over independent agencies."[174]

Several recent opinions, however, have cut back on the broad understanding of *Humphrey's Executor*. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court addressed whether Congress can create multiple layers of removal restrictions—in other words, whether Congress can prevent an agency's leaders from removing at will a subordinate officer where the President cannot remove those same agency leaders at will.[175] With Chief Justice Roberts writing, the Court held that two levels of removal is one too many.[176]

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170 *Id.* at 626–27.

171 *See, e.g.*, Wiener v. United States, 357 U.S. 349, 353 (1958) (inferring a removal restriction on the strength of *Humphrey's Executor*).

172 487 U.S. 654, 705 (1988).

173 *Id.* at 691.

174 Mistretta v. United States, 488 U.S. 361, 410–11 (1989).

175 561 U.S. 477, 483–84 (2010).

176 *Id.* at 514; *see also* Neomi Rao, *A Modest Proposal: Abolishing Agency Independence in* Free Enterprise Fund v. PCAOB, 79 FORDHAM L. REV. 2541, 2541 (2011) (contending that "[t]he structure of the Court's argument, which focuses on the importance of presidential control and accountability through the removal power, logically calls into question the constitutionality of agency independence" generally).

The Court returned to removal ten years later in *Seila Law*, which addressed the Consumer Financial Protection Bureau ("CFPB"), a consumer-protection regulator headed by a single Director with a five-year term removable by the President for "inefficiency, neglect of duty, or malfeasance in office."[177] With Chief Justice Roberts again writing, the Court held that placing such "significant executive power" in a single person not subject to the President's plenary control offends Article II.[178] The Court explained that its cases recognized just two limits on presidential removal of executive branch officers: one for multimember agencies that do not exercise executive power[179] and another for certain inferior officers "with limited duties and no policymaking or administrative authority."[180] *Seila Law* further said that in evaluating whether to "extend" those two exceptions to "new situation[s]," a court should consider "history," "tradition," and "constitutional structure."[181] The Court concluded that the CFPB's structure violated Article II in part because a single-headed independent agency like the CFPB was "almost wholly unprecedented," with the exception of a "one-year blip for the Comptroller of the Currency" and a handful of relatively modern agencies.[182]

Notably, *Seila Law* did not ground its two exceptions in first principles, but instead on precedent.[183] Moreover, the Court construed the holding in *Humphrey's Executor* so narrowly that it seems likely that most modern independent agencies, the FTC included, do not fall within the Court's literal language.[184] The Court explained that "*Humphrey's Executor* permitted Congress to give for-cause removal protections to a multimember body of experts, balanced along partisan lines, that performed legislative and judicial functions and was said

177 Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2188 (2020).

178 *Id.* at 2191–92.

179 *See id.* at 2199–2200; *see also id.* at 2188 n.2.

180 *Id.* at 2200.

181 *Id.* at 2201–02.

182 *Id.*

183 *Id.* at 2191–92.

184 *See id.* at 2200 n.4 ("Perhaps the FTC possessed broader rulemaking, enforcement, and adjudicatory powers than the *Humphrey's* Court appreciated. Perhaps not. Either way, what matters is the set of powers the Court considered as the basis for its decision, not any latent powers that the agency may have had not alluded to by the Court."); *see* also Daniel A. Crane, *FTC Independence after Seila Law*, *in* RULEMAKING AUTHORITY OF THE US FEDERAL TRADE COMMISSION 271, 281–93 (Daniel A. Crane ed., 2022).

not to exercise any executive power."[185] The Court also noted that *Humphrey's Executor*'s "conclusion that the FTC did not exercise executive power has not withstood the test of time."[186] Read together, these conclusions suggest that "*Humphrey's Executor* does not even satisfy its own exception."[187] Justice Thomas thus wrote separately to stress that "it is not clear what is left of *Humphrey's Executor*'s rationale[,]" and that "if any remnant of that decision is still standing, it certainly is not enough to justify the numerous, unaccountable independent agencies that currently exercise vast executive power outside the bounds of our constitutional structure."[188]

In 2021, the Court held in *Collins* that the rule from *Seila Law* applies to the Federal Housing Finance Agency, another agency headed by a single Director whom Congress purported to protect from at-will removal. In doing so, the Court elaborated on the rule from *Seila Law* in at least three respects. First, the Court held that, as a matter of statutory interpretation, unless Congress expressly limits the President's removal power, there is a presumption that the President has such authority.[189] Second, the Court held that the President's removal power applies regardless of whether an agency exercises "significant executive power"—any executive power is enough.[190] And third, the Court suggested that even less onerous removal restrictions than those at issue in *Humphrey's Executor* and *Seila Law*—perhaps even one that would allow removal based on policy disagreement—are also unconstitutional.[191] In particular, the provision in *Collins* allowed removal so long as there was "cause"—a term the Court suggested includes disobedience of a superior's order.[192]

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185 *Seila Law*, 140 S. Ct. at 2199.

186 *Id.* at 2198 n.2.

187 *Id.* at 2218 (Thomas, J., concurring in part and dissenting in part).

188 *Id.*

189 Collins v. Yellen, 141 S. Ct. 1761, 1782–83 (2021) (following Article II-infused analysis from Shurtleff v. United States, 189 U.S. 311, 316 (1903)).

190 *See id.* at 1784 ("[T]he nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head.").

191 *See id.* at 1787.

192 *Id.* at 1786 ("[T]he Recovery Act's 'for cause' restriction appears to give the President more removal authority than other removal provisions reviewed by this Court. . . . And it is certainly true that disobeying an order is generally regarded as 'cause' for removal.") (citing NLRB v. Electrical Workers, 346 U.S. 464, 475 (1953)). Following *Collins*, OLC concluded that the President may fire the head of the Social Security Administration, explaining that "the statutory restriction on removing the Commissioner is unconstitutional." *Constitutionality of the*

D. The Court and the Fed

The implications these cases have for the Fed has loomed over the Court's jurisprudence. In *Free Enterprise Fund*, for example, Justice Breyer noted in dissent that members of the Fed's Board of Governors are also protected by a "for cause" removal provision.[193] In *Seila Law*, Paul Clement, as Court-appointed amicus, repeatedly attempted to tie the CFPB's fate to the Federal Reserve's[194]—a move echoed by Justice Kagan in her dissent.[195] And in *Collins*, the Court-appointed amicus argued that declaring unlawful the FHFA's removal restriction would threaten the Fed,[196] while Justice Sotomayor in dissent contended that the Court's decision imperiled the nation's "long tradition of independence enjoyed by financial regulators."[197]

A majority of the Court, however, has never squarely addressed the issue. In *Free Enterprise Fund*, the Court did not explore the broader implications of its holding, and in *Seila Law*, the Court speculated in a footnote—without further

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Commissioner of Social Security's Tenure Protection, 45 Op. O.L.C. 1,10 (July 8, 2021). President Biden thereafter removed the Commissioner of the Social Security Administration based on policy disagreement, something no president had done before. *See* Jim Tankersley, *Biden Fires Trump Appointee as Head of Social Security Administration*, N.Y. TIMES (Oct. 13, 2021).

193 *See* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 549–50 (2010) (Breyer, J., dissenting).

194 *See, e.g.*, Brief for Court-Appointed Amicus Curiae in Support of Judgment Below, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (No. 19–7), 2020 WL 353477, at *39 (U.S. 2020) ("[E]ven when accompanied by an inefficiency-neglect-or-malfeasance standard, as with the Federal Reserve, such terms have never been understood to be constitutionally problematic."); *see also* Brief for Amicus Curiae the U.S. House of Representatives in Support of the Judgment Below, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (No. 19–7), 2020 WL 487328, at *31 (U.S. 2020) ("[T]he Governors of the Federal Reserve oversee monetary policy and are insulated from politics both through fourteen-year terms and for-cause removal protection. . . . Those protections reflect a wise judgment that the Nation's monetary policy should not be driven—or be perceived to be driven—by a President's short-term political interests.").

195 *See, e.g.*, *Seila Law*, 140 S. Ct. at 2237 (arguing that "the Federal Reserve's independence stops a President trying to win a second term from manipulating interest rates") (Kagan, J., dissenting).

196 *See* Brief for Court–Appointed Amicus Curiae, *Collins v. Yellen*, 141 S. Ct. 1716 (Nos. 19–422, 19–563), 2020 WL 6264506, at *3 (U.S. 2021) ("If the Court were to hold that the FHFA's structure violates the Constitution, moreover, the repercussions would extend far beyond this case. Other features of the Federal Government—including the Federal Reserve and the Civil Service—would also be vulnerable to attack."). Professor Nielson served as the court-appointed amicus in this case.

197 Collins v. Yellen, 141 S. Ct. 1761, 1807 (2021) (Sotomayor, J., dissenting); *see also id.* (listing "the Federal Reserve Board" as part of that "tradition").

elaboration—that perhaps the Fed's pedigree makes it different.[198] In *Collins*, the Court disclaimed "comment on the constitutionality of any removal restriction that applies to [the] officers" of other agencies.[199] Thus, although the implications of presidential removal for the Fed have long been central to the debate,[200] the Court has not resolved that question.

III
THE CONSTITUTIONAL HISTORY OF U.S. CENTRAL BANKING

Well before the United States was founded, nations created central banks for a variety of reasons, including to make policy regarding the "country's supply of money and credit."[201] The United States followed this trend, with the Fed serving as the

198 *See Seila Law*, 140 S. Ct. at 2202 n.8 ("[E]ven assuming financial institutions like the Second Bank and the Federal Reserve can claim a special historical status, the CFPB is in an entirely different league."). Some scholars have also attempted to carve off the Fed. *See, e.g.*, John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 850 n.173 (2009) ("We are inclined to believe that the independence of the Federal Reserve is now so well accepted that it should be regarded as an entrenched precedent."). Others, however, have suggested that aspects of the Fed's structure may be problematic. *See, e.g.*, Conti-Brown, *supra* note 14, at 302–03 (reasoning that the FOMC is constitutionally problematic after *Free Enterprise Fund* because the President cannot remove the heads of the Reserve Banks, who themselves can be removed (if at all) by "the Board of Governors in Washington," whom the President can also not freely remove); *see also* Bolzani, *supra* note 143, at 222–23 ("The FOMC's governance structure fails [removal precedent] because the President may not remove the presidents of the Federal reserve banks, even when there is cause."). Still others have suggested that the Fed cannot be treated differently. *See* YOO & CALABRESI, *supra* note 8, at 6 ("[M]any a president has tried to hide behind the chairman of his Federal Reserve Board and imply that the president is largely without power to affect monetary policy. We find this lack of accountability unfortunate and hope that our book will prevent future presidents from being able to hide in that way.").

199 *Collins*, 141 S. Ct. at 1787 n.21. Some have defended the Fed on historical grounds by reference to the Sinking Fund Commission, an early agency staffed by three cabinet secretaries and the Chief Justice and the Vice President. *See* Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 1, 4 (2020). In *Collins*, however, the Court rejected the Sinking Fund Commission's applicability to the removal debate, explaining that the agency "was run by a 5-member Commission, and three of those Commissioners were part of the President's Cabinet and therefore removable at will." 141 S. Ct. at 1785 n.19.

200 *See, e.g.*, Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 654–56 (2010) (concluding the Fed is constitutional following *Humphrey's Executor* because "[i]t would be hard to devise a test that could distinguish [the FTC] from [the Fed]"); *see also* L. Harold Levinson, *Balancing Acts:* Bowsher v. Synar, *Gramm-Rudman-Hollings, and Beyond*, 72 CORNELL L. REV. 527, 538 n.45 (1987) (noting the "potential impact" of precedents on removal "on the Federal Reserve Board").

201 Bordo, *supra* note 46.

U.S. central bank since 1913.[202] It is not, however, the nation's first central bank. The history of central banking provides an important backdrop for how the Fed came to perform monetary policy independently of the White House.

A. Early Practice

Money has always been tied to the sovereignty of the state.[203] No doubt for that reason, the Constitution gave Congress the power "[t]o coin Money, regulate the Value thereof, and of foreign Coin"[204] and prohibited the States from "coin[ing] Money; emit[ting] Bills of Credit; [or] mak[ing] any Thing but gold and silver Coin a Tender in Payment of Debts."[205] But the Constitution was silent on the question of whether Congress could create paper money—a silence suggesting that currency creation was not, likewise, tied to sovereignty.[206]

In 1791, Congress—at the urging of Secretary of the Treasury Alexander Hamilton—chartered what came to be known as the First Bank of the United States (First Bank).[207] The First Bank served both public and private functions. For example, it served the federal government by issuing notes that "would be 'receivable in all payments to the United States,' thereby rendering them a *de facto* circulating currency."[208] It also "acted as the federal government's fiscal agent, collecting tax revenues, securing the government's funds, making loans to the government, transferring government deposits through the bank's branch network, and paying the government's bills."[209] But like a private bank, the First Bank "accepted deposits from the public and made loans to private citizens and businesses."[210] Both the United States and private shareholders purchased shares

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202 *See, e.g.*, Michael Wade Strong, *Rethinking the Federal Reserve System: A Monetarist Plan for A More Constitutional System of Central Banking*, 34 IND. L. REV. 371, 376 (2001).

203 *See* Robert A. Mundell, *Money and the Sovereignty of the State* (1997, paper prepared for the International Economic Association Conference in Trento), https://www-ceel.economia.unitn.it/events/monetary/mundell14.pdf [https://perma.cc/ZC25-Q68C].

204 U.S. CONST. art. I, § 8, cl. 5.

205 *Id.* art. I, § 10, cl. 1.

206 *See* Bamzai, *supra* note 41, at 1313.

207 *See id.* at 1340–43.

208 *Id.* at 1342 (citing Act of Feb. 25, 1791, 1 Stat. 196).

209 *See* FEDERAL RESERVE BANK OF PHILADELPHIA, THE FIRST BANK OF THE UNITED STATES: A CHAPTER IN THE HISTORY OF CENTRAL BANKING 5 (2021).

210 *Id.* at 8.

in the First Bank; the First Bank's initial capitalization was ten million dollars, of which only two million came from the United States with the other eight million from private investors.[211]

The First Bank's structure was unlike a government agency. Although Congress "pledged" the "faith of the United States" that the federal government would not establish another bank during the First Bank's twenty-year charter,[212] the federal government did not control the First Bank.[213] Instead, under the statute chartering the First Bank, shareholders elected its twenty-five directors, who in turn chose its President.[214] But the federal government was not entirely hands-off, either. For example, Congress authorized the Secretary of the Treasury "to inspect the bank's books, require statements of the bank's condition as frequently as once each week, and remove the government's deposits at any time for any reason."[215] Rather than placing appointment of the Bank President in the U.S. President's control, however, Congress prescribed who could serve as a director—specifically excluding foreign nationals—and barred the bank from purchasing U.S. government bonds.[216]

The First Bank differed from modern central banks in important ways. It did not, for example, "act as a lender of last resort for other banks," nor hold their reserves or regulate them.[217] But in critical respects, the First Bank's operations *were* like modern central banks. Most importantly, "its prominence as one of the largest corporations in America and its branches' broad geographic position in the emerging American economy allowed it to conduct a rudimentary monetary policy."[218] For

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211 *Id.* at 4.

212 Bamzai, *supra* note 41, at 1342 (citing Act of Feb. 25, 1791, § 12, 1 Stat. 196).

213 *See id.*

214 *See id.* at 1342 (citing Act of Feb. 25, 1791, §§ 4, 7, 1 Stat. 192–93).

215 FIRST BANK OF THE UNITED STATES, *supra* note 209, at 8.

216 *See* DAVID JACK COWEN, THE ORIGINS AND ECONOMIC IMPACT OF THE FIRST BANK OF THE UNITED STATES, 1791–1797, at 14–15 (2000); *see also* FIRST BANK OF THE UNITED STATES, *supra* note 209, at 8 ("[T]he bank was forbidden from buying federal government bonds."). The First Bank's critics did not argue that the bank's structure violated Article II, for example, because the selection of the bank's directors and president did not comply with the Appointments Clause. *See* Bamzai, *supra* note 41, at 1341.

217 FIRST BANK OF THE UNITED STATES, *supra* note 209, at 8; *see also* Strong, *supra* note 202, at 376 (explaining the Federal Reserve is "more ambitious than either of the charters for the First or Second Bank of the United States").

218 FIRST BANK OF THE UNITED STATES, *supra* note 209, at 8–9; *see also id.* at 9 ("By managing its lending policies and the flow of funds through its accounts, the bank could—and did—alter the supply of money and credit in the economy and hence the level of interest rates charged to borrowers.").

example, "[w]hen it wanted to slow the growth of money and credit, it would present the notes [in its vault to state banks] for collection in gold or silver, thereby reducing state banks' reserves and putting the brakes on state banks' ability to circulate new banknotes."[219] It could speed up monetary growth by doing the opposite. Likewise, "[t]he bank's notes, backed by substantial gold reserves, gave the country a relatively stable national currency," and the bank's branches gave it an advantage over state banks in terms of moving currency nationally.[220]

The First Bank was controversial.[221] Thomas Jefferson opposed it because he feared it would undermine state banks and favor big-city financiers, while James Madison argued that the Constitution's enumeration of powers precluded creating a national bank.[222] Such criticisms continued after the bank's creation and in 1811, Congress—by one vote margins in both the House and the Senate—allowed the First Bank's charter to expire.[223]

In 1816, however, following financial difficulties during the War of 1812, Congress chartered the Second Bank of the United States (Second Bank), also for twenty years and with a pledge that the Second Bank would face no competition from any other bank chartered by Congress.[224] In many respects, the Second

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219 *Id.* at 9.

220 Andrew T. Hill, *The First Bank of the United States*, FED. RSRV. HIST. (Dec. 4, 2015), https://www.federalreservehistory.org/essays/first-bank-of-the-us [https://perma.cc/FDU4-9VF6].

221 *See* Bamzai, *supra* note 41, at 1341; *see also* Strong, *supra* note 202, at 372–73.

222 Bamzai, *supra* note 41, at 1341; Strong, *supra* note 202, at 372–73.

223 *See* FIRST BANK OF THE UNITED STATES, *supra* note 209, at 10. Consider the objection of Senator Henry Clay, who claimed that if Congress "could establish a bank, to collect and distribute the revenue, it ought to be expressly restricted to the purpose of such collection and distribution." On Renewing the Charter of the First Bank of the United States (1811), *reprinted in* 1 THE LIFE AND SPEECHES OF THE HONORABLE HENRY CLAY 210, 214 (Daniel Mallory, ed., Robert P. Bisby & Co., N.Y., 1843). According to Clay, the First Bank had been established "for the ostensible purpose of aiding in the collection of the revenue, and whilst it is engaged in this," it had "made to diffuse itself throughout society, and to influence all the great operations of credit, circulation, and commerce." *Id.* Clay's statement thus acknowledged the First Bank's ability to influence monetary policy, while criticizing such actions as beyond the limited purposes for which it had been chartered. Clay ultimately changed his mind on this criticism during the 1816 rechartering. *See id.* at 210; On the United States Bank Question (June 3, 1816), *reprinted in id.* at 262.

224 *See* Act of Apr. 10, 1816, ch. 44, § 21, 3 Stat. 266, 276. Congress included a minor exception to this rule regarding banks in the District of Columbia. *Id.*

Bank was like the First.[225] It also served as the federal government's fiscal agent while, at the same time, borrowing from and loaning money to the private sector.[226] And like its predecessor, the Second Bank could engage in monetary policy by using its holdings to control the amount of credit available.[227] Indeed, the Second Bank possessed a greater power to control monetary policy than the First, due to its larger capitalization of thirty-five million dollars (seven million dollars of which came from the United States) and twenty-five branches.[228]

The Second Bank's organizational structure differed from the First Bank's, however, in important respects. Congress empowered "the President to appoint five of the Bank's twenty-five directors with the Senate's advice and consent."[229] Congress also decreed that no more than three directors could be from any one state and that the twenty directors not nominated by the President would be "annually elected at the banking house in the city of Philadelphia, on the first Monday of January, in each year, by the qualified stockholders of the capital of the said bank, other than the United States . . . ."[230] As with the First Bank, the President of the Second Bank was not nominated by the U.S. President, but was chosen by the bank's directors.[231] This unusual structure—which mixed private and public features—prompted Representative John Sergeant of Philadelphia to wonder whether "this [was] to be a commercial bank, or a Government bank."[232]

The Second Bank was also controversial. President Andrew Jackson—who was wary of banks in general and whose "dislike of the Second Bank" in particular "may have been fueled by rumors" that it manipulated the economy to hurt his electoral prospects[233]—attacked it.[234] In 1832, Jackson vetoed legislation that would have renewed the Second Bank's charter, and

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225 *See* FEDERAL RESERVE BANK OF PHILADELPHIA, THE SECOND BANK OF THE UNITED STATES: A CHAPTER IN THE HISTORY OF CENTRAL BANKING 5–6 (2021).

226 *See id.* at 6.

227 *Id.* at 9.

228 *Id.* at 6, 8–9.

229 Bamzai, *supra* note 41, at 1343 (citing Act of Apr. 10, 1816, ch. 44, §§ 8, 11, 3 Stat. 266, 269–71). Notably, the President, by statute, could only nominate stockholders to serve as directors. *See* Act of Apr. 10, 1816, ch. 44, § 8, 3 Stat. at 269.

230 Act of Apr. 10, 1816, ch. 44, § 8, 3 Stat. at 269.

231 *Id.* at 270.

232 Bamzai, *supra* note 41, at 1343 (citing 29 ANNALS OF CONG. 1074 (1816)).

233 SECOND BANK OF THE UNITED STATES, *supra* note 225, at 12.

234 *See, e.g.*, Andrew Jackson, *First Annual Message to Congress* (Dec. 8, 1829) ("Both the constitutionality and the expediency of the law creating this bank are

his re-election sealed the Second Bank's fate.[235] In a message accompanying his veto, Jackson contended that if the bank could regulate the currency under a charter that Congress could not alter, Congress would "have parted with their power [to regulate the currency] for [that] term of years, during which the Constitution is a dead letter."[236] Congress did not renew the Second Bank's charter and it closed in 1836.[237]

The United States did not establish a central bank for more than seventy-five years. Instead of creating, say, the Third Bank of the United States, Congress established the Office of the Comptroller of the Currency to regulate state banks that participated in a new federal banking scheme.[238] Relevant here, state banks seeking a national charter "were required to purchase interest-bearing U.S. government bonds," which were "deposited with the Treasury, where they were held as security for a new kind of paper money: national currency."[239]

During this era, the Court acknowledged the link between sovereignty and currency creation in the consolidated cases of *Knox v. Lee* and *Parker v. Davis*—known together as "*The Legal Tender Cases*."[240] The Court alluded to a "general power over the currency which has always been an acknowledged attribute of sovereignty in every other civilized nation."[241] At the same time, the Court acknowledged that the Bank of the United States "was a private [corporation], doing business for its own profit."[242]

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well questioned . . . and it must be admitted by all that it has failed in [certain respects].").

235 SECOND BANK OF THE UNITED STATES, *supra* note 225, at 12, 14–15. The Treasury Secretary, William Duane, refused to carry out President Jackson's decision to withdraw federal funds from the Second Bank, upon which Jackson removed him. *See* Bamzai, *supra* note 41, at 1357. In response, the Senate censured Jackson, and members of Congress engaged in an extended debate over the removal power. *See id.* at 1357–62.

236 Veto Message from President Jackson Regarding the Bank of the United States (July 10, 1832), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139, 1149 (James D. Richardson, ed., 1897).

237 SECOND BANK OF THE UNITED STATES, *supra* note 225, at 5.

238 Bamzai, *supra* note 41, at 1370–71 (discussing the National Bank Acts of 1863 and 1864).

239 *Founding of the OCC & the National Banking System*, OFF. OF THE COMPTROLLER OF THE CURRENCY, https://www.occ.treas.gov/about/who-we-are/history/founding-occ-national-bank-system/index-founding-occ-national-banking-system.html [https://perma.cc/9A3T-ANEE] (last visited Sept. 30, 2022).

240 79 U.S. (12 Wall.) 457 (1871).

241 *Id.* at 545.

242 *Id.* at 537.

But the practice of private currency creation remained controversial. The Democratic Party Platform of 1896 claimed that "Congress alone has the power to coin and issue money, and President Jackson declared that this power could not be delegated to corporations or individuals."[243] Famously, William Jennings Bryan, the Democratic presidential nominee in that election, delivered what became known as "The Cross of Gold" speech at the close of the debate on the adoption of the party platform.[244] In the speech, he contended that "the right to coin and issue money is a function of government" and "a part of sovereignty" that "can no more with safety be delegated to private individuals than we could afford to delegate to private individuals the power to make penal statutes or levy taxes."[245] Bryan thus echoed Andrew Jackson's criticisms of private banks and privatized currency creation.

B. The Federal Reserve Acts

After the turn of the century, Congress decided the time had again come for a central bank. What that bank would look like, however, and how much separation it would have from the President, prompted debate.

1. *Federal Reserve Act of 1913*

At least part of the impetus for the passage of the Act of 1913 was the Panic of 1907—the so-called Knickerbocker Crisis—during which speculation created stock losses that, in turn, led to runs on banks and trusts. With no central bank to step in, the story goes, the financier J. P. Morgan and the leaders of other financial institutions pledged money to stop these runs, thereby demonstrating the financial system's reliance

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243 *See* Dem. Party Platform of 1896 (denouncing "the issuance of notes intended to circulate as money by National banks as in derogation of the Constitution"), https://www.presidency.ucsb.edu/documents/1896-democratic-party-platform [https://perma.cc/K6PT-8WU9] (last visited Feb. 5, 2023). The same issue was raised in the platform four years later. *See* Dem. Party Platform of 1900 (opposing "this private corporation paper circulated as money, but without legal tender qualities"), https://www.presidency.ucsb.edu/documents/1900-democratic-party-platform [https://perma.cc/2VQH-HJK5] (last visited Feb. 5, 2023).

244 Speech in the Chicago Convention, *reprinted in* 1 SPEECHES OF WILLIAM JENNINGS BRYAN 238 (1909).

245 *Id.* at 243 (disputing that "the issue of paper money is a function of the bank, and that the Government ought to go out of the banking business" by claiming that "the issue of money is a function of government, and that the banks ought to go out of the governing business").

on private parties and its overall weakness.[246] The Panic prompted the passage of the Vreeland-Aldrich Act of 1908,[247] which created a National Monetary Commission composed of nine senators and nine House members tasked with inquiring into changes "necessary or desirable in the monetary system of the United States or in the laws relating to banking and currency."[248] From 1908 to 1912, the Commission, under the chairmanship of Senator Nelson Aldrich—a Republican from Rhode Island—studied the problems posed by the U.S. banking system.[249] The Commission's efforts resulted in a proposed bill—known as the Aldrich Bill—that would have created for a term of fifty years a "National Reserve Association," a single corporation subscribed by member banks to pool all of the banks' reserves.[250]

Aldrich's proposed bill struck a Hamiltonian tone—both through its creation of a single, central bank and in its use of a private entity to achieve public ends. First, as to centralization: Although Aldrich's proposal contemplated the creation of fifteen district associations composed of smaller local associations beneath the single National Reserve Association,[251] it established (and was regarded as establishing) a central private bank.[252] The bill designated the Association as the "principal fiscal agent" of the United States and directed the federal government to "deposit its general funds" with the Association and its branches.[253] Second, as to the intended "private" nature: The proposed bill's title "incorporate[d]" the entity instead of establishing a government department.[254] And the Association's governance structure tended to point in the direction of a private entity, albeit with public entanglement in the selection of the Association's leaders similar to the Second Bank. The board of directors would be composed of at least thirty-nine

246 *See* CONTI-BROWN, *supra* note 11, at 17–20 (addressing this history but also identifying where the conventional wisdom oversimplifies it).

247 35 Stat. 546 (1908).

248 *Id.*

249 The voluminous record created by the National Monetary Commission can be found on the website of the St. Louis Fed. *See* https://fraser.stlouisfed.org/author/united-states-national-monetary-commission [https://perma.cc/3HX8-D5SY]; *see also* REPORT OF THE NAT'L MONETARY COMM'N, S. DOC. NO. 243, 62d Cong., 2nd Sess. (1912).

250 S. 4431, 48 Cong. Rec. 749 (1912).

251 *Id.* §§ 5–6.

252 *See* CUSHMAN, *supra* note 23, at 148.

253 S. 4431, § 23, 48 Cong. Rec. at 751.

254 *Id.* § 1, at 749.

private individuals elected by regional bankers accompanied by only four federal officials (the Secretary of the Treasury, the Secretary of Agriculture, the Secretary of Commerce and Labor, and the Comptroller of the Currency).[255] That pointed in the direction of the entity's "private" status. To be sure, on the other hand, the President was to select the "governor" of the Association (who would also be chairman of the board and serve a ten-year term) from a list of at least three candidates submitted by the board of directors.[256] But all told, the bill seemed remarkably similar to the Second Bank on this particular point. The bill (with modifications) garnered the support of the Republican President William Howard Taft,[257] but was opposed by Democrats,[258] who captured the Presidency with the election of Woodrow Wilson in 1912.[259]

The Federal Reserve Act that was hashed out following Wilson's election—and ultimately signed on December 23, 1913—differed from the Aldrich proposal in its reliance on a *government* entity, the Federal Reserve Board, supervising private regional reserve banks.[260] But the first proposal from Democratic Representative Carter Glass did not begin there. Instead, Glass would have created a decentralized system of reserve banks supervised by the Comptroller of the Currency—the official who had exercised comparable authority to supervise national

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255 *Id.* § 9 at 750.

256 *Id.* §§ 9–10. Cutting against the governor's "governmental" status was the fact that he could be removed "for cause by a two-thirds vote of the board." *Id.* § 10. The Aldrich Bill also contemplated that there would be two deputy governors "elected by the board, for a term of seven years, subject to removal for cause by a majority vote of the board." *Id.* The bill avoided the taxation question at issue in *McCulloch v. Maryland*, 17 U.S. 316 (1819), with an express provision that exempted the "National Reserve Association and its branches and the local associations . . . from local and State taxation, except in respect to taxes upon real estate." *Id.* § 13. And it would have required the Association's circulating notes to "be received at par in payment of all taxes, excises, and other dues to the United States, and for all salaries and other debts and demands owing by the United States to individuals, firms, corporations, or associations, except obligations of the Government which are by their terms specifically payable in gold . . . ." *Id.* § 53, at 752.

257 *See* William Howard Taft, *Message to Congress* (Dec. 6, 1912).

258 *See* Dem. Party Platform of 1912 (declaring that the party "oppose[d] the so-called Aldrich bill or the establishment of a central bank . . . .") https://www.presidency.ucsb.edu/documents/1912-democratic-party-platform [https://perma.cc/4428-N8M4].

259 *See generally* JAMES CHACE, 1912: WILSON, ROOSEVELT, TAFT & DEBS—THE ELECTION THAT CHANGED THE COUNTRY (2004).

260 *See, e.g.*, CONTI-BROWN, *supra* note 11, at 21 (remarking that, in what has been called the Wilsonian Compromise of 1913, Congress created "a Washington-based, government-controlled supervisory board . . . on top of . . . essentially private, decentralized central banks . . . .").

banks since the Civil War.[261] Glass's proposal, thus, appeared to extend the institutional balance regarding federal regulation of banking that had been struck in the Civil War era.

President Wilson, however, demanded a central board with supervisory and managerial, but no direct banking, functions. Glass therefore revised his proposal along these lines.[262] In its initial incarnation, the Federal Reserve Board included the Treasury Secretary "as [the] ex officio chair[,]" as well as the Comptroller of the Currency,[263] plus five other board members, each appointed by the President to ten-year terms.[264] Although the Secretary of the Treasury and Comptroller of the Currency were subject to at-will presidential removal, the five other board members received statutory "for cause" protection from removal. From those five other members, the President was authorized to designate a governor who would be "the active executive officer" of the Board, as well as a vice-governor.[265] The Act gave the Board, collectively, the authority to fix the rediscount rate, control bank reserves, manage the issuance of bank notes, and supervise bank examinations and remove directors and officers of reserve banks.[266]

The lawfulness of the Fed's structure was a subject of debate during Congress's consideration of the statute.[267] Representative Glass began the debate by observing that the Aldrich Bill's creation of a private National Reserve Association meant that "there was absolute lack of adequate governmental control[,]" which his plan had fixed by making the Board "part of the Government itself."[268] Glass extolled the virtues of committing power "with a Government board, composed of high

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261 *See* CARTER GLASS, AN ADVENTURE IN CONSTRUCTIVE FINANCE 82 (1927); *Federal Reserve Act Signed into Law*, FED. RESERVE HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/federal-reserve-act-signed [https://perma.cc/5PLR-NEFA].

262 *See* GLASS, *supra* note 261, at 82. Republicans in Congress sought to expand the Board's banking duties. Although Glass resisted additions along those lines, his proposal conferred on the Board duties surpassing those of a bank examiner. *See, e.g.*, COMM. ON BANKING AND CURRENCY, CHANGES IN THE BANKING AND CURRENCY SYSTEM OF THE UNITED STATES, H.R. DOC. No. 69, 63d Cong. § 23 (1st Sess. 1913).

263 Federal Reserve Act, Pub. L. No. 63–43, § 10, 38 Stat. 251, 260–61 ("The Secretary of the Treasury shall be ex officio chairman of the Federal Reserve Board.").

264 *Id.* § 10, 38 Stat. at 260.

265 *Id.* § 10, 38 Stat. at 260–61.

266 The Act also created an advisory council, without legal authority, to advise the Board on matters of policy. *See id.* § 12, 38 Stat. at 263.

267 *See, e.g.*, CUSHMAN, *supra* note 23, at 153 (reasoning that the independence of the Fed was understood to be a more difficult and challenging question than, for example, the problem of the independence of the first independent agency, the ICC).

268 50 Cong. Rec. 4644 (1913).

and experienced men, four of them with long tenure of office . . . ."[269] But this oblique reference to "long tenure" was the closest Glass came to mentioning the "for cause" restriction; his opening speech in favor of the bill otherwise ignored it altogether.[270] Objectors to the plan protested that the inclusion of the Treasury Secretary and the Comptroller allowed the President to dominate the Board completely.[271] Representative Frank Mondell, for example, claimed that the Treasury Secretary was "the Pooh-Bah of the Glass System" and "comes very near being the whole show."[272]

In addition to the Board, Congress also created eight to twelve private Reserve Banks—each with their own board of directors and a governor—that would be established in cities across the nation.[273] Each of the regional banks would have nine directors, composed of three classes: Three chosen by banks to represent their interests; three chosen by banks to represent the commercial, industrial, and financial interests of the region; and three chosen by the Federal Reserve Board, one of whom would be the chairman.[274] According to Representative Glass, these regional banks, "[w]hile subject to limited control by the Federal reserve board . . . [were] given an independent status as well as exceedingly important functions."[275] In this manner, Congress incorporated both public and private features into the Federal Reserve system.

Three institutional design implications follow from the set of events that led to the framing of the Federal Reserve Act of 1913. First, prior to the 1913 Act, Congress had considered the Aldrich Bill, which would have created even more independence from presidential authority through the use of a private central bank, as opposed to a public board. Second, when Glass proposed a board, objectors worried that its members would be subject to presidential control; they did not see the members of the board as truly independent from the President. And third, Congress used the term "for cause" instead of the statutory terminology that it had previously used to mark

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269 *Id.* at 4646. Glass mentioned "four" instead of "five" because of the specific proposal being debated when he made the speech; the fifth governor with for-cause protection was subsequently added.

270 *See id.* at 4642–51.

271 *See id.* at 4682–83 (statement of Rep. Dyer).

272 *Id.* at 4690.

273 § 2, 38 Stat. at 251; CONTI-BROWN, *supra* note 11, at 22.

274 § 4, 38 Stat. at 255.

275 50 Cong. Rec. 4643 (1913).

agency independence for the Interstate Commerce Commission—"inefficiency, neglect of duty, or malfeasance in office."[276] Arguably, "for cause" connoted a greater authority to remove officials, including potentially for policy disagreements, which would explain the objections to Glass's proposal. We will return to this topic below.

2. *The Federal Reserve Acts of 1933 and 1935*

The stories of the Federal Reserve Acts of 1933 and 1935 are inextricably intertwined with economic, political, and legal developments—specifically, the Great Depression, the election of President Franklin Delano Roosevelt, and the Court's decisions in *Myers* and *Humphrey's Executor*.

In the wake of the onset of the Great Depression, the Senate adopted a resolution directing the Committee on Banking and Currency to investigate and to recommend legislation "to provide for a more effective operation of the national and Federal reserve banking systems of the country[.]"[277] Now-Senator Carter Glass introduced a draft bill that would become the Glass-Steagall Act of 1933.[278] As part of that statute, Congress created the Federal Open Market Committee (FOMC)—then composed of the governors of the Reserve Banks—"as the central body that would make proactive decisions about the purchase of market securities, including government securities."[279]

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276 Interstate Commerce Act of 1887, Pub. L. No. 49-41, ch. 104, 24 Stat. 379.

277 S. Res. 71 (May 5, 1930).

278 Pub. L. No. 73-66, 48 Stat. 162. In the consideration of that bill, Congress asked the Federal Reserve to propose a constitutional method of creating a unified banking system. Walter Wyatt, the Fed's General Counsel, prepared a manuscript on the *Constitutionality of Legislation Providing a Unified Commercial Banking System for the United States*, 19 FED. RSRV. BULL. 166 (1933). Wyatt canvassed the cases addressing the lawfulness of congressional authority over the banking system but did not address the separation of powers questions raised by Fed independence. *See id.*

279 CONTI-BROWN, *supra* note 11, at 25. During the bill's consideration, Senator Glass unsuccessfully sought to remove the Secretary of the Treasury from the Board, on the theory that his presence allowed the President to dominate the Board. *See* CUSHMAN, *supra* note 23, at 165. That prompted an objection from Senator Huey Long of Louisiana, who claimed the Secretary should remain on the Board so that "responsibility might be charged to the administration in power . . . . When the Secretary of the Treasury is dissociated from the Federal Reserve Board, then the Federal Reserve Board will constantly 'pass the buck' and say, 'it is the Treasury Department that is responsible,' and the Treasury Department will 'pass the buck' back and say that it is the Federal Reserve Board that is responsible." 76 Cong. Rec. 2276 (1933). Though not made in a constitutional register, Senator Long's claim about responsibility to political control

For reasons that are unclear, the 1933 statute dropped the removal protection for the members of the Reserve Board. Two years later, this omission was described as an accident and the provision was reintroduced.[280] But recall the legal backdrop against which the Congress operated in 1933; the Supreme Court had held unlawful removal limits in *Myers* just seven years earlier and it is possible (though not certain) that Congress dropped the removal provision purposely, as it appears to have done with other commissions created at the same time.[281]

At any rate, Congress acted again just two years later. In the Bank Act of 1935, Congress replaced the Reserve Board with a seven-person Board of Governors, began calling the heads of the Reserve Banks "presidents" rather than "governors," removed the Secretary of the Treasury and the Comptroller from the Board, and restructured the FOMC to include the seven members of the Board of Governors and only five of the Reserve Bank presidents.[282] Congress also created a new office to head the Fed instead of the Treasury Secretary: the Federal Reserve "Chair"—one of the Governors selected by the President with the Senate's advice and consent.[283] And Congress reintroduced the removal restriction, but not before members took stock of the Supreme Court's case law in this area. While the bill was being considered in May 1935, and before the Court decided *Humphrey's Executor*, Senator Nelson Aldrich, for example, remarked that he "realize[d]" that *Myers* "raise[d] serious questions as to whether the Constitution permits Congress to place any limit upon the power of the President to remove from office any officer appointed with the advice and consent of the Senate[.]"[284] But the Court's decision in *Humphrey's Executor* just a few weeks later allowed for the reintroduction of the removal provision.

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echoed Madison's arguments during the 1789 debate. *See supra* note 150. The proposal to remove the Secretary was dropped. *See* 77 Cong. Rec. 3725 (1933).

280 *Banking Act of 1935: Hearings on S. 1715 Before a Subcomm. of the Comm. on Banking and Currency*, U.S. Senate, 74th Cong. 398 (1st Sess. 1935) (statement of Sen. Glass remarking that he "must have been asleep when that was eliminated from the act" because he had "no recollection of it.").

281 *See, e.g.*, *The SEC Is Not an Independent Agency*, 126 HARV. L. REV. 781, 782 (2013) (addressing the 1934 statute creating the Securities and Exchange Commission, which likewise lacks an express removal provision).

282 Banking Act of 1935, Pub L. No. 74-305, 49 Stat. 684; CONTI-BROWN, *supra* note 11, at 29–30.

283 *See* 12 U.S.C. § 242.

284 *Banking Act of 1935: Hearings on S. 1715 Before a Subcomm. of the Comm. on Banking and Currency*, U.S. Senate, 74th Cong. 396 (1st Sess. 1935).

The question of how to fit the Fed into the framework created by *Humphrey's Executor* was raised in the following years. Consider the *Staff Report on the Board of Governors of the Federal Reserve System* written for the Committee on Independent Regulatory Commissions in 1948—the so-called first "Hoover Commission."[285] The Report claimed that the 1913 version of the Fed Board "was conceived as essentially a quasi-judicial body, substantially independent from the executive branch of the government though tied in slightly through the *ex officio* Board membership of the Secretary of the Treasury and the Comptroller of the Currency."[286] Its duties, according to the Report, were intended to be "predominantly supervisory rather than policy-making[.]"[287] Contrast that perspective with that of Robert Cushman, who in his 1941 book, *The Independent Regulatory Commissions*, remarked that it had "never been clearly settled . . . how far it is wise to associate [the Fed] with and possibly subordinate it to Treasury policy, and how far it ought to enjoy the independence which we associate with the quasi-judicial regulatory bodies."[288] The two perspectives appeared to take different positions on whether the Fed was a "quasi-judicial" entity that fit within the schema created by *Humphrey's Executor*.

C. The Road to Independence

The Fed's evolution, however, continued even after these statutes were enacted.

1. *The 1951 Treasury-Federal Reserve Accord*

The passage of the 1935 act did not immediately yield "independence." For one thing, the early occupants of the Fed Board were Roosevelt appointees fully on board with the Administration's agenda.[289] No less importantly, during World War II, bowing to political pressures, the Fed agreed to peg

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285 *See* GEORGE L. BACH, STAFF REPORT ON THE BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM (1948).

286 *Id.* at IV–11.

287 *Id.*

288 CUSHMAN, *supra* note 23, at 153. The Report's use of the term "quasi-judicial" differs from the assessment of Cushman, who described the Fed as "essentially a managerial agency actually sharing in the direction of banking operations, exercising no quasi-judicial duties, and settling no disputes." *Id.* at 146.

289 CONTI-BROWN, *supra* note 11, at 33.

Treasury yields at low levels to reduce the cost of financing wartime deficits.[290]

Following the War's conclusion, however, the Fed sought to assert its independence in 1951. Facing opposition from the Treasury, which desired lower rates to contain the cost of servicing the nation's debt, the two parties ultimately negotiated the Treasury-Federal Reserve Accord.[291] The Accord authorized the Fed to set interest rates with consultation with the Treasury. That informal agreement still "forms the basis in perception and in fact of the idea that the Fed's monetary policy is institutionally separate from the economic policies of the president."[292] This informal agreement, thus, is at the "core" of the modern conception of independence.[293]

2. *Later Developments*

Subsequent developments pointed in different directions. On the one hand, since the Fed's founding, Congress greatly expanded the agency's regulatory authority—both in depth and breadth. For example, the Fed now implements more than thirty statutes through rulemaking and regulates securitizers (issuers and sellers of asset-backed securities), brokers and dealers, insurance companies, investment advisors, commodity trading advisors, motor vehicle dealers, and issuers of credit and debit cards.[294] The Fed even helps administer a *criminal* provision regarding internet gambling.[295] The Fed thus acts as one of the nation's most important financial and consumer-protection regulators.[296]

On the other hand, the status of the agency's independence repeatedly was the subject of congressional debate and criticism, including most notably from Representative Wright Patman, the Chairman of the Joint Economic Committee.[297]

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290 *Id.* at 33–34.

291 *Id.* at 35–36.

292 *Id.* at 37.

293 *Id.*

294 *See supra* Part I.

295 *See* 31 U.S.C. § 5363.

296 *See, e.g.*, Colleen M. Baker, *Regulating the Invisible: The Case of Over-the-Counter Derivatives*, 85 NOTRE DAME L. REV. 1287, 1341 (2010) ("The Federal Reserve is currently one of the United States' most important banking regulators."); Catherine M. Sharkey, *Agency Coordination in Consumer Protection*, 2013 U. CHI. LEGAL F. 329, 331 (2013) (explaining the Fed's role in consumer protection).

297 *See* William B. Harrison, *Annals of a Crusade: Wright Patman and the Federal Reserve System*, 40 AM. J. ECON. SOC. 317 (1981).

Consider, as an example, Patman's 1965 remarks directed to William McChesney Martin, the Fed's Chair.[298] Patman asked Martin, in the case of a conflict, "who is really the boss, the Federal Reserve Board or the President of the United States."[299] Pointing out that the "Executive power" conferred on the President the authority to execute "all the laws," including the Federal Reserve Act, Patman argued that any notion that the Fed Chair could act independently of the President was "contrary to our form of government[.]"[300] To be sure, we do not mention Representative Patman's remarks to suggest that they fix our constitutional understanding of Article II. Rather, we mention the remarks to show how the Fed's status was long disputed—including into the post-World War II era.

IV
An Article II Assessment of the Federal Reserve

Here, we apply the Court's recent separation-of-powers cases, especially *Seila Law* and *Collins*, to the Fed and conclude that the Fed might not enjoy significant policy independence under current statutory law. But even limited statutory independence would appear to violate Article II under modern precedent if the Fed is no different than an ordinary executive branch agency.[301] The First and Second Banks provide important historical analogs for the Fed's monetary functions, so long as those functions fall within the historical umbrella of banking.

A. How Much Independence Does the Fed Have?

At the outset, it is important to assess how much policy independence statutory law confers on the Fed. True, Congress has defined the term "independent regulatory agency" as including—indeed, as the first agency listed—"the Board of Governors of the Federal Reserve System[.]"[302] Moreover, Congress has also decreed that the President cannot fire members of the Board of Governors without "cause."[303] And both the

298 *January 1965 Economic Report of the President: Hearings Before the Joint Econ. Comm.*, 89th Cong. 66 (1st Sess. 1965).

299 *Id.*

300 *Id.* at 66–67.

301 *See* Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2201–02 (2020).

302 *See* 44 U.S.C. § 3502(5).

303 12 U.S.C. § 242.

Chair and Vice Chairs serve four-year terms.[304] Thus, the conventional wisdom has long held that the Fed enjoys robust independence.

In *Collins*, however, the Court explained that labeling an agency "independent" "does not necessarily mean that the Agency is 'independent' of the President."[305] Instead, the term can be read to mean "that the Agency is not part of and is therefore independent of any other unit of the Federal Government."[306] Indeed, *Collins* stressed that Congress sometimes calls agencies "independent" but does not intend to impose any restrictions on removal.[307] Accordingly, just because Congress has labeled an agency "independent" does not necessarily mean that the President cannot fire the agency's head.[308]

Nor does the "for cause" removal provision applicable to the members of the Board of Governors necessarily mean they enjoy *policy* independence. Congress has not defined the term "cause,"[309] but textually, the word "cause"—without any modifier—is expansive. The term simply means "a reason for an action," or at best a "sufficient reason."[310] Accordingly, removal for "cause" can "rather easily be interpreted as including . . . *the failure of an agency head to comply with the President*'s instructions to take some action otherwise within his or her statutory authority."[311] Congress, moreover, has elsewhere demonstrated that the term "cause" *includes* inefficiency, neglect of duty, or malfeasance but is not exhausted by those terms.[312]

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304 *See id.*

305 Collins v. Yellen, 141 S. Ct. 1761, 1782 (2021).

306 *Id.*

307 *Id.* at 1782–83 (citing, among others, the Peace Corps and the Defense Nuclear Facilities Safety Board as agencies that Congress has described as "independent" without imposing removal restrictions).

308 *Id.*

309 Michael Salib & Christina Parajon Skinner, *Executive Override of Central Banks: A Comparison of the Legal Frameworks in the United States and the United Kingdom*, 108 GEO. L.J. 905, 949 (2020) ("But even assuming the *Myers–Humphrey's Executor* paradigm applies, the content of the term 'for cause' in the Federal Reserve Act is a subject of some debate.").

310 *Cause,* MERRIAM-WEBSTER ONLINE DICTIONARY, https://www.merriam-webster.com/dictionary/cause [https://perma.cc/TC56-2DRL] (last visited Sept. 21, 2022).

311 Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 86–87; *see also John F. Manning, The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285, 1301 (1999) (arguing that "the very indeterminacy" of such language "seems to invite the application of" constitutional avoidance).

312 *See, e.g.*, 45 U.S.C. § 154 ("inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no *other* cause") (emphasis added); 42 U.S.C.

Under this reading, the President could remove a member of the Board of Governors for insubordination to a policy directive, which is certainly *a* cause.[313] Indeed, civil servants—who also can only be removed "for cause"—can be terminated for disobedience.[314]

Alluding to that body of law, *Collins* explains that a pure "for cause" removal restriction "appears to give the President more removal authority than other removal provisions reviewed by this Court."[315] And *Collins* states that "it is certainly true that disobeying an order is generally regarded as 'cause' for removal."[316]

That inference based on the meaning of the term "cause" may be even stronger in the case of the Fed because Congress, in the various iterations of the Federal Reserve Acts, elected to use the term "for cause" rather than the seemingly more restrictive terms "inefficiency, neglect of duty, and malfeasance in office." Precisely why Congress did so is not clear. But it may well have been that the drafters of the statute were seeking a particular form of "independence" (i.e., independence from purely political removals) rather than a type of protection reserved for "quasi-judicial" adjudicatory bodies. The selected language might reflect that different factions had different ideas about how much policy independence the Fed was intended to possess. Whatever the reason, the history of the Fed demonstrates that Congress never expressly created policy independence. At a minimum, under *Collins*, it is arguable that the President can fire members of the Board of Governors who disobey the White House's policy directives.

To be sure, Attorney General Nicholas Katzenbach concluded in 1965 that "termination for cause did not include

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§ 10703(h) ("malfeasance in office, persistent neglect of, or inability to discharge duties, or for any offense involving moral turpitude, but for no *other* cause") (emphasis added).

313 *See* NLRB v. Local Union No. 1229, Int'l Bhd. of Elec. Workers, 346 U.S. 464, 475 (1953) ("The legal principle that insubordination, disobedience or disloyalty is adequate cause for discharge is plain enough."); Elrod v. Burns, 427 U.S. 347, 366 (1976) (plurality) ("[Even public] employees may always be discharged for good cause, such as insubordination or poor job performance, when those bases in fact exist.").

314 *See, e.g.*, Kent H. Barnett, *Avoiding Independent Agency Armageddon*, 87 NOTRE DAME L. REV. 1349, 1374 n.142 (2012) (explaining that because "insubordination, disobedience or disloyalty" fall within "cause," "failure to follow a supervisor's directive on a discretionary matter, constitutes 'good cause' for removal").

315 Collins v. Yellen, 141 S. Ct. 1761, 1786 (2021).

316 *Id.*

disagreement with administration policies."[317] The term "for cause" as used for the Fed, moreover, could be different from other usage; the Fed's "for cause" provision, after all, was enacted decades before the Court explained that "for cause" includes disobedience. It is enough here, however, to observe that it is an open question whether such policy-based removal is permissible,[318] and that *Collins* makes it more likely that such removal is allowed.

It also seems likely that the President can remove the Fed Chair or Vice Chairs for any reason.[319] In fact, even before *Collins*, Conti-Brown concluded that "[r]emovability protection does not exist for the Fed Chair."[320] After *Collins*, the case for such power is stronger. *Collins* seemingly embraces a clear-statement rule for removal restrictions. Neither the Chair nor Vice Chairs are expressly protected. Furthermore, *Collins* indicates that the default rule of presidential removal is especially strong where Congress imposes removal restrictions for some officials but not for others.[321] Here, Congress's decision to provide the Board of Governors with "for cause" protection but not the Chair or Vice Chairs in those capacities strongly suggests that there is no legal impediment to presidential removal for

317 Salib & Skinner, *supra* note 308, at 949 (quoting ROBERT P. BREMNER, CHAIRMAN OF THE FED: WILLIAM MCCHESNEY MARTIN JR., AND THE CREATION OF THE AMERICAN FINANCIAL SYSTEM 203 (2004)).

318 *See, e.g.*, Salib & Skinner, *supra* note 309, at 949 (explaining that it is an open question whether the term "'cause' include[s] the failure to set interest rates according to the President's economic agenda").

319 *See Collins*, 141 S. Ct. at 1782–83 ("When a statute does not limit the President's power to remove an agency head, we generally presume that the officer serves at the President's pleasure.") (citing Shurtleff v. United States, 189 U.S. 311, 316 (1903)). In *Shurtleff*, the Court held that a statute listing permissible reasons for removal does not prevent the President from removing for other reasons. 189 U.S. at 316. The Court based its holding on constitutional principles: "[I]t must be assumed that the President acts with reference to his constitutional duty to take care that the laws are faithfully executed," so "it would be a mistaken view to hold that the mere specification in the statute of some causes for removal thereby excluded the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient." *Id.* at 317.

320 CONTI-BROWN, *supra* note 14, at 257.

321 *Collins*, 141 S. Ct. at 1782 ("[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting Barnhart v. Sigmon Coal Co., 534 U.S. 438, 452 (2002)).

them.[322] After *Collins*, achieving true policy independence for the Fed may well require a statutory amendment.[323]

B. The Fed's Tension With *Seila Law* and *Collins*

To the extent that the "for cause" provision confers a degree of statutory independence on the Fed, the Fed's *current* structure and functions are in some tension with *Seila Law* and *Collins*—absent some justification that explains how the Fed in particular might fit within the constitutional scheme. That is because *Seila Law* characterizes the rule of *Humphrey's Executor* to mean that Congress can enact a measure of protection for "multi-member expert agencies that do not wield substantial executive power."[324] Although the Board of Governors is a multimember body, it surely wields "substantial" executive power in the same way that the Director of the CFPB does; indeed, the Board of Governors and the CFPB may jointly issue consumer-protection regulations.[325] Under the logic of *Seila Law*, the President might not be held accountable for the Fed's exercise of executive power, because "the buck would stop somewhere else."[326]

To the extent the offices of Chair and Vice Chair for Supervision are implicitly protected from removal, those limits would also seem problematic—again, absent some explanation for the Fed. In *Collins*, the Court did not require the head of a single-headed agency to wield "significant executive power" to trigger presidential removal.[327] If the amount of power is immaterial,

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322 The Court in the past has inferred a removal restriction in a silent statute. *See, e.g.*, Wiener v. United States, 357 U.S. 349 (1958). Although *Wiener* means that the case in favor of the President's authority to fire the Fed's leaders for policy reasons is not open and shut, the analysis in that case may not survive *Collins* or the rise of textualism more generally.

323 No doubt, norms may dissuade removal of the Fed Chair or members of the Fed Board. *See* Vermeule, *supra* note 15, at 1196. But norms can change. For example, after *Collins*, President Biden removed the Commissioner of the Social Security Administration—the first time that has ever happened. More generally, many norms may be "fragile." Daphna Renan, *Presidential Norms and Article II*, 131 HARV. L. REV. 2187, 2194 (2018); *see generally* Keith Whittington, *The Role of Norms in Our Constitutional Order*, 44 HARV. J.L. & PUB. POL'Y 17, 28 (2021).

324 Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2199 (2020).

325 *See, e.g.*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, Agencies Issue Final Amendments to Regulation CC Regarding Funds Availability (Jun. 24, 2019), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20190624a.htm [https://perma.cc/4FJS-W7VU].

326 *Seila Law*, 140 S. Ct. at 2191 (quotation omitted).

327 Collins v. Yellen, 141 S. Ct. 1761, 1784 (2021) ("[T]he nature and breadth of an agency's authority is not dispositive in determining whether Congress may limit the President's power to remove its head.").

however, it is hard to see a logical difference between the head of a single-headed agency and the chair of a multimember agency when, by statute, that chair has its own unilateral authority, as is the case for the Fed Chair.[328] The same is true for the Vice Chair for Supervision.[329]

Some of the Fed's staff may also raise Article II concerns. The Court has thus far not held that the President's removal power extends all the way to true employees (as opposed to officers),[330] but it has suggested that presidential removal does apply to inferior officers whose duties are not "limited" and who have some "policymaking or administrative authority."[331] That description may apply to some Fed staffers. As Conti-Brown explains, for example, "the Director of International Affairs exercises extraordinary policy authority on behalf of the United States,"[332] as does "[t]he Fed's chief lawyer."[333] If these individuals are "officers" rather than mere "employees"—which may be the case, especially after *Lucia v. SEC*[334]—such protection from removal would appear to violate the principles set forth in *Seila Law* and *Collins*.[335]

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328 *See, e.g.*, 12 U.S.C. § 248(s)(3) (empowering the Chair with unilateral authority to determine whether to publicly release certain information).

329 *See, e.g.*, *id.* § 242 (tasking the Vice Chair for Supervision with "develop[ing] policy recommendations for the Board . . ., and . . . oversee[ing] the supervision and regulation of [depository institution holding companies and other financial firms]"). We are less concerned about the other Vice Chair position because it has no independent duties (other than when acting as Chair). *See supra* pp. 109–110.

330 Notably, *Collins* declines to address the Civil Service. *Collins*, 141 S. Ct. at 1787 n.21. *see also* Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 506 (2010).

331 Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2199–200 (2020) (treating unrestricted removal as the default rule subject to two narrow exceptions, including "one for inferior officers with limited duties and no policymaking or administrative authority").

332 *Examining the Accountability of the Federal Reserve System to Congress and the American Public: Hearing Before the Comm. on Banking, Hous., and Urb. Affs.*, 114th Cong. 69 (2015) (statement of Peter Conti-Brown); *see also* Peter Conti-Brown & David Zaring, *The Foreign Affairs of the Federal Reserve*, 44 J. CORP. L. 665 (2019).

333 Hearing on the Fed's Independence, *supra* note 332, at 69 (statement of Peter Conti-Brown); *see also id.* ("[W]here value judgments are of the most consequence, the Fed's lawyer is the first and last word on what the law allows or forbids. For this reason, the Fed's chief lawyer should be a presidential appointment.").

334 138 S. Ct. 2044, 2049 (2018) (holding that administrative law judges are officers).

335 The question of whether independent funding might pose constitutional problems was raised during *Seila Law*, where the Chief Justice explained that "[t]he CFPB's receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control" because the CFPB could pursue its own "chosen priorities" without fear of presidential pushback. Seila Law LLC

C. Monetary Policy and Sovereign Power

Under *Seila Law* and *Collins*, the President's Article II removal authority broadly applies to individuals who wield executive power. The precedents of the First and Second Banks, however, suggest that the government can create a measure of independence for certain banking and currency creation functions by chartering private entities to perform such activities. Alexander Hamilton's 1790 proposal for the First Bank explained that such banks are private in character—even when chartered by the federal government for a specific purpose to benefit the public, and even when the United States holds shares in those banks.[336] The Fed's activities that are analogous to the activities of those banks likely pass constitutional muster, if performed by private institutions. But Congress cannot give the Fed authority that exceeds those boundaries and amounts to an exercise of "executive power" requiring the President's supervision.[337]

1. *Executive Power and Government Functions*

To understand the Fed's independent role in setting monetary policy, it is essential to recognize that not every entity that acts pursuant to federal law necessarily exercises "executive power" subject to presidential control. Congress, for example, has chartered nongovernmental entities and set out their duties and powers from the founding.[338] The Boy Scouts of

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Seila Law, 140 S. Ct. at 2204. The Chief Justice then explained that the CFPB "receives that money from the Federal Reserve, which is itself funded outside of the annual appropriations process. This financial freedom makes it even more likely that the agency will 'slip from the Executive's control, and thus from that of the people.'" *Id.* (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 499 (2010)). But the Court's recent holding that the Appropriations Clause does not necessarily preclude such independent funding for the CFPB appears to foreclose such an argument regarding the Fed. *See* CFPB v. Cmty. Fin. Servs. Ass'n of Am., Ltd., 601 U.S. 416, 441 (2024).

336 *See, e.g.*, Hamilton, *supra* note 38; *see also* YOO & CALABRESI, *supra* note 8 at 53–55 (calling the First Bank the "one genuinely puzzling entity" and noting it "suggests there is precedent for an independent Federal Reserve Board").

337 *See generally Seila Law*, 140 S. Ct. at 2202.

338 *See, e.g.*, Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361, 1368, 1370–71 (2021) ("Since the Founding, Congress has chartered almost 350 corporations by special act" including "private non-profit corporations with educational or charitable missions" and "business corporations . . . [with] private shareholders [that] are operated, at least in part, for profit").

America (now known as Scouting America) is an example.[339] In general, one cannot "attribute[]" a private actor's actions to the government merely because a statute "has authorized" them.[340]

Two interrelated principles govern the interaction between Article II and these private entities. First, consider the principle at issue in *Buckley v. Valeo*.[341] In 1974, Congress created the Federal Election Commission (FEC) and tasked it with enforcing campaign-finance laws. The FEC had eight members, four of whom were appointed by members of Congress, two of whom were picked by the President, and the remaining two of whom (the Secretary of the Senate and the Clerk of the House) were "*ex officio* members of the Commission without the right to vote."[342] The six voting members, moreover, were "confirmed by the majority of both Houses of Congress."[343] The Court held that this unusual structure was unconstitutional because the FEC exercised executive power but had officers who were not appointed pursuant to the process set forth in Article II.[344] As the Court explained, "it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"[345] The Court, however, also held that Congress *could* place non-executive powers in offices outside of the President's control, where such officers "perform duties only in aid of those functions that Congress may carry out by itself, or in an area sufficiently removed from the administration and enforcement of the public law as to permit their being performed by persons not 'Officers of the United States.'"[346]

The Court concluded that powers of "essentially . . . an investigative and informative nature" do not fall within the scope of Article II, which is why Congress is free to use those powers in its own committees.[347] By contrast, the Court stressed that

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339 *See id.* at 1370 n.32 (citing 36 U.S.C. §§ 30901–30908); *see also* Boy Scouts of Am. v. Dale, 530 U.S. 640, 644 (2000) ("The Boy Scouts is a private, not-for-profit organization engaged in instilling its system of values in young people.").

340 Flagg Bros. v. Brooks, 436 U.S. 149, 164–66 (1978).

341 424 U.S. 1 (1976).

342 *Id.* at 113.

343 *Id.*

344 U.S. CONST. art. 2, § 2, cl. 2.

345 *Id.* at 138; *see also id.* at 140 (holding that provisions "vesting in the Commission primary responsibility for conducting civil litigation in the courts of the United States for vindicating public rights, violate Art. II, § 2, cl. 2, of the Constitution").

346 *Id.* at 138–39.

347 *Id.* at 137.

"administrative functions" such as rulemaking, issuing advisory opinions, making eligibility determinations, and initiating and conducting lawsuits to enforce federal law "may . . . be exercised only by persons who are 'Officers of the United States,'" appointed pursuant to the Appointments Clause and subject to at least some measure of presidential control.[348]

Second, the Court addressed the constitutional status of congressionally chartered private actors in *Lebron v. National Railroad Passenger Corporation*.[349] There, the Court held that the National Railroad Passenger Corporation—commonly known as Amtrak—was a part of the government and, therefore, subject to the Constitution.[350] The Court canvassed—starting with the First and Second Banks—"the long history of corporations created and participated in by the United States for the achievement of governmental objectives"—of which Amtrak was but one example.[351] Although language in Amtrak's charter disclaimed governmental status, the Court reasoned that its *structure* and *functions* rendered Amtrak a federal agency for constitutional purposes.[352] According to the Court, Congress could not "make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions."[353] Amtrak's structure and functions, rather than "congressional label," determined its constitutional status.[354] As for Amtrak's structure: the President appointed (sometimes with the advice and consent of the Senate) six of the corporation's nine directors;[355] the Secretary of Transportation, on behalf of the United States as the holder of Amtrak's preferred stock, selected two more directors;[356] and a majority of the board named

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348 *Id.* at 140–41. *Buckley*'s reliance on *Humphrey's Executor* for the principle that presidential control need not be total may not survive *Seila Law* and *Collins*.

349 513 U.S. 374 (1995).

350 *See id.* at 375.

351 *Id.* at 386.

352 *See id.* at 392.

353 *Id.*

354 *Id.* at 392–93; *see also* Cherry Cotton Mills, Inc. v. United States, 327 U.S. 536, 539 (1946) (remarking of the Reconstruction Finance Corporation: "That the Congress chose to call it a corporation does not alter its characteristics so as to make it something other than what it actually is . . . ."); Inland Waterways Corp. v. Young, 309 U.S. 517, 523 (1940).

355 *See* 513 U.S. at 397.

356 *See id.* at 385.

the ninth and final member.[357] As for Amtrak's functions: the Court explained in a later case that the agency has substantial regulatory functions, including the authority "to issue 'metrics and standards' that address the performance and scheduling of passenger railroad services," which affect the freight services of private railroads.[358]

Buckley and *Lebron* thus show how the Constitution permits certain types of activities to be performed, pursuant to federal statute, outside presidential control. Under *Buckley*, certain functions that Congress could perform on its own—such as investigative and informative functions—may be performed by governmental entities outside presidential control. Under *Lebron*, the Court implicitly acknowledged that a private entity can act pursuant to a congressional charter, so long as its structure reflects its private status and its functions are of a non-sovereign nature that can be delegated to a private actor.

2. *Sovereignty and Private Banking*

Precisely how these principles applied to the First and Second Banks of the United States has historically been a subject of dispute. This point is most apparent when one considers the Second Bank of the United States. Recall the Second Bank's structure. The President—with the Senate's advice and consent—could only appoint a handful of the Bank's directors, yet all twenty-five of those directors voted on the Second Bank's president.[359] On its face, this structure could not possibly be constitutional if the Second Bank was exercising sovereign and executive power. Yet, although the Second Bank was controversial and subject to repeated constitutional criticism, even the bank's most formidable opponent, President Jackson, "characterized the Bank as a private entity."[360] In his 1832 statement accompanying his veto of the Second Bank's rechartering, Jackson criticized the bank on both policy and legal grounds.[361] Jackson's separation-of-powers critique of the

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357 *See id.* at 397. For a slightly different discussion of Amtrak's structure—albeit with nuances not relevant here—*see* Dep't of Transp. v. Ass'n of Am. R.R., 575 U.S. 43, 51 (2015). *See* 49 U.S.C. § 24302(a)(1).

358 *Ass'n of Am. R.R.*, 575 U.S. at 45; *see id.* at 58 (Alito, J., concurring) describing "[t]his scheme" as "obviously regulatory").

359 *See generally* Hamilton, *supra* note 38.

360 Bamzai, *supra* note 41, at 1356.

361 *See* Veto Message from President Jackson Regarding the Bank of the United States (July 10, 1832), *reprinted in* 3 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1139 (James D. Richardson ed., 1897).

bank depended on the claim that Congress could not allow a corporation to control currency with a charter unalterable by Congress.[362] He contended that the Constitution would be a "dead letter" if Congress could hand off control over the nation's finances in such a way.[363]

While President Jackson viewed the grant of currency-making authority to the Bank to be an impermissible delegation of congressional authority to a private entity, the mainstream view understood currency creation as a function that could be undertaken outside of presidential supervision. Although "[t]o modern eyes, the Bank of the United States' currency-making functions might seem quintessentially sovereign[,]" that view "was by no means the orthodoxy at the time of the First and Second Banks' establishment in the early 19th Century,"[364] even though these banks were "employed by the government of the Union to carry its powers into execution."[365] As Hamilton explained in 1790, one benefit of a private bank was that it was not subject to political control. He reasoned that "[t]he Stamping of paper is an operation so much easier than the laying of taxes, that a government, in the practice of paper emissions, would rarely fail in any such emergency, to indulge itself too far in the employment of that resource, to avoid, as much as possible, one less auspicious to present popularity."[366] Indeed, responding to those who argued that the "profits" of the bank ought to "redound to the immediate benefit of the [S]tate," Hamilton stressed the bank must not be under "a public direction," but "under the guidance of individual interest."[367] Hamilton thus labeled the bank one under "*private . . .* direction."[368] His argument—which he presented successfully to the First Congress—would be inexplicable if a bank was itself understood to be part of the government merely because the government chartered it and set its mission.

The Supreme Court also characterized government-chartered banks as not governmental in character, despite their significance for the economy. In an 1824 case called *Bank of*

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362 *See* Bamzai, *supra* note 41, at 1356 (citing Veto Message, *supra* note 361, at 1149).

363 Veto Message, *supra* note 361, at 1149.

364 Bamzai, *supra* note 41, at 1354.

365 McCulloch v. Maryland, 17 U.S. 316, 436–37 (1819).

366 ALEXANDER HAMILTON, *Report on a National Bank* (Dec. 13, 1790), *in* 1 REPORTS OF THE SECRETARY OF THE TREASURY 65, 82 (1821).

367 *Id.* at 95.

368 *Id.*

the United States v. Planters' Bank of Georgia,[369] the Court concluded that the Planters' Bank of Georgia—a bank chartered by Georgia—was not part of Georgia, but rather a distinct entity. As part of its decision, the Court similarly characterized the First and Second Banks:

> The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the Bank. The United States was not a party to suits brought by or against the Bank in the sense of the constitution. So with respect to the present Bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions of the corporation, and exercises no power or privilege which is not derived from the charter.[370]

In other words, even where a federal charter specified what the entity can do, and despite the entity being designed to benefit the public, the Court suggested that the nation's sovereignty did not extend to the bank post-chartering.

Other contemporaneous commentators expressed the same view. As Chancellor James Kent explained in his *Commentaries on American Law*, although "[a] bank, created by the government, for its own uses, and where the stock is *exclusively* owned by the government, is a public corporation," matters were different for "a bank, whose stock is owned by private persons."[371] That sort of bank "is a private corporation, though its objects and operations partake of a public nature."[372] One of the leading treatises on corporate law, Joseph Angell and Samuel Ames's *A Treatise on the Law of Private Corporations Aggregate*, similarly distinguished private banks from the government. If a corporation was formed for "public . . . purposes" *and* the government owned "the *whole* interest" in it, then it was part of the government.[373] But if not, a corporation chartered by the government was considered "private," even if the government owned a portion of it. Angell and Ames thus concluded that the Bank of the United States was "a private

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369 Bank of the United States v. Planters' Bank of Georgia, 22 U.S. (9 Wheat.) 904 (1824).

370 *Id.* at 908.

371 KENT, *supra* note 39, at 222 (emphasis added).

372 *Id.*

373 JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE 9 (2d ed. 1843); *see also id.* at 23–24.

corporation" because it had both private and public shareholders, even though the federal government chartered it for a public purpose.

Nor was banking the only endeavor for which the government could charter a private corporation. Angell and Ames explained that the legislature could confer other functions—such as the provision of insurance or the building of hospitals and canals—on private institutions, even if such entities were chartered for publicly beneficial functions.[374] They also explained, however, that certain sovereign and inherently governmental functions could not be handed off to a private institution, regardless of the label used or how the entity was structured.[375] Although they did not offer a clear line between sovereign and non-sovereign functions, the key point for purposes here is that they understood the Banks of the United States to fall on the non-sovereign side of the line.[376] Thus, under Angell and Ames's analysis, if the legislature conferred on a bank with private shareholders inherently "sovereign" functions in addition to ordinary banking functions, the bank would be part of the government—and presumably subject to the full suite of constitutional requirements, including the Appointments Clause and presidential removal.[377] But the government could delegate to a private entity those functions historically exercised by private banks.[378]

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374 *Id.*

375 *See id.* at 25.

376 *See id.* at 22 ("[W]hen a government becomes a partner in a trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen").

377 *See, e.g.*, Bamzai, *supra* note 41, at 1354 ("Even if the federal government elected to call the Department of State a 'private' corporation by statute, in other words, the Department would still accomplish 'sovereign' functions, necessitating its categorization as 'public' and triggering related constitutional ramifications.").

378 Although agreeing that these early banks were not controlled by the President, Yoo and Calabresi dispute that controlling the money supply is not a governmental function. YOO & CALABRESI, *supra* note 8, at 54. They state that the "explanation for the anomaly"—viz., that the President did not control the banks—"stemmed from doubt as to whether the power it exercised was governmental power at all. In 1791, it was not nearly as evident as it is today that to control the money supply is to exercise governmental power." *Id.* They further argue that "[i]t is a little hard to see how a bank that was abolished could provide precedential support for modern independent entities." *Id.* But if the goal is to understand "history or tradition," Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2202 (2020), we should be cautious before accepting modern understandings of what is "governmental power." *See* YOO & CALABRESI, *supra* note 8, at 54. Yoo and Calabresi also speculate that perhaps the President could "have removed all the directors of the bank, both those he appointed and those who were privately chosen." *Id.* Then, as now, however, it was understood that appointment and removal generally go

To be sure, *Lebron* approached the question of Amtrak's status in a manner that arguably drew a slightly different line between public and private entities. There, the Court distinguished the treatment of the Second Bank in *Planters' Bank of Georgia*.[379] In contrast to the Bank, the Court observed that the federal government "specifically created [Amtrak] for the furtherance of governmental objectives, and not merely holds some shares but controls the operation of the corporation through its appointees."[380] Thus, *Lebron* concluded that where the federal government "create[d] a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government" for constitutional purposes.[381] That reasoning suggested that governmental appointment of a majority of the directors of a corporation would automatically convert the entity into a part of the United States, whereas Angell and Ames and Kent appeared to understand that some of those entities might nevertheless be characterized as non-sovereign.

3. *The Fed's Structure Revisited*

Under either analysis, however, Congress can create a central bank that influences monetary policy so long as the bank does so through activities not understood to require the exercise of sovereign power and through a structure that satisfies the Constitution. As explained above, the First and Second Banks engaged in monetary policy, including creating currency and influencing interest rates, under congressional charters that directed their activities.[382] Despite the greater complexity of the modern economy than the economy of two centuries ago, the First and Second Banks in many respects used

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together, *see* 1 ANNALS OF CONG. 496 (Joseph Gales ed., 1834) (explaining that "the power to annul an appointment is, in the nature of things incidental to the power which makes the appointment") (quoting remarks of James Madison, June 17, 1789) yet the President could not appoint all of the directors.

379 *See* Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 398–99 (1995).

380 *Id.* at 399.

381 *Id.* at 400. Relying in part on this logic in *Lebron*, at least one court has extended the reasoning in *Lebron* to apply to the Federal Reserve Banks. See In Gardner-Alfred v. Fed. Rsrv. Bank of N.Y., 651 F. Supp.3d 695 (S.D.N.Y. 2023) (holding that the Federal Reserve Bank of New York was subject to the Free Exercise Clause).

382 *See* FEDERAL RESERVE BANK, THE FIRST BANK, *supra* note 209, at 8.

the same sorts of open-market tools to control monetary policy that the Fed does today.[383] And like the Fed, the First and Second Banks had private shareholders in addition to government shareholders.[384]

4. *Executive Power and the Fed's Monetary and Regulatory Functions*

Against this backdrop, consider the structure of the set of institutions that comprise the Federal Reserve system.

Start, first, with the twelve regional Federal Reserve Banks. As early as 1928, in *United States Shipping Board Emergency Fleet Corporation v. Western Union Telegraph Co.*,[385] the Court noted in dicta that "[i]nstrumentalities like the national banks or the federal reserve banks, in which there are private interests, are not departments of the government," but rather are "private corporations in which the government has an interest."[386] Relying on this reasoning, various courts of appeals have held that Federal Reserve Banks are private actors for different statutory provisions,[387] albeit with possible exceptions depending on the statutory language at issue in the case.[388] To take one example, the Federal Circuit recently reasoned that the Reserve Banks were "established as chartered corporate instrumentalities."[389] In the Federal Circuit's view, the Reserve Banks are "not structured as government

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383 *See* FIRST BANK OF THE UNITED STATES, *supra* note 209.

384 FEDERAL RESERVE BANK, THE FIRST BANK, supra note 209 at 5; FEDERAL RESERVE BANK, THE SECOND BANK, *supra* note 225, at 6. Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2202 (2020). As a policy matter, there no doubt are good reasons to provide the President with authority to remove members of the Board of Governors or other officers under some circumstances, as, indeed, statutory law currently does, *see* 12 U.S.C. § 242. Congress allowed the President to remove some of the officers of the First and Second Banks. *See supra* pp. 134–36. Our point is only that, as a *constitutional* matter, presidential control may not be required for those Fed functions that fall under the heading of banking.

385 275 U.S. 415 (1928).

386 *Id.* at 425–26.

387 *See, e.g.*, Bozeman Financial LLC v. Federal Reserve Bank of Atlanta, 955 F.3d 971 (Fed. Cir. 2020); Scott v. Fed. Reserve Bank of Kan. City, 406 F.3d 532, 534–36 (8th Cir. 2005); Lewis v. United States, 680 F.2d 1239, 1241–42 (9th Cir. 1982).

388 *See, e.g.*, Jet Courier Servs., Inc. v. Federal Rsrv. Bank of Atlanta, 713 F.2d 1221, 1228–29 (6th Cir. 1983); United States v. Hollingshead, 672 F.2d 751, 752–54 (9th Cir. 1982); Fed. Rsrv. Bank of Boston v. Commissioner of Corporations & Taxation, 499 F.2d 60, 63–64 (1st Cir. 1974). *See also* Service Contract Act of 1965 (41 U.S.C. § 351 et seq.)—Applicability to Federal Reserve Banks, 2 Op. O.L.C. 211, 212 (1978).

389 *Bozeman Financial*, 955 F.3d at 975.

agencies," in part because "[n]o Bank official is appointed by the President or any other Government official," the board of directors conducts "direct supervision and control of each Bank," and "the Banks cannot promulgate regulations with the force of law."[390]

Turn, next, to the FOMC. That body, which manages the Fed's open market operations, is composed of the seven members of the Fed's Board, a representative of the Reserve Bank of New York, and four additional representatives of the Federal Reserve Banks chosen on a rotating basis.[391] From a structural perspective, the most salient characteristic of the FOMC is that a majority of its members (the seven Board members) appear to be federal government officials, whereas a minority (five) are representatives of the arguably private Reserve Banks. If simple majority rule by voting members would convert the FOMC into a governmental body subject to the Appointments Clause and *Seila Law* and *Collins*, then the organization's structure poses constitutional complications. If, however, significant private representation by the Reserve Bank members is sufficient to treat the FOMC as a whole as a private entity—as Angell and Ames and Chancellor Kent suggested—then its structure might pass constitutional muster. The private participation of the Reserve Banks, in other words, might render the FOMC sufficiently similar to the structure of the First and Second Banks.

To be sure, this perspective contrasts with the one expressed in two earlier legal challenges to the FOMC brought by members of Congress.[392] For instance, in *Riegle v. Federal Open Market Committee*,[393] a United States Senator challenged the FOMC's structure, arguing that the placement of the five Reserve Bank members on the Committee violated the Appointments Clause because private actors were impermissibly exercising public functions.[394] The D.C. Circuit dismissed the case without addressing the merits of the challenge.[395] But before doing so, the court remarked that "controversy over the balance between public and private control of the Committee

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390 *Id.* at 976.

391 *See* 12 U.S.C. § 263(a).

392 *See* CONTI-BROWN, *supra* note 11, at 113 (arguing that "the presence of the Reserve Banks on the FOMC, and the fact that the president has nothing to do with their appointment or removal . . . creates constitutional problems").

393 656 F.2d 873 (D.C. Cir. 1981).

394 *See id.* at 874, 877.

395 *See id.* at 881–82.

has existed since its creation."[396] The court observed that the original version of the FOMC, under the 1933 statute, "was privately dominated, consisting solely of representatives of the twelve Reserve Banks," but that some members of Congress favored "greater governmental control over disposition of Reserve Bank funds," leading to the 1935 act's addition of the Board members.[397] Despite the 1935 statute, the D.C. Circuit noted that "debate over public and private control of the FOMC has continued."[398]

Similarly, in *Reuss v. Balles*,[399] the D.C. Circuit dismissed for lack of standing a challenge to the FOMC by a House member, who claimed in part that the FOMC's structure improperly delegated to private parties Congress's powers "to coin and regulate the value of money, to regulate commerce, and to borrow money on the credit of the United States."[400] As the Court put it, the "essence" of Representative Reuss's theory was that "without presidential appointment of all its members, the FOMC is essentially a private group to which the specified legislative functions have been improperly delegated."[401]

In making these claims, Senator Riegle and Representative Reuss echoed the legal theories of Andrew Jackson and William Jennings Bryan—that certain kinds of banking and open-market operations could not be properly delegated to the Second Bank of the United States, to national banks, or to the FOMC. But *if* (as Secretary Hamilton argued) such functions can be delegated to a private entity, and *if* the FOMC is deemed appropriately private, *then* the structure of the Committee is constitutional.

Finally, turn to the Fed Board. As compared to the Federal Reserve Banks and FOMC, the seven governors of the Board—appointed and removable for cause by the President—seem more likely to be characterized as government officials. The potential remaining question is whether the Board's interconnected relationship with the Reserve Banks and the FOMC, along with the Board's functions, permit the characterization of the Board as something of a hybrid entity that is

396 *Id.* at 875.

397 *Id.* at 875–76.

398 *Id.* at 876.

399 584 F.2d 461 (D.C. Cir. 1978).

400 *Id.* at 465; *see also id.* at 462.

401 *Id.* at 467.

sufficiently related to the private nature of other components of the Fed.

5. *The Fed's Functions Revisited*

The Fed, however, is much more than a bank. Today's Fed is a full-fledged regulator, complete with the same sort of consumer-protection regulatory powers as those exercised by the CFPB.[402] By its own account, for example, the Fed "requires lenders to clearly disclose lending terms and costs to borrowers," and requires "credit-reporting agencies to allow credit applicants to correct inaccurate credit reports."[403] It also has authority to prescribe rules governing bank advertisements,[404] when certain banks can open a new branch,[405] internal risk management policies,[406] credit evaluations,[407] liability for unauthorized transfers,[408] and much more.

To accomplish these tasks, the Fed engages in notice-and-comment rulemaking and undertakes enforcement actions. In 2018, for example, the Fed fined Citigroup $8.6 million "for the improper execution of residential mortgage-related documents."[409] The power to promulgate regulations and issue fines clearly requires executive power under the Court's modern precedent.[410] That precedent therefore also may dictate that the Fed's independent litigating authority to enforce

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402 *See* CONTI-BROWN, *supra* note 11, at 6.

403 FED EXPLAINED, *supra* note 16, at 116.

404 12 U.S.C. § 371b.

405 12 C.F.R. § 211.3(b).

406 *Id.* § 206.4(a)(1).

407 68 Fed. Reg. 13144, 13147 (Mar. 18, 2003) (prohibiting creditors from "inquir[ing] about" certain characteristics); *id.* at 13167–68 (imposing record-keeping requirements to "monitor compliance" with the rule).

408 12 C.F.R. §§ 205.3, 205.4 (imposing disclosure requirements on banks), 205.10 (giving consumers the right to cancel transactions).

409 *Federal Reserve Board fines Citigroup $8.6 million for the improper execution of residential mortgage-related documents and announces termination of 2011 enforcement action*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (Aug. 10, 2018), https://www.federalreserve.gov/newsevents/pressreleases/enforcement20180810a.htm [https://perma.cc/MA5U-T2K3].

410 *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 58 (2015) (Alito, J., concurring) (calling power to create mandatory standards "obviously regulatory"); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 485 (2010) (concluding PCAOB board members are subject to Article II because the PCAOB "promulgates . . . standards" and imposes sanctions); Buckley v. Valeo, 424 U.S. 1, 137–39 (1976) (explaining that "rulemaking" and "functions necessary to ensure compliance with the statute and rules" fall within the scope of Article II).

certain of its regulatory decisions[411] similarly requires presidential control.[412]

Given the foregoing, it is useful to review again the Fed's functions.[413] At a broad level of abstraction, focusing on the historical record suggest as follows:

- *Monetary Policy*: The Fed's core mission is monetary policy, which it largely performs through open market operations.[414] Although much more sophisticated today, these types of operations are analogous to the activities of the First and Second Banks, which were private. Buying and selling securities and deciding the rate at which it will lend money to other banks thus arguably do not require sovereign power or, at least, to the extent they do, are supported by history, tradition, and Hamilton's view of the constitutional structure.[415]

- *Promote Systemic Financial Stability*: As with the First and Second Banks, Congress may establish a chartered institution's goals without such an institution becoming sovereign; to the extent that a charge to promote systemic financial stability merely informs how the Fed performs activities comparable to those performed by the First and Second Banks, this function may also be defensible against Article II challenges, especially if the Fed is not entirely operated by the federal government. That said, to the extent that Congress has given the Fed regulatory authority for this purpose, such as the power to inspect banks,

411 *See, e.g.*, 12 C.F.R. § 263.1(e) (listing adjudicatory proceedings in which the Fed is authorized to seek civil penalties); Michael Herz, *United States v. United States: When Can the Federal Government Sue Itself?*, 32 WM. & MARY L. REV. 893, 908 n.55 (1991) ("Congress has granted independent litigating authority . . . in specific circumstances . . ." to the Federal Reserve Board) (citing 12 U.S.C. § 1828(c)(7)(D)).

412 *See, e.g.*, *Free Enterprise Fund*, 561 U.S. at 484 (suggesting powers to "determine[] the policy and enforce[] the laws" are executive; *Buckley*, 424 U.S. at 137–38 ("The Commission's enforcement power, exemplified by its discretionary power to seek judicial relief, is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress.").

413 To be clear, we do not purport to review every grant of authority to the Fed to see which has a direct historical analog to the First and Second Banks. It is also possible that even a statutory duty with such a direct analog may be performed in ways that require executive power. The devil is in the details. Rather, the purpose of our analysis is to illustrate the relevant concept.

414 *See* CONTI-Brown, supra note 11, at 131–34.

415 *See* Alexander Hamilton, *supra* note 38.

the argument that the President does not enjoy removal authority is much harder to make.

- *Ensure Financial Soundness*: Although lending money is easy enough to defend based on the history of the First and Second Banks, pure bank regulation is harder to justify. To be sure, even indisputably private banks have an interest in ensuring that those they contract with are financially sound, so perhaps not all inquiry into financial soundness falls outside the traditional umbrella of banking. Examining banks for compliance with statutory and regulatory law, however, is sovereign in character and almost certainly requires executive power.[416]

- *Facilitate Financial Transactions*: Moving money around also seems quite like what the First and Second Banks did. Indeed, one of the primary benefits of the national bank system was its presence across the country. Preventing counterfeiting and the like, however, again may be different, especially when the Fed itself is involved in investigation and actual prosecution.[417] The Court has held that prosecution in particular implicates executive power under Article II.[418]

- *Consumer Protection and Community Development*: As explained above, performing this function without plenary presidential control is hard (if not impossible) to defend in light of modern precedent. Under *Seila Law*, the Fed engages in activities that are sovereign in character and plainly require executive power, including assessing penalties and awarding restitution.[419] Given that the Fed and the CFPB often have overlapping authority and *Seila Law* holds that the CFPB exercises executive power, it is hard to see how this function can be performed if the President does not enjoy a plenary removal power.

This list is tentative, but to the extent that there is evidence that the First or Second Banks engaged in certain activities,

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416 *See* Collins v. Yellen, 141 S. Ct. 1761, 1785 (2021) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of 'execution' of the law.") (quoting Bowsher v. Synar, 478 U.S. 714 (1986)).

417 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 138–39 (1976).

418 *Id.* (holding that law execution requires executive power).

419 Seila Law LLC v. CFPB, 140 S. Ct. 2183, 2188 (2020).

Seila Law's method of analysis may permit a form of independence for an entity like the Fed that engages in those activities today. In this respect, the Fed is unlike many more traditional regulatory entities. But because at least some of the Fed's activities go beyond those of the First and Second Banks, there is a significant argument under *Seila Law* and *Collins* that the President can remove the Fed Chair, Fed Vice Chairs, Board of Governors, and perhaps others who are involved in the Fed's quintessential regulatory functions.

D. Statutory Amendments and Monetary Independence

Congress's decision to blend functions that plainly require executive power (such as the Fed's consumer protection role) with functions that arguably do not (such as the Fed's role in influencing monetary policy) is problematic. As the Court explained in *Collins*, if an agency acts in different capacities, only some of which implicate Article II, the President's removal power applies to *everything* the agency does.[420] Thus, if the President dislikes how the Fed is engaging in monetary policy—a function for which Article II may not require inherent removal authority[421]—the President can threaten to fire the agency's leaders for how they are exercising their regulatory powers. Because those regulatory powers require executive power, and so may trigger the President's unfettered removal authority, the White House may be free to influence monetary policy.

It thus follows that if Congress wishes to preserve the Fed's monetary independence, it should limit the Fed to monetary functions of the sort exercised by the First and Second Banks and remove the agency's regulatory functions—perhaps placing those functions in another entity subject to the President's plenary control. Doing so, of course, may have policy downsides; the Fed might perform its monetary functions better when it also has regulatory authority. For example, the Fed's ability to assess the economy might improve when it has access to information learned from bank supervision, and its ability to encourage systemic stability might improve when it can credibly

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420 *See Collins*, 141 S. Ct. at 1785 (explaining that even if the FHFA's role as conservator or receiver does not implicate executive power, it "does not always act in such a capacity").

421 *See, e.g.*, Fed. Open Mkt. Comm. of Fed. Rsrv. Sys. v. Merrill, 443 U.S. 340, 343 (1979) ("Open market operations—the purchase and sale of Government securities in the domestic securities market—are the most important monetary policy instrument of the Federal Reserve System.").

threaten punishment using sovereign authority.[422] Nonetheless, granting such regulatory authority to the Fed creates risk under today's precedent.

At the same time, cases like *Seila Law* and *Collins* also offer Congress an opportunity to step back and evaluate whether the Fed needs such regulatory authority. Even apart from staving off constitutional litigation, removing some regulatory authority from the Fed could have important policy benefits. As Chair Powell has explained, the Fed should "resist the temptation to broaden [its] scope to address other important social issues of the day."[423] Former Chair Bernanke has sounded similar themes. Like Powell, he separated the "independence afforded central banks for the making of monetary policy," which he said "should not be presumed to extend without qualification to its nonmonetary functions," such as "oversight of the banking system."[424] And that distinction, Bernanke observed, required "clarity about the range of central bank activities deemed to fall under the heading of monetary policy"—with "setting targets for short-term interest rates or the growth rates of monetary aggregates" clearly qualifying and Bernanke also including "the central bank's discount-window and lender-of-last-resort activities."[425] By contrast, he classified "fiscal decisions" as "the province of the executive and the legislature."[426] Indeed, as economic complexity increases, so might the value of a specialized Fed with a narrow task focused on monetary policy alone. Thus, leaving to one side the policy wisdom and particulars of various consumer protection laws, separating those functions from the Fed's core monetary-policy function potentially could both promote political accountability for the bureau that inherits those functions as well as better administration in a Fed that concentrates on its primary role.[427]

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422 *See generally* FED EXPLAINED, *supra* note 16.

423 Powell, *supra* note 25. To be sure, Powell argued that the Fed should continue to exercise statutory authority already provided, some of which may offend Article II. But his broader point that enlarging the Fed's portfolio beyond its core mission may "undermine the case for independence," *id.*, is correct. For a recent, policy-based assessment of the various tradeoffs, see David T. Zaring & Jeffery Y. Zhang, *The Federal Reserve's Mandates*, 108 MINN. L. REV. 333 (2023).

424 Bernanke, *supra* note 28, at 5.

425 *Id.* at 6.

426 *Id.*

427 *See* CONTI-BROWN, *supra* note 11, at 244.

Conclusion

The Supreme Court's recent Article II cases are important for administrative law generally and for the Fed specifically. Under *Seila Law* and *Collins*, any statutory protections for the Fed's leaders (to the extent such protections exist at all) may be too weak to provide meaningful independence; indeed, under today's doctrinal framework, the Chair and Vice Chairs likely serve at the President's pleasure, and a court may well conclude that members of the Fed's Board of Governors can be removed for disagreeing with the President's preferred approach to monetary policy. In other words, especially under *Collins*, without a statutory amendment, the President may not need to rely directly on Article II to control monetary policy because statutory law already allows it.

Any statutory changes by Congress, however, should be coupled with an understanding of how the Fed's current mixture of banking and regulatory functions bears on the constitutionality of the Fed's structure. For decades, scholars and policymakers alike have observed that the Fed's structure may raise constitutional difficulties under Article II.[428] But the nation's monetary policy should be placed on a sound constitutional footing. Using the First and Second Banks as its guide, Congress can allocate authority for certain functions (akin to those exercised by the First and Second Banks) to entities with a degree of independence, while leaving other functions to other departments, such as the Treasury, that are subject to presidential control. Doing so may reconcile an appropriate Fed independence with the demands of Article II.

428 *See* Calabresi & Yoo, *supra* note 8; Harrison, *supra* note 297.