THE FEDERAL RESERVE AND THE CONSTITUTION

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ABSTRACT

In a number of important cases restricting the authority and independence of federal agencies, the Supreme Court’s conservative majority has adopted reasoning that, if applied consistently, could have more far-reaching consequences for the administrative state. To explore the limits of the Court’s evolving doctrines, this Article shows how their application might lead to a conclusion that the structure or mandate of the Federal Reserve, as created by Congress, is unconstitutional. On the assumption that at least some of the conservative Justices would not want to reach this result, the Article goes on to survey strategies available to the Court for avoiding such an outcome. It explains how, if a constitutional challenge to the Federal Reserve were to reach the Court, its choice among these strategies would further delineate the reach of its campaign against the administrative state. Even in the absence of an actual challenge, this exercise reveals how the Court’s political philosophy is shaping its jurisprudence.

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INTRODUCTION

The low intensity offensive against the administrative state that has been waged by the conservative Justices of the Supreme Court for well over a decade has escalated in the last several terms. The campaign has two prongs. One is the restriction of agency authority derived from enabling
legislation. The other is the invalidation of structural measures that insulate decisions of government officials from the political control of the President. The first is exemplified by the potentially very broad “major questions doctrine” announced by the Court in *West Virginia v. EPA*\(^1\) and the possible revival of the long dormant non-delegation doctrine heralded by Justice Gorsuch’s dissent in *Gundy v. United States.*\(^2\) The second is reflected in the trio of decisions invalidating for-cause removal protections for officials in agencies that Congress had chosen to make independent,\(^3\) and in *United States v. Arthrex*,\(^4\) which gave a political appointee authority to review certain decisions of patent law judges that Congress had insulated from direct political influence.

While the battle lines have thus been drawn, it remains unclear how much territory the conservative Court aims to capture. The rhetoric and logic of some of these opinions seem to extend far beyond the holdings and practical effects of the decisions themselves. An important open question is where the Court will stop. In this article I take up that question indirectly by examining what is perhaps the strongest candidate for a limiting case—the Federal Reserve.

In his famous foretaste of Legal Realism, Justice Holmes observed that common law rights and duties are “nothing but prophecies” of what courts will do when presented with a specific case.\(^5\) So too with a judicially-centered view of constitutional law. An assertion that an act of Congress is “constitutional” or “unconstitutional,” as opposed to whether it should be, is coherent only if it rests on a more or less convincing prediction of how the Supreme Court would rule on the matter.\(^6\) I believe, as I suspect most readers do, that even the current Court is unlikely to rule unconstitutional the delegation of monetary policy to the Federal Open Market Committee (“FOMC”)—an independent entity that includes nongovernmental officials as well as the Board of Governors of the Federal Reserve System (the “Board”), an independent government agency. At least on first inspection,

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4. *See United States v. Arthrex*, Inc., 141 S. Ct. 1970, 1988 (2021). One must, in fairness, note that although Justice Thomas is in some respects the most aggressive of the Justices in the Court’s offensive against the administrative state, he dissented from Chief Justice Roberts’s opinion for the majority in *Arthrex*.
6. Holmes’s second famous point in his address—the impact of a prediction as to how a court would rule on a “bad man”—is less, though by no means completely, irrelevant to constitutional law. *Id.* at 459.
however, this prediction is discordant with some of what the Court has already said about the Appointments Clause and the removal power. Were the conservative Justices’ intimations of further expansion of the removal power doctrine and revival of the non-delegation doctrine to be realized, the dissonance with the Federal Reserve’s structure would only grow. If my intuition is correct, and the Court would decline to follow some of the logic in earlier opinions to a conclusion that the Federal Reserve was unconstitutional, then its rationale for pulling up short of this outcome would itself be revealing of the limits of the emerging doctrines and, perhaps, of the political philosophy lying behind them.

The Article proceeds as follows: Part I provides some background on the mandate and structure of the Federal Reserve. Part II evaluates that mandate and structure in light the evolving separation of powers doctrines of the Court’s conservative majority and reaches the following conclusions:

First, although a majority of the Justices have indicated interest in reviving the non-delegation doctrine, the streak of nearly ninety years without a statute being declared an excessive delegation continues. Should the conservative Justices move beyond their talk in *Gundy* to action, the broad delegation of authority to the FOMC in the Federal Reserve Act would almost surely raise a constitutional question.

Second, the status of the nongovernmental members on the FOMC is most vulnerable to constitutional challenge. The FOMC includes as five of its voting members the presidents of regional Federal Reserve Banks, who are not appointed by the President and confirmed by the Senate. Indeed, they are not even employees of the U.S. government. They could well be adjudged principal officers of the United States, in which case their presence on the FOMC would be unconstitutional as a violation of Article II.

Third, because the Court has not to this point ruled that traditional multi-member independent agencies are unconstitutional infringements on the President’s removal power, the Board continues to enjoy for-cause removal protection. However, if the Court were to follow through on the logic of its recent opinions, as explicitly urged by some of its conservative members, the Board would presumptively be just as vulnerable as every other independent federal agency.⁷

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⁷. A recent court of appeals decision raised the prospect of another potential constitutional challenge to the FOMC, and the Federal Reserve System more generally. In *Community Financial Services Association of America v. Consumer Financial Protection Bureau*, 51 F.4th 616, 642–43 (5th Cir. 2022), cert. granted, 143 S. Ct. 978 (2023), the Fifth Circuit broke with the conclusion reached by at least six other federal courts and declared that the statutory method for funding the Consumer Financial Protection Bureau (“CFPB”) (a portion of the budget of the Federal Reserve, transferred directly from the Fed) violates the Appropriations Clause because it is not approved by Congress. See id. at 644. Since
Part III discusses why and how, notwithstanding these apparent constitutional vulnerabilities, the Court might well not hold the core delegation to, and structural features of, the Federal Reserve to be unconstitutional. As to why—members of the Court’s conservative majority may be more favorably inclined toward a central bank than other economic regulatory agencies. A more tangible consideration is the difficulty the Court would have in fashioning a remedy for the supposed unconstitutionality of the FOMC structure or mandate that did not risk major disruption to monetary policy, and thus the U.S. economy.

As to how, there are two means of avoidance that are at least arguably consistent with the revealed doctrinal inclinations of the conservative Justices. First, the Court may literally avoid the merits through denying standing to likely plaintiffs. A fairly restrictive standing doctrine of the sort now embraced by the Court would preclude challenges to the FOMC mandate and, quite possibly, to the status of the Reserve Bank presidents.

Second, the Court may find that, on the merits, the Federal Reserve enjoys an exception to the doctrines the Court’s majority has been building. This second way itself has two branches. One is based on the history of the regulation of money going all the way back to the First Bank of the United States. The other rests on perceived functional differences between the Federal Reserve and other independent agencies—an “anomaly,” as then Judge Kavanaugh once described it.8

Part IV builds on the detailed doctrinal analysis of Part II and Part III to discuss the constitutional choices of the Court that would be revealed by the possible outcomes of challenges to the Federal Reserve’s mandate or structure. If the Court refrains from further incursions on congressional decisions to delegate authority to independent agencies, the mandate and structure of the FOMC would be largely insulated from constitutional attack, at least as a practical matter. In that event, some limits on the Court’s separation of powers campaign would have been established.

But what if the Court extends its separation of powers doctrines further? Cass Sunstein and Adrian Vermeule have argued that one of the Court’s

recent removal cases was driven not by originalism or any other interpretive method based on the text of the Constitution, but by “judgments, grounded in abstract principles, about what would make the constitutional order the best that it could be.” Assuming the Court wishes to avoid interfering with the statutory independence of the nation’s central bank, even as it pushes those principles further into the statutory organization of the U.S. government, then it will reveal not just its political philosophy, but some of its specific policy preferences. In granting the Federal Reserve exceptional status, the Court would be making choices that either seem arbitrary or that quite overtly appropriate the legislative role of making policy judgments. Finally, were the Court unexpectedly to find some part of the Federal Reserve’s mandate or structure unconstitutional, it would signal an escalation of its campaign against the administrative state and its strong resolve to remake the U.S. government.

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Two additional points should be stated at the outset. First, my aim in this article is not to make a normative argument on the constitutionality of the Federal Reserve. Instead, my aims are to analyze that set of issues as a positive matter against the backdrop of the Court’s separation of powers jurisprudence and to consider what that analysis reveals about the ideological and policy dispositions of the Court underlying that jurisprudence. But this focus should not be confused with the view that the Federal Reserve’s mandate or structure should be captured by the Court’s evolving doctrines. On the contrary, like so many others, I find Justice Kagan’s arguments in her dissent in Seila Law convincing: Congress should have broad, though not unbounded, leeway in deciding how to structure the agencies it creates.10

Second, the Article focuses solely on these constitutional considerations. Nothing here should be read to suggest that the structure of the FOMC is or ought to be sacrosanct. There are good reasons to consider a range of changes, especially to the Reserve Banks and the status of their presidents. But decisions on whether the country should have an independent central bank, and how independent it should be, properly lie with Congress, not the Supreme Court.

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I. STRUCTURE AND MANDATES OF THE FEDERAL RESERVE

The “Federal Reserve” actually consists of two separate policymaking entities created by statute. The awkwardly named “Board of Governors of the Federal Reserve System” is recognizable as one of the many independent regulatory agencies in the U.S. government. The Federal Reserve Act provides for seven members who are appointed by the President and confirmed by the Senate for fourteen-year terms and then enjoy for-cause removal protection. The Board has a number of regulatory and programmatic responsibilities. Most prominent are certain authorities for providing emergency liquidity to the financial system and the regulation of bank holding companies and certain insured depository institutions. Like the two agencies with which the Board shares bank regulatory authority, it regularly engages in notice-and-comment rulemakings and formal adjudications under the Administrative Procedure Act. And, like those two other agencies, it is self-funding and thus not subject to the congressional appropriations process.

The FOMC, by contrast, is an institutionally unique policymaking entity within the U.S. government. The FOMC sets monetary policy for the United States. While it considers itself an “agency” for purposes of the Administrative Procedure Act, it is not an organization unto itself. Instead, it consists of representatives of the constituent entities of the Federal Reserve System. It has no employees. Its staff work is done by employees of the

12. Id. § 242.
13. Sections 10A and 10B of the Federal Reserve Act authorize the Reserve Banks, under the direction of the Board, to extend short-term loans against good collateral to solvent banks. 12 U.S.C. §§ 347a–b. Section 13(3) of the Federal Reserve Act permits the Federal Reserve, in “unusual and exigent circumstances,” to create “broad-based” programs of lending to non-banks. 12 U.S.C. § 343(3)(A). Any program—usually referred to as a “facility,” created by the Federal Reserve under this authority must be approved by the Secretary of the Treasury. 12 U.S.C. § 343(3)(B)(iv). Credit may be extended under any 13(3) program only to solvent debtors and must be backed by appropriately discounted debt instruments.
14. 12 U.S.C. § 1813(q)(3) specifies that the Board is the regulator for state banks that are members of the Federal Reserve system, all bank holding companies, and certain other bank-related entities.
Board and the Reserve Banks. Its voters include all members of the Board plus, on a rotating basis, five of the presidents of the twelve Reserve Banks. Thus, when the Board is at full strength, there are at any given time seven Board votes and five Reserve Bank votes. The remaining seven Reserve Bank presidents nonetheless attend and participate fully (except for voting) in all FOMC meetings.

The Reserve Banks themselves are organizationally unusual. They are not “agencies” of the U.S. government. Neither the presidents nor staff of the Reserve Banks are government employees. However, both their distribution of profits and governance differ substantially from that of private corporations. They were created through a somewhat circuitous process outlined by Congress in Section 4 of the Federal Reserve Act. Their paid-in capital comes from private banks that are required or choose to become member banks of the Federal Reserve system. Reserve Banks make money principally through seigniorage on cash transactions in securities, interest paid on securities held by the Federal Reserve, and fees charged for various financial services. The member banks are entitled to a dividend, which is calculated roughly as a preferred stock dividend would be—as a percentage of the paid-in capital of each bank. All remaining “profits” of the Reserve Banks, beyond those necessary to meet their expenses, and that of the Board, are turned over to the Treasury Department.

By law, the nine members of the boards of directors of each Reserve Bank consist of three representatives of the member banks (Class A directors), three representatives of non-banking interests selected by the member banks (Class B directors), and three representatives of the public

18. Technically, under 12 U.S.C. § 263(a), the first vice president of a Reserve Bank could be the designated member of the FOMC, but in practice it is always the president. Only the president of the Federal Reserve Bank of New York has a permanent vote on the FOMC. By convention, the others rotate through four other voting positions once every two or three years. Section 12A of the Federal Reserve Act states only that the boards of directors of specified groups of two or three Reserve Banks shall elect a representative annually. 12 U.S.C. § 263(a). In theory, then, the boards of the Boston, Philadelphia, and Richmond Reserve Banks could decide each year which one of their three presidents would represent them on the FOMC that year. By long-established convention, the presidents of the Reserve Banks grouped together by Section 12A rotate as FOMC members. That is why, despite the fact the statutory election has not taken place, the portion of the Board’s website devoted to the FOMC lists the voting members for future years.
22. Id. Since the creation of the CFPB in 2010, a portion of Federal Reserve Revenues is allocated to fund that agency. Id. § 5497.
selected by the Board (Class C directors). The chair of each Reserve Bank is appointed by the Board from among the Class C directors. In practice, Reserve Bank presidents suggest the three public members and chair after consultation with the Board. With the approval of the Board, the Class B and Class C directors select the president of the Reserve Bank, who is generally the representative of that Bank on the FOMC. Both the Board and the board of directors of a Reserve Bank have statutory authority to remove its president.

Congress has legislated the objectives of monetary policy—“to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.” For decades the FOMC’s principal means for managing monetary policy was through “open market operations”—the purchase and sale of short-term U.S. government obligations. Open market operations directly affect interest rates on these risk-free obligations, which in turn affect all interest rates in the economy. During the Global Financial Crisis of 2007–2009, the FOMC quickly used open market purchases of Treasuries to lower its target short-term interest rate to what was effectively zero. At the “zero lower bound,” the traditional policy approach of managing short-term rates had reached its limit. The FOMC consequently engaged in “quantitative easing”—that is, the purchase of longer duration securities in an effort to bring longer-term rates down as well.

The resulting enormous increase in reserves meant that when the FOMC was ready to begin cautiously raising rates in late 2015, traditional open-market operations would not have produced the scarcity of reserves in the federal funds market that would result in higher lending rates in the economy as a whole. Consequently, the FOMC has changed to the use of “administered rates” to set policy. The Federal Reserve sets its interest rate on reserves (and in separate facilities in which certain non-bank financial

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23. *Id.* § 302.
24. *Id.* § 341.
25. *Id.* § 248(f).
26. *Id.* § 341.
27. *Id.* § 225a. See *infra* Section II.A.
28. The FOMC’s core statutory authority is to direct the twelve regional Federal Reserve Banks “[t]o buy and sell in the open market . . . any obligation which is a direct obligation of, or fully guaranteed as to principal and interest by, any agency of the United States.” *Id.* § 355(2).
29. The Federal Reserve’s purchase of securities on the open market increases the supply of money by creating “reserves” for the institutions selling those securities.
30. In normal times, changes in short-term rates engineered by the FOMC affect longer-term rates as well, though rarely in the exact proportion of the change in short-term rates.
32. Throughout most of the Federal Reserve’s history, it was not authorized to pay interest on reserves. In 2006, Congress granted that authority, which was originally to have become effective in
firms can participate)\(^{33}\) to establish floors below which the recipients of the interest will have no incentive to lend to households and businesses.

The FOMC is, if not the most independent policymaking organization in the U.S. government, certainly among the top few. Because its operations are funded by the Reserve Banks and the Board, which are themselves self-funding, it is not subject to the congressional appropriations process. Its deliberations are exempted from the Government in the Sunshine Act\(^{34}\) and, to a considerable extent, from the Freedom of Information Act.\(^{35}\) Monetary policy activities and communications may not be audited by the Government Accountability Office.\(^{36}\) Finally, to repeat, members of the Board may be removed by the President only for cause, and Reserve Bank presidents are neither appointed nor removable by the President.\(^{37}\)

The unusual structure of the Federal Reserve System was established in the original Federal Reserve Act, as signed into law in 1913. However, while the original framework of twelve nongovernmental regional Reserve Banks and a governmental Board in Washington providing coordination and oversight has endured in the intervening century, much else has changed. Because recent Supreme Court decisions have assessed the pedigree of an agency in determining its constitutionality, Parts III and IV will discuss relevant features of Federal Reserve history and of its antecedents—the two Banks of the United States created in the nation’s early decades. Here, as a prefatory matter, I make a few general points to provide some context for the

\(^{33}\) This is the overnight reverse repurchase facility (the "ON RRP"). As explained by the Federal Reserve:

The FOMC sets an overnight reverse repurchase agreement offering rate (ON RRP rate), which is the maximum interest rate the Federal Reserve is willing to pay in an ON RRP operation. When an institution uses the ON RRP facility, it essentially makes a deposit at the Fed overnight, receiving a government security as collateral. The next day, the transaction is "unwound"—the Fed buys back the security, and the institution earns interest on the cash it deposited at the Fed. . . . In general, any counterparty to the facility should be unwilling to invest funds overnight in money markets at a rate below the ON RRP rate.

\(^{34}\) 12 C.F.R. § 281.1; see 5 U.S.C. § 552(b)(9)(A) (exempting from obligation to open deliberations to the public any meeting involving information "the premature disclosure of which would [ ] in the case of any agency which regulates currencies, securities, commodities, or financial institutions, be likely to [ ] lead to significant financial speculation in currencies, securities, or commodities . . . . ").

\(^{35}\) See 5 U.S.C. § 552(b)(1)–(9) (listing categories of records exempt from disclosure); see also 12 C.F.R. § 271.15(a)(1)–(8).


\(^{37}\) There is some question as to whether the Federal Reserve Act permits the President to remove the Chair and Vice Chairs, who are appointed to those specific positions for terms of four years, even in the absence of cause. See infra note 356. Were the President to successfully remove a Chair or Vice Chair, however, that individual would still enjoy for-cause removal protection as a Member of the Board.
discussions to follow.

First, the motivation for creation of the Federal Reserve differs from that of the now prominent central banks that predated it. While the Bank of England and Banque de France were established to help the governments of those countries finance wars, the Federal Reserve was a response to a series of financial panics that culminated in the Panic of 1907. Thus, the availability of credit throughout the economy and the preservation of financial stability were central to the original mission of the Federal Reserve. The legacy of sectional and political disputes over credit helps explain its peculiar decentralized structure, while the experience of private clearinghouse efforts to mobilize private bank resources in the face of credit crunches helps explain its peculiar public-private character.  

Second, the authority of the Federal Reserve is more centralized and governmental today than at its creation. For its first two decades, the Reserve Banks—especially the Federal Reserve Bank of New York—had the upper hand in determining Federal Reserve policies, which often varied across Reserve Banks. New Deal legislation increased Board authority—including requiring Board approval of the Presidents of the Reserve Banks—and entrenched a single, unified approach to monetary policy decisions by formally establishing the FOMC and removing the autonomy of individual Reserve Banks to make their own decisions on the rates at which liquidity can be extended to member banks. While changes in the intervening eighty years have been more incremental, they have almost uniformly enhanced Board authority at the expense of Reserve Bank prerogatives. Still, despite proposals in the 1930s to nationalize the Reserve Banks or to make their Presidents subject to the Article II appointment process, no change in the basic structure of the System was made then. Nor, despite periodic revival of such proposals, has any been made since.

Third, notwithstanding a formal ruling by the Attorney General at the inception of the Federal Reserve that the Board was independent of the Treasury Department, both its de jure and de facto independence have

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39. Attorney General T.W. Gregory relied on both the structure of the Federal Reserve Act and its legislative history in concluding that the Board was a distinct entity from the Treasury and was intended to be such. OFF. OF THE ATT’Y GEN., OPINION LETTER ON STATUS OF FEDERAL RESERVE BOARD (DEC. 19, 1914), as reprinted in First Annual Report of the Federal Reserve Board for the Period Ending December 31, 1914.
varied over time. Until the New Deal legislation, both the Treasury Secretary and Comptroller of the Currency were ex officio members of the Board, with the Treasury Secretary as chair. Even after the Administration officials were removed from the Board, statutory authorities that gave Treasury the authority to create money on its own afforded Administrations leverage over the Federal Reserve. This legal influence was buttressed by political pressures on the Federal Reserve to keep interest rates low in order to support government financing of both World Wars and New Deal spending programs.

Even following the 1951 Fed-Treasury Accord, which obliquely freed the Fed from a commitment to peg rates at a level desired by Treasury, various Presidents and Treasury Secretaries have successfully influenced FOMC decisions, and Fed Chairs in particular. The posture of reasonably scrupulous presidential respect for Fed independence—which today many consider a norm to have been breached by President Trump—was arguably a historical anomaly during a period covered by the presidencies of Clinton, Obama, and both Bushes. Finally, during periods of financial stress, close coordination between the Federal Reserve and Treasury has understandably been the rule, rather than the exception. Now that some of the Board’s emergency liquidity authorities require the agreement of the Secretary, that coordination has a legal, as well as practical, foundation.

II. CONSTITUTIONAL PROBLEMS

A. NON-DELEGATION

As recently as a few years ago, a non-delegation issue would not have appeared in a discussion of possible constitutional infirmities in the structure and operation of the Federal Reserve. Indeed, it would have appeared on none but the most comprehensive lists of constitutional issues associated with any agency. In his opinion for the Court in Whitman, Justice Scalia

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40. See infra notes 324–27 and accompanying text.
41. See WELLS, supra note 38, at 91–95.
42. President Biden has reverted to the practice of the four pre-Trump presidents and scrupulously avoided any public statement that might be seen as interfering with the Fed’s monetary policy independence.
44. Although the special authorities in question belong to the Board, rather than to the FOMC, decisions on use of these powers are analytically and practically related to decisions on extraordinary monetary policy action under stressed conditions.
had seemingly put to rest any lingering question as to whether a congressional grant of authority to an agency might be found to lack an “intelligible principle” and thus be an unconstitutional delegation. But Justice Gorsuch’s dissent in *Gundy v. United States*, which now appears to command the support of a majority of the Court, has raised the prospect of breathing life into the non-delegation doctrine for the first time in ninety years.

It remains to be seen whether this prospect will in fact be realized, or whether the Court will ultimately demur in the face of the same problem of defining the limits of an intelligible principle (or some other test for valid delegations) that bedeviled it for all those decades following *Schechter* and *Panama Refining*. Until the Court’s intentions become clearer, though, at least some consideration of the non-delegation issue—as expressed in Justice Gorsuch’s dissent—seems warranted in assessing the constitutional status of any agency with broad authority. The FOMC’s broad authority to decide between important, sometimes conflicting macroeconomic policy goals would certainly be implicated by any serious revival of the doctrine.

Until 1977, Congress had never articulated a standard to guide monetary policy decisions by the Federal Reserve. In the brief, but

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47. Four other Justices have expressed either sympathy or support for Justice Gorsuch’s opinion. Chief Justice Roberts and Justice Thomas joined his dissent. *Id.* Justice Alito concurred in the judgment but indicated that he would be willing to revisit the delegation doctrine. *Id.* at 2131 (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”) (Alito, J., concurring). Justice Kavanaugh, who had just joined the Court and took no part in the consideration or decision in *Gundy*, nonetheless went out of his way to indicate sympathy for the Gorsuch opinion by adding a statement to the Court’s denial of cert. in a case several months after *Gundy* was decided. *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (“Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.”) (Kavanaugh, J., concurring).


50. It is possible that the Court’s conservative majority may avoid the definitional problems inherent in a non-delegation doctrine by devising or expanding other doctrinal checks on administrative agencies. In *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), for example, the Court majority put forth a rather open-ended “major questions” doctrine that suggested there may be substantial limits on agency authority even where statutory text appears to grant broad administrative powers. While the potential reach of the doctrine is difficult to derive from Chief Justice Roberts’s opinion in *West Virginia*, the FOMC’s discretion to balance maximum employment and price stability does not appear to be a prime candidate for negation under that doctrine. Although the exercise of monetary policy is certainly important economically, and can provoke political controversy at times, the FOMC’s mandate is clear from both the text and the legislative history of the 1997 amendment to the Federal Reserve Act. In exercising this discretion, the FOMC is not invoking an old statute to justify new authority in ways unanticipated by Congress, as the Court argued the Environmental Protection Agency (“EPA”) had done in *West Virginia*.

51. The original Federal Reserve Act granted the Reserve Banks and the Board various powers and imposed various limitations on the exercise of those powers, but included no explicit standard for guiding the exercise of those powers. As to the purpose of those powers, from which such a standard
significant, Federal Reserve Reform Act of that year, Congress specified the monetary policy objectives:

The Board of Governors of the Federal Reserve System and the Federal Open Market Committee shall 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.\(^{52}\)

When assessed against the statutory standards considered in the line of decisions between *Schechter* and *Gundy*, the Federal Reserve’s “dual mandate” of maximum employment and stable prices seems unremarkable.\(^{53}\) True, Congress has given the Federal Reserve broad discretion, both to determine what “maximum employment” and “stable prices” mean in concrete terms and to strike a balance between the two objectives when they may conflict.\(^{54}\) Indeed, the genesis of the amendment was the view of many in Congress that the Federal Reserve needed to weight employment goals more substantially. However, as aptly summarized by Justice Scalia in *Whitman*,\(^{55}\) the Court has found statutes with objectives as broad as achieving the “public interest” to meet the intelligible principle test.

How, though, might the dual mandate fare if the non-delegation doctrine is put back in play? At present the best starting point for answering that question is Justice Gorsuch’s view of the limits of permissible delegations, as explained in his *Gundy* dissent. He gives us a detailed

\[^{52}\text{Federal Reserve Act, Pub. L. No. 95-188, § 202, 91 Stat. 1387, 1387 (1977) (codified at 12 U.S.C. § 225a). Section 204 of the Act required that the Chair and Vice Chair of the Board be separately nominated by the President and confirmed by the Senate for four-year terms. Id. § 204.}\]

\[^{53}\text{Although the statute apparently includes three aims, the conventional view is that because “long-term interest rates can remain low only in a stable macroeconomic environment,” Congress has in fact given the Federal Reserve a “dual” mandate. Frederic S. Mishkin, Governor, Fed. Rsv. Bd., Monetary Policy and the Dual Mandate (Apr, 10, 2007), https://www.federalreserve.gov/newsevents/speech/mishkin20070410a.htm [https://perma.cc/LDW9-2GDB].}\]

\[^{54}\text{Economists discussing central bank “independence” sometimes distinguish between “goal” independence and “instrument” independence, following the taxonomy introduced by the distinguished monetary policy economist and former central banker Stanley Fischer. Stanley Fischer, *Modern Central Banking, in The Future of Central Banking* 262, 292 (1995). Goal independence, as the term suggests, is the ability of a central bank to set its own goals, whereas instrument independence is the “discretion and power to deploy monetary policy to attain its goals.” Id. Fischer further notes that the Federal Reserve is given multiple goals, which at least in the short run may be in conflict. Id. at 265–66. Former Fed Chair Ben Bernanke characterizes the Federal Reserve as having “de facto policy independence.” BERNANKE, supra note 31, at 405.}\]

application of his position only for the Sex Offenders Registration and Notification Act ("SORNA")—the statute challenged in *Gundy*. Still, his dissent is composed mostly of criticism of the evolution of the "intelligible principle" test set forth by the Court nearly a century ago in *J.W. Hampton, Jr., & Co. v. United States* and, as such, contains an outline of what he believes to be the salient considerations in formulating a more robust test.

First, drawing from cases decided prior to *J.W. Hampton*, Justice Gorsuch identifies what he considers the three limited forms of delegation permitted by the Court until the intelligible principle test "began to take on a life of its own." Two are relevant for present purposes—"fill[ing] up the details" of a congressional policy decision and making "the application of . . . [a congressional] rule depend on executive fact-finding." The most far-reaching permissible delegation in the cases he favorably cites to illustrate these principles is found in *United States v. Grimaud*, a 1911 decision upholding a statute authorizing the Secretary of Agriculture to adopt rules regulating the "occupancy and use" of public forests to protect them from "destruction" and "depredations."

Second, after rejecting the "mutated version" of the contemporary intelligible principle doctrine, but suggesting that some cases decided under that test might "be consistent with more traditional teachings" of the nineteenth and early twentieth centuries, Justice Gorsuch enunciates something approaching a test:

To determine whether a statute provides an intelligible principle, we must ask: Does the statute assign to the executive only the responsibility to

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56. This analysis is not especially illuminating in considering regulatory delegations, insofar as it rests on Justice Gorsuch’s interpretation that SORNA authorized the Attorney General to decide which previously convicted sex offenders were subject to its terms, not just the details of how those terms would apply to all such offenders. Justice Kagan’s plurality opinion construed the Attorney General’s discretion much more narrowly, based on her conclusion that SORNA reflected a congressional decision that all prior offenders register under the Act and thus that the “Attorney General’s discretion extends only to considering and addressing feasibility issues.” *Gundy v. United States*, 139 S. Ct. 2116, 2124 (2019). Gorsuch’s interpretation that SORNA allowed the Attorney General to determine the scope of what is, in effect, a status offense set up a favorable test case for those interested in reviving the non-delegation doctrine.


58. *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting).

59. *Id.* at 2136.


61. *Gundy*, 139 S. Ct. at 2139–40 (Gorsuch, J., dissenting). Justice Gorsuch suggested that the tariff cost equalization statute at issue in *J.W. Hampton* itself might have “passed muster under the traditional tests.” *Id.* at 2139. It is unclear from his brief description whether he understood how much discretion the apparently determinate standard of “cost equalization” left to the President—so much that the President had scope for deciding whether to implement a relatively protectionist or free-trade import policy. See Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 UCLA L. REV. 285, 319–22 (1986). If so, then Justice Gorsuch’s contemplated revival of the non-delegation doctrine would likely pose less of a threat to the Administrative State than some have feared.
make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments? Only then can we fairly say that a statute contains the kind of intelligible principle the Constitution demands. 62

At first glance, application of this test would suggest significant, if not major, problems for the Federal Reserve Act. While the Federal Reserve’s dual objectives of stable prices and maximum employment often call for the same policy response, the most important decisions occur precisely at moments when those objectives are in actual, or at least arguable, conflict. Thus, monetary easing was obviously indicated in 2009, when employment was well below anyone’s estimate of its “maximum” levels, and it was the risk of deflation that threatened price stability. But the two objectives were in at least short-term conflict in the early 1980s, when unemployment and inflation were both well above historical levels. Less dramatically, in the recent past there has been vigorous debate both within the FOMC and among outside commentators as to how quickly monetary policy should be eased to reduce the risk of a future recession, as opposed to maintaining a more restrictive policy in order to guard against inflation reaccelerating. 63 For these latter two instances, Congress did not provide a standard to guide the Federal Reserve in making the policy judgment either to maintain an accommodative monetary policy to foster higher employment at the risk of continued price instability, or instead to tighten policy to restrain inflation at the risk of lowering achievable levels of employment in the near to medium term.

Despite this ostensible inconsistency of the FOMC’s policy discretion with Justice Gorsuch’s provisional test for constitutional delegations, the wording of his summary of “traditional teachings” 64 on the subject might be read to suggest that the dual mandate could fall on the permissible side of that yet-to-be-well-defined line. In stating the “fill up the details” and “executive fact-finding” forms of acceptable delegations, he refers

62. Gundy, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).
63. In fact, monetary policy debates can be even more complicated. Through much of 2021, for example, most members of the FOMC opined that the inflationary spike would prove transitory after the supply shocks associated with COVID-19 abated, and thus the apparent conflict between the two sides of the FOMC’s dual mandate was illusory. Jerome H. Powell, Chair, Fed. Rsrv. Bd., Monetary Policy in the Time of COVID (Aug. 27, 2021), https://www.federalreserve.gov/newsevents/speech/powell20210827a.htm [https://perma.cc/QA39-HNZL]. Conversely, quite a number of non-FOMC observers anticipated that COVID-induced constraints on both supply and demand meant that inflation would continue. These kinds of debates over evaluation of the state of the economy invariably slide into policy choices. Olivier Blanchard, In Defense of Concerns Over the $1.9 Trillion Relief Plan, PETE RSON INST. FOR INT’L ECON BLOG (Feb. 18, 2021, 5:15 AM), https://www.piie.com/blogs/realtime-economics/defense-concerns-over-19-trillion-relief-plan [https://perma.cc/5XMD-2YNF].
64. Gundy, 139 S. Ct. at 2140 (Gorsuch, J., dissenting).
respectively to statutes “regulating” and “governing” private conduct. One might draw from this formulation the negative inference that delegations not involving the regulation of private conduct are less constrained by constitutional considerations. As explained in the discussion of standing doctrine in Section III.B., the FOMC’s monetary policy does not “regulate” or “govern” private conduct—at least not directly. Monetary policy is executed through trading in government securities and adjustments in the interest rates the Federal Reserve itself pays on bank reserves and short-term borrowing from certain classes of non-bank financial firms. So perhaps it would fit within what at this moment remains an inchoate possible exception to the Gorsuch test for impermissible delegations.

At present, of course, there is no way to know if this distinction is one that Justice Gorsuch means to be significant. If so, there is something peculiar about the outcome: delegation to the FOMC of authority to balance growth and price stability goals for the entire country through massive open market purchases and sales of government debt could be acceptable, while determinations by the War Department under a statutory standard allowing the government to recover “excessive profits” from military contractors during the Second World War might not be.

Still, Justice Gorsuch’s emphasis in Gundy on the delegation doctrine’s role in preserving “liberty” at least mildly supports this reading. He asserts that the non-delegation doctrine springs from the framers’ belief that the “new federal government’s most dangerous power was the power to enact laws restricting the people’s liberty,” and that it is “one of the most vital of the procedural protections of individual liberty found in our Constitution.”

More importantly, perhaps, this distinction aligns with standing doctrine. As explained later in this Article, plaintiffs challenging the constitutionality of the FOMC have generally been denied standing, at least in part because the

65. Id. at 2136 (emphasis added). Four of the five cases he cites as examples clearly involved government regulation of private conduct. The fifth involved delegation of the federal courts to adapt state law procedures in hearing common law cases for which state law provided the rule of decision. Wayman v. Southard, 23 U.S. 1, 31, 43 (1825). While not the typical way in which the government regulates private conduct, the case involved execution of a judgment in a private dispute and thus did result in a judgment affecting the rights of private parties.

66. The excessive profits case is Lichter v. United States, 334 U.S. 742 (1948), criticized by Justice Gorsuch as one in which the “intelligible principle” standard was misleadingly argued as controlling. Gundy, 139 S. Ct. at 2139 n.60 (Gorsuch, J., dissenting). He is unclear as to whether he believes the result to have been incorrect, but the Lichter Court does indeed appear to rely on J.W. Hampton, Lichter, 334 U.S. at 785 (citing J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928)), and Justice Gorsuch does not include the case as one that would have been correct under “traditional teachings.”

67. Like other of his conservative colleagues on the Court, Justice Gorsuch seems to regard corporate profits as a “liberty” interest rather than a property interest.

68. Gundy, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

69. Id. at 2145.
FOMC did not take any action specifically and directly affecting them. Similar reasoning might lie behind a delegation doctrine that applied most stringently to rules directly regulating the conduct of citizens.

Finally, it is perhaps worth noting that Congress could, if it were so inclined, legislate a monetary policy goal that would come closer to, if not meet, the embryonic test for permissible delegations set forth by Justice Gorsuch in *Gundy*. This possibility might affect the disposition of the Court majority associated with that opinion to conclude that current law failed that test. However, as a practical matter, Congress could do so only if it embraced a conservative monetary policy. To see why, it is necessary to understand at least the broad strokes of two longstanding, and sometimes conflated, debates among monetary policy economists and practitioners concerning the desirability of monetary policy rules.

The first is whether a dual mandate is appropriate, as opposed to a single mandate instructing a central bank to pursue price stability. One traditional position in this debate begins from the premise that monetary policy cannot itself expand the productive potential of the economy, which is determined by structural features such as productivity gains and the efficiency of labor markets. Hence, those taking this position argue, central bank attention to employment is at best inefficacious and at worst inflationary. The second debate is whether, assuming that monetary policy should have only a single objective, that objective should be expressed as a quantified benchmark to guide the central bank. In the past, advocates for this position urged the adoption of a target for the growth of the money supply. While a monetary aggregate target is embraced by relatively few contemporary economists and policymakers, there is considerably more support for an inflation target. Indeed, many major central banks have, as a formal matter, only the single mandate of price stability. And some of those are given a quantified inflation target by their governments.\(^\text{70}\)

Were the Federal Reserve Act amended to establish a single mandate— instructing the FOMC to target, say, 2% inflation—it would fit much more comfortably into Justice Gorsuch’s comments on acceptable delegations.\(^\text{71}\)

\(^\text{70}\). For example, the European Central Bank and the Bank of England have the single mandate of price stability. The Bank of England is given its target by the government, while the European Central Bank can—like the Federal Reserve, set its own target. As a practical matter, there may actually be a good bit of flexibility in their implementation of their mandates, allowing them to take account of growth and employment considerations. See, e.g., David Miles, Inflation, Employment, and Monetary Policy: Objectives and Outcomes in the UK and U.S. Compared, 46 J. MONEY, CREDIT & BANKING 155, 155 (Supp. II 2014).

\(^\text{71}\). In its early years the Federal Reserve did not conduct a monetary policy as we would recognize that function today. Furthermore, in providing an “elastic currency,” the Fed was constrained by the legal obligation created in § 16 of the Federal Reserve Act to convert its notes into gold upon demand. Until
Congress would have made the key policy “judgment” that the country should be aiming for 2% inflation. The FOMC, at least in theory, would not need to balance that policy against other policy aims. Instead, it would be doing something closer to Gorsuch’s “executive fact-finding.” Is inflation materially over (or under) 2%? Or, a bit more subtly, are economic conditions such that inflation is likely to deviate significantly from that target in the coming months unless monetary policy is adjusted?

The problem, of course, is that this more confined delegation is possible only if Congress makes the policy decision to elevate a price stability goal above employment and growth goals. But what if Congress takes one of the other sides in the long-running debates over monetary policy? A majority of legislators might, for example, agree with economists who believe that an exclusive focus on price stability may, under some economic conditions, allow hysteresis effects to take hold—that is, the persistent shortfall in aggregate demand will negatively affect the production potential of the economy. As a result, those holding this position believe an insufficiently accommodative monetary policy during recessions may reduce maximum achievable employment over the medium term. Similarly, legislators might believe that some inflationary (or disinflationary) bursts have idiosyncratic causes that will abate without leading to sustained upward pressure on

President Roosevelt took the United States off the gold standard in 1934, this requirement limited the Federal Reserve’s capacity to create money. 72. Hysteresis effects occur if a persistent shortfall in aggregate demand negatively affects the production potential of the economy. The hypothesis of hysteresis effects is contrary to the traditional economic view that there is a natural rate of output and unemployment that demand management does not change. The concept is still a contested one in economics, though prominent economists—including a Chair of the Federal Reserve—have suggested that economic performance in the aftermath of the Global Financial Crisis supports it. See Janet L. Yellen, Chair, Fed. Rsvr. Bd., Macroeconomic Research After the Crisis, Remarks at “The Elusive ‘Great’ Recovery: Causes and Implications for Future Business Cycle Dynamics” 60th annual economic conference sponsored by the Federal Reserve Bank of Boston (Oct. 14, 2016), https://www.federalreserve.gov/newsevents/speech/yellen20161014a.htm [https://perma.cc/6XUU-VWGL]. For a recent examination of the evidence for hysteresis, see generally Francesco Furlanetto, Antoine Lepetit, Orjan Robstad, Juan Rubio-Ramirez & Pal Ulvedal, Estimating Hysteresis Effects (Divs. of Rsch & Stats. and Monetary Affs. Fed. Rsvr Bd., D.C., Working Paper 2021-059, 2021), https://www.federalreserve.gov/econres/feds/files/2021059pap.pdf [https://perma.cc/GPP5-44J4]. If hysteresis is present, it has important implications for monetary policy:

To the extent that hysteresis is present, it implies that deviations in output from its optimal level are much longer-lasting and thus more costly than usually assumed. The implication is straightforward, namely that monetary policy should react more strongly to output movements, relative to inflation. For example, by being more aggressive early on, this would reduce the increase in unemployment, and by implication, reduce the increase in the number of long term unemployed. It also implies that stabilizing inflation is definitely not the optimal policy: to the extent that an increase in actual unemployment leads to an increase in the natural rate, the unemployment gap, and by implication inflation, will give a misleading signal about the degree of underutilization of resources in the economy.

overall price levels. Under these circumstances, forcing central banks to raise interest rates to dampen demand and thus relieve inflationary pressures would be unnecessary to maintain price stability, but damaging for short-term employment and growth.

As these two examples illustrate, it would be quite rational for Congress to conclude that a single-minded focus on achieving 2% inflation in all circumstances would be suboptimal policy. Further, Congress might recognize the impracticality of trying to specify in advance all situations in which deviation from the target would be desirable, or of itself revisiting the inflation target whenever economic conditions seem to be changing. But if one formulation of Justice Gorsuch’s limited view of permissible delegations is to be taken at face value, Congress would not be able to delegate this policy preference for balancing higher inflation against higher unemployment within a particular configuration of economic circumstances.73

B. APPOINTMENT AND REMOVAL

There are distinct constitutional issues raised by the structure of the FOMC and its constituent entities—one pertaining to the Board and others to the Reserve Bank presidents. The former is not specific to the Board, since it involves the broader question of whether the Court might abandon nearly ninety years of precedent and find traditional multi-member agencies with for-cause removal protection to be unconstitutional. The other issues, though, are very much specific to the unique status of Reserve Bank presidents in the American administrative landscape. Precisely because the status and role of Reserve Bank presidents differ so much from those of the officials at issue in the Court’s recent appointments and removal cases, the analysis here is necessarily not a straightforward application of the doctrines enunciated in those opinions. But it does not require a bold extrapolation of their analyses to conclude that, in their monetary policy capacity, the presidents are principal officers under the Constitution. If that is the case, the structure of the FOMC is unconstitutional because the Reserve Bank presidents are not nominated by the President and confirmed by the Senate.

73. Even a single mandate with a specified inflation target may give a central bank considerable discretion. A central bank can, for example, plausibly indicate that it is focused on medium term price stability, since monetary policy operates only with variable lagged effects on the real economy, some of which are difficult to estimate with precision. A central bank might decide, for example, to begin raising rates even though current inflation is at target (or, conversely, to lower rates even though current inflation is above target). Much depends on the central bank’s analysis of where the economy is headed given current macroeconomic conditions and forces.
1. Removal of Members of the Board of Governors

As with application of the delegation doctrine to monetary policy, the for-cause removal protection afforded members of the Board by the Federal Reserve Act would until recently not have been thought much of an issue at all.⁷⁴ And perhaps it will prove not to be one. But, just as Justice Gorsuch’s dissent in Gundy raises the possibility that the Court may depart from its longstanding accommodating view of the delegation doctrine, so Chief Justice Roberts’s majority opinion in Seila Law⁷⁵ raises the possibility that the Court may upend the traditional understanding that Humphrey’s Executor v. United States⁷⁶ sanctions for-cause removal protection for principals of independent multi-member agencies such as the Federal Trade Commission (“FTC”) and the Federal Communications Commission (“FCC”).

Seila Law involved a constitutional challenge to the structure of the CFPB. Congress established the CFPB with a single director appointed for a five-year term and removable only for cause. In his majority opinion holding this structure unconstitutional, Chief Justice Roberts neither had to, nor did, address directly whether the contemporary form and authority of multi-member independent agencies raise constitutional concerns. In his opinion a decade earlier in Free Enterprise Fund⁷⁷ he had simply left Humphrey’s Executor aside.⁷⁸ In Seila Law, however, he went out of his way to characterize that case as an “exception” to the general rule of broad removal authority that he believes Myers v. United States⁷⁹ had created. While he

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⁷⁴. The Federal Reserve Act states that Members of the Board shall serve a fourteen-year term “unless sooner removed for cause” by the President. 12 U.S.C. § 241. This language differs from the “inefficiency, neglect of duty, or malfeasance in office” language used in both the legislation creating the CFPB and in the original Federal Trade Commission Act, which was essentially contemporaneous with the Federal Reserve Act. Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 718 (1914) (codified at 15 U.S.C. § 41 (2018)). Jane Manners and Lev Menand suggest that, if anything, the “for cause” formulation gives the President a somewhat wider scope for removal than does “inefficiency, neglect of duty, or malfeasance in office.” Jane Manners & Lev Menand, The Three Permissions: Presidential Removal and the Statutory Limits of Agency Independence, 121 COLUM. L. REV. 1, 63 n.36 (2021). It seems unlikely that this difference would affect the current Court’s consideration of the issue. Its opinions in Free Enterprise, Seila Law, and Collins v. Yellen have certainly said nothing to suggest so.


⁷⁸. Id. at 483. In fact, Chief Justice Roberts described Humphrey’s Executor as indicating that the removal power fashioned in Myers v. United States, 272 U.S. 52 (1926), was “not without limit” and “that Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause.” Id. at 479.

⁷⁹. Myers, 272 U.S. at 127.
affirmed that “we do not revisit Humphrey’s Executor or any other precedent today,”80 his opinion suggests that the “exception” it created might be a fairly narrow one. If so, the reach of that precedent may be considerably less than has been widely assumed for decades.

In defining the scope of the Humphrey’s Executor “exception” to the Myers rule, Chief Justice Roberts emphasized what he took to be the narrow reading of the FTC’s authority given by the Court in that case. Specifically, he noted that the Humphrey’s Executor Court described the FTC as possessing legislative and judicial powers, not executive power. He went on to point out that the Court had explicitly abandoned that view in Morrison v. Olson81 and left readers to draw the inference that the rationale for Humphrey’s Executor is no longer valid. The Chief Justice further maintained that the Humphrey’s Executor Court had a more circumscribed view of the FTC’s authority than is associated with it (and many other agencies) today.82 Especially since none of this was necessary to decide whether the single-headed CFPB was constitutional, one finishes reading his depiction of the Humphrey’s Executor exception with at least some doubt as to whether it covers the modern-day FTC or other influential agencies.83

These doubts are strengthened by the way in which the Chief Justice frames the question of the CFPB’s constitutionality. He quotes some of the broadest statements from Chief Justice Taft’s opinion in Myers on the need for the President to be able to control those executing the laws, in order to fulfill the President’s own duty to see that the laws are faithfully executed.84 Furthermore, in drawing a sharp contrast between the powers of the CFPB

82. Seila Law, 140 S. Ct. at 2215 (demonstrating the FTC was understood by the Humphrey’s Executor Court as acting “as a legislative agency in ‘making investigations and reports’ to Congress and ‘as an agency of the judiciary’ in making recommendations to courts as a master in chancery”). The Chief Justice dismissed Justice Kagan’s objection that the FTC in the 1930s actually had more far-reaching powers by stating that “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.” Id. at 2200 n.4.
83. In his opinion concurring in the non-remedial parts of the Chief Justice’s opinion, Justice Thomas—joined by Justice Gorsuch—said as much: “But with today’s decision, the Court has repudiated almost every aspect of Humphrey’s Executor.” Seila Law, 140 S. Ct. at 2212 (Thomas, J., concurring in part and dissenting in part). Also, in his D.C. Circuit opinions, then-Judge Kavanaugh had noted there was a “strong argument” that independent agencies violate Article II. PHH Corp., 881 F.3d at 179 n.7 (Kavanaugh, J., dissenting); PHH Corp., 839 F.3d at 34 n.15. It was only his understanding (and that of most other people prior to Seila Law) that Humphrey’s Executor established the constitutionality of the traditional independent agencies whose members enjoy for-cause removal protection that forced him—as a lower court judge—to distinguish the CFPB from those agencies.
84. Seila Law, 140 S. Ct. at 2213.
and those of the FTC in the 1930s—or at least those he believes the Myers Court understood the FTC to have—Chief Justice Roberts indirectly suggests there may be constitutional problems with the modern administrative agencies:

[T]he CFPB Director is hardly a mere legislative or judicial aid. Instead of making reports and recommendations to Congress, as the 1935 FTC did, the Director possesses the authority to promulgate binding rules fleshing out 19 federal statutes, including a broad prohibition on unfair and deceptive practices in a major segment of the U.S. economy. And instead of submitting recommended dispositions to an Article III court, the Director may unilaterally issue final decisions awarding legal and equitable relief in administrative adjudications. Finally, the Director’s enforcement authority includes the power to seek daunting monetary penalties against private parties on behalf of the United States in federal court—a quintessentially executive power not considered in Humphrey’s Executor.85

Had the Chief Justice wanted only to emphasize the anti-novelty principle86 he had invoked in Free Enterprise, he need not have focused on the authorities of the agency itself, but only their concentration in a single director. It is possible that, in adding this color about the CFPB’s authority, Chief Justice Roberts was simply looking to buttress rhetorically his rather formalistic argument later in the opinion that “[a]side from the sole exception of the Presidency, [the constitutional] structure scrupulously avoids concentrating power in the hands of any single individual.”87 Indeed, the Chief Justice does not make clear whether Myers principles, novelty, and inconsistency with his political theory of American government are each sufficient grounds for the Seila holding. But, as Justice Thomas observed in his separate opinion, “with today’s decision, the Court has repudiated almost every aspect of Humphrey’s Executor.”88 Given the Chief Justice’s proclivity for step-by-step, rather than sweeping, undoing of longstanding constitutional doctrine, it is conceivable that in a head-on challenge to a contemporary “multimember body of experts, balanced along partisan lines,”89 he would find that the modern FTC does exercise “executive power” and thus falls outside his interpretation of the Humphrey’s Executor “exception.”

85. Id. at 2200.
86. For a review and critique of the apparent view of a Court majority that novelty in a statute implicating federalism or separation of powers concerns is constitutionally suspect, see Leah M. Litman, Debunking Antinovelty, 66 DUKE L.J. 1407, 1407 (2017).
87. Seila Law, 140 S. Ct. at 2202.
88. Id. at 2212 (Thomas, J., concurring in part and dissenting in part).
89. Id. at 2199 (majority opinion).
While the members of the Board of Governors in their FOMC roles may not exercise these kinds of powers, they (and not the Reserve Bank presidents) have broad statutory authority to regulate banking organizations that, if anything, exceeds the powers of the CFPB described in the above quote. Were the Court to take the step hinted at by Chief Justice Roberts and urged by Justice Thomas, and invalidate for-cause removal protection for the principals of a multi-member agency that exercises executive authority, the Board of Governors would join many other agencies in the crosshairs of ensuing constitutional challenges.

2. The Status of Reserve Bank Presidents

Up until the last several years, few would have thought there was even a modicum of doubt about the constitutionality of the delegation of monetary policy under the Federal Reserve Act, or for-cause removal protection afforded the members of the Board. In contrast, at least since the 1935 legislation that established the current structure of the Federal Reserve, both the constitutionality and the policy merits of participation by Reserve Bank presidents on the FOMC have periodically become live topics for debate. Various plaintiffs have challenged their constitutional status, although no appellate court has yet reached the merits. (As discussed below, two district courts have). Although some commentators find the analysis and conclusion of unconstitutionality straightforward, the unique configuration of the Federal Reserve makes application of structural constitutional precedents developed in other contexts somewhat inexact.

The basic issue, and the complexities attending it, arise from the fact that the Reserve Bank presidents are not employees of the U.S. government. They are hired as chief executives of the congressionally-created but nongovernmental Reserve Banks by the private boards of directors of those...
Banks. Yet five of them vote on the committee to which Congress has delegated monetary policy. For this arrangement to be constitutional, they must either be “officers” of the United States appointed in conformity with Article II requirements or nongovernmental actors whose participation in policymaking can pass muster under the private non-delegation doctrine enunciated in *Carter v. Carter Coal*. As was evident in *Department of Transportation v. Association of American Railroads*, decided only a decade ago, there is not likely to be much receptivity in the current Court to the latter rationale.

If the Reserve Bank presidents are officers of the United States, they must be appointed by one of the two routes laid out in Article II. Because they are not nominated by the President and confirmed by the Senate, they must both qualify as “inferior” officers and be appointed by a “Head of Department.” Because, at least since *Edmond v. United States*, the determination of whether officers are inferior is bound up with the question of how they can be removed, the constitutional issues pertaining to appointment and removal are closely related.

A good point of reference for considering these questions is a 2019 opinion of the Office of Legal Counsel (“OLC”). This opinion, which was occasioned by the introduction of a bill that would have made all Reserve Bank presidents voting members of the FOMC, concluded after careful analysis that the participation of Reserve Bank presidents on the FOMC was constitutional because they were inferior officers appointed, and removable, by the Board. As we will see, reaching this conclusion took some doing. Moreover, the Court’s subsequent decisions in *Seila Law* and *Arthrex* have arguably attenuated further the weaker links in OLC’s reasoning, though it is difficult to say by how much.

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i. Reserve Bank Presidents as “Officers of the United States”

As the Court itself observed in *Lucia v. SEC*, the standard that an officer of the United States is an official who “exercis[es] significant authority pursuant to the laws of the United States” has not been much developed since it was enunciated in *Buckley v. Valeo* nearly fifty years ago. OLC reasoned that the FOMC meets the *Buckley* standard because it “sets the government’s monetary policy by ordering open-market transactions on the government’s behalf, which is ‘the most important monetary policy instrument’ of the United States.” OLC also cited the FOMC’s power to issue binding rules, a factor that appeared to have influenced the Court in *Buckley*.

On the face of it, conducting monetary policy through the power delegated to the FOMC in the Federal Reserve Act seems an exercise of authority more significant than that possessed by most other officers in the U.S. government. If anything, OLC understated its significance in pointing to the FOMC’s authority to order the Federal Reserve Bank of New York to buy or sell government securities in order to implement monetary policy. When the Federal Reserve buys Treasuries from the market in order to increase demand and thus lower the interest rate on this risk-free asset, it does not fund the transaction as a private bond trader would—by using existing assets to purchase the bonds. Instead, the Federal Reserve creates the money it uses to buy the bonds through increasing the reserve balances of the correspondent banks of the dealers that sell those bonds. Understood in these terms, the FOMC’s power to order the purchase of bonds is a direct exercise of the sovereign authority to create money.

Are there any countervailing arguments? Perhaps the Court would look differently upon the FOMC because it does not bind private parties in ways comparable to the actions of the tax court judges, administrative law judges, Federal Election Commission members, and Public Company Accounting Oversight Board members who have been treated as officers in previous decisions. Indeed, the rulemaking function of the FOMC cited by OLC

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100. *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, as recognized in *Ams. for Prosperity v. Grewal*, 2019 WL 4855853 (D.N.J. Oct. 2, 2019). A much older case, United States v. Germaine, 99 U.S. 508 (1878), had established that someone must occupy a “continuing,” and not temporary, position in order to be an officer of the United States. *Id.* at 511–12. OLC quite reasonably concluded that, even though most Reserve Bank presidents serve as voting members of the FOMC for only one year at a time, they still meet the *Germaine* standard because the voting slots for Reserve Bank presidents are permanent, even though the individuals filling those slots may rotate. 43 Op. O.L.C., *supra* note 97, at 7.
102. *Id.* (citing *Buckley*, 424 U.S. at 141).
103. *Id.*
mostly binds parts of the Federal Reserve System itself. While this point does echo a distinction suggested in Justice Gorsuch’s Gundy dissent, there is little in any of the cases just noted to suggest that this distinction makes a difference. Nor do the alternative formulations for determining officer status suggested by the concurring and dissenting Justices in Lucia support such a distinction. It seems likely, then, that the Court would find Reserve Bank presidents to be officers of the United States.

ii. Inferior or Principal Officers

As is already apparent, there is some uncertainty around how precedents derived in other contexts would be applied by the Court in considering the constitutionality of the Federal Reserve. The question of whether the Reserve Bank presidents are inferior officers is easily the most nettlesome of all, owing both to the idiosyncrasies of the Federal Reserve structure and to the fact that the line of relevant Supreme Court cases has generally involved officials acting in an adjudicatory capacity. OLC concluded they were, but in doing so appeared to elide some salient considerations. A recent district court case also concluded that a Reserve Bank president was an inferior officer, but outside the monetary policy context. As this section will show, there is a respectable argument that, extending the reasoning of recent opinions by members of the conservative majority, the Reserve Bank presidents are principal officers, at least for purposes of monetary policy.

OLC applied the test put forth by Justice Scalia in the first of those cases, Edmond: an inferior officer is one “whose work is directed and supervised at some level” by an officer who was nominated by the President.

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104. See 43 Op. O.L.C., supra note 97, at 7. The FOMC does issue rules governing public access to its proceedings, 12 C.F.R. §§ 271.1–9, but these regulations do not “bind” third parties in the way that the Federal Election Commission’s requirements for reporting of campaign contributions binds those who have received the contributions.

105. Justice Thomas, joined by Justice Gorsuch, reiterated his far-reaching position that any official “with responsibility for an ongoing statutory duty” is an officer subject the Appointments Clause. Lucia v. SEC, 138 S. Ct. 2044, 2056 (2018) (Thomas, J., concurring) (quoting NLRB v. SW General, Inc., 137 S. Ct. 929, 946 (2017) (Thomas, J., concurring)). That formulation would seem clearly to embrace all members of the FOMC. In dissent, Justice Sotomayor, joined by Justice Ginsburg, proposed refining the “significant authority” test so as to limit the universe of officers to officials with “the ability to make final, binding decisions on behalf of the Government.” Id. at 2065 (Sotomayor, J., dissenting). Narrower though her recommended standard may be, it would still seem to cover the FOMC, which makes the final decision on the open market purchases that influence interest rates. Her contrast of officers with “a person who merely advises and provides recommendations to an officer” surely does not describe Reserve Bank presidents who vote in the FOMC (though it might describe the presidents in the years in which they participate, but are not voting members). Id.

and confirmed by the Senate.\textsuperscript{107} OLC acknowledged that “the FOMC, as a body, has final authority over open-market operations.” But, specifically citing Justice Scalia’s “at some level” language in \textit{Edmond}, as well as his observation that the “power to remove . . . is a powerful tool for control,”\textsuperscript{108} OLC relied heavily on the statutory authority of the Board to remove Reserve Bank presidents for its conclusion that they were inferior officers.\textsuperscript{109} It did not invoke the provisions of the Federal Reserve Act giving the Board broad authority over Federal Reserve Banks,\textsuperscript{110} presumably because the presidents act in a different capacity on the FOMC than as chief executives of their Banks.

Before assessing whether the at-will removal power of the Board is enough to make the presidents inferior officers, we must address the threshold question of whether the Federal Reserve Act actually grants this power. As OLC noted, the same statutory provision that creates the removal authority goes on to require that “the cause of such removal [must] . . . be forthwith communicated in writing by the Board . . . to the removed officer or director and to said bank.”\textsuperscript{111} The question is whether the requirement to communicate “the cause” should be read to restrict the Board’s discretion, just as it would be if the language paralleled that applicable to the Board—with a specified term of office “unless sooner removed for cause by the President.”\textsuperscript{112} OLC concluded that it did not, citing four reasons: the meaning of “cause” in the context of a reporting requirement; what OLC characterized as the “default rule that the appointing authority retains plenary removal authority”; the existence of “many statutes” that “parallel” the requirement of a communication of reasons; and the principle of constitutional avoidance.\textsuperscript{113}

At the time the opinion was issued, one might have wondered whether OLC’s assertion of the default rule proposition reflected Executive Branch bias toward presidential prerogative. The Court’s subsequent opinion in

\textsuperscript{107} \textit{Edmond}, 520 U.S. at 662–63.
\textsuperscript{108} \textit{Id.} at 664.
\textsuperscript{109} 43 Op. O.L.C., supra note 97, at 11. OLC characterized the Board’s removal power as “at will.” \textit{Id.} The relevant language of the Federal Reserve Act is at least slightly ambiguous: “The Board . . . shall be authorized and empowered . . . [t]o suspend or remove any officer or director of any Federal reserve bank, the cause of such removal to be forthwith communicated in writing by the Board of Governors of the Federal Reserve System to the removed officer or director and to said bank.” 12 U.S.C. § 248(f).
\textsuperscript{110} The Act gives the Board seemingly plenary power to “exercise general supervision over said Federal reserve banks,” 12 U.S.C. § 248(j), as well as specific powers, such as to examine “the accounts, books, and affairs of each Federal reserve bank,” \textit{id.} § 248(a)(1), and suspend, liquidate or reorganize the banks, \textit{id.} § 248(h).
\textsuperscript{111} \textit{Id.} § 248(f).
\textsuperscript{112} \textit{Id.} § 242.
\textsuperscript{113} 43 Op. O.L.C., supra note 97, at 11–12.
Seila Law, with its full-throated reaffirmation of much of the Myers reasoning, has certainly strengthened the OLC conclusion. Given that rule, OLC’s related argument of constitutional avoidance seems fairly well-grounded. So too, the Court’s endorsement of that rule strengthens an already plausible argument that a requirement to communicate “the cause” does not carry the term-of-art meaning of “for cause” elsewhere in the statute. So, the OLC’s conclusion that clear statutory language will be required by the current Court before it recognizes “for-cause” protection seems a reasonable prediction.114

Turning back to the inferior vs. principal officer issue, it is not obvious that a principal’s removal power is always sufficient to establish inferior status. While Justice Scalia’s majority opinion in Edmond clearly elevated the “directed and supervised” standard above other factors that had been considered in past cases, it did not specify that the removal power was dispositive. The Coast Guard judges at issue in that case were removable by the Judge Advocate General, though not in an effort to change the outcome in any specific case, and Justice Scalia noted the importance of that fact.115 He went on to cite two other ways in which the work of the judges was “directed and supervised.” One was that the Judge Advocate General set the rules of procedure and formulated policies for reviews of court-martial cases.116 The other was that the judges had “no power to render a final decision on behalf of the United States” because of an explicit, if somewhat

114. Less supportive of its conclusion are the other statutes cited by OLC, insofar as they do not use the term “cause” at all. Instead, they require that in removing the officer in question, the President communicate the “reasons for any such removal” to Congress. The statutes cited by OLC are Director of Operational Test and Evaluation in the Defense Department, 10 U.S.C. § 139(a)(1); Inspector General of the State Department, 22 U.S.C. § 3929; and Archivist of the United States, 44 U.S.C. § 2103(a). The three statutes use the same formulation: “The [Officer] may be removed from office by the President. The President shall communicate the reasons for any such removal to” either “both Houses” or “each House” of Congress. These cases do not contradict the OLC conclusion, but they do not support it either. Additionally, the only court to have considered the issue read the Federal Reserve Act as providing for-cause removal protection for the presidents. Melcher v. Fed. Open Mkt. Comm., 644 F. Supp. 510, 511 (D.D.C. 1986), aff’d on other grounds, Melcher v. Fed. Open Mkt. Comm., 836 F.2d 561, 561 (D.C. Cir. 1987). However, the persuasiveness of that opinion is questionable, both because its judgment was upheld by the Court of Appeals on other grounds and because the district court never addressed the fact that “cause” was used in a reporting context, rather than explicitly as a qualification on removal. The Court reasoned as follows:

The statutes governing the FOMC contain no suggestion that the Governors may supervise or otherwise influence the policy choices of the Reserve Bank members. Similarly, not even a hint of a suggestion exists that the power of the Board of Governors to remove officers of the Federal Reserve Banks was meant to be used by the Board to influence the votes of those officers who sit with them as members of the FOMC. To the contrary, the power of removal granted by 12 U.S.C. § 248(f) was to facilitate only the suspension or removal of Federal Reserve Bank officers for cause, a mechanism undoubtedly meant to encompass such infractions as misfeasance in office, but not a policy disagreement.

116. Id. at 664.
complicated, system of review within the military justice system.\textsuperscript{117}

The inference one might draw from \textit{Edmond} that removability alone may not be enough was modestly strengthened by the Court’s ruling in \textit{Free Enterprise Fund}. There the Court ruled that the members of the Public Company Accounting Oversight Board were inferior officers both because it had invalidated their for-cause removal protection and because of “the Commission’s other oversight authority.”\textsuperscript{118}

The importance of one of Justice Scalia’s other factors for determining inferior status—the inability to “render a final decision on behalf of the United States”—has increased following the Court’s decision in \textit{Arthrex}, which came nearly two years after the OLC opinion. It was precisely the “unreviewable authority wielded by [Administrative Patent Judges]” that the Court found “incompatible with their appointment by the Secretary to an inferior office.”\textsuperscript{119} The removal authority of the relevant principal officer was more circumscribed than in \textit{Edmond}: while Administrative Patent Judges (“APJs”) could be removed from serving on future review panels, they had for-cause protection from being fired from federal service entirely.\textsuperscript{120} It is not clear whether the Court would have found an unrestricted removal authority enough to offset the fact that the agency principal would still have had “no means of countermanding the final decision already on the books.”\textsuperscript{121} But Chief Justice Roberts’s choice of remedy suggests it would not have ruled differently. Rather than making the power to remove APJs explicitly plenary, the Court required that—contrary to the statutory scheme—the Director of the Patent and Trademark Office (the relevant principal officer) have discretion to review every decision made by the APJs.\textsuperscript{122}

Perhaps because the Court was so closely divided, Chief Justice Roberts made clear that “we do not address supervision outside the context of adjudication.”\textsuperscript{123} This remark underscores the uncertainty as to how the Court might apply principles developed in an adjudicatory context to other kinds of officers. Still, it helps identify the part of the OLC opinion that was necessarily the most speculative. OLC was aware of the difference in functions between FOMC members and the officials in prior cases. It

\begin{itemize}
\item \textsuperscript{117} \textit{Id.} at 665.
\item \textsuperscript{120} \textit{Id.} at 1982.
\item \textsuperscript{121} \textit{Id.}
\item \textsuperscript{122} \textit{Id.} at 1986–88.
\item \textsuperscript{123} \textit{Id.} at 1986. How much weight attaches to any part of Chief Justice Roberts’s opinion in \textit{Arthrex} remains to be seen. The Court was split 5–4 on both the merits and the remedy, with the Chief Justice the sole affirmative vote for both parts of his opinion.
\end{itemize}
“recognize[d] that Reserve Bank FOMC members have voting power on a body that is empowered to make final decisions on behalf of the federal government.”

In opining that they were nonetheless inferior officers, OLC doubled down on its removal argument: “The Board’s ability to supervise Reserve Bank FOMC members through the removal authority means that Reserve Bank members would have remained inferior officers, even if H.R. 6741 had made them a majority on the FOMC.”

In support of its conclusion, OLC cited a 2012 Court of Appeals case that, like Edmond and Arthrex, involved an adjudicatory function. In Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board, the D.C. Circuit had ruled that “[w]ith unfettered removal power, the Librarian [of Congress] will have the direct ability to ‘direct,’ ‘supervise,’ and exert some ‘control’ over the Judges’ decisions,” even though “individual CRJ decisions will still not be directly reversible.” Whether this precedent remains a good one after Arthrex is at least questionable (again, the apparently dissimilar removal powers in the two cases leaves us without a clear answer). Even before Arthrex was decided, however, Intercollegiate would have been less than a complete answer to the “directed and controlled” issue in the significantly different context of the FOMC—one in which supposed inferior officers vote for final government decisions on the same committee with principal officers.

For similar reasons, a district court’s recent holding in Custodia Bank, Inc. v. Federal Reserve Board of Governors that a Reserve Bank president is an inferior officer provides at best limited support for the OLC conclusion. This case involved not monetary policy, but a determination by the Federal Reserve Bank of Kansas City not to grant a “master account” at the Federal Reserve to a financial institution. Although the Court’s analysis was brief, it referred both to the Board’s appointment and removal powers and

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125. Id.
128. Id. at 1180–81. An account of this sort is necessary for a financial institution to access the payments system, and certain other services, operated by the Federal Reserve. See MARC LABONTE, CONG. RSCH. SERV., IN12031, FEDERAL RESERVE: MASTER ACCOUNTS AND THE PAYMENT SYSTEM (2022), https://crsreports.congress.gov/product/pdf/IN/IN12031 [https://perma.cc/6YP8-KMAG].
129. For example, the Court did not explicitly address the implications of Arthrex for its conclusion, despite the fact that both sides briefed the point. Defendant Board of Governors of the Federal Reserve System’s Memorandum of Points and Authorities in Support of its Motion to Dismiss at 43–45, Custodia Bank, Inc., v. Fed. Rsrv. Bd. of Governors, 640 F. Supp. 3d 1169 (D. Wyo. 2022) (No. 1:22-CV-00125-SWS) [hereinafter Board of Governors Motion to Dismiss]; Omnibus Memorandum in Opposition to Defendants’ Motions to Dismiss Plaintiff’s Complaint, Custodia Bank, Inc., v. Fed. Rsrv. Bd. of
to its statutory authority to “exercise general supervision over [the] Federal reserve banks.”\footnote{Governors, 640 F. Supp. 3d 1169 (D. Wyo. 2022) (No. 1:22-CV-00125-SWS).} Moreover, elsewhere in its opinion, the Court had concluded that the Board was properly a defendant in the case because Custodia had plausibly alleged that the Board had “participated in or interfered with the consideration and decision of Custodia’s master account application.”\footnote{\textit{Custodia Bank}, 640 F. Supp. 3d, at 1192 (citing 12 U.S.C. §§ 248 (a), (f), (j)).} It appears, then, that the Court was under the impression that the Board’s actual influence over the Reserve Bank’s decision extended beyond its removal power.

Stepping back for a moment from the doctrine that has evolved in the cases just discussed, one is struck by the oddness of the relationship between members of the Board and Reserve Bank presidents on the FOMC that is implicit in the OLC opinion: If the Board does not like the positions taken on monetary policy by one or more presidents, it can replace those presidents. Through the exercise of this power, or the threat of its exercise, the Board thereby provides the direction and control necessary to satisfy the Edmond standard. To accept this view, one would have to believe that when Congress created the FOMC in 1933, its allocation of five votes to Reserve Bank presidents was more or less for show.\footnote{For a discussion of the impact of, and possible motivations for, the change, see CLIFFORD, supra note 91, at 131–35 (explaining that the creation of FOMC meant to enhance status of Reserve Bank presidents as against their Boards of Directors, and the powers of the Board, but not to displace the Federal Reserve’s attribute of group authority).} Yet there is nothing in the historical record suggesting such an intent. Nor, in contrast to the Board’s posture towards Reserve Banks with respect to non-monetary policy issues,\footnote{My experience while on the Board was that, on essentially any non-monetary policy issue, the Board believed it had the authority to provide both generally applicable guidelines for the Reserve Banks and direction on specific matters. An example of the former is the Board’s response to controversy over the securities trading activities of certain Reserve Bank presidents: the Board adopted a set of conflict of interest rules applicable to the presidents. Nick Timiraos & Michael S. Derby, \textit{Fed Imposes New Restrictions on Officials’ Investment Activities}, WALL. ST. J. (Oct. 21, 2021, 6:07 PM), https://www.wsj.com/articles/fed-imposes-new-restrictions-on-officials-investment-activities-11634839207 [https://perma.cc/XD84-RBQW]. An alleged, publicly known, example of the latter is found in another suit by a financial institution seeking a master account. See Complaint at 3, TNB USA, Inc. v. Fed. Rsrv. Bank of New York, 2020 WL 1445806 (S.D.N.Y. 20202) (No. 1:18-CV-07978).} is there anything in Federal Reserve practice during the ensuing ninety years to support the view that Reserve Bank presidents are answerable to the Board for their votes on monetary policy. Of course, when the Court starts operating under the rubric of the constitutional avoidance doctrine, it may reshape statutes in ways surely not contemplated when they were passed.\footnote{See Neal Kumar Katyal & Thomas P. Schmidt, \textit{Active Avoidance: The Modern Supreme Court and Legal Change}, 128 HARV. L. REV., 2109, 2129–53 (2015).} But OLC does not appear to be relying on the constitutional
avoidance doctrine to conclude that the Board must have supervisory power over the monetary policies of Reserve Bank presidents.\textsuperscript{135} Moreover, even if we accept this view of the statutory relationship between the Board and the presidents, there may still be constitutional problems.

The votes of Reserve Bank presidents have not come close to determining outcomes on the FOMC in the last thirty years. If the Board is at full strength and of one mind on monetary policy, even a solid bloc of Reserve Bank presidents would be outvoted 7-5. True, for several periods in recent years, the Board has had as few as four Members. Even in such circumstances, however, a prevailing coalition of Reserve Bank presidents has never seemed even a remote possibility. For one thing, there have been only two dissenting votes cast by Members of the Board in the twenty years since the FOMC began announcing its rolcall vote immediately following its meetings.\textsuperscript{136} For another, the president of the Federal Reserve Bank of New York has traditionally been Vice-Chair of the FOMC and, in that capacity, has worked closely with the Chair in the so-called “troika,” which formulates the proposed monetary policy action prior to each FOMC meeting.\textsuperscript{137} Finally, as a group Reserve Bank presidents tend to have more divergent views than Board members, and thus the odds of all five voters taking the same dissonant position are low.

\textsuperscript{135} Elsewhere in its opinion, OLC explicitly invokes the constitutional avoidance doctrine. See infra Section II.B.2.iv.

\textsuperscript{136} Information on FOMC dissents is maintained in tabular form by the Federal Reserve Bank of St. Louis. DANIEL L. THORNTON & DAVID C. WHEELOCK, MAKING SENSE OF DISSENTS: A HISTORY OF FOMC DISSENTS (2014), https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Ffiles.stlouisfed.org%2Ffiles%2Fhtdocs%2Fpublications%2Fprev%2F2014%2Fq3%2FData_Appendix_Thornton_Wheelock_Dissents.xlsx&wdOrigin=BROWSELINK [https://perma.cc/EL5H-YM3R]. This change was one of many transparency measures instituted by Alan Greenspan during his lengthy tenure as Chair. My suspicion is that the greater transparency has modestly increased the threshold of disagreement that a Board Member would need to feel before dissenting from the Chair’s proposed policy decision. Especially after a prolonged period of Board unanimity—no Board Member has dissented since 2005—a dissent would itself become a big part of the story after an FOMC meeting. With the advent of another transparency measure—this one introduced by Chair Bernanke—of press conferences following FOMC meetings, a dissent by a Board member would surely become a major topic at the Chair’s press conference. Since communication is now itself regarded as an important tool of monetary policy, the resulting muddying of the waters around the Board’s views could be counterproductive, even from the perspective of a Board Member who would have preferred a different outcome. As recounted in Ben Bernanke’s reminiscence on his years as Chair, there are sometimes still quite significant differences of view among Board members. See BEN S. BERNANE, THE COURAGE TO ACT 539–46 (2015). But Chair Powell and his two immediate predecessors have all taken pains to accommodate differences in forging an eventual consensus position.

\textsuperscript{137} The third member of the troika is the Vice Chair of the Board. The troika is not an official entity. At times the Chair has invited a fourth FOMC member to participate in these preparatory meetings—most recently, Chair Jerome Powell invited then-Governor Lael Brainard to join those meetings. See NICK TIMIAIOS, TRILLION DOLLAR TRIAGE: HOW JAY POWELL AND THE FED BATTLED A PRESIDENT AND A PANDEMIC—AND PREVENTED ECONOMIC DISASTER 54 (2022).
However, the opinions in *Free Enterprise Fund*, *Seila Law*, and *Arthrex* suggest that a majority of current Justices is largely uninterested in the ways in which agencies have actually functioned. Led by Chief Justice Roberts, they have focused more on theoretically possible outcomes within the structures Congress has created. In *Seila Law*, Roberts invoked the possibility that a single director might be less responsive to the President than a multi-member Board as part of the justification for striking down the for-cause removal protection that Congress had granted the Director of the Consumer Finance Protection Bureau. And in both *Free Enterprise Fund* and *Arthrex* he rejected arguments from dissenting Justices that the relevant principal officers had effective, though not direct, control over the decisions of officers who had not been nominated by the President and confirmed by the Senate. Here, there are certainly theoretical possibilities for Reserve Bank presidents to determine the outcome of an FOMC vote. Moreover, there were at least half a dozen votes in the period 1960–1988 in which the votes of Reserve Bank presidents were significant, including one in which those votes produced a different outcome from that which would have been reached had only Board members been voters.

The first possibility has already been mentioned: a Board at less than full strength may be outvoted by the bloc of five Reserve Bank presidents at an FOMC meeting. Under OLC’s account of the Board’s control over the “inferior” presidents, the Board could respond by removing some or all of the presidents, who would be replaced as voters by the previously designated alternates.\(^{138}\) Then the Chair could call a special FOMC meeting at which the Board’s original monetary policy preference could be adopted. If all the alternates proved recalcitrant, the Board could then remove *them*. Because the Federal Reserve Act specifies that only presidents and first vice presidents can represent the Reserve Banks on the FOMC,\(^ {139}\) at some point there would be no eligible alternates remaining and the Board would outnumber the Reserve Bank presidents.

The foregoing scenario is no way to run a central bank. The FOMC personnel drama would consume financial markets. The projection of a solid institutional footing, on which central banks rely for their credibility, would at least for a time be undermined, with potentially deleterious effects on the achievement of monetary policy aims. How would the Court assess the prospect of such a situation (fanciful as one hopes it will remain)? Perhaps the Court would find the confusion resulting from this sequence of events, coupled with the delay in implementing the Board’s preferred action,

\(^{138}\) Under current practice, the alternatives in any given year would be four other Reserve Bank presidents and the first vice president of the Federal Reserve Bank of New York.

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analogous to the impact of a decision by the APJs in *Arthrex*. That is, there would have been a final action taken on behalf of the United States that would have consequences that could not be completely undone by subsequent dismissal of the inferior officers involved. Alternatively, because the impact of the FOMC struggle would not fall on identifiable actors (such as patent holders), the Court might worry less about infringements on “liberty,” and accept the plenary removal power of the Board as adequate to establish the inferior officer status of Reserve Bank presidents. That is, the removal power might be found in this context to meet the *Edmond* standard of direction and supervision “at some level.”

A second possible situation in which Reserve Bank votes could be determinative is where a monetary policy action favored by a majority, but not all, of the Board did not prevail because of the votes of Reserve Bank presidents. In a sense, the circumstances of this second situation present a variation on the first. As a matter of legal authority, the same majority favoring a different monetary policy action could remove one or more presidents who had taken the opposite position. If the Chair was in the minority of Board members (but the majority of the FOMC), the organizational complications in achieving this outcome could be substantial, with potential negative effects on financial markets. But, if the dissenting Board members held their ground, eventually they would probably prevail.

A third possible situation seems harder to resolve through use of the Board’s removal authority. Suppose the Board is one short of its full complement, and the Members are split 3-3 on whether to raise rates. If three or more of the Reserve Bank presidents vote to raise rates, a majority of the FOMC will have voted to raise the target federal funds rate. If only the votes of the Board Members (principal officers) counted, the target rate would remain the same. Unlike the prior hypothesized situations, the policy outcome that would have prevailed if only Board Members voted may not be achievable through use of the removal power, since the evenly divided Board could deadlock on removing the presidents who favored the rate increase.

As mentioned earlier, this last scenario is not entirely hypothetical. There are at least two instances in Federal Reserve history when the votes of Reserve Bank presidents resulted in a change of policy for which there was not majority support on the Board. At the June 1988 FOMC meeting, the Board had six Members, rather than its full complement of seven. They split evenly on whether to tighten monetary policy conditions, the position favored by Chairman Greenspan. Had only the presidentially appointed

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members of the FOMC been voting, the deadlock would have meant no change in policy. But because all five Reserve Bank voting members sided with the Chairman, the outcome was an 8-3 vote to tighten.\(^{141}\) At the December 1961 FOMC meeting, four of the Board’s seven Members dissented from the position favored by Chairman Martin, which nonetheless prevailed because of the Reserve Bank presidents’ votes. This situation was unlike that in my second hypothetical scenario, because the four dissenting Board members had three different views—one for greater tightening of policy than the FOMC majority had voted, two who opposed any tightening, and one who disagreed with the means chosen to implement the less accommodative policy.\(^{142}\)

Whatever the Court’s views of the other situations, this last possibility would presumably be more troubling. The closest thing we have to a relevant view from a member of the current Court supports that inference. Justice Alito, concurring in *Department of Transportation v. Association of American Railroads*,\(^{143}\) considered various constitutional issues that would need to be addressed following the Court’s unanimous decision that Amtrak was a governmental entity.\(^{144}\) Among these was whether the manner of selecting Amtrak’s president ran afoul of the Appointments Clause. Eight members of Amtrak’s board were presidentially appointed and Senate confirmed. They chose the president, who became *ex officio* the ninth member of the Board. The president served at the pleasure of the Board.\(^{145}\)

Although he did not reach any definitive conclusions, Justice Alito clearly found the arrangement constitutionally suspect:

> It would seem to follow that because agency heads must be principal officers, every member of a multimember body heading an agency must also be a principal officer. After all, every member of a multimember body could cast the deciding vote with respect to a particular decision. One


\(^{144}\) Writing for the Court, Justice Kennedy briefly noted the issues, which were to be considered by the Court of Appeals on remand. *Id.* at 55–56. As it happened, the D.C. Circuit did not reach the issue of interest here, having decided the case on other grounds. Ass’n of Am. R.Rs. v. U.S. Dept’t. of Transp., 821 F.3d 19, 23 (D.C. Cir. 2016), vacated, Ass’n of Am. RRs. v. U.S. Dept’ of Transp., WL 6209642 (D.D.C. Mar. 23, 2017).

\(^{145}\) Ass’n of Am. RRs., 575 U.S. at 65 (Alito, J., concurring).
would think that anyone who has the unilateral authority to tip a final
decision one way or the other cannot be an inferior officer.146

Dismissing the government’s argument that the president serves only at
the pleasure of the other members of the Amtrak board, Justice Alito said “it
makes no sense to think that the side with which the president agrees will
demand his removal.”147 It is hard to know how Justice Alito would parse
the FOMC. As already noted, interest rate increases are not regulatory, at
least in a direct sense, and thus perhaps not the threat to “liberty” perceived
by the conservative members of the Court to lurk in every administrative
regulatory action.148 On the other hand, nothing in the logic of Justice Alito’s
comment that every member of a multimember body heading an agency must
be a principal officer suggests that this principle is limited to agencies that
directly regulate nongovernmental individuals or entities.149

iii. Article II Requirements for Appointment of Inferior Officers

Assuming Reserve Bank presidents are inferior officers, there remains
the question whether their appointments conform to Article II requirements.
Free Enterprise confirmed that the “Head” of a Department may be a multi-
member board or commission, so it is clearly acceptable for the Board to
appoint the inferior members of the FOMC.150 There are two additional
issues. First, the Board does not appoint the presidents directly; it approves
selections made by the boards of directors of the Reserve Banks. Second,
that approval is for the individuals appointed to be presidents of the Reserve
Banks, not members of the FOMC. Under the Federal Reserve Act, the
boards of directors of the Reserve Banks each year select the representatives
of the Reserve Banks who will be voting members of the FOMC, with no
requirement for approval by the Board of Governors.151

146. Id.
147. Id.
148. Indeed, Justice Alito began his concurring opinion in the Amtrak case with the now customary
invocation of liberty. Id. at 57.
149. There might even be a better argument for the Amtrak president’s manner of selection and
presence on its board of directors than for the presence of Reserve Bank presidents on the FOMC. When
Congress created that governance arrangement, which was designed for what was supposed to be a
profitably run government corporation, it was apparently following practice at most public corporations,
where non-executive directors select the chief executive officer, who is then placed on the board. In
contrast, while the Reserve Bank presidents are also chief executive officers, their participation on the
FOMC is not a managerial function; it is pure policymaking. Interestingly, OLC followed a logic similar
to that of Justice Alito in concluding that the Reserve Bank presidents must be officers to serve on the
FOMC: “[T]he officer status of some members does not turn on the presence of others who may outvote
them.” 43 Op. O.L.C., supra note 97, at 8. As discussed in the text, however, OLC did not follow this
logic in evaluating whether the presidents needed to be principal officers. Id.
OLC disposed of both issues in concluding that the appointment of the presidents to the FOMC was consistent with Article II requirements. To deal with the fact that the Board approves—rather than directly makes—the selections of the Reserve Bank boards, OLC cited a 19th century case, United States v. Hartwell.\textsuperscript{152} In Hartwell, which was favorably cited in a footnote in Free Enterprise Fund,\textsuperscript{153} the Court ruled that a clerk in the office of the assistant Treasurer of the United States was a validly appointed officer, even though he had been selected by the assistant Treasurer with the “approbation” of the Secretary of the Treasury.\textsuperscript{154} OLC further noted that the Board appoints the Class C directors of the Reserve Banks (one of whom is designated as the chair), and has the power to dismiss the directors of all three classes.\textsuperscript{155} OLC reasoned that “the Board could indefinitely reject proposed candidates until the directors propose Reserve Bank presidents to the Board’s liking.”\textsuperscript{156} Indeed, it appears as though the Board could even short circuit that potentially lengthy process by dismissing any Class B director who was unwilling to appoint a president satisfactory to the Board and, if necessary, appointing new Class C directors, who for at least a brief time could be the only members of the Board eligible to select the president.

As to the fact that the Board’s approval authority is for selection of individuals in their roles as presidents of Reserve Banks, rather than for participation on the FOMC as such, OLC again relied on a 19th century decision whose authority has been reaffirmed in a modern case. In Shoemaker v. United States,\textsuperscript{157} the Court ruled that Congress could place the holders of two existing offices requiring Senate confirmation on a newly created commission without the incumbents having to go through another nomination and confirmation process. The test adopted by the Court was whether the “additional duties” were “germane to the offices already held by them.”\textsuperscript{158} Applying this test to the Chief of Engineers of the U.S. Army and the Engineer Commissioner of the District of Columbia, the Court found that the duties of their original offices were indeed germane to sitting on a commission charged with creating what is now Rock Creek Park in Washington, D.C.\textsuperscript{159}

\textsuperscript{152} 43 Op. O.L.C., \textit{supra} note 97, at 14 (citing United States v. Hartwell, 73 U.S. 385, 393–94 (1867)).
\textsuperscript{153} Free Enter. Fund, 561 U.S. at 512 n.13. OLC also cited to a line of Attorney General opinions predating Hartwell that had reached a similar conclusion. 43 Op. O.L.C., \textit{supra} note 97, at 14–15.
\textsuperscript{154} 73 U.S. at 392–93.
\textsuperscript{156} \textit{Id}.
\textsuperscript{157} Shoemaker v. United States, 147 U.S. 282, 300–01 (1893).
\textsuperscript{158} \textit{Id}. at 301.
\textsuperscript{159} \textit{Id}.
Weiss v. United States, a 1994 case considering whether commissioned military officers could be appointed as military judges without a new Article II appointment, applied the Shoemaker germaneness test. In a concurring opinion, Justice Scalia explained the rationale for the test:

Violation of the Appointments Clause occurs not only when (as in Shoemaker) Congress may be aggrandizing itself (by effectively appropriating the appointment power over the officer exercising the new duties), but also when Congress, without aggrandizing itself, effectively lodges appointment power in any person other than those whom the Constitution specifies. Thus, “germaneness” is relevant whenever Congress gives power to confer new duties to anyone other than the few potential recipients of the appointment power specified in the Appointments Clause—i.e., the President, the Courts of Law, and Heads of Departments.

Insofar as Justice Scalia’s concerns extended beyond the potential for congressional aggrandizement, they foreshadow the Court’s construction of the President’s removal power in Free Enterprise Fund, and thus better reflect the contemporary approach to these structural Constitutional issues.

Even with this more expansive view of the germaneness test, the selection by Reserve Bank boards of the presidents who will vote on the FOMC seems to pass muster. As OLC reasoned, “[I]n approving the selection of Reserve Bank presidents to their positions, the Board of Governors has implicitly concluded that the presidents would be competent to serve on the FOMC.” Indeed, the Federal Reserve Act explicitly ties the two roles together. The Board is fully aware that, in approving Reserve Bank presidents, they are effectively deciding who will be sitting around the table at FOMC meetings.

iv. Removal of Presidents by Reserve Bank Boards

Unless one reads as a limitation the requirement that the Board notify a president of its reasons for exercising its power of removal, the Board has the plenary removal authority that is consistent with inferior officer status of the presidents. But OLC pointed out that the boards of directors of the Reserve Banks also have statutory authority to remove presidents whose appointments have been approved by the Board. This is the one feature of

160. Weiss v. United States, 510 U.S. 163, 175 (1994). The majority opinion distinguished the case from Shoemaker on the ground that Congress had clearly not tried to “both create an office and also select a particular individual to fill the office.” Id. at 174. However, the Court went on to apply the germaneness test and found it satisfied. Id. at 177.

161. Id. at 196 (Scalia, J., concurring) (emphasis omitted).


163. Id. at 11. The statutory provision is included among the enumerated powers of the Reserve Banks: “To appoint by its board of directors a president, vice presidents, and such officers and employees
the Federal Reserve structure that OLC assessed to be unconstitutional.\textsuperscript{164}

In reaching this conclusion, OLC cited \textit{Myers v. United States} for the proposition that “the power to remove inferior officers is . . . ‘an incident of the power to appoint them.’”\textsuperscript{165} But \textit{Myers} involved a statute requiring congressional approval before the President could remove a postmaster. Even a broad reading of that case does not directly support the OLC conclusion, since there is no question the Board can remove a Reserve Bank president on its own. Doubtless for this reason, OLC relied more on its own prior opinions involving removals of officers by actors other than those with the Constitutional power to appoint them.\textsuperscript{166} However, in asserting that “a delegation [of the power to remove a Reserve Bank president] would improperly diffuse accountability for the supervision of inferior officers,”\textsuperscript{167} OLC did reflect a concern that has been featured in the Court’s recent decisions. It cited Chief Justice Roberts’s complaint in \textit{Free Enterprise Fund} that “[t]he diffusion of power carries with it a diffusion of accountability.”\textsuperscript{168}

Though preceding \textit{Arthrex}, OLC foreshadowed the Chief Justice’s emphasis there on the “chain of command” from the president,\textsuperscript{169} in whom—according to a majority of the current Court—an indivisible and complete executive power of the United States was lodged by the Constitution.

OLC apparently resolved this issue by invoking the constitutional avoidance doctrine and then reading the statutory provision giving Reserve Bank boards the power of removal as requiring the approval of the Board before exercising that authority.\textsuperscript{170} I say “apparently” because, although OLC cited to a well-known case in which the Court applied that doctrine,\textsuperscript{171} it also pointed out that “all classes of directors are subservient to the Board of Governors,”\textsuperscript{172} because of the Board’s power to remove those directors and its general supervision of Reserve Banks. OLC reasoned that the Board could, accordingly, require the Reserve Bank boards to seek approval before dismissing a president.\textsuperscript{173}

\textsuperscript{164} 43 Op. O.L.C., supra note 97, at 21.
\textsuperscript{165} 43 Op. O.L.C., supra note 97, at 21.
\textsuperscript{166} Id. at 20 (citing Myers v. United States, 272 U.S. 52, 161 (1926)).
\textsuperscript{167} Id.
\textsuperscript{168} Id. at 21.
\textsuperscript{171} 43 Op. O.L.C., supra note 97, at 21.
\textsuperscript{172} Id. (citing Edward J. DeBartolo Corp. v. Fla. Gulf Coast Trades Council, 485 U.S. 568, 575 (1988)).
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 21–22.
Given that these powers of the Board are explicitly set forth in the Federal Reserve Act, it is unclear why OLC felt it needed to give the directors’ removal authority provision a reading arguably inconsistent with its plain language. The alternative would have been for OLC to follow the course it did in considering the appointments process, where it emphasized that the Board could repeatedly reject individuals suggested by a Reserve Bank board until the latter sent the Board a name it liked.\textsuperscript{174} Here, OLC could have noted that the Board’s authority to dismiss directors (and directly appoint the Class C directors) means that the Board could effectively reverse any decision by a Reserve Bank board to dismiss a president.

\textit{v. Reserve Bank Presidents as Private Actors}

Until the recent \textit{Custodia Bank} case, the only court opinion addressing the merits of the constitutional status of the Reserve Bank presidents was the 1986 district court decision in \textit{Melcher v. Federal Open Market Committee}.\textsuperscript{175} The D.C. Circuit Court affirmed on procedural grounds, leaving Judge Greene’s opinion on the merits neither validated nor rejected.\textsuperscript{176} Judge Greene’s view that the authority granted Reserve Bank presidents on the FOMC was a permissible delegation to private actors seems unlikely to find favor in today’s Court.\textsuperscript{177} His opinion is nonetheless instructive in thinking about both the constitutional arguments considered in the preceding subsections and the reasons why the Supreme Court might decline to find the structure of the FOMC unconstitutional even if the logic of its recent decisions tends toward that conclusion.

Judge Greene’s conclusion rested principally on two grounds. One was his textual observation that the Appointments Clause “governs the selection of public officers—it says nothing about the exercise of public power by private persons.”\textsuperscript{178} The other, to which I will return in closing my discussion of the status of the presidents, was that “the lessons of history . . . militate strongly against a conclusion that would rigidly exclude the private members from the FOMC.”\textsuperscript{179}

The first point, while literally true, elided the question of whether someone acting in an effective government capacity should be treated as an “officer of the United States” for Appointments Clause purposes.\textsuperscript{180} It also

\begin{footnotes}
\item[174.] See supra note 156 and accompanying text.
\item[176.] \textit{Melcher}, 836 F.2d at 565.
\item[177.] OLC expressly disagreed with Judge Greene’s reasoning. 43 Op. O.L.C., supra note 97, at 7.
\item[178.] \textit{Melcher}, 644 F. Supp. at 521.
\item[179.] \textit{Id.}
\item[180.] See \textit{id}. A decade before Judge Greene’s opinion, \textit{Buckley} had set forth the “significant authority
ignored the doctrine enunciated, if not especially well explained, in *Carter Coal*, which had found a delegation of federal governmental authority to private parties to be unconstitutional.¹⁸¹

Subsequent judicial developments have further undermined the consistency of Judge Greene’s reasoning with the Court’s views. One is the persistent emphasis in structural constitutional cases over the last thirty years on the accountability of those exercising any form of executive power in the U.S. government. The other, consistent with that emphasis, is the Roberts Court’s conclusion in two cases that even entities and individuals specified as “private” by Congress can be considered parts of the government for Constitutional purposes.¹⁸² Although the features of the Reserve Banks and their presidents might be distinguished from those of the Public Company Accounting Oversight Board and Amtrak—the entities at issue in those cases—the basic logic applies: entities and individuals whose positions have been created by the government, that continue to have significant links to the government, and that exercise governmental powers will be treated as part of the government.¹⁸³

From our vantage point, the most interesting feature of Judge Greene’s opinion is that he turned to a rationale of a permissible delegation to private actors only after he had concluded that the Reserve Bank presidents had not been selected in a manner consistent with the Appointments Clause.¹⁸⁴ He cited three factors in reaching this conclusion: One was that they were pursuant to the laws of the United States” test. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam), *superseded by statute*, Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81, *as recognized in Ams. for Prosperity v. Grewal, 2019 WL 4855853 (D.N.J. Oct. 2, 2019).*

¹⁸¹ Carter v. Carter Coal Co., 298 U.S. 238, 278 (1936). Judge Greene may, in fact, have had *Carter Coal* in mind when he observed later in his opinion that the five Reserve Bank presidents did not have the “decisive voice” on the FOMC. *Melcher*, 644 F. Supp. at 523. That comment may have been an implicit allusion to a line of cases following *Carter Coal* that had countenanced private involvement in government decisions so long as the governmental actors had the final say. For a description of these cases, see Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1437–45 (2003). There are unusual circumstances in which the Reserve Bank presidents could have the decisive vote(s) on an FOMC decision.

¹⁸² See, e.g., Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 485–86, 495–96 (2010) (“Despite the provisions specifying that Board members are not Government officials for statutory purposes, the parties agree that the Board is ‘part of the Government’ for constitutional purposes . . . and that its members are ‘Officers of the United States’ who ‘exercise[s] significant authority pursuant to the laws of the United States.’” ) (citations omitted); see also Dep’t of Transp. v. Ass’n of Am. R.R., 575 U.S. 43, 55 (2015) (“[Despite] Congress’ disclaimer of Amtrak’s governmental status . . . Amtrak is a governmental entity, not a private one, for purposes of determining the constitutional issues presented in this case.”). ¹⁸³ Ironically, Judge Greene cited Amtrak as an example of a “public-private partnership” created by Congress “in lieu of execution of these responsibilities exclusively by government officials.” *Melcher*, 644 F. Supp. at 523.

¹⁸⁴ Obviously, they had not been nominated by the President and confirmed by the Senate. So, if they were officers, they had to be inferior officers to meet the Article II requirements.
appointed by the Reserve Bank boards of directors, rather than by the Board itself.\textsuperscript{185} The other two factors were closely related. The first was that it “would be a distortion of language to label as ‘inferior officers’ members of a body vested with the vast powers possessed by the Federal Open Market Committee.”\textsuperscript{186} The other was that “Reserve Bank members sit on the FOMC with the Governors themselves, with the same opportunity to participate and vote as the Governors.”\textsuperscript{187} Elaborating a bit on the latter point, Judge Greene asserted that the Federal Reserve Act contained “no suggestion that the Governors may supervise or otherwise influence the policy choices of the Reserve Bank members.”\textsuperscript{188} He further maintained that the Board’s power to remove presidents was only for cause and, in any case, that the statutory removal provision contained “not even a hint of a suggestion” that it was “meant to be used by the Board to influence the votes of those officers who sit with them as members of the FOMC.”\textsuperscript{189}

As discussed earlier, some of these arguments would be dealt with by OLC thirty years later. Judge Greene did not even mention the statutory approval authority given to the Board for appointments of the presidents. And, unlike OLC, he did not parse the use of “cause” in the removal provision, but simply asserted that it was “a mechanism undoubtedly meant to encompass such infractions as misfeasance in office, but not a policy disagreement.”\textsuperscript{190} As we have seen, this is a contestable proposition as a textual and doctrinal matter.

Still, Judge Greene’s observations about how the FOMC actually operated were valid in 1986, and remain so today. In a sense, he was anticipating the functional analysis of inferior officer status that would be set forth a couple of years later in \textit{Morrison v. Olson}.\textsuperscript{191} The fact that the Reserve Bank presidents act like, and are treated like, equals on the FOMC sits uneasily with the notion that they are subordinate to the Board. OLC followed the formalist approach to inferior status that began with Justice Scalia’s dissent in \textit{Morrison}, became the Court’s position in \textit{Edmond}, and was reinforced in \textit{Arthrex}. While I constructed low probability hypotheticals to demonstrate the gap in OLC’s formalist analysis, Judge Greene captured the FOMC’s “tradition of operation,”\textsuperscript{192} even as he glossed over doctrinal points that have become only more important as formalism has gotten the

\begin{thebibliography}{199}
\bibitem{Melcher} Melcher, 644 F. Supp. at 519.
\bibitem{Id} Id.
\bibitem{Id} Id.
\bibitem{Id} Id.
\bibitem{Id} Id.
\bibitem{Id} Id. at 520.
\bibitem{Id} Id.
\bibitem{Melcher} Melcher, 644 F. Supp. at 520.
\end{thebibliography}
upper hand over functionalism in the Court’s structural Constitutional doctrines.

Judge Greene’s doctrinal argument that Congress may constitutionally delegate voting positions on the FOMC to private individuals has an awkward feel to it. As already noted, it is almost summary in its brevity and does not deal with two obvious issues. Additionally, one of the points he makes in that argument is somewhat at odds with his analysis of the inferior officer question. While he had earlier referred to “the vast powers possessed by the Federal Open Market Committee” in rejecting the notion that the presidents could be inferior officers, he suggests later that because private parties regularly buy and sell Treasury securities, Congress can establish a public-private partnership in the Federal Reserve to do just that.

An indication of what might have been motivating a smart district court judge to offer such a strained argument may be found in Judge Greene’s invocation of what he called the “deliberate, time-honored balance” of public and private representation in the regulation of the monetary system, as contemporaneously reflected in the composition of the FOMC: “Ever since the birth of this nation, the regulation of the nation’s monetary systems has been governed by a subtle and conscious balance of public and private elements.” He recounted how this balance had been variously struck in the structures of both the First and Second Banks of the United States, the original Federal Reserve Act, and finally the Banking Act of 1935 that established the FOMC as we know it today. He concluded that

193  Id. at 522.
194  Id. at 521.
195  Id. at 524 (footnote omitted).

One can read this part of Judge Greene’s opinion as both acknowledging the force of long-established practice in determining the constitutionality of certain government arrangements and as giving at least
some Constitutional role to the political branches in determining the acceptable form of those arrangements. As we will see in Part III, a variation on this theme might also affect the view of today’s Court on the constitutionality of not just the Reserve Bank presidents’ status, but of the Federal Reserve more generally.

III. CONSTITUTIONAL AVOIDANCE

Application of the doctrines embraced by the Court’s conservative majority in recent cases raises significant questions about the constitutionality of the FOMC. Even without further steps in the Court’s revamp of the separation of powers doctrine, the presence of Reserve Bank presidents on the FOMC is not easy to reconcile with the reasoning in existing opinions. If, as seems quite possible, the conservatives extend the logic of some of their opinions in future cases, other features of the FOMC could be more directly implicated. Were the Court to resurrect a meaningful non-delegation doctrine, the broad monetary policy discretion of the FOMC would obviously invite scrutiny. Similarly, were the Court to invalidate a traditional multi-member independent agency, the Board would obviously be among the many agencies whose constitutionality would be under a cloud.196

But suppose the Court wants to avoid holding that some part of the Federal Reserve’s structure or mandate runs afoul of its separation of powers doctrines. In this Part, I begin with some conjecture as to why the conservative majority may prefer such an outcome and then consider the doctrinal positions that could be available to the Court to achieve this end.197 With respect to the participation of Reserve Bank presidents in monetary policy and the breadth of the FOMC’s delegated powers, standing requirements could foreclose a case from ever reaching the merits.198 Alternatively, even if standing were established and the substantive

196. Additionally, were the Court to find the non-appropriated funding mechanism for the Consumer Finance Protection Bureau unconstitutional on grounds that implicated the Federal Reserve’s independent funding, the independence of monetary policy would be threatened.

197. It is also possible that one or more Justices will not have a strong ex ante view on the issue and could be swayed by one or more of these arguments. Since my aim here is to support my intuition that this Court will not issue a ruling that finds the central role or structure of the FOMC unconstitutional, I focus only on potential arguments that have a fighting chance of being accepted by the current Court majority. Most obviously, I do not include in this part of my discussion a functional analysis of the sort presented in Justice Breyer’s dissents in Free Enterprise Fund and Arthrex, Justice Kagan’s dissent in Seila Law, and to a limited extent Justice Thomas’s dissent in Arthrex. Chief Justice Roberts and the other four of his colleagues have displayed little receptivity to such analyses.

198. Of course, if the Court did not want to rule against the FOMC, it could use its discretion not to grant certiorari to unsuccessful challenges in the lower courts. However, were a circuit court of appeals to engage in its own extrapolation of the Court’s prior rulings and find against the FOMC, the Court could be forced to deal with such a case.
constitutional issues were taken up, the Court might find the FOMC, and perhaps the entire Federal Reserve System, to be exceptional and thus protected from the reach of generally applicable separation of powers doctrines.199

A. REASONS TO FORBEAR

There are many reasons why at least some conservative Justices might be reluctant to invalidate either the mandate or the structure of the FOMC. As a matter of ideology, they may simply be more accepting of a powerful, operationally independent central bank than of regulatory agencies such as the EPA, Occupational Safety and Health Administration, and SEC, which typify the administrative state that they hold in such low esteem. As became apparent when President Trump mused publicly about replacing Federal Reserve Chair Jerome Powell, there is support for an independent Fed among some Republican legislators.200 And, while many—perhaps most—companies subject to the jurisdiction of those latter agencies would like to see their authority curtailed, there is almost certainly more support for an independent central bank. Indeed, while financial firms may differ with specific decisions of the FOMC and regulatory actions of the Board, they rely on the central bank to moderate inflation, promote growth, and support the financial system in periods of stress.201

Another explanation, not inconsistent with the first, is that some members of the Court may share the sense that the Federal Reserve is a higher-status and more consequential agency than others.202 Some of the

199. It is also possible that, despite the apparent logic of some opinions of the conservative majority, the Court might ultimately not revive the non-delegation doctrine directly or extend its removal power dogma to traditional independent agencies. As evidenced by its decision in *West Virginia v. EPA*, 142 S. Ct. 2587, 2607 (2022), the Court might create other routes to de-fang the administrative state that could be less of a threat to the FOMC. But, as with other areas in which the Court’s failure to elaborate a standard for its doctrinal innovations, it is virtually impossible to determine how much impact the majority’s major questions doctrine will have.


201. Additionally, as a group, Reserve Bank presidents have traditionally been inclined toward the more “hawkish” monetary policy associated with some economic conservatives than have the Board members appointed by presidents of both political parties. Of course, there are dovish Reserve Bank presidents. And perhaps no U.S. central banker is more identified with a hawkish monetary policy than Paul Volcker, chair of the Board and the FOMC from 1979 to 1987.

202. Needless to say, there is no official ranking of the status of agencies. If, however, one is looking
Justices may recognize that they have very little understanding of monetary policy, other than that it is important. For both reasons, they may be reluctant to disrupt the agency to which that policy has been committed.

It is obviously hard to know whether, or how much, policy considerations of this sort would affect the Court’s predisposition toward a constitutional challenge lodged against the FOMC. The potential impact of an adverse ruling on the economy, however, would almost surely weigh on at least some of the conservative majority. This concern would be evident in the difficulty the Court would face in the more narrowly legal exercise of crafting a workable remedy.

Although the Court’s recent separation of powers decisions have been doctrinally aggressive, their immediate impact on the functioning of government has been limited. Indeed, it may be a mark of the conservative majority’s eagerness to make new law that its decisions provided little practical relief to the plaintiffs in those cases. None produced any immediate tangible consequences of note to the general public—or, indeed, to anyone beyond the relatively small circles of parties and agency officials involved in the cases.

In contrast, a holding that either the mandate or structure of the FOMC was unconstitutional could have a major destabilizing effect on financial markets and, at least for a time, could be front page news. As in Free

203. In Free Enterprise Fund, the Court denied the broad injunctive relief sought by petitioners, which would effectively have brought the operations of the PCAOB to a halt. All that changed was the invalidation of the for-cause removal protection that Congress had created for PCAOB members. Free Enter. Fund. v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 513 (2010). Similarly, in Seila Law the CFPB’s civil investigative demand that had triggered the case was eventually upheld, an outcome essentially unaffected by the Court’s ruling that the Director could be removed at will by the President. Consumer Fin. Prot. Bureau v. Seila Law LLC, 997 F.3d 837, 848 (9th Cir. 2021). As of this writing it remains unclear if the plaintiffs in Collins v. Yellen will obtain any relief. The Fifth Circuit has remanded the case to the district court to determine if any retrospective relief was appropriate, though five of the judges thought the absence of injury was sufficiently clear that no remand was necessary. Collins v. Yellen, 27 F.4th 1068, 1069 (5th Cir. 2022) (mem.) (en banc). Finally, in Arthrex the only remedy was to give the Director of the Patent and Trademark Office the opportunity to review the decision of the patent law judge. United States v. Arthrex, Inc., 141 S. Ct. 1970, 1987 (2021). Since there was never any indication that the Director was opposed to that decision, this case also made new law while giving no actual relief to the plaintiff.
Enterprise Fund, Setla Law, and Collins, a holding that the Members of the Board were removable at will by the President would not in itself affect the actions of the formerly protected officials. However, the presumed independence of the Federal Reserve would have been called into question. Especially if the decision was handed down at a time when the Administration was thought to be unhappy with FOMC policy, there could be a period of volatility as market actors speculated on whether the President might use the implicit threat of removal to force a change in policy.204

Market actors might also speculate on the likelihood that a new President would remove several members of the Board whose monetary policies did not align with those of the incoming Administration.

A holding that the Reserve Bank presidents were principal officers, and thus not constitutionally eligible to sit on the FOMC, would present an especially tricky remedial challenge. The cleanest option might be to sever the portion of Section 12A of the Federal Reserve Act that provides for Reserve Bank representation on the FOMC,205 leaving just the Members of the Board. This would be a major amputation, not the neat surgical snip performed in recent separation of powers cases. Moreover, it would clearly be at odds with the congressional policy reflected in the Federal Reserve Act for more than a century, and thus hard to justify as capturing what congressional preferences would be in light of the holding that the Reserve Bank presidents were principal officers.

An alternative approach would be to give the President authority to remove the Reserve Bank presidents, thereby dodging the problem of a divided Board discussed in Part II.206 But this remedy would require the

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204. It is possible, perhaps likely, that the President and Secretary of Treasury would respond to the Court’s decision by affirming their intention not to interfere with monetary policy. Such a statement would likely reduce, though probably not eliminate, short-term market uncertainty. There might nonetheless be an impact on longer-term interest rates, as market actors priced in the possibility of a future president threatening, if not actually exercising, the use of the removal power. In discussing the uncertain status of the Federal Reserve chair *qua* chair, Adrian Vermeule has suggested that in most instances convention will deter the President from removing that individual. Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1196–99 (2013). The convention, in turn, is backed by the prospect of political backlash, including difficulties in naming a successor, and the alternative of waiting what has recently been only about a year after a president is inaugurated before the term of the chair lapses. *Id.* In a sense, Vermeule’s hypothesis was strengthened by President Trump’s ultimate decision not to attempt to remove Chair Jerome Powell, despite the President’s deep unhappiness with his own appointee. However, a President empowered by the Supreme Court to remove non-chair members may face less of a political backlash. Moreover, if the Senate is controlled by the same party that holds the presidency, the backlash may not be so significant.


206. An even more far-reaching remedy would be for the Court to require that Reserve Bank presidents be nominated by the President, confirmed by the Senate, and then removable by the President. Since this resolution would probably not be thought necessary by the Court in order to make the Reserve Bank presidents inferior officers, and since this remedy would almost surely reinforce a narrative that the Court is ignoring the will of the political branches in remaking the U.S. government more to its own
Court not just to excise from a statute the provisions that it has found unconstitutional. It would have to write in a new provision never drafted by Congress. In addition, this remedy would create some of the same uncertainty discussed earlier in connection with an invalidation of for-cause protection for Board Members, though probably of a lesser order, because the Reserve Bank presidents occupy fewer seats and generally have more heterogeneous views.

Finally, of course, the Court could simply invalidate the entire Federal Reserve Act, rather than changing a core structural feature of the FOMC by severing or rewriting certain offending provisions. Quite possibly—almost inevitably, to my mind—the result would be chaos in financial markets as banks, businesses, and households all scrambled to preserve the value of their money after the creator and caretaker of that money had just been put out of business. In theory, Congress could step in quickly by—for example, reenacting the Federal Reserve Act for a limited period, while leaving the Reserve Bank presidents off the FOMC. Congress would thereby calm financial markets to some degree, while giving itself time to decide on a permanent solution. Presumably, however, the Court is not oblivious to the difficulties in getting anything done across First Street in the Capitol. Even apparent no-brainers such as raising the statutory debt limit in order to pay obligations already incurred by the federal government have entailed political brinkmanship, which in 2011 led to the credit rating of U.S. government debt being downgraded for a time, and in 2023 caused anxiety in financial markets until an eleventh-hour agreement avoided the U.S. government defaulting on its obligations. The Court could not have confidence that Congress would expeditiously pass a temporary measure that preserved at least a recognizable status quo at the Federal Reserve.

Were the Court to strike down as an excessive delegation of legislative authority the dual mandate that gives the FOMC substantial discretion in the conduct of monetary policy, it would either have to divine a permissible

\[207.\] In Free Enterprise Fund and Seila, the Court was able to remove the brief clauses in the challenged statutes providing for-cause removal protection. As noted earlier, in Arthrex the Court did effectively add its own provision to the statute in framing the remedy to require review by the Director of the Patent and Trademark Office. However, the Court (albeit with a fragile majority that included the Justices who had dissented on the merits) apparently believed that making the Patent Law Judges removable at will would be more at odds with the structure of the statute passed by Congress than making their decision reviewable. Arthrex, 141 S. Ct. at 1987 ("[R]eview by the Director better reflects the structure of supervision within the PTO and the nature of APJs’ duties . . . ").

congressional rule for the FOMC to implement or, as in the invalidation of the entire Federal Reserve Act scenario of the preceding paragraph, leave the country without any monetary policy until Congress (somehow) acted.

The former path seems difficult but not inconceivable. Where could the Court find an appropriate congressional rule if not in the Federal Reserve Act itself? Perhaps, as suggested in Part II.A., the Court could follow the preference of some (mostly conservative) economists and effectively read the “maximum employment” aim of monetary policy out of the Federal Reserve Act. Doing so would leave price stability as the “rule” set by Congress, which will then be assumed to have made the basic policy decision for price stability over employment. As with some other recent controversial steps it has taken, the Court might justify such an outcome by invoking the expanded canon of constitutional avoidance.209 That is, it would argue that Section 2A of the Federal Reserve Act would be an unconstitutional delegation of authority to the FOMC unless the statutory “maximum employment” goal is read to be a byproduct of achieving price stability, rather than as a goal in itself. To reach this decision, though, the Court would have to ignore not just the plain meaning of Section 2A (including the fact that “maximum employment” precedes “stable prices” in the text), but the entire purpose and history of the Federal Reserve Reform Act that added this provision in 1977.210

B. STANDING

One way for the Court to avoid the unattractive outcomes described in the preceding section would be simply to decline to reach the merits of a challenge to the FOMC. There is a quartet of D.C. Circuit cases from the late 1970s to the late 1980s in which the court found that plaintiffs alleging economic harm from monetary policy actions lacked standing to challenge the constitutionality of the FOMC on grounds of excessive delegation of authority, due process, and the Appointments Clause.211 Those cases largely

209. See generally Katyal & Schmidt, supra note 134 (explaining how the Court has used constitutional avoidance canon to aggressively rewrite statutes).
210. Among other factors underscoring the significance of the maximum employment goal in the Federal Reserve Reform Act are the intense contemporary debate around the wisdom of including such a goal, see Michelle A. L. Goldberg, The Fed’s Dual Mandate: One Too Many?, 33 REV. BANKING & FIN. L. 343, 363–67 (2013), and the passage by the same Congress of the Humphrey Hawkins Act establishing full employment as a national goal, see Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887 (codified as amended in scattered sections of 15 U.S.C.). It is also worth noting that, over time, bills have been introduced (and not passed) to remove the maximum employment mandate. See, e.g., H.R. 215, 113th Cong. (2013) (proposing to strike maximum employment).
211. The due process claim was based on the participation in selection of Reserve Bank presidents by the bankers on Reserve Bank boards. The Federal Reserve Act has subsequently been amended to prohibit the three bank representatives on each board from involvement in the selection of the president. 12 U.S.C. § 341, amended by Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No.
explain the paucity of judicial discussions of the constitutional status of Reserve Bank presidents. The two questions to be addressed in this section are, first, whether enough has changed in the last thirty-five years to alter those outcomes today and, second, whether there are claims other than injury from monetary policy actions that might provide an alternative route for a structural challenge to the FOMC.

As to the first question, the best chance for a plaintiff probably lies in appealing to the Court’s recent preoccupation with accountability in the context of Appointments Clause and removal issues to argue that the special rules of separation of powers standing should apply here. As to the second question, there are several possibilities: The D.C. Circuit cases included unsuccessful claims by Members of Congress asserting harm to their position as legislators. Another possibility is an indirect route, by which a plaintiff suing a Reserve Bank or its president for a non-monetary policy harm includes a constitutional claim. Finally, there is the theoretical possibility that the President would attempt to remove a Reserve Bank president.

When both legal and practical considerations are taken into account, the chances of any plaintiff having standing to pursue a structural challenge to the FOMC are, at best, modest. However, it is important to note that the standing hurdle in past cases applied only in cases directly challenging the FOMC—the presence of the Reserve Bank presidents, the breadth of its mandate, or both. Were the Court to extend its reasoning in Seila Law and find traditional multi-member independent commissions unconstitutional, any banking organization regulated by the Federal Reserve could easily meet the standing requirements in challenging a regulation or order. If its outcome were to subject the members of the Board to at-will removal by the President, it would immediately affect the independence of the FOMC.

1. Private Party Standing to Challenge Monetary Policy Actions
   i. The D.C. Circuit Decisions

   Of the four D.C. Circuit cases, two addressed standing claims by plaintiffs suing in their private capacities. Committee for Monetary Reform v. Board of Governor of the Federal Reserve System involved only private

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111-203, 124 Stat. 1412.
standing claims, while in Reuss v. Balles Representative Reuss claimed standing both in his capacity as a Member of Congress and as a private citizen owning government securities.

In Committee for Monetary Reform, the court applied a three-part test for determining standing very similar to that used today:

Art. III requires the party who invokes the court’s authority to show [1] that he personally has suffered some actual threatened injury as a result of the putatively illegal conduct of the defendant, and that the injury [2] fairly can be traced to the challenged action and [3] is likely to be redressed by a favorable decision.\textsuperscript{215}

Although the 800 entities and individuals joining the Committee in the suit were a varied lot,\textsuperscript{216} the court did not dwell on the first prong of the test. It simply assumed that the economic injuries alleged—“serious financial damage as a result of monetary instability and high interest rates in recent years”—\textsuperscript{217}—were sufficient to establish injury in fact. The court may have felt it unnecessary to detail economic injuries such as wealth erosion because of high inflation in the late 1970s and early 1980s, and job loss, because of the contractionary monetary policy and serious recession that followed. Alternatively, the court may simply have economized its analysis because of its conclusion that the second prong of traceability was clearly not satisfied.

On this point, the court stated that it was “entirely speculative” whether the influence of the Reserve Bank presidents was responsible for the FOMC’s pursuit of restrictive monetary policies.\textsuperscript{218} In addition, it was “highly uncertain whether and to what extent such policies were responsible for the adverse economic conditions that allegedly resulted in harm to the appellants.”\textsuperscript{219} For good measure, the court also said that the injuries could not be redressed by the court, because it was again “too speculative” whether having only members on the FOMC subject to “democratic control” would have resulted in a different monetary policy.\textsuperscript{220}

\textsuperscript{216} The plaintiffs included “businesses, building associations, farmers, a labor union, and private individuals.” Comm. for Monetary Reform, 766 F.2d at 542.
\textsuperscript{217} Id.
\textsuperscript{218} Id.
\textsuperscript{219} Id.
\textsuperscript{220} Id. at 543.
The plaintiffs had also argued that they had standing on “separation-of-powers grounds,” an argument based on the Supreme Court’s decision a decade earlier in *Buckley v. Valeo*.221 In *Buckley*, the Court had allowed a challenge to the constitutionality of the composition of the Federal Election Commission without requiring the plaintiff to show that an appropriately appointed Commission would have decided the matter at hand any differently. The D.C. Circuit rejected this argument derived from *Buckley*, quoting its holding that “litigants with sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.”222 Here, the court said, the plaintiffs had not alleged they were “directly subject to the governmental authority they seek to challenge, but merely assert[ed] that they [were] substantially affected by the exercise of that authority.”223 Judicial intervention was thus not necessary to protect individual rights. To allow standing under these circumstances would be to open up the courts to the “generalized grievances” shared by a large class of citizens and, thereby, to decide “abstract” questions better decided by other governmental institutions.224

The D.C. Circuit’s earlier decision in *Reuss* had rested on generally similar reasoning, with a few notable differences. One was the reluctance of the panel majority in that case even to conclude that the injury prong of the standing test had been met, though Congressman Reuss’ own pleadings may have led to this conclusion.225 A second was that the panel majority distinguished *Buckley* not on the *Committee for Monetary Reform* ground that the plaintiffs must be “directly subject to the authority of the agency, whether such authority is regulatory, administrative, or adjudicative in nature,”226 but because Reuss had not shown a sufficiently “personal stake”227 that would “benefit” from a favorable decision.228 This reasoning seemed to invoke, without specifically citing, the “generalized grievance” concern. But, as Judge Wright noted in dissent, the counterargument was that

222. *Comm. for Monetary Reform*, 766 F.2d at 543 (quoting *Buckley*, 424 U.S. at 117) (per curiam).
223. *Id.*
224. *Id.* (quoting *Warth v. Seldin*, 422 U.S. 490, 499, 500 (1975)).
225. *Reuss v. Balles*, 584 F.2d 461, 469 (D.C. Cir. 1978). Reuss had alleged that action by the FOMC may affect the value of his bond, an injury the court found too speculative. Note that this case was litigated in the mid-1970s, before the appointment of Paul Volcker as Fed Chair and the dramatic rise in interest rates (and thus decline in value of existing fixed-rate bonds) that followed his steering the FOMC to a much more restrictive monetary policy.
226. *Comm. for Monetary Reform*, 766 F.2d at 543.
Reuss’ bonds could well benefit if the FOMC did not tighten monetary policy.229

ii. Current Standing Doctrine

How, if at all, would the views of a majority of the current Court differ from those expressed in the D.C. Circuit cases decided several decades ago? The recent cases invalidating for-cause removal protection for federal officials provide a starting point for analysis. In the most recent of the three, Collins v. Yellen,230 Justice Alito addressed standing to bring a separation of powers challenge, in a part of his opinion joined by all his colleagues but Justice Sotomayor.231 Because he concluded rather easily that the plaintiffs had standing, his discussion is not lengthy.

Justice Alito began by invoking the now-familiar three-part test of Lujan.232 The plaintiffs, shareholders of the government-sponsored enterprises Fannie Mae and Freddie Mac, claimed that actions taken by the Federal Housing Finance Agency (“FHFA”) had diminished the value of their holdings. FHFA, the regulator of Fannie and Freddie, had taken these actions in its other statutory role as conservator of those two enterprises following their massive losses during the onset of the Global Financial Crisis in 2008. Justice Alito found the first injury-in-fact prong of the Lujan standard easily satisfied because plaintiffs’ claim of unnecessarily withheld dividends was the “sort of pocketbook injury [that] is a prototypical form of injury in fact.”233

The second prong of traceability was satisfied because FHFA had adopted a dividend formula that swept all the net worth of Fannie and Freddie to the Treasury Department, in exchange for its financial support of the two enterprises. Justice Alito found the third prong of redressability satisfied, at least in part because the case involved a claim that the President’s removal power had been unconstitutionally infringed. He quoted from Seila Law, in which Chief Justice Roberts’s majority opinion had stated that, in

229. Id. at 472.
231. Justices Kagan, Breyer, and Gorsuch did not join in other parts of Justice Alito’s opinion. Id. at 1769.
First, the plaintiff must have suffered an “injury in fact”—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) “actual or imminent, not ‘conjectural’ or ‘hypothetical’ . . . . Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be “fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.” . . . Third, it must be “likely,” as opposed to merely “speculative,” that the injury will be “redressed by a favorable decision.”
the context of the removal power, it was “sufficient that the challenger sustains injury from an executive act that allegedly exceeds the official’s authority.”234 Thus there was no need for plaintiffs to allege, much less prove, that FHFA would have acted differently had the relevant enabling legislation not restricted the President’s removal power.

A claim of standing to challenge the constitutionality of the FOMC by plaintiffs such as Congressman Reuss or the Committee for Monetary Policy Reform would differ in two salient respects from that advanced by the aggrieved Fannie and Freddie shareholders in Collins. First, the existence of an injury-in-fact would not be so clear cut for today’s Court. Second, as discussed by the D.C. Circuit in those two older cases, the many economic factors affecting bond prices and interest rates more generally make tracing the putative bondholder injury back to the FOMC less straightforward. The traceability prong may also be complicated by the absence of the regulatory relationship between agency and plaintiffs that was present in Seila Law, Collins, and Buckley itself.

At first glance, an allegation that the actions of the FOMC reduced the value of a plaintiff’s bonds or resulted in a recession in which a plaintiff was laid off would seem a clear injury in fact, and thus adequate under the first prong of the Lujan test. In Collins, Justice Alito had characterized “pocketbook injury” as a “prototypical” form of injury in fact.235 However, Lujan’s statement of standing requirements included not only that an injury in fact be “concrete,” but that it be “particularized.”236 This requirement is often explained as disallowing standing where plaintiffs have only “generalized grievances” shared with most or all other citizens.237

235. Id. As it further restricted standing in an even more recent case, the Court reaffirmed that “certain harms readily qualify as concrete injuries . . . . The most obvious are traditional tangible harms, such as physical harms and monetary harms.” TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2204 (2021).
236. Lujan, 504 U.S. at 560 (citations omitted). The Lujan formulation also requires that the injury be “actual or imminent,” and not “conjectural or hypothetical.” Id. (citations omitted).
237. See, e.g., id. at 573–74. (“We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.”); see also the discussion of cases featuring the generalized grievance issue in Lance v. Coffman, 549 U.S. 437, 439–41 (2007) (per curiam). In a recent case, Justice Breyer’s majority opinion might be read as suggesting that the generalized grievance standard is distinct from a determination of an injury in fact. Carney v. Adams, 141 S. Ct. 493, 498 (2020) (noting that requirement that injury must be “concrete and particularized” is a first aspect of standing law relevant to the case and requirement that grievance must be “more than an abstract and generalized harm to a citizen’s interest in the proper application of the law,” as a second aspect of standing doctrine). Logically, though, it seems more an elaboration, or example, of the particularization (and perhaps concrete) standard. See Spokeo, Inc. v. Robins, 578 U.S. 330, 339 n.7 (2016) (discussing a generalized grievance in the context of considering the particularization
Again at first glance, the particularization—or non-generalized grievance—requirement does not seem to pose a significant problem for bondholder standing. After all, the injury any bondholder claims to have suffered will vary, obviously with the face value of the bonds they hold, but also with their maturity, since changes in the federal funds rate will normally have different effects on shorter-term bonds than on long bonds. The cases in which the Court has found a plaintiff’s grievance to be a generalized one involved quite different circumstances, usually involving “every citizen’s interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large.” Thus the Court has denied standing to plaintiffs claiming that funds had not been properly appropriated or spent, that a member of Congress who was also an officer in the military reserves violated the Incompatibility Clause, and that a successful voter referendum had not been properly implemented.

The particularized injury argument of a bondholder is arguably strengthened by Justice Scalia’s explanation, offered a few years before he authored the *Lujan* opinion, that a “widely shared” grievance was not the same as a “generalized” grievance. The explanation was contained in his dissent in *Federal Election Commission v. Akins*, a case that granted standing to a group of voters seeking review of a Federal Election Commission (“FEC”) decision that an organization was not a “political committee.” Justice Scalia made clear that his objection was based not on the fact that many people may have been harmed by the FEC action, but that every voter had been harmed in the same way. He explained that victims of a mass tort had standing because each suffered a different injury, and that each plaintiff in a voting rights suit had been denied his or her own statutorily

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238. The difference depends, among other factors, on the degree to which market actors believe that high rates will be sustained. So, for example, if the FOMC raises rates, but most market actors believe that the economy is too fragile to absorb rate increases without falling into recession, then prices of longer-dated bonds will not change as much (and, if markets believe that the FOMC will have to reverse course, the price of longer-dated bonds may actually increase, in anticipation of lower future rates).


244. *Id.*

245. *Id.* at 27 (majority opinion).

246. *Id.* at 35 (Scalia, J., dissenting).
protected right to vote. The differing losses to individual bondholders would seem consistent with these forms of particularized injury.

While Justice Scalia’s reasoning in *Akins* might be applied in a case challenging the constitutionality of the FOMC, two considerations inject at least a bit of doubt. First, in the twenty-five years since *Akins*, the Court has neither embraced nor rejected his approach. There is no congruent analysis to be found in any more recent majority opinion. Second, Chief Justice Roberts has subsequently suggested that the generalized grievance bar to standing might be higher than one might infer from Justice Scalia’s *Akins* opinion.

In a dissent in *Massachusetts v. EPA* joined by Justice Scalia himself, the Chief Justice included among his arguments against standing the fact that the “very concept of global warming seems inconsistent with this particularization requirement” because it is a “phenomenon ‘harmful to humanity at large.’” He did not elaborate. One should perhaps not place too much emphasis on this comment, insofar as most of his dissent focused on the problems of traceability and redressability, and his objections to what he believed to be the majority’s relaxation of standing requirements based on a state’s *parens patriae* interests. Still, his observation about global warming is at least arguably inconsistent with Scalia’s *Akins* reasoning: Not everyone is harmed in the same way by global warming, or perhaps at all. Indeed, while the economic losses are likely to be very large for the country as a whole, there will be discrete winners. And the damage suffered by those owning coastal property in New England surely will be particular to each owner.

So, too, with interest rate increases—households and institutions holding mostly cash or very-short-term assets (as opposed to equities or longer-term bonds) can benefit from higher rates. The Roberts dissent thus raises the possibility that the current Court would expand the meaning of generalized grievance to include actions by the FOMC that reverberate broadly through the economy, whether or not some plaintiffs could point to injuries specific to them. How real that possibility would be is among the many imponderables encountered in the muddled world of standing doctrine. One wonders, for example, whether the Chief Justice’s view may be limited to instances where plaintiffs seek to force an agency to regulate, rather than to escape regulation.

Turning to traceability, there are two hurdles for plaintiffs attempting to satisfy this second prong of the *Lujan* test. First, as both D.C. Circuit
panels concluded in those older cases, the action of the FOMC in raising the federal-funds target does not directly cause the harm that plaintiffs allege they suffer because of a higher-interest-rate financial environment. The second hurdle also implicates the redressability prong of the Lujan test: How can plaintiffs trace back their injury to the fact of a putatively unconstitutional FOMC, when they have no way of showing that a properly appointed (or removable) FOMC would have taken a different policy action in light of prevailing economic circumstances?

The first hurdle to establishing traceability does appear significant for many of the plaintiffs represented in the Committee for Monetary Reform case. While the historically high interest rates of the 1980s FOMC, and the recession they brought on, led to considerable economic pain, tracing any specific job loss or corporate bankruptcy to the FOMC’s actions is not straightforward. After all, not every company went bankrupt, and the vast majority of employees did not lose their jobs. Other factors, such as pre-existing vulnerabilities of certain firms and employees or changes in consumer preference, presumably played a role. At least as to holders of Treasury securities, though, the argument for traceability is much stronger, since Treasuries of the same denomination and maturity are fungible. Indeed, there is solid economic evidence linking changes in the federal-funds rate to changes in the prices of Treasuries. As one review of the economic literature concluded, “FOMC decisions affect bonds of all maturity.”249 While intervening variables such as liquidity considerations and term premia also play a role, it is quite clear that FOMC actions have a major impact on prices.250 Because plaintiffs would not be seeking damages, and thus would not need to quantify the impact of an FOMC policy change on the market value of their bonds, the argument for a traceable injury-in-fact seems a strong one.

249. Andrea Buraschi & Paul Whelan, Bond Markets and Monetary Policy, in HANDBOOK OF FIXED-INCOME SECURITIES 77, 91 (Pietro Veronesi ed., 1st ed. 2016). One important analytic challenge in isolating the impact of FOMC policy decisions on Treasuries has been to determine changes in bond prices that have occurred in anticipation of FOMC policy moves, which may limit the effect of FOMC statements on those prices. Studies demonstrate that the information content of FOMC statements as to future monetary policy also affects the prices of Treasuries. See, e.g., Samuel G. Hanson & Jeremy C. Stein, Monetary Policy and Long-Term Real Rates, 115 J. FIN. ECON. 429, 429 (2015). Recent research has confirmed that non-traditional monetary policy tools, such as large-scale asset purchases, also predictably affect the price of Treasuries. See, e.g., Eric T. Swanson, Measuring the Effects of Federal Reserve Forward Guidance and Asset Purchases on Financial Markets, 118 J. MONETARY ECON. 32, 32 (2021).

250. There may be unusual circumstances in which the prices of certain maturities of bonds do not appreciably change after an FOMC change in its interest-rate target. For example, if the FOMC raises short-term rates, but markets believe that an economic slowdown will ensue, followed by a reversal of the rate increase, then the price of longer-dated bonds may not move much in response to the initial increase. The result would be a flattening of the yield curve, meaning that the slope of the line connecting short-term rates to longer-term rates had been reduced.
Still, the preceding paragraph is based on financial economics analysis, not legal doctrine. There is no regulatory, contractual, or any other relationship between the FOMC and a bondholder. The loss occurs as financial markets adjust their assessment of the value of a bond in light of the effects on funding costs for financial institutions that participate in the federal funds market, hold reserves with the Federal Reserve, or transact in the repo and reverse repo facilities now maintained by the Federal Reserve. 251 Those institutions will face higher borrowing costs and, accordingly, will need to increase the rates they charge to households and businesses borrowing from them.252 Anticipating these effects, a potential purchaser of the plaintiff’s Treasury bond will now be willing to buy it only at a price that effectively equalizes the return the purchaser could get on a newly issued Treasury with a similar term until maturity.

In a sense, the question the Court would face is whether economic traceability will suffice, or whether standing doctrine will demand legal traceability—a kind of privity between the plaintiff and the agency. This same question is raised by the second hurdle, that of demonstrating that a validly constituted FOMC would have acted differently than the current FOMC with Reserve Bank presidents as voters. This hurdle is also relevant to the redressability prong of standing requirements.

Without some doctrinal relaxation, that second hurdle would be effectively insuperable. But, as explicitly stated by the Court in its recent decisions finding that statutory constraints on the President’s prerogative to remove officials were unconstitutional, “a litigant challenging governmental action as void on the basis of the separation of powers is not required to prove

251. The implementation notes issued by the FOMC to accompany its statements at the end of each meeting make clear that there is no regulatory action directed at any particular party, but instead a series of market operations and setting of interest rates to be paid by the Federal Reserve on reserves and in its ONRRP facility. Press Release, Federal Rsrv. Bd. & Fed. Open Mkt. Comm., Implementation Note: Decisions Regarding Monetary Policy Implementation (Dec. 14, 2022), https://www.federalreserve.gov/newsevents/pressreleases/monetary20221214a1.htm [https://perma.cc/8JLK-U4Z3].

252. The set of direct effects of FOMC actions is now broader than it was for many years, when the principal monetary policy instrument of the FOMC was open market operations—that is, buying and selling Treasuries, which affected the level of reserves held by banks, and thus the amount they could lend. As reserves became scarcer, the price of credit extended between financial institutions in the federal funds market rose. Several developments during and after the Global Financial Crisis of 2007–2009 have complicated things. First, a 2008 change in the Federal Reserve Act authorized the FOMC to pay interest on reserves. That authority proved useful to the FOMC when it decided in late 2015 to begin raising rates following seven years near zero, because reserves were so abundant after the extraordinary FOMC purchases of bonds during and after the crisis that open market operations alone likely would have been ineffective in raising rates. The “administered rate” of interest on reserves affects bank lending because there is no reason for a bank to make a loan at a rate lower than the risk-free rate it receives from the Federal Reserve on its reserves. Similarly, the reverse repo and repo facilities created in recent years allow the FOMC to affect the rates that financial institutions eligible to directly participate in those facilities can earn or must pay.
that the Government’s course of conduct would have been different in a ‘counterfactual world’ in which the Government had acted with constitutional authority.”

As noted earlier, the two D.C. Circuit panels had rejected plaintiffs’ claims of “separation of powers standing,” based on their readings of Buckley. Recall that in Buckley the Court said that plaintiffs with “sufficient concrete interests at stake may have standing to raise constitutional questions of separation of powers with respect to an agency designated to adjudicate their rights.” The Committee on Monetary Reform panel read the last clause of that sentence as restricting separation of powers standing to plaintiffs “directly subject to the governmental authority they seek to challenge,” and not simply “substantially affected by the exercise of that authority.” The court seems to have concluded a lot from a single sentence in a massive per curiam opinion. The plaintiffs in Buckley were clearly subject to regulation by the FEC. Thus, the Court had no occasion to consider whether the relaxation of traceability might be permitted in other circumstances. The fact that the Court has never since cited the Buckley sentence in disposing of standing objections in its separation of powers cases reinforces the inference that the D.C. Circuit may have invested it with too much significance.

Again, the atypical characteristics of the FOMC and monetary policy, relative to those of most other federal agencies, make extrapolation of standing doctrine tricky. In most cases, potential plaintiffs fall into two groups—those who are, or might be, regulated by the agency whose action is being challenged, and those who are not. As explained by Justice Scalia in Lujan, contemporary standing doctrine erects a high barrier to those in the second group:

When . . . plaintiff’s asserted injury arises from the government’s allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed. In that circumstance, causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well . . . . [A]nd it becomes the burden of the plaintiff to adduce


facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury.  

Many of the more controversial standing cases have involved the question of whether the Court regards the interests of beneficiaries of the regulation to be concrete and particularized enough to satisfy the Court’s view of legal harm. But the FOMC does not regulate anyone. The claim of bondholders would turn neither on a regulatory relationship nor on the actions of a regulated party, but instead on the well-documented reaction of financial markets to FOMC action, the motivation of which is usually to bring about that very reaction.

This distinctive circumstance appears to pit two predilections of the Roberts Court conservative majority against one another—on the one hand, a restrictive view of standing to challenge agency action (or inaction) for anyone not directly regulated or otherwise suffering injury comparable to one cognizable at common law and, on the other, an expansive view of Appointments Clause requirements and presidential removal prerogatives. While it is obviously impossible to say for sure, I suspect that the conservative majority would incline toward the former position, since the plaintiffs for which it has shown most solicitude are the subjects of regulation. Apart from the Court’s abstract preferences, though, one thing is certain. If, for whatever reason, the Court does not want to take on the merits of such a case, it has a ready means for avoiding the issue by taking a narrower view of standing.


There is one possible, modest qualification to this statement considered. See infra note 282.


There is a slightly different note struck in Justice Alito’s opinion in Collins, as discussed in greater detail later in this Article. See infra Section IV.A.1. In rebutting the argument that the FHFA should be distinguished from the CFPB, he acknowledged that the FHFA did not wield regulatory and enforcement authority over purely private individuals. However, he noted that FHFA did regulate the two government-sponsored enterprises that dominate the secondary mortgage market and, as such, “could have an immediate impact on millions of private individuals and the economy at large.” Collins v. Yellen, 141 S. Ct. 1761, 1785 (2021). Obviously that description applies to the FOMC as well. One should probably not place too much weight on this comment for purposes of a standing determination, though, insofar as the impact of FHFA decisions on the plaintiffs in its role of conservator created the kind of direct economic injury that Justice Alito had already classified as a “prototypical” form of injury-in-fact.
2. Claims Other than Economic Harm from Monetary Policy Actions

   i. Congressional Standing

Three of the four D.C. Circuit cases included a claim of congressional standing. In the first, Reuss v. Balles, the court rejected the argument of the Member of Congress that he had standing because he was deprived of his constitutional right to initiate impeachment proceedings against a Reserve Bank president. In the second case, Riegle v. FOMC, the Court assumed that Senator Riegle had standing, because a violation of the Appointments Clause deprived him of his Constitutional right to advise on, and consent to, officer appointments. However, the Court ruled that "[w]here a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator’s action." In the third case, Melcher v. FOMC, the court simply invoked the Riegle equitable discretion ground for dismissal, without conducting its own standing analysis.

The Supreme Court’s decision in Raines v. Byrd very likely resolves the standing issue raised in Reuss, Riegle, and Melcher against the legislators in those cases. Raines involved a challenge by six legislators to the constitutionality of the Line Item Veto Act, which allowed the President to “cancel” specific spending authorizations or tax benefits in subsequently enacted legislation. The legislators argued that a line item veto violated the Article I bicameralism and presentment requirements and, thereby, “divest[ed]” them of their constitutionally protected role in repealing legislation. The majority opinion by Chief Justice Rehnquist rejected their claim of injury, holding that “individual members of Congress do not have a


261. Reuss, 584 F.2d at 464–65. Because Representative Reuss was a member of the House, he could not rely more directly on the advice and consent role of the Senate. Reuss also claimed that his powers as a member of the Legislative Branch were usurped by an unconstitutional delegation of the Article I power to “coin money.” Id. at 465. As the court noted, that circumstance would not have been changed even had all members of the FOMC been subject to Senate confirmation. Id.

262. Riegle, 656 F.2d at 877. I say “assumed” because, in acting on a motion to dismiss, the Court expressly construed the complaint in the manner most favorable to the plaintiff. Id. The court provided no analysis of the basis for Senator Riegle’s claim of standing. Id.

263. Id. at 881.

264. Melcher, 836 F.2d at 562. The court spent a good bit of its opinion trying to clarify that, contrary to what had been suggested in Riegle, the availability of congressional standing did not depend in any way on whether private standing to assert a similar constitutional claim was available to any plaintiff.


266. Id. at 816.
sufficient ‘personal stake’ in this dispute and have not alleged a sufficiently concrete injury to have established Article III standing.” 267 The Court believed the injury was “institutional,” rather than personal. 268

The injuries alleged in the three suits against the FOMC are fairly clearly “institutional” as the Court used the term in Raines. The Court characterized any claim that is not “personal,” such as entitlement to the congressional seat itself or receipt of salary, as institutional, because it “ran” with the status of being in Congress and would not be retained when the Member left that body. 269 The prerogatives of adopting Articles of Impeachment, or advising and consenting in connection with appointment of an officer of the United States, belong to the full House and Senate, respectively. And, for all the twists and turns in standing doctrine in the intervening years, the Court recently reiterated that after Raines, “individual members lack standing to assert the institutional interests of a legislature.” 270

Might a majority of the House or the Senate have standing under the Raines doctrine, as elaborated in subsequent cases, to complain that the presence of Reserve Bank presidents on the FOMC deprives that house of its unique constitutional powers? 271 Maybe, but not very likely. 272

In the first place, the one circumstance in which the Raines Court envisaged legislative body standing was when an action in another part of government had “completely nullified” its vote. 273 While the Court did not explain the scope of “complete nullification,” the two cases in which it found institutional legislative standing (one before and one after Raines) involved situations in which an executive branch official determined the outcome of a tied legislative vote 274 or a voter initiative removed the authority of a legislature to determine legislative districts. 275 While one might argue that

267.  Id. at 830.
268.  The court easily distinguished the one precedent cited by the legislators, where the plaintiffs had been a group of “legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act . . . on the ground that their votes have been completely nullified.” Id. at 823. The precedent in question was Coleman v. Miller, 307 U.S. 433, 456 (1939).
269.  Raines, 521 U.S. at 821.
271.  In an aside of uncertain significance, the Court noted that it “attach[ed] some importance to the fact that appellees have not been authorized to represent their respective Houses of Congress in this action, and indeed both Houses actively oppose their suit.” Raines, 521 U.S. at 829.
272.  The organizational hurdle to such a case has been substantially diminished, at least with respect to the House of Representatives, by the creation and progressively increased authority of the Bipartisan Legal Advisory Group, a five-member committee that is authorized to bring suit on behalf of the House based on a majority vote. See Ben Miller-Gootnick, How the House Sues, 2021 U. Ill. L. Rev. 607, 607 (2021).
273.  Raines, 521 U.S. at 823.
the denial of the opportunity to vote on articles of impeachment of a presidential nomination also “completely nullified” the relevant house’s vote, the absence of an intervening action by a non-legislative actor distinguishes an FOMC challenge from those prior cases.

Relatedly, *Raines* did not stipulate that institutional legislative standing would be found even if both houses of Congress had authorized challenges to a line item veto. The Court pointedly noted that its denial of standing did not “deprive[] Members of Congress of an adequate remedy (since they may repeal the Act or exempt appropriations bills from its reach).” In one recent D.C. Circuit case, which was later vacated as moot, the Court found institutional standing where there was the theoretical possibility of a veto-proof majority of Congress passing legislation to forbid an allegedly unconstitutional Executive Branch expenditure. But even this somewhat expanded view of legislative standing, assuming its acceptance by the Supreme Court, still involved an action in another part of government that “nullified” the effect of a congressional vote. In the FOMC context, the Court might well return to the point that Congress itself has created the situation of which one House complains, with no intervening action by anyone to undermine the original congressional vote (or a future one). Indeed, the point is further made by the identity of the likely defendant in such a case—the FOMC itself. The FOMC has surely done nothing to interfere with, much less nullify, congressional prerogatives.

As with so many strands of standing doctrine, *Raines* and its progeny have been vigorously criticized from different perspectives. And there

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277. U.S. House of Reps. v. Mnuchin, 976 F.3d 1, 4 (D.C. Cir. 2020), *vacated sub nom.* Yellen v. U.S. House of Reps., 142 S. Ct. 352 (2021). This case involved a challenge to the Trump Administration’s transfer of funds appropriated for other purposes to supplement a congressional appropriation for building a wall on the border between the United States and Mexico. The three-judge panel did not use the language of “nullification” in applying what it deduced as the test emerging from the Supreme Court’s cases. Instead, it asked whether “the defendant’s action curtail[ed] the power and authority of the [House].” *Mnuchin*, 976 F.3d at 12 (emphasis added).

278. The D.C. Circuit has also granted standing to six House members on the Committee on Oversight and Reform, who sought to enforce their statutorily granted right to obtain information related to property owned by the U.S. government. The court ruled that a rebuffed request for information is a sufficiently particularized injury for a legislator that there was no requirement that the House, or even the Committee as a whole, bring the suit. Maloney v. Murphy, 984 F.3d 50, 54 (D.C. Cir. 2020), *vacated sub nom.* Carnahan v. Maloney, 143 S. Ct. 2653 (2023). Again, whatever the receptivity of the Supreme Court to this “informational” exception for individual legislators, it would not be helpful to a legislative challenge to the constitutionality of the Federal Reserve Act.

have been indications that legislative standing may be available in certain other circumstances, such as to defend the Constitutionality of a statute where the Executive declines to do so. But there has been no indication that the Court would be receptive to a claim of standing when members of Congress challenge the constitutionality of a statute validly enacted into law. A search for a nonlegislative government actor that has “nullified” a congressional voting prerogative will come up empty in a prospective challenge to any of the potential Constitutional infirmities associated with the FOMC. As a result, even if one or both houses of Congress voted to initiate such a challenge, the Court would likely find standing lacking.

ii. Private Actions Against Reserve Banks

Recall that in Custodia Bank the plaintiff financial firm argued that the Reserve Bank president was a principal officer. Because the Reserve Bank’s denial of a master account to Custodia was a particularized harm that gave it standing, it could include this structural constitutional argument along with its administrative law claims. In dismissing that claim, the court found that


For a review of these other areas, see generally Wilson C. Freeman & Kevin M. Lewis, Cong. Rsch. Serv., R45636, Congressional Participation in Litigation: Article III and Legislative Standing (2019). In Maloney, the Court of Appeals found standing for a group of members of congressional oversight committees under 5 U.S.C. § 2954, which authorizes a minimum number of members of one of those committees to obtain information pertaining to its jurisdiction from any executive agency. In a split decision, the court concluded that this “informational interest” was more personal than institutional, and thus standing was not foreclosed by Raines. 984 F.3d at 54. Whatever the merits of that decision, it is not relevant to the issue of standing for individual members of Congress to contest the constitutionality of properly enacted legislation.

While disputes over access to Federal Reserve services have occurred in the past, the emergence of financial firms involved with crypto assets and other innovative technologies has elevated the importance of this issue and, with it, the number of possible plaintiffs with standing to challenge the status of Reserve Bank presidents. David Zaring has suggested another possible plaintiff with standing to raise structural constitutional issues pertaining to the FOMC—the primary dealers with which the Federal Reserve conducts its transactions in government securities. David Zaring, Law and Custom on the Federal Open Market Committee, 78 Law & Contemp. Probs. 157, 182–83 (2015). As Zaring himself notes, it is hard to see the incentive of an existing primary dealer to challenge the hand that feeds it. In any case, there is no regulatory relationship between the FOMC and the primary dealers. The Federal Reserve Bank of New York actually maintains the relationships, since it implements FOMC directives. The Bank characterizes them as “business, not regulatory.” Federal Reserve Bank of New York Policy on Counterparties for Market Operations, Fed. Rsrv. Bank of N.Y. (Apr. 25, 2023), https://www.newyorkfed.org/markets/counterparties/policy-on-counterparties-for-market-operations [https://perma.cc/KZM3-ZR3E]:

The Federal Reserve Bank of New York’s relationships with private sector counterparties described in this policy are business, not regulatory, relationships entered into by the New York Fed for the purposes described herein. That a firm is a New York Fed counterparty is not an endorsement of the firm by the New York Fed and should not be used as a substitute for independent analysis and due diligence by other parties considering a business relationship with the firm.

Id. If a firm chooses not to continue as a primary dealer, with the benefits it brings, the Federal Reserve Bank of New York would no longer have any authority to enforce the contractual expectations it has
the Reserve Bank president was an inferior officer properly appointed by the Board. But its conclusion was built on the facts of that case—the undoubted power of the Board to remove her and at least the suggestion that the Board had successfully influenced her decision. Might a similarly situated future plaintiff import the arguments for Reserve Bank presidents being principal officers in the monetary policy context, as discussed in Part II.B.2? Possibly, but there are some hurdles.

First, there is the question of whether the Reserve Bank president’s action is an exercise of “executive power” to which Article II requirements attach. In Custodia, the district court noted that the standard for deciding the case was whether granting a master account “constitutes the execution and enforcement of the Federal Reserve Act.” But the court made clear it was not definitely deciding that actions on master account applications are executive functions as a matter of law. Instead, it observed that Custodia had “plausibly alleged” this to be the case. Presumably because of its view that the Reserve Bank president was an inferior officer, the Court did not believe it needed to resolve the executive power issue.

In its motion to dismiss, the Board had argued that granting a master account was incident to the taking of deposits from banks and other financial institutions, a function that Reserve Banks are authorized (but not required) by the Federal Reserve Act to perform. The Board seemed to be arguing that the granting of master accounts—and, by extension, the provision of other services by Reserve Banks—falls on the private, operational side of the public-private hybrid created by the Federal Reserve Act. Indeed, the Board explicitly invoked the precedent of the First Bank of the United States for the proposition that a “decision on whether to open an account at a government-affiliated bank is not the type of sovereign power implicating the [Appointments] Clause.” This characterization is belied somewhat by the Board’s own explanation that it was developing guidelines to promote consistency in master account decisions across the Federal Reserve System.
because “access decisions made by individual Reserve Banks can have implications for a wide array of Federal Reserve System... policies and objectives.” This aim itself suggests that, in making decisions on master accounts, Reserve Bank presidents do “exercis[e] significant authority pursuant to the laws of the United States.”

Regardless of a plaintiff like Custodia Bank’s success on the executive power issue, the second hurdle would likely prove more formidable. The very fact that its claimed injury has nothing to do with monetary policy decisions, or the FOMC as such, might well foreclose the plaintiff from arguing that Reserve Bank presidents are principal officers because of their role on the FOMC. In Seila Law, the Court stated that, “[i]n the specific context of the President’s removal power, we have found it sufficient that the challenger ‘sustain[s] injury’ from an executive act that allegedly exceeds the official’s authority.” As explained earlier, this standard removes the need for a plaintiff to show that the official or agency would have made a different decision in the absence of for-cause protection. But it retains a required link between the injury and the official’s authority. A disappointed applicant’s injury is related to the Reserve Bank president’s statutory authority to accept deposits, under the general supervision of the Board, not from an FOMC monetary policy decision on which the president has voted.

The circumstance here raises a peculiar question: Can a Reserve Bank president be an inferior officer for some purposes (those in which she is acting as head of the Reserve Bank), while being a principal officer for purposes of FOMC monetary policy decisions? The possibility may seem a bit jarring. But perhaps that is a sensible way to parse the anomalous characteristics of the Federal Reserve System generally, and the Reserve Bank presidents in particular. In any case, if standing to challenge the FOMC role of Reserve Bank presidents is denied plaintiffs like Custodia Bank, chances are that courts will never need to decide the question one way or another.

iii. Presidential Removal of a Reserve Bank President

A third possibility is that the President could attempt to remove a Reserve Bank president, much as President Roosevelt attempted to remove Commissioner Humphrey in the confrontation that gave rise to Humphrey’s Executor. While the procedure by which the President would execute this

effort is not entirely clear, given that the Reserve Bank president is not an employee of the U.S. government, presumably an actual case or controversy would eventually be joined. Undoubtedly, the putatively deposed Reserve Bank president would have standing to challenge her removal, thereby bringing the Article II issues front and center. While the legal issue is clear, the circumstances under which the President might be tempted to initiate a confrontation of this sort, with its potential for economic uncertainty, are probably quite limited.

C. THE FEDERAL RESERVE AS EXEMPLARY

While a relatively low probability outcome, there is at least some chance that a bondholder could successfully argue for standing to challenge the role of Reserve Bank presidents on the FOMC or the breadth of monetary policy discretion granted the FOMC in its statutory mandate. Alternatively, if the Court applies the logic of Seila Law in future cases involving traditional independent agencies, a plaintiff appealing a regulatory action by the Board would have no difficulty establishing standing to challenge the for-cause removal protection of its members. This section explores two, arguably mutually reinforcing, avenues by which the Court might nonetheless find that the FOMC’s pedigree provides it some insulation from contemporary constitutional challenge. One is quite literally the Fed’s pedigree—that is, its arguable ancestry in the First and Second Banks of the United States, which date to the earliest years of the Republic. The other is a simple denomination of the Federal Reserve as “exceptional” or an “anomaly” because of the role of a central bank. There are hints of both these arguments—though no more than that—in opinions by Justices in the current conservative majority.

1. History

Much of the doctrine on the relevance of historical practice to separation of powers issues—if it can even be called that—predates the consolidation of the conservative majority on today’s Court. Still, the Chief Justice’s emphasis on what he regarded as the novelty of the for-cause removal protections invalidated in Free Enterprise Fund and Seila Law raises the question whether a long-established agency structure might be tolerated even if the Court’s increasingly muscular Article II doctrines suggest constitutional difficulties. If, that is, a structure is unconstitutional in

part because it is novel, then perhaps it may be constitutional if it is longstanding. It should be noted at the outset, though, that there are no examples of the current conservative majority using this reasoning to validate a practice in a separation of powers case—only examples where the purported novelty of practice is said to reinforce questions about its constitutionality.

A threshold question is whether the asserted novelty of the two-level for-cause protection in *Free Enterprise Fund* and the single-headed independent agency in *Seila Law* was, in fact, integral to the Court’s conclusions that they were unconstitutional. If the decisions ultimately rested on the Court’s textual extrapolations and its theory of the separation of powers, then the absence of novelty might not save the FOMC (or any other agency). The Chief Justice does not give a clear answer to this question. 292

In *Free Enterprise Fund*, the direct discussion of novelty was relatively brief and came only after both a lengthy consideration of judicial precedent and some speculation as to the effects of the two-level protection on the President’s ability to take care that the laws be faithfully executed. His reference late in the opinion to then-Judge Kavanaugh’s assertion that the “lack of historical precedent” was “the most telling indication of [a] severe constitutional problem” appeared to “hover[] somewhere between rhetorical dressing and doctrine,” as Neal Katyal and Thomas Schmidt characterized it. 293

By contrast, the Chief Justice’s discussion of history and novelty is a prominent part of his opinion in *Seila Law*. It actually precedes his structural analysis. He again quotes the “telling indication” comment and, further echoing then-Judge Kavanaugh’s opinions in the D.C. Circuit, proceeds to distinguish or dismiss the handful of historical precedents of agencies headed by a single director with for-cause removal protection that were cited by the parties and in Justice Kagan’s dissent. But, as in his earlier invocations of an anti-novelty doctrine in *Free Enterprise Fund* and *National Federation of Independent Business v. Sebelius*, 294 he does not explain why the absence of

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292. Cf. Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1423 (2017) (“[I]t is unclear whether the Court uses novelty as a ‘factor’ in its analysis or as an on-off switch that adjusts whether a statute is presumed constitutional or presumed unconstitutional.”).


294. Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549–50 (2012). In the quite different context of the constitutional support for the Affordable Care Act provided by the Commerce Clause, the Chief Justice’s discussion of novelty was remarkably brief. In perhaps his most telling comment, he
historical precedent is problematic. Nor does he specify how, exactly, the purported novelty of the CFPB’s single-director structure fits into his conclusion that it is unconstitutional. He begins his structural discussion by saying that “[i]n addition to being a historical anomaly, the CFPB’s single-Director configuration is incompatible with our constitutional structure.”295 And he certainly gives no indication that a well-established practice might help save an agency structure.

In truth, there is little in the Seila Law opinion to suggest that congressional and executive practice matters to the Chief Justice, except insofar as it confirms his view of far-reaching presidential prerogatives. On the contrary, the trouble he took to narrow the conventional understanding of Humphrey’s Executor might be read to suggest that he attaches little constitutional significance to historical practice by the politically accountable branches of government.296 As the Chief Justice made clear in dismissing Justice Kagan’s argument that the FTC’s authority in 1935 had been quite broad, its actual authority did not matter to him.297 All that mattered was the characterization of the agency provided by the Humphrey’s Executor Court.298

One might conclude from Seila Law that novelty matters because it identifies a practice falling outside the narrow bounds of the reinterpreted Humphrey’s Executor (or Morrison, the other “exception” to Myers), but that non-novelty in itself has no validating force.299 The issues for Chief Justice Roberts may be limited to whether a practice runs afoul of his conception of the Myers “general rule” and, if so, whether the Court deigns to extend the two narrow exceptions created by those two cases. Indeed, the discussion of novelty may be little more than a rhetorical device to help mask what might otherwise seem a rather aggressive judicial restructuring of the government to the Court’s liking.

acknowledged that “[l]egislative novelty is not necessarily fatal.” Id. at 549 (emphasis added). He then quoted the “telling indication” language that had also been quoted in Free Enterprise Fund, Katyal and Schmidt note that the Chief Justice used the rhetoric of novelty throughout his opinion. Katyal & Schmidt, supra note 134, at 2158–59. Whether or not one agrees with their argument that the avoidance doctrine made the anti-novelty doctrine possible, they are manifestly correct that the Court did not “define it carefully . . . defend it with any kind of rigor, or . . . face its full consequences.” Id. at 2149.

296. For Chief Justice Roberts, unlike some of his conservative colleagues, past Supreme Court practice does matter, at least to some degree.
297. Seila Law, 140 S. Ct. at 2200 n.4.
298. Id.
299. This is the conclusion Gillian Metzger had reached even before Seila Law. See Gillian E. Metzger, Forw.ord: 1930s Redux: The Administrative State Under Siege, 131 HARV. L. REV. 1, 19 (2017) (“[N]ovelty can condemn an administrative arrangement, but lack of novelty can’t save it . . . .”).
Still, as already noted, Chief Justice Roberts does not address the issue of historical practice head-on. And there is a single, tantalizing hint in Seila Law—albeit only in a footnote—that history might carry some significance after all. In rejecting the argument that any prior agencies are relevant precedents for the CFPB, Chief Justice Roberts references Justice Kagan’s point that “financial regulators” have historically enjoyed some insulation from the president. He responds that “even 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.” He does not endorse the point, but he apparently admits of the possibility.

To supplement the limited inferences on the relevance of historical precedent that can be drawn from recent separation of powers cases, we can turn to another fairly recent case—one that offers a more extensive look at the constitutional relevance of historical practice. National Labor Relations Board v. Noel Canning relied substantially on past practice in concluding that the Recess Appointments Clause covered vacancies that had arisen prior to a congressional recess. However, with the change in composition of the Court since 2014, Justice Breyer’s majority opinion is likely of limited value in predicting how history might influence the disposition of the constitutional issues raised by the FOMC’s structure and mandate. Justice Scalia’s stinging concurrence in the judgment, joined by the Chief Justice and Justices Thomas and Alito, is almost surely more relevant in projecting when and how the current Court may credit history and practice.

A good portion of Justice Scalia’s opinion addressed disagreements with the majority that are not especially salient for present purposes—whether the Recess Appointments Clause is ambiguous and whether there was any textual basis for the majority’s conclusion that a three day

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300. Seila Law, 140 S. Ct. at 2202 n.8.
301. Id.
303. The appointments at issue were nonetheless voided because the Court found that the Senate was truly “in session” during its pro forma sessions and that a three-day recess was to be too short a time to bring them within the scope of the Recess Appointments Clause. Id. at 549–53.
304. It is perhaps noteworthy that when Chief Justice Roberts in Seila Law and then-Judge Kavanaugh in PHH Corp. cited the Noel Canning majority opinion, it was not to the lengthy part of the opinion in which Justice Breyer found that historical practice had validated the use of the recess appointment power for vacancies occurring before the recess commenced, but for the holding that practice also established that three days was too short a period for the power to be operative. Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2201 (2020) (noting that a “few scattered examples” shed little light on the question); PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 182 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).
305. One would expect that Justices Kavanagh, Gorsuch, and Barrett will align much more closely with the Scalia view than with Breyer’s.
intrasession congressional break was not a "recess." He did, however, also spend considerable time contrasting the majority’s approach with his own high threshold for historical practice to affect constitutional interpretation:

Of course, where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision . . . . But [past practice does not, by itself, create power . . . . That is a necessary corollary of the principle that the political branches cannot by agreement alter the constitutional structure. Plainly, then, a self-aggrandizing practice adopted by one branch well after the founding, often challenged, and never before blessed by this Court—in other words, the sort of practice on which the majority relies in this case—does not relieve us of our duty to interpret the Constitution in light of its text, structure, and original understanding.

He went on to note, among other things, that no “[p]residential legal adviser” had opined until 1921 that intrasession recess appointments were constitutional, and that it was only after this opinion was delivered to President Harding by his Attorney General “did the flow of intra-session recess appointments start.” His observation that “[i]t is necessary to skip over the first 13 decades of our [n]ation’s history” underscored his “early days of the Republic” standard. Indeed, to support his narrowly drawn characterization of when historical practice might argue in favor of its constitutionality, he invoked \textit{INS v. Chadha}, in which “[w]e did not hesitate to hold the legislative veto unconstitutional even though Congress had enacted, and the President had signed, nearly 300 similar provisions over the course of 50 years.” The Court does not defer to accommodations between the President and Congress, because the structural features of the Constitution were “designed first and foremost not to look after the interests of the respective branches, but to ‘protec[t] individual liberty.’ ”

Justice Scalia did not explain why historical practice meeting his fairly demanding standard should receive deference from the judiciary. This omission is unfortunate, because an understanding of the rationale might

\begin{footnotes}
\footnote{Noel Canning, 573 U.S. at 575–83 (Scalia, J., concurring). Addressing the cases cited by Justice Breyer to support the weight he gave to historical practice, Justice Scalia countered that “[n]early all involved venerable and unchallenged practices, and constitutional provisions that were either deeply ambiguous or plainly supportive of the practice.” \textit{Id.} at 574 n.1.}
\footnote{\textit{Id.} at 572–73 (citations omitted).}
\footnote{\textit{Id.} at 589.}
\footnote{\textit{Id.} at 590.}
\footnote{\textit{Id.} at 589.}
\footnote{INS v. Chadha, 462 U.S. 919 (1983).}
\footnote{Noel Canning, 573 U.S. at 572 (Scalia, J., concurring).}
\footnote{\textit{Id.} at 571.}
\end{footnotes}
help in assessing the FOMC’s historical case. Justice Breyer’s majority opinion invoked Madison’s “liquidation” theory in explaining why practice could be relevant to constitutional interpretation—that is, that the “difficulties . . . in expounding terms & phrases necessarily used in such a charter . . . might require a regular course of practice to liquidate & settle the meaning of some of them.”314 Then-Judge Kavanaugh apparently agreed with the liquidation explanation, since he quoted this part of the Breyer opinion in his D.C. Circuit opinions on the CFPB single-director structure.315

In his Seila Law opinion, Chief Justice Roberts does not use the term “liquidation,” but does nod in its direction by citing the famous debate on removability in the First Congress.316 He appears, though, to be nodding toward a narrow view of liquidation, which values the non-judicial explication of ambiguous Constitutional text only when it was “contemporaneous” with the drafting of the Constitution and is thus presumed to reflect its original meaning.317 Again, though, insofar as the Chief Justice reads that decision of the First Congress to accord with his view that the Constitution gives the President far-reaching removal power,318 it remains unclear whether this history has independent significance or is simply a helpful gloss on his structural analysis.

Assuming that Chief Justice Roberts might grant some relevance to history that cuts against his doctrinal instincts on separation of powers issues, his comments in Seila Law on the prior practice cited by Justice Kagan and the parties appear consistent with the Scalia standard: “[T]hese isolated examples [of agencies with single heads who have for-cause removal protection] are modern and contested.”319 While Roberts did not say that a practice had to date back to “the early days of the Republic” to be relevant, he did observe that the Office of Special Counsel, the “first enduring single-leader office,” had been created in 1978, “nearly 200 years after the Constitution was ratified.”320 He tracked the “unchallenged” component of

314. Id. at 525 (majority opinion) (quoting James Madison’s letter to Spencer Roane of Sept. 2, 1819).
317. Id. For an explanation of narrow and broader understandings of liquidation, see Bradley & Siegel, supra note 291, at 39–59.
319. Seila Law, 140 S. Ct. at 2202 (emphasis added).
320. Id. at 2201.
Justice Scalia’s standard in asserting that President Carter had raised a Constitutional objection, that President Reagan had vetoed a renewal of the office on constitutional grounds, and that President Clinton had “questioned the constitutionality” of the Social Security Administration’s new single-director structure when signing the relevant legislation in 1994. 321

Although Chief Justice Roberts did not explicitly embrace the “early years of the Republic” norm, his recasting of Humphrey’s Executor suggests that actual congressional practice in creating the Federal Trade Commission Act in 1914 is not dispositive of anything. As noted earlier, all that matters is the characterization of an agency whose principals enjoy for-cause protection that he understands the Humphrey’s Executor Court to have validated. Since the Federal Reserve was created less than a year before the FTC, it seems increasingly unlikely that the early twentieth century lineage of an agency would in itself buy anything with the current Court. 322

Indeed, one could argue that, for constitutional purposes, the salient characteristic of today’s Federal Reserve—its more or less exclusive, independent authority and discretion to make monetary policy—is even more recent. It did not take shape for two or more decades after passage of the Federal Reserve Act. Both directly and indirectly, Presidents and their Secretaries of the Treasury played a role under the original Federal Reserve Act. It was only in the Banking Act of 1935 that the Secretary of the Treasury and Comptroller of the Currency were removed from the Board. 323 President Roosevelt’s roughly contemporaneous decision to take the United States off

321. *Id.* at 2202. It is not clear that all those constitutional objections by three Presidents actually related to the feature of a single Director removable only for cause. See Sasha W. Boutilier, *Simplistic Structure and History in Seila Law*, 96 N.Y.U. L. REV. 1582, 1610–15 (2021). It is certainly true, however, that the Office of Legal Counsel had, without ultimately resolving the issue, noted that the removal restriction for the Commissioner of the Social Security Administration presented a serious constitutional question. See *Constitutionality of the Commissioner of Social Security’s Tenure Protection*, 45 Op. O.L.C. 1, 1 (2021), https://www.justice.gov/olc/opinion/constitutionality-commissioner-social-security-s-tenure-protection [https://perma.cc/4XMQ-2YYS] (referencing Letter to Lloyd N. Cutler, Counsel to the President, from Walter Dellinger, Assistant Attorney General, Office of Legal Counsel from July 29, 1994). In any case, for purposes of projecting Chief Justice Roberts’s assessment of the FOMC, the accuracy of his history is less important than the point he is making by invoking it.

322. Readers wondering if the nineteenth century Interstate Commerce Commission (“ICC”) provides a hoarier, and thus potentially more convincing, precedent for independent agencies should remember that the ICC as created in 1887 was essentially subordinate to the Secretary of the Interior. Only after the amendments passed by Congress in 1905 was it recognizable as a workably independent agency.

323. Banking Act of 1935, ch. 614, Title II, § 203(b), 49 Stat. 684, 704 (1935) (current version at 12 U.S.C. § 241). The story is complicated by the fact that the 1935 legislation also made the Federal Reserve more governmental and less private by clarifying the authority of the Board over the Reserve Banks, see *id.* §§ 203(a), 204, 49 Stat. 684 at 704, 705 (1935) (current version at 12 U.S.C. §§ 241, 347(b)(a)), and formally creating an FOMC dominated by the Board. *Id.* § 205, 49 Stat. 684, 705 (1935) (current version at 12 U.S.C. § 263(a)). This shift might be argued to somewhat mitigate the Article II issues discussed earlier, but it is almost surely not enough to change the basic analysis.
the gold standard removed what had initially been a notable, if variable, constraint on the Fed’s policy discretion. But even then, the Federal Reserve did not have full legal, much less practical, autonomy in setting monetary policy. Two provisions included in 1933 legislation—the Thomas Amendment to the Agricultural Adjustment Act and the Emergency Banking Act—gave the President and the Treasury Department authority to make open market purchases of Treasury securities and to regulate all member banks of the Federal Reserve System. Although the Administration did not exercise either of these authorities, they “remained at hand to make the wishes of the Treasury forceful in the councils of the Federal Reserve System.”

Assuming that congressional practice from the first half of the twentieth century is not old enough to affect the current Court’s constitutional analysis, do the Banks of the United States nonetheless ground the Fed in practice from the “earliest days of the Republic”? After all, the First Bank was incorporated on February 25, 1791, in the waning days of the very same First Congress whose debates over the removal of presidential appointees loomed so large in the reasoning of Chief Justice Taft in Myers v. United States and, by extension, Chief Justice Roberts in Seila Law. The answer


327. CLIFFORD, supra note 91, at 144. For a description of both statutory provisions and their use, see id. at 142–46. On June 12, 1945, Congress terminated the authority of the President and the Secretary of the Treasury, under section 43(b)(1) of the Agricultural Adjustment Act in 1941, to issue United States notes and use such notes to purchase and retire Unites States bonds and other obligations, absent an agreement with the Federal Reserve Board. Act of June 12, 1945, ch. 186, § 4, 59 Stat. 238 (1945).


to that question may depend on how broadly or narrowly the antecedent “practice” is characterized for purposes of deciding if it created a relevant precedent.

If the history is framed narrowly, then the precedents of the Banks of the United States are likely immaterial. So, for example, if the Court asks whether there is an unchallenged practice for two centuries or more of having a mixed committee composed of both government and nongovernment employees with unlimited capacity and discretion to inject fiat money into the economy, and to withdraw it in order to restore price stability, then the answer is clearly no. Both Banks of the United States were chartered directly by Congress as private entities in a way similar to the chartering of corporations by state legislatures at the time—through special acts of incorporation that sought to achieve a public purpose while setting forth many specific powers, constraints, and governance provisions. Those acts contained neither the mandate nor the authority to conduct monetary policy as we know it today. Unlike the Federal Reserve, both Banks competed with state-chartered banks for lending business. Unlike shares in Federal Reserve Banks, shares of the banks of the United States could be (and were) held by non-bank individuals and entities, and could be alienated more or less freely. Both banks had statutory limitations on the size of their balance sheets, in contrast to today’s Federal Reserve, which as a legal matter has no constraints on the amount of its borrowing, lending, or purchases. The Second Bank was also subject to an explicit requirement that it not refuse payment in specie (i.e., gold or silver) to any noteholder or depositor, thereby restraining its ability to create money.

In short, while the congressional acts of incorporation of the banks did provide for a board that combined shareholder-selected and presidentially-

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331. There is disagreement among Fed historians as to whether some proponents contemplated the First Bank of the United States conducting quasi-monetary policy. See infra p. 180. The disagreement is described in RICHARD H. TIMBERLAKE, MONETARY POLICY IN THE UNITED STATES: AN INTELLECTUAL AND INSTITUTIONAL HISTORY 28–29 (1993). Whatever the intentions of proponents however, it is clear that neither Bank’s charter contained any such mandate.


333. Moreover, the directors of the Banks could be held personally liable for violations of this and certain other charter provision. First Bank Charter § 7; An Act to Incorporate the Subscribers in the Bank of the United States, ch. XLIV, § 11, 3 Stat. 271 (1816) [hereinafter Second Bank Charter].

334. Second Bank Charter § 17. For the importance of this provision, see TIMBERLAKE, supra note 331, at 32–33.
appointed directors, in a manner that roughly foreshadowed the structure of the Federal Reserve, the authority of that board was, to borrow Chief Justice Roberts’s phrase, “in an entirely different league.”\footnote{Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2202 n.8 (2020). Interestingly enough, in light of recent Supreme Court decisions, among President Andrew Jackson’s ideas for an alternative to a straightforward rechartering of the Second Bank of the United States was the feature that all directors of the Bank would have to be renominated by the President and confirmed by the Senate each year. See \textit{Edward S. Kaplan, The Bank of the United States and the American Economy} 111 (1999). Obviously, this would have substantially increased Administration influence over the Bank’s policies and practices.} Finally, while the Supreme Court famously held in \textit{McCulloch v. Maryland}\footnote{\textit{McCulloch v. Maryland}, 17 U.S. 316, 316 (1819).} that Congress could constitutionally charter a banking corporation, the Court gave no indication that it was endorsing the delegation of monetary policy to any actors, governmental or nongovernmental. Indeed, the Court assumed that the purpose of the Second Bank of the United States was to facilitate the “fiscal operations” of the government.\footnote{\textit{Id.} at 422.}

On the other hand, a broader—but, as a factual matter, equally accurate—characterization of the history could readily lend relevance to the legacy of the Banks of the United States in applying separation of powers doctrines as they are remade by the current Court. Starting less than two years after the country began operating under the Constitution, the objective of ensuring a stable, national currency has periodically led the political branches to create institutions to pursue that objective with a significant measure of operational autonomy from those same political branches. In part to reinforce this autonomy, these institutions have always been public/private hybrids, combining certain government features with contributions of private capital and with a governance structure that includes individuals who are not employees of the government.

When the Banks of the United States were incorporated in 1791 and 1816, respectively, there was no conception of monetary policy as we think of it today to be found anywhere in the world.\footnote{See \textit{Hammond}, supra note 332, at 128.} But, as has been regularly noted by economic historians, both Banks engaged in activities to expand or contract the amount of credit being extended in the economy. With the government’s deposits and the Banks’ own capital, they were the dominant financial actor in the country. Like any bank, they could, and did, increase the amount of credit in the economy through their own lending. They also could, and sometimes did, exercise restraint in the interests of a more stable economy by declining to extend more credit, even where profitable opportunities may have been available.\footnote{See, \textit{e.g.}, Cowen, supra note 332, at 104–05, 199–209. At times, though, the Bank might take...}
“regulated” credit creation by the growing number of private, state-chartered banks. This they accomplished not by means of legally binding rules, but by either presenting the notes of those banks with a demand for payment in specie (a credit constraining activity) or by forbearing from doing so, and thereby allowing higher levels of credit in the economy. By statute, both Banks of the United States were granted the critical privilege of having their bills and notes declared legal tender for “all payments to the United States.”

This provision enhanced the money status of the Banks’ notes across the country by sparing them the discounting to which the notes of state banks were frequently subject, especially in locales far removed from the banks. Finally, it is worth noting the contemporary references to the Banks as “public” banks and the fact that the basis for Chief Justice Marshall’s opinion in McCulloch was that Congress had created the Second Bank as a “necessary and proper” adjunct to the exercise of its governmental powers.

The governance of both Banks was even more weighted to the private side than the original Federal Reserve, and certainly than today’s Federal Reserve. In the First Bank, the twenty-five directors were elected annually by a plurality of shareholders, with no more than three-quarters eligible for re-election the following year. The U.S. government had the right to, and did, acquire twenty percent of the ten million dollars in stock that was set by statute as the capital ceiling for the Bank. With the reduced weighting of votes for owners of larger numbers of shares required by the Act of Incorporation, the government would not have been able to dominate formal governance of the Bank in any case. However, the government waived its voting rights, thereby ceding any formal governance role designed to protect its own position, rather than serving the needs of the economy more generally. See Timberlake, supra note 331, at 38. The existence of examples of the Banks acting in both their private and the public interests underscores the availability of facts supporting multiple narratives of the Banks’ relationship to modern day central banking.


342. See Knodell, supra note 340, at 89–92.

343. In Osborn v. Bank of the United States, 22 U.S. 738, 861 (1824), a later case involving the jurisdiction of the federal judiciary to hear cases involving the Bank, Chief Justice Marshall elaborated on his reasoning in McCulloch and stated explicitly that the Bank was a “public,” not a “private” corporation, “created for public and national purposes.” Id. at 860. Of course, neither McCulloch nor Osborn described the Bank in terms we would recognize as describing a modern central bank.

344. First Bank Charter § 11.

345. Id. § 7. The Act specified that the stockholders obtained progressively fewer votes for the number of shares they held (e.g., one vote for every two shares up to ten shares, but then only one additional vote for every four shares between ten and thirty shares). There was an absolute limit of thirty votes per stockholder (including any government stockholders).

altogether (though economic historians have argued that the influence of the Secretary of the Treasury on the Bank’s operations was nonetheless significant). The Act of Incorporation of the Second Bank required, rather than simply authorized, the government to acquire twenty percent of the shares. It also provided for the President to appoint five of the twenty-five directors annually, with the advice and consent of the Senate.

In short, the legacy of the Banks of the United States can be characterized as establishing an American practice of using a public-private hybrid financial institution to manage the monetary affairs of the country, in accordance with the needs of the day. If the Court were to choose this relatively broad framing of the history of the Banks, it would probably have already decided against finding the FOMC unconstitutional. Still, it is worth asking how historical “practice” as so understood measures up against the Scalia formulation in *Noel Canning*.

Scalia’s limitation of history’s value to cases involving an “ambiguous constitutional provision” does not seem especially problematic here. There is no constitutional text defining inferior officers or addressing delegations of congressional authority or granting the President the power to remove officials. All are judge—or, more accurately, Justice—made doctrines whose specifics can be refined as the Justices choose, perhaps in part because of the significance of history. The Appointments Clause, of course, is a part of the Constitution. But that text presents no difficulties for the FOMC so long as the Reserve Bank presidents are considered inferior officers.

The requirement that the practice have been “open” seems less applicable to statutory enactments, which are by definition publicly known. Nor does a requirement that a practice be “widespread” apply to legislation in the same way that actions by the Executive such as recess appointments do. Once legislation is passed, it is law. But might the Court translate “widespread” from the context of Executive practice into a requirement that a legislated practice have been in effect more or less continuously since its implementation in the early years of the Republic? The charters of both Banks were allowed to lapse, one by congressional inaction and the other by

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1994).

347. This argument is especially put forward with respect to the early years of the First Bank of the United States. *See Cowen, supra note 332, at 143–53.*


351. In *Noel Canning*, Justice Scalia was concerned with the potential for presidential aggrandizement through practices that were constitutionally questionable but perhaps difficult for Congress collectively to resist. *Id.* at 593. Obviously, that is not the concern where the issue is the extent of the President’s removal power.
presidential veto. There was an interval of three quarters of a century between the demise of the Second Bank in 1836 and the passage of the Federal Reserve Act in 1913.

Moreover, neither the Banks nor the FOMC have been “unchallenged.” The controversy over the constitutionality of the First Bank gave rise to the famous debate among the Founders, pitting Madison and Jefferson against Hamilton as all three vied to influence President Washington’s decision whether to veto the Bank bill. Controversy over the Second Bank produced one of the landmarks of constitutional history. Later, in his message vetoing the Second Bank, President Jackson argued it was unconstitutional not only by indirectly relitigating the Court’s decision in *McCulloch*, but also by asserting that the Congress had unconstitutionally delegated its own authority to the Bank by granting it an effective monopoly. As discussed earlier, the FOMC itself has been challenged in litigation by legislators.

Even as some of Justice Scalia’s requirements are not germane to legislation, so there may be qualifications on the significance of historical practice that apply only to legislation. Most relevant here is that the “monetary policy” function of the Banks of the United States, as described earlier, was not authorized in either Bank’s Act of incorporation. It was the heft and reach of the Banks that enabled them to permit or restrain credit growth by state banks. While Congress had enabled this rudimentary credit regulation practice through providing for a large capitalization and by allowing branching, it had neither asked nor authorized the Banks to fulfill that function. Accordingly, one might argue, whatever monetary policy power the Banks might have possessed de facto was of no consequence for deciding constitutional practice, which is determined by the formal pronouncements and actions of the three branches of government established by the Constitution.

352. As Jerry Mashaw has pointed out, Jackson did not directly question the validity of the Court’s holding in *McCulloch*. Rather, he argued that the Court had held the Bank was constitutional because Congress had concluded it was a necessary and proper adjunct to exercise of a power explicitly granted in Article I. Jackson went on to enumerate the reasons he (in wielding his veto as part of the Article I legislative process) did not regard a renewal of the Second Bank’s charter as necessary and proper. See Jerry L. Mashaw, *Administration and ‘The Democracy’: Administrative Law from Jackson to Lincoln, 1829–1861*, 117 YALE L.J. 1568, 1592–93 (2008).

353. This is not to say that President Jackson is necessarily persuasive. He essentially argued that the Constitution provides in only a few cases—such as patents and trademarks—for Congress to grant a monopoly over restrictions on “trade or exchange.” Since Congress, in Section 21 of the Act of Incorporation of the Second Bank, had forbidden itself from establishing any other bank during the term of the Second Bank’s charter, Jackson urged that Congress had thereby exceeded its constitutional powers by restricting its own action. This is obviously a different kind of non-delegation argument from those advanced in the last hundred years—one that arises from the act of granting an exclusive privilege through an act of incorporation. However, as President Jackson himself demonstrated in withdrawing U.S. government deposits from the Second Bank, it is not at all clear just how much Congress had restricted the prerogative of the political branches.
There are, in turn, rejoinders to these qualifications on the strong legacy account: As to a reformulation of “widespread” as “continuous,” James Madison himself eventually came to believe that the creation and existence of the First Bank had liquidated the question of its constitutionality. Extending this acknowledgement, one might argue that once the constitutionality of a governance device or delegation is established through practice, subsequent congressional choices for other means of achieving policy aims do not remove the precedential value of that practice. Congress is free to return to it as circumstances change. Similarly, with respect to the “unchallenged” point, it would be odd if constitutional objections by political actors themselves fatally undermine a piece of legislation, especially one that the Court itself has found constitutional. Under the logic by which standing was denied to some of the congressional challengers in the cases discussed earlier, their objections do not carry any constitutional weight beyond that which would apply in a private party’s challenge. Finally, while neither Act of incorporation of the Banks called upon them to regulate the credit practices of state banks, the issue of ensuring sound money—in part through exercising control over state bank note issuance—was central to the debate over (and support for) the Second Bank.354

2. The Federal Reserve as Anomalous

A second route by which the Court might find the FOMC exceptional is to declare it so. Peculiar as that might seem as the stated basis for a judicial conclusion, consider then-Judge Kavanaugh’s possibly revealing aside in his dissent from the en banc decision of the D.C. Circuit in *PHH Corporation v. Consumer Financial Protection Bureau.*355 Responding to the CFPB’s argument that the Chair of the Federal Reserve is not removable except for cause, Judge Kavanaugh first correctly noted that the matter is not at all clear from the language of the Federal Reserve Act.356 He then went on to say that, even if the CFPB were correct, that attribute of the Federal Reserve Board Chair was not pertinent to a decision on the CFPB:

But even assuming the CFPB’s assertion is correct, such an exception would simply reflect the unique function of the Federal Reserve Board with respect to monetary policy. The Chair of the Federal Reserve Board would be akin to what Justice Breyer in *Noel Canning* referred to as an historical anomaly—here, an anomaly due to the Federal Reserve’s special

354. See HAMMOND, supra note 332, at 233–43.
356. While the Act specifies the term of Members of the Board as fourteen years “unless sooner removed for cause,” the following sentence specifies the four-year terms as Chair or Vice Chair for officials who are also members of the Board. 12 U.S.C. § 242. That second sentence neither contains a similar for-cause provision nor indicates explicitly that the President has plenary removal power. Id.
functions in setting monetary policy and stabilizing the financial markets.\footnote{357}

So, the Federal Reserve may be an “anomaly.”\footnote{358} Given that this comment was in a footnote, it is perhaps not surprising that Judge Kavanaugh did not explain it any further. It seems unlikely that, in upholding the constitutionality of the FOMC, the Court would simply declare it anomalous without further explanation. But his remark is a good starting point for projecting what this escape route might look like.

To begin with, of course, the fact that an agency feature is an anomaly does not in itself validate that feature. A law authorizing the Senate Finance Committee to choose the Secretary of the Treasury without the involvement of the President or the rest of the Senate would certainly be anomalous. It would equally certainly be held unconstitutional. So what is it about the Federal Reserve that might make its anomalous status acceptable?

Judge Kavanagh did refer to the Federal Reserve, or at least the possible status of its chair, as a “historical anomaly.”\footnote{359} It is not altogether clear if Judge Kavanaugh meant that the Federal Reserve is, historically, an anomaly or that it is an anomaly because of its history—in the sense of longevity or pedigree. If the answer is that banking and credit played an unusually prominent role in constitutional and policy debates in the early days of the Constitution, then we revert to the analysis in the preceding section. But because he says that the Federal Reserve is an anomaly due to its “special functions in setting monetary policy and stabilizing the financial markets,”\footnote{360} he may be implying that something about those functions could justify agency features that would be struck down elsewhere.

One possibility is that Judge Kavanaugh, and perhaps other conservative colleagues, simply regard the Federal Reserve as too important to mess with, as suggested earlier. Whatever its utility as a realist explanation of why the Court may forbear from finding the FOMC unconstitutional, however, the perceived importance of the Federal Reserve is not an argument carrying much doctrinal weight. A rationale more easily grounded in the Court’s conservative doctrines has already cropped up several times in my discussion of recent separation of powers cases: the FOMC does not regulate any private actors. Judge Kavanaugh began his dissent with the same appeal to liberty that we saw in Justice Gorsuch’s \textit{Gundy} dissent.\footnote{361} That same
invocation of liberty appears in Justice Scalia’s *Noel Canning* concurrence (arguing that separation of powers doctrine is not principally a matter of protecting the prerogatives of the three branches of government, but of guarding liberty).\textsuperscript{362} It is also echoed, albeit with less rhetorical flourish, in some elements of standing doctrine.

If the Court opts to maintain a fairly restrictive standing doctrine for anyone not directly regulated by an agency, perhaps it would extend the rationale for that position to its treatment of a removal, Appointments Clause, or delegation issue that unexpectedly reached the merits. That is, the Chief Justice’s emphasis on accountability and liberty interests in finding removal restrictions unconstitutional in *Free Enterprise Fund* and *Seila Law*, and in his somewhat ambiguous Appointments Clause opinion in *Arthrex*, might lead the Court to give Congress more constitutional latitude in structuring agencies where those interests are not at stake—at least as the Court seems to understand them. Similarly, as noted in Part II, Justice Gorsuch’s suggested non-delegation doctrine appears more permissive where Congress does not empower an agency to “regulate” or “govern” private conduct.\textsuperscript{363}

However convincing this approach might be to the Court in considering the FOMC as a monetary policy body, it does not apply to the Board in its non-monetary policy roles. The Board has far-reaching regulatory powers over banking organizations and certain financial market utilities,\textsuperscript{364} which as an economic matter are much more significant than those of the CFPB. The Board alone exercises these powers, without the participation of the Reserve Bank presidents. Were *Seila Law* to prove a forerunner to a broader invalidation of traditional multi-member independent commissions, the non-regulator logic would hardly save the Board and, by extension, its independence as the more important of the two groups that constitute the FOMC. Indeed, insofar as the Chief Justice’s cryptic reference in *Seila Law* to the Second Bank of the United States and the Federal Reserve contrasted those institutions with the CFPB,\textsuperscript{365} he may have been referring only to their monetary policy and credit extension roles.\textsuperscript{366} His description of the CFPB—“a mini legislature, prosecutor, and court, responsible for creating

\textsuperscript{366} It is also possible that the Chief Justice was not aware of the complexities of the Fed’s structure. In academic legal literature, one sometimes sees references to the “Federal Reserve Board” as the entity conducting monetary policy.
substantive rules for a wide swath of industries, prosecuting violations, and levying knee-buckling penalties against private citizens,” mostly describes non-monetary policy roles of the Board as well.367

There is a basis for distinguishing the Board from the CFPB and most other agencies. The Board’s regulatory authority over banking organizations is in some sense an extension of its monetary policy authority. If the Court accepts a rationale for the exercise of monetary policy independent of the President, then there may be a derivative rationale for the independence of the Board’s regulatory functions. Moreover, the authority to pay interest on bank reserves held at the Federal Reserve, which has become a principal tool of monetary policy, is lodged solely in the Board.368 A greatly simplified explanation of how banks “create” money may be useful for understanding this argument.

When, as is usually the case, private banks extend loans to households and businesses by crediting the transaction accounts of those borrowers, they are creating money—“inside money” as it is described in economics.369 The borrowers receive in their checking accounts the amount of the loans, which are now available to spend. Meanwhile, no other party (for example, the bank or any of its depositors) has seen a reduction in the amount available for immediate expenditure. Hence the aggregate supply of money in the economy has increased. However, the banks know that the borrowers will spend some or all of their loans, and that other depositors will in the normal course of business be drawing funds as well. So the banks’ money creation function is at least somewhat constrained by its need to maintain sufficient reserves to meet the demands for payment as they are presented in the form of checks and electronic transfer instructions by account holders.370

Traditionally, banks have been regarded as the “transmission belt” for monetary policy. The Federal Reserve used open market operations to increase or decrease the amount of reserves in the banking system by, respectively, buying or selling government securities. The variation in available reserves, in turn, affected the amount and pricing of credit that

367. See Seila Law, 140 S. Ct. at 2202 n.8. One might not characterize the Federal Reserve as regulating a “wide swath of industries,” but its scope of powers to set prudential and other requirements for all banking organizations reaches to the heart of those firms’ financial and business models, not just to their relationships with retail customers.


370. Vault cash is of course a reserve asset as well, but the non-cash transfers that dominate the contemporary financial system are ultimately grounded in the “outside” money (i.e., outside of banks) created electronically by the Federal Reserve.
banks could make available. Up until very recently, the Federal Reserve also imposed minimum reserve requirements on banks to help constrain the growth of the money supply.\(^{371}\) The Federal Reserve’s response to the Global Financial Crisis of 2007–2009 included a massive increase in the amount of reserves, and thus significantly reduced the efficacy of open market operations in influencing the amount and pricing of bank lending.\(^{372}\) Still, the now preferred monetary policy tool of paying interest on reserve balances held by banks at the Federal Reserve has not changed the basic situation: the Federal Reserve uses its reserve policies to affect lending—and thus the creation of money—by banks.\(^{373}\)

Through its discount window lending programs, the Federal Reserve makes liquidity available to solvent banks unable to obtain funding from depositors or other private sources.\(^{374}\) The provision of liquidity to banks under stress was a principal motivation for the creation of the Federal Reserve’s discount window.\(^{375}\)


\(^{372}\) Once the acute phase of the Global Financial Crisis (“GFC”) began in the fall of 2008, the FOMC quickly reduced interest rates very close to zero in an effort to make liquidity available and borrowing as cheap as possible under severely adverse conditions. However, the FOMC found that monetary stimulus at the “zero lower bound” was still inadequate in the face of the financial and economic disruptions that followed the collapses of Lehman Brothers, AIG, Fannie Mae, and Freddie Mac. The FOMC therefore undertook to purchase very large amounts of government securities in an effort to ease financial conditions further. As a result, the reserves in the banking system (which the Federal Reserve created in order to purchase the outstanding securities) increased enormously. This “quantitative easing” and its aftermath have moved monetary policy from the traditional “scarce reserves” condition to one of “ample reserves.” When, in late 2015, the FOMC increased its target rate for the first time since the onset of the GFC, it would not have been able to achieve that target with the traditional “modest size” of securities sales. FED. Rsrv. PUB. EDUC. & OUTREACH, *supra* note 15, at 38. Instead, it used its relatively new authority to pay interest on reserves to influence banks’ lending behavior. Since reserves are by definition risk-free, a bank has no incentive to use its reserves to back lending at less than the Federal Reserve pays on those reserves.

\(^{373}\) The Federal Reserve has also established an Overnight Reverse Repurchase facility (“ONRRP”), which allows some non-bank financial institutions—principally money market funds—to engage in what is essentially a short-term, interest-bearing deposit with the Fed. Adjustment of the ONRRP rate and changes in the rate paid on bank reserve balances together constitute the “administered” rate approach to monetary policy that has emerged following the GFC.

\(^{374}\) The Federal Reserve’s description of the discount window explicitly ties the discount window to the purposes of monetary policy:

> Federal Reserve lending to depository institutions (the “discount window”) plays an important role in supporting the liquidity and stability of the banking system and the effective implementation of monetary policy. By providing ready access to funding, the discount window helps depository institutions manage their liquidity risks efficiently and avoid actions that have negative consequences for their customers, such as withdrawing credit during times of market stress. Thus, the discount window supports the smooth flow of credit to households and businesses.

Reserve—this is what was meant by the phrase “to furnish an elastic currency” in the purpose clause of the original Federal Reserve Act. But this access to liquidity is tied to the far-reaching prudential regulatory authority of the Board. That is, only financial institutions that have been subject to regulations designed to keep them responsibly supplying credit to businesses and households are entitled to the favorable terms of the discount window.

More generally, this prudential authority is important to ensure the stability of the banking system, because problems such as bank runs will disrupt the flow of sustainable credit and thus the aims of monetary policy. The purpose clause of the original Federal Reserve Act included the aim of “establish[ing] a more effective supervision of banking in the United States.” The Act imposed detailed reserve requirements for member banks, which the Board was authorized to temporarily suspend. The Board was empowered to examine “the accounts, books and affairs” of each member bank. Any state bank that became a member was to be subject to the various statutory requirements already imposed on national banks “and to such rules and regulations as the Federal Reserve Board may, in pursuance thereof, prescribe.”

The prudential authority of the Federal Reserve granted in the original Act was, in effect, a price of membership for banks wishing to benefit from the Federal Reserve’s exercise of its “elastic currency” authority (though any bank wishing to acquire or maintain a national banking charter was required to be a member of the System). In the succeeding decades, both prudential regulation and access to lender-of-last-resort facilities ceased to be a choice for depository institutions. All state-chartered banks became subject to the reserve requirements promulgated by the Board and also gained access to the

375. Federal Reserve Act, Pub. L. No. 63-43, Ch. 6, 38 Stat. 251 (1913). The classic formulation of lender-of-last-resort policy is that the central bank should make credit freely available to solvent firms upon presentation of good collateral, but at a penalty rate. The penalty referred to, however, is customarily understood to be relative to terms available under normal circumstances—that is, the rate should be such as to disincentivize banks from accessing the discount window when private funding is available. Theoretically, a central bank could make a solvency determination even if it (or other government agencies) did not regulate the specific financial intermediary. In practice, however, a de novo solvency determination in the midst of a financial squeeze would be exceedingly difficult.

376. In “unusual and exigent circumstances,” the Board does have authority to provide liquidity to institutions and markets if it does not regulate. 12 U.S.C. § 343(3)(A). Exercise of this authority now requires agreement by the Secretary of the Treasury. Id. § 343(3)(B)(iv).

378. Id. § 19, 38 Stat. 270.
379. Id. § 11(c), 38 Stat. 262.
380. Id. § 11(a), 38 Stat. 261.
381. Id. § 9, 38 Stat. 259.
discount window. Since passage of the Bank Holding Company Act in 1956, the Board regulates and supervises at a consolidated level all holding companies that own insured depository institutions. In the wake of the GFC, Congress gave the Board additional authority, and instructions, to regulate large banking organizations in order to promote financial stability.

In short, one could plausibly argue that the function of the Board in regulating private banking organizations is inextricably related to the monetary policy function of the entire FOMC. The banks create money. The Board’s prudential regulation of the banks is thus an indirect regulation of the supply of money and credit. The fact that the Board also provides advantages to regulated banks (for example, interest on reserves and discount window access) further demonstrates that monetary policy, liquidity assistance, and bank regulation are all components of the same enterprise. To subject the Board to discretionary presidential removal would, accordingly, compromise monetary policy independence.

Whatever its policy and economic merits, this argument might well vex the conservative Justices, who may be inclined toward the presumed view of many bankers that prudential regulation is just as much an intrusion on their “liberty” as EPA regulation is on the liberty of chemical plants. There are also some complications internal to the argument itself. For one thing, prudential regulatory authority is shared among several federal agencies. While the Board’s authority over bank holding companies gives it, as a practical matter, regulatory power over the vast majority of U.S. banking assets, a small national or state non-member bank would be regulated only by the Office of the Comptroller of the Currency or Federal Deposit Insurance Corporation, respectively. So the Court might ask whether recognition of a special status for the Board under evolving separation of powers doctrines would need to extend to those other banking agencies. Second, the sustained and substantial growth of non-bank lending has led to a situation in which many institutions outside the prudential regulatory perimeter extend credit, and in some cases effectively create “money” through their lending activities. The Board’s regulatory authority is not

385. For example, retail money market funds are a significant enough source of money creation to be included in the Federal Reserve’s calculation of M2, which is the broader of its two standard measures of the money supply. Money Stock Measures—H.6 Release, Bd. OF GOVERNORS OF THE FED. RSRV. SYS.,
coincident with the range of private activities that implicate the aims of monetary policy by affecting credit growth and financial stability.

IV. CONSTITUTIONAL CHOICES

To recap what we have seen thus far: The logic of opinions of conservative Justices in recent separation of powers cases suggests there may be one or more constitutional infirmities in the structure and mandate of the Federal Reserve. At the same time, there are various ways by which the Court could nonetheless avoid a decision that such an infirmity does indeed exist. The working assumption in this paper is that the Court would likely opt for an avoidance route. This last Part details the implications for the conservatives’ separation of powers jurisprudence of each avoidance route, as well as the less likely alternative of deciding that the structure or monetary policy mandate of the Federal Reserve is in action unconstitutional.

A. DOCTRINAL RESTRAINT

As should be clear by now, it would take further evolution in one or more existing separation of powers doctrines to place the structure or mandate of the Federal Reserve at significant risk. If none but a very unlikely plaintiff has standing to challenge the FOMC, then the relatively strong argument on the status of Reserve Bank presidents and a potential argument on non-delegation grounds will not reach the merits. And if the Court forbears from holding traditional multimember independent agencies unconstitutional, then the standing readily available to any regulated banking organization cannot undo the removal protection of the Board. The independence of the Federal Reserve would be preserved.

1. Standing

Long before any of the current Justices were on the Court, the D.C. Circuit applied standing doctrine to preclude challenges to the FOMC from reaching the merits, as recounted in Part III. Thus, even as the current Justices have further restricted standing in other contexts they need not break new doctrinal ground to avoid deciding constitutional issues related to the FOMC. However, in most other contexts, regulated entities will have

https://www.federalreserve.gov/releases/h6/about.htm [https://perma.cc/WVT9-QN8N]. Yet money market funds are regulated by the Securities and Exchange Commission, not the Federal Reserve or the other federal banking agencies.

386. See TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2198 (2021) (holding that a right created by Congress may create standing only if it is one for which there is “a close historical or common-law analogue”) (emphasis omitted). For assessments of the cumulative effect of the Court’s restrictions on standing, see Erwin Chemerinsky, What’s Standing After TransUnion LLC v. Ramirez, 96 N.Y.U. L. REV. ONLINE 269, 282–86 (2021); Sunstein, supra note 258, at 362–73.
standing to challenge an agency’s constitutionality when regulatory beneficiaries and interested members of the public do not. Here it is very possible that no one has standing to launch such a challenge, absent the unlikely scenario of the President attempting to remove a Reserve Bank president.\textsuperscript{387} With the concept of a unitary executive, and the associated norm of presidential accountability that is integral to the Chief Justice’s justification of recent separation of powers decisions, it might seem odd for the most powerful independent agency in the U.S. government to be insulated from presidential control solely because no likely plaintiff has standing.

The Court might try to reconcile these two doctrinal strands by embracing the position the D.C. Circuit inferred from that single sentence in \textit{Buckley}—that is, by holding special separation of powers standing is limited to stating “a regulated entity with sufficiently concrete interests.”\textsuperscript{388} The justification for choosing traditional, restrictive standing doctrine over more recent concerns with political accountability of independent agencies is suggested by the argument we have already seen in the removal cases—that separation of powers principles are important only, or at least principally, to protect the “liberty” interests of regulated companies. Here, though, there is some latent tension between statements in the \textit{Seila Law} and \textit{Collins} majority opinions.

In \textit{Seila Law}, Chief Justice Roberts had dismissed the argument that the single-headed Social Security Administration was a precedent for the CFPB by, among other things, noting that “unlike the CFPB, the SSA lacks the authority to bring enforcement actions against private parties. Its role is largely limited to adjudicating claims for Social Security benefits.”\textsuperscript{389} As with so much in in that opinion, this point echoed then-Judge Kavanaugh’s opinions in the earlier CFPB case, in which he had distinguished the Commissioner of Social Security’s for-cause removal protection because that official lacked the unilateral authority to bring enforcement actions against private citizens, “the core of the executive power and the primary threat to individual liberty.”\textsuperscript{390}

But in \textit{Collins}, Justice Alito—who himself is certainly not ill-disposed to the “liberty” argument—observed that the FHFA “could have an

\begin{footnotesize}
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\item[387.] Of course, were the Court to permit a plaintiff such as Custodia Bank to challenge the status of a Reserve Bank president on the FOMC as part of its suit against a Reserve Bank that had denied it access to certain Federal Reserve services, then a much more likely route to an adjudication on the merits would exist.
\item[388.] \textit{See supra} pp. 53–54, 60.
\end{itemize}
\end{footnotesize}
immediate impact on millions of private individuals and the economy at large,” even though it does not directly regulate any private individuals and businesses, as the CFPB does.391 Because of the unusual circumstances of that case, the criterion of sheer economic impact was not essential to his conclusion on removability of the FHFA director. Nonetheless, it may fit more comfortably with the formalist notion reflected in the Chief Justice’s opinions that the Constitution requires all exercises of executive power to be subject to some form of direct presidential oversight. Indeed, it was relied on in the Office of Legal Counsel opinion that, despite his statutory for-cause protection, the Commissioner of Social Security could be removed by the President.392

There is, of course, no necessary congruence between standing doctrine and the Article II doctrines at issue in these recent cases. Still, a standing decision today would be made against the backdrop of a very different separation of powers jurisprudence from that which prevailed four decades ago when the D.C. Circuit ruled on the challenges to the FOMC. A denial of standing to the hypothetical bondholder in Part II would have the substantive effect of limiting the Court’s Appointments Clause and removal doctrines.

Such a decision would align with the special solicitousness of the current Court for regulated entities, as opposed to beneficiaries of regulation. In that sense it would reflect the Court’s ideological leanings. As a practical matter, it would be of much greater importance for the Federal Reserve, precisely because most other statutorily independent agencies do regulate private actors. But it would not require a break with precedent. Furthermore, in the specific context of the FOMC, the de facto substantive character of restrictive standing would not obviously favor either end of the political spectrum. One can readily imagine a more permissive standing doctrine producing challenges from the left seeking more presidential control over inflation-fighting central bankers, and from the right seeking to remove the discretion of the FOMC to balance employment growth and price stability in making monetary policy decisions.

2. Independent Agencies

Unlike a continuation of restrictive standing doctrine, the Court’s reaffirmation of the traditional understanding of Humphrey’s Executor would be received as very significant. Against the experience of the last decade and the changes in the Court’s composition, such a development may seem unlikely. A declaration that today’s multimember independent

392. See supra note 11 and accompanying text.
agencies violate Article II would permit the Court’s conservatives to pursue their goal of a unitary executive, but to do so through decisions that generally will have limited immediate impact, and thus elicit less popular blowback. The day after the Court’s decision, the agencies would function as they did before, except that they would labor under the tacit—and at times perhaps not so tacit—threat of removal if they do not follow the President’s wishes in their rule-making, programmatic, enforcement, and adjudicatory activities.

For the Court’s conservatives to pass up this opportunity, the Chief Justice and at least one other Justice would need to see good reasons not to apply the logic in parts of Seila Law in deciding a head-on challenge to a traditional independent agency. What reason or combination of reasons might they find convincing? A premonition that condemning those agencies to Executive subservience might indeed produce a significant public reaction, despite the absence of immediate policy change? Second thoughts about undoing nearly a century and a half of settled practice, and substituting their own views for those of so many Congresses and Presidents? A bit of uneasiness at the prospect of the jurisprudential gymnastics that might be needed to save the Board, and perhaps a few other favored agencies, for which a finding of unconstitutionality would produce significant economic or political repercussions?

Whatever its possible motivation, a decision reaffirming Humphrey’s Executor would signal, if not quite a cease fire, then at least a pause on one front of the Court’s campaign against the administrative state. It might be accompanied by an escalation on the other front, resulting in more “major questions” limitations on agency authority and perhaps a straightforward application of the non-delegation doctrine to strike down part of an agency’s statutory authority. But, at least with respect to the structure of government, it would be an accommodation to the transformation that took place in the first third of the twentieth century. In that sense, it would at least somewhat echo the accommodation by the Court’s conservatives in the 1930s.

This stance might well be interpreted in the way Professors Randy E. Barnett and Larry Solum interpreted the first stirrings of the Court’s anti-novelty sentiments—as an embrace of a “this far and no further” approach to evaluating congressional experimentation with agency independence.393 It

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393. Randy E. Barnett, No Small Feat: Who Won the Health Care Case (and Why Did So Many Law Professors Miss the Boat)?, 65 FLA. L. REV. 1331, 1348 (2013); Lawrence B. Solum, How NFIB v. Sebelius Affects the Constitutional Gestalt, 91 WASH. U. L. REV. 1, 52 (2013). Their suggestion, grounded in a version of originalism, was that novelty in and of itself was not a constitutional argument, but that decisions of the Court such as National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012), instead were premised on the inconsistency of a congressional enactment with the original
may limit the range of options to those exercised by Congress through the 1930s but would pull up short of a complete imposition of the Court’s favored organization of government.

B. FEDERAL RESERVE AS EXCEPTIONAL

Were the Court unexpectedly to liberalize standing or open the door to challenging traditional multi-member agencies, it would need to address the merits. In that event, as discussed in Part III, it might distinguish the Federal Reserve from other agencies in applying its evolving separation of powers doctrines. This section considers the implications of a decision upholding the mandate and structure of the Federal Reserve.

1. History

The discussion of the history-based avoidance strategy in Part III explained how the Court can effectively determine the outcome of its analysis by the way it defines the practice for which historical validation is sought. By defining the practice in general terms—such as seeking a stable national currency through creating institutions with significant operational autonomy—the Court could vindicate the structure and mandate of the Federal Reserve. By defining it more narrowly—a mixed committee composed of both government and nongovernment employees with unlimited capacity and discretion to inject fiat money into the economy, and to withdraw it in order to restore price stability—the eighteenth and nineteenth century experience with the Banks of the United States becomes irrelevant. In fact, that narrow characterization of the Federal Reserve’s structure and mandate is not even a description of the original Federal Reserve in 1914 and arguably does not become so for decades following passage of the Federal Reserve Act.394

Faced with a decision on the constitutional merits, the Court might well opt for the broader characterization of the “practice” that was arguably liquidated by the creation of the Banks of the United States. But doing so, while producing the sensible outcome in that case, would raise a different question: Might the congressional practice not be fairly characterized even more broadly—as insulating additional recipients of extensive delegated statutory authority from full control by the President? If the two Banks

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394. See supra pp. 10–12.
provide precedent for today’s Federal Reserve because, despite all their differences, they were congressional creations with substantial autonomy, why do they not also serve as precedent for other such institutions, including today’s agencies such as the FTC and FCC? In creating those agencies, Congress endorsed the proposition that they too needed some degree of insulation from presidential politics and favoritism.

Of course, the early Congresses did not create independent regulatory commissions; they successively chartered two independent Banks that served public functions, including an early form of what today is called monetary policy. So perhaps the relevant precedent is limited to that substantive area—“monetary policy and stabilizing the financial markets” as then-Judge Kavanaugh expressed it. 395 Again, though, why? It would be one thing if, during that same era, Congress had legislated on other economic issues and uniformly delegated regulatory functions to entities wholly subservient to the President. But that is not what happened. The forms of economic regulation pioneered by Congress beginning in the late nineteenth century just did not exist in 1789 or 1816. 396 There was no railroad system to be regulated, no awareness of a radio spectrum to be allocated, no internal combustion engine to pollute the air and overheat the planet. There were not even monopolies, except perhaps those created by the states. 397

The history of the regulation of money, and the various institutional arrangements created by Congress to perform this task, is indeed a complicated one. One can discern broad trends, especially since the founding


396. While there were no other entities we would recognize as independent regulatory agencies, Congress had in fact endowed various agencies performing other functions with considerable independence. See Jerry L. Mashaw, The American Model of Federal Administrative Law: Remembering the First One Hundred Years, 78 GEO. WASH. L. REV. 975, 984–85 (2010).

397. The only other contemporaneous governmental economic regulation that even approaches the importance of money was the tariff, a key subject of another of Alexander Hamilton’s seminal commentaries on the economic circumstances of the new nation. See Alexander Hamilton, Alexander Hamilton’s Final Version of the Report on the Subject of Manufactures, FOUNDERS ONLINE (Dec. 5, 1791), https://founders.archives.gov/documents/Hamilton/01-10-02-0001-0007 [https://perma.cc/RK4Z-E6VF]. Administration of the tariff was lodged in the Treasury Department and thus fully subject to political control. See CARL E. PRINCE & MOLLIE KELLER, THE U.S. CUSTOMS SERVICE: A BICENTENNIAL HISTORY 35–67 (1989). But the history of the tariff is no more compelling as a supposed precedent for what came later than the Banks. In the first place, although the tariff was from the start bound up with debates over the protecting U.S. industry from foreign competition, its most important function was as the dominant source of revenue for the federal government. Second, presumably because of its importance as a revenue measure, Congress itself made all policy decisions in periodic tariff legislation that set specific tariffs in great detail. Third, the early decades of customs administration were characterized by extreme patronage politics and corruption, which eventually produced a measure of insulation for customs employees (though they remained within Treasury). Id. Fourth, there is certainly nothing in the history of the early tariff acts and the creation of tariff districts to suggest that Congress considered, and rejected on constitutional grounds, an independent customs service.
of the Federal Reserve, whose authority has become decidedly more governmental and mostly more independent over time. The very complexity of that history—from Alexander Hamilton’s proposals, to the Banks, to the experiment with congressionally created currency during the Civil War, to the formation of the Federal Reserve, to the removal of the gold standard, to the New Deal overhaul of the Fed’s structure, to the addition of the dual mandate—suggests how reactionary it would be for the Supreme Court to override the decisions Congress and the President have made. Those decisions, as included in the Federal Reserve Act and updated most recently in 2010, have been made as prevailing economic and political concerns changed. For the Court to impose its view on the basis of a separation of powers theory nowhere stated in the text of the Constitution would seem the height of judicial imperialism.

As compelling a reason as this complex story of money regulation is for deferring to the political branches, the position of the Federal Reserve relative to other agencies is an accident of history. Even in a predominantly agricultural economy, the development of a reliable and uniform currency was an important issue for the fledgling national government. The only reason Congress could grant a measure of autonomy to money-related institutions and not to the other agencies we know today was that those other problems associated with the economy were either unknown or of such trivial importance in 1800 as not to be worth Congress’s time. So, yes, the pedigree of the Federal Reserve is unusual, if not unique. But that distinction from other agencies is not necessarily a good reason to parse the scope of congressional authority under the Necessary and Proper Clause in a qualitatively different way.

Noel Canning involved the interpretation of a discrete constitutional text—the Recess Appointments Clause. Both Justice Breyer’s opinion for the majority and Justice Scalia’s concurrence in the result were focused on the history of a well-defined practice that was recognized as such from the outset by the Presidents who made the appointments and by the Congresses that acquiesced in them (or did not, depending on your perspective). The Congresses that chartered the Banks of the United States had no idea that their actions could be relevant to the constitutionality of an independent commission to allocate the radio spectrum. The demarcation of the precedent—or liquidation, for those who prefer the Madisonian term—that was created by those Congresses is thus necessarily a task for those participating in today’s debates. As such, whether the Court defines the practice in need of historical precedent narrowly, somewhat more broadly, or very broadly is itself a policy choice.
2. Nature of Central Banking

In discussing removability doctrine, Justice Kavanaugh characterized the Federal Reserve as anomalous because the Fed has “special functions in setting monetary policy and stabilizing the financial markets.” Well, yes, and the FCC has special functions in regulating access to the airwaves. The FTC has special functions in protecting consumers. The Securities and Exchange Commission has special functions in protecting investors and assuring the smooth operation of capital markets. And, in fact, the CFPB itself has the “special functions” of ensuring that consumers understand financial commitments and protecting them from unscrupulous lenders.

So why might the Federal Reserve’s “special functions” be more special than those of these other agencies, so as to justify agency features that would be struck down elsewhere? Here, the fact that the FOMC does not regulate any private actors, which we have seen multiple times as a possible distinction, does not really fit with the concept of “special functions.” Additionally, of course, the Board does regulate private actors. Some academics who favor more independence for the Federal Reserve than for other agencies offer what has become the standard argument for central bank independence—that a central bank subject to political control will be pushed toward accommodative monetary policy when helpful to the incumbent Administration’s electoral or other political needs, regardless of possible medium term effects in the form of high inflation. That is a good argument, to be sure, though it leaves open the question of just how to strike the balance between operational independence and accountability in a democracy.

Whatever the policy merits of this argument, however, it is not grounded in the Constitution. There is nothing there stating, or even implying, a different separation of powers principle for central banking. On the contrary, the constitutional controversy over the two Banks of the United States, those early avatars of a central bank, was resolved in a Supreme Court decision that rested on the Necessary and Proper Clause, a part of the Constitution that today’s conservative majority often glosses over. There was no reason to think the congressional discretion derived from that Clause applied any less to its implementation of any other explicit Article I power.

398. *PHH Corp.*, 881 F.3d at 192 n.17.
Nor does anything in Article II suggest otherwise. There is no textual basis to conclude, for example, that Congress may grant independence to the Federal Reserve because of the importance of keeping near-term politics out of monetary policy, but that it may not grant independence to the FCC if it believes that near-term politics should be kept out of allocating broadcast licenses.

In her Seila Law dissent, Justice Kagan noted that, up until recently, the Court has nearly always left issues of agency structure and relative independence to the Congress. She made that point in the context of arguing that the Court should similarly have refrained from finding a separation of powers problem in the single-headed structure of the CFPB. As Sunstein and Vermeule argue, in doing otherwise and striking down the for-cause protection of the Director, the Seila Law majority opinion reflected a set of ideas and preferences about government that cannot be derived from the originalist approach to which the conservative justices say they subscribe. Were the Court later to exempt the structure or mandate of the Federal Reserve from the doctrines it has been crafting, its policy preferences would be more obviously on display. While that would be true of any decision giving the Fed special treatment, one that carved out the Board—despite its extensive regulatory powers—from an otherwise applicable prohibition on traditional multimember independent agencies would highlight the Court’s policy preferences in especially sharp relief. In finding historical precedent for allowing, for example, the Federal Reserve but not the FCC to be insulated from presidential control, the Court will be picking favorites from among the creations of Congress.

C. FINDING OF UNCONSTITUTIONALITY

Although my expectation is that at least two of the Court’s conservatives would refrain from finding the structure or mandate of the Federal Reserve to be unconstitutional, one cannot have full confidence in that assumption. Given the scope of some of its recent decisions and the limited regard of at least some Justices for stare decisis, one cannot rule out entirely such a finding. To the degree that the non-disruptive approach described above was attributable to Chief Justice Roberts’s status as the swing vote on the Court prior to Justice Ginsburg’s death, rather than to congruent views of the other conservative Justices, it is obviously less secure. The divergence between the approaches of incrementalism and sweeping change was on full view in the Court’s decision in Dobbs v.

Jackson overruling Roe v. Wade. So too, the possibility of an escalation of the offensive against the administrative state has likely increased. Accordingly, it is worth noting the implications of a negative outcome for the Federal Reserve.

The implications for the Court’s separation of powers doctrine would vary depending on the specific basis for a ruling of unconstitutionality. They would be least significant if the ruling was based on the Appointments Clause issue with Reserve Bank presidents. Even if the ruling disrupted the economy, the Court could craft an opinion with few implications for the rest of the government. The circumstance of nongovernmental employees sitting on a powerful policymaking committee is unique to the Federal Reserve. While the decision might have an impact on policy roles for government corporations, as in the Amtrak case, it would have little relevance for traditional multi-member independent regulatory agencies. Indeed, the most consequential part of this hypothesized decision might be the expansion of the special standing rules for separation of powers cases that might be necessary in order to reach the merits.

On the other hand, a decision that the mandate of the FOMC or the for-cause removal protection of the Board was an unconstitutional delegation would have broad legal, as well as economic, repercussions. It would effectively signal that there were no limits to the Court’s redesigning of the federal government in accordance with its own views of the best relationship among the branches.

A finding that the Fed’s dual mandate for monetary policy was an unconstitutional delegation would either follow or presage the invalidation of a host of statutory authorities—not just of independent agencies, but

401. Dobbs v. Jackson Women’s Health Org., 142 S. Ct. 2228 (2022). In Dobbs, five of the conservative Justices voted to overturn Roe v. Wade. Chief Justice Roberts concurred only in the judgment; he would have found the Mississippi statute at issue in the case to be constitutional, but he would not have gone so far as to overturn Roe completely. Id. at 2310–11 (Roberts, C.J., concurring).

402. Roe v. Wade, 410 U.S. 113 (1973), overruled by Dobbs, 142 S. Ct. 2228 (2022). Still, one or more other conservative members of the Court may be more concerned with the immediate impact on the economy associated with a ruling against the Federal Reserve than they were to the upending of abortion rights in many states. Justice Kavanaugh, in particular, comes to mind, both because of the pains he went to in Dobbs, 142 S. Ct. at 2309–10 (Kavanaugh, J., concurring) to confine the implications of his vote and because of his specific reference to the “anomalous” character of the Federal Reserve in his D.C. Circuit opinions in PHH. PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 174 (D.C. Cir. 2018) (en banc) (Kavanaugh, J., dissenting).

403. Even the economic impact of a finding against the Reserve Bank presidents might be manageable. As noted in Section III.A., a decision invalidating the participation of Reserve Bank presidents on the FOMC would surely create some uncertainty in financial markets. But if it left the Board intact and independent, market actors might conclude after some reflection that there would be substantial continuity in the Federal Reserve’s monetary policy. This outcome is particularly likely if, as has been true for some time, a solid majority of the Board supports the Chair’s policy direction.
probably of agencies within the Administration as well. Any delegation that requires an agency to balance different policy aims could be at risk. In addition, the Court would be faced with the remedial dilemma of either effectively terminating the FOMC or rewriting the Federal Reserve Act. The former option would produce economic chaos. The latter is certainly possible. As discussed in Part II, the Court might elevate price stability to a single mandate, requiring no balancing of inflation against growth. In that event, the Court would have overtly adopted the policy preference of some economic conservatives, thereby reinforcing suspicions that the Court has become an essentially political institution.\textsuperscript{404}

A decision holding that the Board cannot constitutionally be given for-cause removal protection would, again, either follow or presage similar decisions pertaining to other agencies. The Court would have negated well over a century of practice and realized its vision of a unitary executive, eliminating at least the rulemaking functions of independent agencies and perhaps their adjudicatory and programmatic functions as well. As already seen in the cases of the CFPB and FHFA, the impact on most agencies might not be immediately noticeable in policy terms. One would expect, though, that agency principals whose policies were disagreeable to the current President would eventually be removed. Their replacements would presumably be of one mind (the Administration’s) and significant policy changes could ensue. This impact would be even greater if the Court simultaneously struck down partisan balance requirements as a further infringement on unitary executive authority. The result, as Professors Cass R. Sunstein and Adrian Vermeule put it well, would be a “Madisonian nightmare”—a “discretion-wielding, immensely powerful set of administrative authorities concentrated in a single person.”\textsuperscript{405}

\textsuperscript{404.} Were the Court disposed to invalidate the dual mandate, an alternative path would be to interpret the statutory language in a way that effectively read out the distinct goal of maximum employment. That is, the Court would invoke the substantive canon of constitutional avoidance in declaring that only by reading the statute this way could it be upheld as constitutional. The FOMC would be left with the single goal of price stability. In either case—a finding of unconstitutional delegation or a distorted reading of the Federal Reserve Act—in practice the outcome might nonetheless leave the FOMC with de facto discretion to take employment and growth considerations into account. In such circumstances, assuming liberalized standing, private actors might challenge FOMC decisions as inconsistent with the Court’s ruling. At that point, the Court would have to decide if it would get into the business of reviewing monetary policy decisions, something that Judge Augustus Hand, on behalf of the eminent panel including his cousin Judge Learned Hand and Judge Thomas Swan, shunned nearly a century ago. Raichle v. Fed. Resv. Bank of N.Y., 34 F.2d 910 (2d Cir. 1929). Additionally, of course, the Court would need to liberalize non-separation of powers standing doctrine in order to permit challenges to monetary policy decisions.

\textsuperscript{405.} Sunstein & Vermeule, supra note 9, at 98.
CONCLUSION

Some of the most important opinions authored by Chief Justice Roberts disclaim any intention to set forth rules that could be applied in future cases. Of course, it is nothing new for important Supreme Court cases to raise more questions than they answer. But this result is often the product of opinions whose reasoning is tied closely to the facts of the case, as to which competing principles or values are explicitly balanced. The uncertainty about the implications of those decisions for future cases arises because it is hard to predict how the Court will balance these principles and values in different factual circumstances.

Chief Justice Roberts’s opinions are different. They often articulate broad principles that do not appear actually or potentially offset by other principles of equal importance to the Court. Thus, the peculiar feel of cases like Seila Law and Arthrex, whose sweeping logic can readily be understood to threaten many other agency arrangements established by statute, but whose conclusions rather unpersuasively state that the reasoning is confined to specifics of the case.406 We can only guess as to the reasons for this approach. Perhaps the Chief Justice is trying to move the Court’s doctrine forward in a politically less provocative fashion, while still getting his more uncompromising colleagues to sign on to his opinions. Perhaps he hopes to recapture some legitimacy for the Court by pulling up short of full realization of those controversial principles in future cases. Perhaps he himself does not know how far he is willing to extend the doctrines.

Precisely because the Chief Justice’s principles can capture so much more than the facts of the cases that expressed them, their potential reach can be at least generally extrapolated. In this Article I have used the Federal Reserve to explore the limits of those principles, taking into account other relevant doctrines in opinions written or joined by Justices in the Court’s conservative majority. As a practical matter, a challenge to the constitutionality of the mandate or structure of the FOMC may never be decided on the merits. Yet, even if that remains the situation, working

406. Similarly, in West Virginia v. EPA, 142 S. Ct. 2587 (2022), Chief Justice Roberts invoked the potentially far-reaching “major questions doctrine” while declining to give any meaningful guidance as to when that doctrine might be invoked in the future. For early criticisms on this and other grounds, see Natasha Brunstein & Richard L. Revesz, Mangling the Major Questions Doctrine, 74 ADMIN. L. REV. 217, 217 (2022); Daniel T. Deacon & Leah M. Litman, The New Major Questions Doctrine, 109 V.A. L. REV. 1009, 1015 (2023). Justice Gorsuch’s dissenting opinion in Gundy also expressed a sweeping principle and left considerable uncertainty as to how it might be applied. Of course, precisely because he was writing a dissent, he did not have the same obligation to address the implications of his reasoning that might be felt by the author of a majority opinion. Moreover, Justice Gorsuch did try to provide at least some guidance as to how his principle would work. The substantial uncertainty that nonetheless results from his opinion is perhaps mostly a function of the inherent difficulty of drawing even a fuzzy non-delegation line, as Justice Scalia had noted two decades earlier. See supra Section II.A.
through the implications of the conservative majority’s evolving doctrines is valuable heuristically.

This exercise has revealed the choices from which the Court may need to select in applying its new separation of powers doctrines over time: One is to confine the principles already embraced through introduction of additional, moderating principles. A second is to apply doggedly the logic of those principles by invalidating congressional grants of authority and independence for many agencies. A third is to fashion ad hoc arguments that limit the reach of the new doctrines in particular cases. The first would, in essence, be a welcome retreat from the Court’s campaign against the administrative state. The second would lay bare a judicial appropriation of power from the other two branches of government that might (or might not) produce a destabilizing political reaction. The third would rest not on recognizable judicial standards but on the Court’s own preferences for certain agencies and functions of the U.S. government over others.