SYMPOSIUM

The Constitutional Money Problem

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We consider three aspects of the constitutional status of the U.S. Federal Reserve in this Article. Under the Supreme Court's contemporary approach to constitutional meaning, there is a surprising degree of doubt about whether key aspects of the Federal Reserve (or the Fed)—its independence from Congress and the President, and even its power to create money—are constitutional. We suggest this is reason to believe the Court's dominant interpretive approaches generate implausible results, but identify a previously overlooked source of constitutional grounding for the Fed that better supports its authority and structure. We further sketch the potential limits, costs, and benefits of our suggestion.

In particular, we propose that the structure and monetary authority of the Fed can be justified by the Article I, § 8 borrowing power and by the Public Debt Clause of the Fourteenth Amendment. In 1935, eight members of the Court agreed that these provisions require credible commitments: to meaningfully exercise the borrowing power, Congress must be able to promise creditors it will not undermine the value of its debts. We argue that judicial enforcement of sovereign promises is unlikely to fulfill this goal. Instead, the exercise of monetary authority by independent central banks is the most promising current solution to the credible-sovereign-borrower problem.

Nonetheless, we also argue that judges likely have a key role to play, both as a constitutional and normative matter, in central banking. Key monetary-policy decisions should proceed under standard administrative law procedures, including opportunities for judicial review. Review would likely enhance bank independence from political actors, while potentially mitigating excess influence from private banks, who currently enjoy disproportionate weight in the Fed's decision-making.

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INTRODUCTION

Modern nation-states exercise a suite of monetary powers centering upon the creation and regulation of money.[1] The nature and instrumentalities of such monetary powers have varied widely over time. In part, this is because the nature of money, understood broadly as a "practice orchestrated among a group . . . to mark value,"[2] has not been stable over time. Money can take many different forms, both private and public. Over two centuries of U.S. history, these forms have ranged from metal coins to paper notes, private bills of exchange to deposits marked on a bank's electronic balance sheet, and short-term corporate debt to derivative instruments predicated upon mortgage-backed securities. Some are creatures of the state; others predate the United States or emerge out of the practices of a transnational financial sector.

There is a second reason that monetary power has not been a stable concept or associated with a single set of practices: understandings of how public policy shapes economic outcomes have also evolved over time. Today, the dominant view is that the core

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1 There is a vast literature on the nature of the money and its necessary or contingent relation to the state. For useful surveys of different positions, see generally MODERN THEORIES OF MONEY: THE NATURE AND ROLE OF MONEY IN CAPITALIST ECONOMIES (Louis-Philippe Rochon & Sergio Rossi eds., 2003). For an excellent recent treatment focused on the varying political theory of money over time, see generally STEFAN EICH, THE CURRENCY OF POLITICS: THE POLITICAL THEORY OF MONEY FROM ARISTOTLE TO KEYNES (2022).

2 CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 1 (2014).

challenge of monetary policy arises from a time-inconsistency problem: elected officials can benefit at the polls today from surprise inflation (i.e., reducing the value of money), but only at the cost of sharply increased borrowing costs and diminished economic activity in the future.[3] While governments understood for centuries that their power to print money made them untrustworthy borrowers, it was only relatively recently that economists began to fully map the costs of time inconsistency[4] and to study what kinds of government institutions might mitigate it.[5] For example, if a country's medium of exchange is gold or can be redeemed for gold, it is more difficult for officials to deliberately cause inflation, but the economy is instead subject to ups and perilous downs related to the global and national availability of gold.[6]

The leading contemporary solution to the time-inconsistency problem is the creation of a central bank insulated from the political demands of transient coalitions of elected officeholders in either the legislative or the executive branch.[7] Economists have quantitatively measured the importance of building politically insulated monetary-policy institutions able to "reduce the inefficiencies resulting from the time-consistency problem" and "incorporate new ideas into a discretionary monetary strategy" with "widespread" public support.[8] As a result of these technical insights, it is now conventional wisdom that central banks should be independent of political forces in order to be able to credibly commit to long-term monetary policy.[9] Such independence, importantly, sounds in

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3 Alberto Alesina & Andrea Stella, *The Politics of Monetary Policy*, *in* 3B HANDBOOK OF MONETARY ECONOMICS 1001, 1003–04 (Benjamin M. Friedman & Michael Woodford eds., 2010).

4 *See* Barry Eichengreen, Asmaa El-Ganainy, Rui Pedro Esteves & Kris James Mitchener, *Public Debt Through the Ages* 4–9 (Int'l Monetary Fund, Working Paper No. 2019/006, 2019); Ricardo Reis, *Central Bank Design*, 27 J. ECON. PERSPS. 17, 19–20 (2013).

5 *See, e.g.*, Finn E. Kydland & Edward C. Prescott, *Rules Rather than Discretion: The Inconsistency of Optimal Plans*, 86 J. POL. ECON. 473, 475–77 (1977) (analyzing mathematically when a consistent policy would be optimal).

6 PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 209–10 (2016) [hereinafter CONTI-BROWN, POWER AND INDEPENDENCE]. For evidence that the international gold standard was correlated with lower inflation rates but subject to the vicissitudes of gold supply, see Lee A. Craig, Douglas Fisher & Theresa A. Spencer, *Inflation and Money Growth Under the International Gold Standard, 1850–1913*, 17 J. MACROECONOMICS 207, 209–10 (1995).

7 CONTI-BROWN, POWER AND INDEPENDENCE, *supra* note 6, at 136–39.

8 Mervyn King, *The Institutions of Monetary Policy*, 94 AM. ECON. REV. 1, 12 (2004).

9 José Fernández-Albertos, *The Politics of Central Bank Independence*, 19 ANN. REV. POL. SCI. 217, 218–19 (2015) (linking central bank independence to the time-inconsistency problem identified by economists Finn Kydland and Edward Prescott).

horizontal terms vis-à-vis Congress, and in vertical terms in relation to the elected elements of the presidency. Both forms of independence, we stress, are prized as a result of twentieth-century breakthroughs in economic theory. Prior to those breakthroughs, there was no clear understanding of the arguments for buffering monetary policy from democratic politics.[10] Indeed, had the institutional architecture of monetary power been static and procrustean (say, fixed in 1787), the United States would have been ill-positioned more generally to adapt and respond to new developments in the technology of money and new understandings of collective, institutionally plural forms of decision-making.[11]

How monetary powers are constitutionally assigned and controlled, as well as how they are revised and updated within the constitutional frame in light of new developments, is thus a question of great importance—but also one of great, and evolving, complexity. Yet it is a question to which neither U.S. constitutional jurisprudence nor the adjacent academic literature offers a clear or singular response.

To begin with, the constitutional text hammered out in 1787 simply did not offer a complete specification of even the narrow set of monetary powers that were recognized in the late eighteenth century.[12] The provisions of the 1787 Constitution addressing monetary powers, with one potential key exception, also remain largely untouched by Article V's exercise.[13] The federal courts have occasionally skirmished with the political branches over the allocation of monetary powers[14]—but these incidents, while politically fraught in their day, have not generated stable understandings of constitutional monetary powers. One result is a persisting zone of uncertainty between standard constitutional sources (e.g., text and judicial precedent) and the shifting instruments and strategies of monetary power wielded by the United States.[15] This uncertainty arises out of a gap between the formal

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10 CONTI-BROWN, POWER AND INDEPENDENCE, *supra* note 6, at 135–36.

11 *See* Lev Menand, *The Logic and Limits of the Federal Reserve Act*, 40 YALE J. ON REGUL. 197, 204 (2023) [hereinafter Menand, *Federal Reserve Act*] (explaining how the emergence of "alternative forms of money" can lead to new regulatory strategies); *see also id.* at 257–67.

12 *See infra* text accompanying notes 44–50.

13 *But see infra* text accompanying notes 151–68.

14 *See infra* text accompanying notes 125–50.

15 We thus agree with recent analysis by Professor Daniel Tarullo, the erstwhile member of the Fed's Board of Governors, that there are potential constitutional questions about the current Fed structure. *See* Daniel K. Tarullo, *The Federal Reserve and the Constitution*, 97 S. CAL. L. REV. 1, 12–45 (2024).

sources of constitutional monetary power and the drive to adopt novel instruments and untested institutions for its actual exercise.

Paradoxically, this textual gap has had some advantages. It has, in practice, allowed institutional change based on improved understandings beyond the provisional settlement of 1787.[16] But this same uncertainty also fosters unnecessary risks. Perhaps counterintuitively, the dominant contemporary posture of formalist originalism as applied to monetary power would not necessarily advance the libertarian goal of slowing the regulatory state, but it might undermine a key strut of the present global capitalism system. In addition, central banks often depend on political allies in the private financial sector to preserve independence.[17] Constitutional lacunae, and the ensuing uncertainty, leave the Federal Reserve more dependent on these patrons for political support than would otherwise be the case. While tight links to the private sector, pejoratively called capture of central banks,[18] may well have certain positive effects when financial institutions and the general public's interests are aligned on the need to fight inflation, it is a far less desirable political economy when those interests diverge.[19]

Our aim here is to describe the constitutional landscape of money creation and regulation in the United States and to offer a novel theorization of central bank independence in constitutional terms. Surprisingly, there is to date no clear and comprehensive analysis of the textual bases of monetary powers. Building on our analysis of text, precedent, and history, we propose that independent exercise of monetary power can be justified constitutionally as a necessary and appropriate way of giving effect to the intersecting national powers of the Article I, § 8 borrowing power and the Public Debt Clause[20] of the Fourteenth Amendment. The latter has not been analyzed in reference to monetary powers. Yet those provisions in tandem, the Court has implied, vest Congress with a general power to adopt rules that assure bondholders that

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16 *See infra* text accompanying notes 32–40.

17 For a formal statement, see Geoffrey P. Miller, *An Interest-Group Theory of Central Bank Independence*, 27 J. LEGAL STUD. 433, 450 (1998).

18 Elise S. Brezis & Avi Weiss, *Conscientious Regulation and Post-Regulatory Employment Restrictions*, 13 EUR. J. POL. ECON. 517, 520–21 (1997).

19 *Cf.* Peter Conti-Brown, *Ulysses and the Punch Bowl: The Governance, Accountability, and Independence of the Federal Reserve*, 24 GEORGE MASON L. REV. 617, 625, 629–30 (2017) [hereinafter Conti-Brown, *Punch Bowl*] (arguing that the standard case for Fed independence does not necessarily extend to Fed activities other than monetary policy).

20 U.S. CONST. amend. XIV, § 4.

the credit of the United States is sound. Today, an independent bank is understood universally as the surest means to this end.

Quite possibly, though, a convincing implementation of that rationale requires that the Federal Reserve's decision-making processes come into closer alignment with conventional administrative law, including opportunities for public comment and judicial review. That, in particular, may help mitigate the potential for interest-group capture. In the end, we thus aim to provide a clearer constitutional foundation for central bank independence that aims to mitigate the deficiencies of earlier theories, accounts for dynamic and evolving understandings of money and needful monetary power, and responds effectively to rule-of-law and capture concerns.

Part I illustrates the gap between the conventional account of constitutional monetary powers and the seemingly necessary range of monetary institutions and implements that states wield in the contemporary global economy. It foregrounds questions about the ways in which monetary power is warranted by law, the necessary limits to such authority, and the available modalities of constitutional change. With this gap in view, Part II begins to develop a novel legal theory for bridging the gap between eighteenth-century sources and twenty-first-century monetary power. In this Part, we distinguish clearly between three different theories of constitutional power over money that appear in relevant legal sources. We further explore their implications for the legally permissible institutions and instruments of monetary power. Part III surveys another constitutional question: whether the Fed's relative independence from the President and Congress can be squared with recent Supreme Court cases throwing constitutional doubt on some features of independent agencies. Part IV addresses the key elements of modern monetary arrangements that could be open to constitutional challenge by grounding them in two constitutional provisions that courts and scholars have not given much extended consideration. Part V then identifies important limitations on our argument for Fed independence.

I. The Evolution of Constitutional Monetary Power

What is the constitutional source of monetary power? The very concept of an independent central bank, let alone the array of complex instruments comprising monetary policy today, lay far beyond the imagining of Founding Era thinkers. Conventional

accounts of its constitutional foundations are also profoundly ambiguous and incomplete.

Developing these theses, this Part opens with a snapshot account of how monetary institutions have changed in the last two centuries. This account also serves as a brief overview of the Fed's history and operations for readers who may be unfamiliar with those institutional details.

The gap between the past and the present of monetary power is illustrated by a snapshot comparison between the most influential form of monetary authority in the late eighteenth century, the Bank of England, and its analog today, the Federal Reserve. At the time of the Founding, the Bank of England offered the leading example of a central bank. It was a wholly privately owned corporation, operating under a public charter promulgated by King William III at Parliament's behest in July 1694.[21] This was, not coincidentally, only eight years after the Glorious Revolution had wrought new constraints upon the crown's previously untrammeled fiscal and monetary authorities.[22] Rather than just a force multiplier of state power, the Bank was a "triumph of the commercially minded and the unsentimental forces of the new."[23] Its "primary responsibilities" were relatively narrow, limited to managing Great Britain's money supply in line to comply with a gold standard and serving as a lender of last resort during financial panics.[24]

In the United States, by contrast, monetary powers are now vested in the quite different institutional form of the Federal Reserve Board.[25] The Fed rests on a series of statutes enacted in 1913, 1935, and 1977 that articulate its structure and mandate.[26] It is captained by a presidentially nominated and Senate-

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[21] *Our History*, BANK OF ENG. (June 10, 2024), https://perma.cc/HZ6L-SSKB; *see also* Tonnage Act 1694, 5 & 6 W. & M. c. 20.

[22] Steven C.A. Pincus & James A. Robinson, *What Really Happened During the Glorious Revolution*, *in* INSTITUTIONS, PROPERTY RIGHTS, AND ECONOMIC GROWTH: THE LEGACY OF DOUGLASS NORTH 192, 207, 209–11 (Sebastian Galiani & Itai Sened eds., 2014).

[23] DAVID KYNASTON, TILL TIME'S LAST SAND: A HISTORY OF THE BANK OF ENGLAND 1694–2013, at 5 (2020).

[24] BEN S. BERNANKE, 21ST CENTURY MONETARY POLICY: THE FEDERAL RESERVE FROM THE GREAT INFLATION TO COVID-19, at xiii–xiv (2022) [hereinafter BERNANKE, MONETARY POLICY].

[25] Federal Reserve Act, ch. 6, § 10, 38 Stat. 251, 260–62 (1913).

[26] Federal Reserve Act, ch. 6, 38 Stat. 251, *amended by* Banking Act of 1935, ch. 614, 49 Stat. 684; Federal Reserve Reform Act of 1977, Pub. L. No. 95-188, 91 Stat. 1387.

confirmed Board of Governors of the Federal Reserve System.[27] The Board oversees twelve federal corporations known as Federal Reserve Banks, as well as thousands of privately held banks and bank holding companies.[28] The Board shares its authority over monetary policy with the presidents of these reserve banks, as the twelve voting members of the Federal Open Market Committee that controls monetary decisions comprise the Board of Governors, the President of the New York Reserve Bank, and four other Reserve Bank presidents on a rotating basis.[29] The Fed's structure, like that of the Bank of England, amalgamates public and private action, but prioritizes the former.[30]

Even as the Fed is a more public body than the Bank, it diverges from other institutional agents of the federal government in its fiscal working. Unlike almost all other governmental bodies, the Fed funds itself mainly through open market operations.[31] It thus stands outside the congressional appropriations cycle.[32] To the extent that the "power of the purse" constitutes one of Congress's main instruments for control of how law is executed,[33] the Fed is distinct.

The Fed's mandate and tool kit diverge from those of the Bank of England. Its legally specified objectives are inflation control and maximizing employment (although the latter receives less attention).[34] Ordinarily, the Fed's main policy instrument is its power to create the monetary base, which comprises both cash

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27 12 U.S.C. § 241. For a more detailed description of the Fed structure, see Peter Conti-Brown, Yair Listokin & Nicholas R. Parrillo, *Towards an Administrative Law of Central Banking*, 38 YALE J. ON REGUL. 1, 10–11 (2021).

28 Federal Reserve Act §§ 2, 4, 10, 38 Stat. at 251–57, 260–61.

29 Tarullo, *supra* note 15, at 7–8, 8 n.18.

30 *See id.* at 8–9.

31 Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REGUL. 257, 274–75 (2015) [hereinafter Conti-Brown, *Institutions of Independence*].

32 *Id.*

33 *See* Kate Stith, *Congress's Power of the Purse*, 97 YALE L.J. 1343, 1346–63 (1988).

34 *See* 12 U.S.C. § 225a (directing the Fed to "maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates"). The Fed defines maximum employment as the "lowest level of unemployment that the economy can sustain while maintaining a stable inflation rate." *FAQs: What Economic Goals Does the Federal Reserve Seek to Achieve Through Its Monetary Policy?*, BD. OF GOVERNORS OF THE FED. RSRV. SYS. (July 19, 2024), https://perma.cc/W78S-T27W. Curiously, although the statute clearly has three objectives, the Fed describes its task as a "dual mandate," ignoring its obligation to moderate long-run interest rates. *E.g.*, *The Federal Reserve's Dual Mandate*, FED. RSRV. BANK OF CHI. (Oct. 20, 2020), https://perma.cc/227W-NCA2.

and ordinary banks' reserves held in the Fed's accounts.[35] The Fed uses its power to grant reserves to further influence short-term interest rates through purchases and sales of government securities—the "open market operations" we mentioned.[36] The Fed also influences interest rates through other mechanisms, such as by paying interest on reserves.[37]

In moments of systemic financial strain, the Fed steps in to prevent capital markets from failing.[38] In maintaining financial market stability in moments of crisis, the Fed uses many policy tools that would have been alien to the Bank of England's original stockholders. During the 2007 financial crisis, for example, the Fed lent money to securities dealers, such as Bear Stearns, and insurance companies, such as AIG; it "credited half a trillion dollars to foreign central banks so that they could backstop financial firms in Europe and Asia"; and it bought "hundreds of billions of dollars' worth of bundles of home loans known as mortgage-backed securities."[39] In 2020, the Fed applied the same tools to mitigate the financial costs of the COVID-19 pandemic.[40] These tools have underappreciated effects on other core functions of the national government. Because the assets purchased by the Fed often include large tranches of U.S. government bonds, the Fed's efforts to promote financial stability can and do shape the federal government's fiscal capacity, an effect one of us has called "monetary finance."[41] Given this history, it is hardly surprising that the Fed's role as lender of last resort "has seen both more experimentation and more controversy" than any other of its functions.[42]

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[35] MARC LABONTE, CONG. RSCH. SERV., RL30354, MONETARY POLICY AND THE FEDERAL RESERVE: CURRENT POLICY AND CONDITIONS 7 (2020).

[36] LEV MENAND, THE FED UNBOUND: CENTRAL BANKING IN A TIME OF CRISIS 97–99 (2022) [hereinafter MENAND, FED UNBOUND]; *see also* Labonte, *supra* note 35, at 15.

[37] Bennet McCallum & Edward Nelson, *Money and Inflation: Some Critical Issues*, *in* 3A HANDBOOK OF MONETARY ECONOMICS 98, 135–36 (Benjamin M. Friedman & Michael Woodford eds., 2011).

[38] *See, e.g.*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., REVIEW OF THE FEDERAL RESERVE'S SUPERVISION AND REGULATION OF SILICON VALLEY BANK (2023).

[39] Menand, *Federal Reserve Act*, *supra* note 11, at 200; *id.* at 261–66; *see also* BERNANKE, MONETARY POLICY, *supra* note 24, at 130–90 (offering a detailed breakdown of the 2007–08 programs). "[L]arge[-]scale purchases by the central bank of longer-term securities, aimed at reducing longer-term interest rates" are known as "quantitative easing." *Id.* at 282.

[40] Menand, *Federal Reserve Act*, *supra* note 11, at 200–01, 260–67.

[41] Brian Galle & Yair Listokin, *Monetary Finance*, 75 TAX L. REV. 137, 158–69 (2022).

[42] Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 679–86 (2021).

II. THE UNCERTAIN CONSTITUTIONAL SOURCES OF MONETARY POWERS

We now will develop three broad strategies for deriving a constitutional foundation for monetary powers. The first turns upon the original public meaning of several Article I enumerated powers. The second draws on theories of "historical gloss," coupled with the Necessary and Proper Clause,[43] to legitimate the exercise of new monetary powers. The third draws upon the existence of a quantum of inherent sovereign power necessarily implied by a state's existence. This threefold analysis draws to the surface difficulties in locating the sources of monetary powers—starting with the Founding Era powers to issue bills or credit and paper money that could operate as legal tender.

A. Original Public Meaning

A first theory of constitutional monetary power focuses on the original understanding of Congress's Article I enumerated powers. For the Court's contemporary originalists, reconciling the Fed's modern authority with narrow historical practice likely turns on the extent to which the Constitution's text can be read broadly enough to authorize substantial departures from the examples that were available to the drafters.

As Professor Kenneth Dam has explained, there is a serious argument that the Framers intended to prohibit both state and federal governments from issuing paper money or making it legal tender, i.e., requiring private parties to accept paper money at face value.[44] Article I, § 10 provides that states cannot "emit Bills of Credit" or "make any Thing but gold and silver Coin a Tender in Payment of Debts."[45] Although a drafting committee initially recommended that Congress be authorized to borrow money on the credit of the United States and to issue bills of credit, the states' delegations ultimately voted nine to two to strike the latter clause.[46] That resolution left us with an ambiguous text—does denying a power to the states but not the national government mean that Federal authority exists, even if not expressly authorized?—and a somewhat confusing set of written explanations

[43] U.S. CONST. art. I, § 8, cl. 18.

[44] *See* Kenneth W. Dam, *The Legal Tender Cases*, 1981 SUP. CT. REV. 367, 382–90.

[45] U.S. CONST. art. 1, § 10.

[46] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 308–10 (Max Ferrand ed., 1937).

from the Framers about what they thought they had accomplished.[47] It was, indeed, messy enough that the Supreme Court first interpreted it one way, holding in *Hepburn v. Griswold*[48] that there is no congressional power to make paper money legal tender,[49] and then barely a year later reached the opposite result.[50]

As a matter of original intentions, we are persuaded by Dam that the Framers probably thought they were prohibiting paper money. We can best make sense of the drafting history, and President James Madison's explanation of it, by reading "bills of credit" to mean instruments that do not pay interest, are payable on demand, and cannot be redeemed for gold.[51] As Chief Justice John Marshall later pointed out, those features distinguish "bills" from public borrowing, which generally features a regular payment schedule and interest.[52] Dam's reading also turns Madison's commentary, which some others have found internally inconsistent,[53] into a coherent argument that public borrowing can substitute for most of the economic purposes of paper money while generating a preferable political economy.[54] This is not to say that all the delegates who voted against the bills of credit clause shared Madison's views, but it is difficult to read the debate as anything other than a decision "to prohibit paper [money issuance] by the national government."[55] Several delegates, for example, insisted that the Convention should "shut and bar the door against paper money."[56]

Some originalists prioritize original public understandings over the intentions of the Constitution's Framers, and for them matters are less clear. As we have said, we think the ultimate text is ambiguous as to whether bills of credit or congressional power

[47] Dam, *supra* note 44, at 386–89.

[48] 75 U.S. (8 Wall.) 603 (1869).

[49] *Id.* at 625–26. The Court also suggested that legal tender legislation derogated contractual rights and that the "spirit" of the Contracts Clause "pervade[d] the entire body of legislation." *Id.* at 623.

[50] Knox v. Lee, 79 U.S. (12 Wall.) 457, 553–54 (1870).

[51] Dam, *supra* note 44, at 386–88.

[52] *Id.* at 388 (citing Craig v. Missouri, 29 U.S. (4 Pet.) 410, 432, 434–35 (1830)).

[53] *See, e.g.*, Juilliard v. Greenman, 110 U.S. 421, 443–44 (1884).

[54] *Cf.* Dam, *supra* note 44, at 386–87.

[55] Farley Grubb, *The US Constitution and Monetary Powers: An Analysis of the 1787 Constitutional Convention and the Constitutional Transformation of the US Monetary System*, 13 FIN. HIST. REV. 43, 62 (2006).

[56] 5 JONATHAN ELLIOT, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION IN THE CONVENTION HELD AT PHILIDELPHIA, 1787, at 435 (1845).

to define "legal tender" are authorized,[57] and, in any event, we do not know if the general public had a clear understanding of those terms. While we are not aware of any comprehensive effort to discern the original public meanings of "borrow Money" and "coin Money,"[58] there is evidence that the constitutional drafters used the word "coin" intentionally to distinguish that power from the authority to issue paper money.[59]

Insistence upon the original intentions or public meaning of the 1787 Constitution's currency-related clauses, in short, potentially points toward a limited scope of monetary power. The boundaries of this power would exclude, say, the designation of paper money as legal tender. Yet today, the Fed mostly expands the money supply indirectly, by issuing reserves to private banks in exchange for short-term government securities.[60] Reserves are not paper money; they are essentially short-term debt, like any bank account balance, and since 2008, the Fed has paid interest on them.[61] It is thus unclear whether a prohibition on paper money, grounded in original public meaning, would have any important effects on contemporary monetary practice. In part, the question would depend on whether a court reads the prohibition as a narrow, technical prohibition, or instead as a broad principle that generally disfavors any floating-value medium of exchange that cannot be exchanged for gold.[62]

B. Historical Gloss

Early judicial opinions on the Constitution's money-related powers suggest an alternative pathway for evaluating the

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[57] *See supra* text accompanying notes 50–56. The Court relied on the Necessary and Proper Clause and a negative inference from constitutional text to uphold Congress's legal tender power. *See Knox*, 79 U.S. (12 Wall.) at 552. Not only does this ignore the evidence of original public meaning, it is also question begging: Why should a negative inference hold here when it is rejected in, say, the extension of state sovereign immunity beyond the text of the Eleventh Amendment, and even into state courts? *See* Alden v. Maine, 527 U.S. 706, 754 (1999).

[58] U.S. CONST. art. I, § 8.

[59] *Cf.* James B. Thayer, *Legal Tender*, 1 HARV. L. REV. 73, 77 (1887) (discussing the Convention debates and concluding that "the objectionable thing was not merely making paper a legal tender, but having a paper currency at all").

[60] *See* Labonte, *supra* note 35, at 4–5.

[61] *See id.* at 4–6.

[62] *Cf.* Brian Galle, *The Taxing Power, the Affordable Care Act, and the Limits of Constitutional Compromise*, 120 YALE L.J. ONLINE 407, 415–19 (2010); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1682–1720 (2004).

permissible scope of monetary powers. These decisions draw upon a concept that has come to be called historical gloss.[63] Justice Felix Frankfurter coined this term in *Youngstown Sheet & Tube Co. v. Sawyer*,[64] where he defined gloss as "a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution."[65] Justice Frankfurter's definition is not unambiguous. But his idea of "gloss" can be usefully decomposed into three constituent parts based simply on this verbal formulation: "(1) a historical practice by an official actor . . . ; (2) that is temporally durable rather than momentary and fleeting; and (3) that has been recognized and endorsed by other official institutions, such as Congress."[66]

Arguments from historical gloss play a significant role in the Supreme Court's treatment of monetary powers. To begin with, the federal government began to issue bills of credit as early as 1812, and so its power to do so was "taken for granted" in the antebellum period.[67] Overruling *Hepburn* in *Knox v. Lee*,[68] the Court accepted the Attorney General's argument that "the practice of the government from a very early date[ ] [has been that] Congress has never hesitated to enact what should be a legal tender in payment of debts."[69] Fourteen years later, the Court affirmed the validity of peacetime legal tender legislation by asserting that "uniform practice" had "settled" Congress's power to emit bills of credit.[70] Further, it affirmed congressional "authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business" as "settled beyond doubt."[71] Similarly, the Court reasoned that "the law has always recognized [bills emitted by government-chartered national banks] as a good tender in payment of money debts."[72] By 1935, the Court could smartly deflect legal challenges to the decoupling of

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[63] *E.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 424 (2012).

[64] 343 U.S. 579, 610 (1952).

[65] *Id.* at 610 (1952) (Frankfurter, J., concurring).

[66] Aziz Z. Huq, *Fourth Amendment Gloss*, 113 NW. U. L. REV. 701, 709 (2019).

[67] Dam, *supra* note 44, at 389.

[68] 79 U.S. (12 Wall.) 457 (1870).

[69] *Id.* at 518–19; *see also* Veazie Bank v. Fenno, 75 U.S. (8 Wall.) 533, 548 (1869) ("[I]t is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit.").

[70] *Juilliard*, 110 U.S. at 446 (quoting *Veazie Bank*, 75 U.S. (8 Wall.) at 548).

[71] *Id.* at 444–45.

[72] *Id.* at 445.

the dollar from gold by pointing to Congress's "complete authority to regulate the currency system of the country."[73]

In the context of monetary powers, judicial arguments from gloss have been offered alongside invocation of the Necessary and Proper Clause. One way in which gloss can be anchored in text is by understanding it as evidence of which implied powers are, in practice, functionally adjacent to enumerated ones. In this vein, *McCulloch v. Maryland*[74] drew on postratification statutes to resolve a "doubtful" question of constitutional law "of peculiar delicacy."[75] What counts as a necessary incident of an enumerated power, that is, can be determined by reference to the execution of policy, rather than in the abstract. Both the *Legal Tender Cases*[76] and the *Gold Clause Cases*[77] invoked *McCulloch* for the idea that Congress possesses "appropriate means for carrying on the money transactions of the government."[78] Gloss is thus intricated into constitutional meaning because of its evidentiary function in interpreting the Necessary and Proper Clause, rather than as a free-floating source of constitutional meaning.

The argument from gloss, however, faces several significant objections. The first turns on the extent of historical practice necessary to legitimate a challenged government practice. *Pace* the Court's confident factual assertions in the *Legal Tender Cases*, Congress did not in fact authorize the issuance of paper money, or greenbacks, until 1862.[79] Unlike the earlier interest-bearing securities issued to finance the Civil War,[80] greenbacks were not just "irredeemable in gold or silver,"[81] but also served to fully discharge a debt owed to private parties.[82] They hence "sharply

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73 Nortz v. United States, 294 U.S. 317, 328 (1935); *see* Perry v. United States, 294 U.S. 330, 350 (1935); Norman v. Balt. & Ohio R.R., 294 U.S. 240, 303 (1935). *Nortz* and *Perry* rested mainly on the proposition that price controls had limited gold prices, such that the holder of a government bond's claim to "just compensation" required payment at only the devalued rate. *Nortz*, 294 U.S. at 328–30; *Perry*, 294 U.S. at 337.

74 17 U.S. (4 Wheat.) 316 (1819).

75 *Id.* at 401.

76 79 U.S. (12 Wall.) 457 (1870).

77 294 U.S. 240 (1935).

78 *Juilliard*, 110 U.S. at 445; *see also Knox*, 79 U.S. (12 Wall.) at 538–39 (citing *McCulloch* for similar grounds); *Norman*, 294 U.S. at 311–13 (relying on *McCulloch* as a basis for deference to Congress).

79 Act of Feb. 25, 1862, ch. 33, § 1, 12 Stat. 345.

80 *See* G. Thomas Woodward, Comment, *Interest-Bearing Currency: Evidence from the Civil War Experience*, 27 J. MONEY, CREDIT & BANKING 927, 928 (1995).

81 Dam, *supra* note 44, at 373.

82 *Id.* at 373–74 (noting that because greenbacks rapidly depreciated against gold, a creditor paid $100 of greenbacks in effect received less than a creditor paid in gold coin).

reversed the constitutional normative belief held since 1787 that condemned an inflationary Dollar."[83] The *Knox* Court's contention that earlier statutes allowed depreciation of metal coin might demonstrate that statutory impairment of creditors' interests was constitutional,[84] but does not necessarily speak to congressional authority to issue paper money. At best, the Court can be understood to be quietly modulating the relevant practice to extend it beyond the class observed historically. This approach raises a question of the appropriate level of generality at which gloss should be construed. Perhaps the Court saw an ongoing congressional practice of exercising monetary authority, which encompassed both issuing bills and other acts that can have the effect of depreciating the currency.

The final objection is doctrinal in nature. *McCulloch* hinges the availability of a practice-based argument under the Necessary and Proper Clause upon the existence of a threshold "doubtful" constitutional question.[85] At least on one view of original public meaning, Congress has always been denied the power to issue bills of credit or make them legal tender. So the historical conditions for a turn to historical practice were lacking to begin with.

This objection may be reframed in light of more recent Supreme Court precedent concerning the scope of the Necessary and Proper Clause. In 2012, Chief Justice John Roberts issued an opinion in the constitutional challenge to the Affordable Care Act[86] in which he carved a limit to the Necessary and Proper Clause.[87] Citing what was arguably until then mere dicta from *McCulloch*, he said that the Clause "does not license the exercise of any 'great substantive and independent power[s]' beyond those specifically enumerated."[88] This "sudden" and "new" constraint is not self-defining.[89] It has not been extensively developed in the case law; indeed, insurance mandates and public-safety management are the sole examples offered by Justices to date.[90]

83 Christopher P. Guzelian, *Translating a CBDC Dollar into a Constitutional Dollar*, 55 ST. MARY'S L.J. 1, 30 (2024).

84 *See Knox*, 79 U.S. (12 Wall.) at 552.

85 *McCulloch*, 17 U.S. (4 Wheat.) at 378.

86 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

87 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 559 (2012).

88 *Id.* (quoting *McCulloch*, 17 U.S. (4 Wheat.) at 411).

89 Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L.J. 2044, 2080 (2014).

90 *See id.* at 2079–80; United States v. Kebodeaux, 570 U.S. 387, 402 (2013) (Roberts, C.J., concurring) ("It is difficult to imagine a clearer example of such a 'great substantive and independent power' than the power to 'help protect the public . . . and alleviate public safety concerns.'").

It seems reasonable to ask, however, whether any of the monetary powers used by the federal government could fall within the "great substantive and independent power" exception. Perhaps tellingly, challenges to the original legal tender legislation cited the fragment of *McCulloch*[91] reanimated by the Chief Justice in *National Federation of Independent Business v. Sebelius*.[92] This raises fresh questions about the range of negative inferences that could be squeezed from § 10 of Article I.

C. Inherent Sovereignty

A third species of argument found in Supreme Court rulings on monetary powers derives them from a background account of inherent national sovereignty. While some have defended implied sovereign powers on original public meaning grounds, they have not been framed in these terms in the relevant court opinions. We hence treat such powers as distinct, unanchored in original public meaning.

Implied sovereign powers seem the source of monetary authority in several key Supreme Court rulings. In *Juilliard v. Greenman*,[93] for example, the Court pointed to the fact that Congress was indubitably the "legislature of a sovereign nation."[94] As such, it was "clearly authorized" to wield powers "incidental" to its enumerated powers, including the ability "to emit bills of credit, to charter national banks, and to provide a national currency for the whole people," and also the power "to make the notes of the government a legal tender in payment of private debts."[95] To support its inherent sovereignty claim, the *Juilliard* Court pointed out that the individual colonies had exercised the power to issue legal tender (such that, presumably, this power had to be carried forward in some sovereign after independence).[96] And leaning into this notion of inherent sovereignty as a domain not regulated by constitutional text containing determinate legal standards, the Court further held that the prudence of such legislation was "a political question, to be determined by Congress

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91 *See Knox*, 79 U.S. (12 Wall.) at 487 (reproducing arguments against the validity of the legislation from the briefs).

92 567 U.S. 519 (2012).

93 110 U.S. 421 (1884).

94 *Id.* at 449.

95 *Id.* at 449–50.

96 *Id.* at 447–48.

when the question of exigency arises."[97] *Juilliard*'s logic further differs importantly from *McCulloch*'s insofar as it reflects an absolute abrogation of the judicial role in respect to powers "appertaining to sovereignty," as opposed to active judicial scrutiny of how state power was to be divided up between the states and the federal government.[98] Inherent sovereignty, on this view, can be recognized but not questioned by the judicial authority.

A similar line of argument supported the Court's decision, fifty-one years later, to uphold President Franklin Delano Roosevelt's decision to suspend the statutory gold standard. Invoking "the broad and comprehensive national authority" of Congress "to regulate the currency and to establish the monetary system of the country," the Court refused to "fetter[ ]" Congress "by the necessity of maintaining existing [private contractual] arrangements."[99] While this argument does not sound in the register of sovereignty as such, the notion that the legislature necessarily has ultimate decisional authority—private arrangements notwithstanding—is in effect an argument against "imperium in imperio" (or government within a government).[100] Thus, this sort of argument draws upon the intuition that sovereignty, by its nature, must be undivided and free of supervisory judgments, even as it eschews close attention to constitutional text. Further echoing *Juilliard*'s language about the "political" nature of monetary issue, the Court reasoned that "Congress is entitled to its own judgment" as to how best to advance "monetary policy."[101]

The idea of powers inherent to the sovereign nation are in a bad odor these days.[102] It is commonly associated with Justice George Sutherland's opinion on presidential foreign relations powers in *United States v. Curtiss-Wright Export Corp.*,[103] which has long been sharply criticized.[104] The notion of inherent

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97 *Id.* at 450. The Court often reasons that "inherent powers . . . are relatively insulated from judicial review," and so "plenary in their exercise." Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power over Foreign Affairs*, 81 TEX. L. REV. 1, 8 (2002); *see id.* at 133.

98 *McCulloch*, 17 U.S. (4 Wheat.) at 411.

99 *Norman*, 294 U.S. at 303, 310–11.

100 St. Louis v. W. Union Tel. Co., 149 U.S. 465, 467–68 (1893).

101 *Norman*, 294 U.S. at 311.

102 *See, e.g.*, DON HERZOG, SOVEREIGNTY, RIP 258 (2020) ("The classic theory of sovereignty is an atrocious guide to our problems and possibilities.").

103 299 U.S. 304, 315–22 (1936).

104 *See, e.g.*, Louis Fisher, *The Staying Power of Erroneous Dicta: From* Curtiss-Wright *to* Zivotofsky, 31 CONST. COMMENT. 149, 159 (2016) ("Writing for the Supreme Court in *Curtiss-Wright*, Justice George Sutherland introduced three conceptual and

sovereignty also played a central role in a series of decisions justifying the late nineteenth-century Chinese exclusion statutes.[105] Again, these nativist-tinged decisions are viewed with some distaste by contemporary commentators.[106] But despite this potentially discomforting history, the Roberts Court continues to posit the existence of "preconstitutional powers necessarily inherent in any Federal Government" as "necessary concomitants of nationality."[107]

Despite their persistence, the present force of arguments from inherent sovereignty remain difficult to evaluate. Just like the category of "great substantive and independent" powers, inherent sovereignty is amenable to many different constructions. Consider, for instance, the idea that legal tender laws are an exercise of inherent sovereignty. The first paper-money law was enacted by the Massachusetts colony in 1690.[108] In 1751 and 1764, the British crown enacted currency laws limiting paper money not backed by gold or silver.[109] Against this background, it might fairly be doubted that the power to issue paper currency can plausibly be ranked as "inherent" to Founding Era concepts of sovereignty, assuming that is the relevant moment.

Or take the question whether Congress could declare null and void its own bond covenants requiring repayment in gold. During the 1935 oral argument on that question, Chief Justice Charles Hughes asked whether "the very essence of sovereignty" was not the ability to "bind a sovereign State in a contract to

historical errors."); Charles A. Lofgren, United States v. Curtiss-Wright Export Corporation*: An Historical Reassessment*, 83 YALE L.J. 1, 28–30 (1973). *But see* Blackmer v. United States, 284 U.S. 421, 437 (1932) ("Nor can it be doubted that the United States possesses the power inherent in sovereignty to require the return to this country of a citizen, resident elsewhere, whenever the public interest requires it, and to penalize him in case of refusal.").

105 *See, e.g.*, Chae Chan Ping v. United States (Chinese Exclusion Case), 130 U.S. 581, 604–05 (1889); Ekiu v. United States, 142 U.S. 651, 659 (1892).

106 Indeed, the author of the *Chinese Exclusion Case*, Justice Stephen Field, was a dissenter in the final *Legal Tender* decision, and recent work suggests that the latter's construal as an affirmation of extratextual immigration authority is "based on a misunderstanding." Nikolas Bowie & Norah Rast, *The Imaginary Immigration Clause*, 120 MICH. L. REV. 1419, 1448–49 (2022).

107 Haaland v. Brackeen, 143 S. Ct. 1609, 1628 (2023) (quotation marks omitted) (quoting United States v. Lara, 541 U.S. 193, 201 (2004)).

108 Elizabeth E. Dunn, *"Grasping at the Shadow": The Massachusetts Currency Debate, 1690–1751*, 71 NEW ENG. Q. 54, 55–56 (1998).

109 JOSEPH ALBERT ERNST, MONEY AND POLITICS IN AMERICA, 1755–1775: A STUDY IN THE CURRENCY ACT OF 1764 AND THE POLITICAL ECONOMY OF REVOLUTION 41–43 (1973).

borrow money."[110] Adding a further layer of interpretive difficulty, the extent and powers of the nation-state have changed dramatically since 1789.[111] Even if an inherent sovereign power can be identified circa 1787, there remains a question of how to translate that historically framed and limited authority into the dramatically different context of early twenty-first-century modern states.[112] Even a moment's reflection on how to translate control of a metallic coinage into the regulation of private corporate activity through purchases of mortgage-backed securities suggests that this can be a difficult inquiry.

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Understood in its initial light, the constitutional text seemingly takes a gimlet-eyed view of state monetary powers. It is plausibly read not even to license the emission of bills of credit or legal tender (as those terms were initially understood). The gap has been filled by theories of historical gloss and inherent sovereignty. The pathway to an account of the constitutional foundations of the full panoply of monetary powers hence remains uncertain to this day.

III. THE MONETARY SEPARATION OF POWERS: IS THE FED CONSTITUTIONAL?

In this Part, we briefly sketch how contemporary judicial developments may raise legal questions about both the vertical and horizontal independence of the Fed. We believe that these developments are mostly misguided, but offer them as important context for readers in understanding the potential importance of a project to more clearly establish the Fed's constitutional status given its contemporary powers and role.

The exercise of monetary powers raises questions of both source and location. First, there is a question of the distribution of powers between Congress and the executive. This bears on questions of democratic control over monetary policy on the one hand, and the Fed's horizontal independence from elected legislatures on the other. Second, there are questions of how power is

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[110] The oral argument is quoted in Gerard N. Magliocca, *The Gold Clause Cases and Constitutional Necessity*, 64 FLA. L. REV. 1243, 1257 (2012).

[111] *See* CHARLES S. MAIER, THE PROJECT-STATE AND ITS RIVALS 5–6, 379–89 (2023) (charting the emergence of a "project-state").

[112] *See* Lawrence Lessig, *Fidelity in Translation*, 71 TEX. L. REV. 1165, 1184–85 (1993).

distributed within the executive as between a central bank and an elected president, and in particular whether Congress by legislation can insulate central bank leadership from control. This bears on a vertical aspect of central bank independence. Finally, there is a question of how much (if at all) monetary policy should be subject to judicial review, as was the case during debates about legal tender and the gold standard.

With regard to horizontal independence, there is renewed interest at the Supreme Court in the concept that some powers cannot be delegated from the legislature to the executive.[113] For some Justices, this idea is seemingly what justifies the "major questions doctrine" under which agencies cannot pursue certain significant policy projects without clear congressional authorization.[114] Courts have at times pointed to express constitutional assignments of certain powers to the legislature as a textual hook for these principles.[115] That seems potentially significant in the context of monetary authority, where the powers to borrow and coin money are assigned to Congress in Article I. Some scholars have gone even further, claiming that "monetary . . . powers" are "vested in Article I" and that statutory "delegations have . . . created a constitutional oxymoron: a 'Monetary Executive'" courting a risk of "tyranny."[116] The Court did recently turn back a challenge to the funding of the Consumer Financial Protection Bureau (CFPB), which draws from the earnings of the Fed,[117] but some potential legal challenges to financial regulators remain on the horizon.[118]

With respect to vertical independence, there is also a noticeable Supreme Court trend towards presidentialism, with an accompanying skepticism of the structural features of independent

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113 David B. Froomkin, *The Nondelegation Doctrine and the Structure of the Executive*, 41 YALE J. ON REGUL. 60, 62, 78–80 (2024).

114 *See* Mila Sohoni, *The Major Questions Quartet*, 136 HARV. L. REV. 262, 290–315 (2022).

115 *See, e.g.*, West Virginia v. EPA, 142 S. Ct. 2587, 2617–21 (2022) (Gorsuch, J., concurring).

116 Christina Parajon Skinner, *The Monetary Executive*, 91 GEORGE WASH. L. REV. 164, 167–68 (2023); *see id.* at 175, 196–97. This risk largely dissipates if the monetary authority is an independent agency. *See* PAUL TUCKER, UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE 288–89 (2018).

117 Consumer Fin. Prot. Bureau v. Cmty. Fin. Serv. Ass'n of Am., Ltd., 144 S. Ct. 1474, 1486–87 (2024).

118 *See* Hal Scott, *The CFPB's Pyrrhic Supreme Court Victory*, WALL ST. J. (May 20, 2024), https://www.wsj.com/articles/the-cfpb-pyrrhic-supreme-court-victory-federal-reserve-18099f59.

agencies.[119] For instance, in ruling on the for-cause removal protections of the head of the CFPB, the Court held that "lesser officers must remain accountable to the President," except in the case of "expert agencies led by a group of principal officers."[120] The Court did not opine—pointedly, in our view—on whether the Federal Reserve's arrangement of a powerful Fed Chair, albeit one who formally holds only one vote on the Board of Governors, would fall within this exception.[121] On the other hand, that decision also seemed to rest on the "almost wholly unprecedented" structure of the CFPB, perhaps suggesting that long-standing arrangements like the Fed's would be less open to question.[122] Indeed, the canonical formulation of historical gloss as a doctrinal tool focuses on "systematic, unbroken, executive practice."[123] Still, leading commentators believe that the Fed could now be open to "serious challenge."[124]

IV. THE BORROWING POWER AND THE PUBLIC DEBT CLAUSE

We have argued so far that, as a descriptive matter, there are grounds on which key elements of modern monetary arrangements could be open to constitutional challenge given present constitutional doctrine. In this Part, we start to respond to those difficulties.

We offer here what we believe is a new way forward, by grounding the Fed's exercise of monetary authority in two constitutional provisions that courts and scholars have not given any extended consideration. Specifically, we argue that much of the Fed's contemporary design can be understood as a necessary and proper extension of the Article I, § 8 borrowing power, as well as the Public Debt Clause of § 4 of the Fourteenth Amendment. Our basic claim is that monetary authority, and independent Fed control of it, are needed in order to give meaningful effect to the

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[119] *See* Aaron L. Nielsen & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1, 21–27 (2023).

[120] Seila L. v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192, 2197 (2020) (emphasis omitted).

[121] *Id.* at 2243 (Kagan, J., concurring in part and dissenting in part) (flagging the absence of discussion on this point).

[122] *Id.* at 2201; *see* Tarullo, *supra* note 15, at 68–81 (considering whether courts would uphold the constitutionality of the Fed's design based on its historical pedigree).

[123] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring).

[124] Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP. CT. REV. 83, 112; *see* Tarullo, *supra* note 15, at 21–24.

borrowing power and to avoid throwing the public debt into "question." That is, we supply an answer to the question recently posed by Professor Daniel Tarullo, who called into doubt whether there is anything in the Constitution "stating . . . a different separation of powers principle for central banking."[125] First, though, we will explain why it is likely that the Fed, not courts, must play that key role.

A. The Problem of Credible Debt Issuance and the Nonsolution of Judicial Review

To set the stage for our larger argument, we must take what might at first seem a detour into a largely forgotten constitutional "what if" related to the 1935 case of *Perry v. United States*.[126] *Perry* was a moment at which the Supreme Court might have seized for itself the commitment function that modern economists associate with central banks. But the Court's struggles in and after *Perry* illustrate crisply the Fed's irreplaceable institutional role in the constitutional structure. A central bank's place as a monetary keystone helps explain why a direct grant of monetary power to Congress also implies, under at least some theories of constitutional interpretation, the constitutionality of an independent central bank.

Perry was a case about Congress's efforts to skimp on its outstanding World War I debts.[127] In 1918, the United States had begun issuing bonds with a standard "gold clause."[128] The gold clause was a centuries-old solution to sovereign debtors' commitment problem.[129] Sovereigns without the power to self-commit face potentially ruinous interest rates when borrowing because lenders know that the sovereign can later trigger inflation (or otherwise alter the terms of the original loan), reducing the value of the promised repayments.[130] Gold clauses aimed to mitigate this

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[125] Tarullo, *supra* note 15, at 95.

[126] 294 U.S. 330 (1935).

[127] *Id.* at 348–49.

[128] *See id.* at 348.

[129] *See* Michael D. Bordo & Hugh Rockoff, *The Gold Standard as a "Good Housekeeping Seal of Approval"*, 56 J. ECON. HIST. 389, 394 (1996).

[130] *See* Reis, *supra* note 3, at 21; Matthew Canzoneri, Robert Cumby & Behzad Diba, *The Interaction Between Monetary and Fiscal Policy*, *in* 3B HANDBOOK OF MONETARY ECONOMICS 935, 984–92 (Benjamin M. Friedman & Michael Woodford eds., 2010). Although there are theoretically conditions under which it can be in the long-run interest of a sovereign to inflate away its debts, macroeconomists believe these conditions do not typically arise in the real world. Canzoneri et al., *supra*, at 988, 995.

problem by obligating a sovereign borrower to repay in gold, not the borrower's own currency, so that the borrower could not inflate its way out of repayment.[131]

But fighting the Great Depression's deflationary spiral called for policies that induced a sharp increase in prices. After President Franklin Delano Roosevelt took office in 1933, Congress adopted a resolution directing the Treasury to repay extant government debt with dollars, not in the equivalent amount of gold.[132] It also passed the Emergency Banking Relief Act,[133] giving the Treasury Secretary power to compel the U.S. public to sell their gold to the government.[134] Bondholders sued in *Perry*, but even though they seemingly prevailed on the merits, the Supreme Court sent them home empty-handed.[135]

The *Perry* plaintiffs lost on what seems a strange technicality. Eight Justices agreed that Congress should be bound to its promises to creditors, and that letting borrowers escape those promises would be seriously damaging to the nation's power to borrow affordably in the future.[136] Four Justices who joined a plurality opinion, along with four dissenters, concluded that paying off the bonds in dollars was unconstitutional because Congress cannot renege on extant debts.[137] But Justice Harlan Stone, concurring, declined to reach that question.[138] Justice Stone joined the plurality, nevertheless, to make a majority on the appropriate measure of damages, though Justice Stone differed on the underlying reasoning.[139] At the time the bonds came due, there was no domestic U.S. market for gold because of restrictions on internal and international trading. The plurality asserted that as a result of this measure, the plaintiffs had no ascertainable damages, because their right to be paid in gold would not have had any clear value.[140]

Few commentators think much of this argument.[141] Indeed, as Justice Stone pointed out contemporaneously, the plaintiffs did

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131 *See* Bordo & Rockoff, *supra* note 129, at 391–95, 414.

132 S.J. Res. 48, 73d Cong. (1933).

133 Pub. L. No. 73-1, 48 Stat. 1 (1933).

134 *Id.* § 3; *see also* AMITY SHLAES, THE FORGOTTEN MAN: A NEW HISTORY OF THE GREAT DEPRESSION 157 (2007).

135 *Perry*, 294 U.S. at 354–58 (plurality opinion).

136 *Id.* at 354; *id.* at 362–65, 380–81 (McReynolds, J., dissenting).

137 *See id.* at 354 (plurality opinion); *id.* at 362–65, 380–81 (McReynolds, J., dissenting).

138 *Perry*, 294 U.S. at 358–60 (Stone, J., concurring).

139 *Id.* at 359–61.

140 *Id.* at 357–58 (plurality opinion).

141 *See* Magliocca, *supra* note 110, at 1271 (summarizing scholarly commentary).

not have to be paid in unusable gold bars: they could just have been paid more cash instead.[142] But that remedy was blocked by another congressional provision barring grossing up contracts containing gold clauses to account for inflation.[143] As Justice Stone suggested, if it is unconstitutional for a later act of Congress to reduce the value of a previously issued government bond, that no-gross-ups provision should have been unconstitutional too on substantially parallel grounds.[144]

Justice Stone, indeed, exposed a difficult line-drawing problem implicit in the Court's reasoning: *Any* economic policy that Congress adopts could potentially affect the value of government bonds. "Bad" policies that damage the economy reduce tax revenues, threatening the sovereign's ability to repay.[145] "Good" policies that expand the economy can also overheat it, driving inflation and so reducing the real value of existing, nominal bond commitments.[146] Even new bond issuances, to the extent that they could compete with older bonds for repayment, might diminish the expected value of older obligations.[147] How is a court supposed to decide when any such side effects are significant enough to count as an impermissible repudiation of an outstanding bond?[148] And must it sit as constant censor of federal legislation, predicting in each case its effects on government debt?

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142 *Perry*, 294 U.S. at 360 (Stone, J., concurring); *see also id.* at 378 (McReynolds, J., dissenting) (making the same point).

143 *Id.* at 360 (Stone, J., concurring).

144 *See id.* at 361.

145 *See* Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt-Ceiling Standoff*, 112 COLUM. L. REV. 1175, 1192 (2012).

146 *See* Yair Listokin, *Equity, Efficiency, and Stability: The Importance of Macroeconomics for Evaluating Income Tax Policy*, 29 YALE J. ON REGUL. 45, 53–57 (2012) (describing the relationship between economic policy and inflation).

147 *See* Buchanan & Dorf, *supra* note 145, at 1193 (noting but disagreeing with this potential argument). In general, sovereigns have often exercised the power to choose how to prioritize repayment when their resources are inadequate to make complete payment on all debts, and this power can lead to lender uncertainty and higher borrowing costs. *See* Anna Gelpern, *Building a Better Seating Chart for Sovereign Restructurings*, 53 EMORY L.J. 1115, 1117, 1126–28 (2004). For this reason, another government tool for lowering borrowing costs is to self-commit to limit future spending, particularly for governments perceived by the market as unstable. Craig L. Johnson & Kenneth A. Kriz, *Fiscal Institutions, Credit Ratings, and Borrowing Costs*, 25 PUB. BUDGETING & FIN. 84, 87, 100–02 (2005).

148 *Cf.* Henry M. Hart, Jr., *The Gold Clause in United States Bonds*, 48 HARV. L. REV. 1057, 1088, 1097 (1935) (pointing to "fantastic burdens of proof" that would face a plaintiff trying to show that state action had impaired the value of their bonds and concluding "if governmental action is to save us from inflation, it will be legislative and not judicial action").

The dissent's answer implicates a similar, maybe even more problematic, line-drawing challenge. For the dissenters, economic regulation affecting a bond's value is permissible if it is "designed to attain a legitimate end," but not if, "under the guise of pursuing a monetary policy, Congress really has inaugurated a plan primarily designed to . . . repudiate national debts."[149] While there may be some doctrinal contexts where it makes sense for courts to try to infer congressional purposes, general economic regulation surely is not one of them. Because broad economic policies can fulfill many functions, legislators will predictably point to other desired outcomes—as they did in *Perry*—forcing courts to increasingly read between the lines of legislative history. The *Perry* dissenters, indeed, pointed to floor statements to the effect that Congress was trying to "cheapen[ ] . . . the dollar" to help farmers.[150] But that is not the same as repudiating the nation's debts. It is a purpose to achieve an economic objective that also had the *ancillary* effect of partly repudiating the debt. Is that the same as an intentional repudiation? That is just Justice Stone's question in a different form.

In short, not one of the *Perry* Justices could articulate a principle that would allow the Court to make consistent and predictable distinctions between debt repudiation and any other economic policy with a potential effect on bond prices. *Perry* shows that Congress cannot rely on courts to make its no-inflation promise credible. It instead needs some other institution capable of managing the economy and moderating inflation risk. This leaves a constitutional puzzle. Both the plurality and dissent in *Perry* argued persuasively that the Article I power to borrow is hardly meaningful if creditors refuse to believe in the binding force of U.S. debt. Yet in the wake of *Perry*, it was evident that courts could not make those promises truly binding. Without enforcement, what would be the point of the Public Debt Clause? It is here that central bank independence enters the picture as a way out of the sovereign's credibility dilemma when it comes to the bond market.

B. The Borrowing Power and the Public Debt Clause

Perry inadvertently laid the constitutional groundwork for modern central banking. Our argument is a simple syllogism.

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149 *Perry*, 294 U.S. at 369 (McReynolds, J., dissenting).
150 *Id.* at 373–74, 374 n.3.

Perry proclaims, in ringing terms, the crucial importance of a nation's ability to assure creditors that it will not wriggle out of full repayment by printing money. But *Perry* also shows the judiciary's inability to offer that assurance, leaving Congress to find some other way to credibly commit to its creditors. Modern macroeconomics is built largely on the premise that independent central banks provide exactly that form of commitment.[151] It follows that central bank independence is plausibly a necessary (in both the ordinary English and constitutional senses) component of Article I, § 8's borrowing power. In addition, *Perry*'s discussion of § 4 of the Fourteenth Amendment, the Public Debt Clause, provides an additional textual basis for the Fed's independence.

Monetary-policy delegation to an independent central bank solves the *Perry* dilemma. The four dissenters struggled with the fact that the Constitution clearly authorizes Congress both to borrow and to issue money, and the fact that the second power can plainly be used to "destroy" the first.[152] Their answer to that tension was to declare that efforts "primarily designed" to use the power over currency to repudiate earlier debts would be unconstitutional.[153] But they failed to explain why limits on small but intentional (as opposed to, say, incidental but large) repudiations would be important to creditors, let alone how courts would identify that class of violations.

A binding delegation to an agency that is independent from Congress achieves the same goals directly and effectively.[154] Whatever the rationale for limiting intentional repudiations, delegation hinders efforts at debt repudiation by subsequent Congresses, forcing legislators to rely on indirect tools of influence and oversight rather than direct legislation.[155] Independence via a delegation with instructions to preserve the nation's borrowing power (by way of moderating inflation) helps further to shield

[151] *See* Alesina & Stella, *supra* note 3, at 1001, 1013–14, 1017–19. Central banks do face their own commitment problems, but this can be answered through institutional features that are now familiar to global planners. *See* Reis, *supra* note 4, at 21.

[152] *Perry*, 294 U.S. at 377 (McReynolds, J., dissenting).

[153] *Id.* at 369.

[154] *See* TUCKER, *supra* note 116, at 412, 416.

[155] *See* ROSA MARÍA LASTRA, INTERNATIONAL FINANCIAL AND MONETARY LAW 65–67, 83–84 (2d ed. 2015). We are not under the illusion that formal independence is the same as freedom from oversight or control, *see, e.g.*, Neal Devins & David E. Lewis, *The Independent Agency Myth*, 108 CORNELL L. REV. 1305, 1331–35 (2023), but instead claim that independence tends to shift the tools of control from direction to indirect influence, *see* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 6, 27–32 (2013).

the nation's borrowing power today and in the future even from these influence and oversight efforts.[156]

Perry also offered an argument from the provision of the Fourteenth Amendment stating the "validity of the public debt . . . shall not be questioned."[157] While the exact intention and original public meaning of the Public Debt Clause are fairly opaque,[158] *Perry* read it broadly as a reaffirmation of the need for reliable public borrowing. "Nor can we perceive," the majority wrote, "any reason for not considering the expression 'the validity of the public debt' as embracing *whatever* concerns the integrity of the public obligations."[159] Fed independence might on this view be an exercise of Congress's power to implement the Fourteenth Amendment through appropriate legislation under § 5.[160]

In addition, it is hardly difficult to draw a line from preserving the validity of a public debt to the constitutionality of statutory insulation of the Fed from direct presidential control. Presidents share with Congress an interest in achieving immediate policy autonomy and spending freedom by unshackling themselves from past fiscal obligations.[161] Hence, debt-related credibility requires fencing off the White House as well as Congress from monetary powers.

Relying upon these sources of constitutional authority for Fed independence may leave important gaps. Before moving on (in Part V) to that discussion, we pause to consider some potential

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[156] *See* Ana Carolina Garriga & Cesar M. Rodriguez, *More Effective than We Thought: Central Bank Independence and Inflation in Developing Countries*, 85 ECON. MODELLING 87, 90–92 (2020); Jeroen Klomp & Jakob de Haan, *Inflation and Central Bank Independence: A Meta-Regression Analysis*, 24 J. ECON. SURVEYS 593, 594–96 (2010). Independence can help moderate borrowing costs in certain crisis scenarios as well. *See* Neil H. Buchanan & Michael C. Dorf, *Don't End or Audit the Fed: Central Bank Independence in an Age of Austerity*, 102 CORNELL L. REV. 1, 81–82 (2016). We read the argument in Skinner, *supra* note 116, at 175–76, 210–11, as broadly consistent with our claim. Professor Christina Skinner has suggested that the Framers opposed paper money because it would give too much discretion to the executive. *Id.* at 175–76. She then appeared to argue that the existence of paper money is a reason to oppose presidential control over the central bank. *See id.* at 210–11. We play that song backward: given an independent central bank with control over monetary policy, there should be less concern about federal monetary authority.

[157] *Perry*, 294 U.S. at 354 (quotation marks omitted) (quoting U.S. CONST. amend. XIV, § 4).

[158] *See* Jacob D. Charles, *The Debt Limit and the Constitution: How the Fourteenth Amendment Forbids Fiscal Obstructionism*, 62 DUKE L.J. 1227, 1233–34 (2013) (describing "meager" drafting history and debate).

[159] *Perry*, 294 U.S. at 354 (emphasis added and omitted) (quoting U.S. CONST. amend. XIV, § 4).

[160] U.S. CONST. amend. XIV, § 5.

[161] *See* TUCKER, *supra* note 116, at 405–06.

counterarguments to our theory. A first is that *Perry* is simply wrong about the purpose and meaning of the Public Debt Clause. This is the gist of a recent draft by the eminent public debt scholars Anna Gelpern, Adam Levitin, and Stephen Lubben.[162] They have argued that the Public Debt Clause has no clear legal implications for the debate over the federal debt ceiling, because the "shall not be questioned" language was a term of art meant only to foreclose certain forms of judicial challenges to existing debts.[163] That is, they argued, the Amendment forbade Congress from asserting in court that its prior debts were invalid, but did not constrain *legislative* action about future debt. Even if that is so, it would not undermine our argument. *Perry* relies mostly on the Article I, § 8 borrowing power and described the Public Debt Clause as "confirmatory of" the fundamental principles underlying the borrowing power.[164]

A second objection to our theory could be that the Supreme Court generally requires express constitutional authorization, not just residual power under the Necessary and Proper Clause, before it will find that Congress can exercise a "great . . . and independent power."[165] It might be argued that depriving future Congresses and Presidents of direct control over money—authority clearly textually committed to Congress—is a great power, and perhaps one that is independent of Congress's more general power to establish administrative agencies.

Taken at face value, though, that argument fails because it relies on a constitutional anachronism. The premise of the "great and independent power" doctrine, as best we can tell, is that the Court draws a negative inference from the Framers' failure to provide expressly for subjects so important that they would have been worth mentioning.[166] But in the case of independent central banks, there is no such negative inference available for the simple reason that the core concepts of central banking and independent administrative control over the money supply are inventions of the twentieth century.[167] It seemingly wasn't until 1935 that we realized

[162] Anna Gelpern, Adam Levitin & Stephen Lubben, Public Debt and the Public Debt Clause 68–71 (2024) (unpublished manuscript) (on file with authors).

[163] *Id.* at 73–74; *see also* Buchanan & Dorf, *supra* note 145, at 1191 (suggesting another possible narrow reading of the Public Debt Clause).

[164] *Perry*, 294 U.S. at 354.

[165] *See supra* Part II.B.

[166] *See* Caleb Nelson, *Sovereign Immunity as a Doctrine of Personal Jurisdiction*, 115 HARV. L. REV. 1559, 1640 (2002).

[167] *See* CONTI-BROWN, POWER AND INDEPENDENCE, *supra* note 6, at 135–39.

that courts could not be effective guarantors of the public debt. It is hard to see how a power that could not have been imagined in 1787 was simultaneously counted as great and independent.

What of the economic argument that central banks are not necessary for credible sovereign commitments, at least in the ordinary English sense?[168] Again, "gold clauses" like the one in *Perry* were adopted as a means of inflation protection: the borrower held an option to be paid in a fixed amount of gold instead of potentially inflated dollars. Today, the Treasury offers Treasury Inflation-Protected Securities, or TIPS, whose interest rate adjusts automatically to offset any inflation.[169] TIPS bonds offer no protection from fluctuations in interest rates—which, absent central bank control, governments might also manipulate to their advantage—but in theory, bond rates could also float to match prevailing rates.

But recall that the *Perry* bondholders' gold clause had no practical effect. The facts of that case show how central banks offer protection in a way contractual terms cannot. By taking inflation and interest rates out of elected officials' direct control, central banks reduce the temptation for legislatures to repudiate inflation- or rate-protection clauses.

Central banks also help conserve scarce public funds even in a world where private commitment devices like TIPS exist. TIPS usually trade at a discount to fixed-rate bonds.[170] That is, governments that borrow on a fixed-rate basis pay higher rates in order to compensate lenders for their willingness to bear inflation risk. But the size of this premium would likely be prohibitive for most governments if elected officials themselves controlled the inflation rate. Similarly, central banks are a far more economically viable option than a constitutional commitment to a gold standard.

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In sum, an independent central bank is a necessary and appropriate tool of a sovereign's monetary policy. Indeed, notwithstanding recent developments in separation of powers doctrine,

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[168] *Cf.* Skinner, *supra* note 116, at 174–76 (suggesting that restricting the United States to metallic coinage was a way the Framers attempted to offer credible commitments to lenders).

[169] *Treasury Inflation Protected Securities (TIPS)*, TREASURYDIRECT, https://perma.cc/3ZP3-7NXL.

[170] *See* Christine Benz & Margaret Giles, *TIPS Versus I Bonds*, MORNINGSTAR (May 3, 2024), https://perma.cc/694F-7F67.

the Fed's freedom from presidential direction, for-cause removal protections for members of the Fed Board of Governors, and the broad delegation to the Fed of a constitutional power expressly granted to Congress are all necessary attributes of central bank independence. Without some degree of Fed independence, there would simply be no plausible institutional mechanism to reconcile the congressional powers to borrow and to print money.

V. THE LIMITS OF FED INDEPENDENCE UNDER A BORROWING-POWER RATIONALE

In this Part, we identify important limitations on our argument for Fed independence. The borrowing power and the Public Debt Clause offer only weak support, at best, for many of the policy domains and instruments now under the Fed's aegis. Many of the Fed's choices on matters of financial regulation can be connected to the borrowing power only through a chain of logic that would also allow the Fed to assume control of essentially any major economic policy. This suggests it may be necessary to consider how the Fed's current portfolio of authority could be restructured or reassigned. Policy considerations support the same conclusion. As others have noted, the political economy of independence has had corrosive effects on the Fed's supervision of the financial sector.[171] We argue this same problem also applies to other important monetary-adjacent policy areas, such as the fiscal impact of the Fed's choice of monetary tools.

Finally, we consider to what extent the Fed should continue to be largely exempt from any meaningful judicial review. We contend that independence from the legislative and executive branches is not only consistent with judicial review; a limited degree of judicial review is probably necessary for real independence.

A. The Scope of Independence

If the Fed's structure is constitutional only because of the borrowing power and the Public Debt Clause, there might be some question whether the Fed can carry out its traditional dual mandate to balance full employment against stable prices.[172] On its own, the unemployment rate only has a tenuous connection to the

[171] MENAND, FED UNBOUND, *supra* note 36, at 25.

[172] Professor Lev Menand has argued that other commentators misunderstand the dual mandate. *See* MENAND, FED UNBOUND, *supra* note 36, at 90–91. We take no position on that question here.

strength of the nation's borrowing power. High unemployment might sap government revenues and increase government spending, putting some incremental pressure on the government's ability to meet old debts.[173] But as an empirical matter, these effects are usually fairly modest.[174] They can be larger for countries with heavy existing debt burdens.[175] If that were enough of a tie to justify independence, though, then the same logic implies that essentially any important economic policy could be delegated and insulated from presidential control. Granting the Fed authority to consider only inflation, and not unemployment, moreover, would hardly be unprecedented: that is (supposedly) the mandate of the European Central Bank (ECB).[176]

Still, in our view, the dual mandate is very likely constitutional because it provides a more transparent and predictable set of constraints on the Fed than an inflation-only mandate would. The European single mandate is not in truth a single mandate, in the sense that there are few, if any, regulations in which an agency considers only benefits and no costs.[177] If the ECB really were only minimizing inflation, it would be crushing economic activity, limited only by the danger of potential deflation.[178] Instead, evidence suggests that the ECB manages the European economy to maintain a healthy degree of growth, even if that entails more inflation than would be strictly necessary to avoid a deflationary

173 Javier Bianci, Pablo Ottonello & Ignacio Presno, *Fiscal Stimulus Under Sovereign Risk*, 131 J. POL. ECON. 2328, 2334–39, 2345 (2023).

174 *See* Gregory R. Duffee, *Bond Pricing and the Macroeconomy*, *in* 2B HANDBOOK OF THE ECONOMICS OF FINANCE 907, 925–28 (George Constantinides et al. eds., 2013) (finding little correlation between economic variables and government borrowing costs); Ceyhun Elgin & Burak R. Uras, *Public Debt, Sovereign Default Risk and Shadow Economy*, 9 J. FIN. STABILITY 628, 638–39 (2013) (estimating the impact of inflation on borrowing costs).

175 Bianci et al., *supra* note 173, at 2354–55.

176 Consolidated Version of the Treaty on the Functioning of the European Union Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank arts. 2, 12, June 7, 2016, 2016 O.J. (C 202) 230.

177 *See* Michigan v. EPA, 576 U.S. 743, 752–53 (2015); *id.* at 769 (Kagan, J., dissenting).

178 *See* Stephanie Schmitt-Grohé & Martin Uribe, *The Optimal Rate of Inflation*, *in* 3A HANDBOOK OF MONETARY ECONOMICS, *supra* note 37, at 653, 704–06; *cf.* Benjamin M. Friedman, *Why a Dual Mandate Is Right for Monetary Policy*, 11 INT'L FIN. 153, 156–57 (2008) (describing the trade-off between growth and inflation). Central banks around the world often claim to be following an inflation-rate target, generally 2%. *See* Sarwat Jahan, *Inflation Targeting: Holding the Line*, INT'L MONETARY FUND, https://perma.cc/AK2A-QBQC. At first glance, this might look like a policy that has only one maximand. But the choice of 2% itself depends on a balance of considerations: there is a reason the target is not 0%. And central banks also choose how rapidly to attempt to restore their target in "the medium term." *Id.*

spiral.[179] Again, the borrowing-power rationale suggests that Congress can hand the reins of inflation to an independent, autonomous agent in order to make credible commitments to lenders. Constraining that agent using predictable and objective criteria helps convince lenders that the independent agent will not use its power to inflate away existing nominal public debts.[180] Forcing the monitor to pursue an unrealistic objective, and to supplement that pursuit with implicit consideration of unmentioned criteria, as the ECB mandate does, would undermine the borrowing-power justification for delegation.[181] It therefore makes sense that the Fed's independence would extend to the ability to measure and consider fundamental economic conditions or social welfare while managing the money supply.

It is more difficult to connect our borrowing-power argument to the Fed's role as regulator, guarantor, and underwriter of the financial sector.[182] To be sure, recessions often start in the banking sector.[183] Again, though, if the borrowing-power rationale extends to any policy area that might adversely affect the economy, there would be few constitutional limits on Fed authority.[184]

A stronger argument may be that financial regulation cannot be untangled from the project of managing the money supply.[185] For example, many financial instruments are money-like, in the

[179] *See* Vitor Castro, *Can Central Banks' Monetary Policies Be Described by a Linear (Augmented) Taylor Rule or by a Nonlinear Rule?*, 7 J. FIN. STABILITY 228, 235–36 (2011) (finding that the ECB targets economic and financial conditions as well as the inflation rate); Jonas Gross & Johannes Zahner, *What Is on the ECB's Mind? Monetary Policy Before and After the Global Financial Crisis*, 68 J. MACROECONOMICS, 2021, at 9–12 (finding that the ECB considers economic conditions, although to a lesser degree after 2008); *cf.* Jordi Galí, *Monetary Policy and Unemployment*, *in* 3A HANDBOOK OF MONETARY ECONOMICS, *supra* note 37, at 487, 534 (noting that the ECB achieves its supposed inflation targets only in "the medium term").

[180] *See* Conti-Brown et al., *supra* note 27, at 16–17, 43, 46; Alesina & Stella, *supra* note 3, at 1007.

[181] *See* Christophe Blot, Jérôme Creel, Paul Hubert & Fabien Labondance, *Dealing with the ECB's Triple Mandate?*, 134 REVUE DE L'OFCE 163, 165 (2014).

[182] *See* Arthur W.S. Duff, *Central Bank Independence and Macroprudential Policy: A Critical Look at the U.S. Financial Stability Framework*, 11 BERKELEY BUS. L.J. 183, 189–98 (2014).

[183] *Cf.* Mark Gertler & Nobuhiro Kiyotaki, *Financial Intermediation and Credit Policy in Business Cycle Analysis*, *in* 3A HANDBOOK OF MONETARY ECONOMICS, *supra* note 37, at 547, 565–66.

[184] *See* Tarullo, *supra* note 15, at 87 (noting that an argument that the Fed's special status should extend to routine regulatory activities might "vex the . . . Justices").

[185] *See* Alesina & Stella, *supra* note 151, at 1024; *see* Tarullo, *supra* note 15, at 84–87 (examining whether constitutional challenges could distinguish between monetary and bank-regulating powers of the Fed).

sense that they can be used as a medium of exchange, albeit usually on terms that impose greater risks and costs, such as counterparty credit risk, than would be the case for cash or reserves.[186] If central banks had no control over these forms of "M2" (or close substitutes for money), they arguably would be unable to reliably control inflation.[187] The Fed also uses private financial institutions as a transmission system for base money itself.[188]

It is unclear, though, whether these kinds of public-private linkages require independence. If the Fed had only indirect influence over banks, such as through the interest rate offered on Fed reserves, its monetary-policy mission might be more limited or less efficiently realized.[189] But those kinds of failures don't clearly pose the kinds of *opportunistic* inflation risk that the borrowing-power rationale turns on.[190] It seems unlikely that given the opportunity, Congress or the President could expand M2, or weaken Fed tools for reining in inflation, quickly enough to pay off within their limited political time horizon, making these unlikely avenues for the time-inconsistency problem. On the other hand, if the Fed is ineffective, inflation will be more unpredictable, and perhaps higher on average, which is apt to increase borrowing costs. If one views the borrowing-power rationale as broadly encompassing any important (i.e., systemic) contributors to borrowing costs, and not just to "repudiation" of existing debts, then independence could well encompass tools that make the Fed more effective.

But many day-to-day Fed regulatory activities, such as its safety-and-soundness supervision of retail banking establishments, look quite distant from that goal.[191] It takes many steps of inference to get from the failure of a single bank to aggregate inflation effects. Similarly, we are unsure where this account would leave the Fed's role as lender (and sometimes buyer) of last

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[186] *See* M. GREG MANKIW, MACROECONOMICS 547–50 (7th ed. 2010); MORGAN RICKS, THE MONEY PROBLEM: RETHINKING FINANCIAL REGULATION 4, 9 (2016).

[187] *See* James Tobin & William C. Brainard, *Financial Intermediaries and the Effectiveness of Monetary Controls*, 53 AM. ECON. ASS'N 383, 390–91 (1963); Kairong Xao, *Monetary Transmission Through Shadow Banks*, 6 REV. FIN. STUD. 2379, 2380, 2413 (2020) (finding that nonbank financial institutions expand money supply in response to central bank efforts to tighten).

[188] MENAND, FED UNBOUND, *supra* note 36, at 36, 68, 74–78.

[189] *See* Alesina & Stella, *supra* note 3, at 1026.

[190] *Cf.* Buchanan & Dorf, *supra* note 156, at 70 (arguing that Fed independence is justified where political control would lead to a combination of opportunistic self-dealing and bad policy outcomes).

[191] CONTI-BROWN, POWER AND INDEPENDENCE, *supra* note 6, at 168, 170.

resort.[192] Perhaps access to the Fed's emergency liquidity instruments is a carrot the Fed can use to entice financial institutions to participate in the larger project of managing the money supply,[193] but on this logic the Fed could also have independent authority over any potential firehose of cash.

It is also uncertain whether the constitutional justifications for central bank independence developed here would sweep in the Fed's other (largely unacknowledged) recent innovations in fiscal policy. Of particular constitutional note, the Fed now deploys many tools with profound effects on the U.S. budget, including its choice about how much interest to pay on the hundreds of billions of dollars of outstanding reserves held by commercial banks.[194] All of that interest comes, ultimately, from the pockets of U.S. taxpayers.[195] Likewise, Fed purchases of U.S. debt can also dramatically affect the public cost of borrowing.[196]

The former Bank of England official Paul Tucker has suggested that independent Fed control over public borrowing costs (what one of us has called "monetary finance"[197]) may breach the separation of powers because Congress cannot relinquish control over these kinds of fundamental taxing and spending decisions.[198] But the argument developed here may well undermine Tucker's claim, at least in some circumstances. In many cases, the Fed's fiscal impact is a side effect of its exercise of monetary-policy powers.[199] Paying interest on reserves, for instance, is one way to influence the short-term interest rate, the Fed's best tool for

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[192] *See* Dan Awrey, *Unbundling Banking, Money, and Payments*, 110 GEO. L.J. 715, 741, 743–44 (2022).

[193] *See* Saule T. Omarova, *The People's Ledger: How to Democratize Money and Finance the Economy*, 74 VAND. L. REV. 1231, 1244–45 (2021) (describing this rationale for the Fed discount window).

[194] *See* Galle & Listokin, *supra* note 41, at 158–69.

[195] JIM CLOUSE, BILL ENGLISH, JON FAUST, JANE IHRIG, JEFF HUTHER, BETH KLEE, MIKE LEAHY, DAVID REIFSCHNEIDER & JULIE REMACHE, FISCAL IMPLICATIONS OF ADDITIONAL LARGE-SCALE ASSET PURCHASES FOR THE FEDERAL GOVERNMENT AND THE FEDERAL RESERVE 8–10 (2013).

[196] *Id.* at 3. For evidence that effects can be "dramatic[ ]," see Galle & Listokin, *supra* note 41, at 160, 163 (noting that U.S. monetary finance exceeded 11% of GDP in some recent years), and Will Bateman, *The Law of Monetary Finance Under Unconventional Monetary Policy*, 41 OXFORD J. LEGAL STUD. 929, 949–57 (2021).

[197] Galle & Listokin, *supra* note 41, at 152.

[198] TUCKER, *supra* note 116, at 287–90.

[199] *See* BEN S. BERNANKE, THE FEDERAL RESERVE AND THE FINANCIAL CRISIS 102, 104 (2013) (explaining the Fed's rationale for quantitative easing); *Compliance of Outright Monetary Transactions with the Prohibition on Monetary Financing*, ECB MONTHLY BULL., Oct. 2012, at 7, 7–8.

nudging inflation.[200] Yet the Fed might also select between available tools based on criteria that are not directly connected to monetary policy. For example, one rationale the Fed has offered for choosing interest on reserves ahead of alternatives is that one of the alternatives would be an effective tax on banks.[201] To the extent the Fed relies on these kinds of nonmonetary arguments, Tucker's claims seem more persuasive.[202]

Another uncertainty is whether shared governance over monetary-adjacent policy areas is compatible with monetary independence.[203] For example, one route to satisfying separation of powers doctrine for policy areas outside the reach of the borrowing power would be to make Fed decisions over, say, financial regulation subject to direct presidential control.[204] If for-cause removal were also a problem, then those Fed decisions could potentially be subject to overruling by a body without those protections (e.g., the Treasury).[205] In theory, this overlapping authority would give the coregulator opportunities for holdups and logrolling, trading financial-regulation outcomes the Fed favors for monetary outcomes preferred by the President.[206] That obviously could threaten monetary independence.

Whether that kind of influence exists in practice is a subject of debate.[207] Many monetary-adjacent spheres, such as regulation of the money-market funds, are in the hands of other U.S. regulators.[208] Possibly the banking-sector interests that help to hold in place informal Fed norms of independence also have prevented other elements of the executive branch from leveraging their authority to shape the Fed's actions.[209]

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[200] Labonte, *supra* note 35, at 17–18.

[201] *See* INT. ON RSRVS. WORKGROUP, FED. RSRV. BD., INTEREST ON RESERVES: A PRELIMINARY ANALYSIS OF BASIC OPTIONS 5, 19 (2008).

[202] *Cf.* Michael Salib & Christina Parajon Skinner, *Executive Override of Central Banks: A Comparison of the Legal Frameworks in the United States and the United Kingdom*, 108 GEO. L.J. 905, 922 (2020).

[203] *See id.* at 973–77; Duff, *supra* note 182, at 213–14.

[204] TUCKER, *supra* note 116, at 396–98.

[205] A system of this sort is used in the United Kingdom. *See* Salib & Skinner, *supra* note 202, at 920–40.

[206] *See* Galle & Listokin, *supra* note 41, at 184; MENAND, FED UNBOUND, *supra* note 36, at 132.

[207] *See* CONTI-BROWN, POWER AND INDEPENDENCE, *supra* note 6, at 156 (describing criticisms of the Fed's 2008 coordination with Treasury); Salib & Skinner, *supra* note 202, at 973–76 (calling shared authority seemingly "innocuous" but noting that opacity of influence channels makes this difficult to assess).

[208] *See, e.g.*, Duff, *supra* note 182, at 208–13, 216.

[209] *See* Salib & Skinner, *supra* note 202, at 977.

If so, that helps to relieve worries about shared governance in two distinct senses. Most obviously, it means that shared governance is likely at least resilient to most ordinary political pressures. More subtly, it suggests that shared governance is in a sense inescapable. Banking-sector interests with influence over the Fed are likely threatened by all kinds of policies, ranging from tax to employment law, that officials outside the Fed could conceivably use to leverage Fed action. If logrolling and holdups are inevitable, they provide no reason to avoid formal shared governance arrangements that might offer similar forms of indirect influence. A better approach would be to institute some set of reforms that mitigate capture.

B. Judicial Review of the Fed

While there may be constitutional grounds for some degree of Fed independence even under restrictive contemporary views of separation of powers, independence from Congress and the executive does not necessarily imply independence from Article III courts. Indeed, we think there is an argument that Fed independence should be conditional on at least some limited degree of judicial oversight.

Our argument here aligns with that of Professors Peter Conti-Brown, Yair Listokin, and Nicholas Parillo, who have advanced a strong normative case for traditional administrative law's application to central banking.[210] We go further than those authors and urge not just voluntary notice-and-comment rulemaking, but also standard Administrative Procedure Act[211] (APA) review of key Fed decisions.[212] As we understand that form of

[210] *See generally* Conti-Brown et al., *supra* note 27.

[211] Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.).

[212] *See* 5 U.S.C. § 702. To be clear, we do not argue for review of every Fed decision. We agree with the longstanding view that daily transactions of central banks cannot practically be challenged in court. *See, e.g.*, Raichle v. Fed. Rsrv. Bank of N.Y., 34 F.2d 910, 915 (2d Cir. 1929). We are suggesting instead that when the Fed acts as a regulator, such as by setting rules for which financial institutions must hold assets in reserve, *see, e.g.*, 12 C.F.R. § 204 (2024), and perhaps for other major policy decisions, such as interest rate targets, its decisions might be reviewable. In some instances, there could be doctrinal obstacles, such as "final agency action" requirements for judicial review, 5 U.S.C. § 704, that might allow the Fed to evade review if it desired. There may also be practical problems, such as the mixed incentives of potential litigants, that might constrain some lawsuits. *See* Conti-Brown et al., *supra* note 27, at 84 (making this point about suits to challenge emergency lending policies). But an agency may be unsure while it is determining whether this constraint will bind, making the *threat* of judicial review still effective.

review—sometimes called *State Farm*[213] review after the leading Supreme Court precedent—it entails verifying that agency action is authorized by statute, and requires agencies to give reasons for their decisions that are based in evidence, not raw political preference.[214] In the case of rules issued after public notice and comment, agencies must respond to substantive comments with a reasoned explanation.[215] Conti-Brown et al. have adverted to a substantial literature outlining the power of notice-and-comment review to shape personnel, decision-making processes, and public-regarding character of agencies and their rulemaking.[216]

Although Conti-Brown et al. omitted judicial review from their proposal, these benefits depend on external review by judges, or another external actor such as the White House.[217] We thus argue that the Fed should agree to proceed by notice-and-comment rulemaking in contexts where today it does not, and that such notice and comment should be followed by the possibility of judicial review. The threat of review by agency outsiders who may hold different factual priors, methodological commitments, or policy preferences can drive an agency to develop the internal capacity to anticipate and respond to those viewpoints.[218] It also helps ensure that the notice-and-comment process is genuine, not just a formality.[219] Although Conti-Brown et al. assumed that judicial review is impractical because few parties will have

[213] Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., 463 U.S. 29 (1983).

[214] *Id.* at 43, 46–57.

[215] *Michigan*, 576 U.S. at 750–51, 759–60.

[216] *See* Conti-Brown et al., *supra* note 27, at 21–29.

[217] *See* Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 523–24 (2002); Glenn Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1279–84 (2009); Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1361–72 (2013). Conti-Brown et al. argued that judicial review is not needed in order for agencies to be able to make credible promises, citing reputational interests of the agency personnel, among other factors. Conti-Brown et al., *supra* note 27, at 15–20. We have no quarrel with this aspect of their argument.

[218] *See* M. Elizabeth Magill, *Agency Choice of Policymaking Form*, 71 U. CHI. L. REV. 1383, 1390–91 (2004).

[219] Conti-Brown et al. do acknowledge this point. Conti-Brown et al., *supra* note 27, at 14–15. They also offered a potential counterpoint: judicial review can be a vehicle for a form of capture in which the threat of intense industry challenges pushes agencies to conform to the challengers' preferred agenda. *Id.* at 35–36. The extent of this problem depends on the details of administrative law and adjacent procedures. *See* Brian Galle & Stephen Shay, *Admin Law and the Crisis of Tax Administration*, 101 N.C. L. REV. 1645, 1693–1700 (2023) (discussing how reforms to administrative procedure could mitigate effects of litigation on tax administration).

standing to challenge Fed action,[220] we think instead that many central bank decisions affect bond prices, where there are typically traders with both long and short positions, so that any new policy will directly affect some investors.[221]

Notably, one of the traditional advantages of this version of administrative law is that it helps to mitigate capture or special-interest influence,[222] a virtue that is especially urgent in the context of modern central banking. The Fed's independence depends to a good degree on its close alignment with private banks and other financial institutions.[223] As former Secretary of the Treasury Larry Summers and others have observed, this is an important virtue because it helps signal the Fed's strong distaste for inflation.[224] It thus tamps down on inflation expectations.[225] In

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220 Conti-Brown et al., *supra* note 27, at 15, 42.

221 Tarullo, *supra* note 15, at 55–56; *see* Comm. for Monetary Reform v. Bd. of Governors of the Fed. Reserve Sys., 766 F.2d 538, 542 (D.C. Cir. 1985) (suggesting that private plaintiffs could easily show they suffered injury in fact from Fed action). The *Comm. for Monetary Reform* suit was dismissed on standing grounds, but that was because the plaintiffs were challenging the composition of the Board, and the Court held that it was speculative whether a differently composed Board would have reached different policies. *Comm. for Monetary Reform*, 766 F.2d at 543–44. This would not be an obstacle to routine APA challenges. *But see* Tarullo, *supra* note 15, at 56–57 (noting uncertainties about the meaning of the "generalized grievance" exception to standing rules).

222 *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1808 (1975). *But see* Nicholas Bagley, *The Procedure Fetish*, 118 MICH. L. REV. 345, 393–95 (2019) (arguing that the contemporary version of notice-and-comment rulemaking may actually favor industry interests). While we agree with Professor Nicholas Bagley on the general point that modern doctrine has taken some missteps, we remain unconvinced that in most settings reasoned decision-making is even worse than giving no reasons at all. Though Bagley pointed to correlational studies finding that rules with more industry comments have less public-regarding outcomes, those studies suffer from serious endogeneity problems. The weakness of the rule may be what attracts comments, not vice versa; intensity of industry opposition manifests both in comments and in final outcomes, and so on.

223 *See* Conti-Brown, *Institutions of Independence*, *supra* note 31, at 273–92; Salib & Skinner, *supra* note 202, at 977; *cf.* Alesina & Stella, *supra* note 3, at 1019–20 (describing evidence that independence depends on underlying social consensus on the importance of independence).

224 *See* Alberto Alesina & Lawrence H. Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. MONEY, CREDIT & BANKING 151, 151–52 (1993); William Poole, *Institutions for Stable Prices: How to Design an Optimal Central Bank Law*, 85 REV. (FED. RSRV. BANK ST. LOUIS), no. 5, Sept./Oct. 2003, at 1, 3; Kenneth Rogoff, *The Optimal Degree of Commitment to an Intermediate Monetary Target*, 100 Q.J. ECON. 1169, 1177–80 (1985) (suggesting delegation of monetary authority to agency leaders who will profit when they return to employment at a financial institution); Tarullo, *supra* note 15, at 46 (describing reasons financial firms would support Fed independence).

225 *See* MANKIW, *supra* note 186, at 99–100 (discussing sources and effects of inflation expectations).

other words, to the extent that the Fed is captured by banking interests, it is less likely to tolerate inflation.[226] There is certainly room for strong critique of that claim, and objections that such tamping effects come at too high a cost in other ways.[227] But even if the claim were right, as other commentators have noted, the problem is that central banks do not just do monetary policy.[228] They also regulate banks, and implicitly make important fiscal policy decisions such as whether to pluck money from public pockets to avoid an effective tax on banks.[229] On those other policy questions, it seems quite unlikely that banking interests align well with those of the general public, to put it mildly.

As a descriptive matter, judicial review fits into even a contemporary formalist separation of powers framework, since judicial review strengthens the kinds of independence the borrowing power requires.[230] Moreover, a functionalist reading of the borrowing power shows that the Fed has to be independent of short-run political control by Congress and the executive, not necessarily free from procedural review by federal courts. APA-style review can even bolster independence because its reason-giving and public-participation demands constrain, at least modestly, the extent to which an agency can act based on extrinsic partisan motives.[231] For example, a Fed that faces heavy pressure from the President to cut rates would, if it had to justify interest-rate targets under the threat of APA review, have to identify economic evidence consistent with a rate cut.[232] In some cases, it may be unable to identify a plausible evidentiary justification to this end.

Judicial review might also make the Fed's independence more palatable to courts. To the extent that modern separation of powers doctrine springs from concerns about the influences on and incentives of independent rulemaking, judicial review offers

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[226] *See* Rogoff, *supra* note 224, at 1177–80.

[227] *See* CONTI-BROWN, POWER AND INDEPENDENCE, *supra* note 6, at 260 (condemning "banker-dominated governance").

[228] MENAND, FED UNBOUND, *supra* note 36, at 25; *see also* Bateman, *supra* note 196, at 961; Conti-Brown, *Punch Bowl*, *supra* note 19, at 629–30.

[229] *Cf.* Galle & Listokin, *supra* note 41, at 183–85 (considering whether the political economy of traditional central banking extends to monetary finance).

[230] *Cf.* Froomkin, *supra* note 113, at 87, 108 (suggesting that APA review meets the same policy objectives as the nondelegation doctrine).

[231] *See* Mark Seidenfeld, *The Role of Politics in a Deliberative Model of the Administrative State*, 81 GEORGE WASH. L. REV. 1397, 1444–48, 1455–56 (2013).

[232] *See State Farm*, 463 U.S. at 46–57.

a way to shape those incentives.[233] Pragmatically, courts may be more comfortable with an independent agency whose decisions they have at least some degree of influence over, even if, in our preferred version of judicial review, that review is far less exacting than what some courts seem to understand *State Farm* to permit.

CONCLUSION

We have argued that some aspects of contemporary monetary policy are constitutionally uncertain. The unsettled doctrine that ensues leaves room for innovation and experiment. These are urgent virtues for an agency charged with keeping pace with our evolving understanding of macroeconomics. But unsettled doctrine also has notable additional costs for central banking in particular. While the absence of some clear boundaries may give officials more freedom than they would have under a settled doctrine, it also may cause them to perceive barriers that do not exist or to delay taking action.[234] When the next Lehman is failing, does it make sense for the Fed to wait while its lawyers scour Framers' diaries and dictionaries for the necessary authority? Few seem to think so when it comes to matters of traditional national security.[235] Why should things be different in the economic domain?

More importantly still, open constitutional questions leave the Fed more dependent on its political patrons for reliable, continued independence. The Fed's critics—us included—often seem to wield constitutional skepticism as a cudgel to bully the Fed into changing its substantive approaches.[236] Without an extra layer of parchment protection, the Fed's freedom to conduct monetary policy independently may require buying the support of those allies with open lending windows or a lower tax on banks. It may well be rational for the Fed to take these steps. But it would be better if constitutional doctrine, and its uncertainties, did not push them there.

Legislation could put the Fed on firmer constitutional footing, both doctrinally and pragmatically. For example, we have argued that instituting more regular administrative procedure at the Fed, including the possibility of judicial review, would likely

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[233] *See* Brian Galle & Mark Seidenfeld, *Administrative Law's Federalism: Preemption, Delegation, and Agencies at the Edge of Federal Power*, 57 DUKE L.J. 1933, 1974–78 (2008).

[234] *See* Alesina & Stella, *supra* note 3, at 1011, 1014–15.

[235] CONTI-BROWN, POWER AND INDEPENDENCE, *supra* note 6, at 254.

[236] *See* Buchanan & Dorf, *supra* note 156, at 6–7, 59–63.

mitigate judicial scrutiny of whether the Fed comports with contemporary separation of powers doctrine. The statute might reassign some areas currently under exclusive Fed control to shared or exclusive governance by other agencies, such as by requiring Treasury participation in decisions about whether to impose a "tax" on banks. Implementing legislation might also expressly cite the Public Debt Clause and point to Congress's § 5 authority to enforce it. And by firming up the Fed's legal status, these changes would tend to diminish the Fed's dependence on private actors.