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Judging the Fed

ABSTRACT. Judicial review of the Federal Reserve (Fed) is uncommon. But this does not mean that courts play no role in constraining the Fed. The law, and the way that the Fed expects courts to apply it, creates the boundaries within which the Agency operates. Understanding courts' treatment of the Fed, then, is necessary to understand the constraints on Fed decision-making. This is particularly true in our current jurisprudential and macroeconomic landscape, in which the Court has become more skeptical of agency action, and the Fed has intervened in the economy in increasingly dramatic ways. If (or when) a collision occurs, what result?

This Note provides a comprehensive overview of judicial review of the Fed: when it occurs and what happens when it does. Where judicial review is available, courts take a narrow view of the Fed in any given dispute, applying different degrees of deference depending on whether the Fed is acting as regulator, lender, or monetary-policy maker. Recently, though, Fed actions have blurred the lines between these roles. Courts have so far largely declined to review these types of actions, avoiding the doctrinal dilemma. But if—or when—they do, precedent will not provide a helpful guide. Rather than continue along this categorical path, courts should apply a unified framework, considering Fed actions in the context of the Fed's unique institutional position within the federal bureaucracy. The past two decades have ushered in a new age of central banking. A new approach to judicial review of central banking should follow.

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INTRODUCTION

Historically, administrative law has centered on the relationship between administrative agencies and courts.[1] More recently, scholarship has expanded beyond this narrow conception of how agencies work, emphasizing the ways in which the "law" of administrative agencies is constituted outside of courts—frequently, within the agencies themselves.[2] This turn has been no less present in scholarship surrounding the Federal Reserve (Fed). Recognizing that the Fed is rarely subject to judicial review, scholars have looked to other mechanisms—including congressional oversight,[3] legislation,[4] internal procedures,[5] reputational concerns,[6] and agency culture[7]—to describe the constraints on and determinants of Fed action. But in their haste to develop an administrative law of the Fed that looks beyond judicial review, scholars have tended to simply ignore it. The result is an incomplete administrative law of the Federal Reserve.

Judicial review of the Fed is indeed uncommon. But this does not mean that courts play no role in constraining the Fed. The law, and, more precisely, the way that the Fed expects courts to apply it, creates the boundaries within which Fed

1. *See generally* JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS 1-5 (1983) (critiquing this court-centered approach). By "administrative law," I mean the field of law primarily focused on how administrative agencies make decisions. *See* Peter Conti-Brown, Yair Listokin & Nicholas R. Parrillo, *Towards an Administrative Law of Central Banking*, 38 YALE J. ON REGUL. 1, 5-6 (2021) (describing "the heartland of administrative law" as agency "practices for interpreting law" and "making decisions").

2. Jerry L. Mashaw largely pioneered this "inside out" view of administrative law, and it has been a dominant theme in administrative-law scholarship ever since. *See, e.g.*, Nicholas R. Parrillo, *Introduction* to ADMINISTRATIVE LAW FROM THE INSIDE OUT: ESSAYS ON THEMES IN THE WORK OF JERRY L. MASHAW 1, 2-3 (Nicholas R. Parrillo ed., 2017); *see also* Gillian E. Metzger & Kevin M. Stack, *Internal Administrative Law*, 115 MICH. L. REV. 1239, 1243 & nn.16-18 (2017) (describing this trend and compiling sources).

3. *See, e.g.*, SARAH BINDER & MARK SPINDEL, THE MYTH OF INDEPENDENCE: HOW CONGRESS GOVERNS THE FEDERAL RESERVE 26-51, 201-31 (2017).

4. *See, e.g.*, Alexander Mehra, *Legal Authority in Unusual and Exigent Circumstances: The Federal Reserve and the Financial Crisis*, 13 U. PA. J. BUS. L. 221, 264-70 (2010) (describing Congress's revisions to the Federal Reserve Act in the Dodd-Frank Act as a response to the Federal Reserve's (Fed) lending in the aftermath of the 2008 financial crisis); Lev Menand, *The Federal Reserve and the 2020 Economic Crisis*, 24 STAN. J.L. BUS. & FIN. 295, 326-28 (2021).

5. *See, e.g.*, Conti-Brown et al., *supra* note 1, at 8 (considering the value of increased transparency for certain Fed procedures).

6. Kathryn Judge, *The Federal Reserve: A Study in Soft Constraints*, 78 LAW & CONTEMP. PROBS. 65, 82-87 (2015).

7. *See* Conti-Brown et al., *supra* note 1, at 32-34; David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 LAW & CONTEMP. PROBS. 157, 173-74 (2015).

officials may operate.[8] Just as the specter of congressional intervention affects the Fed's understanding of what actions are within its legal authority and which are ultra vires,[9] the expected justiciability (or not) of a given action and the expected deference a court will afford the Agency do as well. Understanding courts' treatment of the Fed, then, is necessary to understand the constraints on Fed decision-making.

A study of judicial review of the Fed may be all the more vital in our current jurisprudential and macroeconomic landscape. Over the past decade, we have seen a remarkable rise in antiadministrativism on the Supreme Court.[10] Even where such views have not yet commanded a majority on the Court, "a revolution in separation of powers and administrative law" that could hamstring the administrative state feels imminent.[11] At the same time, the last two decades have brought some of the most dramatic actions by the Fed in its hundred-year history, with contemporary macroeconomic theory embracing a more activist role for the Fed. Many commentators have characterized these actions as occurring at, near, or even past the boundaries of the Fed's statutory authority.[12] The Fed and the Court appear to be on a collision path: an unstoppable force barreling toward an immovable object.

If (or when) this collision occurs, what result? The scholarship on judicial review of the Fed is notably thin. Most scholars who have discussed the subject

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8. *See* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 4-6 (2016).

9. *See id.* at 200-05.

10. *See* Gillian E. Metzger, *The Supreme Court 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 1-4 (2017) (describing the antiregulatory and anti-administrative trend on the Supreme Court); *id.* at 3 ("These judicial attacks on administrative governance . . . oppose administration and bureaucracy, but not greater presidential power; . . . advocate a greater role for the courts to defend individual liberty against the ever-expanding national state; and . . . regularly condemn contemporary national government for being at odds with the constitutional structure the Framers created . . . .").

11. *See* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1294 (2021). A majority of the Court may be ready to abandon the longstanding approach to the nondelegation doctrine—the "intelligible principle" test—in favor of a much more restrictive understanding of Congress's ability to give the President or administrative agencies discretion through which to act. *See id.* at 1293-95. If the Court were to adopt the view embraced by Justice Thomas in *Department of Transportation v. Ass'n of American Railroads*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment), "all agency rulemaking governing private conduct [would be] unconstitutional unless it turns solely on a factual determination or involves foreign relations." Parrillo, *supra*, at 1295.

12. *See, e.g.*, Menand, *supra* note 4, at 300 (arguing that "as many as seven of the Fed's credit facilities" created in response to the economic fallout due to the spread of COVID-19 "are in tension with section 13(3)(B)(i) of the [Federal Reserve Act]").

within the last thirty years touch on it only briefly, noting that Fed actions "rarely . . . undergo judicial review."[13] But even those treating it in greater depth have failed to cover it comprehensively. One line of scholarship addresses judicial review of financial regulators in general, discussing the Fed alongside other regulatory agencies.[14] Other scholarship focuses specifically on the Fed, recognizing that it differs from other regulators in the scope of its mandate and the deference

13. Gillian E. Metzger, *Through the Looking Glass to a Shared Reflection: The Evolving Relationship Between Administrative Law and Financial Regulation*, 78 LAW & CONTEMP. PROBS. 129, 133 (2015); *see also* Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 478 (2009) ("[I]n administering the discount window and providing assistance to banks, the Federal Reserve's actions are effectively removed from judicial review."); Adam J. Levitin, *The Politics of Financial Regulation and the Regulation of Financial Politics: A Review Essay*, 127 HARV. L. REV. 1991, 2047 (2014) (book review) (noting that "much of financial regulation occurs via 'soft law' outside of the regulatory ambit of the APA's notice-and-comment rulemaking and administrative adjudication requirements," thereby largely precluding judicial review); Note, *Cashing out a Special Relationship?: Trends Toward Reconciliation Between Financial Regulation and Administrative Law*, 130 HARV. L. REV. 1183, 1186 (2017) ("[F]ew Federal Reserve Board decisions face judicial review in the form contemplated by the Administrative Procedure Act . . . .").

14. *See, e.g.*, Barry J. Friedberg & Abram S. Gordon, Note, *Judicial Review of the Federal Banking Regulatory Agencies*, 7 ANN. REV. BANKING L. 365, 379-99 (1988) (describing the Court's deference regime as applied to the regulatory activities of the Federal Reserve Board of Governors, the Office of the Comptroller of the Currency (OCC), and the Federal Deposit Insurance Corporation (FDIC)); John C. Deal, *Banking Law Is Not for Sissies: Judicial Review of Capital Directives*, 12 J.L. & COM. 185, 202 (1993) (discussing the availability of judicial review under section 8 of the Federal Deposit Insurance Act); Carolyn Sissoko, Note, *Is Financial Regulation Structurally Biased to Favor Deregulation?*, 86 S. CAL. L. REV. 365, 415-16 (2013) (arguing that judicial review of financial regulators, including the Fed, favors deregulation); Donald C. Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672, 675 (1987) (describing judicial review under the Glass-Steagall Act and the McFadden Act); Jonathan Stevenson, Note, *Efficiency or Principle?: A Model for Judicial Review of Federal Banking Agency Decisions*, 2 ANN. REV. BANKING L. 235, 245-47 (1983) (surveying theories of judicial review in the banking-law context); Raymond H. Brescia, *Part of the Disease or Part of the Cure: The Financial Crisis and the Community Reinvestment Act*, 60 S.C. L. REV. 617, 653-61 (2009) (describing judicial review of financial regulators, including the Fed, under the Community Reinvestment Act); Marilyn B. Cane, *Non-Broker Brokers and Other Anomalies in the Regulation of Financial Services*, 11 HARV. J.L. & PUB. POL'Y 111, 131-56 (1988) (describing judicial review of the regulation of securities by the Fed and other financial regulators); Peter C. Carstensen, *Restricting the Power to Promote Competition in Banking: A Foolish Consistency Among the Circuits*, 1983 DUKE L.J. 580, 589-95 (describing judicial review of the Federal Reserve Board and FDIC decisions to approve or deny bank mergers); Arthur E. Wilmarth, Jr., *The Expansion of State Bank Powers, the Federal Response, and the Case for Preserving the Dual Banking System*, 58 FORDHAM L. REV. 1133, 1189-91 (1990) (describing judicial review of Federal Reserve and FDIC action under the Bank Holding Company Act (BHCA)).

it receives from courts.[15] But these articles tend to focus narrowly on the Fed acting in one specific capacity, be it the Fed as regulator,[16] enforcer,[17] or lender.[18] Finally, a separate line of scholarship discusses judicial review of constitutional challenges to the Fed's agency structure.[19]

Each of these approaches has its benefits. Looking across financial regulators as a class lets scholars identify broad trends in judicial treatment. And focusing on specific subsets of Fed activity facilitates deeper engagement with each. But these approaches have their blind spots as well. Judicial review of a given agency action does not occur in a vacuum; an agency's reputation before a court "can expand or deflate the [agency's] legal authority," whether the court consciously recognizes it or not.[20] One need not look far to find the Fed's reputation doing such work before courts. In judicial opinions, courts have singled out the Fed as

15. *See, e.g.*, Benjamin W. Cramer & Martin E. Halstuk, *Crash and Learn: The Inability of Transparency Laws to Penetrate American Monetary Policy*, 25 WM. & MARY BILL RTS. J. 195, 220-25 (2016) (discussing courts' exceptional treatment of the Fed in Freedom of Information Act (FOIA) cases); Kara Karlson, *Checks and Balances: Using the Freedom of Information Act to Evaluate the Federal Reserve Banks*, 60 AM. U. L. REV. 213, 231-33 (2010) (similar).

16. *See* Natasha Sarin, *Making Consumer Finance Work*, 119 COLUM. L. REV. 1519, 1533-35 (2019) (describing judicial review of the Fed's implementation of the Durbin Rule under the Dodd-Frank Act); Leonard Bierman & Donald R. Fraser, *The "Source of Strength" Doctrine: Formulating the Future of America's Financial Markets*, 12 ANN. REV. BANKING L. 269, 269-71 (1993) (discussing the Fed's "source of strength" regulation); Alfred C. Aman Jr., *Bargaining for Justice: An Examination of the Use and Limits of Conditions by the Federal Reserve Board*, 74 IOWA L. REV. 837 (1989) (describing judicial review of the Fed's regulatory actions under the Bank Holding Company Act); Saule T. Omarova & Margaret E. Tahyar, *That Which We Call a Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L. 113, 114 (2011) (describing the Fed's "comprehensive consolidated regulation" of banks); Lawrence G. Baxter, *Administrative and Judicial Review of Prompt Corrective Action Decisions by the Federal Banking Regulators*, 7 ADMIN. L.J. AM. U. 505, 508 n.8 (1993) (observing that the Fed "has primary federal responsibility for the regulation of all bank holding companies").

17. *See* Julie Andersen Hill, *Bank Capital Regulation by Enforcement: An Empirical Study*, 87 IND. L.J. 645 (2012) [hereinafter Hill, *Bank Capital Regulation by Enforcement*]; Julie Andersen Hill, *When Bank Examiners Get It Wrong: Financial Institution Appeals of Material Supervisory Determinations*, 92 WASH. U. L. REV. 1101, 1127-29 (2015); Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 965-67 (2021).

18. *See, e.g.*, David Zaring, *Litigating the Financial Crisis*, 100 VA. L. REV. 1405 (2014) (analyzing litigation of the Fed's actions in the aftermath of the 2008 financial crisis).

19. *See, e.g.*, Carl McGowan, *Congressmen in Court: The New Plaintiffs*, 15 GA. L. REV. 241, 243-44 (1981) (describing the issue of legislative standing in the context of legal challenges to the structure of the Federal Open Market Committee (FOMC)).

20. DANIEL CARPENTER, REPUTATION AND POWER 33 (2010); *see also id.* ("Reputation can, by assigning expertise and status to government agencies, allow them to define basic terms of debate, essential concepts of thought, learning, and activity. . . . [R]egulatory power depends profoundly upon the image of state organizations.").

uniquely independent and unreviewable because of its particular expertise.[21] Advocates tend to cast the Fed as the paradigmatic technocratic agency that requires independence from the Executive.[22] And judges themselves frequently gesture to the Fed as an exceptional agency.[23] Judicial interference with the Fed, judges seem to feel, would be beyond the pale.

But Fed policy making encompasses a range of initiatives, where the strength of its reputation before courts varies. Judicial pronouncements of Fed exceptionalism occur in certain contexts but not others. For example, when the Fed raises or lowers interest rates, the Second Circuit has declared that it would be "grotesque" for courts to get involved.[24] But when it regulates the financial system, it is treated like any other agency.[25] The fragmented treatment of judicial review of the Fed in scholarship misses this nuance, which is essential for understanding the relationship between the Federal Reserve System and the courts.[26]

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21. *See infra* Section I.A.

22. *See, e.g.*, Brief for Court-Appointed Amicus Curiae at 3, 13, Collins v. Yellen, 141 S. Ct. 1761 (2021) (Nos. 19-422, 19-563), https://www.supremecourt.gov/DocketPDF/19/19-422/157945/20201016124102195_Collins%20v.%20Mnuchin%20Appointed%20Amicus%20Brief.pdf [https://perma.cc/V733-TUWS] (warning the Court that an adverse holding could bring the constitutionality of the Federal Reserve Board in question).

23. *See, e.g.*, Transcript of Oral Argument at 51, PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75 (D.C. Cir. 2018) (No. 15-1177), https://www.consumerfinancemonitor.com/wp-content/uploads/sites/14/2017/06/15-1177-oral-argument-transcript.pdf [https://perma.cc/BZ4N-DYM6] (then-Judge Kavanaugh noting that the structure of the Federal Reserve Board is somewhat exceptional as compared to other independent agencies); *id.* at 10, 21, 23 (Judges Pillard and Millett repeatedly comparing the case to that of the Federal Reserve Board); Oral Argument at 23:22, Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020) (No. 19-7), https://apps.oyez.org/player/#/roberts10/oral_argument_audio/24977 [https://perma.cc/4QJK-QX4F] (Justice Breyer invoking the unusual structure of the Fed).

24. Raichle v. Fed. Rsrv. Bank of N.Y., 34 F.2d 910, 915 (2d Cir. 1929).

25. *See infra* Section II.A.

26. A notable exception to this trend is a recent line of scholarship, led by Peter Conti-Brown, that focuses on the institutional structure of the Fed across its various roles. *See* CONTI-BROWN, *supra* note 8; Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REGUL. 257 (2015); Conti-Brown et al., *supra* note 1, at 48-53, 56-60. However, noting the near absence of judicial review, this scholarship has prioritized the Fed's relationships with other institutions (including Congress, the Executive, and the financial industry, to name a few) and has yet to analyze judicial review in depth. *See* CONTI-BROWN, *supra* note 8, at 100 ("A key but underdeveloped part of this book's story is the role that courts play in defining the Fed's policy-making space."); Conti-Brown et al., *supra* note 1, at 5 (noting that "the Fed rarely finds itself haled into court"). Indeed, in Conti-Brown's seminal work on the Federal Reserve as an institution, his primary citation concerning the relationship between the Fed and the courts is to a student note on "judicial review of banking regulation" from 1988. *See* CONTI-BROWN, *supra* note 8, at 100 n.32 (citing Friedberg & Gordon, *supra* note 14).

This Note aims to fill that gap, offering a comprehensive description and analysis of judicial review of the Fed. It proceeds in three parts. Part I describes when judicial review of Fed activity is available—or, more commonly, when it is not. Some barriers to review emerge from judge-made law, whereas others are de facto obstacles to bringing litigation against the Fed. Part II describes courts' treatment of the Fed when judicial review *is* available, tracing the various deference regimes courts have applied to the Fed. Courts tend to take a narrow view of the Fed in any given dispute, analyzing the mechanism or statute the Fed is implementing in isolation, rather than considering the Fed in a cross-functional way. As a result, courts have developed a series of deference doctrines that they apply to the Fed depending on its role in a given dispute. Part III turns from the descriptive to the normative. It argues that this category-based approach to judicial review does not fit well with the contemporary macroeconomic landscape, in which Fed actions frequently cross category boundaries. Past Fed policies may have fallen somewhat neatly into categories of actions designed to achieve monetary-policy aims and actions that, say, serve a "lender of last resort" function. But recent macroeconomic developments have caused these (and other) functions to blur. For example, at the zero lower bound, the Fed has used its lending powers to achieve its monetary-policy goals. Courts have so far largely declined to review these types of actions, avoiding this doctrinal dilemma. But if—or when—they do, precedent will not provide a helpful guide. Rather than continue their categorical approach, courts should unify their framework for judicial review and consider Fed actions in the context of the Fed's unique institutional role in the federal bureaucracy.

Make no mistake: I do not mean to suggest that courts are the most important factor when it comes to Fed decision-making—far from it. In administrative law generally, and administrative law of the Fed in particular, the shift in focus from judicial review toward internal agency decision-making is positive. But any complete understanding of the Fed must include analysis of its complex relationship with courts. It is to this analysis that I now turn.

I. BARRIERS TO JUDICIAL REVIEW OF THE FEDERAL RESERVE

There is no question that judicial review of the Federal Reserve is rare.[27] But just what is it that precludes review? In some cases, judicial review is doctrinally barred. In others, review is available in theory but infrequent in practice. This Part considers each barrier in turn.

27. *See* sources cited *supra* note 13.

A. *Doctrinal Barriers to Judicial Review*

Courts have insulated the Fed from judicial review in three main areas. First, judicial review is wholly unavailable when it comes to the Fed's interest-rate-setting activities. Second, the Fed's lending actions are largely unreviewable under contemporary standing doctrine. Finally, courts have so far declined to permit challenges to the constitutionality of the Fed's structure to reach the merits.

1. *Interest-Rate Regulation*

The Supreme Court has never considered a challenge to the Fed's decision to raise or lower interest rates. In fact, there have been remarkably few challenges to the Fed's interest-rate regulation over the course of its lifespan. But what precedent does exist holds that such challenges are unreviewable.[28]

In *Raichle v. Federal Reserve Bank of New York*, the Second Circuit denied judicial review in a challenge to various actions taken by the New York Federal Reserve Bank.[29] The Bank had acted to raise interest rates through a blend of open-market operations[30] and discount-window actions.[31] The plaintiff alleged that the increased interest rates had harmed him, as he was "obliged to pay such rates for borrowed money."[32] He also alleged that economic conditions had not warranted an interest-rate increase.[33]

Writing for the court, Judge Augustus Hand first considered whether the challenged actions—namely, open-market operations and rediscounting—were within the Bank's statutory authority.[34] He found that they were.[35] Judge Hand then turned to the more difficult question: whether an interest-rate increase was

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28. *See* Zaring, *supra* note 7, at 175-76; Conti-Brown, *supra* note 26, at 305 & n.209; Mark F. Bernstein, Note, *The Federal Open Market Committee and the Sharing of Governmental Power with Private Citizens*, 75 VA. L. REV. 111, 131 & n.90 (1989).

29. *Raichle*, 34 F.2d at 915.

30. *See id.* at 911 (reproducing the plaintiff's claim that "[t]he defendant and other Federal Reserve Banks have sold quantities of securities aggregating many millions of dollars . . . for the sole purpose of taking money and its attendant credit out of the market . . . thus curtailing credit and causing an artificial money shortage, to the plaintiff's damage and injury").

31. *Id.* (restating the plaintiff's claim that "[t]he defendant has on three different occasions 'arbitrarily and unreasonably raised' the rediscount rate which it charges to its member banks . . . . [and t]hrough this action interest rates have become unreasonable").

32. *Id.*

33. *Id.*

34. *Id.* at 912-14.

35. *Id.* at 914 ("Certainly it was lawful to engage in open market transactions by the sale of securities, to fix the rediscount rate, and to decline to rediscount eligible paper.").

appropriate in *this* instance. But this question, the court held, was not justiciable. Judge Hand reasoned from the rapidly changing nature of the money market:

> It would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review. Indeed, the correction of discount rates by judicial decree seems almost grotesque, when we remember that conditions in the money market often change from hour to hour, and the disease would ordinarily be over long before a judicial diagnosis could be made.[36]

Therefore, it could not be a tort "for a Federal Reserve Bank to sell its securities in the open market, to fix discount rates which are unreasonably high, or to refuse to discount eligible paper, *even though its policy may be mistaken and its judgment bad*."[37]

The Federal Reserve System has changed dramatically since *Raichle*. Most significantly, individual Federal Reserve Banks no longer control the nation's monetary policy; rather, all such decisions are now made by the Federal Open Market Committee (FOMC), a centralized body consisting of all seven members of the Federal Reserve System Board of Governors and five of the twelve Federal Reserve Bank presidents.[38] But this change does not undermine Judge Hand's reasoning in *Raichle*. The fact that the FOMC is now the decision-making body, rather than the Federal Reserve Banks, does not make court involvement any more desirable. As Judge Hand noted, judicial review of open-market operations "would make the courts, rather than the Federal Reserve Board, the supervisors of the Federal Reserve System"—a "cure worse than the malady."[39]

This is perhaps even more true today than in 1929. In 1929, the Board had minimal authority over monetary-policy decisions made by the private Federal Reserve Banks.[40] This made judicial oversight arguably more appropriate, as there was no other mechanism for public oversight of these consequential decisions made by private entities.[41] But today, monetary-policy decisions are made under the aegis of the (public) Federal Reserve Board, which has a majority of seats on the FOMC. And the Board Chair exercises enormous control over the

36. *Id.* at 915.

37. *Id.* (emphasis added).

38. *Federal Open Market Committee*, BD. GOVERNORS FED. RSRV. SYS. (July 28, 2021), https://www.federalreserve.gov/monetarypolicy/fomc.htm [https://perma.cc/Z5M9-NTLJ].

39. *Raichle*, 34 F.2d at 915.

40. *See* 1 JANE W. D'ARISTA, THE EVOLUTION OF U.S. FINANCE: FEDERAL RESERVE MONETARY POLICY: 1915-1935, at 13-16 (1994); CONTI-BROWN, *supra* note 8, at 21-25.

41. *See* D'ARISTA, *supra* note 40, at 13-16; CONTI-BROWN, *supra* note 8, at 21-25.

FOMC's agenda and policy. Further, the underlying logic of Judge Hand's opinion was that interest-rate policy must be entrusted to the experts, not the courts. As the court recognized, it is "[t]he [Federal Reserve] bank, under the supervision of the board," which must make the final determination.[42] This is true regardless of the effect such decisions have on private parties: "If it proceeds in good faith through open-market operations and control of discount rates to bring about a reduction of brokers' loans, it commits no legal wrong."[43]

2. *Lending Actions*

Apart from setting interest rates, one of the Fed's most powerful tools is its authority to lend money to private parties in times of crisis.[44] As litigation following the 2008 financial crisis illustrates, standing doctrine largely insulates such actions from judicial review.

In the aftermath of the 2008 crisis, the Federal Reserve undertook a range of extraordinary measures to stop the bleeding. These actions included a series of bailouts, including a bailout of financial adviser AIG.[45] The terms of the AIG bailout were unique even among the other 2008 bailouts: the Federal Reserve Bank of New York loaned AIG $85 billion, and the federal government acquired a 79.9% equity interest in AIG.[46] Starr International Co., then one of the largest nongovernmental shareholders of AIG common stock, sued. It argued that section 13(3) of the Federal Reserve Act—the legal authority behind the bailout—did not let the government take equity in a corporation.[47] Though the Claims Court reached the merits of the claim, the Federal Circuit reversed, finding that the plaintiffs lacked standing.[48]

Specifically, the court held that Starr lacked third-party standing. Under the Supreme Court's third-party standing doctrine, a party "generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal

42. *Raichle*, 34 F.2d at 915.

43. *Id.*

44. *See* Federal Reserve Act of 1913 § 13(3), 12 U.S.C. § 343(3) (2018).

45. For an in-depth discussion of the lead-up to this case, see *Starr International Co. v. United States*, 856 F.3d 953, 958-60 (Fed. Cir. 2017); and Dennis J. Callahan, Lauren B. Kramer, Lucas T. Hanback & Stephen L. Bacon, *2017 Government Contract Law Decisions of the Federal Circuit*, 67 AM. U. L. REV. 1273, 1314-15 (2018).

46. *Starr Int'l Co.*, 856 F.3d at 957, 960-61.

47. *Id.* at 961. Starr's other claims related to a one-to-twenty reverse stock split that occurred in June of 2009. *Id.* The Claims Court found that there was "insufficient evidence in the record to support" these claims, and the Federal Circuit affirmed. *Id.* at 974 (quoting Starr Int'l Co. v. United States, 121 Fed. Cl. 428, 455 (2015)).

48. *Id.* at 957.

rights or interests of third parties."[49] While the Court has recognized exceptions to this general rule, it has not done so "in the context of the distinction between derivative and direct shareholder actions" – as was the context of *Starr*.[50] In other words, the Federal Circuit held that the correct party to sue would have been AIG – not its shareholders.[51] *Starr*, then, stands for the principle that shareholders do not have standing to challenge the legality of Federal Reserve bailouts – at least where the injury is entirely derivative to the shareholders' ownership interests.[52]

3. *Structure of the FOMC*

In a series of cases from the 1980s, the D.C. Circuit declined to review the constitutionality of the FOMC's composition.[53] Two principles emerge from these cases. First, the court has consistently declined to permit congressional representatives to sue, originally under a theory of standing and later under the court's "equitable discretion." Second, the court's conception of the injury in these cases seems to make it difficult, if not impossible, for any future action by private bondholders against the FOMC to reach the merits.

a. *Congressional Suits*

The first challenge to the FOMC's constitutionality was brought by Henry Reuss, a congressman from Wisconsin.[54] Reuss argued that the improper appointment process for members of the FOMC violated the Appointments Clause and infringed upon his powers as a member of Congress.[55] The D.C. Circuit

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49. *Id.* at 965 (quoting Kowalski v. Tesmer, 543 U.S. 125, 129 (2004)); *see* Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 1-3 (2021).

50. *Starr Int'l Co.*, 856 F.3d at 965 n.17.

51. *See id.* at 966 ("Under federal law, the shareholder standing rule 'generally prohibits shareholders from initiating actions to enforce the rights of [a] corporation unless the corporation's management has refused to pursue the same action for reasons other than good-faith business judgment.'" (quoting Franchise Tax Bd. v. Alcan Aluminium Ltd., 493 U.S. 331, 336 (1990))).

52. *Id.*

53. For a discussion of the potential unconstitutionality of the FOMC's appointment and removal processes, see Conti-Brown, *supra* note 26, at 301-02, which discusses appointments; and *id.* at 302-03, which discusses removal. Not all commentators agree with Conti-Brown that these procedures are unconstitutional. *See* Daniel Hemel, *Maybe the Federal Reserve Banks Are Constitutional After All*, YALE J. ON REGUL.: NOTICE & COMMENT (Apr. 4, 2016), https://www.yalejreg.com/nc/maybe-the-federal-reserve-banks-are-constitutional-after-all-by-daniel-hemel [https://perma.cc/4THX-2LMV].

54. *See* Reuss v. Balles, 584 F.2d 461 (D.C. Cir. 1978).

55. *Id.* at 464-65.

declined to reach the merits, finding that the representative lacked standing.[56] But after the publication of an influential lecture by former D.C. Circuit Chief Judge McGowan, the court changed tack.[57] In a subsequent case challenging the constitutionality of the FOMC (this time brought by a senator), the D.C. Circuit declined to review the case under the doctrine of "equitable discretion."[58] The D.C. Circuit reaffirmed this holding six years later, in another challenge brought by a senator.[59] The Supreme Court denied certiorari in both cases and has yet to weigh in on the principle,[60] though it seems consistent with the Court's restrictive view of congressional standing.[61]

b. Private Bondholders

In *Reuss v. Balles*, the D.C. Circuit dismissed Representative Reuss's claim not only in his capacity as a member of the House, but also as a private bondholder.[62] The latter claims to injury, it found, were too attenuated to warrant standing; Reuss did not argue that he *had* been injured by the FOMC, but that he *could* be in the future.[63] The court then went on to articulate an even more restrictive theory of standing. After noting that Reuss had failed to establish the other two factors required for standing—causality and redressability—it asserted that, "even if [Reuss] could overcome these obstacles, he would be faced with the fact that his is a very generalized grievance, one held in common, to some degree, by

56. *See id.* at 467-70.

57. *See* McGowan, *supra* note 19. McGowan argued that courts should deal with congressional suits via the doctrine of equitable discretion, rather than standing, ripeness, or the political-question doctrines. *Id.* at 244.

58. Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 881 (D.C. Cir. 1981) ("Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action.").

59. Melcher v. Fed. Open Mkt. Comm., 836 F.2d 561, 565 (D.C. Cir. 1987) ("[O]ur disposition of Senator Melcher's claim is controlled by the holding in *Riegle*: if a legislator could obtain substantial relief from his fellow legislators through the legislative process itself, then it is an abuse of discretion for a court to entertain the legislator's action.").

60. Riegle v. Fed. Open Mkt. Comm., 454 U.S. 1082 (1981) (denying cert); Melcher v. Fed. Open Mkt. Comm., 486 U.S. 1042 (1988) (same).

61. *See* Raines v. Byrd, 521 U.S. 811, 830 (1997).

62. Reuss v. Balles, 584 F.2d 461, 465, 467, 469-70 (D.C. Cir. 1978).

63. Such a claim was too "conjectural" to satisfy the requirements for Article III standing. *Id.* at 469.

virtually all members of the public."[64] In other words, because the FOMC has such vast power and affects everyone through its policies, no one has standing to challenge its authority.

Subsequent cases have not gone quite as far. For example, in *Committee for Monetary Reform v. Board of Governors of the Federal Reserve System*, the D.C. Circuit did not reaffirm *Reuss*'s dicta about "generalized grievances" but simply found causality and redressability lacking.[65] Still, the court hinted yet again that the nature of the claim had motivated its reasoning. In dicta, it opined that "courts lack both the competence and the authority to determine such abstract issues, which are better addressed through political and economic debate over the role of monetary policy in the national economy."[66] It is not obvious whether today's Supreme Court similarly believes that it lacks "competence and authority" to rule on the Federal Reserve System's structure. On the one hand, the Court has recently demonstrated a remarkable willingness to find agency structures unconstitutional,[67] and it has arguably stretched the limits of standing doctrine to do so.[68] Further, the inquiry required by this sort of lawsuit—concerning separation of powers and the Executive's authority to appoint and remove officers—seems to be exactly the type of inquiry that the Court believes it, as opposed to the legislature, is best suited to make.[69] But at the same time, there have been

64. *Id.* The court seemed to believe that there was something special about the effects of interest-rate policy that make standing on this basis impossible. *See id.* at 469-70 ("The somewhat unusual features of long-term bonds do not sufficiently distinguish them from the many other forms that an individual's financial holdings can assume, and, since all forms of personal wealth are affected to some degree by actions of the type under challenge here, it is difficult to imagine how appellant could set himself apart from other citizens seeking some way to protect the value of their holdings.").

65. *See* 766 F.2d 538, 542-43 (D.C. Cir. 1985).

66. *Id.* at 542.

67. *See supra* notes 10-12 and accompanying text.

68. *See* Collins v. Yellen, 141 S. Ct. 1761, 1779 (2021) (majority opinion) (relying on a weak theory of traceability in the "specific context" of challenges to limitations on the President's removal power); *id.* at 1791-95 (Thomas, J., concurring) (seeming to criticize this trend—though ultimately finding that standing was satisfied).

69. *See* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2225-26 (2020) (Kagan, J., concurring in the judgment in part and dissenting in part) (chastising the majority for "second-guessing the political branches" by interfering with Congress's "authority to organize all the institutions of American governance"); *see also id.* at 2225 ("But the Constitution—both as originally drafted and as practiced—mostly leaves disagreements about [the] administrative structure [of government] to Congress and the President, who have the knowledge and experience needed to address them. Within broad bounds, it keeps the courts—who do not—out of the picture.").

some suggestions that for current members of the Court, interfering with the Fed is a bridge too far.[70] Only time will tell.

B. *De Facto Barriers to Judicial Review*

The previous Section enumerated the largest doctrinal barriers to judicial review of the Fed. But even where doctrinally available, judicial review is infrequent. Trends in agency behavior, the structure of financial regulation, and other factors regularly prevent courts, in practice, from reviewing the Fed's regulatory decisions.

1. *Lack of Final Agency Action*

Under the Administrative Procedure Act (APA), only "final" agency action is subject to judicial review.[71] That is, a regulated entity can only seek review of agency action that "mark[s] the consummation of the agency's decision-making process" and "from which legal consequences will flow."[72] But the world of bank regulation is notoriously informal.[73] This is largely due to its model of enforcement: bank supervision. As Lev Menand has noted, "[s]upervision is a form of governance distinct from rulemaking, adjudication, and guidance" that "proceeds through iterative, ongoing, firm-specific engagement," traditionally characterized by its informal nature.[74] Supervision powers are vast[75] and, importantly, subject to considerable regulator discretion: "the agencies can discipline banks not only when bankers break express legal rules, but whenever, '*in the opinion of* [the agencies],' bankers are engaging in, have engaged in, or the agencies reasonably believe are about to engage in 'unsafe or unsound practice[s].'"[76] This discretion gives bank regulators enormous leverage over those

70. *See* sources cited *supra* note 23.

71. *See* 5 U.S.C. § 704 (2018).

72. U.S. Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, 1813 (2016) (quoting Bennett v. Spear, 520 U.S. 154, 177-78 (1997)).

73. *See, e.g.*, Menand, *supra* note 17, at 953; *see also infra* note 78.

74. Menand, *supra* note 17, at 953.

75. Under their supervisory powers, codified primarily in Title 12 of the U.S. Code, bank regulators have the power to "decide if banks can commence business," "alter their capital structures," or "expand their activities." *Id.* at 953 n.4. They also give regulators the power to "veto mergers and acquisitions," "place banks in receivership outside the bankruptcy process," enter banks without notice, "review books and records, administer oaths, take testimony, subpoena witnesses, and shield the examination process from public disclosure." *Id.* at 953 nn.4-5, 978.

76. *Id.* at 954 (quoting 12 U.S.C. § 1818(b) (2018)).

they regulate, even absent formal enforcement mechanisms. Because bank regulators wield such a heavy stick,[77] including the ability to revoke bank licenses, banks may simply comply with a regulator's demands, whether or not enforceable in court.[78]

Indeed, there is reason to think that the Fed operates even more informally than other financial regulators. Julie Andersen Hill has conducted a comprehensive empirical analysis of this phenomenon, analyzing all publicly reported formal bank-capital enforcement actions issued between 1993 and 2010.[79] While her study focuses on just one type of enforcement action, its results confirm other scholars' qualitative findings and suggest a general trend. Compared to other financial regulators,[80] "the Federal Reserve appears less likely . . . to bring formal, serious capital enforcement actions and less likely to impose individual bank minimum capital requirements."[81] And the Fed is much more likely than other enforcers to use written agreements[82]—supervisory actions that cannot be enforced in court—even though its guidance documents recommend doing so only when "circumstances warrant a less severe form" of action.[83]

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77. *Id.* at 954 n.6 (explaining that, under Title 12, bank regulators have the power to "direct banks to claw back bonuses, halt dividends, . . . divest assets[,] . . . levy fines[,] trigger criminal penalties[,] . . . terminate deposit insurance coverage, revoke charters, . . . and remove bank executives from office" (citations omitted)).

78. *See, e.g.*, Jerry L. Mashaw, *Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law*, 57 U. PITT. L. REV. 405, 420-21 (1996) (noting that "banking regulatory agencies can probably be equally effective through threats of prosecution, even raised eyebrows" as they can through formal enforcement); RICHARD SCOTT CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, THE LAW OF BANKING AND FINANCIAL INSTITUTIONS 644 (4th ed. 2009) ("Given the federal banking agencies' tremendous power over insured banks . . . they have ample means of—and opportunities for—informally coercing [banks]."); Hill, *Bank Capital Regulation by Enforcement*, *supra* note 17, at 662-63; *see also* CARPENTER, *supra* note 20, at 24-25 (describing agencies with "veto power" over a regulated entity's existence or products as more powerful than a regulator that can only intervene "after a [product] has been produced and marketed."); Ashutosh Bhagwat, *Modes of Regulatory Enforcement and the Problem of Administrative Discretion*, 50 HASTINGS L.J. 1275, 1277 (1999) (distinguishing ex ante from ex post regulatory regimes and noting that the former are more coercive). For a discussion of this phenomenon in practice, see Matthew C. Turk, *Regulation by Settlement*, 66 KAN. L. REV. 259, 276-84 (2017), which describes the Securitization Settlements in the aftermath of the 2008 financial crisis as resting on an implausible legal theory and thus demonstrating the power of financial regulators over the regulated entities.

79. Hill, *Bank Capital Regulation by Enforcement*, *supra* note 17.

80. Such regulators include the OCC, FDIC, and Office of Thrift Supervision. *See id.* at 650.

81. *Id.* at 648.

82. *Id.* at 662 ("To enforce a written agreement, a regulator must first issue a cease-and-desist order and then enforce the cease-and-desist order in court.").

83. DIV. OF SUPERVISION & REGUL., BD. OF GOVERNORS OF THE FED. RSRV. SYS., COMMERCIAL BANK EXAMINATION MANUAL § 1050.1, at 2 (2021).

Perhaps the Fed has turned to these informal mechanisms specifically to avoid judicial review. Or perhaps statutes allowing for review, including the APA, have carved out these sorts of actions precisely to permit bank supervision to operate informally.[84] But regardless of the causal mechanism, the informality of many of the Fed's regulatory actions has resulted in its own barrier to judicial review—above and apart from any doctrinal ones.

2. *Lack of Plaintiffs*

The final barrier to judicial review is the lack of potential plaintiffs. The unavailability of monetary damages, the dynamics between financial regulators and their regulated counterparts, and the structure of financial regulation all disincentivize groups and individuals from bringing suit, even when they may have a viable claim.

First, the APA does not provide for monetary damages for prevailing plaintiffs.[85] Similarly, the Federal Tort Claims Act does not permit recovery against a federal officer where the officer acted within the scope of a discretionary function.[86] The result undoubtedly deters potential plaintiffs from seeking review, even where it would otherwise be available.[87] And those who do go to court likely structure their lawsuits around causes of action that permit recovery of damages—even if such claims are more tenuous. For example, though the Fed's decisions to bail out certain institutions in the aftermath of the 2008 financial crisis were final agency actions subject to judicial review under the APA, the primary lawsuit challenging the AIG bailout was a novel takings claim.[88] The plaintiffs may have crafted this litigation strategy to get around the APA's failure to waive sovereign immunity for money damages.[89]

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84. *See* Menand, *supra* note 17, at 965-69.

85. 5 U.S.C. § 702 (2018).

86. 28 U.S.C. § 2680(a) (2018).

87. Of course, the Administrative Procedure Act (APA) and Federal Tort Claims Act (FTCA) prevent litigants from seeking money damages in other areas where there is still a fair amount of litigation, such as environmental regulation. *Cf.* JEREMY RABKIN, JUDICIAL COMPULSIONS: HOW PUBLIC LAW DISTORTS PUBLIC POLICY 147-242 (1989) (describing institutional-plaintiff litigation against various administrative agencies). But no similar plaintiffs' bar has arisen around Fed policies. This is likely because there is a feedback loop between judicial doctrines precluding review, *see supra* Section I.A, and the lack of plaintiffs: plaintiffs' lawyers dependent on winning attorney's fees to fund their practices are unlikely to invest in an area of litigation where judicial review is widely unavailable.

88. Starr Int'l Co. v. United States, 121 Fed. Cl. 428, 430-31 (2015).

89. *See* Zaring, *supra* note 18, at 1432; Conti-Brown et al., *supra* note 1, at 83 n.379 ("Given that statutory government tort law allows no compensation for injury from how a federal agency

Second, as discussed above, regulated entities may fail to challenge Fed actions for prudential reasons. Banks may waive their right to judicial review in consent orders, for example, in order to avoid aggravating their regulators.[90] Additionally, the party directly affected by Fed actions may not, in fact, have suffered harm on net: in the aftermath of the financial crisis, for example, many of the most logical potential plaintiffs received substantial bailout funds and may "have had their silence, in this way, purchased."[91] Finally, in the case of deregulation, deregulated entities have no incentive to challenge the action, and regulatory beneficiaries are unlikely to have standing.[92]

Third and finally, the structure of financial regulation impacts the availability of judicial review. Following the Great Depression, Congress took a structural approach to bank regulation. In the Glass-Steagall Act, Congress limited the activities that a bank could engage in, in an effort to separate commercial from investment banking.[93] A little over twenty years later, Congress continued this structural approach with the Bank Holding Company Act (BHCA). The BHCA prohibits bank holding companies from owning nonbanks, or entities whose primary activities are not "closely related to banking."[94]

To implement this regulatory scheme, the Fed had to articulate the boundaries of these categories. Interestingly, the structure of these regulations opened the door to judicial review even concerning *deregulatory* actions by the Fed. As the Fed expanded these categories—blurring the lines between commercial and investment banking and expanding its understanding of those activities that are "closely related to banking"—industry competitors sued, challenging regulators'

exercises a discretionary function, 28 U.S.C. § 2680(a) (2018), which surely includes emergency loans, plaintiffs' theories had to be (and were) quite extraordinary.").

90. *See* Hill, *Bank Capital Regulation by Enforcement*, *supra* note 17, at 660-61. This dynamic is not unique to the Fed: the sensitive relationship between the regulator and the regulated likely leads to less judicial review of agency action across the board—particularly in preapproval enforcement regimes, where regulators exercise enormous power over regulated parties. *See* Bhagwat, *supra* note 78, at 1279.

91. Zaring, *supra* note 18, at 1432.

92. Judicial review is even more uncommon when it comes to deregulatory actions, because very few parties have both standing and incentive to sue. *See* Sissoko, *supra* note 14, at 367.

93. Banking (Glass-Steagall) Act of 1933, Pub. L. No. 73-66, 48 Stat. 162 (codified as amended in scattered sections of 12 U.S.C.), *repealed in part by* Financial Services Modernization (Gramm-Leach-Bliley) Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338; *see* Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 807 F.2d 1052, 1056 (D.C. Cir. 1986) (noting that Glass-Steagall "separate[ed] as completely as possible commercial from investment banking" (citing Bd. of Governors of the Fed. Rsrv. Sys. v. Inv. Co. Inst., 450 U.S. 46, 70 (1981))); Langevoort, *supra* note 14, at 687-88.

94. 12 U.S.C. § 1843(c)(8) (2018); *see* Omarova & Tahyar, *supra* note 16, at 114, 118-20.

decisions that permitted banks to enter, and compete in, their lines of business.[95] For example, in *Board of Governors of the Federal Reserve System v. Investment Co. Institute*, an industry group representing mutual funds challenged a regulatory amendment that permitted "bank holding companies and their nonbanking subsidiaries to act as an investment adviser."[96] Hearing this case before it reached the Supreme Court, the D.C. Circuit commented on this litigation trend, explaining that "[t]he case presents a variation on a recurring theme in modern banking law: the tension between federal regulatory statutes designed in part to limit bank activities, and attempts by banks – often sanctioned by federal banking authorities – to compete in broader lines of business."[97] Such competitor-driven lawsuits were common in the 1980s and 1990s.[98] But in 1999, Congress shifted gears, repealing the Glass-Steagall Act and lifting the chief constraints of the BHCA.[99] Since then, Congress has not attempted structural banking regulation, preferring a microprudential model concerned with preventing the failure of individual institutions.[100] The result is a regulatory framework with fewer categorical rules that create causes of action by restricting banks' behavior ex ante – a scheme less amenable to judicial review.

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95. This was possible because of courts' expansive view of competitor standing in these cases. *See, e.g.*, Inv. Co. Inst. v. Bd. of Governors of the Fed. Rsrv. Sys., 606 F.2d 1004, 1010 (D.C. Cir. 1979), *rev'd on other grounds*, 450 U.S. 46 (1981) ("In the field of banking legislation . . . Congress has evidenced its concern to give broad rights of judicial review to parties alleging competitive injury as a result of decisions by federal banking authorities.").

96. *Inv. Co. Inst.*, 450 U.S. at 49. Specifically, the Fed's rule clarified that a "banking holding company may not lawfully sponsor, organize, or control an open-end investment company" (i.e., a mutual fund) but could sponsor a "closed-end investment company." *Id.* at 52.

97. *Inv. Co. Inst.*, 606 F.2d at 1010.

98. *See, e.g.*, Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys. (*Bankers Trust I*), 468 U.S. 137 (1984); Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys. (*Schwab*), 468 U.S. 207 (1984); Indep. Ins. Agents of Am., Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 736 F.2d 468 (8th Cir. 1984); Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 745 F.2d 677 (D.C. Cir. 1984); Okla. Bankers Ass'n v. Fed. Rsrv. Bd., 766 F.2d 1446 (10th Cir. 1985); Fla. Dep't of Banking & Fin. v. Bd. of Governors of the Fed. Rsrv. Sys., 800 F.2d 1534 (11th Cir. 1986); Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 807 F.2d 1052 (D.C. Cir. 1986); Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 821 F.2d 810 (D.C. Cir. 1987); Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 839 F.2d 47 (2d Cir. 1988); Indep. Ins. Agents of Am., Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 890 F.2d 1275 (2d Cir. 1989); Am. Land Title Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 892 F.2d 1059 (D.C. Cir. 1989); Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys., 900 F.2d 360 (D.C. Cir. 1990); Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Rsrv. Sys., 195 F.3d 28 (D.C. Cir. 1999).

99. Financial Services Modernization (Gramm-Leach-Bliley) Act of 1999, Pub. L. No. 106-102, 113 Stat. 1338.

100. *See* Samuel G. Hanson, Anil K. Kashyap & Jeremy C. Stein, *A Macroprudential Approach to Financial Regulation*, 25 J. ECON. PERSPS. 3, 3-4 (2011).

II. JUDICIAL DEFERENCE TO THE FEDERAL RESERVE

Though the principles discussed above make judicial review of the Fed infrequent, they do not prevent it altogether. This Part considers judicial treatment of the Fed when courts do deem review appropriate—once a case reaches the merits.[101] Like judicial review of agency action in general, the relationship between judge and agency turns largely on doctrines of judicial deference.

The case law is not entirely consistent, but the general trend has been the development of distinct doctrines of deference to deal with the Fed, depending on the role that the Fed is playing in any given dispute (whether regulator, lender, or monetary-policy maker). For example, in its role as monetary-policy maker, courts have been incredibly deferential throughout the life of the Fed. But the story is different when it comes to regulation. In early cases, the Court seemed to treat Fed regulatory actions similar to monetary-policy actions, toying with a Fed-specific regime of "the greatest deference" that stemmed from the Fed's exceptional nature and the unique difficulty of reviewing financial regulation.[102] But more recently, the Court has rejected this Fed-specific logic in favor of a more searching transsubstantive approach, treating the Fed qua regulator like any other administrative agency.

As I argue in Part III, this categorical approach to deference—treating the Fed differently whether it is acting as monetary policy maker, lender, or regulator—has become incoherent in our contemporary macroeconomic landscape, where Fed policies frequently blur the lines between these roles.

A. *Judicial Review of Regulatory Decisions*

As discussed, the Fed has enormous power and discretion in its role as financial regulator. Though prudential factors have largely insulated the Fed's regulatory decisions from judicial review,[103] when the Court does review them, it generally treats the Fed like any other agency. But this was not always the case. In a

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101. In this Part, I discuss case law involving Fed action across three domains: regulation, monetary policy, and emergency lending. Courts interact with the Fed outside these domains, including through FOIA litigation, *see, e.g.*, Bloomberg, L.P. v. Bd. of Governors of the Fed. Rsrv. Sys., 601 F.3d 143 (2d Cir. 2010), suits brought under the FTCA, *see, e.g.*, Lewis v. United States, 680 F.2d 1239 (9th Cir. 1982), and employment litigation, *see, e.g.*, Fasano v. Fed. Rsrv. Bank of N.Y., 457 F.3d 274 (3d Cir. 2006). But these cases rarely, if ever, turn on the involvement of the Fed qua Fed, and even adverse decisions have a limited impact on Fed policy making. In the interest of space, I have therefore chosen to limit my discussion to the three areas where I believe judicial review of the Fed is most salient.

102. *See infra* text accompanying notes 124-125.

103. *See supra* Section I.B.

line of cases from 1947 to 1986, the Court toyed with an alternate model, waffling between a transsubstantive deference doctrine and a Fed-specific approach.

The few scholars who have discussed this line of cases have offered two narratives for its doctrinal development. In one telling, the Court's treatment of the Fed is a substory in the broader narrative of the Court's development of *Chevron* deference.[104] In earlier cases, the Court struggled to articulate a coherent vision of deference to administrative agencies, resulting in inconsistent decisions across a range of substantive areas—financial regulation being no exception.[105] With the announcement of *Chevron* in 1984, the Court eventually settled on the approach that has defined agency deference ever since. In this telling, there is nothing special about cases involving the Fed: doctrinal incoherence in early Fed cases merely reflects broader doctrinal difficulties that the Court was resolving as the administrative state matured.

In a second telling, this line of cases is a story of statutory obsolescence in the face of industry change.[106] Here, the key development is not *Chevron* but technological advancements that rendered obsolete the post-Depression regulatory structure—embodied in the Glass-Steagall Act and the BHCA.[107] This statutory obsolescence forced the Court to abandon its early jurisprudential commitment to statutory purpose in favor of a textualism that permitted the Fed to update its regulatory scheme for the modern economy.

Neither of these narratives is incorrect, but neither tells the whole story. Specifically, neither addresses the role that the Fed's institutional reputation played in early instances of judicial review. Judicial recognition of the Fed as an exceptional agency deserving of respect led to an early doctrine of Fed-specific deference—distinct from the transsubstantive doctrine that would later dominate. Considering these early cases through the lens of institutional reputation, then,

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104. *See* Friedberg & Gordon, *supra* note 14.

105. *See* Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 972 (1992) ("Prior to 1984, the Supreme Court had no unifying theory for determining when to defer to agency interpretations of statutes.").

106. This argument has been made by Donald Langevoort, Saule Omarova, and Margaret Tahyer, though in slightly different registers. *See* Langevoort, *supra* note 14 (describing patterns of judicial intervention in the face of obsolete statutes); Omarova & Tahyar, *supra* note 16 (tracing the regulatory oversight of the BCHA).

107. Omarova and Tahyar argue that this obsolescence was not the result of neutral technological forces, but was made possible by the law itself—which then had to adjust to accommodate the world it had created. In their telling, law is endogenous to market conditions. *See* Omarova & Tahyar, *supra* note 16, at 116 ("[H]ow the BHCA definition of 'bank' changed over time . . . is a fascinating story of how law shapes market developments, and then, in turn, attempts to respond to such developments.").

offers a third reading. Under this reading, the Court's initial, Fed-specific deference was not a mistake that it later resolved, but a principled stance that courts should treat the Fed differently from other agencies.

In 1947, the Court heard its first challenge to a regulatory decision made by the Board of Governors.[108] The case occurred early in the Fed's history: just twelve years after the "Second Founding of the Fed," which had overhauled its institutional design in favor of greater centralization in the Board of Governors.[109] The challenge arose under the Banking Act of 1933, more commonly referred to as the Glass-Steagall Act, which let the Board remove directors or officers of national banks for violating certain regulatory provisions.[110] The Board determined that John Agnew, the director of Paterson National Bank, had violated regulatory requirements and ordered his dismissal. Agnew filed suit.

The dispute centered around the proper reading of the Glass-Steagall Act, which prohibited any partner or employee of a partnership "engaged primarily" in certain financial activities from simultaneously serving as director of a national bank.[111] The Board argued that Agnew was "primarily engaged" in underwriting within the meaning of the Act. Agnew argued that, as less than forty percent of his partnership's income came from underwriting, the partnership was not "primarily" engaged in that activity.[112] The D.C. Circuit found in favor of Agnew, reasoning that a firm could only be "primarily engaged" in an activity if that activity's income exceeded fifty percent of its total business. The Supreme Court reversed, upholding the Fed's regulatory action.

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108. Bd. of Governors of the Fed. Rsrv. Sys. v. Agnew, 329 U.S. 441 (1947).

109. *See* CONTI-BROWN, *supra* note 8, at 28-32.

110. *Agnew*, 329 U.S. at 443.

111. Banking (Glass-Steagall) Act of 1933, Pub. L. No. 73-66, § 32, 48 Stat. 162, 194; *see Agnew*, 329 U.S. at 443.

112. *Agnew*, 329 U.S. at 445-46.

The majority opinion is a straightforward example of the Court's approach to statutory interpretation in the midcentury: reading the statute in light of its purpose, given the text and legislative history.[113] But in a concurrence, Justice Rutledge, joined by Justice Frankfurter, articulated an alternate ground for the Court's ruling.[114] Rutledge argued that the Court should merely review the Board's reading of the Act for abuse of discretion because of the specific nature of the Federal Reserve Board and the financial system. Deference was due "[n]ot only because Congress has committed the system's operation to [the Board's] hands," but because of the specific expertise of the Agency and the technical nature of the dispute.[115] The Board possessed "specialized experience" that "gives them an advantage judges cannot possibly have."[116] Therefore, the Court should overturn the Board's regulatory decisions only "where there is no reasonable basis to sustain it or where they exercise [power] in a manner which clearly exceeds their statutory authority."[117] Notably, Rutledge did not cite any authority for his reasoning, despite existing case law arguing for deference to administrative agencies.[118] This is further evidence that Rutledge was not appealing to transsubstantive principles governing the relationship between courts and agencies, but was instead reasoning from first principles specific to the Federal Reserve Board.

113. *See id.* at 447.

114. *Id.* at 449-51 (Rutledge, J., concurring).

115. *Id.* at 450 (recognizing that the "highly specialized and technical" situation required "expert and coordinate management").

116. *Id.*

117. *Id.*

118. *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 966-69 (2017) (tracing the emergence of judicial deference to administrative agencies to cases in the early 1900s, including *Bates & Guild Co. v. Payne*, 194 U.S. 106 (1904)); *see also* Comm'r v. Chi. Portrait Co., 285 U.S. 1, 16 (1932) (alluding to the "familiar principle . . . that great weight is attached to the construction consistently given to a statute by the executive department charged with its administration"). Indeed, Rutledge's language in *Agnew* is markedly different from the Court's generic statements in *Skidmore v. Swift & Co.*, just three years prior, which argued that certain factors may give administrative constructions the "power to persuade," if not the "power to control." Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944).

The next major challenge to Fed regulations occurred in 1978.[119] This time, the challenge arose under the BHCA, which prohibited any company from acquiring a bank without prior approval by the Board of Governors.[120] The Board had rejected First Lincolnwood's attempt to acquire the First National Bank of Lincolnwood, and First Lincolnwood sued. The Court again upheld the Fed's decision, this time with the majority explicitly invoking principles of deference.[121] But its articulation of deference did not sound in the same register as Justice Rutledge's *Agnew* concurrence—indeed, the Court did not cite *Agnew* at all. Instead, the Court rooted its discussion of deference in transsubstantive administrative-law doctrine, citing a case involving the Federal Communications Commission for the principle that "courts should defer to an agency's construction of its own statutory mandate."[122]

These two opinions—the Rutledge concurrence in *Agnew* and the majority opinion in *First Lincolnwood*—present two different theories of agency deference. In *Agnew*, Justice Rutledge's appeal for deference was Fed specific, dependent on financial regulation's uniquely technical nature and the Federal Reserve Board's expertise. *First Lincolnwood*, however, did not view the Fed as exceptional and declined to consider whether its expertise was relevant to the given dispute. Instead, it treated the Fed like any other agency and the dispute like any other regulatory disagreement.

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119. Bd. of Governors of the Fed. Rsrv. Sys. v. First Lincolnwood Corp., 439 U.S. 234 (1978). This was not technically the first case dealing with the Fed's regulatory authority since *Agnew*. In 1973, the Court heard a challenge to a regulation promulgated by the Fed under the Truth in Lending Act (TILA). Mourning v. Fam. Publ'ns Serv., Inc., 411 U.S. 356 (1973). The Court upheld the Fed's regulation as consistent with the statutory text. But the opinion is specific to the statutory scheme at issue which, in the view of the Court, clearly "entrust[ed the statute's] construction to an agency with the necessary experience and resources to monitor its operation" making the Board "empowered to define such classifications as were reasonably necessary to insure that the objectives of the Act were fulfilled." *Id.* at 365-66. In 1980, the Court once again embraced this reading of TILA, noting that "deference is especially appropriate in the process of interpreting the Truth in Lending Act" because "Congress delegated broad administrative lawmaking power to the Federal Reserve Board when it framed TILA." Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565-66 (1980); *see also* Household Credit Servs., Inc. v. Pfennig, 541 U.S. 232, 238 (2004) (citing *Milhollin*, 444 U.S. 555). In Dodd-Frank, Congress transferred most rulemaking authority under TILA from the Board to the Consumer Financial Protection Bureau. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1101-37, 124 Stat. 1376, 1955-2011 (2010). The Court's doctrine of deference under TILA has moved with it, further emphasizing the statute-specific nature of this jurisprudence. *See, e.g.*, Strubel v. Comenity Bank, 842 F.3d 181, 186-87 (2d Cir. 2016). I am therefore skipping over these TILA cases in my discussion of judicial review of the Fed as they are not indicative of the Court's treatment of the Fed but rather are statute specific.

120. 12 U.S.C. § 1842(a) (2018); *First Lincolnwood*, 439 U.S. at 235.

121. *First Lincolnwood*, 439 U.S. at 251.

122. *Id.* (citing Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381 (1969)).

Over the next eight years, the Court waffled between these two approaches, at times embracing *Agnew*'s Fed-specific logic, at others treating the Fed like any other agency. In *Board of Governors v. Investment Co. Institute*, for example, the Court held that "[t]he Board's determination of what activities are 'closely related' to banking is entitled to the greatest deference,"[123] citing at length to the passage in Justice Rutledge's *Agnew* concurrence[124] and to legislative history discussing the unique role of the Fed in the regulatory design.[125] The Court embraced similar language three years later in *Schwab*, acknowledging "the deference normally accorded the Board's construction of the banking laws"[126] and granting the Board's interpretation of the Glass-Steagall Act "the greatest deference."[127] But the Fed-specific logic of this reasoning was already deteriorating. The same day *Schwab* came down, the Court announced another opinion reviewing a Board regulatory action—this time overturning the Board's decision.[128] The D.C. Circuit had ruled for the Board in an opinion deeply rooted in a recognition of the Fed's unique expertise. It had drawn on *Agnew* and *Investment Company Institute* for the principle that the Fed's "expert knowledge of commercial banking" and "substantial responsibility" for administering "federal regulation of the national banking system" merited deference.[129] But the Supreme Court wholly rejected this reasoning. While quoting *Schwab* for the principle that it "accord[s] substantial deference to the Board's interpretation" of Glass-Steagall, the Court went on to argue against deference, citing case law concerning judicial review of the Federal Election Commission and Interstate Commerce Commission, among other agencies.[130]

123. Bd. of Governors of the Fed. Rsrv. Sys. v. Inv. Co. Inst., 450 U.S. 46, 56 (1981).

124. *Id.* at 56 n.21 (1981) (citing Bd. of Governors of the Fed. Rsrv. Sys. v. Agnew, 329 U.S. 441, 450 (1947) (Rutledge, J., concurring)). The Court also included a quoteless cite to *First Lincolnwood* for this principle. *Id.*

125. *Id.* at 57 n.23.

126. Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys. (*Schwab*), 468 U.S. 207, 221 (1984).

127. *Id.* at 215-16 (quoting *Inv. Co. Inst.*, 450 U.S. at 56).

128. Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Rsrv. Sys. (*Bankers Trust I*), 468 U.S. 137 (1984).

129. A.G. Becker Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 693 F.2d 136, 140 (D.C. Cir. 1982), *rev'd sub nom. Bankers Trust I*, 468 US. 137.

130. *Bankers Trust I*, 468 U.S. at 142 (citing *Schwab*, 468 U.S. at 217); *see id.* at 143 (citing FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981)); *id.* at 144 (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168-69 (1962)). Writing in dissent, Justice O'Connor argued that deference was appropriate because of the "specialized and technical" nature of the financial world and the unique expertise that the Federal Reserve Board thus had in administering and interpreting federal banking laws. *Id.* at 161 (O'Connor, J., dissenting).

Finally, in *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*,[131] the Court fully embraced the transsubstantive approach. That opinion did not cite *Agnew*, *Investment Company Institute*, or any other administrative-law case involving the Federal Reserve Board. Instead, the Court denied deference under *Chevron* step one: "If the statute is clear and unambiguous 'that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'"[132] Since *Dimension*, the Court has not looked back. While no Supreme Court cases since *Dimension* have concerned judicial deference to the Board of Governors, lower courts have fully embraced the generic model, treating Board regulations like those of any other agency.[133] The upshot of this doctrinal development is that the Fed is now vulnerable to the shifting winds of administrative law. As *Chevron* deference becomes less widely available,[134] more searching,[135] or eliminated altogether,[136] the

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131. 474 U.S. 361 (1986).

132. *Id.* at 368 (quoting Chevron U.S.A. Inc., v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984)).

133. *See, e.g.*, Pharaon v. Bd. of Governors of the Fed. Rsrv. Sys., 135 F.3d 148 (D.C. Cir. 1998) (upholding the Fed's interpretation via transsubstantive reasoning); Indep. Cmty. Bankers of Am. v. Bd. of Governors of the Fed. Rsrv. Sys., 195 F.3d 28, 30 (D.C. Cir. 1999) (deferring to the Board under *Chevron* step two); NACS v. Bd. of Governors of the Fed. Rsrv. Sys., 746 F.3d 474, 482-83 (D.C. Cir. 2014) (analyzing the reasonableness of the Fed's rulemaking wholly under *Chevron*); Loan Syndications & Trading Ass'n v. SEC, 882 F.3d 220, 221 (D.C. Cir. 2018) (setting aside a regulation promulgated by the Fed and SEC as relying on an unreasonable interpretation of the relevant statute).

134. *See, e.g.*, King v. Burwell, 576 U.S. 473, 484-86 (2015) (declining to apply *Chevron* because the case involved a major question); Kristin E. Hickman & Aaron L. Nielson, *Foreword: The Future of* Chevron *Deference*, 70 DUKE L.J. 1015, 1016 & n.8 (2021) (noting that "the Supreme Court has not been very receptive to *Chevron* deference claims in recent years" and listing cases in which the Court failed to mention it, despite its applicability). In light of this shift, scholars have proposed various ways to limit its applicability. *See, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Narrowing* Chevron*'s Domain*, 70 DUKE L.J. 931, 938-39 (2021) (arguing that the Court should limit *Chevron* to agency rulemakings, as opposed to adjudication).

135. *See, e.g.*, Nicholas R. Bednar & Kristin E. Hickman, Chevron*'s Inevitability*, 85 GEO. WASH. L. REV. 1392, 1396-97, 1397 n.34 (2017) (citing cases in which the Court "gave *Chevron*'s second step greater heft by incorporating *State Farm*'s reasoned decisionmaking requirement").

136. At least two Justices have questioned the constitutionality of *Chevron*. *See* Michigan v. EPA, 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (commenting on "the scope of the potentially unconstitutional delegations we have come to countenance in the name of *Chevron* deference"); Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149-58 (10th Cir. 2016) (Gorsuch, J., concurring); *see also* Kisor v. Wilkie, 139 S. Ct. 2400, 2438-39 (2019) (Gorsuch, J., joined by Thomas, Kavanaugh & Alito, JJ., concurring in the judgment) (arguing, with many points that seem to apply to *Chevron* as well, that *Auer* deference violates the separation of powers). *But see* Bednar & Hickman, *supra* note 135, at 1397-98 (arguing that "reports of the doctrine's pending demise are overblown").

Fed may find its ability to regulate the financial system stymied by judicial intervention.

B. *Judicial Review of Monetary-Policy Decisions*

As discussed in Section I.A.1, courts have never reviewed a decision of the Fed to raise or lower interest rates via open-market operations or the discount window.[137] The primary case for this principle, *Raichle v. Federal Reserve Bank of New York*, somewhat blurs the line between nonjusticiability and extreme deference.[138] In *Raichle*, the Second Circuit rejected a state tort claim against the Federal Reserve's open-market operations and discount-rate policy under the principle that it is the Fed—not the courts—that must supervise such actions.[139] At the same time, the court declined to address the Federal Reserve Bank's argument that the case involved a nonjusticiable political question, though it noted that the argument was "persuasive."[140] At bottom, it matters little whether this precedent is best read as a merits decision subject to enormous deference or a holding on justiciability—the takeaway is the same.

Delimiting the scope of *Raichle* is somewhat more difficult. *Raichle* itself never uses the term "monetary policy," instead speaking of "open market sales and discount rates."[141] But the logic of the opinion goes beyond these two technical tools. The plaintiffs in *Raichle* did not merely challenge the Fed's open-market operations or discount-window lending. Rather, they brought a much broader tort claim, charging the Fed with engaging in a "course of conduct" that had resulted in "an arbitrary reduction in the volume of collateral or brokers' loans."[142] And the crux of the court's reasoning—that the Federal Reserve Board, rather than the courts, should be the "supervisors of the Federal Reserve System"[143]—was most attuned to the *outcome* of the Fed's action, not the means.

Such an outcome-based understanding of monetary policy comports with the Fed's own usage of the term. The Fed defines monetary policy as "the Federal

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137. *See supra* notes 28-43 and accompanying text.

138. 34 F.2d 910 (2d Cir. 1929).

139. *Id.* at 915.

140. *Id.* at 916 ("Defendant's counsel have made a persuasive argument that upon the facts alleged the questions raised are political, and not justiciable. We have not discussed it, because without it the defendant's position seems to be unassailable.").

141. *Id.* at 915.

142. *Id.* The plaintiffs went so far as to accuse the Fed of "spreading propaganda concerning an alleged money shortage." *Id.* at 912.

143. *Id.* at 915.

Reserve's actions and communications to promote maximum employment, stable prices, and moderate long-term interest rates."[144] Though open-market operations and discount-window lending may be the Fed's paradigmatic monetary-policy tools, its tool kit is much larger, encompassing agency communication (as the court and plaintiffs recognized in *Raichle*), balance-sheet management,[145] and even regulation and supervision that promote stability of the financial system.[146] The breadth of the "monetary policy" category is particularly salient at the zero lower bound, where traditional monetary-policy tools run out.[147]

In the current economic environment, then, the precedent concerning the Fed's monetary-policy actions is less settled than it may first appear. There is little reason for the logic of *Raichle* to be limited to interest-rate policy. As I argue in Section III.A, the lines separating "monetary policy" from "financial regulation" or "lending" have blurred, making the arguments for deference to open-market operations similarly salient for other monetary-policy tools. But if everything is monetary policy, nothing is: it is untenable to imagine that the Court will decline to review any action that the Fed argues "promot[es] maximum employment, stable prices, and moderate long-term interest rates."[148] Such a broad reading of *Raichle* would therefore likely lead courts to water down *Raichle*'s standard of deference. To preserve this vital area of deference, while recognizing the artificiality of a narrow reading of *Raichle*, a more stable doctrine would eschew such categorization altogether.[149] But before I turn to this prescriptive argument, one more line of cases remains: judicial review of Fed emergency lending, which has received somewhat distinct treatment from other monetary-policy actions.

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144. *Monetary Policy*, BD. GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/monetarypolicy.htm [https://perma.cc/PZ4L-HUFE].

145. *See, e.g.*, *Monetary Policy Report*, BD. GOVERNORS FED. RSRV. SYS. 3, 32 (Feb. 7, 2020), https://www.federalreserve.gov/monetarypolicy/files/20200207_mprfullreport.pdf [https://perma.cc/Y9MU-6VS3] (describing the Fed's "Balance sheet Policy" in its "Monetary Policy Report" to Congress).

146. *See* Fed. Open Mkt. Comm., *Statement on Longer-Run Goals and Monetary Policy Strategy*, BD. GOVERNORS FED. RSRV. SYS. 1 (Jan. 26, 2021), https://www.federalreserve.gov/monetarypolicy/files/fomc_longerrungoals.pdf [https://perma.cc/CN5V-WUDY] (noting that achieving its monetary-policy goals "depends on a stable financial system").

147. *See infra* notes 188-200 and accompanying text.

148. Fed. Open Mkt. Comm., *supra* note 146, at 1.

149. *See infra* Section III.B.

C. *Judicial Review of Lending Decisions*

Over the past two decades, the most widely debated Fed actions have involved emergency lending.[150] But despite the controversy, very few lending actions have been challenged in court. Indeed, though the Fed has possessed emergency-lending power in some form since 1932, its use has gone almost completely unchallenged. And where review has occurred, it has been highly deferential. Still, recent cases have considered lending actions under doctrinal analyses distinct from the deference courts afford the Fed in monetary-policy (or regulatory) cases. Once again, the trend has been toward the application of transsubstantive principles, rather than a Fed-specific logic.

Before turning to the case law, a quick discussion of central-bank emergency-lending theory is in order. Since Walter Bagehot's influential work, *Lombard Street*, economic theory has widely accepted the idea that central banks should act as the "lender of last resort" in times of economic crisis.[151] When exogenous forces cause a liquidity crisis, it is the job of the central bank to step in and provide liquidity to the financial sector.[152] When the crisis stops, liquidity will return, and the central bank can be repaid. Today, the principle that central banks should lend "freely and vigorously" in a crisis (while taking some action to reduce moral hazard) is known as "Bagehot's dictum."[153] The principle is quite powerful: if financial markets understand that the central bank will step in and

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150. *See, e.g.*, James B. Stewart & Peter Eavis, *Revisiting the Lehman Brothers Bailout that Never Was*, N.Y. TIMES (Sept. 29, 2014), https://www.nytimes.com/2014/09/30/business/revisiting-the-lehman-brothers-bailout-that-never-was.html [https://perma.cc/6W4A-D49U]; Claudia Sahm, Opinion, *The Money Machine that Can Save Cities*, N.Y. TIMES (Apr. 23, 2020), https://www.nytimes.com/2020/04/23/opinion/coronavirus-federal-reserve-cities.html [https://perma.cc/YKK2-JDCU]; Editorial, *The Fed's 'Main Street' Mistake*, WALL ST. J. (Apr. 9, 2020, 7:28 PM ET), https://www.wsj.com/articles/the-feds-main-street-mistake-11586474912 [https://perma.cc/KUF9-L8QH].

151. WALTER BAGEHOT, LOMBARD STREET: A DESCRIPTION OF THE MONEY MARKET (Hartley Withers ed. 1917) (1873); *see* Kathryn Judge, *The First Year: The Role of a Modern Lender of Last Resort*, 116 COLUM. L. REV. 843, 850-51 (2016).

152. *See* Judge, *supra* note 151, at 851. Liquidity is "a measure of the cash and other assets [firms] have available to quickly pay bills and meet short-term business and financial obligations." *FAQs: What Is the Difference Between a Bank's Liquidity and Its Capital?*, BD. GOVERNORS FED. RSRV. SYS. (Dec. 31, 2019), https://www.federalreserve.gov/faqs/cat_21427.htm [https://perma.cc/3YGS-LAXH]. For example, an individual with a net worth of $10,000 in cash is more liquid than an individual with $5,000 in cash and a cookie-jar collection valued at $5,000 because, if the second individual needed to quickly access $10,000, it would be difficult for them to do so—they would need to find a willing buyer to purchase their cookie jars. A liquidity crisis occurs when firms are unable to meet short-term financial obligations, even though they may possess significant long-term assets.

153. Judge, *supra* note 151, at 851; BAGEHOT, *supra* note 151, at 194-97.

provide liquidity, the vicious cycle that leads to bank runs can be halted in its tracks. Depositors "have no reason to fear that an otherwise healthy bank might be rendered insolvent should other depositors demand their money back."[154] In this way, a lender of last resort can, in theory, prevent bank runs from occurring at all. This rationale led to the first emergency-lending provision, added to the Federal Reserve Act in 1932, which permitted the Federal Reserve Board to authorize loans to "any individual, partnership, or corporation" in "unusual and exigent circumstances."[155] The original language remains today, subject to a few modifications.[156]

Prior to the 2008 financial crisis, courts had reviewed Fed lending decisions on two occasions. The first occurred in 1934, under section 13(b) of the Federal Reserve Act, which authorized the Fed to "make credit available for the purpose of supplying working capital to established industrial and commercial business."[157] Billings Utility Company, a heating plant in Montana, applied for a $35,000 loan from the Fed but was denied. The Company sued, arguing that the Fed "wil[l]fully, arbitrarily, capriciously, tyrannically, oppressively, monopolistically, and without good or justifiable reasons" denied their application.[158] On review, the Eighth Circuit quickly disposed of the case. The court interpreted the statutory language—which provided that the Fed "may make loans" under certain circumstances—as permissive, not mandatory.[159] But in explicating its decision, the court spoke more broadly about the discretion that the statute granted the Fed:

> The many cautionary and safeguarding expressions contained in the act dispel the thought that Congress intended that its provisions should be construed to make it mandatory on the bank to make such loans. It is only in "exceptional circumstances" and unusual cases, when it appears "to the satisfaction of a Federal Reserve bank," that appellant was "unable to obtain requisite financial assistance on a reasonable basis from the

154. Judge, *supra* note 151, at 853.

155. Emergency Relief and Construction Act of 1932, Pub. L. No. 72-302, § 210, 47 Stat. 709, 715; *see* Menand, *supra* note 4, at 324.

156. *See* Federal Reserve Act of 1913 § 13(3)(A), 12 U.S.C. § 343(3) (2018).

157. 3 FRANKLIN DELANO ROOSEVELT, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE ADVANCE OF RECOVERY AND REFORM, 1934, at 154 (Samuel I. Rosenman ed., 1938). This provision extended Fed lending beyond the typical lender-of-last-resort role, establishing the Fed as an investment authority. For an interesting discussion of the history of this provision and its repeal, see David Fettig, *Lender of More than Last Resort*, FED. RSRV. BANK MINNEAPOLIS (Dec. 1, 2002), https://www.minneapolisfed.org/article/2002/lender-of-more-than-last-resort [https://perma.cc/5UMU-DPEH].

158. Billings Util. Co. v. Advisory Comm., 135 F.2d 108, 109 (8th Cir. 1943).

159. *Id.* at 111.

> usual sources," that the bank is granted authority to make such loans. . . . The loan should be made on "a reasonable and sound basis" . . . . *Congress did not assume the responsibility of directing the Federal Reserve Bank to make such loans, but gave it authority to make them subject to many safeguards, limitations and restrictions*.[160]

Under a narrow reading, this provision simply explains that the Fed has complete and total discretion to *deny* loans. However, the logic may suggest a broader reading: that Congress gave the Fed full authority to determine when the statute's limiting conditions apply. Under this broad reading, decisions to deny *or grant* a loan would be equally within the Fed's discretion, and not subject to judicial review. To the extent that the broad reading is correct, it is dicta, as the holding in *Billings Utility* is limited to the Fed's discretion to deny loans. Still, the case is useful in thinking about the interaction between courts and the Fed's section 13 lending authority. Though section 13(b) was repealed in 1950, similar language is used in section 13(3), the Federal Reserve Act provision under which the Fed conducts emergency lending today.[161]

Thirty years later, courts once again examined the Fed's lending-authority discretion. This time, the challenge was to a loan extended during the largest bank failure in U.S. history. The Federal Reserve Bank of New York had provided emergency credit to Franklin National Bank, in an effort to allow it to maintain banking operations while the Comptroller tried to architect a merger to save it.[162] The plan failed, and the bank was declared insolvent. But between the Fed's extension of credit and the bank's collapse, Franklin National Bank had entered into various transactions, including a mortgage agreement with Huntington Towers. Upon the bank's failure, it had ceased paying out its loan to Huntington Towers, which subsequently sued the Federal Reserve Bank. Huntington Towers argued that the Federal Reserve loan "should not have been made in light of [Franklin National Bank's] hopeless financial situation" and that the "failure to disclose the insolvency" of Franklin National Bank to Huntington Towers constituted a tort.[163]

The Second Circuit rejected Huntington Towers's argument, holding that it could not adjudicate such a tort action under the Federal Reserve Act. Its rationale was similar to the broad reading of *Billings Utility*:

160. *Id.* (emphasis added).

161. Federal Reserve Act § 13(3)(A), 12 U.S.C. § 343(3)(A) (2018) ("In unusual and exigent circumstances, the Board of Governors of the Federal Reserve System . . . *may authorize* any Federal reserve bank . . . to discount . . . notes . . . ." (emphasis added)).

162. Huntington Towers, Ltd. v. Franklin Nat'l Bank, 559 F.2d 863, 865 (2d Cir. 1977).

163. *Id.* at 867.

> [T]he granting of rescue funds to [Franklin National Bank] by the [Federal Reserve Board was an] exercise[] of judgment by the public officials concerned and [was] well within their competence and authority. Absent clear evidence of grossly arbitrary or capricious action on the part of [the Board] . . . it is not for the courts to say whether or not the actions taken were justified in the public interest, particularly where it vitally concerned the operation and stability of the nation's banking system.[164]

The court supported this statement with citations both to *Raichle*—noting the "unthinkable burden" judicial review of open-market operations would place upon the banking system[165]—and *Billings Utility*.[166] With these citations, the court signaled that it thought the deference due to the Fed in lending decisions was on par with that due in cases involving monetary policy, rejecting any role for the courts in either.

Courts have not embraced this logic in subsequent cases, even within the Second Circuit. In the aftermath of the 2008 financial crisis, two major challenges to the Fed's lending actions were brought.[167] While both cases came out in favor of the Fed, neither relied on *Huntington Towers*'s logic of unreviewability. As discussed above, the case in the Federal Circuit was dismissed for lack of standing.[168] The case in the Second Circuit, a state tort action somewhat analogous to *Huntington Towers*, was resolved in favor of the Fed under general principles of federal preemption. But notably, the Second Circuit did not cite to *Huntington Towers*—or any other case standing for broad deference to the Federal Reserve—even though the district court had grounded its reasoning in *Huntington Towers*, *Raichle*, and *Billings Utility*.[169] In affirming the district court's dismissal, the Second Circuit did note that "Delaware fiduciary duty law cannot be applied to the [Federal Reserve Bank of New York's] rescue activities consistently

164. *Id.* at 868.

165. *Id.* at 868-69 (citing Raichle v. Fed. Rsrv. Bank of N.Y., 34 F.2d 910, 915 (2d Cir. 1929)); *see also Raichle*, 34 F.2d at 915 ("It would be an unthinkable burden upon any banking system if its open-market sales and discount rates were to be subject to judicial review.").

166. *Huntington Towers*, 559 F.2d at 869 (citing Billings Util. Co. v. Advisory Comm., 135 F.2d 108, 112 (8th Cir. 1943), for the principle that the Fed's lending decision was "not subject to judicial review"). The Second Circuit also cited *Bryan v. Federal Open Market Committee*, 235 F. Supp. 877 (D. Mont. 1964), in which a district court had dismissed a challenge to open-market operations for lack of standing.

167. *See* Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y., 742 F.3d 37 (2d Cir. 2014); Starr Int'l Co. v. United States, 856 F.3d 953 (Fed. Cir. 2017).

168. *See supra* Section I.A.2.

169. Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y., 906 F. Supp. 2d 202, 246 (S.D.N.Y. 2012).

with adequate protection of the federal interests at stake in stabilizing the national economy."[170] But the court appealed only to transsubstantive preemption principles, finding the stabilization of the national economy a "uniquely federal concern"—independent of any discretion granted specifically to the Fed.[171]

The takeaways from this spotty case law, then, are somewhat unclear. Though historically some courts recognized the similarities between the Fed's lending and monetary-policy powers, later decisions adopted a more categorical approach. Ironically, this trend has occurred alongside a greater blurring of monetary policy and lending actions in practice.

III. TOWARD A UNIFIED THEORY OF JUDICIAL REVIEW OF THE FEDERAL RESERVE

To recap: the Fed rarely finds itself haled into court.[172] Sometimes this is due to decisions made by the Fed itself—as with nonfinal bank-supervision actions, for example. Other times, cases are quickly dismissed under court-made doctrine, such as standing or equitable discretion. When Fed cases do reach the merits, the deference courts apply generally depends upon the role that the Fed was playing in a given dispute: lender, regulator, monetary-policy maker.[173] Recently, however, cracks in this approach have begun to show. As Robert K. Rasmussen and David A. Skeel, Jr., argue, in the litigation following the 2008 bailouts, courts' commitment to a hands-off approach resulted in an analysis that strained credibility.[174] While the courts likely came to the correct outcome, declining to overturn the Fed's actions, Rasmussen and Skeel argue that the cases were "much closer than the court[s'] analys[e]s suggest[]."[175] By ignoring these cases' complexity, reviewing courts "implie[d] that future regulators need not pay attention to legal constraints in a crisis."[176] This is not a good result.

At the same time, courts may be poised to adopt greater skepticism of the Fed's exercise of regulatory and supervisory authority. The Roberts Court has exhibited increasing hostility toward administrative action, particularly in cases

170. *Starr Int'l Co.*, 742 F.3d at 41-42.

171. *Id.* at 41.

172. *See supra* Part I.

173. *See supra* Part II.

174. *See* Robert K. Rasmussen & David A. Skeel, Jr., *Governmental Intervention in an Economic Crisis*, 19 U. PA. J. BUS. L. 7, 43-45 (2016).

175. *Id.* at 44.

176. *Id.*

concerning independent agencies.[177] With this rightward shift, formerly fringe arguments may find their way into the mainstream.[178] This trend, too, is not a good result, as judicial interference with Fed regulatory authority could thwart Congress's charge to the Fed to "promote effectively the goals of maximum employment, stable prices and moderate long-term interest rates" by undermining the effectiveness of the Fed's macroeconomic policy making.[179]

The root of the difficulty is that our economic system does not look like it did in 1929,[180] or 1943,[181] or even 1978.[182] Current deference doctrines came from

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177. *See supra* notes 10-11 and accompanying text. In the context of independent agencies specifically, Justice Scalia's theory of the unitary executive expressed in his *Morrison* dissent, Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting), has emerged (nearly) victorious, *see* Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2192-93 (2020). Though Chief Justice Roberts's majority opinion in *Seila Law* declined to overrule *Morrison* formally (let alone *Humphrey's Executor*), the opinion rests on a unitary-executive logic that flows directly from Scalia. *See, e.g.*, *Seila Law*, 140 S. Ct. at 2197 ("The entire 'executive Power' belongs to the President alone."). Indeed, in a concurrence, Justice Thomas (joined by Justice Gorsuch) noted that the decision "repudiated almost every aspect of *Humphrey's Executor*." *Id.* at 2212 (Thomas, J., concurring in part and dissenting in part); *see also* Ilan Wurman, *The Removal Power: A Critical Guide*, 2020 CATO SUP. CT. REV. 157, 157 ("[I]t is unclear what is left of the reasoning of the earlier, functionalist precedents [including *Morrison* and *Humphrey's Executor*] after *Seila Law*."). For a discussion of the practical stakes of this debate, see Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352 (2020).

178. For example, right-wing interest groups have argued that the models and assumptions underlying the Fed's stress tests are "rulemakings" under the APA, and that they thus must comport with notice-and-comment procedural requirements. *See* Hal Scott, *The Administrative Procedure Act and Federal Reserve Stress Tests: Enhancing Transparency*, COMM. ON CAP. MKTS. REGUL. 11-23 (Sept. 2016), http://online.wsj.com/public/resources/documents/StressTestStatement09-15-2016.pdf [https://perma.cc/QH2D-J4AF]; Emily Glazer & Ryan Tracy, *Bank Groups Weigh Legal Challenge to Fed Stress Test*, WALL ST. J. (Sept. 1, 2016, 1:31 PM ET), https://www.wsj.com/articles/bank-groups-weigh-legal-challenge-to-fed-stress-tests-1472751110 [https://perma.cc/BJX6-UFMW]; John Heltman, *Why Suing the Fed over the Stress Tests Is a Dangerous Idea*, AM. BANKER (Sept. 16, 2016, 11:30 AM EDT), https://www.americanbanker.com/news/why-suing-the-fed-over-the-stress-tests-is-a-dangerous-idea [https://perma.cc/YBG9-63S5]. This argument would undermine the effectiveness of stress testing—a key part of post-2008 financial-stability regulation—by requiring the Fed to publish its models in advance of the test. *See* Daniel K. Tarullo, *Are We Seeing the Demise of Stress Testing?*, BROOKINGS (June 25, 2020), https://www.brookings.edu/blog/up-front/2020/06/25/stress-testing [https://perma.cc/3MX7-377D] (discussing concerns caused by "the Fed increasingly accommodat[ing] the banks' preference for more predictability" in stress testing—concerns that would only be deepened if the models themselves were published).

179. 12 U.S.C. § 225a (2018). For a discussion of the way financial regulation is intimately connected with monetary policy, see *infra* Section III.A.

180. Raichle v. Fed. Rsrv. Bank of N.Y., 34 F.2d 910 (2d Cir. 1929).

181. Billings Util. Co. v. Advisory Comm., 135 F.2d 108 (8th Cir. 1943).

182. Bd. of Governors of the Fed. Rsrv. Sys. v. First Lincolnwood Corp., 439 U.S. 234 (1978).

eras when the Fed acted in ways that were much less likely to blur the lines between its roles. Monetary policy was controlled through open-market operations and the discount window; lending was narrowly focused on providing liquidity to the financial system; and regulation was concerned with the stability of individual banks. But today, the world looks different. Over the past two decades, we have faced two economic crises where interest rates dropped to zero, requiring the Fed to engage in novel interventions at the zero lower bound.[183] The financial system's interconnectedness has led to novel regulatory actions, like stress testing, that do not resemble traditional bank supervision.[184] And the Fed has recently engaged in lending programs that do not fit neatly into any of these buckets, injecting credit into the real (that is, nonbank) economy during the COVID-19 pandemic.[185]

Rather than attempting to bucket Fed actions by role, type, or even statutory justification, courts should engage in a functional, purpose-driven analysis. The question should not be the form that Fed interventions take. Instead, courts should consider the purpose that the interventions seek to achieve and the legal relationships that the Fed alters in service of that goal. This analysis is not unprecedented: some lower courts already engage in functional analyses of Fed activities in certain contexts.[186] Nor is it outside of courts' competencies: in other

183. *See infra* notes 188-194 and accompanying text.

184. *See infra* notes 201-206 and accompanying text.

185. *See infra* notes 195-200 and accompanying text.

186. One illustrative case is *United States v. Wells Fargo & Co.*, in which the Second Circuit held that the False Claims Act (FCA) applies to lending decisions made by Federal Reserve Banks. 943 F.3d 588 (2d Cir. 2019). In an amicus brief, the Board of Governors had argued that the FCA did not cover loans made by Federal Reserve Banks because money from Fed loans is not "provided" by the United States. Brief for Amicus Curiae of the United States and the Federal Reserve Board in Support of Neither Party at 17, United States v. Wells Fargo & Co., 943 F.3d 588 (2d Cir. 2019) (No. 18-1746). But the court rejected this argument in an opinion that exemplifies many of the prescriptions I recommend here. First, the decision rejected arguments based merely on labels (e.g., whether the money for the loans literally came out of the Treasury's coffers) and pierced through to the legal relationships at bottom. *Wells Fargo*, 943 F.3d at 601-02. Second, the decision may facilitate a dialogue between the Fed and Congress; if the Fed determines that FCA claims would disrupt future lending regimes, it can petition Congress for statutory insulation from the FCA. Third, there was no particular reason to defer to Fed expertise on this issue. And finally, the timing (nearly a decade after the worst of the crisis) and remedy (damages) made the court's searching analysis appropriate. The court put future borrowers on notice and remedied a past harm, all without disrupting an economic recovery.

areas of financial litigation, courts routinely look beyond the labels on a transaction to parties' intentions and the transaction's economic impact.[187] The goal when reviewing the Fed, then, should be a more transparent approach that provides meaningful oversight of the agency without unduly intervening in its zone of expertise.

A. The Blurring of Macroeconomic Policy Making

Many of the Fed's recent policies have blurred the lines between its roles. To begin, Large-Scale Asset Purchases (frequently called "Quantitative Easing" (QE)) are an example of the Fed acting as both monetary-policy maker and lender of last resort.[188] When interest rates are well above zero, the Fed can use open-market operations to lower (or raise) short-term interest rates in order to increase (or decrease) borrowing and aggregate demand.[189] But once interest rates hit zero, the Fed must turn to other techniques to stimulate demand,[190]

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187. *See* Menand, *supra* note 4, at 343 n.180 (describing the precedent—going back to Chief Justice Marshall in 1812—of looking into the intent of the parties to determine whether a "conditional sale" was really a loan); *see also* Conway's Ex'rs v. Alexander, 11 U.S. (7 Cranch) 218, 237 (1812) ("[T]he inquiry in every case must be, whether the contract in the specific case is a security for the re-payment of money or an actual sale."); *In re* Grand Union Co., 219 F. 353, 359 (2d Cir. 1914) ("Stripped of the verbiage with which the parties have sought to clothe their transactions, the naked facts disclose that what they were doing was not a sale, but a loan, and that the leases were turned over simply by way of security.").

188. *See Annual Economic Report*, BANK FOR INT'L SETTLEMENTS 39 (June 2020), https://www.bis.org/publ/arpdf/ar2020e.pdf [https://perma.cc/G8VM-7EJB].

189. In simplest terms, open-market operations are the process through which the Fed buys or sells securities—usually Treasury bonds—to increase or decrease the amount of liquidity, or cash, in the hands of banks. This cash is then transmitted to the economy through bank lending. For an explanation of open-market operations in "normal" times (when interest rates are well above zero), see YAIR LISTOKIN, LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS 54-55 (2019); CONTI-BROWN, *supra* note 8, at 132; and Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757, 776 (2018). Since the 2008 financial crisis, the Fed has also controlled short-term interest rates by adjusting the interest it pays on bank reserves held within the Federal Reserve System. *See, e.g.*, Jane Ihrig & Scott A. Wolla, *The Fed's New Monetary Policy Tools*, FED. RSRV. BANK ST. LOUIS (Aug. 2020), https://research.stlouisfed.org/publications/page1-econ/2020/08/03/the-feds-new-monetary-policy-tools [https://perma.cc/5FX2-JJUC].

190. *See* LISTOKIN, *supra* note 189, at 81. Technically, the Fed could keep going and target a negative federal-funds rate (which would simply mean that banks are paying, rather than being paid, to have other banks hold their money). But once rates are negative, the incentive structure of the federal-funds rate breaks down: banks could hold onto their money in cash rather than pay for it to be held elsewhere, as cash has an effective interest rate of zero percent. *See id.* at 74-75, 87. In practice, therefore, though interbank lending will not completely halt at the zero lower bound (the practical difficulties of storing large amounts of cash, for one, will encourage such as purchasing longer-term assets to lower long-term interest rates.[191] The Fed did precisely this during the Great Recession.[192] With these purchases, on the one hand, the Fed was clearly acting to further its monetary-policy aims: the goal of the program was to boost aggregate demand by flattening the yield curve.[193] At the same time, by purchasing specific assets, such as mortgage-backed securities, the Fed was intervening to prevent a liquidity trap in specific markets—a policy goal more aligned with its lender-of-last-resort role.[194]

The lending programs that the Fed enacted in response to the COVID-19 pandemic cannot be easily categorized for similar reasons.[195] Many of these programs were not canonical liquidity programs (i.e., "lend[ing] to solvent banks facing massive cash withdrawals when no other source of cash is available" to "prevent sharp, sudden falls in the money stock"[196]), but rather were designed to extend credit to the real economy.[197] For example, the Fed's Primary Market Corporate Credit Facility lent money directly to large U.S. employers.[198] And the

banks to continue lending, even if they have to pay for it), the effectiveness of open-market operations drops off precipitously once rates hit zero. *See id.*

191. The intuition behind Quantitative Easing (QE) is that, though the Fed cannot effectively lower short-term interest rates at the zero lower bound, there is still room to push down longer-term rates. *See id.* at 84; CONTI-BROWN, *supra* note 8, at 139-42; *see also* David Bowman, Fang Cai, Sally Davies & Steven Kamin, *Quantitative Easing and Bank Lending: Evidence from Japan*, BD. GOVERNORS FED. RSRV. SYS. 3 (June 2011), https://www.federalreserve.gov/pubs/ifdp/2011/1018/ifdp1018.pdf [https://perma.cc/ZE8G-VQ6F] (describing the separate channels through which QE affects the economy).

192. LISTOKIN, *supra* note 189, at 85.

193. *See Open Market Operations*, BD. GOVERNORS FED. RSRV. SYS. (Mar. 16, 2020), https://www.federalreserve.gov/monetarypolicy/openmarket.htm [https://perma.cc/9FWC-NPJG].

194. *See* Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Announces It Will Initiate a Program to Purchase the Direct Obligations of Housing-Related Government-Sponsored Enterprises and Mortgage-Backed Securities Backed by Fannie Mae, Freddie Mac, and Ginnie Mae (Nov. 25, 2008), https://www.federalreserve.gov/newsevents/pressreleases/monetary20081125b.htm [https://perma.cc/4RV5-9AU4]; Diana Hancock & Wayne Passmore, *Did the Federal Reserve's MBS Purchase Program Lower Mortgage Rates?* 1 (Fed. Rsrv. Bd. Fin. & Econ. Discussion Series, Working Paper No. 2011-01, 2010), https://www.federalreserve.gov/pubs/feds/2011/201101/201101pap.pdf [https://perma.cc/X9XQ-BBJT].

195. *See Annual Economic Report*, *supra* note 188, at 54-58.

196. Thomas M. Humphrey, *Lender of Last Resort*, *in* AN ENCYCLOPEDIA OF KEYNESIAN ECONOMICS (Thomas Cate ed., 2d ed. 2013); *see also* Menand, *supra* note 4, at 303-07 (describing the Fed's powers to provide banks with liquidity to backstop deposits).

197. *See* Menand, *supra* note 4, at 300; *see also Annual Economic Report*, *supra* note 188, at 55-56 (describing the way that central banks functioned as the "dealer of last resort" during the crisis, blurring the line between monetary policy maker and lender of last resort).

198. *Primary Market Corporate Credit Facility*, BD. GOVERNORS FED. RSRV. SYS. (Aug. 11, 2021), https://www.federalreserve.gov/monetarypolicy/pmccf.htm [https://perma.cc/48V5-

Municipal Liquidity Facility lent money directly to state and local governments.[199] These programs further resist categorization by regulating loan recipients. The Main Street New Loan Facility, for example, placed limitations on loan recipients' ability to buy back stocks or make dividend payments.[200]

Finally, the Fed's regulatory policies frequently creep into the monetary-policy space.[201] As the 2008 financial crisis made painfully clear, the stability of financial markets is necessary for macroeconomic stability. This is because the disruption of financial markets can disrupt the transmission of monetary policy to the economy.[202] And monetary policy and financial regulation have been further

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63RT]; *see also* Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Announces Extensive New Measures to Support the Economy (Mar. 23, 2020), https://www.federalreserve.gov/newsevents/pressreleases/monetary20200323b.htm [https://perma.cc/K7P5-DUJW] (announcing the facility).

199. *Municipal Liquidity Facility*, BD. GOVERNORS FED. RSRV. SYS. (Aug. 11, 2021), https://www.federalreserve.gov/monetarypolicy/muni.htm [https://perma.cc/9RXE-F6P8].

200. *See Main Street New Loan Facility*, BD. GOVERNORS FED. RSRV. SYS. (Dec. 29, 2020), https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20201229a1.pdf [https://perma.cc/5WM7-G7KV] (requiring borrowers to follow the restrictions that apply to direct loan recipients under section 4003(c)(3)(A)(ii) of the CARES Act). All Fed lending programs regulate loan recipients to some extent by imposing conditions or eligibility requirements on borrowers. But wading into the debate over stock buybacks and dividend payments in the implementation of these lending programs is more canonically "regulatory" than, say, limiting what Term Asset-Backed Securities Loan Facility participants can use as collateral. *See Term Asset-Backed Securities Loan Facility*, BD. GOVERNORS FED. RSRV. SYS. (July 28, 2020), https://www.federalreserve.gov/newsevents/pressreleases/files/monetary20200728a6.pdf [https://perma.cc/NS9B-GG4P].

201. Recall that monetary policy encompasses the Fed's "actions and communications to promote maximum employment, stable prices, and moderate long-term interest rates." *Monetary Policy*, *supra* note 144.

202. Loretta J. Mester, President and CEO, Fed. Rsrv. Bank of Cleveland, A Practical Viewpoint on Financial System Resiliency and Monetary Policy, Address at the Third Annual ECB Macroprudential Policy and Research Conference 3 (May 18, 2018), https://www.clevelandfed.org/en/newsroom-and-events/speeches/sp-20180518-practical-viewpoint-on-financial-system-resiliency-and-monetary-policy.aspx [https://perma.cc/LL9H-VFCR] ("When financial markets are disrupted, as they were during the financial crisis, the transmission of monetary policy to the economy can also be disrupted."); *see also* Comm. on Int'l Econ. Pol'y & Reform, *Rethinking Central Banking*, BROOKINGS 7 (Sept. 2011), https://www.brookings.edu/wp-content/uploads/2016/06/Rethinking-Central-Banking.pdf [https://perma.cc/U44W-QTEV] ("A consequence of this doctrine of 'leaning against the wind' is that the neat Tinbergen assignment of different tools to different objectives becomes more difficult to implement in practice. . . . Rather than viewing the allocation problem as having a corner solution where one instrument is devoted entirely to one objective, the macro-stabilization exercise must be viewed as a joint optimization problem where monetary and regulatory policies are used in concert in pursuit of both objectives.").

blurred by QE, as "monetary policymakers have to be more attuned to developments in financial markets and institutions than they once were" due to the "increased . . . size and changed . . . composition of the Fed's balance sheet."[203] This interrelationship means that financial regulation has become a tool in the monetary-policy maker's tool belt.

Consider stress testing. The Fed can vary the severity of stress tests with the perceived fragility of the economy as a countercyclical regulatory tool.[204] The Fed's regulatory responses to the COVID-19 pandemic, too, acted as both financial regulation and monetary policy. For example, in June 2020, the Fed required large banks to suspend stock buybacks and limited their dividend payments.[205] This policy's purpose went beyond the regulatory aim of preventing bank failures; it functioned as part of the Fed's expansionary monetary-policy framework. Even actions that seem canonically regulatory—such as the Fed's authority to remove bankers who violate the law, or other forms of bank supervision—may best be understood as part of an institutional arrangement whereby private banks implement the Fed's monetary-policy ends under the Fed's watchful eye.[206] In this telling, regulation is not distinct from monetary-policy making but a vital component of it.

Of course, such blurring is not entirely novel. Between 1934 and 1957, for example, the Fed issued small-business loans under the Federal Reserve Act's now-deleted section 13(b).[207] Financial stability has always affected monetary policy's transmission into the real economy to some extent. And during the Great Depression, the Fed engaged in some long-term asset purchases when interest

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203. Mester, *supra* note 202, at 3.

204. *Id.* at 5.

205. *See* Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Federal Reserve Board Releases Results of Stress Tests for 2020 and Additional Sensitivity Analyses Conducted in Light of the Coronavirus Event (June 25, 2020), https://www.federalreserve.gov/newsevents/pressreleases/bcreg20200625c.htm [https://perma.cc/TP42-6PJM]; Jeanna Smialek, Peter Eavis & Kate Kelly, *Fed Limits Bank Payouts and Suspends Share Buybacks as Pandemic Grinds on*, N.Y. TIMES (June 25, 2020), https://www.nytimes.com/2020/06/25/business/economy/fed-dividend-buyback-limits.html [https://perma.cc/M3S6-DP3K].

206. *See generally* Menand, *supra* note 17 (describing the "American Monetary Settlement" by which chartered banks create money under the supervision of government actors, including the Fed); Da Lin & Lev Menand, *The Banker Removal Power*, 108 VA. L. REV. (forthcoming 2022), https://ssrn.com/abstract=3806879 [https://perma.cc/8297-6KPY] (describing the Fed's authority to remove law-breaking bankers from office).

207. *See supra* note 157 and accompanying text; *see also* George Selgin, *When the Fed Tried to Save Main Street*, CATO INST. (Mar. 30, 2020, 1:07 PM), https://www.cato.org/blog/when-fed-tried-save-main-street [https://perma.cc/6UJW-AC9H] (comparing this program to the Main Street Lending Program of 2020).

rates reached the zero lower bound.[208] But these and other unconventional programs were significantly more cabined than were more recent Fed initiatives, and financial institutions are more systemically important today than they were in past decades.[209] It is the scope and scale of modern programs, along with the frequency with which they have been adopted, that suggest that we have entered a new age of central banking. A new approach to judicial review of central banking should follow.

B. Guiding Principles

Working from a combination of legal theory and precedent, I have identified four principles that should inform a court's analysis. First, courts should minimize policy distortions: the Fed should not feel pressure to frame its policies in a certain way in order to receive greater deference from courts. Second, judicial review should act as a catalyst for congressional action, as Congress, rather than the courts, is the better body to oversee the Fed's activities. Third, courts should consider the timing of their decisions, and should behave differently in the throes of a crisis than in the interstitial moments between crises. And finally, courts should be open to experimentation by the Fed within its core areas of expertise and subject to limitations.

The upshot of these principles is that courts should allow the Fed the flexibility to respond to rapidly changing economic conditions, without resorting to judicial workarounds that mask close cases.[210] What would this look like in practice? To begin, the court's current stance of extreme deference toward the Fed's interest-rate policy would not change.[211] But this deference would likely extend into other areas of Fed policy—such as QE programs—because of monetary policy's evolving nature.[212] The Fed's regulatory policies would likely receive greater scrutiny, because run-of-the-mill banking regulation is more commonly introduced in the aftermath of a crisis, rather than as an emergency measure. Judicial

208. Michael Bordo & Arunima Sinha, *A Lesson from the Great Depression that the Fed Might Have Learned: A Comparison of the 1932 Open Market Purchases with Quantitative Easing* 3-4, 8-9 (Nat'l Bureau of Econ. Rsch., Working Paper No. 2258, 2016), https://www.nber.org/system/files/working_papers/w22581/w22581.pdf [https://perma.cc/67WP-VJAD].

209. *See, e.g.*, Dimitrios Bisias, Mark Flood, Andrew W. Lo & Stavros Valavanis, *A Survey of Systemic Risk Analytics* 7-10 (Off. of Fin. Rsch., Working Paper No. 0001, 2012), https://www.treasury.gov/initiatives/wsr/ofr/Documents/OFRwp0001_BisiasFloodLoValavanis_ASurveyOfSystemicRiskAnalytics.pdf [https://perma.cc/38B9-75Q8].

210. *See supra* text accompanying notes 174-176.

211. *See supra* Section II.B.

212. *See supra* text accompanying notes 188-194.

involvement is therefore ordinarily less disruptive. Still, courts should take seriously the Fed's unique role in our economy and administrative state. Bank supervision, for example, is distinct from other forms of regulation and is largely untouched by the APA.[213] The Fed's forward guidance, though undoubtedly regulatory, should not be treated like final agency action.[214] And the Fed may be deserving of greater leeway in its interpretation of its statutory authority than other agencies, particularly when it acts within the locus of its expertise.[215]

Finally, in the aftermath of a crisis, judicial intervention may be appropriate. For example, the Fed's legal authority for some of its COVID-19 lending programs was borderline.[216] Under my prescriptions, courts would not scrutinize such programs during the worst of a crisis. But judicial review after that crisis can help Congress and the Fed prepare for a subsequent one. As I argue below, courts should do their best to keep any remedies forward looking, to avoid ex ante disruptions of emergency-crisis relief. But honest, searching review of the Fed's statutory authority in this context can prompt the Fed to seek the authorization it desires—and can signal to Congress that the Fed may not be able to compensate for a congressional failure to act in the future.[217]

1. *Minimize Policy Distortions*

Courts should minimally distort the means the Fed chooses to achieve a particular policy end. As Mark Tushnet has recognized in the legislative context, "[p]olicy distortion occurs when, due to judicial review, legislators choose policies that are less effective but more easily defensible than other constitutionally acceptable alternatives."[218] A similar logic applies to judicial review of administrative action. Policy distortion occurs when, due to judicial review, Fed officials

213. *See generally* Menand, *supra* note 17 (describing the history and purpose of bank supervision).

214. Those who argue for greater review of this type of action do so by analogizing Fed activity to activity by other agencies. *See, e.g.*, Robert B. Ahdieh, *From Fedspeak to Forward Guidance: Regulatory Dimensions of Central Bank Communications*, 50 GA. L. REV. 213, 231-46 (2015) (arguing that some degree of judicial review of Fed communications may be appropriate). But the Fed is not like other agencies in terms of its structure, relationship to the political branches, or authority. Judicial review should therefore not be crafted through appeals to greater transsubstantivity, but through a more nuanced understanding of how the Fed operates.

215. *See infra* Section III.B.4.

216. *See* Menand, *supra* note 4, at 324-51.

217. *Cf. id.* at 159-61 (discussing the downsides of "government by central bank").

218. Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 250 (1995).

choose policies that are less effective, but more easily defensible in court, than are other statutorily acceptable alternatives.[219]

Under the current approach to judicial review, actions that the Fed can more readily label "monetary policy" receive greater deference than those most aptly labeled "regulation."[220] This distinction—rooted nowhere in the statutory text, but rather stemming from the Court's value judgments—may distort Fed policy making. Fed officials know that certain actions (such as raising or lowering interest rates) will be easier to defend in court than other actions (such as regulating the financial system). Importantly, such distortion could discourage the Fed from taking lawful action: the mere threat of a "close case," and the costs its litigation would impose,[221] could lead the Fed to take actions it knows will receive greater judicial deference. And given the past two decades of blurring between regulation and monetary policy, scrutinizing "regulatory" actions more than other forms of policy making could impede the Fed's ability to pursue its mandate.

Even when this distortion does not ultimately affect the Fed's policy choice, it may lead the Fed to frame a chosen policy in a different light.[222] This effect, too, is undesirable. First, it would result in a less transparent agency, which is

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219. The nondistortion principle is similar to the argument of Judge Ralph K. Winter, Jr., that courts should permit agencies to "flesh out" their substantive statutes: "To the extent that [an agency] is engaged in 'fleshing out' the statute . . . the courts' principal function initially would be not to determine the correct result through an overly imaginative reading of legislative history but merely to locate the outer boundaries of the legislative power delegated to the [agency]. And within those boundaries, the [agency] should be permitted to exercise choice freely." Ralph K. Winter, Jr., *Judicial Review of Agency Decisions: The Labor Board and the Court*, 1968 SUP. CT. REV. 53, 68.

220. *Compare supra* Section II.A (describing judicial review of regulatory decisions), *with supra* Section II.B (describing judicial review of monetary-policy decisions).

221. The "costs" of such litigation go beyond the financial cost and burden on administrative resources of litigating. If the market is concerned that a given program will not withstand judicial scrutiny, parties may be wary to participate. Additionally, market expectations of the effects of a policy on the economy will vary based on the perceived likelihood of judicial intervention. In this way, even if courts would uphold a given Fed policy under either *Raichle*-level deference or *Chevron*, the latter decision would be costlier to the Fed, as it might cause the market to lose confidence in the stability of future, similar actions.

222. This is not mere speculation; the Fed frequently frames its policies in specific ways to support its overarching policy goals. For example, when the Fed reduced its balance sheet in 2017 and 2018, it avoided framing the decision as monetary tightening. *See* Benn Steil & Benjamin Della Rocca, *The Fed Could Be Tightening More than It Realizes*, BUS. INSIDER (Nov. 10, 2017, 4:05 PM), https://www.businessinsider.com/the-fed-could-be-tightening-more-than-it-realizes-2017-11 [https://perma.cc/E2CR-L7Q6].

normatively undesirable in its own right.[223] Second, there is reason to think that even this seemingly superficial distortion could have a real effect on markets. Though "signaling" is an important lawmaking tool for any agency, its effects can be particularly far-reaching for the Fed. This is because many situations that the Fed must address—such as inflation and bank runs—are caused by, and managed via, changes in expectations.[224] For example, "a credible signal that a central bank will not bail out [firms taking on excessive risk] can induce them to be more careful ex ante, such that a crisis never comes."[225] Given the tea-leaf reading that occurs in the world of central banking,[226] even labels or framing can affect how financial markets respond to a given announcement or policy. Finally, opaque or misleading behavior can erode the Fed's credibility in the long run. And the Fed's credibility is vital to its ability to achieve its monetary-policy goals. For example, forward guidance—"the issuance by a central bank of public statements concerning the likely future settings of its policy instruments"—has become a key tool of U.S. monetary policy.[227] But forward guidance only works if the public believes the Fed when it speaks. Courts, then, should avoid having a distortionary effect on the Fed's policy making at the level of either substance or appearance.

Absent simply denying review altogether, the best way to achieve this goal is by encouraging the Fed to be transparent about its policies and purposes. The fact that the Fed chooses to act by imposing limits on private parties (i.e., through "regulation") should not necessarily result in more searching review. But the flipside is also true: merely alluding to the effects a given policy has on "monetary policy" should not necessarily grant the Fed *Raichle*-level deference.

223. *See* Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 374 (1998) (calling an agency practice of applying misleading labels to its practices a "violent breach" of the requirement of reasoned decision-making); ALAN BLINDER, THE QUIET REVOLUTION: CENTRAL BANKING GOES MODERN (2004), https://collaborate.princeton.edu/en/publications/the-quiet-revolution-central-banking-goes-modern [https://perma.cc/94GF-NY49] (abstract).

224. *See* Conti-Brown et al., *supra* note 1, at 12.

225. *Id.* at 12-13.

226. For one lighthearted (and debunked) example of the scrutiny facing central banks and their spokespeople, see Izabella Kaminska, *Scrutinising the Draghi Tie Indicator*, FIN. TIMES (Jan. 9, 2019), https://www.ft.com/content/8ac8a68e-b78e-30af-b916-7a2f7e54d02f [https:// perma.cc/S9L7-9CWP].

227. Edward Nelson, *The Emergence of Forward Guidance as a Monetary Policy Tool* 1 (Fed. Rsrv. Bd. Fin. & Econ. Discussion Series, Working Paper No. 2021-033, 2021), https://www.federalreserve.gov/econres/feds/files/2021033pap.pdf [https://perma.cc/ZJ7M-Y83K].

Instead, courts should pierce through self-serving labels and look to the ultimate legal relationships beneath a given policy.[228]

Consider, for example, stress testing. Though nominally "regulatory," stress tests have become part of the Fed's monetary-policy tool kit as a way to promote financial stability. Courts should therefore be wary of arguments attempting to paint stress testing as equivalent to run-of-the-mill actions by other agencies.[229] If the court's argument for deference in *Raichle* is valid (as I think it is) there is no principled reason to find deference less appropriate for this form of regulatory activity. Of course, courts should require Fed officials to show their work: the Fed must adequately explain to the court how stress tests fit within the broader monetary-policy tool kit.[230] But requiring reasoned deliberation is a far cry from imposing more searching review on a Fed policy simply because the court is more skeptical of command-and-control regulation than open-market operations.

2. *Act as a Catalyst for Congressional Action*

The basis for the Fed's legitimacy is commonly located in its technocratic expertise. As Peter Conti-Brown and David A. Wishnick describe it, "the Fed is not

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228. For example, the D.C. Circuit (in an opinion by then-Judge Scalia), took a similar approach when evaluating the Fed's decision to act via rulemaking rather than adjudication. The court noted that it would be "preferable, from the point of view of accuracy alone, to make every 'closely related' determination on a more narrow, specific, case-by-case basis" (i.e., through adjudication). Ass'n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 745 F.2d 677, 689 (D.C. Cir. 1984) (Scalia, J.). But the Fed had chosen to act via rulemaking, for logical reasons: "[T]he whole point of rulemaking as opposed to adjudication . . . is to incur a small possibility of inaccuracy in exchange for a large increase in efficiency and predictability." *Id.* Given this tradeoff, the court upheld the Fed's chosen methodology—despite its negative effect on the plaintiff.

229. *See, e.g.*, *supra* note 178. Put another way, this is an argument against administrative law's default of transsubstantivity—an argument that has deep roots in administrative-law theory. *See, e.g.*, Mark Tushnet, *The Story of* Crowell*: Grounding the Administrative State*, *in* FEDERAL COURTS STORIES 359, 383 (Vicki C. Jackson & Judith Resnik eds., 2010) (describing Louis Jaffe's position against transsubstantivity); *id.* at 385-86 (describing James Landis's similar position). The Fed is an exceptional agency, by virtue of (1) the breadth of its statutory mandate; (2) the nature of macroeconomic policy, which is best managed outside of courts; and (3) its structure, which fosters a specific form of expertise and political accountability. The Fed-specific logic of Justice Rutledge's approach in *Agnew* would result in considerably less distortion than the transsubstantive approach the Court has embraced. *See supra* Section II.A.

230. *Cf.* Winter, *supra* note 219, at 69 ("The task of the courts is not to weigh their experience against that of the [agency] but, first, to compel the [agency] to state clearly what its experience has been, what inferences it has drawn from that experience, and what impact those inferences should have in the particular case and, second, to decide whether on that basis each decision is a reasoned one.").

meant to be a purely political deliberative body, but must rely instead on the kind of expertise that contributes to the legitimacy of technocracy."[231] But such appeals to technocracy may not be enough to sustain the Fed's legitimacy—particularly when it ventures into uncharted territory. Given the Fed's political insulation, there is a risk that the Agency will too often have "the last word," making it difficult to "stimulate the requisite form of deliberation necessary to make sure that [the] force of the better argument prevails over sheer power."[232] When "sheer power" prevails, legitimacy wanes—the public may have reason to think, for example, that unrepresentative interest groups, such as financiers or asset holders, control the Fed's decision-making.[233] At the outer bounds of its power, then, deliberative process can ground the legitimacy of the Fed's policy experimentations.[234] Congress can spur such deliberation by exercising oversight over the Fed's authority and clarifying its scope. This, in turn, can increase the public's

231. Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 640 (2021).

232. James J. Brudney & Ethan J. Leib, *Statutory Interpretation as "Interbranch Dialogue"?*, 66 UCLA L. REV. 346, 392 (2019). The Fed itself has recognized the need for something beyond mere technocratic expertise to ground its legitimacy, though it has not gone so far as to root its legitimacy in the deliberative process. *See, e.g.*, Jerome H. Powell, Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Remarks at the Economics Club of New York on the Federal Reserve's Framework for Monitoring Financial Stability 1 (Nov. 28, 2018), https://www.federalreserve.gov/newsevents/speech/files/powell20181128a.pdf [https://perma.cc/NLH2-ZAYM] ("By clearly and transparently explaining our policies, we aim to strengthen the foundation of democratic legitimacy that enables the Fed to serve the needs of the American public.").

233. *See, e.g.*, *The Federal Reserve: Real and Perceived Conflicts of Interest and a Path Forward*, CTR. FOR POPULAR DEMOCRACY 1, 5, 7 (June 2016), https:// www.populardemocracy.org/sites/default/files/Perceived%20Conflicts%20Fed.pdf [https://perma.cc/47ES-PLK3]. This worry goes beyond mere optics. Some argue that the Fed historically has prioritized the needs of asset holders over the needs of workers despite its mandate to consider each on equal grounds. *See* David Stein, *Containing Keynesianism in an Age of Civil Rights: Jim Crow Monetary Policy and the Struggle for Guaranteed Jobs, 1956-1979*, *in* BEYOND THE NEW DEAL ORDER: U.S. POLITICS FROM THE GREAT DEPRESSION TO THE GREAT RECESSION 124, 126-28 (Gary Gerstle, Nelson Lichtenstein & Alice O'Connor eds., 2019); *cf.* BLAKE EMERSON, THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY 179 (2019) ("The administrative process can only claim legitimacy in the eyes of those it binds if it acknowledges its own moral and political character rather than concealing it in the apolitical language of expertise, technique, and procedure.").

234. *See* Joshua Cohen, *Deliberation and Democratic Legitimacy*, *in* THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE 17, 21 (Alan Hamlin & Philip Pettit eds., 1989) (arguing that a legitimate resolution of collective problems must proceed through "public argument and reasoning among equal citizens"). *See generally* JERRY L. MASHAW, REASONED ADMINISTRATION AND DEMOCRATIC LEGITIMACY: HOW ADMINISTRATIVE LAW SUPPORTS DEMOCRATIC GOVERNMENT (2018) (rooting the legitimacy of administrative action in "reasoned administration"—a theory similar to (but distinct from) deliberative democracy).

confidence in future Fed actions: where the Fed's legal authority for a given program is clear, market actors will have little reason to question the legality of a Fed action. And where Congress has explicitly sanctioned a given program, private citizens can trust that their elected representatives are ultimately in charge—and that, moving forward, they have representatives through which they can express support or discomfort with the Fed's role in the economy.[235] One role for courts, then, is to prompt these moments of legitimizing oversight to occur.

Congressional oversight of the Fed is not a new phenomenon. Despite the rhetoric surrounding the "independence" of the Federal Reserve,[236] the Fed's institutional history is replete with examples of congressional intervention when the Fed appeared to act out of step with the public interest.[237] As Sarah Binder and Mark Spindel have documented, the relationship between the Fed and Congress can be described as a cycle of "crisis, blame, and reform": when the Fed becomes politically salient, Congress intervenes, demonstrating to the public that the Fed is subject to political oversight.[238] These legitimizing touchpoints tend to occur around moments of economic crisis, when the Fed is most visible to the public.[239]

Judicial review can increase the quantity of these touchpoints, spurring more opportunities for Congress and the Fed to deliberate about the proper scope of the Fed's authority. Importantly, judicial review can also change the current one-way stream of communication between Congress and the Fed. The Fed has little incentive, if any, to go to Congress and ask for revisions to its statutory authority, since courts so rarely review it. But by engaging more explicitly with the scope of Fed authority, courts can prompt the Agency to proactively seek authorization from Congress for a novel program or policy. Any resulting authorization would

235. *Cf.* EMERSON, *supra* note 233, at 174-75 ("[C]ycles of bureaucratic intervention, social uptake and resistance, followed by bureaucratic revision, are and should be a fundamental part of our public life."); Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1827 (2020) ("[L]aw's creation of economic order should be accountable to those who live in that order, and the ultimate standard of accountability is the democratic will of the people, expressed in procedures that accord equal weight to all members in structuring our shared life.").

236. *See* CONTI-BROWN, *supra* note 8, at 2-3.

237. *See, e.g.*, *id.* at 26-32 (describing the restructuring of the Federal Reserve through the Banking Act of 1935 as motivated by the Fed's failed response to the Great Depression); D'ARISTA, *supra* note 40, at 172 (describing the Fed's failed response to the Great Depression at least in part due to the Fed's acting in the interest of the banking community, rather than the public).

238. BINDER & SPINDEL, *supra* note 3, at 27.

239. *See id.* at 42-43 ("[E]conomic conditions drive lawmakers' prescriptions for the Fed. When the economy is sound, lawmakers propose fewer changes to the Federal Reserve Act; when the economy falters . . . lawmakers renew calls for reform.").

give the public—and market—additional confidence in the propriety of future Fed activity under this authority.

Greater congressional oversight would, of course, limit the "independence" of the Fed. However, oversight's benefits are worth the potential costs, particularly given the politically charged value judgments inherent in novel Fed programs. For example, in response to the COVID-19 pandemic, the Fed intervened in specific credit markets, extending credit to owners of asset-backed securities,[240] municipalities,[241] and certain corporations,[242] to name but a few.[243] These programs blurred the line between monetary and fiscal policy: rather than "preserv[ing] existing credit arrangements by preventing fire sales and runs on financial institutions," these credit facilities were "designed to support markets for certain financial assets."[244] Congress sanctioned these programs in the CARES Act, communicating to the Fed, the public, and the courts that it approved of this (arguable) expansion of Fed authority in the immediate crisis.[245] But whether the Fed should continue along this path in future crises is a live question. If the nation faces an economic downturn from a natural disaster spurred on by climate change, for example, should the Fed support financial

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240. *Term Asset-Backed Securities Loan Facility*, BD. GOVERNORS FED. RSRV. SYS. (Aug. 11, 2021), https://www.federalreserve.gov/monetarypolicy/talf.htm [https://perma.cc/5KP9-BDEG].

241. *Municipal Liquidity Facility*, *supra* note 199.

242. *See, e.g.*, *Primary Market Corporate Credit Facility*, BD. GOVERNORS FED. RSRV. SYS. (Aug. 11, 2021), https://www.federalreserve.gov/monetarypolicy/pmccf.htm [https://perma.cc/XHW2-6R3P]; *Secondary Market Corporate Credit Facility*, BD. GOVERNORS FED. RSRV. SYS. (Aug. 11, 2021), https://www.federalreserve.gov/monetarypolicy/smccf.htm [https://perma.cc/K4ML-Y9GY]; *Paycheck Protection Program Liquidity Facility (PPPLF)*, BD. GOVERNORS FED. RSRV. SYS. (Aug. 11, 2021), https://www.federalreserve.gov/monetarypolicy/ppplf.htm [https://perma.cc/L4K9-LBKP]; *Main Street Lending Program*, BD. GOVERNORS FED. RSRV. SYS. (Aug. 11, 2021), https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm [https://perma.cc/QSZ5-XDS6].

243. *See* Menand, *supra* note 4, at 315.

244. *Id.* at 121-22; *see also* MARC LABONTE, CONG. RSCH. SERV., R46411, THE FEDERAL RESERVE'S RESPONSE TO COVID-19: POLICY ISSUES, at i (2021) (noting this blurring between fiscal and monetary policy in the Fed's crisis response and arguing that "[t]he more the Fed's COVID-19 response comes to resemble spending, the greater the implications may be for the Fed's political independence").

245. *See* Menand, *supra* note 4, at 324, 328-29. Menand criticizes the congressional approval of these programs without subsequently amending section 13(3) as "[s]ub [s]ilentio [l]awmaking." *Id.* at 157. But such narrow approval was an appropriate response given the limited legislative bandwidth available at the time due to the imminent economic crisis. Still, Congress will certainly need to revisit this issue in the future.

markets for "green" technologies?[246] Whether and how the Fed should embark on such a value-laden endeavor is a question best handled via democratic deliberation. By catalyzing such congressional deliberation, courts can promote sounder—and more just—decision-making.[247]

3. *Consider the Timing of Legal Decisions*

Much of the conversation in administrative-law theory asks *who* should make a given decision, given the varied competencies and expertise across institutions.[248] But just as important is the question of *when* to make that decision.[249] When it comes to judicial review of the Fed, timing is everything, particularly when it comes to monetary policy and emergency lending. Recall the court's observation in *Raichle* that "conditions in the money market often change from hour to hour," and thus "the disease would ordinarily be over long before a judicial diagnosis could be made."[250] The court recognized that the delay inherent in the judicial process makes monetary-policy actions particularly ill-suited for review. Thus, considering judicial review from a timing perspective sheds light on the otherwise intractable question of institutional competence.[251]

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246. *See, e.g.*, Mary C. Daly, President and CEO, Fed. Rsrv. Bank of S.F., Speech at the Economics of Climate Change Conference: Why Climate Change Matters to Us (Nov. 8, 2019), https://www.frbsf.org/our-district/files/Speech-Daly-Economics-of-Climate-Change-Conference.pdf [https://perma.cc/XRV7-8XWH]; Christina Parajon Skinner, *Central Banks and Climate Change*, 74 VAND. L. REV. 1301 (2021); Anne Richards, *Central Banks Need to Take Action Now on Climate Change*, FIN. TIMES (Apr. 21, 2021), https://www.ft.com/content/e5be5650-d880-48cd-b3f4-fdedeb41480e [https://perma.cc/HB77-HHUA]; Simon Clark, *Central Banks Jump into Climate-Change Policy Fray*, WALL ST. J. (May 16, 2021, 8:00 AM ET), https://www.wsj.com/articles/central-banks-jump-into-climate-change-policy-fray-11621166402 [https://perma.cc/8BJA-J7WK].

247. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 145-52 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

248. *See* William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction* to HART & SACKS, *supra* note 247, at li, lxi.

249. *See* David A. Super, *Against Flexibility*, 96 CORNELL L. REV. 1375, 1379 (2011).

250. Raichle v. Fed. Rsrv. Bank of N.Y., 34 F.2d 910, 915 (2d Cir. 1929).

251. Institutional competence is sometimes obvious: there is no question that the Fed, rather than courts, is best equipped to set interest rates. However, when it comes to issues of statutory interpretation, the question becomes much more difficult. *See* Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 364-65 (1986) (advocating for a pragmatic, multifactor approach concerning the attributes of the statute being interpreted when deciding which institution is best suited to do so). *Compare* William N. Eskridge Jr., *Expanding* Chevron*'s Domain: A Comparative Institutional Analysis of the Relative Competence of Courts and Agencies to Interpret Statutes*, 2013 WIS. L. REV. 411, 417 (arguing that agencies are best

David A. Super offers a helpful framework for establishing the ideal timing of legal decisions. The desirability of postponing a given legal decision depends upon "the cumulative effect of changes in inputs' costs" – that is, the cost of gathering information – and "changes in the value of the decision."[252] Super argues that, while input costs might rise or fall (i.e., information can become more available, or scarcer, over time), the decision's value likely decreases over time – there is a cost to delay.[253] He therefore provocatively argues against flexibility and in favor of earlier decision-making, even at the cost of less informational clarity.[254]

With respect to the Fed's decisions, there is reason to think that information costs fall over time. One of the primary difficulties of responding to an economic crisis is the lack of real-time information about the crisis's root cause. However, over time, information grows, as researchers, academics, and regulators analyze the issues. But two competing aspects of the Fed's role in the economy complicate delays in decisions by the Fed versus the prototypical actor in Super's story.

On the one hand, the Fed's ability to stabilize markets relates closely to its ability to establish clear market expectations. There is thus a significant cost to unsettling the Fed's actions: if market participants are unsure whether Fed programs will withstand judicial scrutiny, they will not adjust their expectations in line with the Fed's goals, for fear that the interventions will not stick. This concern is the primary rationale for minimal, if any, judicial intervention in monetary policy or emergency lending. But economic downturns are not one-time events. Though any given downturn is unique, the fact of cyclical recession and recovery is emblematic of our capitalist economy.[255] The timing of any given legal decision in the context of an economic recession is thus always both early and late: ex post from the perspective of the current crisis, but ex ante from the perspective of the next.

The combination of these two dynamics means that judicial intervention may have *negative* value regarding the active crisis, but *positive* value for the next one. Of course, weighing these costs and benefits is difficult. However, the

positioned to interpret their governing statutes), *with* Baldwin v. United States, 140 S. Ct. 690, 691 (2020) (Thomas, J., dissenting from a denial of certiorari) (arguing that *Chevron* impermissibly places the power to "interpret[] and expound[] upon the laws" in the hands of federal agencies, rather than courts (quoting Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 119 (2015))).

252. Super, *supra* note 249, at 1409.

253. *See id.* at 1380.

254. *Id.*

255. *See* LISTOKIN, *supra* note 189, at 27-30. *See generally* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1936) (challenging the belief that capitalist economies tend toward full employment in equilibrium).

tradeoff suggests that a desirable heuristic may be to split the difference—a sort of countercyclical judicial review. Judicial intervention between two crises can both reap the benefits of the decreased informational costs of a "delayed" decision and provide upfront certainty for future crises.[256] Moreover, deliberation between the Fed and Congress outside the urgency of a crisis will likely produce better outcomes than revising legislation during a recession.[257]

There is some evidence that the normal pace of litigation is well-suited for this type of countercyclical review. For example, the two major lawsuits in the aftermath of the Great Recession were both filed in November 2011—well after the worst of the crisis had passed (though well before full economic recovery).[258] In the Southern District of New York case, the district court's decision came down a year later,[259] and the Second Circuit opinion did not come out until January 2014.[260] In the Federal Circuit, the process was even further delayed: the Federal Claims Court did not rule on the matter until June 2015,[261] and the Federal Circuit did not issue its opinion until May 2017.[262]

256. From the perspective of future crises, one of the primary benefits of countercyclical judicial review is the opportunity for the Fed to petition Congress to revise its statutory authority in advance of the next crisis. As I argue in Section III.B.2, these additional touchpoints provide an opportunity for deliberation, resulting in better substantive outcomes and increased democratic legitimacy.

257. For example, in the throes of the COVID-19 pandemic and resulting economic downturn, Congress passed multiple rounds of emergency stimulus relief. Tucked in one of these relief bills was a limitation on the Fed's emergency-lending programs that Congress had previously approved. The final language was limited, but Congress had considered a much more significant alteration to the Fed's emergency-lending authority: Senator Pat Toomey, a Republican representing Pennsylvania, initially proposed language that would bar the Fed from "re-establishing emergency lending programs" that had been backed by the CARES Act or from creating "similar" programs in the future. *See* Emily Cochrane & Jeanna Smialek, *Lawmakers Resolve Fed Dispute as They Race to Close Stimulus Deal*, N.Y. TIMES (Dec. 19, 2020), https://www.nytimes.com/2020/12/19/us/politics/stimulus-deal-congress.html [https://perma.cc/XA4A-MKCF]. The entire debate occurred over the course of a few days, during which other aspects of the COVID-19 relief bill consumed most congressional actors' time. *Id.* This is not the ideal environment in which to deliberate on the scope of the Fed's authority.

258. Complaint, Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y., 906 F. Supp. 2d 202 (S.D.N.Y. 2012) (No. 11-civ-8422) (filed Nov. 21, 2011); Complaint, Starr Int'l Co. v. United States, 121 Fed. Cl. 428 (2015) (No. 11-779) (same).

259. *Starr Int'l Co.*, 906 F. Supp. 2d 202 (issued Nov. 16, 2012).

260. Starr Int'l Co. v. Fed. Rsrv. Bank of N.Y., 742 F.3d 37 (2d Cir.) (issued Jan. 29, 2014), *cert. denied*, 573 U.S. 947 (2014).

261. *Starr Int'l Co.*, 121 Fed. Cl. 428 (issued June 15, 2015).

262. Starr Int'l Co. v. United States, 856 F.3d 953 (Fed. Cir. 2017) (issued May 9, 2017). Certiorari was denied a year later. Starr Int'l Co. v. United States, 138 S. Ct. 1324 (2018).

The natural pace of litigation, then, can help ensure that major decisions do not come down in the throes of an economic crisis. However, the above delays arose partly because the plaintiffs did not file suit until late 2011. Imagine that the plaintiffs had filed their lawsuit challenging the AIG bailout on September 16, 2008—the day of the bailout—asking for a temporary restraining order or preliminary injunction. Under countercyclical review, how should a court handle such a case? The doctrines of emergency relief are helpful guides. Ordinarily, a party seeking a preliminary injunction must clearly show four factors: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."[263]

Concerning irreparability, emergency equitable relief is rarely warranted in cases involving financial harm, as legal remedies (namely, damages) can adequately compensate the victim after the fact.[264] A preliminary injunction would therefore not be appropriate in damages actions concerning Fed policies. But damages actions concerning the Fed are few and far between; though enterprising litigants have sometimes sought damages in cases concerning Fed policies,[265] sovereign immunity usually bars them.[266]

In cases where damages are not available, plaintiffs have a strong argument of irreparable harm: any financial injury will be left uncompensated. But courts can still deny preliminary injunctions under prongs three and four (which merge when the government is the nonmoving party)[267] by granting deference to the government's position that the challenged policy is in the public interest.[268] Such

263. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

264. *See* Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982).

265. *See, e.g.*, *supra* Section I.B.2 (describing *Starr Int'l Co.*, 121 Fed. Cl. 428, a Takings Clause claim).

266. *See supra* notes 85-89 and accompanying text.

267. *See* Nken v. Holder, 556 U.S. 418, 435 (2009). This is because the "balance of the equities" prong—which asks the court to consider the "balance of hardships between the plaintiff and defendant," eBay Inc. v. MercExchange LLC, 547 U.S. 388, 391 (2006)—applies somewhat awkwardly to suits against the government. When the government is the nonmoving party, the relevant question is not how the agency qua agency will be harmed by an injunction, but whether its aims will be undermined. In suits against the government, then, the focus of prong three moves from the parties themselves to an injunction's effect on *nonparties*, the domain of the public-interest prong.

268. Deference to the government's evaluation of the public interest is appropriate because the political branches are better equipped to determine what is in the "public interest" than judges. *See* Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1987) ("[F]ederal judges—who have no constituency—have a duty to respect legitimate policy choices made by deference is particularly appropriate when it comes to Fed policies in times of crisis. A single preliminary injunction could greatly destabilize a Fed program, as the ripples will reverberate throughout the financial sector. And in times of crisis, economic actors must feel confident that Fed programs will stick. The interconnectedness of our financial system, then, weighs strongly against preliminary injunctive relief. The complaining party may suffer real harm, but the stability of the nation's economy rests in the balance.

By the time the case reaches the merits, however, the worst of the crisis will likely have passed. Still, promptly filed litigation may bring judicial involvement too early. Courts can then decline review under the logic of *Raichle*, recognizing the inappropriateness of judicial intervention when conditions on the ground are still evolving.[269] In any event, the plaintiffs may not yet be able to establish standing: financial conditions change swiftly during crises, making it more difficult to demonstrate injury in fact. And in the most extreme cases, the doctrine of equitable discretion could provide courts an additional way to dismiss early cases.[270] But importantly, under any of these approaches, timing is the dispositive issue. Judicial review may be available in the future—it is just not appropriate now.[271]

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those who do. The responsibility for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones . . . ."). The Second Circuit has expressly linked this logic from *Chevron* to the question of whether injunctive relief would be in the public interest. *See* SEC v. Citigroup Glob. Mkts., Inc., 752 F.3d 285, 296-97 (2d Cir. 2014) ("What the district court may not do is find the public interest disserved based on its disagreement with the SEC's decisions on discretionary matters of policy . . . .").

269. Raichle v. Fed. Rsrv. Bank of N.Y., 34 F.2d 910, 915 (2d Cir. 1929).

270. This approach would frame the dispute as a separation-of-powers issue, somewhat akin to the political-questions doctrine.

271. When it comes to crafting relief on the merits, injunctive relief may be appropriate. After all, where damages are unavailable, plaintiffs should be able to get some remedy for unlawful agency action, and the Fed should not be permitted to carry on unlawful programs. The potential for this type of remedy, even well after the worst of a crisis has passed, may still be destabilizing ex ante. Fortunately, courts have considerable flexibility in crafting such equitable remedies. *See* Hecht Co. v. Bowles, 321 U.S. 321, 329-30 (1944). Courts therefore should do their best to craft remedies in a way that is purely forward looking. For example, if a court finds that a certain Fed lending program is unlawful, the court could enjoin the Fed from entering into any new loans under the program, while permitting it to continue to serve loan contracts into which it already entered. The effect of such a remedy would primarily be on the next crisis, and the judgment would encourage the Fed to seek additional authorization from Congress in advance of a future crisis, if it believes it needs this power. *See supra* Section III.B.2.

4. *Permit Experimentation Within the Fed's Locus of Expertise*

Finally, courts should permit more experimentation when the Fed is acting within its locus of expertise. This guideline harkens back to the Fed-specific deference from Justice Rutledge's *Agnew* concurrence[272] and forms the basis for the court's strong deference in *Raichle*.[273] But this principle raises the question: just what is the locus of the Fed's expertise? Many scholars and commentators have construed this area narrowly, advising the Fed to "stay in [its] lane," so to speak.[274] Such a narrow understanding, however, ignores how endogenous processes foster new agency expertise.[275] The locus of the Fed's expertise can, and should, be expected to change over time—through, for example, "the creation of academic research departments, experimentation through market participation and internal operations, embedded supervision, trial-and-error market interventions in crisis, and creative structures of congressional oversight."[276] A narrow approach, then, will be overly constraining and halt the important information-producing mechanisms on which the Fed has long relied to satisfy its dual mandate.[277]

But a pragmatic understanding of agency expertise, which recognizes the importance of creativity and experimentation, does not mean that anything goes. As Conti-Brown and Wishnick argue, though the Agency should push its experimentation "to the edge" of legality in the face of complex problems, doing so requires an understanding of what "the edge" is.[278] Those authors advocate for the Fed, itself, to articulate the outer bounds of its authority. But it is unlikely that the Agency will do so absent some judicial check. Therefore, courts can confer legitimacy on Fed experimentation by requiring the Fed to articulate reasonable boundaries of its power—and perhaps themselves articulating those boundaries where the Fed fails to do so.

Climate change, again, provides a helpful illustration. Including climate-change induced scenarios in stress tests, for example, would be well within the

272. Bd. of Governors of Fed. Rsrv. Sys. v. Agnew, 329 U.S. 441, 450-51 (1947) (Rutledge, J., concurring); *see supra* notes 114-118 and accompanying text.

273. *See supra* notes 29-43 and accompanying text.

274. Conti-Brown & Wishnick, *supra* note 231, at 641 (quoting *Powell Defends Aggressive Fed Actions*, BOND BUYER (May 29, 2020, 12:42 PM EDT), https://www.bondbuyer.com/articles/we-crossed-a-lot-of-red-lines-that-had-not-been-crossed-before-said-federal-reserve-chairman-jerome-powell [https://perma.cc/S2ZB-XSGH]).

275. *Id.* at 642.

276. *Id.*

277. *Id.* at 649 (noting that "complex problems . . . likely have little to do with past experience" and thus will require "value-laden experimentation").

278. *Id.* at 654.

Fed's expertise of analyzing the financial system's readiness for potential macroeconomic shocks, as would imposing regulations on the basis of such tests' results.[279] But conditioning future liquidity programs on a firm's carbon footprint is much closer—if not past—the edge of the Fed's expertise.[280] While the Fed's programs frequently benefit certain firms over others, these types of value judgments are not the decisions that the Fed is best suited to make; they are better handled by democratic, deliberative bodies. Indeed, the Fed often goes out of its way to stress the importance of *not* "picking winners and losers" in the economy.[281] Courts, then, should be more deferential to the Fed in its implementation of the former policy, while subjecting the latter to greater scrutiny. This does not mean that any experimental Fed activity is unlawful; rather, it means that the Fed must be able to justify wading into an area outside its core expertise.

This judicial calculus resembles courts' historical approach to reviewing certain Fed regulatory actions. Consider two cases brought under section 3 of the BHCA, which required Fed preapproval of bank mergers. Under that provision, the Fed had considerable discretion to deny a merger: it could do so whenever it found that the merger would "expand the size . . . of the bank holding company system" beyond what was consistent with "the public interest."[282] In *Northwest Bancorporation*, the Eighth Circuit upheld the Fed's denial of an acquisition,[283]

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279. *Id.* at 689-91; *see* Ann Saphir, *Fed's Powell Signals He's Open to Using Climate Stress Scenarios*, REUTERS (July 15, 2021, 1:12 PM EDT), https://www.reuters.com/business/sustainable-business/feds-powell-signals-hes-open-using-climate-stress-scenarios-2021-07-15 [https://perma.cc/9DQJ-3UEY].

280. Other central banks have begun implementing this type of policy. *See, e.g.*, Hanna Ziady, *Fighting Climate Change Is Now a Job for the Bank of England*, CNN (Mar. 4, 2021, 9:40 AM ET), https://www.cnn.com/2021/03/03/investing/bank-of-england-climate-mandate/index.html [https://perma.cc/GW8J-XV3H].

281. *Federal Reserve Chair Jerome Powell Testifies on the State of the Economy*, C-SPAN, at 04:18 (July 10, 2019), https://www.c-span.org/video/?c4862326/user-clip-rashida-tlaib-fed-chair-jerome-powell [https://perma.cc/W8KJ-RK37] (statement of Jerome Powell, Chairman, Federal Reserve). Whether the Fed is successful in this stated goal is another matter. *See, e.g.*, Stein, *supra* note 233, at 126-28; Martin H. Wolfson, *Federal Reserve Priorities and the Influence of Capital: The Evolution of Monetary Policy in the Postwar Period*, *in* BANKING, MONETARY POLICY AND THE POLITICAL ECONOMY OF FINANCIAL REGULATION: ESSAYS IN THE TRADITION OF JANE D'ARISTA 34, 36 (Gerald A. Epstein, Tom Schlesinger & Matías Vernengo eds., 2014); Alina K. Bartsher, Moritz Kuhn, Moritz Schularick & Paul Wachtel, *Monetary Policy and Racial Inequality*, FED. RSRV. BANK N.Y. (June 2021), https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr959.pdf [https://perma.cc/528R-YTRR].

282. Nw. Bancorporation v. Bd. of Governors of the Fed. Rsrv. Sys., 303 F.2d 832, 835 (8th Cir. 1962) (quoting 12 U.S.C. § 1842(c) (1958)).

283. *Id.*

while in *Western Bancshares* the Tenth Circuit set aside the Fed's denial.[284] The cases seem to have turned on whether the merger evaluation fell within the Fed's zone of expertise. In *Northwest Bancorporation*, the Fed argued that the merger would unduly concentrate the banking industry in Minnesota—a judgment call that was uncontroversially within its expertise.[285] But in *Western Bancshares*, the Fed based its denial on the stock price of the acquisition.[286] As recounted in the court's opinion, the Fed's argument failed to articulate any limiting principle on its discretion under the BHCA to deny a merger as against "the public interest."[287] The court balked, and opted to provide a narrowing construction itself—with the Fed's action on the wrong side of the line.[288] Given that the Fed did not propose any boundary on its expertise, this was likely the right outcome. Had the Fed instead explained why acquisition stock prices fell within its mandate while other considerations did not, the decision should perhaps have come out the other way.

CONCLUSION

There are good reasons to be wary of judicial review of the Federal Reserve. Economic conditions change rapidly, particularly in times of crisis. And judges are ill-equipped to make the kinds of economic and value judgments that Fed decision-making implicates. But courts cannot simply ignore the Fed—nor have they. Judicial review of the Fed, though rare, has continually occurred throughout the Fed's history. Courts have largely applied distinct doctrines of review depending on the role that the Fed embodies in a given dispute.

In our contemporary economy, this categorical approach makes little sense. As a result, the current approach to judicial review may actually distort Fed decision-making and impede transparency. Further, given the changing composition of the Court, a more hands-on approach to review may be coming, whether we like it or not. With this in mind, I have advocated for a pragmatic, functional approach to judicial review that takes democratic legitimacy seriously, while also recognizing the vital role that the Fed plays in our contemporary economy. A

284. W. Bancshares, Inc. v. Bd. of Governors of the Fed. Rsrv. Sys., 480 F.2d 749, 749-50 (10th Cir. 1973).

285. *Nw. Bancorporation*, 303 F.2d at 838-41.

286. Specifically, the Fed objected to the structure of the acquisition, in which the minority shareholders received less per share than majority shareholders. *W. Bancshares*, 480 F.2d at 752. The Fed argued that such disparate treatment was not in the public interest. *Id.* at 752-53.

287. *Id.*

288. *Id.* at 752.

more just economy requires a more deliberative Fed. And, done correctly, judicial involvement can spur such deliberation.