

## THE FED UNDER FIRE

Pieterjan Heynen\*

*The Global Financial Crisis and the COVID-19 pandemic fundamentally transformed the Federal Reserve System (“the Fed”), expanding its remit and increasing its powers. Financial stability concerns turned into a pivotal and ubiquitous policy priority, which has inflated the level of discretion enjoyed by the Fed. While these crises have left the Fed more powerful and in charge of more tasks than ever before, its actions have also generated severe backlash and triggered mounting scrutiny. Recently, the Trump Administration has launched several attempts to rein in the U.S. central bank, for example by continued threats to remove the Fed Chair. Bolstering the Fed’s political accountability at the expense of its independent status carries major risks, however. Relief should instead be sought in Congressional—not Presidential—action to entrench the Fed’s independent status more clearly in the Federal Reserve Act. At the same time, such a statutory amendment could punctually restrict Fed discretion in policy areas that have sparked controversy but that do not touch upon the Fed’s core powers to conduct monetary policy and regulate the banking system. In this way, Congress can put the Fed back on track, reconciling its independent status with appropriate levels of discretion and accountability.*

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\* Ph.D. Researcher, Financial Law, KU Leuven; Fellow, Research Foundation Flanders; LL.M., Harvard Law School, 2025. The author is most thankful to Howell E. Jackson, who supervised a first version of this article in the context of the Harvard Law School LL.M. program and who provided invaluable feedback and advice. The author is also grateful to Veerle Colaert for further feedback and Daniel K. Tarullo for additional suggestions and insights. The article has also greatly benefited from comments by participants of the Financial Law Research Days Leuven – Nijmegen, organized by Veerle Colaert and Danny Busch in June 2025. Materials are up to date as of January 15, 2026.

INTRODUCTION . . . . .	348
I. TRANSFORMATION OF THE FED. . . . .	355
A. The Renewed Importance of Financial Stability . . . . .	355
B. Changes to the Fed’s Legal Framework . . . . .	360
1. From Conventional to Unconventional Monetary Policy . . . . .	360
2. Changes to the Fed’s Regulatory and Supervisory Remit . . . . .	364
C. Implications for Independence, Accountability, and Discretion . . . . .	367
1. Increased Discretion . . . . .	371
2. Outdated Accountability . . . . .	375
3. Jeopardized Independence . . . . .	381
II. AUGMENTED SCRUTINY AND POLITICAL BACKLASH . . . . .	383
A. The Fed and Congress . . . . .	383
B. The Fed and the President . . . . .	384
C. The Administrative State at Stake . . . . .	396
III. A CALL FOR CONGRESSIONAL ACTION . . . . .	399
A. The Fed as an Agent of Congress . . . . .	399
B. Entrenching Fed Independence . . . . .	401
C. Circumscribing Discretion and Enhancing Accountability . . . . .	406
CONCLUSION . . . . .	410

#### INTRODUCTION

The past fifteen years have proven turbulent for the U.S. central bank, the Federal Reserve System (“the Fed”).<sup>1</sup> During both the Global Financial Crisis of 2007–08 (“GFC”) and the COVID-19 pandemic, the Fed found itself in the middle of the storm and was transformed into one of the most important actors managing the crises.<sup>2</sup> As a result, the Fed’s

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1. The Federal Reserve System does not refer to one entity, but rather comprises several entities, including the Board of Governors, the Fed Chair and Vice Chairs, and the Federal Open Market Committee, which consists of the Board and the regional reserve bank presidents. For a clear overview, see PETER CONTI-BROWN & SIMON JOHNSON, PETERSON INST. FOR INT’L ECONS., *GOVERNING THE FEDERAL RESERVE SYSTEM AFTER THE DODD-FRANK ACT 1–10* (2013). If not clarified explicitly in this article, “the Fed” refers to the overarching Federal Reserve System.

2. See Donald L. Kohn, Vice Chairman, Bd. of Governors of the Fed. Rsrv. Sys., Speech at Carleton University in Ottawa, Canada: *The Federal Reserve’s Policy Actions During the Financial Crisis and Lessons for the Future* (May 13, 2010), <https://www.federalreserve.gov/newsevents/speech/kohn20100513a.htm> [<https://perma.cc/VXP4-25BG>] (“The financial and economic crisis that started in 2007 tested central banks as they had not been tested for many decades.”); MARC LABONTE, CONG. RSCH. SERV., R46411, *THE FEDERAL RESERVE’S RESPONSE TO COVID-19: POLICY ISSUES* (2021) (providing a detailed overview of Fed initiatives launched during the pandemic). In his book, Mohamed A. El-Erian even claims that central banks were “the only game

“remit,” referring to the totality of tasks it carries out, has expanded significantly over the past decade. One common theme underlies all these changes to the Fed’s remit: the rising importance of financial stability as a policy goal, or in other words, the ability of the financial system to absorb and withstand crises and shocks.<sup>3</sup> Indeed, the various crises time and again forced the central bank to act with a view towards preserving the stability of the financial system.<sup>4</sup>

The expansion of the Fed’s remit has prompted different reactions. Some have been enthusiastic about the increased crisis management capacities of the Federal Reserve and even see a role for the Fed to play in a wide range of policy areas, such as climate change.<sup>5</sup> Others have voiced calls for further expansion of the Fed’s remit specifically in regards to the development of the Digital Dollar, the U.S. version of a Central Bank Digital Currency.<sup>6</sup> On the other hand, some have

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in town” during the financial crisis of 2008, since governments often were too divided and too slow to be effective crisis managers. *See generally* MOHAMED A. EL-ERIAN, *THE ONLY GAME IN TOWN: CENTRAL BANKS, INSTABILITY, AND AVOIDING THE NEXT COLLAPSE* (2016).

3. For this definition, see DOUGLAS ARNER, *FINANCIAL STABILITY, ECONOMIC GROWTH, AND THE ROLE OF LAW* 72–73 (2009).

4. *See* Juliana B. Bolzani, *Independent Central Banks and Independent Agencies: Is the Fed Super Independent?*, 22 U.C. DAVIS BUS. L.J. 196, 196 (2022) (“[F]ollowing the 2008 financial crisis, central banks have taken over responsibilities that go far beyond conducting monetary policy to fight inflation. . . . [T]hey have become guardians of financial stability, with emphasis in their role as macroprudential regulators and supervisors.”); Kathryn Judge, *Three Discount Windows*, 99 CORNELL L. REV. 795, 797 (2014) (“A core function of the Federal Reserve System (the Fed) is to promote financial stability.”); Paul Wachtel & Mario I. Blejer, *A Fresh Look at Central Bank Independence*, 40 CATO J. 105, 106 (2020) (“[T]he financial crisis of 2007–09 brought a renewed emphasis on the lender-of-last-resort function and the use of central bank lending to ensure financial stability.”).

5. *See* John Crawford, *A Threshold Test for Fed Activism*, 16 WM. & MARY BUS. L. REV. 1, 3 (2024) (“Some propose expanding the Fed’s remit to help address societal problems like racial inequality and climate change.”); David T. Zaring & Jeffery Y. Zhang, *The Federal Reserve’s Mandates*, 108 MINN. L. REV. 330, 336 (2023) (“[B]ecause of the Federal Reserve’s numerous successes, lawmakers and others have suggested that our central bank adopt new mandates to deal with problems outside of its core mission of maintaining economic stability.”); PATRICK BOLTON ET AL., *BANK FOR INT’L SETTLEMENTS, THE GREEN SWAN: CENTRAL BANKING AND FINANCIAL STABILITY IN THE AGE OF CLIMATE CHANGE* 1 (2020) (Fr.) (calling the Fed to act on climate change); Anne Perrault & Elyse Schupak, *Opinion, Out of Touch: How Powell’s Fed Is Avoiding Climate Responsibility*, GREEN CENT. BANKING (Aug. 9, 2024), <https://greencentralbanking.com/2024/08/09/out-of-touch-jerome-powell-fed-climate-responsibility/> [<https://perma.cc/574Z-U5KW>] (same).

6. *See* Josh Lipsky & Ananya Kumar, *The Fed Is Falling Behind as Other Central Banks Leap Ahead on Digital Currencies*, ATL. COUNCIL (Jan. 25, 2024), <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-fed-is-falling-behind-as-other-central-banks-leap-ahead-on-digital-currencies/> [<https://perma.cc/WX9T-XUA8>] (urging the Fed to take steps towards the development of a Central Bank Digital Currency).

expressed concerns about the expansion of central banks' remits. In a 2022 special issue, *The Economist* argued that central banks should be wary of being struck by "the curse of being too competent," a situation in which they are assigned ever more responsibilities, distracting them from their core tasks.<sup>7</sup> Legal scholars have similarly expressed doubts about expanding the remits of central banks.<sup>8</sup>

The upheavals of the past decade and the ensuing expansion of the Fed's powers have drastically rearranged the balance between the Fed's independence, accountability, and discretion.<sup>9</sup> These are three fundamental legal principles which define and limit the Fed's powers. Before the GFC, a delicate relationship had arisen between these principles, in which limited accountability and firm independence were counterbalanced by restricted levels of discretion.<sup>10</sup> As a result of sweeping crisis interventions, the Fed now enjoys much higher levels of discretion, which have consequently given rise to questions about the Fed's restricted accountability arrangements and strong independent status.<sup>11</sup> Indeed, the expanded remit of the Fed and its powerful actions did not come without repercussions. In recent years, its actions have elicited severe political backlash. Currently, the second Trump Administration is in the process of employing a range of instruments to restrict the Fed's discretion and accountability.<sup>12</sup> However, measures

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7. *The Curse of Being Too Competent*, *ECONOMIST* (Apr. 20, 2022), <https://www.economist.com/special-report/2022/04/20/the-curse-of-being-too-competent> [https://perma.cc/ZET4-F4LJ].

8. See, e.g., Carola C. Binder & Christina P. Skinner, *The Legitimacy of the Federal Reserve*, 28 *STAN. J.L. BUS. & FIN.* 1, 3 (2023) ("[T]he Fed is too valuable to economic and financial stability to have its credibility undermined by veering off its track."); Lev Menand, *The Logic and Limits of the Federal Reserve Act*, 40 *YALE J. ON REGUL.* 197, 206 (2023) ("The Fed's growing footprint also raises questions about its ability to carry out its activities effectively and equitably and to do so without undermining the vitality of the democratic process."). Skinner refers to the phenomenon of central banks' expanding remits as "central bank activism," which risks undermining the legitimacy of central banks and eroding their independence. See Christina Parajon Skinner, *Central Bank Activism*, 71 *DUKE L.J.* 247 (2021).

9. See Binder & Skinner, *supra* note 8 (describing how the Fed's expanding remit has jeopardized its legitimacy, which, in turn, endangers its independence from the President).

10. See *infra* section I.C.

11. See *infra* section I.C; see also Andrew T. Levin & Christina Parajon Skinner, *Central Bank Oversight: Assessing the Fed's Accountability to Congress*, 77 *VAND. L. REV.* 1769, 1775–76 (2024) (describing how the Fed's powers have expanded over the past decades, while its independent status and accountability arrangements remained unchanged).

12. On one hand, the Trump Administration has taken a series of initiatives to curtail Fed independence, including an attempt to remove Fed Governor Lisa Cook from office, ongoing threats to remove Fed Chair Powell, and a proposal to install a "shadow Chair" at the Fed. See Claire Jones, *Can the Fed Stay Independent Under*

to subject the Fed to enhanced scrutiny by the political branches carry major risks to the Fed's independence and effectiveness, and therefore risk turning out to be self-defeating.

As a result, the Federal Reserve currently finds itself in a peculiar situation. On the one hand, its remit has expanded spectacularly compared to fifteen years ago, in ways it might not have imagined at the time. This has turned the Fed into one of the most powerful federal agencies.<sup>13</sup> On the other hand, due to these developments and given its new role as omnipresent crisis actor, it is subject to severe criticism and scrutiny by the political branches. These are certainly no easy waters for a central bank to navigate.

How can the Fed find a way out of this deadlock? Answering that question, this Article concludes that lawmakers must strike a new balance between the central bank's independence, accountability, and discretion. This new equilibrium will not be met by merely increasing political accountability or eroding independence—the strategy currently being employed by the second Trump Administration. If redemption is to be found, it must come from Congress. Indeed, to safeguard Fed independence, Congress should step up and entrench the central bank's independent status more clearly in the Federal Reserve Act (“FRA”).<sup>14</sup> At the same time, a legislative amendment presents an opportunity to punctually restrict Fed discretion in policy areas that have sparked

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*Trump?*, FIN. TIMES (July 10, 2025), <https://www.ft.com/content/3b525be4-e83b-4bea-b206-c3afe1c8e57c> [<https://perma.cc/XE7E-N5QM>]; Stefania Palma & Claire Jones, *Supreme Court Blocks Donald Trump from Immediately Firing Federal Reserve's Lisa Cook*, FIN. TIMES (Oct. 1, 2025), <https://www.ft.com/content/0430b348-d7da-439c-aa31-f8c0fedec9d3> [<https://perma.cc/S453-95DU>]. On the other hand, the Fed's regulatory powers have also been restricted by the Administration, which has issued an array of Executive Orders seeking to dissuade agencies from adopting new rules. See Richard J. Pierce, Jr., *On Direct Exercises of Presidential Power*, REGUL. REV. (May 5, 2025), <https://www.theregreview.org/2025/05/05/pierce-on-direct-exercises-of-presidential-power/> [<https://perma.cc/CF4M-BWWK>]; Lisa A. Robinson, *Regulatory Benefit-Cost Analysis Under the Trump Administration*, REGUL. REV. (May 6, 2025), <https://www.theregreview.org/2025/05/06/robinson-regulatory-benefit-cost-analysis-under-the-trump-administration/> [<https://perma.cc/7N7S-3748>].

13. See Peter Conti-Brown, Yair Listokin & Nicholas R. Parrillo, *Towards an Administrative Law of Central Banking*, 38 YALE J. ON REGUL. 1, 1 (2021) (“[T]he Federal Reserve is arguably the most powerful administrative agency in government.”); Benjamin Dinovelli, *The Federal Reserve Exception 6* (Vanderbilt L. Rsch. Paper No. 5277476, 2025) (“The Fed is one of the most powerful agencies ever to exist.”); Kathryn Judge, *The Federal Reserve: A Study in Soft Constraints*, 78 LAW & CONTEMP. PROBS. 65, 65 (2015) (“[T]he Fed is uniquely powerful among federal agencies.”). Furthermore, the Fed Chair has been referred to as the “second most powerful person in Washington.” David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 LAW & CONTEMP. PROBS. 157, 157 (2015).

14. Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251 (1913).

controversy but that do not touch upon the Fed's core powers to conduct monetary policy and regulate the banking system. After all, the Fed is an agent of Congress, which has delegated part of its authority to the central bank to carry out a number of specific tasks.<sup>15</sup> Accordingly, it should be the job of Congress to put the Fed back on track and reconcile its independence with appropriate levels of discretion and accountability.

To bolster its normative proposition, this Article will compare the Federal Reserve with its European counterpart, the European Central Bank ("ECB"). Just like the Fed, the ECB has a wide range of tasks.<sup>16</sup> It was established in 1998 to conduct the monetary policy of the euro currency.<sup>17</sup> According to the European Treaties, the ECB is an official Institution of the European Union ("EU"), endowed with a strong independent status,<sup>18</sup> and is equivalent to other EU institutions, such as the European Commission, the European Parliament, and the Council.<sup>19</sup> Its main field of action is geographically limited to the Eurozone, which covers the EU Member States which have adopted the euro as their official currency. The ECB does not fulfill its tasks alone, but within the framework of the Eurosystem, which is composed of the ECB and the twenty-one National Central Banks ("NCBs") representing each EU Member State with the euro as its official currency.<sup>20</sup> The Eurosystem is governed and presided over by the decision-making bodies of the

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15. Rosa María Lastra & Christina Parajon Skinner, *Sustainable Central Banking*, 63 VA. J. INT'L L. 397, 434 (2023) ("[T]he Fed is an agent of Congress, not the President, and can legitimately only pursue the goals established by the legislature regardless of a president's priorities."); Skinner, *supra* note 8, at 254 ("[The Fed Board] makes policy and regulation based on authority delegated to it by the U.S. Congress.").

16. At the same time, major differences between the Federal Reserve and the ECB remain. For instance, while the ECB is only a banking supervisor, the Fed combines supervision with full-fledged regulatory powers over the banking industry.

17. Consolidated Version of the Treaty on the Functioning of the European Union art. 127, Oct. 26, 2012, 2012 O.J. (C 326) 102 [hereinafter TFEU]. The TFEU mentions only a few other tasks which are closely related to monetary policy, such as holding and managing foreign reserves of the Member States and conducting foreign exchange operations. *Id.* art. 127(2).

18. *Id.* arts. 130, 282(3).

19. Consolidated Version of the Treaty on the European Union, art. 13, Oct. 26, 2012, 2012 O.J. (C 326) 22 [hereinafter TEU]. As an EU Institution, the ECB derives its powers directly from the Treaties and not by virtue of a delegation of power from other EU Institutions. See Chiara Zilioli & Phoebus Athanassiou, *The European Central Bank*, in OXFORD PRINCIPLES OF EUROPEAN UNION LAW VOLUME I 610, 611 n.2 (Robert Schütze & Takis Tridimas eds., 2018) ("[B]ecause the ECB (as well as the Eurosystem and the ESCB) are creations of the Treaty, the powers they enjoy are powers conferred by primary law, granted thereto by the Treaty rather than delegated thereto by other Union institutions.").

20. TFEU, *supra* note 17, art. 282(1). Apart from the Eurosystem, the ECB and the NCBs also work together in the framework of the European System of Central Banks ("ESCB"), which comprises the ECB and all twenty-seven NCBs of EU Member States.

ECB, which are the Governing Council and the Executive Board.<sup>21</sup> The Governing Council is the most powerful actor, as it formulates and defines the monetary policy of the euro.<sup>22</sup> The implementation and execution of these decisions is subsequently left to the Executive Board and the NCBs.<sup>23</sup> Article 127 of the TFEU formulates the ECB's monetary policy objectives. First and foremost, it must maintain "price stability," which has been defined more concretely as the pursuit of "2% inflation over the medium term."<sup>24</sup> Furthermore, the Treaties allow the ECB to pursue secondary objectives by contributing to "general economic policies in the Union."<sup>25</sup> Importantly, the ECB can only take measures with a view to further its secondary objective to the extent they are "[w]ithout prejudice" to price stability.<sup>26</sup>

Like the Fed's transformation, in the wake of the GFC, the ECB was vested with several new tasks. In 2010, the ECB became involved in the management of the European Systemic Risk Board ("ESRB"), an EU agency responsible for monitoring financial stability and signaling potential build-ups of systemic risk.<sup>27</sup> In 2013, the ECB became responsible for micro-prudential banking supervision in the Eurozone as part of the Single Supervisory Mechanism ("SSM"), a network of

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However, most of the ECB's tasks are actually conducted by the Eurosystem, which can be considered the operational limb of the ESCB.

21. *Id.* arts. 129(1), 282(2); Protocol (No. 4) on the Statute of the European System of Central Banks and of the European Central Bank, art. 8, 2016 O.J. (C 202) 230 [hereinafter ECB Statute]. The Governing Council is composed of the members of the Executive Board and the NCB Governors of all Eurozone Member States, while the Executive Board comprises the ECB President, Vice President, and four other high-level European officials. *Id.* arts. 10–11.

22. For an illustration of the ECB's dominance of the Eurosystem framework, see ECB Statute, *supra* note 21, art. 14.3 which empowers the Governing Council to "take the necessary steps to ensure compliance with the guidelines and instructions of the ECB."

23. *Id.*

24. *Two Per Cent Inflation Target*, EUR. CENT. BANK, <https://www.ecb.europa.eu/mopo/strategy/pricestab/html/index.en.html> [https://perma.cc/B8KM-TCMV].

25. TFEU, *supra* note 17, art. 127(1).

26. *Id.*

27. Regulation 1092/2010 of the European Parliament and of the Council of 24 Nov. 2010, on European Union Macro-Prudential Oversight of the Financial System and Establishing a European Systemic Risk Board, 2010 O.J. (L 331) 1 [hereafter ESRB Regulation]; Council Regulation 1096/2010 of 17 Nov. 2010, Conferring Specific Tasks upon the European Central Bank Concerning the Functioning of the European Systemic Risk Board, O.J. (L 331) 162 [hereafter ECB-ESRB Regulation]. The ECB is involved in the ESRB in several ways. Among other things, the ESRB is governed by a General Board, which is chaired by the ECB President and of which the Vice-Chair is selected from the members of the ECB's General Council. Second, the ESRB Secretariat is organized and run by ECB staff. *See* ESRB Regulation, art. 5(1); ECB-ESRB Regulation, art. 2.

national banking supervisors of Eurozone Member States coordinated and led by the ECB.<sup>28</sup> Finally, the ECB played an active role during the European sovereign debt crisis of 2010 to 2015. As a member of the infamous Troika, an informal body which also comprised the European Commission and the IMF, the ECB co-negotiated and monitored financial assistance programs for distressed Eurozone Member States.<sup>29</sup>

Moreover, the ECB also extensively turned to measures of unconventional monetary policy during the GFC. While it proceeded more carefully than the Fed with regard to such measures, it eventually launched a wide array of crisis interventions. For instance, the ECB lowered its interest rates slightly under zero percent, a measure the Fed has never taken.<sup>30</sup> By reducing interest rates under zero percent, banks were encouraged to invest their liquid assets and to lend money at a low rate instead of parking it at the central bank, increasing the amount of money in the economy and thus spurring inflation.<sup>31</sup> Another adjustment eased the eligibility conditions for collateral.<sup>32</sup> To protect the ECB from credit risk, banks must pledge “adequate collateral” when they enter into open market operations.<sup>33</sup> By easing eligibility requirements, a wider variety of assets can be seized in case of non-performance, which facilitates banks’ access to central bank liquidity.<sup>34</sup> A final adjustment

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28. Council Regulation 1024/2013 of 15 Oct. 2013, Conferring Specific Tasks on the European Central Bank Concerning Policies Relating to the Prudential Supervision of Credit Institutions, O.J. (L 287) 63 [hereafter SSM Regulation]. EU Member States outside of the euro area have an option to join the SSM by entering into a regime of close cooperation. *Id.* art. 7.

29. See generally Treaty Establishing the European Stability Mechanism, Feb. 2, 2012, 2012 O.J. (C 91) 1. For a detailed account of the ECB’s and the Troika’s actions during the sovereign debt crisis, see generally VESTERT BORGER, THE CURRENCY OF SOLIDARITY: CONSTITUTIONAL SOLIDARITY DURING THE EURO CRISIS 261–89 (2020); Paul Dermine, *Out of the Comfort Zone? The ECB, Financial Assistance, Independence and Accountability*, 26 MAASTRICHT J. EUR. & COMPAR. L 108 (2019); KLAUS TUORI, THE EUROPEAN CENTRAL BANK AND THE EUROPEAN MACROECONOMIC CONSTITUTION: FROM ENSURING STABILITY TO FIGHTING CRISIS (2022).

30. Compare Key ECB Interest Rates, EUR. CENT. BANK, [https://www.ecb.europa.eu/stats/policy\\_and\\_exchange\\_rates/key\\_ecb\\_interest\\_rates/html/index.en.html](https://www.ecb.europa.eu/stats/policy_and_exchange_rates/key_ecb_interest_rates/html/index.en.html) [<https://perma.cc/4BKN-34U2>] (providing an overview of ECB interest rates over the years), with Effective Federal Funds Rate, FED. RESRV. BANK OF N.Y., <https://www.newyorkfed.org/markets/reference-rates/effr> [<https://perma.cc/UQ5J-PEFR>].

31. René Smits, *A Central Bank in Times of Crisis: The ECB’s Developing Role in the EU’s Currency Union*, in RESEARCH HANDBOOK ON CENTRAL BANKING 184, 186–87 (Peter Conti-Brown & Rosa M. Lastra eds., 2018) (discussing the ECB’s negative rates).

32. Klaus Tuori, *Monetary Policy (Objectives and Instruments)*, in THE EU LAW OF ECONOMIC AND MONETARY UNION 615, 634–38 (Fabian Amtenbrink et al. eds., 2020).

33. ECB Statute, *supra* note 21, art. 18.1.

34. ULRICH BINDSEIL & ALESSIO FOTIA, INTRODUCTION TO CENTRAL BANKING 47–51 (2021); see also Guideline 2015/510 of the European Central Bank of 19 Dec. 2014, On the Implementation of the Eurosystem Monetary Policy ECB/2014/60 art. 15,

was the introduction of “forward guidance,” which led the ECB to indicate more vocally how it plans to conduct monetary policy over a certain timeframe, thereby providing the market with more information on what to expect.<sup>35</sup> Finally, the ECB’s unconventional monetary policy also included a number of sovereign bond-buying programs that became so controversial they were litigated before the Court of Justice of the European Union (“CJEU”).<sup>36</sup> In conclusion, like the Fed, the ECB thus transformed into a major crisis actor during the financial crisis and the COVID-19 pandemic.<sup>37</sup> Thus, comparing the two can provide important insights to guide the reforms to the Fed proposed by this Article.

## I. TRANSFORMATION OF THE FED

### A. *The Renewed Importance of Financial Stability*

The changes made to the Fed’s legal framework following the Global Financial Crisis and the COVID-19 pandemic have placed the policy objective of financial stability at the forefront of virtually all Fed tasks.<sup>38</sup> First, financial stability was the main driving force behind the Fed assuming the role of Lender of Last Resort (“LOLR”), by virtue of which it acts as the ultimate lender to illiquid but solvent banks who have lost access to market-based lending options.<sup>39</sup> By stepping in when financial institutions are at the brink of collapse, the Fed ensures that the financial system remains afloat. Second, financial stability features as the primary goal undergirding the new regulatory and supervisory

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tit. 7, Apr. 2, 2015, O.K. (L 91) 23 (containing detailed rules on the quality and criteria applied to eligible collateral).

35. See Benoît Cœuré, Member of the Exec. Bd. of the ECB, Speech at the Money Marketeters Club of New York, New York: The Usefulness of Forward Guidance (Sep. 26, 2013), [https://www.ecb.europa.eu/press/key/date/2013/html/sp130926\\_1.en.html](https://www.ecb.europa.eu/press/key/date/2013/html/sp130926_1.en.html) [<https://perma.cc/U6CY-X9N6>] (“Through forward guidance – that is by providing more systematic guidance on the expected path of future policy rates – central banks can exert a stronger influence on market expectations of future short term interest rates”); see also Smits, *supra* note 31, at 187–88 (discussing the ECB’s use of forward guidance during the GFC).

36. The Court confirmed the validity of these rulings. See Case C-62/14, Gauweiler et al. v. Deutscher Bundestag, ECLI:EU:C:2015:400 (June 16, 2015); Case C-506/15, Peter Weiss v. Finanzamt Frankfurt am Main, ECLI:EE:C:2015:381 (Mar. 8, 2018).

37. Seraina Grünewald, *The ECB’s Response to the COVID-19 Crisis and Its Role in the Green Recovery*, in FINANCIAL STABILITY AMIDST THE PANDEMIC CRISIS: ON TOP OF THE WAVE 263, 264 (Christos V. Gortsos & Wolf-Georg Ringe eds., 2021) (“[T]he ECB . . . has turned into a central bank that actively addresses and counteracts crises.”).

38. See *infra* section I.B. See also Bolzani, *supra* note 4; Steffi Ostrowski, *Judging the Fed*, 131 YALE L.J. 726, 753, 772 (2021) (noting that due to the financial crises of the past few years “the lines separating ‘monetary policy’ from ‘financial regulation’ or ‘lending’ have blurred”).

39. For an elaboration of this concept, see Andrew Campbell & Rosa Lastra, *Revisiting the Lender of Last Resort*, 24 BANKING & FIN. L. REV. 453, 464–67 (2009).

responsibilities vested in the Fed by the 2010 Dodd-Frank Act.<sup>40</sup> The same goes for the changes made to its institutional design, which include the creation of the Vice Chair for Supervision and the Fed's involvement in the Financial Stability Oversight Council ("FSOC"), a federal agency founded in the wake of the GFC that is tasked with monitoring financial stability.<sup>41</sup> Moreover, the smooth operation of payment systems ultimately serves a financial stability objective as well, alongside the policy objectives of maintaining market integrity and financial inclusion.<sup>42</sup>

Importantly, the Fed's attention to financial stability, alongside monetary stability, is not without historical precedent. In fact, the Federal Reserve System was established primarily with a view towards safeguarding the stability of the U.S. financial system.<sup>43</sup> Since the Civil War, the U.S. banking system consisted of national and state banks of various sizes.<sup>44</sup> Both took care of the money supply, issuing a federal note currency ("greenbacks") and elastic deposit currencies, respectively.<sup>45</sup> For various reasons, this system proved unstable. First,

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40. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010). The Dodd-Frank Act is codified in 12 U.S.C. ch. 53, which has a primary focus on financial stability.

41. See 12 U.S.C. § 5321 (describing the mandate and functioning of the Financial Stability Oversight Council).

42. Phoebus L. Athanassiou, *Payment Systems*, in THE EU LAW OF ECONOMIC AND MONETARY UNION 711, 711–35 (Fabian Amttenbrink et al. eds., 2020) ("[T]he involvement of commercial banks in the provision of payment services exposes them to the risks of insolvency and/or illiquidity of other financial intermediaries, with an impact on financial and, ultimately, systemic stability."); Georgios Psaroudakis, *The Scope for Financial Stability Considerations in the Fulfilment of the Mandate of the ECB/Eurosystem*, 4 J. FIN. REG. 119, 120 (2018) ("[T]he smooth operation of payment systems' undoubtedly contributes greatly to financial stability.>").

43. See Michael S. Barr, Vice Chair for Supervision, Bd. of Governors of the Fed. Rsrv. Sys., Speech at the Forecasters Club of New York, New York: Monetary Policy and Financial Stability (Oct. 2, 2023), <https://www.federalreserve.gov/newsevents/speech/barr20231002a.htm> [<https://perma.cc/CSP9-AG86>] ("Financial stability was a key motivation for the creation of the Federal Reserve System in 1913."); Dinovelli, *supra* note 13, at 65 ("It is clear based on the Congressional record that the drafters were concerned about financial stability."); Shawn Ritenour, *The Federal Reserve: Reality Trumps Rhetoric*, in THE FED AT ONE HUNDRED 55, 55 (David Howden & Joseph T. Salerno eds., 2014) ("[T]he Federal Reserve specifically arose out of the instability in the banking, financial, and monetary system created by the National Banking Acts of 1863 and 1864.>").

44. Before the National Banking Act of 1863, the U.S. banking system only consisted of state banks. The Act established a national bank charter, which led to national banks coexisting alongside state-chartered banks. See Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 994–1001 (2021) (discussing the 1863 Act in more detail).

45. For a more detailed account of the functioning of the U.S. banking system in the Nineteenth Century, see PERRY MEHLING, THE NEW LOMBARD STREET – HOW THE FED BECAME THE DEALER OF LAST RESORT 30–35 (2011).

lacking central coordination, the money supply could often not expand or contract as necessary.<sup>46</sup> Second, while national banks were subject to supervision by the Office of the Comptroller of the Currency, many states left their banks largely unregulated.<sup>47</sup> Finally, there was no emergency actor to intervene during moments of stress, leading to a series of financial crises throughout the late 1800s and early 1900s. The Panic of 1907 eventually prompted the establishment of the Federal Reserve System in 1913, after long political negotiations.<sup>48</sup> The System, comprising regional Reserve Banks and a Board in Washington, D.C., tightened banking supervision, exerted control over the money supply, and could step in as LOLR.<sup>49</sup> The Fed's initial focus was thus clearly on financial stability—not price stability. During the Second World War, for example, interest rates were kept artificially low to finance the war efforts—despite staggering inflation.<sup>50</sup>

It was only at the start of the “Great Moderation” era—a period of macroeconomic stability in the U.S. between 1980 and 2008—that price stability steadily became the top priority for the Federal Reserve.<sup>51</sup> The Federal Reserve Reform Act of 1977 amended the FRA and laid down the Fed's dual mandate of maximum employment and stable prices.<sup>52</sup> The Humphrey-Hawkins Act of 1978 subsequently imposed

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46. At the time, agriculture was the most important economic activity in the United States. Credit thus followed a seasonal cycle and often required expansion or contraction on short notice, which provided for an additional challenge. *See id.*

47. *See Menand, supra* note 44, at 980–1001 (detailing a historical overview of banking supervision in the U.S. in the Nineteenth Century).

48. Michael D. Bordo, *Some Historical Reflections on the Governance of the Federal Reserve*, in *CENTRAL BANK GOVERNANCE & OVERSIGHT REFORM* 221, 222–24 (Michael D. Bordo ed., 2016). The U.S. already had a central bank between 1791 and 1811 (the First National Bank of the U.S.) and also from 1816 until 1836 (the Second National Bank of the U.S.). *See* Barry Eichengreen, *The Two Eras of Central Banking in the United States*, in *SVERIGES RIKSBANK AND THE HISTORY OF CENTRAL BANKING* 361, 362–66 (Rodney Edvinsson, Tor Jacobson & Daniel Waldenström eds., 2018).

49. *See Menand, supra* note 44, at 1001–02.

50. MEHLING, *supra* note 45, at 46 (“Throughout the war, the interest rate on Treasury debt was fixed at 3/8 percent for three-month bills and between 2 and 2½ percent for long-term bonds, and it was the job of the Fed to support these prices by offering two-way convertibility into cash.”).

51. Levin & Skinner, *supra* note 11, at 1802 (“[T]he [Federal Open Market Committee] succeeded in restoring price stability in a context of robust economic growth and employment, leading to an era known as the ‘Great Moderation.’”).

52. Federal Reserve Reform Act of 1977, Pub. L. No. 95-188, 91 Stat. 1387 (1977); Federal Reserve Act of 1913, Pub. L. No. 63-43, 38 Stat. 251 (2013). Notably, this provision assigns a third policy objective to the Fed: to maintain moderate long-term interest rates. However, since this policy goal is considered to overlap with the price stability objective, reference is typically only made to the employment and the inflation objective. *See* Stefania Baroncelli, *The Independence of the ECB After the Economic Crisis*, in *THE CONSTITUTIONALIZATION OF EUROPEAN BUDGETARY CONSTRAINTS* 125, 129 (Maurice Adams, Federico Fabbrini & Pierre Larouche eds., 2014) (“Even though

some additional accountability arrangements on the Fed, such as its semi-annual reporting duties to Congress.<sup>53</sup> Then-Fed Chair Paul Volcker decisively raised interest rates during the 1980s to tame the high inflation levels which had scourged the U.S. economy during the 1970s.<sup>54</sup> Inflation-targeting quickly became the Fed's most prevalent policy concern, spurred by the academic ascent of monetarism, an economic theory centered around the money supply as the dominant variable in regulating the economy, developed by eminent scholars such as Milton Friedman.<sup>55</sup>

At the same time, the Great Moderation was marked by relatively few and small financial crises, which pushed financial stability concerns into the background. Alan Greenspan, who succeeded Volcker as Fed Chair, was known to have little regard for the Fed's regulatory and supervisory responsibilities—two tasks primarily concerned with financial stability.<sup>56</sup> Instead, Greenspan relied on market discipline enforced by private market participants to maintain financial stability and curb excessive risk-taking by banks.<sup>57</sup> It was only at the outbreak of the GFC in 2007 that financial stability concerns took center stage once again.

While financial stability might not have been at the forefront of the Fed's work during the pre-crisis years, it did not entirely escape the Fed's attention. Economic and legal scholarship generally accept that central banks always hold at least some responsibility for financial stability.<sup>58</sup> The

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the Fed's mandate includes three primary goals, it is commonly referred by economists as a dual mandate, including only maximum employment and stable prices.”).

53. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-253, 92 Stat. 1887 (1978).

54. Judge, *supra* note 13, at 84 (2015) (“Under Volcker, the Fed responded by dramatically increasing the fed funds rate.”).

55. PETER CONTI-BROWN, *THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE* 233 (2017) (“Perhaps the most influential economist to shape the policies of the Federal Reserve System was Milton Friedman.”); Christina Parajon Skinner, *The Monetary Executive*, 91 *GEO. WASH. L. REV.* 164, 220 (2023) (“Milton Friedman famously wrote that ‘inflation is always and everywhere a monetary phenomenon,’ setting the intellectual stage for the Federal Reserve to take primary responsibility—both in policy and in the public eye—for managing inflation.”).

56. Judge, *supra* note 13, at 85 (“Greenspan’s faith in market forces to produce socially desirable outcomes, a faith reflected in a range of policies that the Fed both adopted and failed to adopt during his reign, is now viewed by many as fundamentally flawed.”).

57. Lev Menand, *Too Big to Supervise: The Rise of Financial Conglomerates and the Decline of Discretionary Oversight in Banking*, 103 *CORNELL L. REV.* 1527, 1555 (2018) (“To Greenspan, banks were just like other businesses, except for the fact that their failure often started panics, which harmed other banks and businesses.”).

58. Skinner, *supra* note 8, at 253 n.20 (arguing that financial stability is an implied mandate of the Fed but not an express one); Psaroudakis, *supra* note 42 (“[F]inancial

influential Italian economist and central banker Tommaso Padoa-Schioppa referred to financial stability as a “land in between” monetary policy and prudential supervision, inevitably requiring attention from central bankers.<sup>59</sup> A similar sentiment was echoed by Volcker, who argued that both monetary policy and financial stability are best served when a central bank takes interest in both.<sup>60</sup> In this sense, financial stability is not only regarded as a policy objective in itself, but also as a precondition necessary to effective monetary policy. Indeed, in the context of financial instability or crisis, it is generally hard to maintain price stability.<sup>61</sup>

Moreover, turmoil on the financial markets might impair the smooth functioning of the monetary policy transmission mechanism, which relies on banks and other financial firms to convey monetary policy decisions to the real economy.<sup>62</sup> A financial crisis can distort this mechanism, consequently hampering the effectiveness of monetary policy. In the European context, the CJEU has confirmed the validity of ECB measures taken with a view towards restoring and preserving the functioning of the monetary transmission mechanism.<sup>63</sup> Lastra and

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stability seems to be increasingly recognized as an objective (among others) to be pursued by the central bank.”).

59. Tommaso Padoa-Schioppa, *Central Banks and Financial Stability: Exploring a Land in Between*, in *THE TRANSFORMATION OF THE EUROPEAN FINANCIAL SYSTEM* 269, 271 (Second ECB Central Banking Conference, 2002).

60. Paul Volcker, *The 1990 Per Jacobsson Lecture: The Triumph of Central Banking?* (Sep. 23, 1990), <http://www.perjacobsson.org/lectures/1990.pdf> [<https://perma.cc/E8GM-978T>]. For a more detailed discussion of Volcker’s statement, see PAUL TUCKER, *UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE* 438–40 (2019).

61. For instance, the GFC painfully showed that a financial crisis can exert downward pressure on prices, which confronted central banks with persistently low and sometimes even deflationary price levels.

62. Vestert Borger, *Outright Monetary Transactions and the Stability Mandate of the ECB: Gauweiler*, 53 *COMMON MKT. L. REV.* 139, 174 (2016) (“The ECB targets financial stability to the extent that certain segments of the financial system, in particular bond markets, are dysfunctional and hamper the transmission of monetary policy.”); see also Psaroudakis, *supra* note 42, at 132 (“[T]he Court does accept, in principle, that monetary competence encompasses the instruments to prevent disturbances in monetary transmission.”).

63. See Case C-62/14, *Gauweiler et al. v. Deutscher Bundestag*, ECLI:EU:C:2015:400, § 50 (June 16, 2015) (“The ability of the ESCB to influence price developments by means of its monetary policy decisions in fact depends, to a great extent, on the transmission of the ‘impulses’ which the ESCB sends out across the money market to the various sectors of the economy. Consequently, if the monetary policy transmission mechanism is disrupted, that is likely to render the ESCB’s decisions ineffective in a part of the euro area and, accordingly, to undermine the singleness of monetary policy. Moreover, since disruption of the transmission mechanism undermines the effectiveness of the measures adopted by the ESCB, that necessarily affects the ESCB’s ability to guarantee price stability. Accordingly, measures that are intended to preserve that transmission mechanism may be regarded as pertaining to the primary objective laid down in Article

Goodhart even argue that financial stability replaced price stability as the ECB's primary monetary policy objective during the GFC.<sup>64</sup> In the same vein, financial stability is an underlying, but central concern for the Federal Reserve.

Thus, the Fed's current attention towards financial stability has clearly not been created out of thin air. From its inception, financial stability was of pivotal importance for the Fed—at the time, modern interest-rate based monetary policy as we know it did not even exist.<sup>65</sup> Financial stability has thus re-emerged as a central policy objective, after flying under the radar for several decades. The next section considers how the financial crises of the past decades and the ensuing rise of financial stability as a dominant policy objective have reshaped the Fed's legal framework.

### B. Changes to the Fed's Legal Framework

#### 1. From Conventional to Unconventional Monetary Policy

From the very beginning of the GFC, the Fed played a major role—it assisted in the acquisition of Bear Stearns by JPMorgan, helped save the insurer AIG, and was involved in the demise of the investment bank Lehman Brothers.<sup>66</sup> Apart from this high-stakes ad hoc crisis management of financial firms facing the precipice, the Fed

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127(1) TFEU.”). Some legal scholars have inferred from this holding that other ECB measures taken with a view to ensure financial stability might therefore also fall under the heading of Article 127(1) TFEU. See Michael Ioannidis, Sarah Jane Hlášková Murphy & Chiara Zilioli, *The Mandate of the ECB: Legal Considerations in the ECB's Monetary Policy Strategy Review*, 276 ECB STRATEGY REV. 1, 10 (2021) (“By analogy with the CJEU's reasoning on the transmission mechanism, it may be possible to argue that measures which take into account other considerations because they necessarily affect the ECB's ability to guarantee price stability are capable of being justified as falling within its mandate, provided they are instrumental to the primary objective laid down in Article 127(1) TFEU.”).

64. EUR. PARL. DOC. (PE 563.458) 42 (2015) (“[I]n practice the primary objective of central banking has become financial stability.”); see also Dariusz Adamski, *The Overburdened Monetary Policy Mandate of the ECB*, in THE CAMBRIDGE HANDBOOK OF EUROPEAN MONETARY, ECONOMIC AND FINANCIAL INTEGRATION 155, 162 (Dariusz Adamski, Fabian Amtenbrink & Jakob de Haan eds., 2023) (asserting that price stability remains a “corollary” of financial stability as overarching policy goal in the European Monetary Union).

65. See Dinovelli, *supra* note 13, at 49–51 (2025); Kevin D. Hoover, *The Coevolution of Central Banks and the Concept of Monetary Policy* 1–2 (Ctr. for the Hist. of Pol. Econ. at Duke Univ., Working Paper No. 2023-04, 2023).

66. See Nibert Michel, *Dodd-Frank's Expansion of Fed Power: A Historical Perspective*, 34 CATO J. 557, 562–63 (2014) (describing the Fed's involvement with Bear Stearns); PHILIP A. WALLACH, *TO THE EDGE: LEGALITY, LEGITIMACY, AND THE RESPONSES TO THE 2008 FINANCIAL CRISIS* 45–56, 62–71 (2015) (describing the Fed's crisis actions).

employed a wide array of structural support measures for the financial system. First, the Fed adjusted its main monetary policy instrument: the federal funds rate, the rate banks charge each other for overnight, uncollateralized loans of reserve balances. This rate was repeatedly cut throughout the crisis in order to enhance liquidity provision, ease market conditions, and counter deflation.<sup>67</sup> Second, the Fed launched a range of liquidity and support mechanisms throughout the GFC, such as the Term Auction Facility.<sup>68</sup> This facility was swiftly followed by a range of other arrangements that allowed banks to lend flexibly and against a broad base of collateral, such as the Term Securities Lending Facility and the Primary Dealer Credit Facility, two loan facilities for commercial and investment banks.<sup>69</sup> By injecting trillions of dollars into the U.S. financial system, these programs were of an unprecedented scale and qualified as measures of Quantitative Easing.<sup>70</sup> Third, the Fed eased access conditions to the discount window, a loan facility maintained and operated by the Fed from which credit institutions can draw short-term loans.<sup>71</sup> Ultimately, this crisis tool did not prove very effective due to associated stigma.<sup>72</sup> Fourth, the Fed took action on the international level, installing swap lines where foreign central banks could exchange their respective currencies for dollars.<sup>73</sup> Since 2013, the Fed has maintained permanent swap lines with a select number of foreign central banks, among them the ECB.<sup>74</sup>

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67. See *Effective Federal Funds Rate*, *supra* note 30 (providing the rate cuts made in the period of 2007–09).

68. *Term Auction Facility*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: POLICY TOOLS, <https://www.federalreserve.gov/monetarypolicy/taf.htm> [<https://perma.cc/RM46-JTJ9>].

69. *Term Securities Lending Facility*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: POLICY TOOLS, <https://www.federalreserve.gov/monetarypolicy/tslf.htm> [<https://perma.cc/YGR8-SWSK>]; *Primary Dealer Credit Facility*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: POLICY TOOLS, <https://www.federalreserve.gov/monetarypolicy/pdcf.htm> [<https://perma.cc/UD69-5QQ7>]. For a full overview of all the Fed’s crisis facilities, see WALLACH, *supra* note 66.

70. See Dinovelli, *supra* note 13, at 67 (“In response to the financial crisis, the Fed added trillions of dollars of reserves into the financial system.”); see also Edison Yu, *Did Quantitative Easing Work?*, FED. RSRV. BANK OF PHILA. RSCH. DEP’T 5, 5–11 (2016) (evaluating the effectiveness of the Fed’s Quantitative Easing programs).

71. See *Discount Window Lending*, BD. OF GOVERNORS OF THE FED. RSRV. SYS., <https://www.federalreserve.gov/regreform/discount-window.htm> [<https://perma.cc/KWK5-NA39>] (explaining the functioning and importance of the discount window).

72. See Judge, *supra* note 4, at 797 (“[T]he Discount Window played a surprisingly minor role in meeting banks’ liquidity needs.”).

73. See Peter Conti-Brown & David Zaring, *The Foreign Affairs of the Federal Reserve*, 44 J. CORP. L. 665, 689–96 (2019) (detailing an overview of the history, legal basis, and functioning of the Fed’s swap lines).

74. *Id.* For a critical account of these permanent swap lines, see Alexander R. Perry, Note, *The Federal Reserve’s Questionable Legal Basis for Foreign Central Bank*

From a legal point of view, these actions were often far from self-evident, and much of the Fed's liquidity provision was based on its role as LOLR. Article 13(3) of the FRA enables the Fed to act as LOLR by providing broad liquidity support, including to nonbank financial institutions under "unusual and exigent circumstances."<sup>75</sup> The GFC marked only the second time since the Great Depression that this provision was activated.<sup>76</sup> Despite this provision only allowing for secured loans, the Fed also invoked it to directly purchase assets from troubled firms. To get around the legal boundaries spelled out in Article 13(3), the Fed created Special Purpose Vehicles ("SPVs") to carry out these purchases instead.<sup>77</sup> Furthermore, the FRA allows only a limited selection of public securities to be purchased under open market operations. During the crisis, the Fed nonetheless acquired private securities via these SPVs, in the context of both ad hoc rescue operations and more structural arrangements.<sup>78</sup> The use of SPVs was widely criticized at the time as a legally impermissible maneuver.<sup>79</sup> Yet, critics often had to begrudgingly admit there was no other choice for the Fed than to stretch the provisions of the FRA in the face of unprecedented crisis circumstances. Indeed, the question of whether all

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*Liquidity Swaps*, 120 COLUM. L. REV. 729, 729 (2020) ("[T]his Note argues that the Fed acted without statutory authority in establishing a network of swap lines providing aid to foreign economies.").

75. Federal Reserve Act of 1913 Pub. L. No. 63-43, § 13(3), 38 Stat. 251 (1913) (codified as amended at 12 U.S.C. § 343(3) (2012)); see also Judge, *supra* note 4, at 806–07 (providing a more detailed discussion about the scope of this provision).

76. See WALLACH, *supra* note 66, at 46 (noting that "[t]he Fed made modest use of each of these powers during the Depression, making just \$1.5 million in loans under § 13(3)").

77. See Alexander Mehra, *Legal Authority in Unusual and Exigent Circumstances: The Federal Reserve and the Financial Crisis*, 13 U. PA. J. BUS. L. 221, 235–36 (2010) (recalling how the Fed created SPVs to purchase assets from troubled firms).

78. See *id.* at 237–38 (describing an ad hoc facility that acquired private securities in the context of the Bear Stearns failure). An example of a structural arrangement is the Commercial Paper Funding Facility, which directly purchased commercial paper from eligible counterparties. See *Commercial Paper Funding Facility (2008)*, FED. RSRV. BANK OF N.Y., <https://www.newyorkfed.org/markets/cpff.html> [<https://perma.cc/53N7-9BTS>] ("Under the CPFF, the Federal Reserve Bank of New York financed the purchase of highly rated unsecured and asset-backed commercial paper from eligible issuers.").

79. See Mehra, *supra* note 77, at 222, 238–41 ("[M]any of the Fed's actions during the financial crisis exceeded the bounds of its statutory authority."); Chad Emerson, *The Illegal Actions of the Federal Reserve: An Analysis of How the Nation's Central Bank Has Acted Outside the Law in Responding to the Current Financial Crisis*, 1 WM. & MARY BUS. L. REV. 109, 128–29 (2010) ("[T]he Fed attempted to use legal trickery to disguise its illegal purchases of private assets from these companies.").

these interventions were legal was mostly raised by legal scholars but did not gain traction in political circles.<sup>80</sup>

Most of the facilities were temporary and terminated once the crisis was somewhat under control and the markets had started to function again.<sup>81</sup> In 2010, Congress adopted the extensive Dodd-Frank Act with a view towards strengthening financial regulation and supervision.<sup>82</sup> The Act also sought to install clearer rules and a structural framework for crisis actions undertaken by the Fed. While Dodd-Frank generally led to an expansion of the Fed's remit,<sup>83</sup> it is worth noting that some Fed powers were curtailed, such as its ability to offer liquidity support to individual financial firms.<sup>84</sup>

Notwithstanding those new restrictions, the Fed once again transformed into a pivotal crisis actor during the COVID-19 pandemic in 2020. Just as during the GFC, the Federal Reserve again relied on Article 13(3) of the FRA to provide liquidity support, purchase assets, and employ a range of crisis mechanisms to support financial (shadow) markets, such as commercial paper and money market funds.<sup>85</sup> However, three features set the Fed's pandemic crisis actions apart from the support it provided during the 2008 financial crisis. First, following the Dodd-Frank Act, the Fed could no longer grant support to individual firms. Second, support actions were not only addressed to the financial sector, but were also targeted to stimulate and relieve the real economy.<sup>86</sup>

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80. See WALLACH, *supra* note 66, at 55 (“There were serious grounds on which to question the legality of the Fed’s creative response, but . . . these concerns largely failed to gain traction among the political class.”).

81. The final Term Auction Facility auction was conducted in 2010, for instance. See *Term Auction Facility*, *supra* note 68. Other crisis arrangements, such as certain swap lines with foreign central banks, were turned into permanent facilities. See *supra* text and accompanying notes 73–74.

82. Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010). For a detailed discussion on how Dodd-Frank aims to contain systemic risks to the financial system, see MARC LABONTE, CONG. RSCH. SERV., R41384, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: SYSTEMIC RISK AND THE FEDERAL RESERVE 4–5 (2010).

83. See *infra* section I.B.2.

84. See HOWELL E. JACKSON, MARGARET E. TAHYAR & MICHAEL S. BARR, FINANCIAL REGULATION: LAW AND POLICY 1023–25 (3d ed. 2021) (describing how the Dodd-Frank Act prohibits the Fed from lending to individual firms and how it imposes an obligation on the Fed to obtain approval from the Treasury before acting on the basis of Article 13(3) of the FRA); Mehra, *supra* note 77, at 264–66 (same).

85. See Howell E. Jackson & Steven L. Schwarcz, *Protecting Financial Stability: Lessons from the Covid-19 Pandemic*, 11 HARV. BUS. L. REV. 193, 203–06 (2021) (providing an overview).

86. See Lev Menand, *The Federal Reserve and the 2020 Economic and Financial Crisis*, 26 STAN. J.L. BUS. & FIN. 295, 322 (2021) (“The Fed’s credit programs allocate capital to the real economy either directly as in the case of the Main Street program or indirectly by enhancing liquidity in certain secondary markets.”).

For example, the Fed launched the Main Street Lending Program to support small and medium enterprises and nonprofit organizations hit by the pandemic. The program was run via an SPV, which purchased parts of loans previously made to these businesses.<sup>87</sup> Third, Congress enacted the CARES Act,<sup>88</sup> which enabled the Treasury Department to back up the Fed's lending facilities with up to \$454 billion.<sup>89</sup> Throughout the pandemic, the Fed often acted in coordination with the Treasury, which backstopped many emergency facilities. While the Treasury Department had been highly involved in Fed emergency actions during the GFC, it was less formalized and depended more on ad hoc coordination.<sup>90</sup> During the pandemic, the coordination between the Fed and the Treasury grew closer, leading to a form of close collaboration often described as a "joint venture."<sup>91</sup>

A final, recent event prompting the Fed's intervention concerned the banking turmoil in Spring 2023. The risk management practices of Silicon Valley Bank, a California bank whose clientele comprised mostly tech startups, appeared insufficiently prepared to face rising interest rates, and the bank collapsed, together with a limited number of other banks. Immediately, the Fed stepped in again by deploying a number of support facilities to still market turmoil.<sup>92</sup>

## 2. *Changes to the Fed's Regulatory and Supervisory Remit*

Apart from monetary policy and emergency liquidity assistance, the Fed's remit also expanded in other areas. Such new tasks have been

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87. *Main Street Lending Program*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: POLICY TOOLS, <https://www.federalreserve.gov/monetarypolicy/mainstreetlending.htm> [<https://perma.cc/YX4W-2U7F>].

88. Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, Pub. L. No. 116-136, 134 Stat. 281 (2020).

89. CARES Act § 4003(b)(4); *see also* U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-180, FEDERAL RESERVE LENDING PROGRAMS: USE OF CARES ACT-SUPPORTED PROGRAMS HAS BEEN LIMITED AND FLOW OF CREDIT HAS GENERALLY IMPROVED 1 (2020) (describing how the funds were spent).

90. *See generally* Daniel K. Tarullo, *The Federal Reserve and the Constitution*, 97 S. CALIF. L. REV. 1, 12 (2024) ("[D]uring periods of financial stress, close coordination between the Federal Reserve and Treasury has understandably been the rule, rather than the exception.").

91. Jackson & Schwarcz, *supra* note 85, at 206 ("[T]he two entities seem to have engaged in something that looks much more like a joint venture: no doubt expedient and well-intentioned, but also a novel way of doing crisis management in the United States.").

92. *See generally* Hal S. Scott & Connor R. Kortje, *Lender of Last Resort: Lessons from the 2023 Banking Crisis*, 30 STAN. J.L. ECON. & BUS. 349 (2025) (describing the Fed's facilities and crisis measures).

mostly concerned with financial regulation and supervision.<sup>93</sup> The most prominent change in this regard is the Board of Governors' enlarged perimeter to regulate and supervise large financial firms designated as systemically important financial institutions ("SIFIs") by the Financial Stability Oversight Council ("FSOC"), a body created by the Dodd-Frank Act to monitor and oversee the overall stability of the financial system.<sup>94</sup> While FSOC analyzes which firms can pose systemic risks to the U.S. financial system and should thus be subject to enhanced regulation and supervision, it is the Federal Reserve that ultimately exercises these powers over designated SIFIs.<sup>95</sup> In 2013 and 2014, FSOC designated several firms as SIFIs, including nonbank insurers such as Financial Prudential and AIG.<sup>96</sup>

Dodd-Frank also conferred powers on the Federal Reserve to conduct stress tests for bank holding companies and individual banks to assess if they will remain viable in times of turmoil or distress.<sup>97</sup> Moreover, the Act took further steps to implement a more elaborate resolution regime for SIFIs and other financial firms in order to minimize reliance on taxpayers' money for bailouts. The Fed plays a role in this area too as supervisor of the "living wills" in which these firms explain how they will ensure a "rapid and orderly" resolution when facing bankruptcy.<sup>98</sup> Subsidiaries of financial holding companies were also subjected to enhanced supervision by the Fed.<sup>99</sup> Interestingly, while Dodd-Frank generally expanded the Fed's regulatory and supervisory authority, it also restricted some powers. For example, the creation of a specific agency for consumer protection, the Consumer Financial Protection Bureau ("CFPB"), has decreased the Fed's involvement in matters of financial consumer protection.<sup>100</sup>

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93. See generally Scott Alvarez, *A Summary of the Federal Reserve's Supervisory and Regulatory Priorities During the Past Four Years and Into the Future*, 40 REV. BANKING & FIN. L. 807, 807–12 (2020); see also CONTI-BROWN & JOHNSON, *supra* note 1, at 1 ("Dodd-Frank . . . increased the powers of the Board of Governors of the Federal Reserve System . . . along almost all dimensions pertaining to the supervision and operation of systemically important financial institutions.").

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

95. 12 U.S.C. §§ 5323, 5365.

96. JACKSON, TAHYAR & BARR, *supra* note 84, at 780–85 (describing how FSOC designated several large insurers and providing an account of the ensuing litigation filed by some of these insurers against their designation).

97. 12 U.S.C. § 5365(i)(1).

98. *Id.* § 5365(d)(1).

99. See Michel, *supra* note 66, at 564 (discussing how "Dodd-Frank extended the Fed's reach into financial holding companies' subsidiaries").

100. Dodd Frank Act tit. X. See generally DAVID H. CARPENTER, CONG. RSCH. SERV. R42572, THE CONSUMER FINANCIAL PROTECTION BUREAU (CFPB): A LEGAL

Apart from Dodd-Frank, the Fed's remit has expanded in other ways over the years. The Fed has a long tradition of involvement as supervisor and operator of payment systems,<sup>101</sup> but it has recently become more active in this area. In 2023, the Fed launched its own real-time payment system, FedNow, with a view towards spurring innovation and competition in the payment sector and increasing access to instant payment systems for U.S. citizens.<sup>102</sup> Another interesting development is the controversy surrounding Fed Master Accounts, which are administered by the Fed's regional branches, the Reserve Banks.<sup>103</sup> Only banks with a Fed Master Account have access to the interbank payment systems provided by the Fed, which explains the critical importance of these accounts. For a long time, the procedure for commercial banks to obtain access to Master Accounts was highly standardized and sparked little interest. Recently, however, a number of atypical banks, including a crypto bank and a credit union focused on the cannabis industry, were denied access to a Master Account by the Fed. The Fed invoked financial stability concerns for barring access but received criticism it has little statutory authority for these discretionary denials.<sup>104</sup>

Furthermore, legislation enacted in the wake of the GFC did not only vest new substantive powers with the Fed, but also amended its institutional design in various ways. First, Dodd-Frank created a Vice Chair for Supervision, who is selected by the President among the members of the Board of Governors and enjoys a four-year tenure.<sup>105</sup> The Vice Chair for Supervision formulates supervisory policy recommendations and oversees the Fed's supervisory and regulatory tasks.<sup>106</sup> The creation of an official position for supervision and regulation within the Board aimed to underscore the importance of this policy area,

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ANALYSIS 12–25 (2014) (describing the CFPB's powers); Aditya Bamzai & Aaron L. Nielson, *Article II and the Federal Reserve*, 109 CORN. L. REV. 843, 863 (2024) (concisely explaining the Fed's consumer protection powers that remain in force).

101. See AARON KLEIN, WHARTON INITIATIVE ON FIN. POL'Y & REGUL., STRUCTURAL CONFLICTS IN CENTRAL BANKING: REGULATOR OR OPERATOR OF A PAYMENT SYSTEM? 2 (2023) (discussing the Fed's dual role as operator and supervisor of payment systems).

102. *FedNow Service*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: PAYMENT SYSTEMS, [https://www.federalreserve.gov/paymentsystems/fednow\\_about.htm](https://www.federalreserve.gov/paymentsystems/fednow_about.htm) [<https://perma.cc/6ZV6-HNTA>].

103. 12 U.S.C. § 248c.

104. See Julie Andersen Hill, *From Cannabis to Crypto: Federal Reserve Discretion in Payments*, 109 IOWA L. REV. 117, 117 (2023) (“[A]lthough the Federal Reserve has some discretion over the payments it processes and terms under which it offers it [sic] payments services, the Fed's discretion is not so broad that it can deny access to legally eligible banks.”); see also *infra* section III.C.

105. 12 U.S.C. § 242.

106. *Id.*

which had been overlooked in the years leading up to the crisis.<sup>107</sup> In January 2025, acting Vice Chair for Supervision Michael Barr stepped down from the position following the re-election of President Trump, but he will remain in office as a “regular” member of the Board of Governors.<sup>108</sup> Second, as already mentioned, Dodd-Frank established the FSOC, which is responsible for monitoring financial stability.<sup>109</sup> FSOC is a separate agency, but the Fed Chair holds a position in the Council as voting member.<sup>110</sup> Moreover, the Fed is often responsible for ensuring FSOC analyses and advice are implemented and executed, for instance by exercising the actual supervision of firms designated as SIFI by FSOC.

### C. *Implications for Independence, Accountability, and Discretion*

Modern central banks such as the Federal Reserve do not operate in a legal vacuum, but are subject to fundamental principles such as independence, accountability, and discretion, which define and limit the scope of their powers. First, independence refers to the ability of the central bank to operate autonomously and without political interference.<sup>111</sup> The Fed’s independence is multifaceted. A significant aspect concerns removal protections for members of the Board of Governors, who can only be removed for serious cause by the President.<sup>112</sup> The Fed’s funding is also exempt from congressional

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107. Peter Conti-Brown, Opinion, *Where is the Fed Vice Chair for Supervision?*, BROOKINGS (Oct. 26, 2021), <https://www.brookings.edu/articles/where-is-the-fed-vice-chair-for-supervision/> [<https://perma.cc/VGB6-XWA2>] (“[The Vice Chair] was created in 2010 in the Dodd-Frank Act to encourage the Fed to focus more completely on the vital work of bank regulation and supervision, areas that many feared had become neglected during the Greenspan years.”); see also CONTI-BROWN & JOHNSON, *supra* note 1, at 2 (2013) (describing the rocky start of the Vice Chair position, which remained unfilled up to three years after the adoption of Dodd-Frank).

108. See Deborah B. Solomon & Jeanna Smialek, *Fed Vice Chair Says He’s Leaving Role Early to Avoid Fight with Trump*, N.Y. TIMES (Jan. 6, 2025), <https://www.nytimes.com/2025/01/06/business/economy/fed-barr-vice-chair.html> [<https://perma.cc/3AXU-D42P>].

109. 12 U.S.C. § 5321.

110. *Id.* § 5321(b)(1)(B).

111. This is important because politicians cannot credibly commit to conducting monetary policy aimed at long term price stability, as they are incentivized to boost short term output with a view to the next electoral cycle. See Dinovelli, *supra* note 13, at 14–15; Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 7–9 (2020); Sylvester F. Eijffinger & Jakob De Haan, *The Political Economy of Central Bank Independence*, INT’L ECONS. SECTION, DEP’T OF ECONS. PRINCETON UNIVERSITY 1, 4–22 (1996).

112. See 12 U.S.C. § 242; Dinovelli, *supra* note 13, at 15–17 (providing more detail on the status of the Reserve Bank Presidents); Tarullo, *supra* note 90, at 21–41 (same).

appropriations, allowing for financial independence.<sup>113</sup> Finally, the executive branch has committed itself to abstain (in theory) from interfering with monetary policy decision-making.<sup>114</sup> Importantly, Fed independence is also shaped by “conventions,” which are non-legal rules rooted in political tradition.<sup>115</sup> For instance, the Fed Chair does not enjoy explicit removal protection granted by the FRA, but legal scholars have long held that, due to political convention, the Chair can only be removed for cause.<sup>116</sup>

A second principle is accountability, which requires a central bank to explain and justify its actions to preserve its legitimacy as an independent and non-democratic agency operating within a democratic system.<sup>117</sup> Accountability has both an input and an output dimension. Input accountability arrangements seek to compensate for the lack of direct democratic control over the Fed. For example, the Fed periodically issues reports and the Fed Chair testifies semi-annually before Congress.<sup>118</sup> Judicial review presents another accountability forum,<sup>119</sup> albeit a very limited one with respect to the Fed’s monetary policy.<sup>120</sup>

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113. See 12 U.S.C. § 243; Levin & Skinner, *supra* note 11, at 1788 (“In lieu of receiving an appropriation from Congress as other agencies do . . . the Fed directly exercises this aspect of Congress’s Article I power to fund itself.”).

114. This commitment was laid down in the 1951 Fed-Treasury Accord, which decoupled monetary policy from the management of sovereign debt. See Caroline W. Tan, *What the Federal Reserve Board Tells Us About Agency Independence*, 95 N.Y.U. L. REV. 326, 345–50 (2020) (describing the Accord and its implications for Fed independence).

115. See Peter Conti-Brown, *The Institutions of Federal Reserve Independence*, 32 YALE J. ON REGUL. 257, 263–310 (2015) (recounting an overview of conventions and practices shaping the independence of the Federal Reserve); Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1181–218 (2013) (exploring the role of “conventions” in agency independence).

116. See *infra* section II.B for a more detailed discussion.

117. See Seraina Grünewald & Jens van ’t Klooster, *New Strategy, New Accountability: The European Central Bank and the European Parliament After the Strategy Review*, 60 COMMON MKT. L. REV. 959, 974 (2023) (“Adequate mechanisms of accountability are at the core of democratic systems since they serve to ensure that political actors remain sensitive to the interests and views of citizens.”); Levin & Skinner, *supra* note 11, at 1821 (“[P]ublic accountability is essential for fostering legitimacy and ensuring that the central bank remains well insulated from political interference.”); see generally Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 EUR. L.J. 447 (2007) (elaborating on the concept of accountability).

118. See 12 U.S.C. §§ 247, 247a.

119. See Rosa M. Lastra, *Central Bank Independence and Financial Stability*, 18 REVISTA DE ESTABILIDAD FINANCIERA 51, 55 (2010) (“[A]ccountability – from a legal perspective – should be diversified to include parliamentary accountability as well as judicial review of the agency’s acts and decisions.”).

120. See Binder & Skinner, *supra* note 8, at 12–13 (“[T]he Fed is unique among facets of the administrative state in its practical insulation from judicial review.”); Ostrowski, *supra* note 38, at 728 (“Judicial review of the Fed is indeed uncommon.”);

Requiring the Fed to defend its policies to institutions that have direct democratic legitimacy, such as Congress, allows it to maintain a degree of democratic legitimacy itself. Output accountability, for its part, focuses on the effectiveness and credibility of the central bank's actions—is it able to deliver on its policy goals? With regard to central banks like the Fed and the ECB, this roughly boils down to the question of whether they can preserve financial stability and keep inflation in check.<sup>121</sup> It has been argued that independence and output accountability have an inverse relationship, shaped by “blame game” dynamics.<sup>122</sup> When the Fed delivers on its policy goals of price stability and financial stability, its independence is more easily accepted by the political branches. Conversely, when inflation levels rise or economic conditions deteriorate, Congress and the President will adopt a more critical attitude towards the Fed and start to question its independence and legitimacy.<sup>123</sup>

Finally, the Fed's powers are shaped by the level of discretion it enjoys, which can be defined as having “latitude of choice,” in both a legal and operational sense.<sup>124</sup> While the former refers to broadly defined statutory delegations to the Federal Reserve, such as finding an appropriate balance between low inflation and maximum employment, the latter refers to having the choice whether and how to act, for instance in the event of a crisis.<sup>125</sup> While some authors identify other central

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Levin & Skinner, *supra* note 11, at 1777 (“[T]he Fed has a unique relationship with . . . the courts, which have consistently abstained from judicial review.”).

121. See Alicia Hinarejos & Drazen Rakic, *Independence, Discretion and Accountability in the Evolving Monetary Policy Framework of the European Central Bank*, 30 MAASTRICHT J. EUR. & COMPAR. L. 473, 474 (2023) (referring to “output legitimacy” of the central bank when “successfully attaining defined objectives”); Klaus Tuori, *This Time It Is For Real – The ECB's Accountability Amidst Rampant Inflation*, 30 MAASTRICHT J. EUR. & COMPAR. L. 491, 505 (2023) (“[P]rovision of price stability to the people of the euro area . . . is seen as the ultimate accountability of the ECB.”).

122. See SARAH BINDER & MARK SPINDEL, *THE MYTH OF INDEPENDENCE: HOW CONGRESS GOVERNS THE FEDERAL RESERVE* 236 (2017) (“In the wake of economic downturns that are often but not always a by-product of legislative or monetary failures, lawmakers' reactive attention to the Fed perpetuates a cycle of blame and reform.”).

123. *Id.* at 236–39.

124. Hinarejos & Rakic, *supra* note 121, at 479 (“[D]iscretion refers to an institution's latitude of choice when making decisions and conducting policy.”).

125. Interestingly, operational discretion forms part of a long-standing debate in U.S. academia over rules and discretion in monetary policy. See, e.g., Benjamin M. Friedman, *Rules Versus Discretion at the Federal Reserve System: On to the Second Century*, 34 J. MACROECONOMICS 608 (2012); Frederic S. Mishkin, *Improving the Use of Discretion in Monetary Policy*, 21 INT'L FIN. 224 (2018).

bank principles, they can often be qualified as falling under the wings of either independence, accountability, or discretion.<sup>126</sup>

The concrete scope and meaning of these principles are not carved in stone but influenced by external events and evolve over time. At the root of the Fed's independence lies the 1951 Fed-Treasury Accord, in which the Truman Administration committed itself not to interfere with monetary policy decision-making.<sup>127</sup> Ever since, the Fed has slowly consolidated independence. This was not always a linear process, and some aspects of Fed independence were only established in the 1990s. For instance, political attempts to influence the Federal Open Market Committee ("FOMC"), the entity within the Fed responsible for the conduct of interest rate-based monetary policy,<sup>128</sup> only halted when the Clinton Administration took office.<sup>129</sup> Throughout the Great Moderation, expanding Fed independence went hand in hand with minimal accountability and discretion. Monetary policy was often shrouded in fog, and the Fed took only gradual steps to become somewhat more accountable and transparent.<sup>130</sup> This lack of accountability was not considered to be a problem, however, because monetary policy was

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126. Transparency is another often cited central bank principle. *See infra* section III.C; *see also* Deirdre Curtin, "Accountable Independence" of the European Central Bank: *Seeing the Logics of Transparency*, 23 EUR. L.J. 28 (2017) (advocating for more attention for transparency practices); Ellen E. Meade, *The Governance of Central Banks*, in THE OXFORD HANDBOOK OF GOVERNANCE 401, 401–12 (David Levi-Faur ed., 2012). However, it could be argued that transparency is not a principle in itself, but rather a means to an end, since it provides a way for central banks to be accountable towards the public, the courts, and the political branches, by being open about their actions and stating adequate reasons for policy decisions. *See* Luis Garicano & Rosa M. Lastra, *Towards a New Architecture for Financial Stability: Seven Principles*, J. INT'L ECON. L. 597, 616 (2010) ("Transparency is a complement of accountability.")

127. *See* Bolzani, *supra* note 4, at 228; Tan, *supra* note 114, at 345–50 (describing how the Accord decoupled monetary policy from the management of U.S. sovereign debt and how it came into existence).

128. *See* 12 U.S.C. § 263; *see also* Zaring, *supra* note 13 (detailing an account of the FOMC).

129. *See* Tarullo, *supra* note 90, at 12 (stating that Presidents George H.W. Bush, Bill Clinton, George W. Bush, Barack Obama, and Joe Biden all abstained from interfering with monetary policy decision-making). *But see* Tan, *supra* note 114, at 329–30 n.21 (arguing that George Bush tried to influence the Fed Chair). This tradition of political restraint vis-à-vis monetary policy decisions grounded to a halt at the start of the first Trump Administration and has resumed since the second Trump Administration took office. *See infra* section II.B.

130. CONTI-BROWN, *supra* note 55, at 203–05 (describing how threats of legislative reform by Congressman Henry Gonzalez pushed the Fed to become more transparent in the 1990s).

conducted in a much less discretionary way—relying on conventional, interest rate-based instruments.<sup>131</sup>

On the eve of the GFC, a delicate balance had thus arisen between well-established independence, limited accountability, and restricted levels of discretion. As described *supra* section I.B, crisis events and changes to the Fed's remit have jolted and recalibrated the relation between the Fed's independence, accountability, and discretion. Inevitably, the re-emergence of financial stability as a policy objective undercutting several other Fed tasks has influenced how these fundamental principles shape the Fed's legal framework.

### 1. *Increased Discretion*

The first result of the Fed's expanded remit is increased levels of discretion. Admittedly, the FRA has always been a discretionary statute.<sup>132</sup> The Fed's dual monetary policy objective, which empowers it to strike a balance between low inflation and maximum employment, comes with a great deal of discretion by its nature. However, a statute allowing for discretion is one thing; the extent to which an agency makes use of the (potential) discretion conferred on it is another.<sup>133</sup> Following decades of conventional monetary policy, the GFC prompted the Fed to explore its full range of available discretion. Driven by financial stability concerns, it employed an array of far-reaching measures of unconventional monetary policy, stretching the boundaries of its discretion. Importantly, while price stability is a relatively

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131. See Levin & Skinner, *supra* note 11, at 1775 (“Many of the decisions to adopt this light-touch Fed oversight were made in the 1970s but now appear anachronistic in light of recent developments. In particular, the Fed’s power has dramatically expanded.”). Importantly, this does not mean that the Fed’s monetary policy was *uncontroversial* during the Great Moderation. After all, the aggressive interest rate hikes by the Volcker Fed caused a recession and massive job losses in the United States. See Iwan Morgan, *Monetary Metamorphosis: The Volcker Fed and Inflation*, 24 J. POL’Y HIST. 545, 545 (2012). While controversial, monetary policy did not enjoy broad discretion; it was conducted by employing a handful of conventional instruments only.

132. See Peter Conti-Brown & David A. Wishnick, *Technocratic Pragmatism, Bureaucratic Expertise, and the Federal Reserve*, 130 YALE L.J. 636, 654–58 (2021) (pointing to the discretionary nature of many provisions in the FRA). For a discussion whether the Fed’s dual mandate would pass muster under the nondelegation doctrine, see Tarullo, *supra* note 90, at 12–20.

133. See CONTI-BROWN, *supra* note 55, at 62 (“Policy discretion by itself isn’t enough to send central bankers to the pantheon; it depends on what the policy maker does with that discretion that matters.”); Conti-Brown & Wishnick, *supra* note 132, at 656 (“Of course, declaring the Federal Reserve Act to be broad in its mandates and permissive in the discretion it grants to the Fed is one thing. But when the Fed engages in this experimentation, who decides whether the legal boundaries, such as they are, are honored?”).

straightforward policy objective,<sup>134</sup> financial stability is more complex, elusive, and multifaceted. Hence, financial stability can be interpreted more broadly and enable a greater pallet of potential actions. According to Skinner, the ambiguous nature of financial stability as a policy goal has therefore amplified Fed discretion.<sup>135</sup>

Although some of the Fed's actions during the GFC were highly controversial and legally doubtful,<sup>136</sup> the Fed came out of the crisis with an increased level of discretion.<sup>137</sup> This was clearly illustrated during the COVID-19 pandemic when the Fed took a wide range of crisis actions oftentimes pushing the boundaries of discretion even further, most notably by extending the reach of its emergency assistance facilities from financial firms to the real economy.<sup>138</sup> For its own reasons, the SVB failure proved significant as well. While the magnitude of SVB's failure was much smaller than previous crises, the Fed decisively intervened to still market turmoil.<sup>139</sup> These events aptly illustrate how the Fed has not only increasingly invoked the discretion granted by the FRA, but also expanded said discretion, enabling far-reaching measures to preserve financial stability.<sup>140</sup>

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134. It has been readily quantified by the Fed as a two percent inflation target. See Matthew Wells, *The Origins of the 2 Percent Inflation Target*, ECON FOCUS: FED. RSRV. BANK OF RICHMOND (2024), [https://www.richmondfed.org/publications/research/econ\\_focus/2024/q1\\_q2\\_federal\\_reserve](https://www.richmondfed.org/publications/research/econ_focus/2024/q1_q2_federal_reserve) [<https://perma.cc/J7WA-CUCJ>].

135. See Skinner, *supra* note 8, at 326 (“[A]gainst a backdrop of broadly worded mandates to pursue ‘price stability,’ ‘financial stability,’ and ‘safety and soundness,’ is it any wonder that the architects and leaders of America’s central banks can succumb to activism?”); see also Lastra, *supra* note 119, at 61 (“The major problem lying ahead for central banks in their pursuit of financial stability is the so-called boundary problem or perimeter issue.”).

136. See *supra* section I.B.1.

137. See Levin & Skinner, *supra* note 11, at 1770–76 (pointing to the vast expansion of Fed powers over the course of the past decades); TUCKER, *supra* note 60, at 4–5 (describing how central banks emerged from the financial crisis of 2008 with expanded mandates and leading roles in international reform programs for the financial system).

138. See *supra* section I.B.1.

139. Scott & Kortje, *supra* note 92, at 362–64 (discussing the emergency facilities deployed by the Fed at the occasion of SVB’s demise).

140. Alternatively, it could be argued that the Fed’s discretion did not actually expand, but in a certain way shrunk. By intervening firmly at every event of market turmoil, the Fed might create an expectation among market participants that once a certain floor is reached in stock or bond prices, the Fed will always take action to still turmoil and save the day. This dynamic is referred to by investors as the “Fed put” or, *in casu*, the “Powell put.” According to this alternative narrative, the Fed may enjoy high levels of discretion with respect to the magnitude of its programs and the array of instruments in its monetary policy toolkit, but its freedom of choice whether to step in or not anytime the markets tremble may well have been curbed by its own powerful market interventions. See The Editorial Board, Opinion, *The Federal Reserve Should Be Careful of a ‘Powell Put’*, FIN. TIMES (June 7, 2019), <https://www.ft.com/content/41580b5c-8845-11e9-97ea-05ac2431f453> [<https://perma.cc/MG9H-8RDH>]. Arguably, this reading of

Furthermore, apart from exploring the boundaries of its operational discretion, the Fed also started to consider a number of issues that were traditionally not part of its remit, such as climate change and income and wealth inequality.<sup>141</sup> The Fed joined the Network for Greening the Financial System, an international network of supervisors and central banks concerned with climate change.<sup>142</sup> Moreover, Fed economists performed research on the impact of climate change on the financial system, and Fed Governors gave speeches about the Fed's involvement in the fight against climate change.<sup>143</sup> Even though the ECB has been far more active and vocal on climate change than its U.S. counterpart,<sup>144</sup> the Fed's more modest inquiry into this policy area was met with fierce opposition.<sup>145</sup> As a result, the Fed has largely retreated

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decreased discretion is more worrisome than increased discretion, since a guarantee of powerful Fed interventions trumps sound risk management by financial firms and can interfere with price stability objectives. *See generally* CHRISTOPHER LEONARD, *THE LORDS OF EASY MONEY: HOW THE FEDERAL RESERVE BROKE THE AMERICAN ECONOMY* (2022).

141. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., *PILOT CLIMATE SCENARIO ANALYSIS EXERCISE: SUMMARY OF PARTICIPANTS' RISK-MANAGEMENT PRACTICES AND ESTIMATES 3–5* (2024), <https://www.federalreserve.gov/publications/files/csa-exercise-summary-20240509.pdf> [<https://perma.cc/9HJN-LPCC>] (providing the Fed's own research on these topics); Anni T. Isojaervi & Sam Jerow, *Inequality and Financial Sector Vulnerabilities*, BD. OF GOVERNORS OF THE FED. RSRV. SYS.: FEDS NOTES (Apr. 19, 2024), <https://www.federalreserve.gov/econres/notes/feds-notes/inequality-and-financial-sector-vulnerabilities-20240419.html> [<https://perma.cc/5A93-8UQ5>].

142. *See* Jay Cullen, *Central Banks and Climate Change: Mission Impossible?*, 9 J. FIN. REGUL. 174, 179–80 (2023) (discussing the Network for Greening the Financial System); Pieterjan Heynen, *Greening the ECB: Issues and Developments*, 2022 BANK EN FINANCIËEL RECHT 179, 186 (2022) (same).

143. *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 141; Lael Brainard, Governor, Bd. of Governors of the Fed. Rsrv. Sys., *Speech at Research Conference by the Federal Reserve Bank of San Francisco: Why Climate Change Matters for Monetary Policy and Financial Stability* (Nov. 8, 2019), <https://www.federalreserve.gov/newsevents/speech/brainard20191108a.htm> [<https://perma.cc/R5PX-4D6J>].

144. For an overview of the ECB's actions with regard to climate change, *see generally* Sara Dietz, *Green Monetary Policy Between Market Neutrality and Market Efficiency*, 59 COMMON MKT. L. REV. 395 (2022); Heynen, *supra* note 142, at 179–89; Chiara Zilioli & Michael Ioannidis, *Climate Change and the Mandate of the ECB: Potential and Limits of Monetary Contribution to European Green Policies*, 59 COMMON MKT. L. REV. 363 (2022).

145. Christina P. Skinner, *Central Banks and Climate Change*, 74 VAND. L. REV. 1301, 1364 (2021) (“While climate change may be a significant economic problem or concern, the Fed’s present authority in this space remains limited.”); Skinner, *supra* note 8, at 288–93 (conceptualizing the Fed’s interest in climate-related policies as a form of central bank activism). Criticism came from not only from legal scholars, but also from the Fed’s own Governors. *See* Christopher J. Waller, Governor, Bd. of Governors of the Fed. Rsrv. Sys., *Speech at Federal Reserve Bank of St. Louis Conference Current Challenges in Economics and Finance: Climate Change and Financial Stability* (May 11, 2023), <https://www.federalreserve.gov/newsevents/speech/waller20230511a.htm> [<https://perma.cc/3RSM-UJB2>] (claiming that climate change does not pose serious threats to the financial system or monetary policy, hence there is no need and mandate

from considering climate change for the time being.<sup>146</sup> Furthermore, with respect to inequality, the Fed adjusted its inflation target to give more room to the maximum employment objective.<sup>147</sup> Skinner has complained that this decision is driven by concerns over inequality, wrongfully prioritizing employment over price stability.<sup>148</sup>

Importantly, the Fed's ventures into these areas are directly tied to financial stability.<sup>149</sup> Indeed, the Fed did not suddenly think of itself as an appropriate climate regulator, but instead developed an interest in climate change because of its likeliness to impair financial stability.<sup>150</sup> The physical and transition risks posed by climate change produce a series of hazards for the financial system, ranging from stranded assets to operational and credit risks for banks caused by natural disasters.<sup>151</sup>

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for the Fed to become involved, noting “I believe risks posed by climate change are not sufficiently unique or material to merit special treatment relative to others”).

146. Among other actions, the Fed withdrew from the Network for Greening the Financial System shortly before the second Trump Administration took office. *See infra* section II.B.

147. In 2020, the Fed announced a shift from the two percent inflation target rate to an *average* inflation rate of two percent. *See* Jerome H. Powell, Chair, Bd. of Governors of the Fed. Rsv. Sys., Speech at Economic Policy Symposium by the Federal Reserve Bank of Kansas City: New Economic Challenges and the Fed's Monetary Policy Review (Aug. 27, 2020), <https://www.federalreserve.gov/newsevents/speech/powell20200827a.htm> [<https://perma.cc/L7E9-LX2K>]. The difference is subtle, but nonetheless important. While the Fed strived to maintain an inflation level *below* two percent under the first model, the second model allows inflation to rise above the target rate of two percent as long as it remains close to an *average* of two percent. *See* Skinner, *supra* note 8, at 282 (“The difference may seem subtle, but it is tremendously substantive. It means that the Fed will no longer take steps to cool down economic activity when inflation reaches 2 percent.”).

148. *See id.* at 287 (“[E]levating the employment side of the mandate—in this case, to strive for more equality—would divorce the economic logic behind the Fed's monetary authority from the legal power in section 2A, with potentially problematic macroeconomic effect.”).

149. *See* Pieterjan Heynen, *The ECB Going Green: Impact on the Interrelationship Between Monetary Policy and Banking Supervision?*, 29 MAASTRICHT J. EUR. & COMPAR. L. 667, 677 (2023) (“[S]cholars have pointed to the fact that climate change may pose even more severe and imminent threats to financial stability than to price stability.”).

150. *See* RENS VAN TILBURG & ALEKSANDAR SIMIĆ, SUSTAINABLE FINANCE LAB, LESSONS FROM MONETARY HISTORY FOR TACKLING CLIMATE CHANGE 38 (2021), <https://sustainablefinancelab.nl/wp-content/uploads/sites/506/2021/02/Every-Avenue-Available.pdf> [<https://perma.cc/NW6Y-2U7J>] (“[C]entral banks acknowledge the relevance of climate change for their role as supervisors and as guardians of financial stability. They also acknowledge the impact of climate risks on monetary policy and on their own balance sheets.”).

151. *See* David Brinkman, *Climate-Related Risks and Banking Supervision: From Climate Change Risk Mitigation to Double Materiality*, 30 MAASTRICHT J. EUR. & COMPAR. L. 396, 398–400 (2023) (discussing the nature of environmental and climate-related risks for the financial system); Barnali Choudhury, *Climate Change as Systemic*

Income and wealth inequality may seem less connected to financial stability at first sight, but in the context of central banking it is often considered a threat to the effective transmission of monetary policy.<sup>152</sup> Since the transmission mechanism depends on the smooth functioning of the financial system,<sup>153</sup> financial stability concerns are consequently looming in the background.

## 2. *Outdated Accountability*

The renewed focus on financial stability and increased levels of discretion have clearly made the Fed more powerful. However, these changes were not accompanied by more stringent accountability arrangements. Nonetheless, if an independent agency wields vast powers and wide discretion without corresponding accountability measures, its overall legitimacy becomes hampered.<sup>154</sup> For several reasons, the Fed's expanded remit has left the present set of accountability practices insufficient and outdated.

First, blending new policy objectives into the decision-making process provides room to make a broader range of decisions. As a result, increased discretion now makes it harder for the Fed to remain accountable for its decisions, as the rising number of policy objectives in the mix makes them more opaque.<sup>155</sup> If lawmakers wish to successfully and legitimately delegate a set of powers to independent agencies, such a delegation should be accompanied by clearly articulated policy

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*Risk*, 18 BERKELEY BUS. L.J. 52, 59–64 (2021) (discussing the various types of risks for financial stability caused by climate change).

152. See Sara Dietz, *Central Banks and Inequality*, 60 COMMON MKT. L. REV. 1349, 1363–65 (2023); see generally Raffaele Felicetti, *A Study on Central Banks and Social Responsibility: The Case of the ESCB*, 10 J. FIN. REGUL. 65 (2023) (elaborating on the connection between monetary policy transmission and inequality).

153. On the monetary policy transmission mechanism, see *supra* section I.A.

154. See Binder & Skinner, *supra* note 8, at 1–8 (discussing the Fed's wide discretion and hampered accountability arrangements, which jeopardize its legitimacy); Conti-Brown & Wishnick, *supra* note 132, at 640 (same); see also Conti-Brown, Listokin & Parrillo, *supra* note 13, at 1–7 (explaining that the Fed wields enormous powers but is subject to little procedural and transparency requirements); Psaroudakis, *supra* note 42, at 127 (“[A]ccountability is not a value per se, but rather an instrument that promotes the fulfilment of other public policy objectives,” such as legitimacy.).

155. See Charles Goodhart & Rosa Lastra, *Populism and Central Bank Independence*, 29 OPEN ECONS. REV. 49, 55 (2018) (“The existence of several unranked objectives - or an unspecific mandate - complicates the exercise of performance accountability.”). For several emergency facilities employed during the COVID-19 pandemic, for instance, it was unclear whether the Fed was acting with a view to preserve price stability, to protect financial stability, or even to safeguard the fiscal stability of U.S. sovereign debt.

goals.<sup>156</sup> When this set of goals broadens without clear guidance on how all these objectives are structured and ranked vis-à-vis one another, the agency's legitimacy and accountability can become blurred.<sup>157</sup> Besides opaqueness, a proliferation of policy objectives can also threaten the credibility and effectiveness of the Fed's monetary policy.<sup>158</sup> Credibility is considered a prerequisite for a central bank to deliver effective monetary policy decisions.<sup>159</sup> When financial markets start to believe that a central bank's communications and actions lack credibility, its policies become less effective.<sup>160</sup> This could occur, for instance, if it appears that the Fed is juggling multiple policy goals without a clear priority or hierarchy.<sup>161</sup> Ultimately, credibility and effectiveness are linked to the Fed's output accountability.<sup>162</sup>

Output accountability can also be hindered by conflicts resulting from the proliferation of policy objectives and tasks, which can distort the effectiveness of the Fed's policies.<sup>163</sup> For instance, while price

156. See TUCKER, *supra* note 60, at 556–69 (emphasizing the importance of clear and unambiguous policy objectives that should always accompany a delegation of power to an independent agency).

157. See *id.*; Grünewald & van 't Klooster, *supra* note 117, at 961–62 (“[The ECB] gives little insight into the complex considerations, prioritization, and balancing that have led to the monetary policy decisions taken as well as alternative courses of action that it discarded.”); Hinarejos & Rakic, *supra* note 121, at 483 (noting that, when financial stability is increasingly a policy goal in the ECB's monetary policy, “[t]he result is that inputs that go into the Governing Council's monetary policy decisions became more complex and practically impossible to scrutinize from the outside”).

158. See Garicano & Lastra, *supra* note 126, at 611 (discussing the risks of having a central bank with a broad remit that encompasses both monetary policy and banking supervision); Goodhart & Lastra, *supra* note 155, at 55 (“As the mandate has become fuzzier, broader and more complicated – with unconventional monetary policies and the renewed emphasis on financial stability – the consensus which surrounds the goal/s crumbles.”).

159. See Judge, *supra* note 13, at 68 (labelling credibility as an important “soft constraint” that keeps the Fed in check).

160. See Skinner, *Central Banks and Climate Change*, *supra* note 145, at 1354–55 (“Because the efficacy of central banks' pronouncements hinges on their credibility, if a policy cannot be undertaken credibly, it should not be undertaken at all.”); Michael D. Bordo & Pierre L. Siklos, *Central Bank Credibility: An Historical and Quantitative Exploration* (Nat'l Bureau of Econ. Rsch., Working Paper No. 20824, 2015) (analyzing central bank credibility and its evolution over time).

161. This risk has been referred to as “the curse of being too competent” by the Economist. *The Curse of Being Too Competent*, ECONOMIST (Apr. 20, 2022), <https://www.economist.com/special-report/2022/04/20/the-curse-of-being-too-competent> [<https://perma.cc/2BNJ-YX3M>].

162. In order to deliver on low inflation and maximum employment, an effective monetary policy is required. In this way, when the Fed fulfils its statutory policy goals, it gains output legitimacy and accountability. For an analogous argument regarding the ECB, see Tuori, *supra* note 121, at 494.

163. In the UK, the UK House of Lords has warned against the risk of conflicting policy objectives within the Bank of England. See ECONOMIC AFFAIRS COMMITTEE,

stability and financial stability are generally complementary, this is not always the case.<sup>164</sup> During the Spring 2023 banking turmoil, for example, further interest rate hikes were required for the sake of price stability, as inflation levels remained high. At the same time, increasing interest rates put further pressure on the banking system, which was already struggling to keep up with the changing macroeconomic environment.<sup>165</sup> These dynamics lead to a concern that the increased attention for financial stability could come at the expense of price stability. As a result, the Board of Governors might become more concerned about the viability of the banking system than over the maintenance of low inflation levels. This phenomenon has been described in economic and legal literature as financial dominance.<sup>166</sup>

The Fed seems especially vulnerable for financial dominance because of its governance structure. Indeed, the Board of Governors is in charge of both monetary policy—together with the Reserve Bank Presidents in the FOMC—and banking regulation and supervision. In theory, each policy area should be conducted in accordance with its proper policy goals: monetary policy should target low inflation and maximum employment, while regulatory policies principally aim at

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MAKING AN INDEPENDENT BANK OF ENGLAND WORK BETTER, 2023-4, HL 10, at 27 (UK) (“Another area of concern highlighted by economists is the potential for conflicting objectives stemming from a central bank’s increased responsibilities.”).

164. See Donato Masciandaro & Davide Romelli, *Twin Peaks and Central Banks: Economics, Political Economy and Comparative Analysis*, in THE CAMBRIDGE HANDBOOK OF TWIN PEAKS FINANCIAL REGULATION 51, 52–58 (Andrew Godwin & Andrew Schmulow eds., 2021) (discussing the pros and cons of vesting supervisory tasks with the central bank); Rosa M. Lastra & Georgios Psaroudakis, *Prudential Supervisory Tasks (Article 127(6) TFEU: Monetary Policy vs Prudential Supervision)*, in THE EU LAW OF ECONOMIC AND MONETARY UNION 751, 765 (Fabian Amtenbrink & Christoph Hermann eds., 2020) (“[M]easures required by the price stability and the financial stability mandate should ultimately converge. Nevertheless, it is conceivable, and has already been discussed, that there may be some temporary divergence.”); Zaring & Zhang, *supra* note 5, at 396 (“[W]e argue based on our theoretical framework that such an explicit mandate of maintaining financial stability could sometimes conflict with the execution of monetary policy and vice versa.”).

165. See generally XUAN-THAO NGUYEN, *SILICON VALLEY BANK: THE RISE AND FALL OF A COMMUNITY BANK FOR TECH* 243–81 (Cambridge Univ. Press 2024) (detailing SVB’s failure). Indeed, one of the very reasons why SVB failed was rapidly rising interest rates.

166. See Tobias Linzert & Frank Smets, *Monetary Policy in a Banking Union*, in FINANCIAL REGULATION: A TRANSATLANTIC PERSPECTIVE 61, 72 (Andreas Hackethal et al. eds., 2015) (referring to economic research signaling that “central banks may be trapped in a situation of financial dominance, conducting monetary policy foremost in the interest of financial stability”). Another manifestation of financial dominance is the “Fed put,” a phenomenon in which markets start to believe the Fed will intervene whenever there is heavy turmoil, even when this would be at odds with monetary policy objectives. See *supra* note 140.

preserving financial stability.<sup>167</sup> Since Fed Governors are responsible for both, however, there is a risk they might prioritize one policy objective over the other.

In the Eurozone, this was a real concern in 2013, when prudential banking supervision was transferred to the ECB. Germany feared the ECB would adopt a loose monetary policy stance to accommodate the banking industry at the expense of price stability.<sup>168</sup> The SSM Regulation therefore created a system of “organizational separation” between the ECB’s monetary policy and supervisory divisions.<sup>169</sup> While monetary policy remained in the hands of the Governing Council, the Regulation established a new decision-making body, the Supervisory Board, with only one overlapping member.<sup>170</sup> In this way, the policy areas of banking supervision and monetary policy could be carried out “in full separation.”<sup>171</sup> Although the so-called “Chinese Wall” between monetary policy and prudential supervision is actually far from absolute,<sup>172</sup> it allows a vast majority of supervisory decisions to

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167. Alongside financial stability, banking regulation and supervision also pursue a number of other objectives, such as the safety and soundness of individual banks. See Eilís Ferran, *International Competitiveness and Financial Regulators’ Mandates: Coming Around Again in the UK*, 9 J. FIN. REGUL. 30, 34 (2023) (“Finance ministries, central banks and supervisors in countries that are, or want to be, leading international financial centres aspire to have a financial regulatory framework that simultaneously ensures safety, soundness, market integrity, and investor protection and facilitates innovation, experimentation, entrepreneurial risk-taking, and advances in technology that promote diverse and efficient market practices.”); JACEK OSIŃSKI, KATHARINE SEAL & LEX HOOGDUIN, IMF STAFF DISCUSSION NOTE 13/05, MACROPRUDENTIAL AND MICROPRUDENTIAL POLICIES: TOWARD COHABITATION 5 (2013) (“Financial stability is generally considered to be one of the objectives of microprudential policy. Through its focus on the risks and resilience of individual institutions it makes an important contribution to ensuring resilience of the system as a whole.”).

168. See Kern Alexander, *European Banking Union: A Legal and Institutional Analysis of the Single Supervisory Mechanism and the Single Resolution Mechanism*, 40 EUR. L. REV. 154, 165 (2015) (“Germany insisted on separation of the ECB’s supervisory functions from its monetary policy functions in order to protect ECB monetary policy from being influenced by the pursuit of banking supervision mandates.”).

169. See SSM Regulation, *supra* note 28, art. 25 (conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions); see also Chiara Zilioli & Antonio Luca Riso, *New Tasks and Central Bank Independence: The Eurosystem Experience*, in RESEARCH HANDBOOK ON CENTRAL BANKING 155, 170 (Peter Conti-Brown & Rosa M. Lastra eds., 2018).

170. The one exception is the Vice Chair of the Supervisory Board, who is chosen from among the members of the ECB Executive Board. SSM Regulation, *supra* note 28, art. 26(3).

171. *Id.* recital 65.

172. For instance, due to European Union primary law constraints, every Supervisory Board decision must be formally approved by the Governing Council, since the Treaties limit the ECB’s decision-making bodies to the Governing Council and the Executive Board. See Gerrit Tönningsen, *Trying to Square the Circle: The ECB’s*

be taken autonomously by the Supervisory Board without interference by the Governing Council.<sup>173</sup> This arrangement avoids placing the same officials in charge of both areas, which reduces the risk of financial dominance and other instances of conflicting policy goals.<sup>174</sup> When carrying out different tasks, one cannot expect central bankers to act as if monetary policy does not exist when deciding over supervisory matters, and vice versa. As it has been remarked in the literature, these policymakers do not suffer from “collective schizophrenia.”<sup>175</sup>

Indeed, bearing the responsibility for several tasks can complicate the execution of each individual task.<sup>176</sup> For example, monetary policy decisions to reduce interest rates might be taken with an actual view to relieve the banking system when it is struggling, rather than to tame inflation.<sup>177</sup> In the same vein, it has been questioned whether the Fed would adopt stringent macroprudential measures to stem systemic risk when doing so produces an adverse effect on the soundness of individual banks.<sup>178</sup> While certain conflicts between different policy areas will always occur because of macroeconomic cycles and regardless of whether they are executed by the same agency or not, a concentration of tasks within one authority arguably increases the risk of tasks being carried out with the objectives of other policy areas in mind.<sup>179</sup>

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*Janus-Faced Character Post SSM and Its Implications for Effective Banking Supervision 7* (Eur. Banking Inst., Working Paper No. 27, 2018) (discussing the ample breaches in the Chinese Wall).

173. It has therefore been argued that the Supervisory Board enjoys full “de facto” decision-making powers. See Raffaele D’Ambrosio, *Single Supervision Mechanism: Organs and Procedures*, in THE PALGRAVE HANDBOOK OF EUROPEAN BANKING UNION LAW 169, 169 (Mario P. Chiti & Vittorio Santoro eds., 2019).

174. See Heynen, *supra* note 149, at 670–76 (discussing a number of risks flowing from an integrated decision-making process, such as financial dominance or the misuse of supervisory tools with a view to monetary policy goals.).

175. Sébastien Adalid, *Les Transformations de la Gouvernance de la BCE*, in L’UNION BANCAIRE 161, 181 (Francesco Martucci ed., 2016); Ute Lettanie, *Accountability of the European Central Bank – Theory, Legal Framework and Practice* 94 (2022) (Ph.D. dissertation, University of Antwerp) (on file with author).

176. Menand, *supra* note 86, at 354 (“Mixing monetary and nonmonetary functions together in one agency creates problems for the execution of both.”).

177. See David Green, *The Relationship Between Micro-Macro-Prudential Supervision and Central Banking*, in FINANCIAL REGULATION AND SUPERVISION: A POST-CRISIS ANALYSIS 57, 60 (Eddy Wymeersch, Klaus J. Hopt & Guido Ferrarini eds., 2012).

178. See Roberta S. Karmel, *The Controversy Over Systemic Risk Regulation*, 35 BROOKLYN J. INT’L L. 823, 832–34 (2010) (discussing example of derivatives, the lax regulation which exacerbated the financial crisis). Former Fed Chair Greenspan was a notorious proponent of derivatives because they allowed banks to spread risk and increase their balance sheets. *Id.* at 832.

179. For a similar argument calling for a “narrow” Fed, see Zaring & Zhang, *supra* note 5, at 334 (“[I]f an agency tries to juggle too many balls at the same time, it may drop them all.”).

Admittedly, there are also important benefits of having one powerful authority in charge of a range of policy goals.<sup>180</sup> If different tasks are executed in a well-coordinated way, for instance by ensuring they are not incoherent, this can enhance the effectiveness of each individual policy area.<sup>181</sup> For such an institutional scheme to work, however, it is a precondition to have clear accountability arrangements in place. As long as it is unclear which policy objectives are prioritized and how different goals should be pursued by the Fed, its accountability remains hampered. In any case, considering the wide range of policy goals the Fed is responsible for, the lack of clarity regarding how tradeoffs are made between these goals has blurred the Fed's accountability.

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180. See David Aikman & Richard Barwell, *Unification Versus Delegation: Is One Policy Committee Better Than Two?*, MACROPRUDENTIAL MATTERS (Mar. 23, 2023), <https://macroprudentialmatters.com/unification-versus-delegation-is-one-policy-committee-better-than-two/> [<https://perma.cc/9MRY-3DEC>] (“One argument for centralising decision-making within one committee is that it manages the risk of very bad outcomes in circumstances where monetary and macroprudential policy are acting at crossed purposes.”); Matthias Goldmann, *United in Diversity? The Relationship Between Monetary Policy and Prudential Supervision in the Banking Union*, 14 EUR. CONST. L. REV. 283, 294 (2018) (“Important voices in the economic literature therefore favour a more holistic approach, where monetary policy decisions pay due regard to financial stability concerns, and where supervisory decisions account for monetary policy effects.”); José Viñals, Tommaso Mancini-Griffoli & Erlend Nier, *Three Cooks or Three Wise Men? The Interplay Between Monetary, Macroprudential and Microprudential Policies in Supporting Financial Stability*, in THE CHANGING FORTUNES OF CENTRAL BANKING 135, 141 (Philipp Hartmann, Haizhou Huang & Dirk Schoenmaker eds., 2018) (“[E]ffective monetary and macroprudential policies complement each other, yielding superior outcomes to a world where monetary policy – or macroprudential policy – is pursued on its own and in the absence of the other policy.”); Frank Smets, *Financial Stability and Monetary Policy: How Closely Interlinked?*, 10 INT’L J. CENT. BANKING 263, 266 (2014) (“Conflicts of interest of a ‘push-me, pull-you’ nature may arise when monetary and macroprudential policy instruments are used more aggressively, in opposite directions, leading to a worse outcome than if the instruments had been coordinated.”).

181. ANGELO BAGLIONI, THE EUROPEAN BANKING UNION, A CRITICAL ASSESSMENT 37 (Palgrave Macmillan UK 2016) (“A trade-off between conflicting objectives, if any, should be internalized within the same institution to obtain an efficient management of the trade-off.”); Frederic Boissay et al., *Prudential Policy and Financial Dominance: Exploring the Link*, BIS Q. REV. (Feb. 27, 2023), <https://www.bis.org/publ/qtrpdf/rqt2303e.htm> [<https://perma.cc/PHZ5-94M7>] (pointing to the “highly complementary role that monetary and prudential policies can play in a more holistic macro-financial stability framework”). With regard to climate change specifically, see Heynen, *supra* note 149, at 684 (“[A] non-coordinated approach towards climate change may lead to conflicting decisions, whereas a mutually aligned advancement of both tasks may, on the contrary, result in an endorsement and reinforcement of the ECB’s climate-related initiatives.”).

### 3. *Jeopardized Independence*

The Fed's discretion has inflated considerably, but countervailing accountability arrangements have stayed behind. Moreover, the price instability and deteriorating economic conditions that unfolded in the wake of the GFC have further pressured the Fed, in accordance with the "blame game" dynamics between Fed and the political branches.<sup>182</sup> As a result, the Fed is experiencing increased criticism and scrutiny from the political branches, which has jeopardized its independent status in various ways. Importantly, the pressure on the Fed's independence is also directly connected with the increased presence of financial stability as predominant policy goal. Conti-Brown has argued that financial stability does not sit well with the traditional rationale for central bank independence, which he refers to as the "Ulysses/punch-bowl view."<sup>183</sup> According to this theory, central banks enjoy independence because they must sometimes take unpopular decisions to preserve long-term goals, especially when doing so is unattractive in the short run. For instance, market participants will not cheer for a decision to raise interest rates during a period of economic growth and booming investments, but it may be necessary to avoid high inflation levels later. This rationale is illustrated by Homer's tale in which Ulysses ties himself to the mast of his ship in order not to yield to the tempting chants of sirens, as well as the more contemporaneous words of former Fed Chair William McChesney Martin Jr., who remarked that the Fed has the unpleasant but important job to "'remove the punchbowl' just when the party is really warming up."<sup>184</sup>

However, this justification for central bank independence does not sit well with actions driven by financial stability concerns.<sup>185</sup> When the Fed intervenes to preserve financial stability, its actions seek to keep the party going rather than end it prematurely. Moreover, financial stability actions can give rise to moral hazard, as market participants may start to believe that the central bank will be there to save the day, no matter how hot the party has become.<sup>186</sup> In such a case, the punchbowl theory does not apply, which begs the question if the central bank should have a lesser level of independence for financial stability actions than it has for price stability actions.

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182. *See supra* text and accompanying note 122.

183. CONTI-BROWN, *supra* note 55, at 170–73.

184. *See id.* at 2–3.

185. *See id.* at 170–73.

186. This critique on unwanted side effects of central bank crisis interventions is related to the problem of the "Fed put," *see supra* note 140, and has been articulated by several authors. *See, e.g.,* LEONARD, *supra* note 140.

While these financial stability dynamics indeed differ from the traditional independence rationale, there are still good reasons to extend central bank independence to financial stability matters too. As discussed *supra* section I.A, financial stability is closely intertwined with price stability. This is especially true during crises, when monetary policy often seeks to maintain not only price stability, but also financial stability.<sup>187</sup> Hence, it seems hardly conceivable for the Fed to enjoy no independence for certain actions aimed at the preservation of financial stability, such as ensuring the smooth functioning of the monetary policy transmission mechanism. Moreover, political influence is not strictly reserved for matters of monetary policy; banking regulators and supervisors may well be targets of undue political interference too.<sup>188</sup> Finally, because the Fed's emergency instruments are so impactful and far-reaching, it could be argued that its independent status can function as a shield against overzealous politicians contemplating employing emergency support measures for wrongful ends, such as boosting economic output by flooding the system with liquidity.<sup>189</sup>

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187. See Neil H. Buchanan & Michael C. Dorf, *Don't End or Audit the Fed: Central Bank Independence in an Age of Austerity*, 102 CORNELL L. REV. 1, 35–51 (2016) (describing the interplay between price stability and financial stability concerns during the GFC). For instance, the Fed targeted certain Quantitative Easing measures during the pandemic at the real economy, such as the “Main Street Lending Program.” See *supra* section I.B.1. The aim of this program was much more about financial stability than price stability.

188. For a similar argument on the importance of independence to protect the ECB's supervisory responsibilities from political influence by Eurozone Member States, see Pedro Gustavo Teixeira, *The Future of the European Banking Union: Risk-Sharing and Democratic Legitimacy*, in THE PALGRAVE HANDBOOK OF EUROPEAN BANKING UNION LAW 135, 146–47 (Mario P. Chiti & Vittorio Santoro eds., 2019) (“[E]ndowing the European conduct of banking supervision and resolution competences with unprecedented institutional independence . . . would insulate the ECB/SSM and the SRB from European and national political preferences as a condition for the legitimacy of its actions.”).

189. See Buchanan & Dorf, *supra* note 187, at 28–29 (“[J]ust as there are reasons of political economy to vest monetary policy in an independent central bank, there are similar reasons to vest bailout authority in a financial actor that is independent of short-term political pressure.”); Skinner, *supra* note 55, at 215 (“In the President's hands, [Quantitative Easing] would be a dangerous weapon of capital allocation.”). Admittedly, the Fed has been criticized for wrongful use of LOLR and Quantitative Easing measures itself. See, e.g., LEONARD, *supra* note 140, at 212–19 (describing how a combination of Quantitative Easing programs and zero interest rate policy set by the Fed flooded the financial system with liquidity, pushing money to risky investments such as low-rated corporate debt or sovereign bonds from debt-loaded developing countries). My argument is thus not that the Fed would never wrongfully employ certain instruments aimed at restoring or preserving financial stability, but rather that it experiences less adverse incentives to do so than politicians who worry about their constituents and the next electoral cycle.

## II. AUGMENTED SCRUTINY AND POLITICAL BACKLASH

The financial crises of the last two decades have brought financial stability to the forefront of the Fed's priorities, subsequently jolting the fundamental principles of discretion, accountability, and independence. The Fed's expanded powers have not been tacitly accepted, however: its actions have triggered mounting scrutiny and elicited severe political backlash. Both Congress and the President have contemplated how to rein in the Fed. Currently, the second Trump Administration is fiercely employing a range of instruments to restrict the Fed's discretion and independence.

### A. *The Fed and Congress*

Congress has actively attempted to increase its say over the Fed in the wake of the GFC.<sup>190</sup> In 2015, the House passed the Fed Oversight Reform and Modernization bill, which would have simultaneously contained measures to curtail the Fed's discretion and augment its accountability vis-à-vis Congress.<sup>191</sup> First, the bill would have required the FOMC to commit itself to a quantifiable "Directive Policy Rule" to shape its monetary policy decisions.<sup>192</sup> Second, the initiative aimed to discipline communications by FOMC Members and to subject the Fed to audits by the Government Accountability Office.<sup>193</sup> Even though the bill never passed the Senate, it signaled a willingness by a substantial part of Congress to increase the Fed's accountability, arguably at the expense of its independence.

Since 2015, Congress has not made new attempts to increase its say over the Fed. Nonetheless, certain initiatives might be launched over the coming years. In Project 2025—often viewed as a blueprint for President Trump's policy agenda in his second term—there are several legislative proposals on the Federal Reserve in a chapter written by former economic policy advisor Paul Winfree.<sup>194</sup> Some ideas are fairly limited in scope, such as a plea to remove maximum employment from the Fed's dual mandate.<sup>195</sup> It seems at least doubtful whether this would fundamentally change the Fed's approach to monetary policy.<sup>196</sup> Other

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190. For earlier initiatives taken by Congress to enhance Fed accountability, see BINDER & SPINDEL, *supra* note 122, at 180–85.

191. Fed Oversight and Modernization Act of 2015, H.R. 3189, 114th Cong. (2015).

192. *Id.* § 2(c).

193. *Id.*

194. See Paul Winfree, *Federal Reserve*, in PROJECT 2025 MANDATE FOR LEADERSHIP 731, 731–44 (2023).

195. *Id.* at 732–33.

196. After all, the Fed's current monetary policy priority lies already with price stability rather than maximum employment. See Skinner, *supra* note 8, at 281–88.

suggestions are more radical, such as advocating for a return to the Gold Standard or stripping the Fed of all its tasks except monetary policy.<sup>197</sup> Winfree's chapter further lays out a proposed commission to re-evaluate the Fed's design, independence, and even *existence*.<sup>198</sup> To say the least, the Fed's independence would be severely thwarted if some of these Project 2025 ideas were picked up by Congress.

### B. *The Fed and the President*

The most vigorous attempts to increase the Fed's political accountability have lately come from the White House, which has employed two distinct strategies to curb Fed independence. The Trump Administration invokes both the President's removal powers and the unitary executive theory, which predicates increased presidential control and oversight over regulatory agencies.<sup>199</sup>

The precise scope of the President's constitutional removal authority has already been intensely debated.<sup>200</sup> In its longstanding precedent from 1935, *Humphrey's Executor v. United States*, the Supreme Court sanctioned a statutory scheme that granted protection to FTC Commissioners against removal at will by the President.<sup>201</sup> The Court affirmed *Humphrey's Executor* several times,<sup>202</sup> which paved the way for independent regulatory agencies with removal protection for

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Similarly, the ECB's primary objective consists of price stability alone, but it does not necessarily act more hawkish than the Fed. Even if economic output, financial stability, or employment are not explicitly articulated as policy goals, central banks have to take these factors—which are all closely connected to inflation levels—into account.

197. See Winfree, *supra* note 194, at 737–38, 740.

198. *Id.* at 741.

199. On the unitary executive theory, see Peter M. Shane, Opinion, *The Unbearable Lightness of the Unitary Executive Theory*, REGUL. REV. (Mar. 3, 2025), <https://www.theregreview.org/2025/03/03/shane-the-unbearable-lightness-of-the-unitary-executive-theory/> [<https://perma.cc/5MUV-VRWR>]; Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2022 SUP. CT. REV. 83 (2020); see generally JOHN YOO, DEFENDER IN CHIEF: DONALD TRUMP'S FIGHT FOR PRESIDENTIAL POWER (2020) (providing a defense of the unitary executive theory as invoked by the first Trump Administration). Broad removal powers for the President certainly form part of the unitary executive theory, but this theory has a broader scope and defends overall strong powers for the President.

200. See, e.g., Aditya Bamzai & Saikrishna Bangalore Prakash, *The Executive Power of Removal*, 136 HARV. L. REV. 1756 (2023) (arguing in favor of broad presidential removal powers, based on an originalist reading of the Constitution); Aaron L. Nielson & Christopher J. Walker, *Congress's Anti-Removal Power*, 76 VAND. L. REV. 1 (2023) (discussing a range of strategic options for Congress to make removal at will more costly for the President); Sunstein & Vermeule, *supra* note 199 (distinguishing between different degrees of presidential removal power in light of recent Supreme Court rulings).

201. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

202. See, e.g., *Wiener v. United States*, 357 U.S. 349 (1958).

its board members. As a result, the President needs serious cause to remove an officer, such as “inefficiency, neglect of duty, or malfeasance in office.”<sup>203</sup> For the time being, *Humphrey’s Executor* stands, but the Court has cabined the holding of this opinion significantly over the past years. In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court struck down a statutory scheme that permitted an inferior officer to be removed for cause by a multimember board that itself enjoyed for cause removal protection—in doing so, the Court set the limit at one layer of removal protection.<sup>204</sup> Then, in *Seila Law LLC v. Consumer Financial Protection Bureau*, Chief Justice John Roberts found for cause protection for the CFPB’s single director irreconcilable with the Appointment Clause.<sup>205</sup> The holding of *Humphrey’s Executor* was further stripped in *Collins v. Yellen*, where the Court clarified that for cause protection cannot be invoked for disobeying the President, and that Congress must be explicit when granting removal protection to agencies.<sup>206</sup> In other words, for cause protection should not be hinted at, but unequivocally established.

In the cases cited above, the constitutionality of a statutory scheme granting for cause protection was in a certain sense a hypothetical issue, because the Court did not have to directly adjudicate the actual removal of an agency head by the President. Instead, questions over statutory removal protections were mostly raised by regulated entities involved in litigation with agencies, who invoked this constitutional question to strengthen their case. Since the second Trump Administration has taken office, the constitutionality of for cause removal protection has turned into a central issue with practical implications. President Trump has showed himself determined to test the reach of for cause removal protection by promptly firing several agency heads, such as FTC Commissioners Alvaro Bedoya and Rebecca Slaughter, National Labor Relations Board (“NLRB”) member Gwynne Wilcox, and U.S. Merit System Protection Board (“MSPB”) member Cathy Harris.<sup>207</sup> Most of these removals were

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203. 15 U.S.C. § 41. This is the formulation set forward in the Federal Trade Commission Act of 1914 that was at stake in *Humphrey’s Executor*. It is still the common understanding of what constitutes a removal “for cause.”

204. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477 (2010); *see also* David Moon, Note, *When Does Dual For-Cause Removal Protection Become Unconstitutional? Exploring the Scope of Free Enterprise Fund v. Public Company Accounting Oversight Board*, 2013 Wis. L. REV. 875 (2013) (providing a detailed analysis of this opinion).

205. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197 (2020).

206. *Collins v. Yellen*, 594 U.S. 220 (2021).

207. *See* Andrea Hsu, *Trump Fires EEOC and Labor Board Officials, Setting up Legal Fight*, NPR (Jan. 28, 2025, 6:07 PM), <https://www.npr.org/2025/01/28/nx-s1-5277103/nlr-trump-wilcox-abruzzo-democrats-labor> [<https://perma.cc/QH7K-CZCE>]; Melissa

subsequently challenged in court, initially resulting in some wins for the agency heads. An en banc D.C. Circuit opinion reinstated NLRB Member Wilcox to office, for instance.<sup>208</sup> However, at the end of May 2025, the Supreme Court issued a short emergency docket opinion in *Trump v. Wilcox* in which the Court stayed the reinstatement of both Harris and Wilcox by the D.C. Circuit, sanctioning their dismissal for the time being.<sup>209</sup> While the legality of their removals is not yet decided on the merits, the Court seems determined to further narrow, if not overrule, *Humphrey's Executor's* holding.

If agency officials of the NLRB or the MSPB can no longer rely on their statutory removal protection, does this mean the personal independence of Fed Governors might be at risk? Since *Free Enterprise* and *Seila Law*, this pressing question has loomed over the debate about the President's removal powers.<sup>210</sup> Apparently, the Court must have felt as if it had to say something about the Fed, as in *Trump v. Wilcox*, seemingly out of nowhere, it added an obiter dictum stating explicitly that this ruling does not apply to the Fed's Board of Governors or other members of the FOMC. Consequently, the removal protection of Fed Governors still stands and courts remain allowed to stay an unlawful removal by means of an interim measure. To justify this exception, the Court referred to the Fed as a "uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States."<sup>211</sup> This depiction of the Fed seems indebted to a formulation previously used by Justice Samuel Alito in his dissenting opinion in *CFPB v. Community Financial Services*, a 2024 ruling that sanctioned the peculiar funding structure of the CFPB, which draws its funds from the Fed's revenues.<sup>212</sup> While the Court's threefold claim of the Fed being unique, quasi-private, and rooted in the

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Bredbenner, *President Trump's Power to Remove FTC Commissioners*, REGUL. REV. (Mar. 27, 2025), <https://www.theregreview.org/2025/03/27/bredbenner-president-trumps-power-to-remove-ftc-commissioners/> [<https://perma.cc/X6NX-WK7V>].

208. See *Harris v. Bessent*, No. 25-5037, 2025 LX 259745 (D.C. Cir. Apr. 7, 2025); see also Matthew Netti et al., *Full D.C. Circuit Court Reinstates Wilcox to the NLRB*, SHEPPARD MULLIN LAB. & EMP. L. BLOG (Apr. 7, 2025), <https://www.laboremploymentlawblog.com/2025/04/articles/labor-and-employment/full-d-c-circuit-court-reinstates-wilcox-to-the-nlr/> [<https://perma.cc/U25Q-8KNL>].

209. *Trump v. Wilcox*, 145 S. Ct. 1415 (2025).

210. Bamzai & Nielson, *supra* note 100, at 843 ("[T]hese cases have prompted discussion about the future of independent agencies generally, with special attention to the Federal Reserve in particular."); Dinovelli, *supra* note 13, at 4 ("Any attempt by the Court to narrow or overturn the holding of *Humphrey's* risks exposing the Fed to significant uncertainty.").

211. *Wilcox*, 145 S. Ct. at 1417.

212. *Consumer Fin. Prot. Bureau v. Cmty. Fin. Servs. Ass'n of Am.*, 601 U.S. 416, 467 n.16 (2024) (Alito, J., dissenting).

First and Second Banks of the United States has already been refuted by legal scholars,<sup>213</sup> it shows that a vast majority of the justices on the Court appear sympathetic to the Fed's high level of independence.<sup>214</sup>

The Fed is now left with a mixed picture. On the one hand, it seems largely exempt from the Supreme Court's crusade against independent federal agencies, leaving the removal protection for Fed Governors intact. On the other hand, President Trump has been ratcheting up his threats to remove Chair Powell from office.<sup>215</sup> Already in his first term and on the 2024 campaign trail, Trump heavily criticized the Fed.<sup>216</sup> In doing so, he broke with a political tradition dating back to President Clinton to not openly criticize the Fed's monetary policy.<sup>217</sup> Triggered by the FOMC's wait-and-see attitude to not cut interest rates yet, President Trump resumed his critique on the Fed during the first months of his second term. His imprecations are mostly targeted at Fed Chair Jerome Powell, whom he refers to as "Mr. Too Late" for his reluctance to cut interest rates.<sup>218</sup> On his part, Chair Powell has argued that rate cuts were

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213. See, e.g., Lev Menand, *The Supreme Court's Fed Carveout: An Initial Assessment* 11 (Columbia Pub. L. Rsch. Paper, 2025) (arguing that the Fed is not a unique agency, it is not quasi-private, and it is profoundly different from the First and Second Banks); Dinovelli, *supra* note 13, at 9 (positing that a Federal Reserve exception is "illogical").

214. Apart from Justice Alito, Justice Brett Kavanaugh and Chief Justice Roberts have both made comments indicating that the Fed is a "special" agency warranting special treatment by the Court. See Bamzai & Nielson, *supra* note 100, at 847–48. Moreover, the three liberal Justices on the Court have already extensively argued that statutory removal protections are constitutional as such, *a fortiori* removal protection for Fed Governors and FOMC members is constitutional. See, e.g., *Wilcox*, 605 U.S. at 1 (Kagan, J., dissenting) ("*Humphrey's* undergirds a significant feature of American governance: bipartisan administrative bodies carrying out expertise-based functions with a measure of independence from presidential control."); *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 261 (2020) ("[T]he Court has commonly allowed those two branches to create zones of administrative independence by limiting the President's power to remove agency heads.") (Kagan, J., dissenting).

215. See Deborah B. Solomon, *Trump Seizes on Rate Cuts Elsewhere in Bid to Pressure the Fed*, N.Y. TIMES (June 18, 2025), <https://www.nytimes.com/2025/06/18/business/trump-fed-interest-rates-powell.html> [<https://perma.cc/RJA7-ZZS2>].

216. See Jason Furman, *The End of the Federal Reserve as We Know It?*, DISPATCH (Sep. 25, 2024), <https://thedispatch.com/article/the-end-of-the-federal-reserve-as-we-know-it/> [<https://perma.cc/K7HU-44KW>] (discussing the heavy critique and numerous threats Trump expressed during his first term and on the 2024 campaign trail); Jordan Weissmann, *Could Donald Trump Break the Fed?*, ATLANTIC (Aug. 21, 2024), <https://www.theatlantic.com/politics/archive/2024/08/donald-trump-federal-reserve-independence/679535/> [<https://perma.cc/9ZGS-4LT3>] (same).

217. See *supra* section I.C.1; see also Tan, *supra* note 114, at 329–30.

218. See Dan Ennis, *Trump Backs off His Push to Fire Fed's Powell*, BANKING DIVE (Apr. 23, 2025), <https://www.bankingdive.com/news/trump-no-intention-fire-jerome-powell-fed/746148/> [<https://perma.cc/F3J5-LNTU>].

not appropriate, pointing to macroeconomic uncertainty caused by the President's own trade war.<sup>219</sup>

Notwithstanding his defiant attitude towards the President, Powell's position is precarious, since the Fed Chair does not enjoy any special removal protection. Indeed, the Fed Chair and Vice Chairs only enjoy removal protection in their capacity as regular members of the Board of Governors, but not for their position as Chair or Vice Chair. From a legal point of view, they can thus be removed at will by the President from their leadership positions, which would demote them to the position of "ordinary" board member.<sup>220</sup>

Tensions between President Trump and Chair Powell escalated in April 2025, when the President came very close to removing Powell as Fed Chair—notwithstanding the broadly shared "convention" that the executive should respect the independence of Fed officials.<sup>221</sup> Then, President Trump backed down from outright removing Powell, but only after the threat of removing Powell created turmoil in the markets for U.S. stocks and Treasuries.<sup>222</sup> The financial markets had grown nervous over prospects of a dependent and politicized Fed, which might keep interest rates artificially low to boost the government's economic policy or even engage in monetary financing of government debt.<sup>223</sup> In late June 2025, President Trump explored other strategies to raise pressure on the Fed. On the one hand, he started to openly consider who might replace Powell once his term expires in Spring 2026, or possibly even earlier.<sup>224</sup> For a while, the Administration also entertained the idea of installing a "shadow Chair" at the Fed. Without formally removing

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219. See Heather Stewart, *Federal Reserve Chair Blames Trump's Tariffs for Preventing Interest Rate Cuts*, GUARDIAN (July 1, 2025, 11:21 AM), <https://www.theguardian.com/us-news/2025/jul/01/federal-reserve-chair-blames-trump-tariffs-for-preventing-interest-rates-cut> [<https://perma.cc/Q8RB-P6DR>].

220. See Bamzai & Nielson, *supra* note 100, at 891 ("It also seems likely that the President can remove the Fed Chair or Vice Chairs for any reason," pointing to the Supreme Court's *Collins* ruling.); Conti-Brown, *supra* note 115, at 298 ("[T]he presidential decision whether to remove the Fed Chair is fundamentally a political one.").

221. A little less than fifteen years ago, Vermeule stated that it would be "unimaginable" for the President to remove the Fed Chair without serious cause. Vermeule, *supra* note 115, at 1179.

222. See Natalie Sherman & Faarea Masud, *US Stocks and Dollar Plunge as Trump Attacks Fed Chair Powell*, BBC NEWS (Apr. 22, 2025), <https://www.bbc.com/news/articles/ce92y3j9v34o> [<https://perma.cc/X9UG-F6FH>].

223. See *id.*

224. See Brian Schwartz & Nick Timiraos, *Trump Considers Naming Next Fed Chair Early in Bid to Undermine Powell*, WALL ST. J. (June 25, 2025, 7:00 PM), <https://www.wsj.com/economy/central-banking/trump-next-federal-reserve-chair-powell-d3edcb9c> [<https://perma.cc/Y4RP-4EJC>].

Powell, the President could nominate the new Fed Chair earlier than usual. Because this Chair-appointee could already start to convey his stance regarding interest rates and other questions relating to monetary policy, the authority of the actual Chair would be undermined.<sup>225</sup> On the other hand, the Trump Administration started questioning the expensive refurbishment of the Fed headquarters in D.C., accusing Chair Powell of “grossly mismanaging” public funds.<sup>226</sup> Questioning the integrity of the Fed Chair could open the way to a removal for good cause based around alleged malfeasance. However, it was notable that the President did not explicitly suggest removing Powell from office, possibly to avoid another wave of market turmoil. The Treasury Secretary too stressed that the Administration had no plans to actually fire the Chair.<sup>227</sup> Still, JPMorgan CEO Jamie Dimon stood up for Chair Powell and emphasized that central bank independence remains crucial.<sup>228</sup> In January 2026, the U.S. Department of Justice nonetheless launched a criminal investigation against the Fed Chair, claiming that he misled Congress about the renovation of the Fed headquarters.<sup>229</sup> Soon after, the claim was called into question by journalists,<sup>230</sup> and Chair Powell immediately recorded a video message and issued a press statement in which he denounced the investigation as another attack on the Fed’s independence by the executive.<sup>231</sup> Eventually, President Trump did not proceed to actually remove Powell from office, and even claimed

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225. *See id.* (“An early announcement could allow the chair-in-waiting to influence investor expectations about the likely path for rates, like a backseat driver, attempting to steer monetary policy before Powell’s term ends.”).

226. Claire Jones, *White House Opens New Front in Attack on Fed Chief Jay Powell*, FIN. TIMES (July 10, 2025), <https://www.ft.com/content/2e7f2b75-b7f2-4878-bbe4-210caf693e3c> [https://perma.cc/4V35-Y8EJ].

227. Myles McCormick, *Jamie Dimon Warns on Fed Independence as Donald Trump Piles Pressure on Jay Powell*, FIN. TIMES (July 15, 2025), <https://www.ft.com/content/8732cf33-70e9-4fee-a2a7-836a935c6df0> [https://perma.cc/9QP4-7RXB].

228. *Id.*

229. Claire Jones & Kate Duguid, *US Prosecutors Launch Criminal Investigation into Federal Reserve’s Jay Powell*, FIN. TIMES (Jan. 12, 2026), <https://www.ft.com/content/a4230e9a-504a-4e39-87bc-9450e2b71287> [https://perma.cc/FGG6-M7K9].

230. Lauren Fedor & Claire Jones, *Jay Powell Sent Senators Details on \$2.5bn Fed Project Following Testimony*, FIN. TIMES (Jan. 13, 2026), <https://www.ft.com/content/1df72693-a510-4bcf-80ba-318e085bc2e6> [https://perma.cc/2C7A-BE8W] (“Jay Powell wrote to senators last July with details about the Federal Reserve’s \$2.5bn renovation project, according to a letter seen by the FT, complicating the Trump administration’s claims that he misled Congress”).

231. Jerome H. Powell, Chair, Bd. of Governors of the Fed. Rsrv. Sys., Statement from Federal Reserve Chair Jerome H. Powell (Jan. 11, 2026), <https://www.federalreserve.gov/newsevents/speech/powell20260111a.htm> [https://perma.cc/T6RS-3MRQ] (“This is about whether the Fed will be able to continue to set interest rates based on evidence and economic conditions—or whether instead monetary policy will be directed by political pressure or intimidation.”).

he had nothing to do with the investigation.<sup>232</sup> The entire episode revealed a somewhat unexpected mechanism safeguarding the Fed's independence: apart from legal provisions and political tradition, the financial markets—and sovereign debt markets in particular—appear to function as an additional gatekeeper to central bank independence. The watchdog function of financial markets should not be overestimated, however. Whereas they initially reacted strongly when the Trump Administration threatened the independence of the Fed, the markets quickly grew accustomed to this trend and have become more indifferent when such threats are made.<sup>233</sup>

Tensions between the Administration and the Fed culminated in late August 2025, when the President decided to remove Fed Governor Lisa Cook from office. A few days earlier, Bill Pulte, head of the Federal Housing Finance Agency, alleged that Cook had committed fraud in the management of her personal assets by registering two properties as her primary residence. President Trump seized this opportunity to justify Cook's removal, asserting that the purported misconduct constituted a "serious cause" under the Federal Reserve Act, thus fulfilling the conditions for a "for cause" removal.<sup>234</sup> Cook contested her removal and initiated legal proceedings, arguing, among other things, that the allegations were unsubstantiated and that the President did not have actual "cause," considering the lack of criminal investigations or a judicial ruling confirming the alleged fraud.<sup>235</sup> She filed proceedings before the U.S. District Court for the District of Columbia, which issued a preliminary injunction blocking the President's removal

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232. See Jones & Duguid, *supra* note 229 ("I don't know anything about it, but he's certainly not very good at the Fed, and he's not very good at building buildings," the president told NBC News on Sunday evening, claiming the investigation had nothing to do with Powell's refusal to slash rates.').

233. When Fed Governor Lisa Cook was removed from office by President Trump in late August 2025, see *infra* text and accompanying notes 234–38, bond markets did not strongly react to this news. See Olaf Storbeck & Claire Jones, *Investors Underestimate Donald Trump's Threat to the Federal Reserve, Economists Warn*, FIN. TIMES (Sep. 1, 2025), <https://www.ft.com/content/be7070f5-1db3-4831-974b-f6698ea91da1> [<https://perma.cc/8MBW-YGMA>] (noting that "[e]arlier threats to fire Powell triggered a strong reaction from investors, but markets reacted with a whimper to news of Cook's firing"). The same happened in January 2026, when the Department of Justice launched a criminal investigation against Chair Powell. See Nils Pratley, *US Bond Markets Should Be in Revolt. Fed Independence Matters*, GUARDIAN (Jan. 12, 2026, 1:08 PM), <https://www.theguardian.com/business/nils-pratley-on-finance/2026/jan/12/us-bond-markets-should-be-in-revolt-fed-independence-matters> [<https://perma.cc/47NC-FA6V>] ("The dollar weakened, but only slightly, and US treasuries suffered modest selling pressure.').

234. See 12 U.S.C. § 242.

235. Complaint at 15–18, *Cook v. Trump*, No. 25-cv-2903, 2025 WL 2607761 (D.D.C. Aug. 28, 2025).

decision on September 9, 2025.<sup>236</sup> As a result of the injunction, Cook has been temporarily reinstated to office. The Administration appealed this decision to the D.C. Circuit, which confirmed the District Court's injunction on September 15, 2025.<sup>237</sup> The Supreme Court subsequently granted the Administration's request for cert and heard oral arguments in January 2026.<sup>238</sup> In granting cert, the Court issued a two-sentence order in which it deferred the Administration's application for stay of Cook's temporary reinstatement.<sup>239</sup> Consequently, she will remain in office until the Court's ruling on the merits. Even though the Court has not yet decided the President's removal decision on the merits, the deferral of the application for stay seems to foreshadow a ruling in Cook's favor. The Court thus appears to be acting in accordance with its earlier obiter dictum in *Trump v. Wilcox*.

Whereas the Federal Reserve has remained steadfast under the removal threats from the Trump Administration, it has tried to appease the White House in other ways. With a view towards shielding itself from increased political scrutiny, the Fed withdrew from the Network for Greening the Financial System only a handful of days before President Trump's inauguration.<sup>240</sup> The Fed's interest in climate change and its membership in the Network attracted criticism from the start,<sup>241</sup> so a retreat from this initiative arguably aimed to de-escalate tensions with Republican lawmakers. Furthermore, the Vice Chair for Supervision Michael S. Barr resigned shortly before President Trump took office.<sup>242</sup> By leaving the coordination of the Fed's supervisory and regulatory tasks to a Trump appointee, reporting suggests Barr wanted to avoid trapping the Fed in a contentious standoff with the Administration over new rules on banking regulation.<sup>243</sup> Interestingly, Barr decided to step

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236. Cook v. Trump, 804 F. Supp. 3d 14 (D.D.C. 2025).

237. Cook v. Trump, No. 25-5326, 2025 LX 360887 (D.C. Cir. Sep. 15, 2025).

238. Trump v. Cook, 146 S. Ct. 79 (Oct. 1, 2025).

239. *Id.*; see also Palma & Jones, *supra* note 12.

240. See Press Release, Federal Reserve, Federal Reserve Board Announces It Has Withdrawn from the Network of Central Banks and Supervisors for Greening the Financial System (NGFS) (Jan. 17, 2025), <https://www.federalreserve.gov/newsevents/pressreleases/bcreg20250117a.htm> [<https://perma.cc/7C9E-C7W5>]; see generally *supra* text and accompanying notes 142–45 (describing the Network for Greening the Financial System in general).

241. See Madeleine Ngo & Lydia DePillis, *Fed Quits Global Climate Risk Group Ahead of Trump Presidency*, N.Y. TIMES (Jan. 17, 2025), <https://www.nytimes.com/2025/01/17/us/politics/fed-trump-climate-network.html> [<https://perma.cc/BJ5B-PBQN>].

242. See Solomon & Smialek, *supra* note 108.

243. *Id.* Among others, the Vice Chair is responsible for the implementation of the Basel III Endgame package, a set of international soft law standards imposing stringent capital and liquidity requirements on banks, which are subsequently transposed into “hard law” by domestic legislation. See David Wessel, Commentary, *What Is Bank*

down as Vice Chair but retained his seat on the Board of Governors as an ordinary board member. This is a potential strategy for Chair Powell, too, if the President were to proceed with removing him as Chair.

Apart from removal threats, The Trump Administration has also explored other ways to make the Fed more accountable and less independent. Not long after taking office, President Trump issued Executive Order 14215, which purports to bring independent agencies more strongly within the purview of Presidential control.<sup>244</sup> While the Fed's monetary policy is explicitly exempted, its supervisory and regulatory tasks will come under closer scrutiny from the executive.<sup>245</sup> More specifically, the EO subjects independent agencies to review by the Office for Information and Regulatory Affairs ("OIRA"), imposes performance standards on agency heads, and creates an obligation to conduct policies consistent with the President's priorities.<sup>246</sup> It remains to be seen whether the Executive Order will survive in court.<sup>247</sup>

For the moment, however, the Fed's ability to maneuver will probably be curtailed. While this is obviously the case for its regulatory and supervisory tasks, monetary policy may still be impacted despite the

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*Capital? What Is the Basel III Endgame?*, Brookings Commentary (Mar. 7, 2024), <https://www.brookings.edu/articles/what-is-bank-capital-what-is-the-basel-iii-endgame/> [https://perma.cc/62DT-SA42]. The implementation of these international standards into domestic rules already proved challenging before the second Trump Administration had taken office and would only become more difficult afterwards. See Daniel Davies, *Endgame for Endgame?*, FIN. TIMES (Nov. 14, 2024), <https://www.ft.com/content/899f499e-2249-40f8-9d0c-fa72ffb98869> [https://perma.cc/3BM7-CAUV].

244. Ensuring Accountability for All Agencies, Exec. Order No. 14,215, 90 Fed. Reg. 10447 (Feb. 18, 2025) [hereinafter EO 14215]; see also Todd H. Baker, *What We Talk About When We Talk About "Fed Independence"*, CLS BLUE SKY BLOG (July 15, 2025), <https://clsbluesky.law.columbia.edu/2025/07/15/what-we-talk-about-when-we-talk-about-fed-independence/> [https://perma.cc/35TY-H82M] (pointing out that the order "claim[ed] direct authority over the Fed in connection with its 'conduct and authorities directly related to its supervision and regulation of financial institutions'"); Stefania Palma, *Donald Trump Makes Push for Control of Independent US Regulators*, FIN. TIMES (Feb. 19, 2025), <https://www.ft.com/content/9d097840-cad0-49d2-8d27-5f59b4628f10> [https://perma.cc/56WD-9BK9] ("Donald Trump is to take greater control of independent federal agencies — including important financial watchdogs.").

245. See EO 14215, *supra* note 244, § 2.

246. See *id.* §§ 3–5.

247. The Democratic Party immediately challenged the EO before the District Court of Columbia, but the case was dismissed in June 2025 due to lack of standing. See *Democratic Nat'l Comm. v. Trump*, No. 25-00587, 2025 LX 183424 (D.D.C. June 3, 2025). Further litigation can be expected, however, since the Order seems to be at odds with Supreme Court rulings such as *Humphrey's* and Administrative Procedure Act procedural requirements. See Marc S. Martin & Dania Assas, *Executive Order Expands Presidential Oversight of Independent Agencies*, PERKINS COIE: BLOGS (Feb. 20, 2025) (discussing the legal implications of the EO).

Executive Order's carveout.<sup>248</sup> First, the Order does not clearly define monetary policy, which raises the question of how broad or narrow this policy area should be construed.<sup>249</sup> Does it only encompass conventional interest rate-based policies? Or do unconventional instruments such as large-scale asset purchases fall within the scope of the carveout too? Other Fed tasks, such as overseeing payment systems or providing emergency relief, cannot always be neatly distinguished from monetary policy.<sup>250</sup> And what about future monetary policy instruments that do not yet exist at the moment?<sup>251</sup>

Second, even if the boundaries of the carveout were well-defined, applying two completely different standards of independence to one and the same agency might not be as straightforward as it seems. For instance, certain elements of independence cannot simply be compartmentalized.<sup>252</sup> Most notably, removal protections for Governors must necessarily apply to all Fed tasks. Making a Fed Governor independent for monetary policy but removable at will for regulatory affairs would be hardly conceivable.<sup>253</sup>

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248. This concern has also been voiced by economists. See Palma, *supra* note 244 (quoting an analyst saying, “[t]he fact that it’s carved out should not mean that we can breathe easy when it comes to the independence of the Fed”).

249. See Daniel Tarullo, *Can the Federal Reserve Be Split in Two?*, HUTCHINS CTR. ON FISCAL & MONETARY POL’Y AT BROOKINGS 1, 9 (Oct. 10, 2025), <https://www.brookings.edu/articles/can-the-federal-reserve-be-split-in-two/> [<https://perma.cc/3L9R-JKGG>] (pointing to the difficulty of distinguishing monetary policy from banking regulation and supervision). “The executive order and the OMB guidance issued to date leave several questions unanswered. Most obvious is how the line is to be drawn between the Fed’s monetary and regulatory activities. For example, how should one classify the Fed’s solvency criteria for banks to access discount window borrowing?” *Id.*

250. See e.g., Michel, *supra* note 66, at 562 (qualifying emergency support as being part of monetary policy); Ostrowski, *supra* note 38, at 753, 772 (remarking that the demarcations between different Fed policies have increasingly started to blur); Athanassiou, *supra* note 42, at 717 (explaining that “[i]f the efficient circulation of money were to be thwarted by an unsound and unreliable payment system, the ability of money to fulfill its core purpose would suffer, and so would public trust in it”); Campbell & Lastra, *supra* note 39, at 458 (describing the definitional issue during times of crisis between regular discount policies and extraordinary or emergency lending); Armin Steinbach, *The Lender of Last Resort in the Eurozone*, 53 COMMON MKT. L. REV. 361, 366 (2016). (“The relation between monetary policy and financial stability policy has been controversially debated.”).

251. This question has been raised by scholars. See Dinovelli, *supra* note 13, at 68.

252. Cf. Pieterjan Heynen, *The Evolving Status of National Central Banks in the Eurosystem*, 30 EUR. PUB. L. 243, 262 (2024) (elaborating on this idea in the EU context).

253. Doing so would inevitably impinge on the monetary policy independence of Governors. The Administration could simply always claim that they dismissed a Governor at will over a regulatory issue, as it is unclear how removed Governors could ever prove that they were actually dismissed because of their monetary policy stance—for which they still enjoy removal protection, in theory—and not over a supervisory

To illustrate this point, reference can be made to a 2019 CJEU ruling about Ilmārs Rimšēvičs, the Governor of the National Central Bank (NCB) of the Republic of Latvia.<sup>254</sup> NCB Governors are officials with a double capacity—they head their respective NCBs, but they also hold a position in the ECB Governing Council, which decides monetary policy in the Eurozone.<sup>255</sup> In 2018, Governor Rimšēvičs was arrested by the Latvian Anti-Corruption Authorities on suspicion of accepting bribes.<sup>256</sup> He was released after two days in prison, but the Authorities imposed a temporary suspension on the Governor to execute his tasks.<sup>257</sup> Following these measures, Rimšēvičs and the ECB filed an appeal with the CJEU, which has statutory authority to review decisions to remove NCB Governors.<sup>258</sup> Due to a lack of evidence, the Court annulled the removal decision and reinstated Rimšēvičs in office.<sup>259</sup> In this regard, it is interesting to note that Rimšēvičs was reinstated both to his position of NCB Governor and as member of the ECB Governing Council. In other words, the CJEU did not limit itself to reviewing only Rimšēvičs's capacity as member of the ECB Governing Council, but also included his position as NCB Governor. Hence, Rimšēvičs could invoke his personal independence derived from EU law in the context of national criminal prosecutions for acts allegedly committed under his national capacity.<sup>260</sup> This holding can certainly be defended. Imposing different standards of personal independence on one and the same individual who holds several positions would inevitably jeopardize that person's overall independence.<sup>261</sup>

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or regulatory matter. A similar argument has been made by Tarullo, arguing that two different removal standards for regulatory affairs and monetary policy is “unworkable.” See Tarullo, *supra* note 249, at 5 (“In the face of a challenge by a board member dismissed by the President for the stated reason of differences on regulatory policy, it would—as a practical matter—be very difficult for a court to distinguish regulatory policy disagreements from monetary policy disagreements.”).

254. Case C-202/18, Ilmārs Rimšēvičs v. Republic of Latvia, ECLI:EU:C:2019:139 (Feb. 26, 2019). See generally Alicia Hinarejos, *The Court of Justice Annuls a National Measure Directly to Protect ECB Independence: Rimšēvičs*, 56 COMMON MKT. L. REV. 1649 (2019) (discussing the judgement in detail).

255. See *supra* text and accompanying notes 20–22.

256. Case C-202/18, Rimšēvičs §§ 14–15.

257. *Id.* § 16.

258. ECB Statute, *supra* note 21, art. 14.2. This provision prescribes that members of the Governing Council can only be removed from office if they no longer fulfill the necessary qualifications laid down in primary law, or when they are guilty to serious misconduct. Such decisions can be reviewed by the CJEU. *Id.*

259. Case C-202/18, Rimšēvičs § 96–97.

260. *Id.* § 64–66.

261. See Heynen, *supra* note 252, at 264 (“In the end, an NCB remains one institution: one legal person with one budget and one (main) decision-making body. With regard

Moreover, even if monetary policy decisions are not formally scrutinized by OIRA, it is difficult to see how such close involvement of the executive branch in one policy area will not spill over into other Fed tasks. After all, monetary policy and banking regulation are not isolated policy areas, but rather have significant influence on each other.<sup>262</sup> To name but a few intertwinements, capital requirements are well known to have an impact on monetary policy and monetary policy interest rates obviously matter a great deal to the banking industry.<sup>263</sup> As soon as rules on capital requirements are on the table, for example, OIRA might thus have a hard time limiting itself to banking regulation and avoiding commenting on the Fed's monetary policy stance. Furthermore, the spillover effect of monetary policy seems likely to take on a more intangible and psychological dimension too. In the end, the Governors who are subject to submitting performance plans and proposals to OIRA would be the same Governors occupying seats in the FOMC to conduct monetary policy. Being under augmented scrutiny in the context of regulatory and supervisory affairs might produce a chilling effect in the area of monetary policy and strain the Governors' policy positions with a view towards soothing the White House.

At first sight, the Administration's actions seem suitable to increase the Fed's political accountability and restrict some of its discretion. However, the White House's proposals to subject the Fed to OIRA review or make the Fed Chair removable at will are of such a striking magnitude that the increased level of input accountability does not seem proportionate to the ensuing loss of independence and discretion. When the Fed's independent status vanishes, monetary policy will lose credibility and effectiveness.<sup>264</sup> At this point, the Fed's overall accountability would also be undercut, since a decrease of credibility and effectiveness will curb output accountability.<sup>265</sup> When the Fed is no

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to these subcategories of independence, it would be artificial to maintain different standards depending on the task."); *see also supra* note 253.

262. Banking regulation has even been referred to as an "extension of monetary policy." *See infra* section III.B; *see also* Green, *supra* note 177, at 57–68; Goldmann, *supra* note 180, at 285 ("[T]he coordination of monetary policy and prudential supervision might reap some benefits and prevent some harms.").

263. *See, e.g.,* Leonardo Gambacorta & Hyun Song Shin, *Why Bank Capital Matters for Monetary Policy*, 35 J. FIN. INTERMEDIATION 17, 18 (2018).

264. *See* Skinner, *supra* note 55, at 221 ("[I]f central bankers cannot credibly commit to doing the difficult thing over the longer-term—e.g., not expand the money supply in response to presidential pressure—their near-term promises to that effect will not be believed and inflation expectations will get out of hand.").

265. *See supra* section I.C.2. Indeed, the mere prospect of the Fed losing its independence has proven sufficient to cause rising inflation outlooks. *See* Kate Duguid et al., *Donald Trump's Escalating Attacks on Federal Reserve Unnerve Investors*,

longer willing or able to raise interest rates when inflation is above target due to a political appetite for low rates, this will inevitably exacerbate inflationary trends. Ramping up political accountability by these means will therefore turn out to be self-defeating and could prompt a collapse of the Fed's output accountability. Moreover, the envisaged actions would undermine the very rationale for independence.

Admittedly, it is not per se impossible to apply different standards to one and the same institution, depending on the task at hand. For example, when the ECB was assigned the responsibility for prudential banking supervision, the SSM Regulation did not subject the ECB's supervisory task to the standards that were already in place for monetary policy. Instead, the SSM Regulation created separate accountability and independence arrangements for supervision.<sup>266</sup> Legal scholars have therefore argued that the ECB's independence under its supervisory task is somewhat less elevated than the independent status it enjoys under its monetary policy mandate.<sup>267</sup> However, these varying degrees of independence and accountability must not be overestimated. The independence regime laid down in the SSM Regulation largely mirrors the provision on monetary policy independence in Article 130 of the TFEU, and the same goes for accountability arrangements.<sup>268</sup> Thus, if the regimes applicable to different tasks all held by one institution start to diverge completely or if two policy areas cannot be clearly delineated from one another, the spill-over effects and problems mentioned above will likely materialize.

### C. *The Administrative State at Stake*

The independence of the Federal Reserve is not only under strain because of its increased levels of discretion. The augmented pressure on the Fed cannot be fully appreciated without regard to a broader trend in the United States of hostility towards the administrative state.<sup>269</sup> Since

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FIN. TIMES (July 17, 2025), <https://www.ft.com/content/7f2aeb4e-f0cc-48f8-a973-c640b5cc5324> [<https://perma.cc/H8KN-GXEP>].

266. See SSM Regulation, *supra* note 28, art. 19–20.

267. Thomas Voland & Benedikt Wolfers, *Level the Playing Field: The New Supervision of Credit Institutions by the European Central Bank*, 51 COMMON MKT. L. REV. 1463, 1487 (2016) (“It may be argued that such a limitation [of independence] is possible because the supervisory tasks are not directly conferred upon the ECB by the TFEU.”). *But see* Zilioli & Riso, *supra* note 169, at 174 n.155 (arguing that the ECB can rely on its Treaty independence also with regard to its supervisory tasks).

268. Compare TFEU, *supra* note 17, art. 284(3), with SSM Regulation, *supra* note 28, art. 19–20.

269. For an early analysis of the mounting criticism on the administrative state, see Gillian E. Metzger, *1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1 (2017).

taking office, the second Trump Administration has issued a series of executive orders aimed at reforming the executive departments and agencies. Some of these measures are very explicit in their intent, such as Executive Order 14192, tellingly titled *Unleashing Prosperity Through Deregulation*.<sup>270</sup> This order targets all federal government departments and agencies and seeks to encourage deregulation, for example by stipulating that for new regulations, costs for regulated entities may in no case outweigh projected benefits.<sup>271</sup> The order also requires that when a government agency issues one new measure, it must repeal at least ten existing measures under the so-called “ten for one” principle.<sup>272</sup>

Another example concerns the aforementioned Executive Order 14215, *Ensuring Accountability for All Agencies*, which aims to bolster unitary executive power by curtailing the independent status of government agencies as much as possible in favor of presidential control and oversight.<sup>273</sup> Moreover, since the Trump administration took office, federal agencies have not only had to contend with Executive Orders, but also with the Department of Government Efficiency (“DoGE”), an initiative established by President Trump and initially led by Elon Musk to make the government more efficient and cheaper. Although the legal basis of DoGE is shrouded in fog,<sup>274</sup> the impact of this initiative has been significant: DoGE claims that since its inception, it has implemented \$215 billion in savings and layoffs, effectively completely shutting down several government agencies, such as the U.S. Agency for International Development.<sup>275</sup> Even though DoGE officials targeted

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270. *Unleashing Prosperity Through Deregulation*, Exec. Order No. 14,192, 90 Fed. Reg. 9065 (Jan. 31, 2025).

271. *Id.* § 3.

272. *Id.* §§ 3(a), 6; see also Robinson, *supra* note 12 (“Executive Order 14192 requires that 10 regulations be eliminated for each new regulation issued and establishes a more stringent cap on regulatory costs.”).

273. See EO 14215, *supra* note 244.

274. See Ben Makuch, *Elon Musk’s Gutting of US Agencies is Illegal, Experts Say. How Do You Muzzle DOGE?*, GUARDIAN (Feb. 10, 2025, 6:00 AM), <https://www.theguardian.com/us-news/2025/feb/10/elon-musk-doge-agency-illegal> [<https://perma.cc/KP4E-QDAF>] (doubting the legality of DOGE). But see John O. McGinnis, *Musk’s Government Crusade is Legal—and All-American*, CITY J. (Feb. 11, 2025), <https://www.city-journal.org/article/elon-musk-doge-legal-democracy> [<https://perma.cc/A56S-4LXV>] (suggesting that “law, democracy, and precedents” all support DoGE’s actions).

275. The amount estimated by DoGE was found on its website as of Jan. 8, 2026. *Savings*, DEPT. OF GOV’T EFFICIENCY, <https://doge.gov/savings> [<https://perma.cc/3XX4-YFVW>]; see also Amy Schoenfeld Walker et al., *What Remains of U.S.A.I.D.?*, N.Y. TIMES (June 22, 2025), <https://www.nytimes.com/interactive/2025/06/22/us/politics/usaid-foreign-aid-trump.html> [<https://perma.cc/T3NM-FFC8>]

the Fed by accusing it of being “absurdly overstaffed,” the actual impact of DoGE on the Fed appears limited.<sup>276</sup>

At the same time, the Roberts Court has morphed into one of the most active—and most effective—critics of federal agencies. Over the past two decades, it has issued a number of milestone rulings which have strongly constrained the functioning and firepower of federal agencies. In *West Virginia v. EPA*, the Court embraced the Major Questions Doctrine, which demands explicit Congressional delegation before agencies can assume rulemaking authority over issues of vast economic and political significance.<sup>277</sup> Moreover, a pair of 2024 decisions facilitate litigation against agency action by removing strict time limits to bring civil suits and restrict agencies’ ability to conduct adjudications by requiring jury trials when a party is facing civil penalties.<sup>278</sup> Finally, in *Loper Bright v. Raimondo*, the Court disposed of its longstanding doctrine of *Chevron* deference, referring to a 1984 ruling which gave deference to agencies interpreting ambiguous statutes.<sup>279</sup> The implications of the latter ruling are most likely to be felt by the Fed with respect to its regulatory and supervisory tasks, for which it has often exercised broad discretion.<sup>280</sup> Especially when evaluating the totality of these rulings, the disruption and demolition of the administrative state becomes clear.<sup>281</sup> While only one of these judgments is explicitly concerned with the Federal Reserve, the Fed’s functioning is inevitably impacted by the Supreme Court’s anti-agency rulings.

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276. See Riley Steward, *Do Trump/Doge Materially Threaten the Federal Reserve?*, CENT. BANKING (Apr. 4, 2025), <https://www.centralbanking.com/central-banks/governance/7972641/do-trumpdoge-materially-threaten-the-federal-reserve> [<https://perma.cc/U9X3-UXEG>] (on file with author) (explaining how experts had mixed opinions about the threat posed by DoGE, with economist Michael Bordo stating that the Fed is likely to be “browbeaten by Trump at some point, but [the Fed] should stick to its knitting”).

277. *West Virginia v. EPA*, 597 U.S. 697, 700 (2022).

278. *Corner Post, Inc. v. Bd. of Governors*, 603 U.S. 799, 804 (2024); *SEC v. Jarkesy*, 603 U.S. 109, 120 (2024).

279. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407–08 (2024); *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 844–45 (1984). The concrete implications of *Loper Bright* remain somewhat unclear, however. See Adrian Vermeule, *Implied Delegations After Loper*, YALE J. ON REGUL. (July 9, 2024), <https://www.yalejreg.com/nc/implied-delegations-after-loper-by-adrian-vermeule/> [<https://perma.cc/TVH4-6MGK>].

280. Monetary policy decision-making is not expected to take a blow after *Loper Bright*, since this policy area is largely insulated from judicial review. See *supra* text and accompany note 120.

281. As remarked by Justice Jackson in her dissent in *Corner Post*, “[t]he tsunami of lawsuits against agencies that the Court’s holdings in this case and *Loper Bright* . . . have authorized has the potential to devastate the functioning of the Federal Government.” *Corner Post*, 603 U.S. at 865 (Jackson, J., dissenting).

### III. A CALL FOR CONGRESSIONAL ACTION

#### A. *The Fed as an Agent of Congress*

The GFC and the COVID-19 pandemic have brought vast levels of discretion to the Fed, while accountability mechanisms were left unchanged. As a result, the Fed is now facing unprecedented levels of political backlash, which have put its independent status under firm pressure. To find a way out of this deadlock, it is crucial to strike a new balance between independence, discretion, and accountability. One strategy the Federal Reserve could follow to increase its accountability without giving up independence is to seek alignment with Congress before taking certain actions or assuming new tasks. After all, the Fed is a highly independent agency without a constituency or other arrangements capable of bestowing direct democratic legitimacy upon it.<sup>282</sup> Engaging with Congress can take various forms, some more binding than others. Before assuming a new task or venturing into controversial topics such as wealth inequality, the Fed could hold back until it obtains explicit congressional approval.<sup>283</sup> However, for less contentious issues or in the case of an emergency, more informal coordination and alignment with Congress might suffice.<sup>284</sup>

Coordinating with Congress is not without precedent. With regard to the Digital USD, for example, the Fed repeatedly stressed it will not consider the issue of a U.S. Central Bank Digital Currency without “clear support from Congress” for such an initiative.<sup>285</sup> A similar trend could be observed during the GFC and even more strongly during the pandemic, when the Fed acted in concert with Congress and the

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282. See *supra* section I.C.2.

283. With regard to actions in the realm of financial consumer protection and retail payment systems, for instance, Zaring and Zhang have called for Fed restraint, especially without a mandate from Congress for doing so. See Zaring & Zhang, *supra* note 5, at 392 (“Congress has never told the Federal Reserve to develop payment systems that put the Federal Reserve in a relationship with individuals.”).

284. Skinner and Salib have raised the idea of Congressional approval for emergency lending but admit that Congress is poorly equipped to act in the case of an emergency. See Michael Salib & Christina Parajon Skinner, *Executive Override of Central Banks: A Comparison of the Legal Frameworks in the United States and the United Kingdom*, 108 GEO. L.J. 905, 969 (2020) (“[O]ne might wonder whether the Fed should have an opportunity to make its case for lending to Congress. But then again, Congress may not be well-suited to hear pleadings on how to respond to a crisis.”).

285. See BRD. OF GOVERNORS OF THE FED. RSRV. SYS., MONEY AND PAYMENTS: THE U.S. DOLLAR IN THE AGE OF DIGITAL TRANSFORMATION 3 (2022), <https://www.federalreserve.gov/publications/files/money-and-payments-20220120.pdf> [<https://perma.cc/X3UF-XL9W>]. It seems Congress will not give its support to a Digital Dollar project anytime soon, as it is considering adopting a Bill which prohibits the Federal Reserve from issuing a CDBC. See CBDC Anti-Surveillance State Act, H.R. 5403, 118th Cong. (2023).

Treasury. As discussed *supra* section I.B.1, the CARES Act of 2020 gave Congressional authorization for sweeping Fed action to keep the financial system and the real economy afloat. While such actions may have been dubious under the FRA, the crisis instruments employed were found more acceptable because they enjoyed Congressional sanctioning.<sup>286</sup>

By ensuring alignment with Congress before acting on certain matters, the Fed can reconcile political accountability and enhanced democratic legitimacy with an expanded remit and broad discretion. According to this view, the more Congressional authorization, the more decisively the Fed can act. To better understand the relationship between the Fed and Congress, an analogy can be drawn to the framework eloquently set out by Justice Robert H. Jackson in the 1952 *Youngstown* case with regards to Congress and presidential powers.<sup>287</sup> In his concurrence, Justice Jackson explains the President is most powerful when enjoying clear Congressional authorization that enables him to rely on both his own *and* Congress's authority. When Congress has remained silent on a particular topic, there is a "zone of twilight" which limits the President's powers but leaves room for considerable "independent presidential responsibility."<sup>288</sup> Finally, if Presidential action is incompatible with Congressional will, his authority is "at its lowest ebb," allowing only the exercise of the President's core constitutional powers.<sup>289</sup> In the same vein, it could be argued the Fed should always be able to independently conduct interest rate-based monetary policy, which is at the core of its powers. In contrast, more controversial measures of unconventional monetary policy with less statutory backing might be more or less permissible, depending on the position taken by Congress.<sup>290</sup>

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286. See Jackson & Schwarcz, *supra* note 85, at 205–06 (discussing how the CARES Act reversed a number of restrictions on Fed powers that were imposed by Dodd-Frank).  
287. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 634–638 (1952) (Jackson, J., concurring).

288. *Id.* at 637.

289. *Id.*

290. For example, in the case of a future financial crisis, if Congress decided not to enact a statute similar to the CARES Act, there would arguably be considerably less room for the Fed to establish emergency facilities seeking to relieve the real economy. If Congress remained silent, the Fed must thus proceed cautiously in order not to overstep its discretionary "twilight zone." Moreover, if Congress enacted a statute that explicitly prohibited the Fed from setting up such facilities, the Fed's powers to do so would be "at their lowest ebb," thus virtually non-existent. Importantly, the *Youngstown* analogy to the scope of presidential powers depending on congressional sanctioning cannot be entirely extended to the Fed. Justice Jackson's opinion is concerned with constitutional authority, but the Federal Reserve's powers are, of course, delegated to it by Congress and not spelled out directly in the Constitution.

Turning to Congress comes with certain hazards. For example, the CARES Act scheme entailed a real risk of depleting the Treasury's backstops, which would have required the Fed to cover the losses itself. This could have strained its financial independence.<sup>291</sup> Moreover, the emergency actions conducted under the watchful eye of Congress and the Treasury inevitably benefited some and harmed others, which forced the Fed to run programs with distributional implications and overall exposed it to augmented political risks.<sup>292</sup> In this way, the Fed risks immediately losing the benefits of increased political accountability by venturing into controversial distributional tradeoffs, which would in turn undermine its legitimacy.<sup>293</sup> To this, it can be added that the CARES Act has arguably inflated Fed discretion. Because Congress and the Treasury sanctioned its actions, the Fed may have felt less restraint to expand the perimeter of its programs to benefit the real economy, for instance.

### B. Entrenching Fed Independence

Coordinating with Congress before taking certain actions presents an interesting strategy for the Fed to protect its status as an independent and discretionary agency. It is by no means a panacea, however. The threats currently confronting the Fed are of such a sweeping magnitude that a small increase in congressional involvement will not be sufficient

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291. See Jackson & Schwarcz, *supra* note 85, at 205 (“One open question, of course, is whether the Federal Reserve exposed itself to substantial credit risks as a result of these liquidity and guarantee responses.”).

292. See *id.* (“[T]he consequences of its interventions could impose losses or gains (on creditors, shareholders, or some other parties) that in retrospect seem inappropriate or improper.”); Menand, *supra* note 86, at 355 (“[C]redit support activities entail difficult distributive choices likely to embroil the Fed in political disputes.”).

293. Many scholars have expressed their concerns over monetary policy actions with significant distributional implications. See, e.g., Fabian Amtenbrink & René Repasi, *The German Federal Constitutional Court's Decision in Weiss: A Contextual Analysis*, 45 EUR. L. REV. 757, 775 (2020) (“[T]he legitimation of the delegation of the (monetary) policy function to an independent agency . . . becomes frail when the policy objective shifts or when the independent agency effectively makes principle distributive choices.”); Kanad Bagchi, *Depoliticizing Money: How the International Monetary Fund Transformed Central Banking*, 27 J. INT'L ECON. L. 166, 180 (2024) (“[T]he crisis years exposed central banks for what they are—highly consequential and political entities, performing functions with large-scale distributive and allocative effects.”); Klaus Tuori, *Expert, Stakeholder or Just Politician? New Roles of European Central Bank*, 14 HELSINKI COLLEGIUM FOR ADVANCED STUDS. 143, 149 (2013) (“Another corollary of the limited role of the ECB is that it clearly excludes any role for redistributive elements in ECB policy.”); Jens van 't Klooster & Clément Fontan, *The Myth of Market Neutrality: A Comparative Study of the European Central Bank's and the Swiss National Bank's Corporate Security Purchases*, 25 NEW POL. ECON. 865, 865–76 (2020) (denouncing the distributional impact of many quantitative easing programs launched by the ECB in the wake of the 2008 financial crisis).

to safeguard Fed independence. To preserve the Fed and its effectiveness as a monetary policy authority, it is pivotal to protect its independent status, which is under fierce attack from the executive branch.<sup>294</sup> As previously discussed, Fed independence is not only grounded in law, but also derived from “conventions” and political mores.<sup>295</sup> Consequently, the independent status and discretion of the Federal Reserve developed largely organically.<sup>296</sup> While the flexible nature of its independence was for a long time a strength—the Fed was among the first independent central banks in the world—this now turns out to be its Achilles Heel. As the current administration arguably has little regard for political tradition, the Fed has to fall back on sparse and disputed legal provisions in the FRA to uphold its independence.

Congress should therefore amend the FRA by adopting more explicit provisions confirming the personal independence of Fed Governors, especially the Chair and Vice Chairs. The saga surrounding Governor Cook’s removal has illustrated that when the personal independence of Fed board members is unequivocally enshrined in law, courts feel backed by Congress and do not shy away from upholding this independence, even in the face of aggressive executive power. The FRA should therefore be amended to include the Chair and Vice Chairs in 12 U.S.C. § 242. In the same vein, the FRA should more unequivocally propagate the functional independence of the FOMC to autonomously conduct monetary policy without undue political influence. For such an amendment, inspiration can be found in the Eurozone, where the functional independence of the ECB is enshrined in Article 130 of the TFEU.<sup>297</sup> According to this provision, no EU or national institution, office, or body may “seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks.”<sup>298</sup>

Following a set of statements by President Trump in April 2025, Chair Powell declared that, “[g]enerally speaking, Fed independence is very widely understood and supported in Washington, *in Congress*, where it really matters.”<sup>299</sup> If Congress agrees with the Chair’s view, it

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294. *See supra* section I.C.3.

295. *See supra* note 115 (discussing the wide array of legal provisions and political conventions providing for Fed independence).

296. In regards to the self-proclaimed discretion enjoyed by the FOMC, see Michel, *supra* note 66, at 561 (“[I]n a very real sense the Board gave itself the discretionary power to conduct open market operations.”).

297. *See* TFEU, *supra* note 17, art. 130.

298. *Id.* On ECB independence, *see infra* text and accompanying notes 315–18.

299. Claire Jones, *Could Donald Trump Fire Federal Reserve Chair Jay Powell?*, FIN. TIMES (Apr. 18, 2025), <https://www.ft.com/content/2c7302d3-ce64-438f-85e7-96375058ecad> [<https://perma.cc/6CJW-8Q63>] (emphasis added).

should seize this momentum to step up and entrench Fed independence firmly in the FRA, before the Fed collapses under the President's pressure.

Aditya Bamzai and Aaron Nielson, too, have called for entrenching Fed independence in an act of Congress. They claim, however, that Fed independence for monetary policy can only be maintained by stripping the Fed of its regulatory and supervisory tasks because of the Supreme Court's rulings which prohibit removal protection for agencies with purely executive remits.<sup>300</sup> While the Fed indeed exercises "core executive powers" as a banking regulator and supervisor, their contention may not hold in light of the recently-issued shadow docket opinion *Trump v. Wilcox*.<sup>301</sup> In this ruling, the Court noted that the Fed cannot simply be equated with other federal agencies due to its "unique and quasi-private" status, grounded in the historical tradition of the First and Second Banks of the United States.<sup>302</sup> This special status consequently justifies a higher level of independence, including for cause removal protection for members of the Board of Governors and the FOMC. Interestingly, the Court did not refer to the conduct of monetary policy as a special reason for independence. For the Court, the Fed derives its independent status from its history and unique institutional DNA, not from the subject-matter of its tasks.<sup>303</sup> As a result, it is no longer clear that the Court would only approve of removal protections for Fed Governors within the realm of monetary policy. Moreover, monetary policy and banking regulation remain closely intertwined. Lev Menand has argued that monetary policy is not such an exceptional and unique policy area as it sometimes appears. In the end, it is just another instance of banking regulation.<sup>304</sup> Conversely,

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300. See Bamzai & Nielson, *supra* note 100, at 844 ("[I]f Congress wishes to preserve the Federal Reserve's monetary independence, it should remove those regulatory functions that are inherently executive from the Federal Reserve's ambit.").

301. *Trump v. Wilcox*, 145 S. Ct. 1415 (2025).

302. See *supra* text and accompanying notes 211–14.

303. Moreover, as discussed *supra* section I.A., monetary policy is a relatively new task for the Fed, established with a view towards regulating the banking system and preserving financial stability. Modern monetary policy as it is conducted today was non-existent at the time of the Fed's inception and only later became part of its remit.

304. Menand, *supra* note 213, at 8 ("The majority ignores the elephant in the room: that the Fed's Board of Governors exercises quintessential executive power (at least on the Court's broad definition of the term).") *But see* Bamzai & Nielson, *supra* note 100, at 906 ("The Fed's core mission is monetary policy . . . these types of operations are analogous to the activities of the First and Second Banks, which were private.").

banking regulation and supervision have already been referred to as “an extension of monetary policy.”<sup>305</sup>

Furthermore, relieving the Fed of its regulatory and supervisory responsibilities seems unlikely to save it from the Administration’s resentments. Indeed, President Trump’s frustration with the Fed lies first and foremost in its monetary policy, so doing away with regulatory matters will not still all his grievances.<sup>306</sup> Moreover, independence for financial regulatory and supervisory functions is not novel nor unusual. Indeed, many financial regulators and supervisors enjoy an independent status, often established by Congress a longtime ago. For instance, both the Federal Deposit Insurance Corporation and the Office of the Comptroller of the Currency enjoy financial independence and are exempt from Congressional appropriations.<sup>307</sup> Moreover, the multimember boards of the Federal Deposit Insurance Corporation, Commodity Futures Trading Commission, and Office of the Comptroller of the Currency all enjoy varying levels of independence.<sup>308</sup> To this, it can be added that supervisory independence is separately required because the United States has committed itself to implementing the Basel Committee’s Core Principles for Effective Banking Supervision, which recommend an appropriate degree of operational independence for supervisory agencies.<sup>309</sup>

In conclusion, Congress does not have to strip the Fed of its regulatory and supervisory powers if it wishes to safeguard its independent status. Moreover, one should not disregard the synergies arising from the Fed’s dual role as LOLR and banking supervisor. It goes without saying that

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305. See Dinovelli, *supra* note 13, at 67–68 (“[T]he Fed also uses bank regulations in a way that functions as ‘an extension of its monetary policy authority.’”); Menand, *supra* note 8, at 247 (“[B]y regulating the quality of bank money, the Fed necessarily influences the quantity of money the banking system will create.”); Tarullo, *supra* note 90, at 84 (“The Board’s regulatory authority over banking organizations is in some sense an extension of its monetary policy authority.”).

306. See *supra* section II.B. (discussing the President’s main grievances against the Fed, which revolve mostly about its current stance on monetary policy).

307. See Bolzani, *supra* note 4, at 226–27 (“Some agencies’ budgets, such as the Federal Deposit Insurance Corporation (FDIC)’s and the Office of the Comptroller of the Currency (OCC)’s, depend exclusively or heavily on fee assessments collected against private regulated entities in the financial industry.”).

308. See HENRY B. HOGUE, BAIRD WEBEL & MARC LABONTE, CONG. RSCH. SERV., R43391, INDEPENDENCE OF FEDERAL FINANCIAL REGULATORS: STRUCTURE, FUNDING, AND OTHER ISSUES 16–20 (2023).

309. See BASEL COMM. ON BANKING SUPERVISION, CORE PRINCIPLES FOR EFFECTIVE BANKING SUPERVISION 21 (2012) (requiring that “[t]he supervisor possesses operational independence”). While the Basel principles have a soft law status, compliance is nonetheless expected. About the remarkably binding nature of financial soft law arrangements, see generally CHRIS BRUMMER, *SOFT LAW AND THE GLOBAL FINANCIAL SYSTEM: RULE MAKING IN THE 21ST CENTURY* (Cambridge Univ. Press 2015).

the former task provides invaluable information about banks' viability, which can be consulted when deciding emergency liquidity assistance requests, for instance.<sup>310</sup>

Admittedly, it seems unlikely that the current Congress will take up any of the above proposals to strengthen the Fed's independent status. Whereas some Republican lawmakers in Congress are known to value the idea of central bank independence,<sup>311</sup> there is currently no realistic majority either in the House or the Senate to adopt legislation in this regard.<sup>312</sup> Nevertheless, the current composition of Congress is not set in stone and could already turn around following the midterm elections in 2026. In addition, reform proposals for the Fed could be included in "Project 2029," the Democrat program for the next administration following the 2028 presidential election.<sup>313</sup>

Despite the political realities, members of Congress should realize that the Fed's independence is more fundamental than current political fault lines or partisan politics. The expanding reach of the executive branch into monetary affairs severely jeopardizes the powers of Congress, the branch designated as primary actor in this policy area by the Constitution.<sup>314</sup> Every member of Congress should be cognizant of this, partisan affiliations notwithstanding.

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310. See *supra* notes 180–81 (describing the coordination benefits flowing from the Fed's large remit); see also HOWARD DAVIES & DAVID W. GREEN, *BANKING ON THE FUTURE: THE FALL AND RISE OF CENTRAL BANKING* 16–23 (Princeton Univ. Press 2010) (providing a more general consideration of this particular synergy); Linzert & Smets, *supra* note 166, at 61–88 (same).

311. Examples include Republican Senators Thom Tillis from North Carolina and Mike Rounds from South Dakota. See Andrew Ackerman, *Trump Floats Firing Fed Chair with GOP Lawmakers, Then Backs Off*, WASH. POST (July 16, 2025), <https://www.washingtonpost.com/business/2025/07/16/president-trump-is-preparing-fire-fed-chair/> [<https://perma.cc/2WB6-YWGX>]; Associated Press & Spectrum News Staff, *Republican Senators Caution Trump Against Firing Fed Chair Jerome Powell*, SPECTRUM NEWS (July 17, 2025, 7:29 AM), <https://spectrumnews1.com/oh/columbus/news/2025/07/17/republican-senators-caution-trump-against-firing-fed-chair-jerome-powell> [<https://perma.cc/3SHM-85YX>]; Victoria Guida, *Why Some Trump Allies Want to Protect the Fed's Independence*, POLITICO (July 16, 2025, 9:05 PM), <https://www.politico.com/news/magazine/2025/07/16/trump-powell-fed-independence-interest-rates-inflation-00459115> [<https://perma.cc/BG9N-WQQE>].

312. Under the current circumstances, most Democratic lawmakers may arguably be willing to embed the Fed's independence in the FRA. Nonetheless, forging a bipartisan coalition to save the Fed seems even more unattainable.

313. See Shane Goldmacher, *Sound Familiar? Democrats Lay Groundwork for a 'Project 2029'*, N.Y. TIMES (July 7, 2025), <https://www.nytimes.com/2025/06/30/us/politics/democrats-project-2029.html> [<https://perma.cc/S73A-VNLT>].

314. See Levin & Skinner, *supra* note 11, at 172 (“[T]he Fed is carrying out the work of Congress, not the President.”); Skinner, *supra* note 55, at 164 (“[T]he consequence of this migration of monetary power from Congress to the Executive will be corrosive to our democratic institutions and contribute to inflation.”).

To underscore the importance of statutorily embedded independence, the ECB is a useful reference. Unlike the Fed, the ECB's independent status did not develop steadily over time, but was incorporated in the European Treaties at its inception.<sup>315</sup> As a result, the ECB's independence enjoys a quasi-constitutional status and can only be torn down by a Treaty Amendment, which requires the approval of all EU Member States.<sup>316</sup> ECB independence is also broad in scope, encompassing personal independence of ECB officials, functional independence, and financial independence.<sup>317</sup> At the same time, the CJEU has proven to be a firm guardian of the independent status of the ECB. It has referred to independence as a necessary safeguard to ensure a commitment to price stability, shield the central bank from political influence and pressure, and allow it to exercise broad discretion.<sup>318</sup>

### C. *Circumscribing Discretion and Enhancing Accountability*

A revision of the FRA should not only entrench Fed independence but also seize the opportunity to punctually limit the Fed's discretion and update the Fed's accountability arrangements. Punctually curtailing the Fed's discretion on certain issues can provide for a counterbalance to an increased level of independence. It also enhances accountability by facilitating less opaque decision-making.

Carefully circumscribing discretion was previously accomplished by the Dodd-Frank Act in 2010, which restricted the Fed's ability to provide emergency lending to individual financial firms during crises.<sup>319</sup> In the same vein, Congress could restrict Fed discretion in sensitive policy areas by setting out clear rules and guidelines. For example, Congress could intervene around Fed Master Accounts, as the Fed's conditions to obtain access to its Master Accounts have sparked controversy.<sup>320</sup> Whereas the Federal Reserve has repeatedly rejected certain applicants such as crypto banks on the basis of financial stability concerns, these applicants have contended that the FRA does not confer such discretion

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315. TFEU, *supra* note 17, arts. 130, 282.

316. TEU, *supra* note 19, art. 48.

317. For a detailed discussion, see generally CORNELIA MANGER-NESTLER & MARKUS GENTZSCH, *DEMOCRATIC LEGITIMATION OF CENTRAL BANK INDEPENDENCE IN THE EUROPEAN UNION* (2021).

318. *See* Case C-62/14, Gauweiler et al. v. Deutscher Bundestag, ECLI:EU:C:2015:400, § 40 (June 16, 2015) (“Article 130 TFEU is, in essence, intended to shield the ESCB from all political pressure in order to enable it effectively to pursue the objectives attributed to its tasks, through the independent exercise of the specific powers conferred on it for that purpose by primary law.”).

319. *See supra* section I.B.2.

320. *See supra* notes 103–04.

upon the Fed.<sup>321</sup> Congress could set the record straight by clarifying the criteria on which the Fed can rely on these assessments. This would not only restrict the Fed's discretion, but also shield the Fed from executive interference, as the Trump Administration might be inclined to push the Fed to ease access to these accounts.<sup>322</sup> Another possible intervention is for Congress to limit the perimeter of the Fed's emergency programs addressing the financial system, since its lending practices to the real economy during the pandemic were criticized and arguably unlawful.<sup>323</sup> Furthermore, it makes sense for the Fed to not further explore the issue of a Digital Dollar as long as Congress is opposed to such an initiative.<sup>324</sup>

Other amendments to the FRA could update accountability mechanisms. First, Congress could motivate the Fed to become more accountable by spelling out certain policy tradeoffs in the FRA instead of leaving such balancing exercises entirely to the Fed. For example, Congress could spell out more clearly how the Fed should strike a balance between different tasks and policy objectives when they are in conflict.<sup>325</sup> As described *supra* section I.C.2, one of the sources of the Fed's currently hampered accountability follows from its opaque decision-making process.<sup>326</sup> Fed Governors are in charge of financial regulation, payment systems, and monetary policy.<sup>327</sup> If a conflict between such policy objectives arises, it would be appropriate for the

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321. See Hill, *supra* note 104 (detailing the controversy).

322. See Baker, *supra* note 244 (“[T]he question of whether the Fed is independent in all its aspects or only when setting monetary policy may come to a head soon given the large number of applications for new national trust banks engaged in the crypto businesses, including stablecoin issuance and custody.”).

323. See Menand, *supra* note 86, at 301 (“[T]he Fed’s credit facility designed to buy corporate bonds and corporate bond Exchange Traded Funds . . . on secondary markets is inconsistent with section 13(3)(A) of the FRA.”).

324. See *supra* text and accompanying note 285.

325. TUCKER, *supra* note 60, at 556–69 (emphasizing the importance of clear and unambiguous policy objectives that should always accompany a delegation of power to an independent agency, such as the Fed).

326. See Zaring, *supra* note 13, at 159 (pointing to the FOMC’s “extraordinary independence and relative opacity”). The problem is not only between different Fed tasks, but also occurs within the framework of one task, such as monetary policy. Here, Skinner and Levin have argued that the Fed’s maximum employment goal is not sufficiently clarified and quantified, which obscures its accountability. See Levin & Skinner, *supra* note 11, at 1822–24.

327. To conduct the third task, the Fed of course enjoys the company of the Reserve Bank Presidents in the FOMC.

Fed to indicate how it makes a trade-off between the different objectives at stake.<sup>328</sup> In this way, its accountability would be bolstered.<sup>329</sup>

A second bucket of measures to enhance accountability are procedural in nature. Several scholars have argued that the Federal Reserve should pay more attention to administrative law requirements and heed closer to the Administrative Procedure Act (“APA”).<sup>330</sup> This could be done by encouraging the Fed to provide more guidance on future policy decisions or to collect more input and comments from stakeholders throughout the decision-making process.<sup>331</sup> Another possibility would be to impose more stringent reporting requirements and information sharing regimes with Congress, which would enhance the Fed’s transparency and political accountability vis-à-vis Congress.<sup>332</sup> Currently, the Fed’s reports to Congress tend to be succinct and pay little attention to alternative policy options. Moreover, Congress often has limited access to confidential information.<sup>333</sup>

Raising transparency standards towards Congress and the broader public furthers accountability by reducing uncertainty and allowing the Fed to explain its policy decisions and facilitate public scrutiny of its actions.<sup>334</sup> At the same time, raising transparency standards generally

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328. For a similar argument regarding the ECB, see Grünewald & van ’t Klooster, *supra* note 117, at 962 (“The ECB has become concerned with a range of objectives alongside price stability, but how they are balanced and how the ECB makes trade-offs remains profoundly unclear.”).

329. This point has also been made by Martin Hellwig, who has argued it is “desirable to bring the conflict into the open.” MARTIN HELLWIG, MAX PLANCK INST. FOR RSCH. ON COLLECTIVE GOODS, FINANCIAL STABILITY, MONETARY POLICY, BANKING SUPERVISION, AND CENTRAL BANKING 19 (2014); *see also* Klaus Tuori, *The ECB’s Quantitative Easing Program as a Constitutional Game Changer*, 26 MAASTRICHT J. EUR. & COMPAR. L. 94, 105 (2019) (“When a measure affects the institution’s objectives in a conflicting manner, its accountability becomes blurred. If the institution responds by denying the conflict, it starts to damage its credibility.”).

330. *See* Administrative Procedure Act, Pub. L. 79–404, 60 Stat. 237 (1946); *see generally* Conti-Brown, Listokin & Parrillo, *supra* note 13.

331. While the Fed already complies with APA rulemaking requirements under its regulatory tasks, Conti-Brown, Listokin, and Parrillo argue that it should put similar procedural safeguards in place under its monetary policy and emergency lending powers too. *See* Conti-Brown, Listokin & Parrillo, *supra* note 13.

332. In this way, Congress would be better equipped to hold the Fed accountable and enable the Fed to fulfill its role as an agent of Congress. *See supra* section II.A; Levin & Skinner, *supra* note 11, at 1769 (noting that “persistent congressional ‘undersight’ could threaten the delicate balance between the Fed’s independence and its public accountability”).

333. *See* Levin & Skinner, *supra* note 11, at 1822–29 (elaborating on potential improvements to the Fed’s accountability towards Congress regarding reporting requirements).

334. *See* Garicano & Lastra, *supra* note 126, at 616 (“Transparency is a complement of accountability—information needs to be observed for the agent to be made

only decreases independence and discretion at the margins,<sup>335</sup> which makes it a useful tool to recalibrate fundamental central bank principles. Such procedural obligations not only enhance transparency, but are also likely to benefit substantive decision-making, as the Fed would be forced to consult a wider variety of sources.<sup>336</sup> Overall, procedural safeguards could thus lead to increased accountability while maintaining Fed independence.

Nonetheless, measures to enhance transparency should not swing to the other extreme. Christina Skinner and Andrew Levin have made other recommendations to make the Fed more accountable to Congress, such as U.S. Government Accountability Office reviews of the Fed.<sup>337</sup> Such proposals require more caution, however, because such close scrutiny of the Fed could compromise the independence of monetary policy—which the authors admit.<sup>338</sup> Still, Government Accountability Office reviews would be preferable to OIRA reviews, as proposed by Executive Order 14215,<sup>339</sup> since the former operates as an agency within the legislative branch while the latter is an executive agency.<sup>340</sup>

To be clear, Congress should only punctually curtail Fed discretion. Overall, the Fed should maintain an appropriate margin of discretion to conduct its policies. This includes the ability to select the most suitable monetary policy instruments, take supervisory measures to safeguard financial stability, and adopt regulations necessary to ensure the safety and soundness of the banking system. Circumscribing discretion should not be used by Congress as a disguise to paralyze the proper execution

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accountable.”); Meade, *supra* note 126, at 407–09 (discussing the importance of transparency for the legitimacy of central banks).

335. In this sense, transparency is sometimes also portrayed as an autonomous principle, placed somewhere in between independence and accountability. See Curtin *supra* note 126, at 30 (“[I]n between the grandiose concept of ECB ‘independence’ and the more performative ECB ‘accountability’ lies ‘transparency.’”).

336. Enhanced transparency is not without risks, however. In extreme cases, it can amount to “external control” over the Fed. See Buchanan & Dorf, *supra* note 187, at 30–35.

337. Levin & Skinner, *supra* note 11, at 1829–30.

338. *Id.* at 1829 (“[A] potential concern is whether [Government Accountability Office] reviews could undermine the FOMC’s independence in determining the stance of monetary policy.”).

339. See EO 14215, *supra* note 244.

340. As discussed above, the White House recently increased pressure on the Fed by questioning the pricey renovation work at the Eccles Building, the Fed’s headquarters. The Office of Management and Budget director joined the President in criticizing the Fed over this renovation project. See Myles McCormick & Claire Jones, *Donald Trump to Visit Federal Reserve After Attacking \$2.5bn Renovation*, FIN. TIMES (July 23, 2025), <https://www.ft.com/content/6af6c95f-6554-47eb-afd1-4863ad2b1cd6> [https://perma.cc/T3FP-24PX]. Thus, as oversight actor over the Fed, the Office of Management and Budget and OIRA quickly risk becoming a political henchman for the President.

of Fed tasks. Indeed, a passive central bank with little discretion gives rise to other risks. If financial markets and the broader public cease to believe that the central bank is able and willing to control inflation or still market turmoil, it will lose credibility and legitimacy.<sup>341</sup> The Fed's inertia during the Great Depression era painfully showed that *not* exercising discretion can also produce devastating consequences.<sup>342</sup>

Furthermore, the Fed should not be barred from assessing and reacting to new risks to its policy goals, such as climate-related risks. As mentioned above, central banks did not start to pay attention to this problem because they deem themselves to be well positioned to solve global warming, but rather because these risks threaten their core policy goals of price stability and financial stability.<sup>343</sup> The Fed must therefore be allowed to develop expertise and take measures to counteract the adverse implications of climate-related risks for its remit.<sup>344</sup> Of course, the Fed must stay within the boundaries of its legal framework when doing so. It cannot, for instance, suddenly start purchasing private sector green bonds, which is precluded by the FRA.<sup>345</sup> Nonetheless, the Fed must be allowed to employ its toolkit to conduct climate stress tests, conduct further research, and monitor whether banks are well prepared to manage climate-related risks.<sup>346</sup>

#### CONCLUSION

The financial crises of the past decades have substantially reshaped the Federal Reserve's legal framework. Its remit has expanded significantly, now including additional supervisory and regulatory responsibilities, an increased presence in payment systems, and a powerful toolkit of unconventional monetary policy instruments. Underlying these expansions is a vast concern over financial stability, a policy objective currently at the forefront of the Fed's priorities. These evolutions have rattled the fundamental principles of accountability, independence, and discretion that shape and limit the Fed's mandates

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341. On the importance of credibility as a necessary condition for the effectiveness of the Fed's monetary policy, see *supra* section I.C.2.

342. For a detailed analysis of the Fed's response to the Great Depression, see generally BEN S. BERNANKE, *ESSAYS ON THE GREAT DEPRESSION* (Princeton Univ. Press 2004).

343. See *supra* section I.C.1.

344. See Conti-Brown & Wishnick, *supra* note 132, at 687–706 (finding that responding to risks posed by climate change for the financial system sits comfortably within the Federal Reserve's mandate as banking regulator and supervisor).

345. See Skinner, *Central Banks and Climate Change*, *supra* note 145, at 1330–32 (analyzing the purchases of green assets).

346. See Zaring & Zhang, *supra* note 5, at 382 (“[The Fed] has the discretion to conduct climate stress testing, but must be able to show that the stress testing is relevant to economic safety and soundness.”).

and legal framework. As a result of the rising importance of financial stability as a policy goal, the Fed's discretion has amplified, which has sparked concerns over its limited accountability and high levels of independence. Consequently, these evolutions have also given rise to severe political backlash and mounting scrutiny of the Fed.

Several pathways can be explored to recalibrate these principles. The way forward preferred by the current White House is to rein in Fed accountability by bringing it under firm Presidential control. Executive Order 14215 provides a first but decisive step towards more presidential control over the Fed, just like the Trump Administration's attempts to remove the Fed Chair from office. Demolishing the independent status of the Federal Reserve in such vigorous ways risks backfiring, however, as it will result in a severe loss of credibility and of effectiveness of monetary policy.

For now, Fed independence stands. But it is under firm pressure from the White House, which might have fired the first series of shots at the Fed, rather than the last. A multifaceted amendment of the FRA is therefore required to save the Fed and allow it to maintain its function as an effective, credible, and independent central bank. On the one hand, Congress should bolster Fed independence by explicitly and unequivocally entrenching its independent status in the FRA. On the other hand, an amendment to the FRA should limit Fed discretion in certain areas and enhance accountability requirements. In this way, Congress can put the Fed back on track, reconciling its independence with appropriate levels of discretion and accountability.