LAW AND CUSTOM ON THE FEDERAL OPEN MARKET COMMITTEE

DAVID ZARING*

I
INTRODUCTION

The Federal Open Market Committee (FOMC), which controls the supply of money in the United States, may be the country's most important agency.[1] The chair of the committee is often dubbed the second most powerful person in Washington, only deferring to the President himself.[2] Financial scholars and analysts obsess over the institution, leading to a rich tradition of FOMC Kremlinology, veneration, and second-guessing in business schools and economics departments.[3]

This article is also available at http://lcp.law.duke.edu/.

* Associate Professor, The Wharton School. Thanks to James Cox, Kate Judge, and to comments received at presentations at Columbia and the Mid-Atlantic Academy of Legal Studies in Business annual meeting. Thanks also to Jenny Lin and Jane Trueper for research assistance and the Dean's Research Fund for support.

1. Gerald Dunne has suggested that the FOMC be renamed the National Monetary Policy Commission, "so as to reflect what the Committee really is." Gerald T. Dunne, *A Central Bank for the Third Millennium*, 113 BANKING L.J. 327 (1996). The "may" exists partly to hedge on the possibility that a committee of officials of the Federal Reserve System would be considered an agency, though under 5 U.S.C. § 551(1) (2012), they likely would meet the test (the White House, for what it is worth, does not constitute an agency under the Administrative Procedure Act (APA)). *See id.* (defining agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency").

2. *See* Michelle C. Bligh & Gregory D. Hess, *The Power of Leading Subtly: Alan Greenspan, Rhetorical Leadership, and Monetary Policy*, 18 LEADERSHIP Q. 87, 89 (quoting Brady Willet, *As Greenspan Bids Adieu, Say Hello to Uncertainty,* FALLSTREET.COM (May 18, 2005), http://www.fallstreet.com/may1805.php); Henry W. Chappell, Jr., et al., *Partisan Monetary Policies: Presidential Influence Through the Power of Appointment*, 108 Q.J. OF ECON. 185, 191 (1993) (citing a U.S. News and World Report annual ranking of powerful individuals that placed the Federal Reserve Chairman second); William A. Kelly, Jr., et al., *Should We Sell the Fed?*, 8 CATO J. 125, 128 (1988) ("The chairman of the Federal Reserve Board has been called the second most powerful man in America.").

3. This obsession has led to numerous publications in popular media as well as academic sources. *See, e.g.*, Janet Yellen, *The View from Inside the Fed*, *in* THE TAYLOR RULE AND THE TRANSFORMATION OF MONETARY POLICY (Evan F. Koenig et al. eds., 2012) (describing the influence of the famous Taylor Rule, which offers guidance on how a central bank can respond, through the nominal interest rate, to changes in inflation or other economic conditions on American monetary policy); Paul Krugman, Op–Ed, *Give Jobs A Chance*, N.Y. TIMES, Sept. 15, 2013, http://www.nytimes.com/2013/09/16/opinion/krugman-give-jobs-a-change.html (focusing many of his articles on the actions of the Fed and debating their merits); Lawrence Summers, Op–Ed, *Economic Stagnation Is Not Our Fate—Unless We Let it Be*, WASH. POST, Dec. 18, 2013, http://www.washingtonpost.com/opinions/lawrence-summers-stagflation-is-not-our-fate--unless-we-let-

But legal scholars have been less entranced by the committee—put off, perhaps, by the fact that the institution has never been checked by the courts or by the Administrative Procedure Act (APA).[4] As a result, there has been no effort to come to grips with the administrative law of the FOMC; this article seeks to redress that gap.

The FOMC enjoys a legal mandate that shields its discretion to a remarkable degree. The principal claim here is that this shield, combined with the imperatives of bureaucratic organization in an institution whose raison d'etre is stability, has turned the FOMC into an agency governed by internally developed tradition in lieu of externally imposed constraints. The makeup of the committee, the materials that it consults before rendering monetary policy decisions, its voting mechanisms, and the way its decisions are promulgated are products of a mélange of evolving tradition and statutory permissiveness.

One might argue that some combination of law and tradition explains what happens in most agencies. But the degree of reliance on tradition sets the FOMC apart. No one worries about the customs governing evidence presentation and voting order on multimember boards like the Securities and Exchange Commission (SEC) or the National Labor Relations Board (NLRB), but they are subjects of scrutiny at the FOMC. By the same token, APA law, rather than traditions such as that of the FOMC's so-called "beige book," governs what goes into the record before, say, the EPA or Commerce Department make their factual findings.[5] And Supreme Court decisions like *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance Co.* mean that the decisions rendered by most agencies are substantially lengthier, and strive for substantially less ambiguity, than those of the FOMC.[6]

It is possible that this sort of development of routinized custom might be expected for agencies with few legal constraints. If so, the FOMC is a fine example of an institutional tendency, one that might have particular application in other forms of financial regulation. A mix of tradition and legal constraint are a feature of administrative constraint in that field, where litigation providing definitive opinions on required process is rare, and informal—and often nontransparent—oversight a norm. An account of the FOMC that jibes with the way this sort of regulation works might serve as a prod or a comparator for

it-be/2013/12/15/55a1b84e-65c1-11e3-a0b9-249bbb34602c_story.html (outlining the role of monetary policy in avoiding a permanent depression).

4. The agency that houses the FOMC has suffered from a similar neglect, even though, as Colleen Baker has observed, the Federal Reserve Board has "legal aspects [that] are highly significant and merit careful analysis by legal scholarship." Colleen Baker, *The Federal Reserve as Last Resort*, 46 U. MICH. J.L. REFORM 69, 71 (2012).

5. *See* David Fettig, *The Federal Reserve's Beige Book: A Better Mirror than Crystal Ball,* THE REGION, (Mar. 1, 1999), https://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3568 (stating that the Beige Book is "just one piece of information used in the making of monetary policy" by the FOMC).

6. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 30 (1983). The FOMC, of course, also must in theory adhere to rationality review—it is, however, rarely required to do so.

other accounts of the administrative law of financial oversight.

Given this theme, the article makes the following additional points:

1. The FOMC enjoys the sorts of broad delegations that other New Deal agencies benefit from, only more so; the orders issued by the committee at the conclusion of each of its eight annual meetings do not fit within the traditional paradigms of administrative rulemaking or adjudication, leading courts to eschew any effort to review those decisions as committed to the agency's discretion.[7]
2. Given its free hand, the FOMC might be expected to be an empire builder. But in reality, it has only expanded its remit with regard to the sort of transactions it takes on, which have moved beyond the purchase and sale of federal government debt to include positions in a broader range of financial assets, as the financial crisis exemplified.
3. The modest problems that the FOMC has endured at the hands of the branches that monitor independent agencies like it—the courts and Congress—have reflected its extraordinary independence and relative opacity. The courts have turned away a series of plaintiffs, including two senators, concerned about the breath of the delegation of power over the economy to the committee and the mechanism of appointment of committee members. Congress has occasionally fretted about the black box within which the committee makes its economy-changing decisions. However, in 1990, Congress removed legislation passed in the 1970s designed to require more reporting from the committee, suggesting that it, too, is cowed by the idea of subjecting the agency to much legislative oversight.[8]
4. The committee makes decisions in a procedurally consistent but increasingly lengthy and elaborate way. Simple correlations between the transcripts of these meetings (length, size, mood, number of times the chair spoke), the ultimate decision made by the FOMC, and a number of leading economic indicators found one intriguing relationship between attendance and the direction of the federal funds rate.[9] There may be some promising research directions available for this sort of analysis.

If the above observations are meant to make a descriptive case about the way the FOMC makes decisions, the question arises whether we should regret its distance from traditional sorts of administrative procedure. The FOMC's procedural uniqueness is a function of its independence; that independence is

7. Though probably, if they must belong somewhere in the APA, they belong to informal adjudications, which amount to any order issued by an agency. *See* 5 U.S.C. § 551(6) (2012) ("'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing"). The FOMC's monetary policy rules amount to guidance to its open market trading desks as to what sort of federal funds rate they should target.

8. *See infra* note 127.

9. *See infra* Part II.B.2.

justly celebrated. We can live with the irregularities and experiments offered by the idiosyncratic procedures of financial regulation in general, and with the FOMC in particular, though comfort with the independence of the committee does not excuse unfamiliarity with the way it operates.

It is accordingly worth determining how the FOMC does its business, and no scholar has yet done so. This lack of coverage by legal scholars of the rules and culture surrounding open market operations is not, to be sure, a terrible dereliction of duty. Administrative lawyers often assume that the subjects they study closely—rulemaking and adjudication by agencies—are quite different from other services provided by the government, including block grants, the management of state-owned enterprises, and, indeed, the oversight of interest rates. These lawyers do not necessarily claim that administrative scholarship should cover the entire waterfront of government action. Moreover, from a disciplinary perspective, although lawyers are very much engaged in financial supervision—that is, the way that the Federal Reserve (the Fed) regulates banks—they have little to do with either the decisionmaking by the FOMC, which expands or shrinks the nation's monetary supply, or the implementation of its open market orders, which is done by the traders who staff the New York Fed's open market operations desk.

Although these are all good reasons not to place the scrutiny of the government's open market operations agency at the top of every scholar's agenda, they do not justify ignorance of the committee. Any lawyer interested in institutional design ought to be interested in the design of one of the government's signature institutions; by the same token, knowing how law constrains the least rule-bound or adjudicatory of agencies essays an outline of the reach of these legal constraints.

In part III of this article, the legal constraints of the FOMC are considered in the classical administrative law vein. As this article discusses, those constraints have not limited the discretion of the FOMC, which enjoys a remarkable degree of independence from Congress, the executive, and the judiciary. Nonetheless, the limitations on the freedom of committee members to do as they wish are reviewed to give the reader a comprehensive sense of how the law, as expressed by the actual practice of the courts and Congress, have constrained the agency. But the analysis of how the FOMC operates begins in part II, where the way that the constraints that do exist have affected the agency's decisionmaking process is considered. A brief conclusion ends the analysis.

II

FOMC DECISIONMAKING DURING THE GREENSPAN ERA

This article posits that consistently observed custom comprises an important part of the governance offered by the FOMC, as the law offers little constraint on the agency. In part III, that law is reviewed. In this part of the article, some important consistencies that can be observed in FOMC decisionmaking are discussed, illustrating the traditions that the Fed observes.

Indeed, FOMC traditions affect the committee's work product. There is some evidence that establishing customs mattered to one former Fed Chair: Alan Greenspan. During his tenure, movement in the federal funds rate was correlated in a statistically significant way with the ways its meetings were conducted.

The FOMC's work product is entirely encapsulated in its short missives issued at the conclusion of its deliberations; the agency is almost nothing more than its eight annual meetings. Those missives include a very brief statement about the federal funds rate that will be pursued in the period leading to the next meeting.

Otherwise, except for occasional emergency telephonic meetings, FOMC members do not meet, and although Fed staffers prepare reports to the committee on the state of the economy in the interim, the committee does not operate its own research staff. No enforcement arm of the committee pursues cases against primary dealers who fail to target the interest rate sought by the agency, and so on. Instead, a trading desk in the New York Fed tries to meet the FOMC's targets, and its actions are almost the sum total of the aftereffects—at least those involving bureaucratic action—of an FOMC meeting.[10] Indeed, because all of the members of the FOMC hold other positions in the Fed and its regional reserve banks, the committee can be thought of as an agency that essentially only operates during its eight meetings per year, with the goal of producing a directive for the trading desk in New York.

Understanding the process adopted at the meetings is accordingly critical to understanding the process of the FOMC. But, until recently, such an analysis was difficult to do. For much of the committee's existence, what happened in FOMC meetings was kept secret. Congress only discovered that the agency was making meeting transcripts in the mid-1990s, and when it did, it evinced an exceeding interest in publicizing them.[11] The FOMC protested, but ultimately agreed to release the transcripts, provided that a five-year delay on their publication would be observed.[12] The quantitative component of this study lies in the relatively recent availability of transcripts of Fed meetings during the Greenspan era, which few realized were recorded.

The qualitative component of the analysis lies in the availability of first-hand sources on how the Greenspan Fed conducted its business, including an autobiography by Alan Greenspan,[13] and a first-draft-of-history-style account of

10. Of course, much of the effect of the announcement at the conclusion of the FOMC meeting is not realized by the trading activities of the New York Fed but by the reaction of the private sector to the FOMC's announced target.

11. *See* ROBERT D. AUERBACH, DECEPTION AND ABUSE AT THE FED; HENRY B. GONZALEZ BATTLES ALAN GREENSPAN'S BANK 87 (2008).

12. *Id.*

13. *See generally* ALAN GREENSPAN, THE AGE OF TURBULENCE: ADVENTURES IN A NEW WORLD (2007).

his era by Bob Woodward.[14]

A. Qualitative

During the Greenspan era, FOMC meetings acquired a predictable sense of order. It adhered to traditions of consensus, it considered the same sort of evidence to make its decisions, and that evidence was produced in the same way. Its meeting agendas rarely varied, and the minimal guidance issued at the conclusion of each session also followed predictable tropes, even if the content of the guidance varied with the state of the economy. These outcomes were produced through a relatively standardized set of inputs.

Meetings roughly started with a report, then a discussion, and then a conclusion by each member on the state of the economy, which was followed by a report, then a discussion, and then a recommendation by each member on what the Board of Governors (the Board) should do with the federal funds rate.[15] The report—a staff report on the country's economic conditions—preceded a discussion by the committee about that subject. Ultimately, the members of the committee, in seriatim, would present their own assessments of the economy; regional bank presidents reported on their region, whereas Board members evaluated the national economy as a whole.

The staff would then present a report on policy options, followed by a debate over which policy each member of the committee preferred. Greenspan would speak first in the policy debates and generally offered a proposal at that time.[16] After the debate, Greenspan would propose a final policy, including a target funds rate. That policy would be subject to a formal vote. Almost overwhelmingly during the Greenspan era, those votes were unanimous. Only seven percent of all votes cast during his tenure were dissents.[17]

In none of these meetings did the FOMC discuss what the larger purpose of its mission or approach to economic regulation ought to be—that is, to what end interest-rate manipulation ought to serve, and generally, whether pursuing it was good or bad at achieving particular goals, which surprised then–Board member and current Fed Chair Janet Yellen.[18] Woodward concluded that "the flexibility and lack of clearly stated goals gave the FOMC, and Greenspan in

14. *See generally* BOB WOODWARD, MAESTRO: ALAN GREENSPAN AND THE AMERICAN ECONOMY (2012).

15. Ellen W. Meade, *The FOMC: Preferences, Voting and Consensus*, 87 FED. RESERVE BANK OF ST. LOUIS REV. 1, 93–94, *available at* http://research.stlouisfed.org/publications/review/05/03/part1/Meade.pdf. This organization has persisted to this day. *See The Federal Open Market Committee*, THE STRUCTURE OF THE FED. RESERVE SYS., http://www.federalreserve.gov/pubs/frseries/frseri2.htm (last visited Apr. 3, 2015).

16. *See* HENRY W. CHAPPELL, JR. ET AL., COMMITTEE DECISIONS ON MONETARY POLICY: EVIDENCE FROM HISTORICAL RECORDS OF THE FEDERAL OPEN MARKET COMMITTEE 121 (2005) ("Greenspan usually spoke first and offered a policy proposal in the policy go-around.").

17. Henry W. Chappell, Jr., Rob Roy McGregor & Todd A. Vermilyea, *The Role of The Bias in Crafting Consensus: FOMC Decision Making in the Greenspan Era*, 40 INT'L J. OF CENT. BANKING 39, 42 (2007), *available at* http://www.ijcb.org/journal/ijcb07q2a2.pdf.

18. WOODWARD, *supra* note 14, at 170.

particular, much more maneuvering room."[19]

At the conclusion of the meeting, once the target rate and policy preferences had been voted upon, the committee would issue operating instructions—known as a "directive"—to the open market trading desk at the Federal Reserve Bank in New York. During most of Greenspan's tenure, these instructions included a statement about the committee's expectations for future changes in the federal fund rates.[20] The statement on future policy came to be known as the "bias" of the policy directive.[21] That bias would be "symmetric" if it indicated that a tightening or an easing of monetary policy would be equally likely.[22] It would be "tilted" if it suggested that monetary policy was more likely to change in the future in one direction or another.[23]

Of course, the meeting itself was not the only opportunity for FOMC members to interact. Greenspan discussed upcoming meetings with the other members of the Board—a practice he called "bilateral schmoozing."[24] In these one-on-one interactions, Greenspan could be quite persuasive. In the larger culture, Greenspan had a reputation for solemnity, fueled in part by his famously Delphic pronouncements before Congress of the state of the economy. But those who knew him praised the chairman for his sense of humor and force of personality.[25]

Greenspan's persuasive skills and apparently winning personality contributed in part to his ability to achieve consensus. Former Fed Vice Chairman Manuel Johnson said that during Greenspan's tenure, "Alan rule[d] the room . . . . Until he ma[de] a big mistake he'[d] continue to get everything he want[ed]."[26] Recently, Peter Conti-Brown and Simon Johnson have described the FOMC as one dominated by its chair, an observation few would contest for the Greenspan years.[27]

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19. *Id.*

20. Meade, supra note 15, at 95. *See also* Ben Bernanke, Chairman, Fed. Reserve, The Federal Reserve: Looking Back, Looking Forward (Jan. 3, 2014), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20140103a.htm ("The practice of issuing a statement after each meeting of the Federal Open Market Committee (FOMC) began under Chairman Greenspan.").

21. Daniel L. Thornton & David C. Wheelock, *A History of Asymmetric Policy Directive*, 82 FED. RESERVE BANK OF ST. LOUIS REV. 1, 1 (2000), *available at* http://research.stlouisfed.org/publications/review/00/09/0009dt.pdf.

22. *Id.*

23. *Id.*

24. WOODWARD, *supra* note 14, at 32.

25. JEROME TUCCILLE, ALAN SHRUGGED: ALAN GREENSPAN, THE WORLD'S MOST POWERFUL BANKER xv, 53, 66 (2002).

26. *Id.* at 237.

27. *See generally* Makram El-Shagi & Alexander Jung, *Does the Greenspan Era Provide Evidence on Leadership in the FOMC?* 6–8 (European Central Bank Working Paper Series No. 1579, 2013) (noting the abundance of academic literature discussing the dominance of the chairman in the FOMC and likewise concluding that, "[c]learly, the Fed's decision-making process is characterised by captainship"); Peter Conti-Brown & Simon Johnson, *Governing the Federal Reserve System after the Dodd-Frank Act* 8 (Peterson Inst. for Int'l Econ. Working Paper No. 2013-25, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376915.

In these pre- and postmeeting sessions, Greenspan evinced particular interest in unanimity on FOMC directives. He preferred that "the Fed speak with a single voice, even if no one was totally comfortable with the final decision," even if the question was difficult and the economy was in dire shape.[28] According to Woodward, "Greenspan went into FOMC meetings with a bunch of votes stuffed in his pocket."[29] On occasion, Greenspan urged his fellow FOMC members to coalesce around a particular policy recommendation, arguing that "it would be very tragic if a group of this extraordinary capability . . . were perceived to be in disarray," making it "crucially important that we stand tall as a group and try to find the means by which we can merge our differences."[30]

Greenspan was disinclined to worry overly about transparency. The decision to turn the reports on the economy from the country's regional banks into the more organized *Beige Book*, to be publicized two weeks before FOMC meetings, preceded his time as Chair.[31] His testimony to Congress was famously opaque.[32] And the Fed Chair who succeeded him vowed to increase the transparency of the FOMC.[33]

He also played an important role in making the agendas of the meetings so routinized and thereby narrowed the focus of the committee to the questions of the economic health of the country and the change in the money supply that the central bank could make to maintain that health. His organization of the FOMC schedule persists to this day, rendering the customs created during the Greenspan era durable and influential.

Those customs of consensus where possible, ordered decisionmaking made pursuant to a rarely-deviated-from meeting template in most cases, a template that typically ended with terse public announcements about the decisions made, became the touchstones that market participants could count on from the committee.

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28. WOODWARD, *supra* note 14, at 49.

29. *Id.* at 186.

30. *Id.* at 107.

31. Madeline Zavodny & Donna Ginter, *Does the Beige Book Move Financial Markets?* 72 SOUTHERN ECON. J. 138, 140 (2005) ("The Beige Book is a survey of regional economic conditions publicly released about two weeks prior to each FOMC meeting since mid-1983.").

32. As Greenspan himself observed, the opacity was intentional. Devin Leonard & Peter Coy, *Alan Greenspan on His Fed Legacy and the Economy*, BLOOMBERG BUS., Aug. 9, 2012, http://www.bloomberg.com/bw/articles/2012-08-09/alan-greenspan-on-his-fed-legacy-and-the-economy#p2 ("[Y]ou construct what we used to call Fed-speak. I would hypothetically think of a little plate in front of my eyes, which was the Washington Post, the following morning's headline, and I would catch myself in the middle of a sentence. Then, instead of just stopping, I would continue on resolving the sentence in some obscure way which made it incomprehensible.").

33. Bernanke, *supra* note 20 (observing that "[f]ostering transparency and accountability at the Federal Reserve was one of my principal objectives when I became Chairman in February 2006," and describing his initiatives to do so in the FOMC specifically).

B. Quantitative

One way to evaluate the effect of the increasingly customary procedure of the FOMC is to see whether variance in that process is associated with variance in the Fed's policy outcomes. By mining the transcripts of FOMC meetings during the Greenspan era, a preliminary effort along these lines could be pursued.

1. Introduction

A literary analysis of all of the thousands of pages recorded during Greenspan's lengthy tenure at the head of the committee is beyond the scope of this article; a quantitative analysis of those transcripts can, in its own way, be suggestive. Accordingly, the transcripts for the meetings between, and inclusive of, December 16, 1987, and January 31, 2006, were collected from the Federal Reserve Board's FOMC history database.[34] There was little missing data; some early meetings, held via telephonic conference call, were not transcribed.[35] Of the 223 individual meeting days (FOMC meetings are two days long, in most cases, but sometimes are concluded in one), nine meeting days—all in 1987—did not feature such transcripts.[36] The list of individuals who served on the FOMC at least once was obtained from two sources: the Board of Governors membership list and the first FOMC minutes of each year, which lists the five Fed presidents who had executed their oaths of office joining the committee.[37] The list of attendees at each meeting, which includes not just FOMC members, but nonvoting regional bank presidents and Fed staffers, appears at the beginning of each transcript of the meeting.

From the transcripts, basic data was collected related to the number of attendees at any FOMC meeting, the length of the transcript of any such meeting, and the existence of dissents from the order issued at the conclusion of the meeting, if any. In addition, the advanced search function of Adobe Reader permitted a search for terms. Most transcripts, for example, recorded "[LAUGHTER]", making it possible to search for the number of occasions such hilarity ensued in any meeting, which in turn could serve as a proxy for the mood in the committee. For that reason, the number of laughs recorded in each FOMC meeting transcript was also collected. In the same way, the contributions, on a purely numerical level, of any particular FOMC member could also be searched by, for example, searching for "GREENSPAN." Because the transcripts were recorded in a uniform format, with text and spacing the same size throughout the period, the total number of pages in a

34. *Federal Open Market Committee—Transcripts and Other Historical Materials*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (2013), http://www.federalreserve.gov/monetarypolicy/fomc_historical.htm (last visited Apr. 3, 2015).

35. *Id.*

36. *Id.*

37. *See, e.g.*, *Federal Open Market Committee—Conference Call of the Federal Open Market Committee*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., Jan. 9, 2008, *available at* http://www.federalreserve.gov/monetarypolicy/files/FOMC20080109confcall.pdf.

transcript served as evidence of the length of the deliberations in any particular meeting.

Because the contributions and the attendance of any member of the committee could be tracked, this article assembled data doing so, even though it added to the scope of the project. Many of the members, if they were relatively long-serving regional bank presidents, rotated on and off the FOMC with some regularity. If they were members of the Board of Governors, they served for small portions of the approximately twenty years during which Greenspan chaired the Fed. Or, if they were staffers, they appeared at occasional, but not regular, meetings.

Data from macroeconomic variables between August 18, 1987 and January 31, 2006 were collected from the Federal Reserve Economic Data (FRED) database maintained by the St. Louis Fed.[38] Macroeconomic data was collected on the Case-Shiller home price index, the federal funds rate, the country average home mortgage rate, real GDP in billions of chained 2005 dollars, the S&P 500 Index, and the unemployment rate. FRED data series were available in varying time interval formats. The format that provided dates that most closely matched the FOMC meeting date were selected for inclusion because that format most accurately reflected the macroeconomic environments on the date of the meeting.

Accordingly, for each meeting, 181 variables were kept, most of which accounted for the attendance of any particular member of the FOMC or staff member. The data form a panel structure, because data on these members were collected for the 214 meeting days for which transcripts were available during the Greenspan era.

2. Results

Descriptively alone, the transcripts reveal some interesting facts about evolution of open market committee decisionmaking. Meetings lengthened as the Greenspan era wore on. In the beginning, the transcripts would average around fifty pages in length. This lasted until the mid-1990s, but then, from 2001 to 2006, the average was much closer to one hundred pages in length.

Marginally more people began attending the meetings as well. The number of attendees was always quite large, including the voting members of the committee, the nonvoting presidents of the other regional central banks, and the large quantity of staffers at the Fed reporting to the committee. During the early years, the average number of attendees of the Greenspan era was less than fifty, but after the halfway point in his regime, the average nosed above that mark.

Moreover, for what it is worth, meetings got more amusing as the Chairman aged. This might indicate a lightening of the mood in those meetings, although the FOMC certainly went through turbulent times during both the beginning

38. *Federal Reserve Economic Data*, FED. RESERVE BANK OF ST. LOUIS, http://research.stlouisfed.org/fred2/ (last visited Apr. 3, 2015).

and the end of Greenspan's tenure. FOMC transcribers recorded laughter on a per-transcript-page basis increasing from an average of less than twenty percent between 1988 and 1992 to over twenty percent in between 2001 and 2006.[39] The higher the attendance at a meeting, the more laughter was recorded as well.

Finally, a regression analysis including relevant macroeconomic variables and the various meeting-specific variables was conducted to see if any characteristics of the meetings reflected some statistically significant relationship with the broader economic decisions that the FOMC was trying to make. The most intriguing relationship—although a multivariate regression hardly establishes causation (there are no instruments or discontinuities exploited in the analysis) and the relationship was modest—was the statistically significant relationship between the number of attendees at the meeting and the change in the federal funds rate, holding time and other factors constant.

The federal funds rate is the rate that the FOMC specifically targets, and is, at least in theory, the rate over which the committee has the most control. As figure 1 demonstrates, the rate varied over the era of Greenspan's tenure depending on the state of the economy, inflation, growth, and the like. Conventional FOMC policy would be to reduce the federal funds rate to encourage borrowing during recessions, and to increase it when the economy grew, threatening inflation.[40]

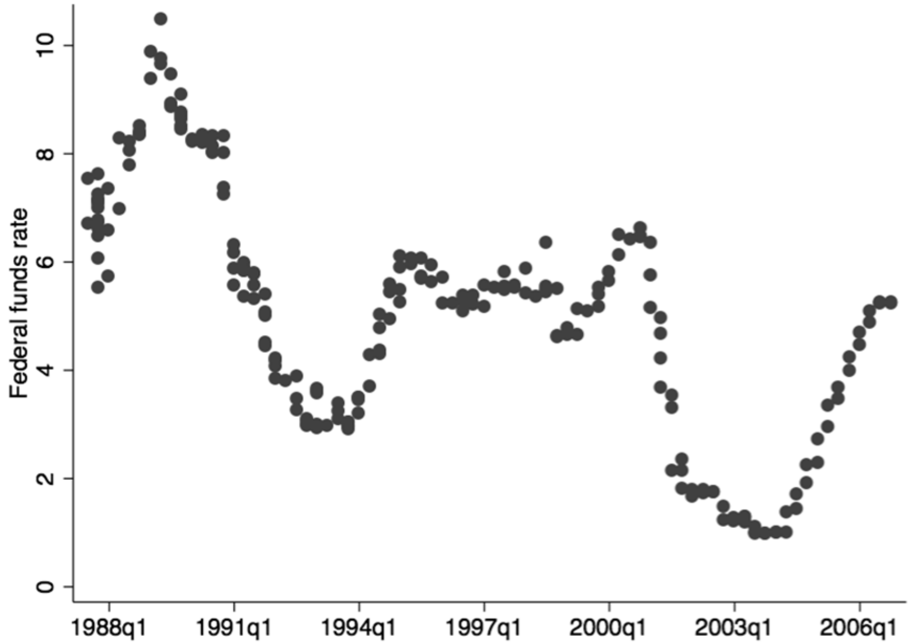
39. Some of these changes, of course, are artifacts of better or at least different transcription paradigms. Some meetings between 1988 and 1992 were not recorded. Transcription mores may change over time as well, perhaps with laughter being part of a responsible transcriber's remit in the twenty-first century, while being superfluous to the art in the early 1980s.

40. As the Federal Reserve Bank of San Francisco has explained:

> To keep inflation in check, the Fed can use its monetary policy tools to raise the federal funds rate. Monetary policy in this case is said to be "tight" or "contractionary." To fight recessions, the Fed can use its monetary policy tools to lower the federal funds rate. Monetary policy is then said to be "easy," "expansionary," or "accommodative."

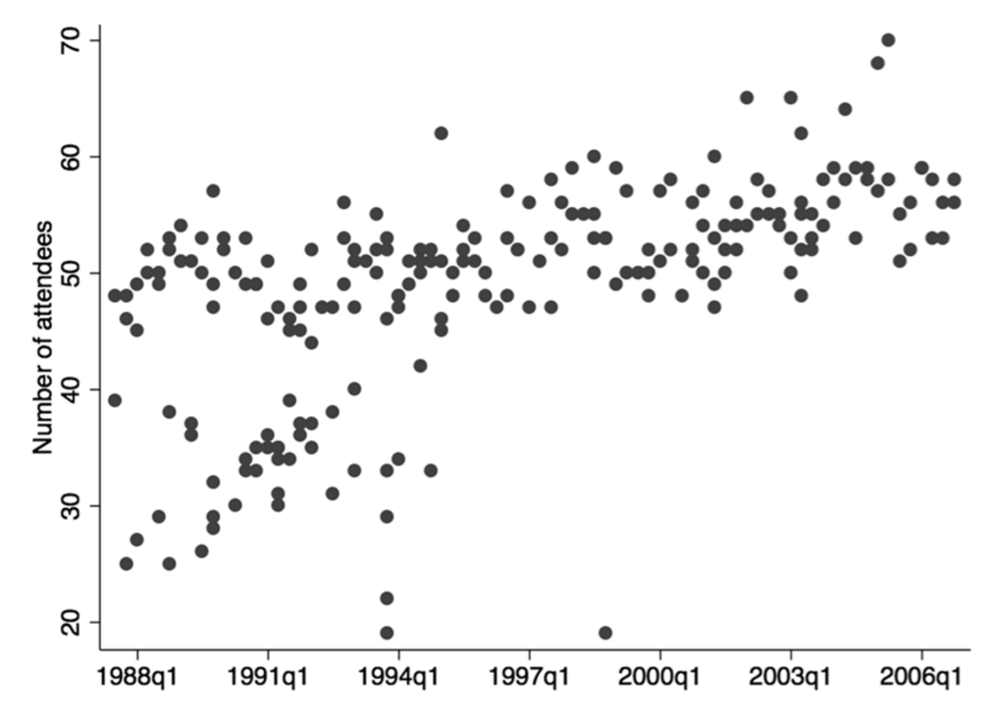
What is the Fed: Monetary Policy, FED. RESERVE BANK OF S.F., http://www.frbsf.org/education/teacher-resources/what-is-the-fed/monetary-policy (last visited Apr. 3, 2015).

Figure 1



As figure 2 demonstrates, attendance at the meetings exhibited a broadly upward trend; the two trends do not seem at first glance to be particularly synchronized, but, conditioned on time, a small but statistically significant relationship at the five-percent level did exist. Figure 3 shows the histogram of the number of attendees over all the meetings in the sample; the mean number of attendees was 48.7 with a standard deviation of 9.3.

Figure 2



As it turned out, each additional attendee at an FOMC meeting is associated with a 0.02 increase in the federal funds rate. One way to state the relationship would be to say that for every increase of two basis points in the rate, an additional attendee at the meeting would be expected. ("Basis points" is the term used in the financial sector for hundredths of a percent.) To give the relationship context, the FOMC tends to target increases and decreases in the federal funds rate in increments of twenty-five basis points, and very rarely increases or decreases the rate by more than fifty basis points, that is, half of a percent.[41]

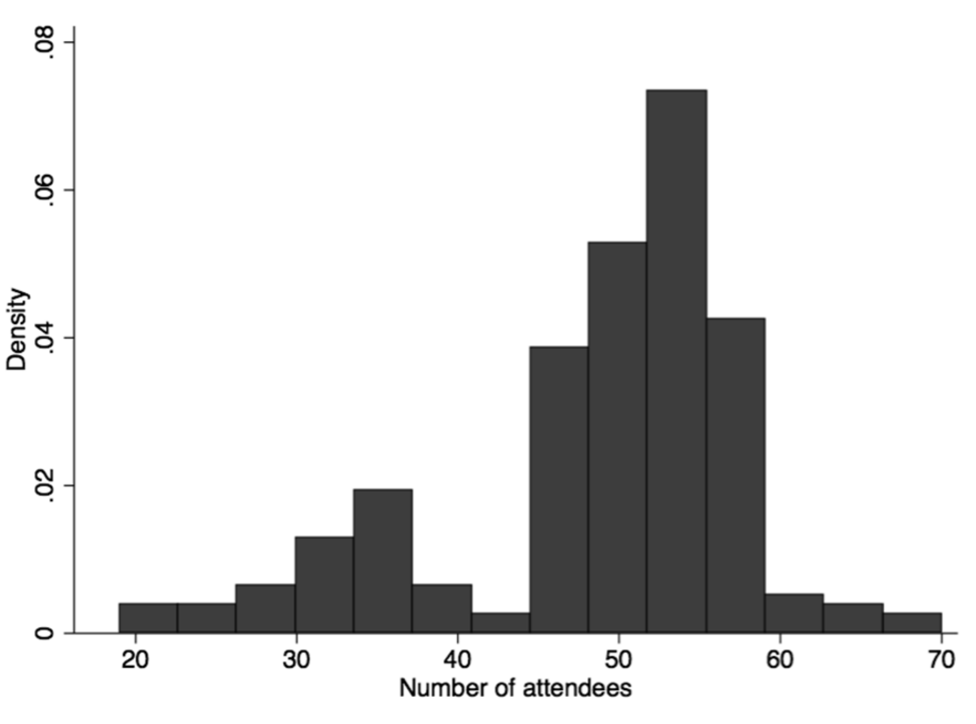
To be more precise, the mean of the federal funds rate is 5.02%, with a standard deviation of 2.2 (which means that 68% of the time during the course of the study, the federal funds rate would be between 2.82% and 7.22%). The mean number of attendees is 48.7, with a standard deviation of 9.3. Since each attendee is associated with a 0.02 increase in the federal funds rate, a one standard deviation increase in the number of attendees—that is, if 58 people attended an FOMC meeting, rather than 49—was associated with a 9*.02 = 0.18 increase in the federal funds rate, which is about 8% of the standard deviation

41. *See Open Market Operations Archive*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (2013), *available at* http://www.federalreserve.gov/monetarypolicy/openmarket_archive.htm (tracking the history of changes in the federal funds rate targeted by the FOMC at the conclusion of its meetings).

in that variable (0.18/2.2 = 0.08). In other words, 8% of the ordinary variance in the rate could be associated with substantially increased attendance at the meeting.

A table setting forth some simple models regressing the funds rates against time trends, a proxy for the mood of the meeting, the length of the meeting, and its size are set forth in the appendix to this article.[42] A table suggesting some intriguing correlations between each of the variables is also set forth; these correlations did not survive the regression analysis, but are nonetheless interesting.

Figure 3



It would be premature to make much of the relationship, given that the effect is modest and the number of variables included in the regression is few. But positive correlations, and statistically significant relationships, are not to be ignored, and there is some reason to think that the link between rate increases and meeting attendance is not spurious. Perhaps, during the Greenspan era, the FOMC was marginally more likely to bring additional staffers to its meetings when it was thinking about increasing the interest rate, which had risky consequences for both growth and unemployment. Possibly, more observers, and indeed more committee members, made efforts to attend meetings when a

42. *See* Appendix.

rate raise was at risk. It is difficult to speculate as to precisely why the effect is seen but it is nonetheless worth noting. The effect—despite being small—does emerge as statistically significant in the multivariate regression.

The real hope is that the regression analysis provokes interest in further research along these lines. The claim here is not that a very important predictor of FOMC interest rate decisions has been found, but that a close study of the transcripts of FOMC meetings might have quantitative as well as qualitative insights worth revealing, and that collecting data towards that effort is uncomplicated.

III
THE LEGAL CONSTRAINTS ON THE FOMC

This part of the article offers a traditional analysis of the law governing the FOMC. It covers the authorizing statutes, court decisions, and the small amount of legal scholarship directed towards the committee.[43] The FOMC enjoys a broad open market operations remit, though not one bereft of legislative instruction. Its authorizing statutes and location within the Fed give it a strong degree of structural insulation. That isolation has survived legal challenges, including challenges filed by congressional plaintiffs. The result is that neither the law of the committee, nor supervision by the President, Congress, or the courts, have provided the sort of constraints over what the FOMC does that other agencies ordinarily face.

A. The FOMC's Powers and Independence

1. Statutory Authority

The Supreme Court has said that the Fed's "[o]pen market operations—the purchase and sale of Government securities in the domestic securities market—are the most important monetary policy instrument of the Federal Reserve System."[44] The power to target a particular federal funds rate was given to the Fed by the Federal Reserve Act of 1913.[45] That statute granted the various reserve banks the power to "establish . . . rates of discount to be charged by the

43. For some context, Henry Hu has described the Federal Reserve and the FOMC as biased, if well-meaning, stabilizers of investor expectations, in a way that incentivizes them—somewhat ironically—to take more risks. *See* Henry Hu, *Faith and Magic: Investor Beliefs and Government Neutrality*, 78 TEX. L. REV. 777 (2000). On this understanding, the Fed's role in ensuring economic stability is regularly undermined by its contribution to moral hazard in finance. Under Allan Meltzer's political economic model of the Fed, any interpretation of the policymaker's decisions would be incomplete without accounting for the relevant political pressures, and even some influence from the academy. *See generally* 1 ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE (2003); 2 ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE (2009); Allan H. Meltzer, Politics and the Fed (Apr. 8, 2010) (unpublished manuscript) (on file with Carnegie Mellon University), *available at* https://student–3k.tepper.cmu.edu/GSIADOC/WP/2010–E30.pdf. As such, policy success is predicated on a delicate balance of political pressures and a correct understanding of economics, which, in his view, means one receptive to monetarism and the economic theories of Milton Friedman.

44. Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 343 (1979).

45. *See* 12 U.S.C. §§ 221–522 (2012).

Federal Reserve Bank for each class of paper" that it was authorized to sell.[46]

The modern Fed and the FOMC were created in the Great Depression to coordinate the setting of these discount rates. The FOMC was given the power to engage in "open market operations," as well as to direct the terms of those operations in all of the Federal Reserve banks.[47] "Open market operations" is a term that Congress has not defined with precision, though it has identified a laundry list of permissible transactions that fall within the term's rubric.[48]

The FOMC has accordingly interpreted its mandate broadly. The Fed has said that the Congress meant to allocate to the FOMC the power to make any "purchase and sale of securities in the open market by a central bank," and, because the term "securities" covers myriad financial instruments, the FOMC has exercised its authority to buy and sell American sovereign debt,[49] foreign currencies,[50] and, during the financial crisis, even take positions in troubled real estate assets.[51]

Congress has directed the FOMC to use its open market powers to facilitate three goals; it "shall maintain long-run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates."[52] Moreover, with regard to the timing and scale of transactions, it has directed that "open-market operations shall be governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country."[53]

2. Structural Independence

The FOMC's structural insulation has given it a great deal of discretion in deciding how to implement this real guidance (indeed, the agency arguably has

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46. 12 U.S.C. § 357 (2012).

47. *See generally* 12 U.S.C. § 263 (2012).

48. *See* 12 U.S.C. §§ 348a, 353 (2012) (identifying powers of the Board of Governors of the Federal Reserve System). For an overview, see generally *What is the Fed?,* FEDERAL RESERVE BANK OF SAN FRANCISCO, http://www.frbsf.org/education/teacher-resources/what-is-the-fed (last visited Apr. 3, 2015).

49. *See* Credit Liquidity Programs and the Balance Sheet, BD. OF GOVERNORS OF THE FED. RESERVE SYS., http://www.federalreserve.gov/monetarypolicy/bst_openmarketops.htm (last visited Apr. 3, 2015) (describing how the Fed uses open market operations to take positions in, among other things, "Treasury securities, agency securities, and agency MBS").

50. *See* Colleen Baker, *The Federal Reserve's Use of International Swap Lines*, 55 ARIZ. L. REV. 603, 628 (2013) ("The FOMC . . . has traditionally had authority for swap line operations. The Federal Reserve Board has traditionally had authority over the opening and the maintenance of accounts with foreign banks based upon the language of section 14(e).").

51. For example, the Term Asset-Backed Securities Lending Facility (TALF) and the public–private partnership during the financial crisis. For a discussion, see generally Peter K. Mckee, Jr., *Checking in on TALF and PPIP: What Are Their Effects of CMBS Markets,* ANDREWS KURTH BLOG (Oct. 8, 2009), http://www.andrewskurth.com/assets/pdf/blogpost_Checking-in-on-TALF-and-PPIP.pdf.

52. 12 U.S.C. § 225a (2012).

53. 12 U.S.C. § 263(c) (2012).

been given more direction by Congress than have other New Deal agencies told to, for example, regulate in the "public interest" or to define "unfair labor practices"[54]). The Fed—the FOMC's home—is probably the most independent of the government's agencies, and part of its independence lies in its legal design. It has been structured in a way that minimizes executive influence in a manner typical of independent agencies, which are agencies headed by officials less accountable to the President than executive branch agencies are. The Fed and the FOMC also enjoy strong freedom from legislative oversight enforced through a tightening or loosening on its purse strings. And the courts almost never get in the agency's way. Out of this striking independence, a culture of noninterference has grown.

The Fed, like the other so-called "independent" government agencies, exists outside of the executive branch.[55] Like other heads of independent agencies, Board members are nominated by the President and confirmed by the Senate.[56] Unlike the heads of cabinet departments, the members of the Fed's Board of Governors, who are also the members of the FOMC, cannot be removed from their posts by the President except for cause.[57]

Moreover, the President enjoys much less control over the Fed and FOMC once they are staffed than he does over executive branch agencies. The FOMC does not submit a regulatory agenda, or its decisions on monetary policy, for review by the White House's Office of Management and Budget, as executive branch agencies must with their agendas and important regulatory rules.[58]

Congressional oversight, often thought to be a feature of independent agencies, is even weaker. Unlike those agencies, the Fed does not depend upon

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54. For a discussion of public interest standards, and comparison of them to the unfair labor practice standard applied by the National Labor Relations Board, see Richard A. Marks, *Retaliatory Reporting of Illegal Alien Employees: Remedying the Labor-Immigration Conflict*, 80 COLUM. L. REV. 1296, 1316 n.35 (1980) (discussing "a broad public interest standard such as those in the enabling statutes of many other regulatory agencies, such as the SEC, see 15 U.S.C. § 78q-1(a)(2) (1976); the FCC, see 47 U.S.C. §§ 303, 307(a), (d), 309(a), 310(d) (1976), and the ICC, see 49 U.S.C. §§ 5(2), 20a(2) (1976)").

55. *See* PAULINE SMALE, CONG. RESEARCH SERV., RS20826, STRUCTURE AND FUNCTIONS OF THE FEDERAL RESERVE SYSTEM 1 (2010) (stating that the Federal Reserve is an independent entity in order to avoid political influence, and that the President only has power to appoint members to the Board of Governors).

56. *The Board of Governors of the Federal Reserve System*, THE STRUCTURE OF THE FED. RESERVE SYS., http://www.federalreserve.gov/pubs/frseries/frseri.htm (last visited Apr. 3, 2015).

57. 12 U.S.C. § 242 (2012). *See also The Federal Open Market Committee*, THE STRUCTURE OF THE FED. RESERVE SYS., http://www.federalreserve.gov/pubs/frseries/frseri2.htm (last visited Apr. 3, 2015) (specifying membership composition details).

58. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sep. 30. 1993) (outlining general regulatory practices executive agencies must participate in). *But see* Letter from Ben Bernanke to Cass R. Sunstein (Nov. 8, 2011), *available at* http://www.federalreserve.gov/foia/files/regulatory-burden-reduction-111115.pdf (noting that the Federal Reserve will keep the OMB informed of its efforts). The FOMC, by contrast, simply announces its federal funds rate decisions to the world shortly after it concludes one of its eight annual meetings. *See, e.g.*, Press Release, Board of Governors of the Federal Reserve System (Jan. 25, 2012), *available at* http://www.federalreserve.gov/newsevents/press/monetary/20120125c.htm (announcing FOMC's "principles regarding its longer-run goals and monetary policy strategy").

Congress for a budget; it is self-funding, based on the fees it charges banks for supervision, and the profits it makes through its open market operations.[59] The agencies do not ignore Congress; the Fed and FOMC do make senior officials available for testimony before both House and Senate committees.[60] But that testimony is rarely as fireworks-filled as it is for other agency heads. Fed officials do not live in fear of the grilling that their counterparts in other agencies receive, as no budget sanction exists in the background, out of which a culture of noninterference has grown.[61]

The result is that the relationship between Congress and the FOMC and Fed is much more attenuated than that between Congress and the SEC, an agency that does depend on an annual appropriation and accordingly spends a great deal of time on the cultivation of congressional committees. President Obama's first SEC chair, Mary Schapiro, testified over forty-eight times before Congress during her five years in charge of the agency[62] and by all accounts left "exhausted."[63] During that period, Ben Bernanke, the Fed and FOMC Chair, testified a similar forty-nine times, but on thirteen occasions the testimony was simply repeated before different committees; one never hears of Fed chairmen finding their interaction with legislators to be exhausting.[64]

Congress could, of course, take a sterner approach to supervision of the Fed and the FOMC. It could eliminate its self-funding nature, and indeed, there are some politicians who wish to "end the Fed" and impose an auditing requirement on the institution.[65] The institution, however, has successfully

59. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 11 (9th ed. 2005), *available at* http://www.federalreserve.gov/pf/pdf/pf_complete.pdf.

60. *See e.g.*, BEN S. BERNANKE, FED. RESERVE, SEMIANNUAL MONETARY POLICY REPORT TO THE CONGRESS, (July 17, 2013) *available at* http://www.federalreserve.gov/newsevents/testimony/bernanke20130717a.htm (presenting the Fed's semiannual Monetary Policy Report to the Congress). Identical remarks were presented to the Senate Committee on Banking, Housing, and Urban Affairs the following day.

61. For example, a recent testimony by Commissioner Fink of IRS's Small Business and Self-Employment Division was quite lively. Gregory Korte, *Blasted by Congress, IRS Apologizes For Lavish Events*, USA TODAY, June 6, 2013, http://www.usatoday.com/story/news/politics/2013/06/06/irs-conferences-oversight-hearing/2395337/.

62. Schapiro's hearing activity waxed and waned during that period; she testified 8 (2009); 10 (2010); 18 (2011); 8 (2012); and 4 (2013) times, according to the agency's publicly available records. *See Testimony*, U.S. SEC. AND EXCH. COMM'N, http://www.sec.gov/News/Page/List/Page/1356125649559 (last visited Apr. 3, 2015).

63. Ben Protess & Susanne Craig, *Rebuilding Wall St.'s Watchdog*, DEALBOOK, Nov. 26, 2012, http://dealbook.nytimes.com/2012/11/26/schapiro-head-of-s-e-c-to-announce-departure/?_php=true&_type=blogs&_r=0. *See also* Joshua Gallu & Robert Schmidt, *Schapiro SEC Reign Nears End with Rescue Mission Not Done*, BLOOMBERG BUSINESSWEEK, Oct. 19, 2012, http://www.businessweek.com/news/2012-10-19/schapiro-sec-reign-nears-end-with-rescue-mission-not-done ("She has told friends that the late nights and almost constant policy battles have left her exhausted and eager to depart after the November election.").

64. These occasions were counted from the Federal Reserve database. *2009 Testimony of Federal Reserve Officials*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., http://www.federalreserve.gov/newsevents/testimony/2009testimony.htm (last visited Apr. 3, 2015).

65. JohnPaul M. Callan, *Reexamining the Federal Monetary Powers*, 19 U. MIAMI BUS. L. REV.

argued that its independence from politics is a necessary precondition for monetary stability, and, as this article examines, relative independence from political oversight is now thought to be a "best practice" of currency stability.[66]

3. Judicial Review

Moreover, the FOMC and the agency that houses it have an excellent record in the courts, meaning that the gentle oversight played by the two politically accountable branches is not paired with something more rigorous from the judiciary. Augustus Hand stated that he could not guess at what might be wrong with a legally constituted bank making loans to other banks and setting interest rates for those loans in *Raichle v. Federal Reserve Bank,* in one of the earliest efforts to challenge a Fed policy.[67] Hand concluded that,

> It would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review. Indeed, the correction of discount rates by judicial decree seems almost grotesque, when we remember that conditions in the money market often change from hour to hour, and the disease would ordinarily be over long before a judicial diagnosis could be made.[68]

No court has disagreed with Hand's view of the institutional competences at play. Indeed, the Fed's record in court is strong enough to suggest that a combination of *Chevron* deference, unwilling potential plaintiffs, and, most importantly, the lack of a standard for reviewability identified by Judge Hand in *Raichle,* has made the agency extremely difficult to judicially supervise.[69]

The record is even stronger for the FOMC. Although the Fed's supervisory rules do get reversed occasionally,[70] the FOMC's decisions have generally been exempted from judicial review entirely.[71] None of the five cases reported in the

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111, 144 (2011) (describing these critics as the people behind "slogans such as "End the Fed," or nationally supported "Audit the Fed" Bills").

66. *See infra* Part II.C.

67. *See* Raichle v. Fed. Reserve Bank, 34 F.2d 910, 915 (2d Cir. 1929).

> We can see no basis for the contention that it is a tort for a Federal Reserve Bank to sell its securities in the open market, to fix discount rates which are unreasonably high, or to refuse to discount eligible paper, even though its policy may be mistaken and its judgment bad.

Id. See also Huntington Towers, Ltd. v. Franklin Nat'l. Bank, 559 F.2d 863, 868 (2d Cir. 1978) (discussing in a case involving the supervisory powers of the Fed that, "it is not for the courts to say whether or not the actions taken were justified in the public interest, particularly where it vitally concerned the operation and stability of the nation's banking system").

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

69. *Cf.* David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187 (2010) (discussing the high degree of judicial deference granted to Treasury actions under similar conditions).

70. *Compare* In Re Bankers Trust Co., 61 F.3d 465 (6th Cir. 1995) (holding the Fed exceeded its authority in enacting rule precluding discovery of bank examination information), *and* Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys., 807 F.2d 1052 (D.C. Cir. 1986) (reversing the Fed's decision to permit a bank to sell commercial paper), *with* Ass'n of Bank Travel Bureaus, Inc. v. Bd. of Governors of the Fed. Reserve Sys., 568 F.2d 549 (7th Cir. 1978) (denying petition to review the Fed's rule–making decision).

71. None of the five cases that named the FOMC as a defendant were direct challenges to FOMC decisions and all were dismissed for lack of standing or merit. Two suits, brought by senators, challenged the appointment procedures of the committee as violating the Constitution. An earlier suit, filed in 1976, alleged FOMC violations of the Freedom of Information Act for failing to make certain

Federal Reporter or Supplement that name the FOMC as a defendant were direct challenges to FOMC open market orders, and all were dismissed for lack of standing or merit. Two suits, brought by legislators, challenged the appointment procedures of the committee as violating the Constitution.[72] An earlier suit, filed in 1976, alleged FOMC violations of the Freedom of Information Act (FOIA) for failing to make certain records promptly available.[73] Another suit was brought against both the Fed and the FOMC, challenging the constitutionality of the American monetary system.[74] Although I analyze this litigation in more detail later in this article, as a first order of approximation, with the exception of the FOIA suit (which failed at the Supreme Court), it went nowhere. The judiciary is simply disengaged from the project of oversight of the committee.

B. The Strange Case of FOMC Appointments

If anything, the strongest legal limitations on the FOMC lie not in the calibration of its statutory mandate (which is generously broad) or its location in the federal government (where it is an independent part of a particularly independent agency) but in the constraints on the committee's membership. The committee is comprised of the seven members of the Board of Governors of the Fed, along with five representatives from the thirteen Federal Reserve banks, one of which is, by law, the head of the Federal Reserve Bank of New York.[75]

This committee structure has enabled regional dissent on open market policymaking matters and incorporates some relative outsiders into committee decisionmaking; it appears that the regional presidents are more likely to have diverse monetary policy views than are the members of the Board of Governors, although polarization on the FOMC is far from dramatic.[76] It also, at least, in theory, makes for an FOMC with a voting membership larger than that of most agencies, which ought to be more difficult for a chair to dominate.

The mechanisms of appointments to the FOMC have had cross-cutting effects over time. The history of the way appointments to the FOMC have been handled has bolstered the insulation, rather than the diversity, of the committee. For example, in the Banking Act of 1933 that created the FOMC, membership was doled out to the Secretary of the Treasury and the

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records promptly available. Another suit was brought against both the Fed and the FOMC, challenging the constitutionality of the American monetary system.

72. Melcher v. Fed. Open Mkt. Comm., 644 F. Supp. 510 (D.D.C. 1986); Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873 (D.C. Cir. 1981).

73. Fed. Open Mkt. Comm. v. Merrill, 443 U.S. 340 (1979).

74. Howe v. United States, 632 F. Supp. 700 (D. Mass. 1986).

75. 12 U.S.C. § 263 (2012).

76. *See* John Sides, *Democratic and Republican Appointees to the Federal Reserve Aren't That Different, After All,* WASH. POST, Nov. 15, 2013, http://www.washingtonpost.com/blogs/monkey-cage/wp/2013/11/15/democratic-and-republican-appointees-to-the-federal-reserve-arent-that-different-after-all/ (stating that differences in political views of appointed Fed members are "modest at best").

Comptroller of the Currency.[77] That was changed in the Banking Act of 1935 (the '35 Act), which removed the members of the executive branch from the committee and added the regional bank presidents.[78] The '35 Act also increased the tenure of members of the Board of Governors to fourteen years, which is long by federal agency standards.[79] In the Banking Act of 1942, the voting and membership structure of the committee as it exists today was established, giving members of the board a majority of the seats on the committee.[80]

In other ways, the membership is chosen in a way perfectly consistent with the ordinary practice for federal administrative agencies. The Board of Governors component of the FOMC cannot have more than four members of the same party, and is meant to be drawn from "a fair representation of the financial, agricultural, industrial, and commercial interests."[81] Presidents do not always honor every aspect of this cross-sectional suggestion, but there is a tradition of nominating one community (which is traditionally the word used to refer to "small" in the industry) banker to the Board of Governors.[82] Nonvoting reserve bank presidents also attend the committee's meetings, and can debate, but not vote.[83]

But the reserve bank role on the FOMC makes the appointments question a particularly interesting one. Because the member banks of the Federal Reserve own their regional banks, their representation on the FOMC blurs the public and the private and is hardly characteristic of federal agencies.

Accordingly, although the FOMC generally speaks with one voice, its rotating regional presidents are the likely sources of any dissent, as they do not

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77. Gary Richardson et al., *Banking Act of 1935*, FED. RESERVE HISTORY, (Nov. 22, 2013), http://www.federalreservehistory.org/Events/DetailView/26 ("The secretary of treasury, who had served as the chairman of the Federal Reserve Board, and the comptroller of the currency, who had served as a member of the Federal Reserve Board, ceased to serve with the Federal Reserve after 1936.").

78. For a discussion, see Bernard Shull, *Financial Crisis Resolution and Federal Reserve Governance: Economic Thought and Political Realities* (Levy Econ. Inst. of Bard College Working Paper No. 784, 2014), *available at* http://www.levyinstitute.org/pubs/wp_784.pdf; *see also* Laurence H. Meyer, Governor of the Fed. Reserve Bd., The Politics of Monetary Policy: Balancing Independence and Accountability, Remarks at the University of Wisconsin (Oct. 24, 2000), *available at* http://www.federalreserve.gov/boarddocs/speeches/2000/20001024.htm (describing independence of the Fed as being "especially important").

79. Peter Conti-Brown, *The Structure of Federal Reserve Independence* 36 (Rock Ctr. for Corporate Governance at Stanford Univ. Working Paper No. 139, 2014) ("This is one of the longest terms of service in the federal government. Scholars have long discussed the Fed Governors' lengthy tenure," though Conti-Brown observes that, in practice, board members rarely serve out their full terms.).

80. David Fettig, *The Federal Reserve's Beige Book: A Better Mirror Than Crystal Ball*, THE REGION: FED. RESERVE BANK OF MINNEAPOLIS, March 1999, *available at* https://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3568.

81. 12 U.S.C. § 241 (2012).

82. *See* Conti-Brown & Johnson, supra note 27, at 8 (stating that there is usually one board member who is either a community banker or "has strong support among community bankers).

83. FED. OPEN MKT. COMM. http://www.federalreserve.gov/monetarypolicy/fomc.htm (last visited Apr. 3, 2015) ("Nonvoting Reserve Bank presidents attend the meetings of the Committee, participate in the discussions, and contribute to the Committee's assessment of the economy and policy options.").

necessarily come from the same cloth as do appointees to the Board of Governors. Some rise through the ranks of the reserve banks bureaucracy, whereas others enjoy long careers in either finance or other business before taking up the post of president. Members of the Board, on the other hand, are more likely to be highly credentialed economists, and more likely to come from academia or politics. In some ways, the regional presidents add some diversity of viewpoints to the FOMC; in other ways, they are sometimes thought to provide lower-quality advice to the chair.[84]

But, given their outsider status and yet decidedly insider committee role, they, too, have prompted some rumblings about the legality of their role, rumblings that have a doctrinally compelling basis but that have enjoyed no success in the courts. The committee has been challenged for constituting a violation of the Appointments Clause; the idea is that the members of the committee are exercising substantial enough powers to constitute either principal or inferior officers of the United States and yet are not treated as such.

Article II of the Constitution states that the President "shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."[85] The Court in *Morrison v. Olson* announced a totality of the circumstances test for determining who is an "[o]fficer of the United States"—of either the principal or the inferior variety—that involved, as Justice Scalia's dissent characterized it, "[t]aking all things into account."[86]

That test is not exactly precise, but the case against the FOMC appointees is straightforward enough. Even if the regional bank presidents did not constitute principal officers—and everyone else on the FOMC does, in fact, go through the process of presidential nomination and Senate confirmation—the argument that they constitute at the very least inferior officers is strong. The FOMC directs important government action, is reversible by no one, and mostly consists of Senate-appointed Officers of the United States. Should five of its twelve members really be considered anything different?

Inferior officers include district court clerks and special prosecutors; the argument that members of the committee tasked with combatting unemployment and inflation on a country-wide basis enjoy similar, or better, degrees of authority is straightforward.[87] The appointment of inferior officers

84. For a critique of regional bank president performance in the aftermath of the financial crisis, see Mark Thoma, *Refocusing the Fed?,* MODEL BEHAVIOR, (May 3, 2011), http://modeledbehavior.com/2011/05/03/refocusing-the-fed/.

85. U.S. CONST. art. II, § 2, cl. 2.

86. Morrison v. Olson, 487 U.S. 654, 733 (1988) (Scalia, J. dissenting).

87. As the Heritage Foundation has observed:

> In *Edmond v. United States* (1997), the Court, while continuing to deny that it had recognized any definitive test, stated that "'inferior Officers' are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." Among those officers recognized as "inferior" are district court clerks, federal supervisors of elections, the Watergate Special Prosecutor, and an Independent Counsel appointed under the Ethics in Government Act of 1978.

need not be subject to Senate confirmation, but the power to do so must be vested in the President, the Heads of Departments, or the Courts of Law.[88] The regional Fed presidents, appointed by their semiprivate boards of bankers, probably do not meet that test.[89]

Although this looks like a real problem, the courts have uniformly rejected challenges based on this critique, either on political question grounds or on unexplained grounds that seem to work the same way. For example, in *Melcher v. FOMC*, Senator John Melcher (D-MT) challenged the appointment of the five regional bank representatives on the FOMC under this exact reasoning. The court, without a substantial amount of explanation, concluded that "while the composition of the [FOMC] may be unusual, it is not unconstitutional."[90]

In *Riegle v. FOMC*, Senator Donald Riegle (D-MI) claimed that the election process was invalid because it deprived him, as a senator, of his "constitutional right to advise and consent regarding the appointment."[91] The D.C. Circuit exercised its "equitable discretion to dismiss the case on the ground that judicial action would improperly interfere with the legislative process."[92]

Recently, these appointments concerns have been given a boost by the logic of *Free Enterprise Fund v. PCAOB,* where the Court held that "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President."[93] This also poses a problem for institutions like the FOMC because some members are appointed by a combination of private parties and for cause appointees. Harold Krent has argued that "[t]he logic of *Free Enterprise Fund* strongly suggests that Congress may not, consistent with Article II, delegate significant authority to private and state entities [which] . . . imperils . . . the Federal Open Market."[94]

To be sure, there are some reasons to think that, functionally, the oddly appointed FOMC is constitutionally acceptable. Regional bank members of the committee know that they are accountable to *someone*—the boards of the

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See Douglas Cox, *Inferior Offices*, THE HERITAGE FOUND., http://www.heritage.org/constitution/#!/articles/2/essays/92/inferior-officers (last visited Apr. 3, 2015).

88. U.S. CONST. art. II, § 2, cl. 2.

89. *See Morrison*, 487 U.S. at 671–72. The court in *Morrison* advanced a four-part test in scrutinizing the constitutionality of appointments that did not occur by the President followed by confirmation by the Senate: (1) whether the officer is removable by a higher Executive Branch official; (2) whether the officer's duties are limited in scope; (3) whether the officer's office is limited in jurisdiction; and (4) whether the officer's office is limited in tenure. *See generally id.* It seems plausible, if not likely, that the Fed presidents would fail the first of these tests; they may not pass muster under the other factors either.

90. Melcher v. Fed. Open Mkt. Comm., 644 F. Supp. 510, 524 (D.D.C. 1986) *aff'd*, 836 F.2d 561 (D.C. Cir. 1987).

91. Riegle v. Fed. Open Mkt. Comm., 656 F.2d 873, 877 (D.C. Cir. 1981).

92. *Id.*

93. Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 561 U.S. 477, 484 (2010).

94. Harold Krent, *Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund*, 79 FORDHAM L. REV. 2425, 2454 (2011).

regional Fed banks; and, moreover, member banks of the Fed desire a stable and strong economy just as much as the Board of Governors in Washington do and are likely to hope that the presidents of the regional reserve banks share those aims. Indeed, this alignment of basic interest between banks and their supervisors is a unique feature of banking regulation.[95]

Second, or at least so Krent has argued, market discipline may goad partly privately accountable FOMC members to act in a public-spirited fashion because acting for purely private gain would be easily disclosed and therefore unlikely to be successful.[96] Thus, even though the FOMC is "unaccountable in the usual sense for [its] acts," the committee is "circumscribed by some external constraint."[97]

C. Implications of Independence

The striking degree of independence enjoyed by the FOMC is often thought to be a "best practice" of central bank design.[98] Central banks that are subject to the political process, it has been argued, often surrender to short-term thinking about the need for currency stability so that they adjust monetary policy to suit the needs of the party in power—often to the detriment of long-term stability to the money supply as well as the economy as a whole.[99]

This tendency is why the World Bank has recommended to all of its client countries that they insulate their central banks from political oversight.[100] The European Central Bank has been created with something approaching superindependence. During the European sovereign debt crisis, it has, often over political opposition, devised its own novel and active approach to defending the Euro; it can afford to essentially disregard the views of European

95. *See* David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 107 (2013) (noting that "regulators are charged with ensuring safety and soundness of the system, and the managers and owners of banks have every interest in ensuring that their own institutions do not go bankrupt"); *see also* Harold Krent, *Fragmenting the Unitary Executive*, 85 NW. U.L. REV. 62, 102 (also discussing the reasons why even semiprivately accountable officials might have the right sorts of incentives in the case of the FOMC).

96. Krent, *supra* note 94, at 103 ("market discipline may ensure a measure of public-regardedness").

97. *Id.* at 102.

98. *See* Alberto Alesina & Lawrence H. Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. MONEY CREDIT & BANKING 151, 154 (1993) (insulated central banks are less likely to set inflationary monetary policy); Meyer, *supra* note 77 (speech by member of the FOMC on the value of independent central banks); Geoffrey P. Miller, *An Interest-Group Theory of Central Bank Independence*, 27 J. LEGAL STUD. 433 (1998) (discussing the interest group effects on a nonindependent central bank). *Cf.* David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294 (2006) (discussing the best practices of agency rulemaking).

99. *See* Timothy A. Canova, *Black Swans and Black Elephants in Plain Sight: An Empirical Review of Central Bank Independence*, 14 CHAP. L. REV. 237, 237 ("It was widely accepted that politicians could not be trusted with monetary policy because their short-term time horizons and fixations on their next elections.").

100. The World Bank strongly advocates for national political, fiscal, and administrative decentralization. *See Decentralization & Subnational Regional Economics*, THE WORLD BANK GROUP (2001), http://www1.worldbank.org/publicsector/decentralization/what.htm (last visited Apr. 3, 2015).

political leaders over its appropriate role.[101]

D. Nondelegation Agonists

Nonetheless, the dramatic insulation of a particular agency from oversight from any of the three branches of government—or, indeed, the very existence of a central bank with responsibility for currency stability and economic growth—is not something obviously contemplated by the Constitution.[102]

Because of what I would characterize as the "settled expectations" check on the logic of constitutional law, the FOMC is probably too old and too important to be vulnerable to life-threatening constitutional challenge.[103] It has been accepted in almost all corners of the Washington establishment; the FOMC has been playing a surpassingly important monetary policy role since passage of the Banking Act of 1933. It is difficult to raise constitutional questions now about something that has been part of the furniture of government for so long.[104] Moreover, other longstanding traditions that the Supreme Court has called into constitutional question—the sentencing guidelines or the legislative veto, for example—had much shorter tenures, and were not the subject of active opposition by duly appointed officers of the United States, such as Article III judges, in the case of the former,[105] and the Department of Justice, in the case of the latter.[106]

That does not mean that the separation of powers problems posed by the FOMC are easy. The first constitutional question posed by a central bank is whether the Constitution permits the creation of such an institution. President

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101. *See Independence*, EUROPEAN CENTRAL BANK, https://www.ecb.europa.eu/ecb/orga/independence/html/index.en.html (last visited Apr. 3, 2015) ("Neither the ECB or the national central banks, nor any member of their decisionmaking bodies, are allowed to seek or take instruction from EU institutions or bodies, from any government of an EU member State or from any other body.").

102. The creation of the First Bank of the United States—not a central bank, but not entirely dissimilar—was vehemently opposed by Thomas Jefferson for this reason. *See Growing Opposition*, U.S. HISTORY, http://www.ushistory.org/us/18c.asp (last visited Apr. 3, 2015).

103. This "doctrine" is entirely my invention and might be considered a precautionary principle for Supreme Court Justices. It helps to explain why the Court might find, for example, that prayer to open legislative sessions is not inconsistent with the First Amendment prohibition against the establishment of religion, or, as it said, "A test that would sweep away what has so long been settled would create new controversy and begin anew the very divisions along religious lines that the Establishment Clause seeks to prevent." Town of Greece v. Galloway, 124 S.Ct. 1811, 1819 (2014). *See generally* Serpentfoot v. Rome City Comm'n, 426 Fed. App'x. 884 (11th Cir. 2011). Or, it may help to explain why the Court might find that an agency with broad powers to regulate the accounting industry should not be disbanded despite being staffed in a manner inconsistent with the Appointments Clause. *See generally* Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.,, 561 U.S. 477 (2009).

104. *See* Bernstein, *infra* note 116, at 118–23 (outlining the history of the FOMC).

105. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000) (holding that the Sixth Amendment right to a jury trial proscribes judges from imposing criminal sentences above statutorily fixed maximums if the sentence is based on factors other than those determined by a jury beyond a reasonable doubt).

106. *See* I.N.S. v. Chadha, 462 U.S. 919 (1983) (holding that a section of the Immigration and Nationality Act permitting an Executive Branch decision to allow a deportable alien to remain in the United States to be overruled by resolution of one house of Congress was unconstitutional because such action was legislative in nature).

Jefferson thought it did not; neither did President Jackson, who said, "if the bank be established for that purpose, with a charter unalterable without its consent, Congress have parted with their power for a term of years, during which the Constitution is a dead letter. It is neither necessary nor proper to transfer its legislative power to such a bank."[107]

M'Culloch v. Maryland settled that part of that old argument, doctrinally, at least, in favor of central banking. The second iteration of the Bank of the United States was deemed to be a permissible exercise of the power to regulate interstate commerce because the Necessary and Proper Clause of the Constitution permitted Congress to go beyond the enumerated powers of the Constitution and create new institutions if doing so would contribute to its constitutional remit.[108]

The second question posed is whether an institution with such broad powers and independence is consistent with our three-branch system of government. Under the nondelegation doctrine, Congress is not allowed to entirely abdicate its responsibility for legislating in favor of some other institution.[109] It must provide that institution with an "intelligible principle" to guide its use of the legislative power granted it by the legislature.[110] The intelligible principle test has been famously easy to meet. The Supreme Court has only found two delegations of legislative authority to be unconstitutional—and both were in 1935, two short terms before the "switch in time that saved nine" that marked a drastic shift in judicial receptivity to the administrative innovations of the New Deal state.[111] A suit challenging the delegation to FOMC was brought in 1964—*Bryan v. Federal Open Market Committee*—challenging the powers of the committee to be an "unwarranted delegation of power by Congress."[112] The suit was dismissed for lack of standing, as the plaintiff could not differentiate his injury from the existence of the institution from that of any other American

107. Andrew Jackson, Veto Message (July 10, 1832), *reprinted in* 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576–89 (James D. Richardson ed., 1897). *See also* H.W. BRANDS, THE MONEY MEN 57–96 (2006) (describing the obstacles that faced the national bank).

108. M'Culloch v. Maryland, 17 U.S. 316, 350 (1819).

109. See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994) (using the example of Congress delegating all legislative responsibilities to a "Goodness and Niceness Commission" with direction that they act only in applying those standards).

110. Mistretta v. United States, 488 U.S. 361, 373 (1989) (Congress can seek assistance from other branches as long as it "lay[s] down by legislative an intelligible principle to which the person or body authorized . . . is directed to conform."). *See generally* Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between The Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921 (2006) (discussing the consequences of "the nearly unbounded nondelegation doctrine"); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000) (describing "how certain canons of construction operate as nondelegation principles").

111. *See e.g.* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 542 (1935) (holding "that the code-making authority thus conferred is an unconstitutional delegation of legislative power"); Panama Refining Co. v. Ryan, 293 U.S. 388, 430 (1935) (finding that the challenged statute "goes beyond" the "limits of delegation which there is no constitutional authority to transcend").

112. *See* Bryan v. Fed. Open Mkt. Comm., 235 F. Supp. 877, 878, 882 (D. Mont. 1964) ("[I]f plaintiff could champion and litigate such a case, every other owner of government obligations affected by the operations of the Open Market Committee could do the same.").

citizen – something that means that a nondelegation doctrine challenge would have to come from the primary deal banks themselves (who buy or sell Treasury debt from the open markets desk of the New York Fed, as directed by the FOMC), or perhaps their financial market competitors.[113] These pools of plaintiffs might be able to show the requisite differential injury. Thus far, for whatever reason, no such suit appears to have ever been filed, possibly because primary dealers enjoy their role as the Fed's counterparty, and their competitors prefer the policies of the FOMC to their alternative.

However, the nondelegation doctrine has a corollary, of admittedly uncertain doctrinal provenance, that posits that legislative delegations to private parties are particularly disfavored—much more than congressional delegation to the executive branch or to an independent agency would be. In 2013, the D.C. Circuit proclaimed—in *Association of American Railroads v. United States Department of Transportation*—that "federal lawmakers cannot delegate regulatory authority to a private entity."[114] The Fed's regional banks are owned, at least in theory, by their members, who are private-sector financial intermediaries—meaning that some of the voters on the FOMC come from institutions that are privately held.[115] The purported private antidelegation canon has been the most persistent source of worry about the superindependence of the FOMC in both the legal literature and in the doctrine.[116] As perspicacious a constitutional thinker as John Hart Ely argued that the Fed and its monetary policy committee are "the poster child of an unconstitutional private delegation."[117]

But the Supreme Court has never indicated implacable hostility to private delegations, and, indeed, in the modern state, nongovernmental standard-setters can and do play an important role in making agency policy on subjects

113. *Id. See also* Howe v. United States, 632 F. Supp. 700 (D. Mass. 1986) *aff'd*, 802 F.2d 440 (1st Cir. 1986) (dismissing suit against constitutionality of FOMC for lack of standing).

114. *See* Ass'n of Am. R.R. v. U.S. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013) (For the federal government to "delegate regulatory authority to a private entity . . . would be 'legislative delegation in its most obnoxious form.'" (quoting Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936))), *rev'd on other grounds*, Ass'n of Am. R.R. v. U.S. Dep't of Transp., 135 S. Ct. 1225 (2015) (finding Amtrak to be a government actor). *Cf.* Potter v. State, 509 P.2d 933, 935 (Okla. Crim. App. 1973) ("[T]he general rule has become fixed that the legislature may not delegate legislative functions to private persons.").

115. Although, under the Dodd–Frank Act, the directors who pick those regional bank presidents may not run private commercial banks. As the Fed says in the procedures for electing directors, Class B Directors, who are appointed by member banks (that is, private banks), but are meant to represent the interest of the public continue to vote on the regional bank president. In this way, private sector actors retain a stake in the selection of FOMC members. *Directors— Procedures for Elections of Class A and Class B Directors,* FED. RESERVE, http://www.federalreserve.gov/aboutthefed/directors/PDF/procedure-for-elections-classes-a-b.pdf (last visited Apr. 3, 2015).

116. *See* Mark F. Bernstein, *The Federal Open Market Committee and the Sharing of Government Power with Private Citizens,* 75 VA. L. REV. 111, 112 (1989) ("The problems raised by a delegation to private individuals . . . suggest the need for closer scrutiny of the status of the FOMC's privately appointed members.").

117. Canova, *supra* note 99, at 301 n.361 (crediting "the late John Hart Ely, for this description of the Federal Reserve").

ranging from accounting standards set by the privately staffed Financial Accounting Standards Board to safety standards propounded by professional associations of engineers.[118] It is to these sorts of precedents that the FOMC would be analogized, if the courts were, as is likely, looking to find a reason to conclude that the FOMC is constitutionally structured.

E. Secrecy and the FOMC

Because the FOMC's deliberates in private on matters of great import to the public, the third area of consternation about the agency has involved its lack of transparency. This has also engaged the agency, if only modestly, with the legal system.

The FOMC has been exempted from many of the open government requirements that apply to other administrative agencies, such as those imposed upon the government in the Sunshine Act.[119] Although the FOMC is subject to FOIA, it regularly invokes the deliberative process exemption to deny journalists and others a right to listen into its meetings.[120]

The Supreme Court upheld this approach in *Federal Open Market Committee of the Federal Reserve System v. Merrill*.[121] The Court concluded that the agency's directives, which were first directed to its trading desk before being disseminated more broadly, were exempt from FOIA as interagency memoranda. "We think that if the . . . Directives contain sensitive information not otherwise available, and if immediate release of these Directives would significantly harm the Government's monetary functions or commercial interests, then a slight delay in the publication of the Directives . . . would be permitted."[122]

If the courts have exempted the FOMC from the tender mercies of FOIA, the committee's relationship with the legislative branch has at times been more

118. Moreover private delegations have been around for some time; in 1893, Congress delegated the power to establish a mandatory height for drawbars on railroad cars to the American Railway Association, upon the pain of the payment of a civil penalty. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531. The Supreme Court affirmed the delegation. *See* St. Louis, Iron Mountain & S. Ry. v. Taylor, 210 U.S. 281, 285–87 (1908); *see also* Harold J. Krent, *Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund*, 79 FORDHAM L. REV. 2425, 2454 n.31 (2011) (discussing the history of the delegation to the American Railway Association). *But see* Mistretta v. United States, 488 U.S. 361, 421 (1989) (Scalia, J., dissenting) (stating that the "delegation of lawmaking authority to the Commission is, in short, unsupported by any legitimating theory to explain why it is not a delegation of legislative power").

119. 12 C.F.R. § 281.1 (describing the basis for the FOMC's exemption from the statute is due to its status as a "separate and independent statutory body within the Federal Reserve System).

120. BD. OF GOVS. OF THE FED. RESERVE SYS., INTERPRETIVE LETTER RULING: RULES REGARDING AVAILABILITY OF INFORMATION FROM FEDERAL OPEN MARKET COMMITTEE, 1994 WL 762911, at *1 (Feb. 1, 1994) (citing 5 U.S.C. § 552(b)(5)) ("Such deliberative, predecisional materials are exempt from disclosure as 'inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.'").

121. Fed. Open Mkt. Comm. of the Fed. Reserve Sys. v. Merrill 443 U.S. 340, 342–43 (1979) ("The Federal Open Market Committee has a practice . . . of withholding certain monetary policy directives from the public during the month they are in effect.").

122. *Id.* at 363.

contentious. Congress has repeatedly threatened to require more disclosure from the committee.[123] In practice, these sorts of threats are often the first resort of those dissatisfied with the policymaking of the committee.

When, during the 1970s, inflation exposed the Fed to criticism from a number of sectors, Congress, in addition to occasionally engaging in single-legislator lawsuits, imposed more reporting requirements on the FOMC.[124] The committee was obliged to inform Congress of its targets, and its predictions for the economy, via a series of formal reports.[125] But, as has been the case with the agency's relationships with the courts, in the end, the FOMC has apparently convinced Congress that what it does is nothing that mere legislators could possibly hope to supervise.[126] The Fed protested this threat to its independence and successfully managed to get the requirements removed in 2000.[127]

In addition, in the 1990s, when Congress learned that the FOMC was taping and transcribing its meetings, it insisted that the transcripts be made public.[128] The Fed negotiated a five-year delay on that publication but acceded to Congress's request (much to the benefit of the part of this article which relies on the transcripts of meetings).[129]

IV

CONCLUSION

The existence of legal protections of the independence of the FOMC that might be thought to amount to superprotections have not been wholly uncontroversial. But that superdiscretion has not made the committee unpredictable, or unbureaucratic. Instead, tradition has interestingly filled the gaping discretionary gap enjoyed by the agency.

This regularization on some metric other than law, given law's unavailability governing central bankers, may in part be due to the committee's organic interest in regularity. The FOMC protects currency stability, and, as it turns out,

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123. For a recent history of these events, see MARC LABONTE, CONG. RESEARCH SERV., R42079, FEDERAL RESERVE: OVERSIGHT AND DISCLOSURE (2014).

124. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95–523, 92 Stat. 1887 ("The Board of Governors shall include an explanation of the reasons for any revisions to or deviations from such objectives and plans.").

125. For a discussion, see JOHN B. TAYLOR, LEGISLATING A RULE FOR MONETARY POLICY 6 (2011) *available at* http://siepr.stanford.edu/?q=/system/files/shared/pubs/papers/pdf/10-032_Paper_Taylor.pdf; Kara Karlson, *Checks and Balances: Using the Freedom of Information Act to Evaluate the Federal Reserve Banks,* 60 AM. U. L. REV. 213, 222 (2010) ("Originally, the Board was not required to report to Congress at all.").

126. For a discussion of this by a famous macroeconomist, see John Taylor, *More on a Two-Track Plan to Restore Growth*, ECON. ONE (Jan. 31, 2011), http://economicsone.com/2011/01/31/more-on-a-two-track-plan-to-restore-growth/ ("In my view Congress should restore the Fed's reporting requirements which it removed in the year 2000 in a little-known section of the American Homeownership and Economic Opportunity Act of 2000.").

127. *Id.*

128. *See* AUERBACH, *supra* note 11, at 87.

129. *Id.*

stability is an important value for financial markets. The need for traditions and rules may simply be part and parcel of the job of central banking, meaning that if those rules will not be externally imposed, they may be internally adopted.

Over time, consistencies have emerged over the course of the Fed's existence that are quite predictable and that may even—although future research is required before any strong statements could be made—be amenable to some understanding of the relationship between that process and the efforts that the committee makes on the economy as a whole.

APPENDIX

Table 1

Dependent variable: federal funds rate

	(1)	(2)	(3)	(4)	(5)
Lagged federal funds rate	0.938***	0.889***	0.881***	0.880***	0.881***
	(40.22)	(28.74)	(27.74)	(27.05)	(27.11)
Year		––0.0290*	––0.0418*	––0.0452*	––0.0529**
		(––2.40)	(––2.45)	(––2.50)	(––2.89)
Laughter			0.00692	0.00564	0.00820
			(1.06)	(0.65)	(0.95)
Transcript length				0.000606	––0.00250
				(0.29)	(––1.01)
Number of attendees					0.0200*
					(2.22)
Constant	0.315*	58.40*	83.87*	90.80*	105.2**
	(2.46)	(2.41)	(2.46)	(2.51)	(2.88)
N	222	222	222	213	212
adj. R––sq	0.880	0.882	0.882	0.879	0.881

t statistics in parentheses
* p<0.05 ** p<0.01 *** p<0.001"

Table 2

	Federal funds rate	Lagged federal funds rate	Laughter	Transcript length	Number of attendees
Federal funds rate	1				
Lagged federal funds rate	0.9366	1			
Laughter	-–0.36	-–0.3581	1		
Transcript length	-–0.3089	-–0.3082	0.8175	1	
Number of attendees	-–0.3465	-–0.3112	0.6113	0.7568	1