The Monetary Executive

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Abstract

Contemporary presidents possess a significant array of powers to intervene in the economy unilaterally, via executive order or the Treasury Department's tools. But the Constitution does not vest the Executive Branch with monetary or fiscal power. Rather, the President has accumulated vast monetary power gradually, over time, through successive delegations from Congress. This Article traces the development of a constitutional oxymoron—the "Monetary Executive"—through the lens of statutory delegations. Ultimately, the Article urges that the consequence of this migration of monetary power from Congress to the Executive will be corrosive to our democratic institutions and contribute to inflation—undermining the central bank's independence, eroding fiscal discipline, and perpetuating policy error.

Table of Contents

Introduction 165
I. (Non)delegation of Monetary Matters at the Founding 173
  A. The Original Monetary Power 173
  B. The Original Fiscal Power 177
  C. Early Public Finance Institutions 179
II. The Shift to Presidential Delegation 184
  A. Executive Order and Economic Emergency 184
    1. President Roosevelt 185
    2. Presidents Johnson and Nixon 192
  B. Exchange Stabilization Fund 200
    1. Stabilization Loans 202
    2. Special Drawing Rights 203
    3. Financial Sector Backstops 205
  C. Financial Stability Oversight Council 207
III. Monetary Checks and Balances 210

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A. The Problems of Profligacy and Error 210
B. The Importance of Central Bank Independence 212
C. Congress and the Fed 216
1. Presidential Checks 219
2. The Fed and Fiscal Dominance 220
Conclusion 223

Introduction

Presidents today possess significant power to influence federal spending and increase the public deficit. Consider a few recent examples: in August 2022, President Biden announced via executive order a "promise to cancel $10,000 of student debt for low- to middle-income borrowers,"[1] which analysts estimate will add $379 billion to the federal budget over the next three decades.[2] In a similar effort to "provide more breathing room to America's working families,"[3] the President also, in 2022, attempted to declare a "gas tax holiday."[4] And at various points in the past fifteen years, presidents have flirted with the idea of using the U.S. Treasury's authority to create commemorative—"numismatic"—coins to mint a "trillion-dollar coin" in order to bypass Congress and finance spending programs.[5] In each of these

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1 Press Release, White House, FACT SHEET: President Biden Announces Student Loan Relief for Borrowers Who Need It Most (Aug. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/24/fact-sheet-president-biden-announces-student-loan-relief-for-borrowers-who-need-it-most/ [https://perma.cc/7JT6-XBQU]. The plan would offer up to $20,000 in cancellation for those that had received a Pell Grant. *Id.*

2 *See* Amara Omeokwe, *Student Loan Forgiveness Plan's Cost Likely to Widen 2022 Federal Deficit*, Wall St. J. (Oct. 4, 2022, 10:29 PM), https://www.wsj.com/articles/student-loan-forgiveness-plans-cost-likely-to-widen-2022-federal-deficit-11664924638 [https://perma.cc/FW45-X82G]. Other estimates suggest the student loan forgiveness program could cost between $600 billion and more than $1 trillion over the next decade. *See* Shankar Parameshwaran, *How Student Loan Forgiveness Will Transform College Financing*, Knowledge at Wharton (Sept. 13, 2022), https://knowledge.wharton.upenn.edu/article/how-student-loan-forgiveness-will-transform-college-financing/ [https://perma.cc/TKU6-7YNQ].

3 Press Release, White House *supra* note 1.

4 *See* Press Release, White House, FACT SHEET: President Biden Calls for a Three-Month Federal Gas Tax Holiday (June 22, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/06/22/fact-sheet-president-biden-calls-for-a-three-month-federal-gas-tax-holiday/ [https://perma.cc/65M5-DP37].

5 31 U.S.C. § 5112(k). In some cases, the idea of the trillion-dollar coin has been floated as a way of bypassing Congress's decisions about limiting the debt ceiling. *See* Paul Krugman, Opinion, *Wonking Out: Biden Should Ignore the Debt Limit and Mint a $1 Trillion Coin*, N.Y. Times (Oct. 1, 2021), https://www.nytimes.com/2021/10/01/opinion/biden-coin-democrat-republican-debt-limit.html [https://perma.cc/3F7Y-9H2K]; *see also* Jacob Bogage, *The Trillion-Dollar Coin: Is It a Solution to the Debt Ceiling Drama—Or a Gimmick?*, Wash. Post (Oct. 5, 2021, 4:53 PM), https://www.washingtonpost.com/business/2021/10/05/trillion-dollar-coin-faq/ [https://perma.cc/RS9V-X4UN]; Ted Barrett et al., *Debt Ceiling: Timeline of Deal's Development*, CNN

cases, the President referred to statutory authority that could be argued to justify the spending programs.[6]

The Framers of the Constitution were worried about accumulating monetary and fiscal power in the Executive in this manner.[7] They were, after all, tasked with designing a new form of government that would be accepted by the People as legitimate.[8] With fresh memories of the colonial experience with arbitrary taxation, and the popular resistance to government it fomented, the Framers believed it critical that the "power of the purse" be lodged firmly within the most representative body, the legislature.[9] They therefore gave Congress the power to raise money to pay for government expenditure in the "general welfare" by taxing and borrowing, as well as power to decide how these public monies, once raised, would be spent through the allocative act of appropriation.[10]

POL. (Aug. 2, 2011, 5:55 PM), http://www.cnn.com/2011/POLITICS/07/25/debt.talks.timeline/index.html [https://perma.cc/6Q7H-KL2A]; Felix Salmon, *Trillion-Dollar Platinum Coin Could Be Minted at the Last Minute*, AXIOS (Oct. 5, 2021), https://www.axios.com/trillion-dollar-platinum-coin-mint-janet-yellen-223e7722-d7ba-47c9-b5f6-49a841d181de.html [https://perma.cc/9B9X-HTR6]. In other cases, the trillion-dollar coin would have been used to position the Treasury as a monetary authority, by giving it the power to force the Federal Reserve to monetize the coin and engage in a "Treasury-initiated version of helicopter money." *See* George Selgin, *That Darn Coin*, ALT-M, Mar. 4, 2020.

6 *See* 20 U.S.C. § 1082(a)(6) (giving the Secretary of Education power to cancel or modify debt under any federal student loan program); 26 U.S.C. § 7508A(a) (giving the President power to direct IRS to suspend tax collection in connection with a "federally declared disaster"); *see also* Use of the HEROES Act of 2003 to Cancel the Principal Amounts of Student Loans, 46 Op. O.L.C. __ (2022), https://www.justice.gov/olc/file/1528451/download [https://perma.cc/6WYQ-N9ZA].

7 MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING 101, 103–04 (Stephen Macedo ed., 2020).

8 *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 35 (2012) (noting that Framers were concerned that if the structure and power of the new government "violated deep-seated principles of Republican governance . . . its authority would be rejected").

9 *See* MCCONNELL, *supra* note 7, at 103–04; Kevin R. Kosar, Philip Wallach, John C. Fortier & Zachary Courser, *Does Congress Still Control the Power of the Purse?*, AEI (Apr. 1, 2021), https://www.aei.org/podcast/does-congress-still-control-the-power-of-the-purse/ [https://perma.cc/VJ5S-XME3]. Further, the Origination Clause confirms this intent, that questions and decisions about raising funds and allocating them, would be made by the body closest to the people. *See* Erik M. Jensen, *Hands Off My Purse! Why Money Bills Originate in the House*, HERITAGE FOUND. (Jan. 27, 2011), https://www.heritage.org/the-constitution/report/hands-my-purse-why-money-bills-originate-the-house [https://perma.cc/VF3E-EU8H]; Abner J. Mikva, *Congress: The Purse, the Purpose, and the Power*, 21 GA. L. REV. 1, 1 (1986).

10 U.S. CONST. art. I, § 8, cl. 1 (covering the taxing power); *id.* art. I, § 7, cl. 1 (covering the Origination Clause); *id.* art. I, § 8, cl. 2 (covering borrowing); *id.* art. I, § 8, cl. 5 (covering the coinage power).

Keeping power over public money away from the President was also especially important. Understandably, the Framers were intent on protecting our new democracy against slippage into a monarchy.[11] Because monarchs cannot accomplish tyranny without money, the power to decide what would qualify as money, and which governmental organs could create it, was intentionally given to Congress—to guard against any future presidential propensity for profligacy or altering money's value in ways hallmark of a despot.[12]

Not only were monetary and fiscal powers vested in Article I, but they were also enmeshed in an overall structure of government that divided, in order to constrain, power among the branches.[13] It was thus unconscionable to the Framers that Congress would not jealously guard its monetary and fiscal powers, as James Madison expressed when writing *Federalist No. 51*.[14]

But Congress in the twentieth century began the practice of delegation with the rise in the administrative state. And so too it began to experiment with delegating pieces of its Article I monetary and fiscal powers directly to the President. Specifically, starting in the 1930s, Congress began to chip away at this separation of Article I monetary power from the President with serial emergency delegations.

In the 1930s, Congress gave emergency powers to President Roosevelt to alter the value of money and increase its supply.[15] In the 1950s, Congress deferred to the President on the international monetary regime, setting the conditions for President Nixon to declare the dollar as a fiat currency for the first time since the Civil War.[16] As an ongoing source of power, the Treasury has at its disposal the Exchange Stabilization Fund to fluctuate the global money supply and engage in quasi-monetary policy actions in tandem with the Fed.[17] As

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11 *See* Mashaw, *supra* note 8, at 35.

12 U.S. Const. art. I, § 8, cl. 5; *see infra* Section I.B (discussing the original and founding discussions around the monetary powers).

13 *See* Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1531 (2021).

14 *See* The Federalist No. 51 (James Madison) (Clinton Rossiter ed., 1961). Further, as Madison wrote in *Federalist No. 47*, "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47, *supra*, at 301 (James Madison).

15 S*ee, e.g.*, Stephen Greene, *Emergency Banking Act of 1933*, Fed. Rsrv. Hist. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/emergency-banking-act-of-1933 [https://perma.cc/98U7-CBXG].

16 *See* Sandra Kollen Ghizoni, *Nixon Ends Convertibility of U.S. Dollars to Gold and Announces Wage/Price Controls*, Fed. Rsrv. Hist. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/gold-convertibility-ends [https://perma.cc/YJ3H-KTNH].

17 *See Exchange Stabilization Fund History*, U.S. Dep't Treasury, https://

a result of these successive yet ad hoc delegations, presidents today have a host of tools at their disposal to affect the size of the deficit and the supply of money—through executive order and the Treasury Department's tools.

This Article argues that contemporary presidents' cache of economic power was not consistent with the original constitutional design. Rather, it has built up over time as a result of statutory delegations from Congress.[18] These delegations have thus created a constitutional oxymoron: a "Monetary Executive." Inasmuch as our system of government was designed to guard against a Monetary Executive, this aspect of separated powers has become eroded in the past ninety years. This Article thus aims to shed light on key legal moments in U.S. history when statutory delegations contributed to the formation of a Monetary Executive.

It also highlights the contemporary policy implications of the Monetary Executive. One implication concerns the independence of the central bank, the Federal Reserve ("the Fed").[19] Large government deficits tend to create pressure on the central bank to "monetize" the deficit by creating money to pay for the new spending.[20] The

home.treasury.gov/policy-issues/international/exchange-stabilization-fund/exchange-stabilization-fund-history [https://perma.cc/VYE9-WST9].

18 To date, the formal mechanism of fiscal dominance has remained relatively mysterious—often discussed in soft law terms—for scholars of central banking. In the U.S. system, channels of fiscal dominance seem unclear, as there are few obvious legal mechanisms—written into the text of the Federal Reserve Act—for the President or the Treasury to influence the Fed. *See* Michael Salib & Christina Parajon Skinner, *Executive Override of Central Banks: A Comparison of the Legal Frameworks in the United States and the United Kingdom*, 108 GEO. L.J. 905, 953, 969–71 (2020) (comparing the U.K. Treasury's power to direct the Bank of England with the lack of such formal override powers in the United States).

19 The Federal Reserve Reform Act of 1977, Pub. L. No. 95-188, 91 Stat. 1387, added section 2A to the Federal Reserve Act, thereby giving the Fed a formal mandate for price stability for the first time since its creation in 1913. For a history of the origins of section 2A and the "dual mandate," see, for example, Christina Parajon Skinner, *Capture the Fed*, *in* POPULISM AND THE FUTURE OF THE FED 65–69 (James A. Dorn ed., 2022).

20 *See* Daniel L. Thornton, *Monetizing the Debt*, FED. RSRV. BANK ST. LOUIS REV., Dec. 1984, at 30, 30–31 (defining the phrase "monetizing the debt"); *see, e.g.*, Jeff Spross, *How World War II Reveals the Actual Limits of Deficit Spending*, THE WEEK (May 16, 2016), https://theweek.com/articles/624334/how-world-war-ii-reveals-actual-limits-deficit-spending [https://perma.cc/THG5-YMBC] ("During the [deficit] crisis of WWII, the Fed agreed to print as much money as needed to buy up enough U.S. debt and keep interest rates low."). The United States experienced a period of fiscal dominance between and around the World Wars, whereby the Fed was pressured to keep rates artificially low to support the government's wartime bond buying programs. This policy hamstrung the Fed's ability to control the inflation that ensued from these periods of significant government spending. The famed Treasury-Fed Accord of 1951 established an informal détente between the Fed and Treasury, whereby the Treasury committed to abandoning the pressure of fiscal dominance in this respect. *See* Owen F. Humpage, *Fiscal Domi-*

years 2020–2021 may have been a case in point. The COVID-19 era fiscal stimulus was the largest in U.S. history and increased the federal debt by thirty percent.[21] Importantly, it relied on monetary policy for support.[22] The Fed engaged in an equally unprecedented bond-buying program, adding $4.5 trillion of government debt to its balance sheet between March 2020 and March 2022, nearly doubling its balance sheet.[23] This "coordinated" work of the Treasury and the Fed prompted renewed attention to the possible influence of fiscal programs on monetary policy decisions and, in turn, inflation.[24] Experts are thus increasingly worried about the return of "fiscal dominance," whereby the fiscal prerogatives of government influence a central bank's decisions.[25] There is a fine line between the "coordination" of

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nance and US Monetary: 1940–1975, at 2–3 (Fed. Rsrv. Bank of Cleveland, Working Paper No. 16-32, 2016); Jessie Romero, *The Treasury-Fed Accord*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/treasury-fed-accord [https://perma.cc/3VJF-7M2H].

21 *See* John H. Cochrane, *Fiscal Inflation*, *in* POPULISM AND THE FUTURE OF THE FED 119, 119, 125 (James A. Dorn ed., 2022) (noting that, because of the size of the debt financed stimulus, "constraints on monetary policy are four times larger today [than in 1980]—and counting").

22 *See* Christopher J. Waller, Governor, Fed. Rsrv. Bd., Speech at the Peterson Institute for International Economics: Treasury-Federal Reserve Cooperation and the Importance of Central Bank Independence (Mar. 29, 2021), https://www.federalreserve.gov/newsevents/speech/waller20210329a.htm [https://perma.cc/7HXU-DLUN].

23 *See* William B. English & Donald Kohn, *What If the Federal Reserve Books Losses Because of Its Quantitative Easing?*, BROOKINGS (June 1, 2022), https://www.brookings.edu/blog/up-front/2022/06/01/what-if-the-federal-reserve-books-losses-because-of-its-quantitative-easing/ [https://perma.cc/9VFT-DPP6?type=standard]; Konstantinos Tsatsaronis, Michael Chui, Tirupam Goel & Aaron Mehrotra, *The Monetary-Fiscal Policy Nexus in the Wake of the Pandemic* 4 (Bank for Int'l Settlements, Working Paper No. 122, 2022), https://www.bis.org/publ/bppdf/bispap122.pdf [https://perma.cc/JBB5-32FM] ("By preventing fire sale dynamics and increasing liquidity in the longer part of the yield curve, interventions de facto eased governments' borrowing costs and supported the fiscal expansion and the economy more generally.").

24 *See* Waller, *supra* note 22; *see, e.g.*, ECONOMIC AFFAIRS COMMITTEE, QUANTITATIVE EASING: A DANGEROUS ADDICTION?, 2021–2, HL 42, at 3 (UK) [hereinafter HOUSE OF LORDS REPORT], https://publications.parliament.uk/pa/ld5802/ldselect/ldeconaf/42/4202.htm [https://perma.cc/WFV6-C78T] (demonstrating, through a study by the U.K. Parliament on the effectiveness of quantitative easing and its impact on inflation, the increased attention worldwide towards the successes and limitations of quantitative easing as a monetary and fiscal policy strategy).

25 *See* James Dorn, *The Menace of Fiscal Inflation*, ALT-M (June 16, 2022) [hereinafter Dorn, *Menace of Fiscal Inflation*], https://www.alt-m.org/2022/06/16/the-menace-of-fiscal-inflation/ [https://perma.cc/HGZ8-6WBX] (noting data from the St. Louis Fed shows that monetary aggregates and deficits series "track each other well, suggesting that the expansion of money in the economy has a fiscal origin"); Fernando M. Martin, *What Are the Risks for Future Inflation?*, FED. RSRV. BANK OF ST. LOUIS (Oct. 7, 2021) [hereinafter Martin, *Risks for Future Inflation*], https://www.stlouisfed.org/on-the-economy/2021/october/what-risks-future-inflation [https://perma.cc/4A3E-28FB] (empirically suggesting a fiscal component to inflation); Fernando M. Martin, *Fiscal Dominance* 1 (Fed. Rsrv. Bank of St. Louis, Working Paper No. 2020-040B, 2021), https://research.stlouisfed.org/wp/more/2020-040 [https://perma.cc/D6ED-82JC] ("When the fiscal authority sets debt as its main policy instrument it achieves fiscal dominance, rendering the

monetary and fiscal policy and fiscal "dominance"—and the latter is a well-known recipe for inflation.[26]

This shift toward a Monetary Executive also may belie a broader democratic ill. The President today possesses the power to spend public money on fiscal programs that Congress has not authorized or condoned. The congressional "end-run" possibilities that these powers pose threaten the liberal democratic order in ways that sweep broader than price levels.[27] Related, there is some danger in entrenching presidential monetary power through emergency. There is a rich legal literature that justifies a strong ("unitary") President, either so that they may better control the administrative state generally or ensure decisive action in an emergency.[28] But as the concept of emergency continues to be stretched—particularly in economic contexts—it risks

preferences of the central bank, and thus its independence, irrelevant."); James A. Dorn, *Fiscal Dominance and Fed Complacency*, CATO INST. (Apr. 8, 2021, 10:25 AM) [hereinafter Dorn, *Fiscal Dominance*], https://www.cato.org/blog/fiscal-dominance-fed-complacency [https://perma.cc/RK9E-X2FF] ("Fiscal dominance occurs when central banks use their monetary powers to support the prices of government securities and to peg interest rates at low levels to reduce the costs of servicing sovereign debt."); Isabel Schnabel, *The Shadow of Fiscal Dominance: Misconceptions, Perceptions and Perspectives*, EUR. CENT. BANK (Sept. 11, 2020), https://www.ecb.europa.eu/press/key/date/2020/html/ecb.sp200911~ea32bd8bb3.en.html [https://perma.cc/SY4Z-L2UE] (noting that at the time of the formation of the European Central Bank, "high government debt was seen as a major threat to central bank independence, and it was feared that *fiscal dominance* could induce a central bank to deviate from its monetary policy objectives, endangering price stability").

26 In nearly all experiments with "cheap money polic[ies]" to finance government spending, tried in "country after country," all cases "led to inflation and had to be abandoned." MILTON FRIEDMAN, THE COUNTER-REVOLUTION IN MONETARY THEORY 15 (1970); *see* Michael U. Krause, Thomas A. Lubik & Karl Rhodes, *MMT and Government Finance: You Can't Always Get What You Want*, FED. RSRV. BANK OF RICHMOND (Apr. 2021), https://www.richmondfed.org/publications/research/economic_brief/2021/eb_21-12 [https://perma.cc/973W-WDA2] (arguing that coordinated efforts between the Treasury and the Fed to print money to finance government spending may lead to inflation in the long run, despite short term projections that are skewed by other market factors); *see also* John Hooley & Mika Saito, *Inflation and 'Fiscal Dominance': Evidence From Sub-Saharan Africa*, VOXEU (Dec. 6, 2021), https://voxeu.org/article/inflation-and-fiscal-dominance#:~:text=IN%20summary%2C%20our%20findings%20suggest,still%20generate%20significant%20inflation%20pressure [https://perma.cc/3R2Y-RUD3] ("The dangers of fiscal dominance . . . have long been warned against by economists and policymakers and history provides no shortage of cautionary tales.").

27 As one former Fed Chairman, William McChesney Martin, powerfully stated in a 1955 speech, "The history of despotic rule, of authoritarian rule" over the economy is that illiberal policies take "a frightful toll in human misery and degradation." In contrast, in a liberal economic order—in which the "[p]owers of decision are dispersed among the millions affected"—there is a more efficient use of society's resources and "vast gains in terms of personal liberty." James A. Dorn, *Myopic Monetary Policy and Presidential Power: Why Rules Matter*, 39 CATO J. 577, 582 (2019).

28 *See* ERIC A. POSNER & ADRIAN VERMEULE, THE EXECUTIVE UNBOUND 7–8 (2010); Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, 2020 SUP.

empowering the President in permanent but unintended ways.[29] With standing monetary powers, the President can have outsized influence in the economy which, over time, could undermine established democratic values.

As such, this Article aims at three distinct literatures. The first is the literature on inflation, urging a place for legal scholarship in this conversation. Not only does this Article pinpoint the legal precedents to a President's power to promote fiscal spending and, in turn, fiscal dominance, and ergo inflation, but it also sheds new light on how shifts in economic theories around inflation also coincided with legal changes in the President's power, providing tailwinds to an economic theory. So, for example, in the 1930s, just as Congress gave Roosevelt more power to inflate the economy directly, academic economists were moving away from the classic quantity theory of money and embracing Keynesian economics.[30] This paradigm shift would have created the political-economy atmosphere in which fiscal spending programs would not necessarily be seen as problematically inflationary to Congress. Similar legal-economic paradigm shifts occurred in the 1970s and now again around the 2020s.[31]

This Article also advances the literature on central bank independence, which spans the fields of law, politics, history, and economics.[32] As critics now question whether the Fed should, in fact, be independent from the President, this Article presents a new layer in the defense of central bank independence—namely, as a key institution for pushing back against the growth of a Monetary Executive.

Lastly, the arguments herein engage the literature on delegation generally. Although much of the delegation literature is focused on delegations to the administrative state,[33] this Article looks at the

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CT. REV. 83, 90–91, 96 (discussing unitary theory more generally); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2331–32, 2339 (2001).

29 *See* Yeva Nersisyan & L. Randall Wray, *How to Pay for the Green New Deal* 3–4 (Levy Econ. Inst., Working Paper No. 931, 2019) (relying on the idea first proposed by William James in 1906, the "moral equivalent of war," to define climate change as an emergency).

30 *See generally infra* Section II.A.1.

31 For discussion, see *infra* Section II.A.2.

32 *See, e.g.*, PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE (2016); Charles Goodhart & Rosa Lastra, *Populism and Central Bank Independence*, 29 OPEN ECON. REV. 49 (2018); Kathryn Judge, *The Federal Reserve: A Study in Soft Constraints*, 78 L. & CONTEMP. PROBS. 65 (2015).

33 *See, e.g.*, MASHAW, *supra* note 8, at 7; Wurman, *supra* note 13, at 1490; *see also* Christine Desan & Nadav Orian Peer, *The Constitution and the Fed After the COVID-19 Crisis*, JUST MONEY: POL'Y SPOTLIGHT (June 10, 2020), https://justmoney.org/the-constitution-and-the-fed-after-the-covid-19-crisis-2/ [https://perma.cc/H8J9-RN88] (discussing the specific situation of the Treasury and financial crisis guarantees). While there is notable literature discussing how the

unique kind of delegation directly to the President in the specific arena of monetary affairs.[34] More broadly, as most members of the Supreme Court narrow in on originalism as the primary statutory lens for interpreting the Constitution, an original understanding of the metes and bounds of the President's authority in monetary affairs should also be of value to the growing legal literature on central banking in—or alongside—the administrative state.

This Article proceeds in three parts. Part I discusses the original understanding of the monetary and fiscal powers in Article I of the Constitution—the power to "coin" money and regulate its value, and also the power to decide how money would be spent through the so-called power of the purse. It further explains why it would have been firmly understood that these powers could not or would not be delegated to the President.

Part II develops the descriptive argument—that Congress has delegated significant monetary and fiscal power to the President, thereby shifting the constitutional baseline balance of power. These delegations were done in an ad hoc way and often intended to be temporary. But when taken in full view, these delegated powers have amassed significantly and outlasted any exigency.

Part III offers some suggestions for regaining constitutional balance over public money. In particular, it suggests operational changes to Fed policy—for Congress to enforce limits on the Fed's ability to pay interest on excess reserves as a bulwark against future presidential pressure to monetize deficit spending. It also suggests that the Fed move back to a quasi-rules-based regime as another defense against a Monetary Executive and the threats it presents to Fed independence. Lastly, the Article makes suggestions to Congress for checking the presidential use of delegation grounded in an economic emergency.

Now, more than in any other period in U.S. history, there appears to be a willingness to entertain fundamental breaches to the constitutionally prescribed separation of powers, and nowhere is such experi-

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President increasingly exercises Congress's appropriation power—see Gillian E. Metzger, *Taking Appropriations Seriously*, 121 Colum. L. Rev. 1075, 1075 (2021); Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1377 (1988) (discussing executive access to public funds); Zachary Courser & Kevin R. Kosar, Restoring the Power of the Purse (Am. Enter. Inst. 2021) (discussing earmarking and agency fines)—this Article focuses distinctly on the President's powers to affect the value of money. While appropriations certainly feature in this story, they do not star in it.

34 *See generally* Kagan, *supra* note 28, at 2248. This Article also engages literature on the President and emergency. *See* Posner & Vermeule, *supra* note 28, at 7–8; Sunstein & Vermeule, *supra* note 28 (discussing unitary theory more generally).

mentation as enticing as where money and public finance are concerned.[35] It is crucial for the public, policymakers, and the legal academy to pause and reflect on whether we are satisfied with our new silent monetary constitution, where the President looms larger than Congress, and whether this mode of governance can be sustained as legitimate over time.

I. (Non)delegation of Monetary Matters at the Founding

The Framers of the Constitution gave Congress plenary power over money to ensure that it would remain the "first among equals"—the most powerful of the three branches.[36] As Alexander Hamilton made clear in *Federalist No. 30*, the founding generation astutely surmised that "[m]oney is, with propriety, considered as the vital principle of the body politic; as that which sustains its life and motion and enables it to perform its most essential functions."[37] The Framers expected that control over money and spending would be the fount of the government's power. Accordingly, the power to create money, set its value, and the power to spend money were kept separate from the presidency.

A. *The Original Monetary Power*

The question of what is "money" was an important part of the constitutional conversation. The Framers' views on money and government were influenced by two distinct sets of history. The first was the history of Europe and its monarchs, which illustrated that Executives could use their power to create money, or alter its value, as a tool for denigrating the property interests of the People.[38] Such an outcome would be anathema to the ethos of the new republic, which was built on a theory of liberty that viewed private rights of property and contract, alongside life and liberty, as rights that, once vested, should never be "dependent upon the will of the government."[39]

35 As former Chief Justice of the Supreme Court Warren Burger once said, "No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but 'the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution.'" Bowsher v. Synar, 478 U.S. 714, 736 (1986) (quoting INS v. Chadha, 462 U.S. 919, 944 (1983)).

36 The Federalist No. 30, *supra* note 14 (Alexander Hamilton).

37 *Id.* at 188.

38 *See* McConnell, *supra* note 7, at 100–04.

39 Wellness Int'l Network, Ltd. v. Sharif, 575 U.S. 665, 713 (2015) (Thomas, J., dissenting) (citing 1 William Blackstone, Commentaries on the Laws of England 119 (1765)).

The second, more recent history the Framers had to bear in mind was the experience of money in England and the colonies before the Revolution. English experience suggested to the Framers, as Professor McConnell explains, that "[m]inting more money and debasing its value is a time-honored and usually pernicious way for debtor nations to get out from under their sovereign debt. Henry VIII had used this power to devastating effect, creating economic havoc."[40] As a consequence, the Framers intentionally allocated this royal prerogative to Congress, even though it was possessed by King George at the time of the Constitutional Convention, and the President would have been the republic's closest analog to a King.[41]

Colonial experience, meanwhile, made the Framers wary about the nature of money itself.[42] At the time, Colony-issued paper money—referred to as "bills of credit"—had circulated widely alongside gold and silver—so-called "hard money."[43] Although this paper money was used as currency, it was not always legal tender, which led to a host of problems in the Colonies ranging from tax avoidance to fraud and speculation.[44] During the actual Revolution, the Continental Congress also relied on bills of credit—without any power of taxation, printing money was the only means of financing the war.[45] The flood of paper money during the Revolution, with no real indication of a means to honor it, led to massive inflation after the war had ended.[46]

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40 McConnell, *supra* note 7, at 103.

41 *Id.*

42 *See* Horace White, Money and Banking 44–49 (6th ed. 1935).

43 A bill of credit, when issued by the government, was then usually understood as "a promise to pay coined money." *Id.* at iv, 44; *see* Adam Hayes, *Hard Money*, Investopedia (Apr. 25, 2022), https://www.investopedia.com/terms/h/hardmoney.asp [https://perma.cc/T4XK-2M63] (defining "hard money"); *see generally* Farley Grubb, *The U.S. Constitution and Monetary Powers: An Analysis of the 1787 Constitutional Convention and How a Constitutional Transformation of the Nation's Monetary System Emerged* (Nat'l Bureau of Econ. Rsch., Working Paper No. 11783, 2005).

44 A 1743 pamphlet, styled "A Letter from a Gentleman in Boston to his Friend in Connecticut," articulated a warning about paper money:

> [T]o themselves, Members of the Legislature, and to other Borrowers, their Friends, at easy and fallacious Lays, to be repaid at very long Periods; and by their provincial Laws made a Tender in all Contracts, Trade and Business, whereby Currencies, various and illegal, have been introduced which from their continued and depreciated nature in the Course of many Years have much oppressed Widows and Orphans and all other Creditors.

White, *supra* note 42, at 46.

45 *See* John Jay Knox, A History of Banking in the United States 19–20 (Bradford Rhodes & Elmer H. Youngman eds., 1900).

46 By 1779, twenty continental dollars were worth one in silver; and by 1780, that ratio was

Given these histories, the Framers viewed paper money with great skepticism. Historians believe that Robert Morris was the most influential in framing the monetary powers as eventually written in the Constitution.[47] In his view, paper money was not only capable of manipulation and inflation, it was often effective for popular movements in pressing the government to spend more. To Morris:

> Emissions of paper money, largesses to the people—a remission of debts and similar measures, will at sometimes be popular, and will be pushed for that reason. . . . The press is indeed a great means of diminishing the evil, yet it is found to be unable to prevent it altogether.[48]

Populist pressure for inflationary spending was never more acute, Morris observed, than in times of emergency.[49] In exigent circumstances, Morris knew the incentives for the government to print money—to, for instance, pay for a war—were inevitably high.[50] The printing press led to inflation and in turn necessitated drastic measures to control it. Given that predictable cycle, Morris condemned paper money as a "ruinous expedient."[51]

The Framers thus opted to eliminate the possibility by reducing discretion as much as possible within the text of the Constitution's so-called coinage power. That power, in Article I, section 8, gives Congress the power to "coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures."[52] "Coin" referred to hard-money specie—gold or silver—commodities of which there was a fixed quantity in circulation.[53] Further, the Con-

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seventy-five to one. *Id.* Northern states soon thereafter abandoned continentals and started using French paper as currency, which had trickled in through the French army, and Southern states dropped continentals altogether. *Id.*; *see From Alexander Hamilton To—, [December–March 1779–1780]*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://founders.archives.gov/?q=ancestor%3AARHN-01-02-02-0559&s=1511311111&r=2 [https://perma.cc/9VT3-8KPW]. This history informed the expression "not worth a continental." *See* Clifford F. Thies, *Not Worth a Continental*, AM. INST. ECON. RSCH. (Nov. 3, 2021), https://www.aier.org/article/not-worth-a-continental/ [https://perma.cc/437Y-D734].

47 *See* KNOX, *supra* note 45, at 27–28.

48 Grubb, *supra* note 43, at 31.

49 *Id.* at 31–40.

50 *Id.*

51 *Id.* at 31, 39.

52 U.S. CONST. art. I, § 8, cl. 5.

53 *See* Grubb, *supra* note 43, at 42–45. The Framers' choice not to refer to the emission of bills of credit (i.e., making paper money) was intentional. The original draft of the Constitution provided to the Convention by the Committee of Detail would have empowered Congress to borrow money *and* emit bills of credit of the United States. But when that section moved to debates, Governor Morris moved to strike the clause "and emit bills on the credit of the United

stitution specifies that "[n]o State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts."[54] So, creating the actual material that would be used in the United States as "money" was a power the Constitution reserved to the federal government, and Congress in particular. The power to create paper money was thus the "only congressional power under the Articles that was deliberately denied to the federal government under the Constitution."[55]

The real value of money was taken at the Founding as a given. At the Founding, the United States, like Western Europe, adhered to a bimetallic standard by which the value of coin was set in reference to weights and fineness of gold and silver, so that gold and silver were valued at a ratio of fifteen and a half to one.[56] In the context of a bimetallic standard, world markets would establish the value of the coin, not government fiat, so discretion as to the "value" of American "coin" would have been meaningless.[57] Accordingly, the power to "regulate the value thereof" referred Congress to the administrative task of adjusting the metallic content of the metals in each coin minted to ensure the coins would more or less track their respective market values, domestically and abroad.[58] Eventually, the United States would adopt a classic gold standard at the end of the nineteenth century, reinforcing this constitutional commitment.[59]

States." *Id.* Thus, the States could not make paper money either. Notably, this left open the possibility that private institutions—banks—could emit bills of credit. *See id.*; *see also* 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 144, 308–09 (Max Farrand ed., 1937) (discussing the limit on Congress's power to the minting of the actual coin).

54 U.S. CONST. art. I, § 10, cl. 1.

55 MCCONNELL, *supra* note 7, at 103.

56 CRAIG K. ELWELL, CONG. RSCH. SERV., R41887, BRIEF HISTORY OF THE GOLD STANDARD IN THE UNITED STATES 1–2 (2011), https://sgp.fas.org/crs/misc/R41887.pdf [https://perma.cc/3MHE-DJHX]. Technically, because the world markets valued gold to silver at a ratio of 15 ½ to 1, this meant that the US was on a de facto silver standard. In 1834, Congress reduced the gold content of the dollar to make the ratio 16 to 1. *Id.* at 3.

57 *Id.* at 1–2.

58 *See* RICHARD H. TIMBERLAKE, CONSTITUTIONAL MONEY 35 (2013).

59 A gold standard was unofficially adopted in 1834, when Congress fixed the price of gold at $20.67 per ounce and, officially, in 1900, when Congress declared the gold dollar the standard and official unit of account—all money issued by the government would maintain parity with gold. *See* Michael D. Bordo, *Gold Standard*, ECONLIB, https://www.econlib.org/library/Enc/GoldStandard.html [https://perma.cc/5K4T-DSK2]. A few historical facts regarding the gold standard may be instructive. Other major countries joined the gold standard in the 1870s. *Id.* The period from 1880 to 1914 is known as the classic gold standard; a majority of countries adhered to the standard. *Id.* The gold standard briefly broke down during World War I but was reinstated from 1925 to 1931. *See id.*; *see also* Gary Richardson, Alejandro Komai & Michael Gou, *Roosevelt's*

For the first 120 years of the republic, Congress would follow the original intent of the Constitution's coinage power, and when deviations happened, in times of emergency, Congress eventually reverted to the mean. For example, during the Civil War, Congress authorized the U.S. government to issue paper money with legal tender status—and like the continentals, these "greenbacks" were not convertible for hard coin.[60] When the Civil War ended, the United States returned to its constitutional baseline. The government stopped issuing greenbacks and even retired some; eventually, it fixed the amount of greenbacks in circulation at whatever level was outstanding and returned to the Gold Standard.[61]

B. The Original Fiscal Power

Today, we often refer to Congress's fiscal powers colloquially as the "purse" and its "strings." The "power of the purse" in fact consists of a constellation of constitutional powers. One refers to Congress's power to amass the funds necessary to run government: these are the taxing and spending powers from Article I, which grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."[62] Additionally, the borrowing power permits Congress "[t]o borrow Money on the credit of the United States."[63] These powers were exclusively for Congress: the Framers intended that "the legislative department alone has access to the pockets of the people."[64]

The text of the appropriation clause established that Congress would decide how money raised for the government would be spent, that is, allocated to various projects, groups, or programs. Specifically, that clause provides that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[65] Unlike the raising, spending, and borrowing powers—which are positive

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Gold Program, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/roosevelts-gold-program [https://perma.cc/X658-MDY5].

60 *See* ELWELL, *supra* note 56, at 5. Congress was in the driver's seat; it authorized three separate issuances of greenbacks with the Legal Tender Acts in February 1862, July 1862, and March 1863. *See* TIMBERLAKE, *supra* note 58, at 56.

61 *See* ELWELL, *supra* note 56, at 6. As will be discussed, the United States remained on the Gold Standard, with brief exceptions during the World Wars, until 1971. *See infra* Section II.A.2.

62 U.S. CONST. art. I, § 8, cl. 1.

63 *Id.* art. I, § 8, cl. 2.

64 THE FEDERALIST NO. 48, *supra* note 14, at 310 (James Madison).

65 U.S. CONST. art. I, § 9, cl. 7.

grants of authority—the Appropriations Clause supplies a limitation: only Congress can provide for the withdrawal of funds from the Treasury and only by virtue of an enacted law.[66]

As with the coinage power, the Framers were informed by fear of antidemocratic outcomes. They had observed that monarchs could rule without a parliament if they controlled the purse.[67] Protecting the purse from executive control was therefore first order to protecting the new republic.[68] The Delegations thus strongly held the view that the President should not have control over the purse.[69] James Madison elaborated in *Federalist No. 58*:

> They, in a word, hold the purse—that powerful instrument by which we behold, in the history of the British Constitution, an infant and humble representation of the people gradually enlarging the sphere of its activity and importance, and finally reducing, as far as it seems to have wished, all the overgrown prerogatives of the other branches of the government. This power over the purse may, in fact, be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure.[70]

Separating "the sword from the purse"—i.e., the Executive, who "take[s] Care" to enforce the laws—was integral to a theory of government that hinged on the notion of separating power between branches.[71] Lodging the fiscal power with Congress became the key

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66 *See id.* For an example of how Congress utilizes this power in the form of earmarks, and arguments for and against such use, see generally Kosar, *supra* note 33.

67 *See* Josh Chafetz, Congress's Constitution: Legislative Authority and The Separation of Powers 51 (2017) (referring to the founding generation's recent memory of monarchs ruling without parliamentary asset, resulting in the 1689 Revolution Settlement that took aim at "monarchial authority . . . royal revenues and royal control over a standing army").

68 *See* Grubb, *supra* note 43, at 45; Chafetz, *supra* note 67, at 56 ("The desire to control how money is spent, which we saw growing during the late Stuart period, coming to maturity in the eighteenth century, and asserted emphatically in colonial and early republican America, found its expression in the requirement—wholly uncontroversial at the Constitutional Convention—that '[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.'" (quoting U.S. Const. art. I, § 9, cl. 7)).

69 *See Power of the Purse*, U.S.H.R.: Hist., Art & Archives, https://history.house.gov/institution/origins-development/power-of-the-purse/ [https://perma.cc/8FYC-FPP4] ("The framers were unanimous that Congress, as the representatives of the people, should be in control of public funds—not the President or executive branch agencies. This strongly-held belief was rooted in the framers' experiences with England, where the king had wide latitude over spending once the money had been raised.").

70 The Federalist No. 58, *supra* note 14, at 359 (James Madison).

71 *James Madison on the Necessity of Separating the Power of "The Sword From the Purse"*

point of comfort to anti-Federalists, concerned about a strong President.[72] So, for instance, when Patrick Henry worried that "[y]our President may easily become king," Madison rejoindered that "the purse is in the hands of the representatives of the people. They have the appropriation of all moneys."[73]

The early congresses upheld the Framers' vision that the powers of the purse and strings be tightly controlled by the legislature.[74] These powers were closely guarded, and, as Professor Jerry Mashaw explains, the first volume of the *United States Statutes at Large* supplies "evidence . . . [of] an overriding concern with money—with appropriations and taxes to finance a government that began its life already deeply in debt."[75] Notably, even as Congress began a fledgling practice of delegating to the President in other areas of public administration,[76] it continued to keep its fiscal power close by micromanaging the details of the early revenue statutes with painstaking specificity and detail.[77]

C. Early Public Finance Institutions

One caveat to the evidence of nondelegation at and shortly after the Founding concerns the institutions that developed to effectuate monetary and fiscal policy—the First and Second Banks of the United States, the U.S. Treasury, and eventually the Federal Reserve.[78] The

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(1793), OLL, https://oll.libertyfund.org/quote/james-madison-on-the-necessity-of-separating-the-power-of-the-sword-from-the-purse-1793 [https://perma.cc/8TUD-FEYX]; U.S. CONST. art. II, § 3.

72 *See* CHAFETZ, *supra* note 67, at 57.

73 *Id.*

74 *See* U.S.H.R.: HIST., ART & ARCHIVES, *supra* note 69.

75 MASHAW, *supra* note 8, at 34.

76 *Id.* at 46 ("Congress made broad delegations of authority in a host of other statutes, often to the President, but with full knowledge that his discretion would of necessity be subdelegated to others.").

77 *Id.* at 44 (The 1791 revenue statute was fifteen pages long specifying "everything from the brand of hydrometer to be used in testing proof to the exact lettering to be used on casks that have been inspected and the wording of signs to be used to identify revenue offices."); *see also id.* at 36–38 (discussing the "complex administrative system" for collecting taxes on certain imported goods and distilled spirits in 1789 and 1791, respectively).

78 *See* PAUL KAHAN, THE BANK WAR 7–9 (2016) (noting the first and second central banks "act[ed] as the Treasury Department's fiscal agent" and "receiv[ed] taxes, disburs[ed] government payments, circulat[ed] currency, and discount[ed] bills of exchange"); RICHARD SYLLA & DAVID J. COWEN, ALEXANDER HAMILTON ON FINANCE, CREDIT, AND DEBT 53 (2018) (noting the need for delegation because "[i]t was impossible that the business of finance could be ably conducted by a body of men, however well composed or well intentioned"); FED. RSRV. BANK OF PHILA., THE FIRST BANK OF THE UNITED STATES: A CHAPTER IN THE HISTORY OF CENTRAL BANKING 2–3 (2021), https://www.philadelphiafed.org/-/media/frbp/assets/institutional/

First and Second Banks were meant to be public finance institutions but had distinctly private elements.[79] Because these institutions effectively would control the supply of money, they inherently exercised some delegated power.[80] It is noteworthy, however, that this delegation flowed to what were in truth privately owned institutions, not an Executive Branch authority. Regardless, these institutions suffered a lack of public legitimacy and did not survive over time. The First Bank was chartered in 1791 and had a twenty-year charter.[81] Congress voted not to renew its charter in 1811, and the First Bank closed.[82] Likewise, Congress also declined to renew the charter of the Second Bank of the United States, which was even more powerful than the first, in 1836.[83]

Congress established the Federal Reserve—a true central bank—in 1913.[84] In part, the Federal Reserve Act was motivated by economic emergency. The period following the Civil War, the "Gilded Age," was beset by banking panics.[85] Between 1863 and 1913, eight separate

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education/publications/the-first-bank-of-the-united-states.pdf [https://perma.cc/FHL5-ZAUV] (discussing Hamilton's desire to charter a national bank to act as Congress's "fiscal agent," and the opposition's argument "that the Constitution did not grant the government the authority to establish banks").

79 *See* KAHAN, *supra* note 78, at 8–9 (discussing how the First Bank of the United States would largely be owned by private shareholders and would be governed by a board of directors, but would be limited in what it could trade in, thereby distinguishing it from a commercial bank). The First Bank of the United States was Alexander Hamilton's key initiative for the new republic, which, in his view, was a "necessary auxiliary . . . [and] an indispensable engine in the administration of the finances." SYLLA & COWEN, *supra* note 78, at 116.

80 *See* KAHAN, *supra* note 78, at 7 (noting the central bank had the power "to regulate the nation's money supply and credit").

81 *See* JOHN THOM HOLDSWORTH & DAVIS R. DEWEY, THE FIRST AND SECOND BANKS OF THE UNITED STATES, S. DOC. NO. 571, at 19–20 (2d Sess. 1910).

82 *See id.* at 97.

83 *See id.* at 157. After the charter expired, the bank became a private corporation, until it underwent liquidation starting in 1841. *See* Bray Hammond, *Jackson, Biddle, and the Bank of the United States*, 7 J. ECON. HIST. 1, 11 (1947). Among other difficulties, the Second Bank was challenged as unconstitutional, but the Supreme Court held that Congress did have authority to charter a bank. McCulloch v. Maryland, 17 U.S. 316, 421 (1819). President Jackson maintained that the bank was unconstitutional and his dispute with the Bank's President, Nicholas Biddle, led to an infamous "Bank War." *See Bank War*, HISTORY (Oct. 4, 2022), https://www.history.com/topics/19th-century/bank-war [https://perma.cc/F8T8-V2KD]. However, the First and Second Banks were quasi-public rather than purely public institutions, and therefore do not neatly fit into the discussion of delegations to other branches. For literature on these institutions, see, for example, JAY COST, THE PRICE OF GREATNESS (2018).

84 Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251 (1913) (codified as amended in scattered sections of 21 U.S.C.).

85 *See* Gary Richardson & Tim Sablik, *Banking Panics of the Gilded Age*, FED. RSRV. HIST. (Dec. 4, 2015), https://www.federalreservehistory.org/essays/banking-panics-of-the-gilded-age [https://perma.cc/8KHT-C5ER]; Jon R. Moen & Ellis W. Tallman, *The Panic of 1907*, FED. RSRV. HIST. (Dec. 4, 2015), https://www.federalreservehistory.org/essays/panic-of-1907 [https://

banking panics struck regionally and nationally, wreaking havoc on the economy.[86] The problem, it would seem, was a monetary one that overlays the business cycle—namely, that the supply of currency could not modulate across the seasons and with needs for liquidity to engage in harvests.[87] The Fed was created to use its tools to improve the elasticity of currency.[88]

To be sure, Congress delegated some modicum of its Article I, section 8 power to this new central banking institution.[89] But the monetary delegation was a mild one at that. Thanks to the Gold Standard, the Fed would not, for some time, confront the task of making judgments about how to in fact determine the supply of money or what its value ought to be.[90] Rather, the supply of money would adjust automatically pursuant to the supply and demand for gold, alongside the international flows of the stock of gold.[91] As such, Congress designed

perma.cc/95FC-X3AW] (explaining the panic of 1907, which tipped Congress over the edge into agreeing to form the Federal Reserve System).

86 *See* Richardson & Sablik, *supra* note 85.

87 *See id.* ("Panics tended to occur in the fall, when the banking system was under the greatest strain. Farmers needed currency to bring their crops to market, and the holiday season increased demands for currency and credit. Under the National Banking System, the supply of currency could not respond quickly to an increase in demand, so the price of currency rose instead. That price is known as the interest rate. Increasing interest rates lowered the value of banks' assets, making it more difficult for them to repay depositors and pushing them toward insolvency. At these times, uncertainty about banks' health and fear that other depositors might withdraw first sometimes triggered panics, when large numbers of depositors simultaneously ran to their banks and withdrew their deposits.").

88 Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251, 251 (1913) In 1863 and 1864 Congress created a national banking system in the National Bank Acts. As such, it needed a supervisor, though it did already have some supervisory functions covered by the Office of the Comptroller of the currency. *See* Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951, 994 (2021). For an overview of this era, see generally *id.*

89 U.S. CONST. art. I, § 8; Federal Reserve Act, Pub. L. No. 63-43, 38 Stat. 251, 251 (1913).

90 THOMAS M. HUMPHREY & RICHARD H. TIMBERLAKE, GOLD, THE REAL BILLS DOCTRINE, AND THE FED (2019) ("At the most basic level there is no need for central banks to manage the gold standard." (quoting Michael D. Bordo, *Gold Standard Theory*, *in* THE NEW PALGRAVE DICTIONARY OF MONEY AND FINANCE 269 (Peter Newman et al. eds., 1992))).

91 *See id.*; *see also The Classical Gold Standard*, WORLD GOLD COUNCIL, https://www.gold.org/history-gold/the-classical-gold-standard [https://perma.cc/DD8Z-FY43]. Moreover, the principal architects of the Federal Reserve Act believed in the so-called Real Bills doctrine and hard-wired that doctrine into the Act. According to that economic school of thought, credit would automatically adjust according to the productive needs of business and agriculture. The original Federal Reserve Act provided that the Federal Reserve banks could only discount real bills, that is, bills attached to production or agriculture. If you had a bill backed by something concrete, then you could get credit; this was designed to ensure that the supply of credit matched productive needs and would not be used for speculation. *See generally* HUMPHREY & TIMBERLAKE, *supra* note 90.

the Fed in the image of its monetary powers—a technocratic expert over money, but one lacking in much discretion.

The role of the Fed changed somewhat in the 1920s as the System's leadership developed a more sophisticated understanding of how monetary actions at the Fed could steer the broad economy.[92] A new economic intellectual elite gained influence at the Fed, including those like Irving Fisher, whose work generally established that the quantity of money, along with its velocity, affected the price level.[93] So even as the Fed began in the 1920s to dip its toe into the water of using policy tools to move the price level—regulating the value of money—it always did so on the basis of technocratic decision-making—on the burgeoning science of macroeconomics.[94]

Only a decade later would Congress seriously consider formally delegating its power to "regulate the value" of money, as well as more expansively interpreting that clause.[95] Still, even when the idea of creating a Federal Monetary Authority within the Fed to actively stabilize prices was first proposed in 1937, congressmen of both political parties widely shared the view that any such new Fed organ should be free of political—i.e., presidential—influence or control.[96]

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92 *See* Perry Mehrling, *Retrospectives: Economists and the Fed: Beginnings*, 16 J. ECON. PERSPS. 207, 211 (2002) (economists began embracing "the idea of active management by a central bank" that could "be operated on a scientific basis, using the most advanced statistical and theoretical tools to guide its intervention").

93 IRVING FISHER, THE PURCHASING POWER OF MONEY 14 (1911); *see* Mehrling, *supra* note 92, at 211 (explaining in modern day terms the quantity theory of money).

94 *See* Mehrling, *supra* note 92, at 211 ("In Fisher's hands, economic science offered the prospect of keeping the politics out of money even while embracing centralization and active management."). For a description of macroeconomics, see *FAQs: What is Macroeconomics?*, FED. RSRV. (Oct. 19, 2017), https://www.federalreserve.gov/faqs/what-is-macroeconomics.htm [https://perma.cc/AT39-CN86].

95 *See Monetary Authority Act: Hearings on S. 1990 Before the Subcomm. of the S. Comm. on Agric. & Forestry*, 75th Cong. 116 (1937) (statement of Sen. Elmer Thomas, Member, S. Comm. on Agric. & Forestry) ("The Constitution provides very specifically that the Congress shall have the power to coin money and to regulate the value thereof, and we are only presuming now to consider the advisability of vitalizing that provision of the Constitution. . . . It never has been done, and there have been reasons for it not having been done, but it occurs to some of us that the time has come where it is not only advisable, but absolutely necessary.").

96 *See generally id.*; *see also* Skinner, *supra* note 19, at 2, 14–16 (discussing the technocratic core of the Fed's price stability mandate). Now, to be fair, the Treasury Secretary was made an ex officio member of the Federal Reserve Board, though there is no other indication that Congress intended to make the newly created System in any way subservient to the President. *See Andrew W. Mellon*, FED. RSRV. HIST., https://www.federalreservehistory.org/people/andrew-w-mellon [https://perma.cc/UYY7-7JH8] ("Andrew W. Mellon served as secretary of the Treasury from March 4, 1921, to February 12, 1932. Under the provisions of the original Federal Reserve Act, this meant he was also ex-officio chairman of the Federal Reserve Board."). It would not be

Congress was also rather disciplined in delegation when it created the U.S. Treasury by statute in 1789.[97] It held close to the reins. For one, the Treasury's organic statute ensured that responsibilities given to the agency's leadership would be specified in detail and that there would be internal checks and balances.[98] The Secretary was given a number of highly "specific functions," and other officers in the department—e.g., the Comptroller, Auditor, Treasurer, and Registrar—would be subject to the Senate confirmation process, an important measure of ex ante congressional accountability.[99] Above all, the proliferation of other officers was "meant to provide checks on the Secretary and each other in the crucial matter of safeguarding the integrity of the fiscal and monetary affairs of the nation."[100]

Moreover, accountability flowed to Congress at least as much as to the President. The statute required that the Secretary of the Treasury report directly to each house of Congress.[101] Tellingly, the President was not mentioned in the statute. In contrast to the statutes constituting the War and Foreign Affairs Department, the Treasury was not initially "denominated an 'Executive Department.'"[102] As Professor Mashaw explains it: "Given that the Treasury was where much of the real power lay in the early structure of the American government . . . Congress seemed jealous of its own authority over the Department."[103] Put simply, the Treasury began its life as "functionally a part of the Congress."[104]

Notably, even well after the Founding, it was not assumed the Treasury—in lieu of Congress—could withdraw funds from the public fisc and spend them.[105]

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until 1977 that the Fed would get a formal price stability mandate from Congress. *See* Skinner, *supra* note 19, at 3–4.

97 *See About: Act of Congress Establishing the Treasury Department*, U.S. DEP'T TREASURY (Oct. 26, 2010, 11:02 AM), https://home.treasury.gov/history/act-of-congress-establishing-the-treasury-department [https://perma.cc/Z3HJ-G38G].

98 *See id.*

99 *See* MASHAW, *supra* note 8, at 40.

100 *Id.*

101 *Id.* at 41 ("The initial Treasury statute thus appears to make the Secretary of the Treasury responsible primarily to Congress rather than to the President.").

102 *Id. But see* Ilan Wurman, *The Removal Power: A Critical Guide*, 2019–2020 CATO SUP. CT. REV. 157, 181 (noting that the Secretary of Treasury "was denominated an 'executive officer'" in the bill providing for salaries).

103 MASHAW, *supra* note 8, at 41.

104 *Id.*

105 *See* Knote v. United States, 95 U.S. 149, 154 (1877) (holding that there could be no delivery of seized funds to a pardoned criminal without formal appropriation law by Congress).

* * *

In summary, The Framers of the Constitution were quite intentional—and parsimonious—in vesting monetary and fiscal powers in the legislature in Article I. For over one hundred years, Congress maintained the dividing line between Congress's money powers and the President. But throughout the twentieth and twenty-first centuries, when pressed with economic emergency, Congress opted to blur that line and increasingly delegate these powers to the President.

II. The Shift to Presidential Delegation

This Part examines in close detail key instances of statutory delegation that contributed to the birth of the Monetary Executive. In particular, this Part studies delegations that have created statutory bases for a president to affect the value of money—either directly through changes to the supply of money or indirectly through spending programs that affect people's perception of the government's ability to repay public debt.

A. *Executive Order and Economic Emergency*

Despite the longstanding historical practice, the Constitution does not expressly supply the President with the authority to issue edicts that resemble laws.[106] By the middle of the twentieth century, the Supreme Court had recognized the constitutional ambiguity around the practice, most directly in the 1952 Steel Seizure Case, *Youngstown Sheet & Tube Co. v. Sawyer*.[107] That case involved the President's seizure of steel mills to facilitate the Korean War effort; as such, the Court was especially focused on the scope of the President's power to face off against national emergencies.[108] Although the Court observed that Congress had only recently, in the 1930s, resorted to empowering the President in such respects, it did not have occasion to reflect upon the particular ways in which Congress had already begun to delegate its Article I *money-related powers* to the President to invoke against emergency.[109]

106 Vivian S. Chu & Todd Garvey, Cong. Rsch. Serv., RS20846, Executive Orders: Issuance, Modification, and Revocation 2 (2014) ("Just as there is no definition of executive orders, presidential memoranda, and proclamations in the U.S. Constitution, there is, likewise, no specific provision authorizing their issuance.").

107 343 U.S. 579, 643–44 (1952).

108 *Id.* at 582–84, 643.

109 *See generally id.* Indeed, Professor McConnell's framework is likely more instructive, or at least helpful, to illuminate the issue: in lieu of *Youngstown*, Professor McConnell suggests a tripartite framework organized around whether an exercise of power is a prerogative power, a

1. *President Roosevelt*

The Franklin D. Roosevelt ("FDR") Administration began in the midst of the Great Depression. Shortly after FDR took office, Congress passed the Emergency Banking Act on March 9, 1933.[110] The Act supplied FDR with sweeping powers to address the unfolding banking crisis, including regulating all foreign exchange transactions and gold movements—specifically, in section 2, it gave the Secretary of the Treasury the discretion to compel the surrender of gold.[111] Section 2 of the Emergency Banking Act had amended section 5(b) of the Trading with the Enemy Act—which applied during wartime only—to apply to peacetime emergencies.[112]

Roosevelt took unprecedented monetary action with that power. First, on April 5, 1933, he issued Executive Order 6102 to confiscate—i.e., nationalize—gold from private citizens.[113] The Order required all private citizens and corporations to surrender their gold to the Federal Reserve at the exchange rate of $20.67 per ounce.[114]

This confiscation was touted as an emergency measure to support the Federal Reserve's ability to maintain the money supply.[115] At the time, the Federal Reserve Act required that all Federal Reserve notes, the official term for "dollar," be backed forty percent by gold.[116] Due to the Fed's reduced interest rates, gold was flowing out of the country.[117] Accordingly, the Fed's gold stock was running precariously low, putting into question its ability to maintain the required backing of gold to outstanding currency.[118] Confiscating privately owned gold was

delegated power, or a residual power. The presidential actions fall under the delegation category, but they may run afoul of the proviso that they are exercised "subject to statutory specification" or that the actions go beyond what is necessary to attend to the "executive part of the business" of a statute. *See* McConnell, *supra* note 7, at 276–77.

110 *Franklin D. Roosevelt: 1933-1945*, White House Hist. Ass'n, https://www.whitehousehistory.org/bios/franklin-roosevelt [https://perma.cc/C7C9-A5C4]; Emergency Banking Act, Pub. L. No. 73-1, 48 Stat. 1 (1933).

111 Emergency Banking Act § 3; Richardson et al., *supra* note 59.

112 Emergency Banking Act § 2; Trading with the Enemy Act, Pub. L. 65-91, § 5(b), 40 Stat. 411, 415 (1917) (codified as amended at 50 U.S.C. §§ 4301–41).

113 Exec. Order No. 6102 (Apr. 5, 1933), *reprinted in* 2 The Public Papers and Addresses of Franklin D. Roosevelt 111, 112 (1938); *see* Bordo, *supra* note 59.

114 *See* Bordo, *supra* note 59.

115 *See* Greene, *supra* note 15.

116 Federal Reserve Act, Pub. L. No. 63-43, § 16, 38 Stat. 251, 266 (1913) (codified as amended in scattered sections of 21 U.S.C.). This provision was found in the original section 11(c). *See* Richardson et al., *supra* note 59.

117 *See* Richardson et al., *supra* note 59.

118 *Id.*

one sure way to replenish the Fed's gold supply.[119] Increasing the Fed's gold stores by confiscation would also handily allow the Fed to issue more Federal Reserve notes, thereby inflating the money supply, consistent with FDR's overall economic policy goals.[120]

Shortly after, on April 20, 1933, FDR suspended the gold standard with Executive Order No. 6111.[121] The proclamation prohibited all exports of gold and the Treasury and other financial institutions would no longer be permitted to convert currency and deposits into gold.[122] This halted all gold outflows, suspended the basic premise of a gold-backed paper currency, and effectively abandoned the gold standard.[123] Congress would later, on June 5, 1933, facilitate Roosevelt's aims by abrogating all gold clauses in private contract through a Joint Resolution.[124] From the vantage point of the Constitution, the deprivation of property was quite remarkable.[125]

Roosevelt also wanted to cause inflation. Indeed, at the same time that Roosevelt took the United States off the gold standard, he "pledged to seek broad powers from Congress to raise prices."[126] Con-

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119 *Id.*

120 *Id.*; *see also* James W. Angell, *Gold, Banks and the New Deal*, 49 POL. SCI. Q. 481, 485 (1934) (noting that President Roosevelt took both steps "designed only to deal with the immediate emergency" and other steps that "were of a more permanent character, and reflected the adoption of quite new monetary and banking policies").

121 Exec. Order No. 6111 (Apr. 20, 1933), https://www.presidency.ucsb.edu/documents/executive-order-6111-transactions-foreign-exchange [https://perma.cc/4XK5-JPRW]. For a history of the gold standard from World War I to the New Deal era, see generally Leland Crabbe, *The International Gold Standard and U.S. Monetary Policy from World War I to the New Deal*, 1989 FED. RSRV. BULL. 423, https://fraser.stlouisfed.org/files/docs/meltzer/craint89.pdf [https://perma.cc/E8XR-PBUB].

122 Exec. Order No. 6111, *supra* note 121.

123 Richardson et al., *supra* note 59.

124 H.R.J. Res. 192, 73d Cong. (1933).

125 U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or *property,* without due process of law; nor shall *private property* be taken for public use, without just compensation." (emphasis added)). Seizing private gold at a forced exchange and subsequently devaluing the dollar alters private contract to the benefit of debtors and the detriment of creditors. Remember: since gold clauses had been struck from contracts by Congress's June 1933 Joint Resolution, private parties would be compelled to accept dollars in lieu of gold in satisfaction of obligations already made—but the exchange would be at the new gold equivalent price. H.R.J. Res. 192. To illustrate, consider the following hypothetical contract that is denominated in gold, say, 1,000 ounces. Before the devaluation, the creditor would be owed back the equivalent of $48.38. After the devaluation, the creditor would only be repaid $28.57. For Madison in 1800, most worrisome were those delegations to the President by which "property [is] deprived of its value to the owner." *See* Wurman, *supra* note 13, at 1513 (quoting JAMES MADISON, *The Report of 1800*, *in* 17 THE PAPERS OF JAMES MADISON 303, 325 (David B. Mattern et al. eds., 1991)).

126 Andrew Jalil & Gisela Rua, *Inflation Expectations and Recovery from the Depression in 1933: Evidence from the Narrative Record* 14 (Fed. Rsrv. Bd., Working Paper No. 2015-029,

gress complied. On May 12, 1933, Congress gave Roosevelt the additional monetary powers he requested, in Title III of the Agricultural Adjustment Act.[127] This provision came to be known as the "Thomas Inflation Amendment" after its sponsor, Elmer Thomas, and in light of the objective of the powers.[128]

The Thomas Amendment gave the President three main categories of monetary power. First, it gave the President the power to strongly encourage the Reserve Banks of the Federal Reserve System to buy up to $3 billion in Treasury bonds—today, we would refer to that as debt monetization.[129] Second, should the $3 billion in asset purchases prove insufficient, or the Reserve Banks unwilling, Section 43(b)(1) of the Act gave the President the power to directly inflate the money supply by directing the Treasury to print $3 billion in United States notes (greenbacks).[130] Finally, the Act gave the President the power to reduce the gold content of the dollar by fifty percent—the Gold Reserve Act of 1934 later amended that figure to sixty percent.[131]

The unprecedented nature of these powers cannot be overstated. At the time, they were recognized as a total grant of power to the President to control monetary affairs.[132] *The Economist* reported on the Thomas Amendment "as giving President Roosevelt dictatorial powers to control inflation: the country has exchanged a President with little effective power for a currency dictator."[133] One notable economist of the times, Edwin Kemmerer, remarked that the Thomas Amendment gave

> the President and his appointees a legal authority over the nation's currency that is almost complete. A Stalin or a Hitler could hardly have more. The things that the President has legal authority to do to the currency directly and their

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2015), https://www.federalreserve.gov_econresdata_feds_2015_files_2015029pap.pdf [perma.cc/G42A-JXDB].

127 Agricultural Adjustment Act, Pub. L. No. 73-10, § 43, 48 Stat. 31, 51–53 (1933) (codified as amended at 31 U.S.C §§ 5301(a)–(c), 5304(1)).

128 *See generally* Jalil & Rua, *supra* note 126. There is very little scholarship or commentary on the Thomas Inflation Amendment. The principal works consist of Elmus Wicker, *Roosevelt's 1933 Monetary Experiment*, 57 J. Am. Hist. 864 (1971) and John Hanna, *The Banking Act of 1935*, 22 Va. L. Rev. 757 (1936).

129 Agricultural Adjustment Act § 43(a); *see* Thornton, *supra* note 20, at 30 (defining the phrase "monetizing the debt").

130 Agricultural Adjustment Act § 43(b)(1).

131 *Id.* § 43(b)(2); Gold Reserve Act of 1934, Pub. L. No. 73-87, § 12, 48 Stat. 337, 342–43.

132 *See* Jalil & Rua, *supra* note 126, at 15.

133 *Id.* (internal quotation marks omitted).

> necessary implications could give us a gold standard, a silver standard, a bimetallic standard, a paper money standard or a commodity dollar standard. They could give us serious deflation or a runaway inflation.[134]

And of course, it completely suspended the Fed's independence to decide the best monetary course for the economy.

The "most dramatic use of the Thomas Amendment came on January 31, 1934."[135] With Presidential Proclamation No. 2072, Roosevelt devalued the dollar, just as Congress authorized him to do in the Thomas Amendment, as amended by the Gold Reserve Act.[136] Roosevelt decreased the gold content of the dollar to 40.94% which meant that the government's fixed price for gold was increased to $35 per ounce.[137] The effect was to increase the value of gold on the Federal Reserve's balance sheet by sixty-nine percent but massively devalue the credit assets of private parties whose contracts had been denominated in gold and now had to accept paper.[138] In regard to this executive action, Roosevelt's "emergency" was again an economic one—deflation. Apparently, FDR believed that economic recovery amid the Great Depression could not begin *until* the price level had risen and boosted consumer sentiment.[139] And, to that end, he thought that devaluing the dollar could spur reflation.[140]

These Executive Actions—and the congressional delegations that enabled them—were far afield from the constitutional norms theretofore.[141] By the 1930s, the dangers that had motivated the Framers to guard against monetary delegations in the first place had crystallized

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134 *See* George Selgin, *The New Deal and Recovery, Part 4: FDR's Fed*, CATO INST. (July 6, 2020, 4:55 PM), https://www.cato.org/blog/new-deal-recovery-part-4-fdrs-fed [https://perma.cc/D59R-QH7V].

135 David D. Webb, *Thomas Amendment*, OKLA. HIST. SOC'Y, https://www.okhistory.org/publications/enc/entry.php?entry=th007 [https://perma.cc/QSB5-E367].

136 Proclamation No. 2072 (Jan. 31, 1934), https://www.presidency.ucsb.edu/documents/proclamation-2072-fixing-the-weight-the-gold-dollar [https://perma.cc/4WEC-NL5Y].

137 *See* George Selgin, *The New Deal and Recovery, Part 7: FDR and Gold*, ALT-M (Aug. 7, 2020), https://www.alt-m.org/2020/08/07/the-new-deal-and-recovery-part-7-fdr-and-gold/ [https://perma.cc/D7G4-F5FR]; Robert G. Anderson, *Gold Is Legal, But . . .* , FOUND. FOR ECON. EDUC. (Jan. 1, 1975), https://fee.org/articles/gold-is-legal-but/ [https://perma.cc/9MV2-ZA3E].

138 *See* Selgin, *supra* note 137; ELWELL, *supra* note 56.

139 Wicker, *supra* note 128, at 866 ("A rise in prices, the President thought, was a necessary condition for initiating a change in economic activity.").

140 FDR also disregarded markets in favor of Executive Branch power to effectuate the devaluation itself. *See* Richardson et al., *supra* note 59. The overall program thus aimed to raise domestic commodity prices, returning them to 1926 levels, while also recalibrating balance of payments by encouraging exports and discouraging imports. *Id.* Part of this effort involved establishing the Reconstruction Finance Corporation and instructing it to buy gold. *Id.*

141 *Id.*

into a politicized use of money.[142] FDR's objective of boosting the price level stemmed from a belief that the general public—and farmers in particular—would perceive a boost in price levels as a proxy for good business conditions and thus the political *sine qua non* to restoring confidence in the economy.[143] FDR had been an ardent supporter of various spending programs to raise the price level; he welcomed these new monetary powers from Congress in order to further that fiscal aim.[144]

Federal Reserve officials at the time vehemently disagreed with the President's decided course of action in regard to the money supply.[145] For fear that they would be formally compelled to monetize the deficit—per the Thomas Amendment—the Reserve banks felt compelled to acquiesce to presidential "requests" to buy government debt, and so they liberally engaged in open market operations very much against their better judgment.[146] Overall, FDR's inflationary policy pressure "was viewed as totally irresponsible by all Federal Reserve officials."[147] This led "[o]fficers and directors of the Federal Reserve Bank of New York, . . . [to] 'debate[] whether they could ethically implement a policy which they considered to be wholly unsound.' "[148] They recognized that the Thomas Amendment had made the Federal Reserve "subservient to the President" and "[t]he Open Market Committee continued to purchase securities in October for no other reason than it did not wish to precipitate an open conflict with the President."[149] Just a few years later, during hearings on the Banking Act of 1935, one expert remarked to Congress that "[t]he President has today full power to proceed on virtually any monetary or credit theory that he wishes to proceed on, under the powers granted by the Thomas amendment."[150] Ironically, Congress had given the President the power to undermine its own monetary agent, the Federal Reserve.

The question of repealing portions of the Thomas Amendment arose for Congress in 1945. In May 1945, the then-Chairman of the

142 *See id.* (noting these fiscal goals included "rais[ing] American prices of commodities . . . [and] lower[ing] prices of American goods abroad").

143 *See* Wicker, *supra* note 128, at 866.

144 *See id.* at 867–88.

145 *See id.* at 870.

146 *Id.* at 870–71.

147 *Id.* at 867.

148 Richardson et al., *supra* note 59 (quoting LESTER V. CHANDLER, AMERICAN MONETARY POLICY, 1928–1941, at 289 (1971)).

149 Wicker, *supra* note 128, at 873.

150 *Banking Act of 1935: Hearings on S. 1715 and H.R. 7617 Before a Subcomm. of the S. Comm. on Banking and Currency*, 74th Cong. 436 (1935).

Federal Reserve, Marriner Eccles, sought advice from his general counsel, Howard Hackley, about the Thomas Amendment and specifically "the Situation If It Were Repealed" by a bill pending in the House of Representatives.[151] Hackley's analysis was that several of the provisions were now moot: the section 43(b)(2) powers—in relation to fixing the weight of the gold dollar—had expired;[152] the President's ability to coin unlimited silver was likely superseded by the Silver Purchase Act; and the greenback provision may have been repealed by portions of the Reserve Ratio bill.[153]

But three remnants still remained. For one, the President's ability to direct the Reserve Banks to engage in open market operations to purchase government debt seemed uninterrupted by any intervening legislation.[154] In addition, section 43(a) had supplied a rather broad catchall authority that also seemed untouched: that the Federal Reserve Board could, with consultation from the Secretary of the Treasury, compel the Reserve Banks "to take such action as may be necessary, in the judgment of the Board and of the Secretary of the Treasury, to prevent undue credit expansion."[155] Hackley thought it preferable to *preserve* that catchall power. His memo noted: "it would seem most unwise, at a time when control of credit is particularly important, to repeal any provision of law which may be of assistance in meeting inflationary forces likely to develop."[156]

Over the years, all but one provision of the Thomas Amendment were repealed.[157] That which was originally codified as section 821 in title 31 of the U.S. Code remained, and in 1982 that provision was recodified into section 5301.[158] Section 5301(a) provides:

> The President may direct the Secretary of the Treasury to make an agreement with the Federal reserve banks and the

151 Memorandum from Howard H. Hackley, Gen. Couns., Fed. Rsrv. Bd. to Marriner S. Eccles, Chairman, Fed. Rsrv. Bd. 1 (May 16, 1945) [hereinafter Hackley Memo], https://fraser.stlouisfed.org/files/docs/historical/eccles/046_13_0002.pdf [https://perma.cc/5TM9-JMHS].

152 The Gold Reserve Act of 1934, Section 12, set an expiration date of this provision of 1936. Gold Reserve Act of 1934, Pub. L. No. 73-87, § 12, 48 Stat. 337, 342–43. The Hackley Memo appears to state that this provision expired in 1943. *See* Hackley Memo, *supra* note 151, at 1.

153 Hackley Memo, *supra* note 151, at 1–2.

154 *Id.*

155 Agricultural Adjustment Act, Pub. L. No. 73-10, § 43(a), 48 Stat. 31, 51–52 (1933) (codified as amended at 31 U.S.C §§ 5301(a)–(c), 5304(1)).

156 Memorandum from Howard H. Hackley, Gen Couns., Fed. Rsrv. Bd. to Marriner S. Eccles, Chairman, Fed. Rsrv. Bd. 2 (May 19, 1945), https://fraser.stlouisfed.org/files/docs/historical/eccles/046_13_0002.pdf [https://perma.cc/5TM9-JMHS].

157 *Compare* Agricultural Adjustment Act § 43(a), *with* 31 U.S.C. § 5301 (2018).

158 31 U.S.C. § 5301.

> Board of Governors . . . when the President decides that the foreign commerce of the United States is affected adversely because . . . an economic emergency requires an expansion of credit; or . . . an expansion of credit is necessary so that the United States Government and the governments of other countries can stabilize the value of coins and currencies of a country.[159]

The lasting impacts of the Thomas Amendment provision are quite significant. For one, as it exists today, section 5301 gives the President broad power to more or less direct the Federal Reserve in matters of global economic emergency or currency affairs—today, a wide range of contexts to be sure.[160] In addition, section 5301(c) retains that "[w]ith the approval of the [Treasury] Secretary, the Board may require Federal reserve banks to take action the Secretary and Board consider necessary to prevent unreasonable credit expansion."[161]

The potency of these latent, sleeping powers cannot be overstated. There is a wide range of circumstances under which a President, directing the Treasury Secretary, could use these powers to exert significant control over money and credit. Per the language of section 5301(a), nearly any global disruption could be said to require an expansion of credit.[162] Based on such an assessment a president could, for example, strongly influence if not direct the Fed to embark on a policy of quantitative easing, whereby the central bank purchases trillions of dollars of government bonds on the open market, in the name of "credit expansion."[163] Effectively, this could amount to statutory authority to order the monetizing of the federal deficit.

Section 5301(c) is still more troubling yet. Here, the President has an overt power of direction to "prevent" credit expansion—but for what purpose, under what conditions, for how long, and in what way? The statute does not say. Consequently, any future president could latch on to this provision to restrain credit in any sector of the economy that they find unpalatable to the administration's goals.

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159 *Id.* § 5301(a)(3)–(4).

160 *See generally id.*

161 *Id.* § 5301(c).

162 *Id.* § 5301(a).

163 For a discussion of quantitative easing, see Eric Milstein, Tyler Powell & David Wessel, *What Does the Federal Reserve Mean When It Talks About Tapering?*, BROOKINGS (Jan. 27, 2022), https://www.brookings.edu/blog/up-front/2021/07/15/what-does-the-federal-reserve-mean-when-it-talks-about-tapering/ [https://perma.cc/8SQU-PLZC]. For a discussion of the potential problems associated with quantitative easing, see HOUSE OF LORDS REPORT, *supra* note 24; *see also infra* Section III.B.

As for the Emergency Banking Act, the emergency that Roosevelt declared lasted from 1933 to 1978, when Congress formally terminated FDR's emergency.[164] But the legacy of the Emergency Banking Act lived on and was reincarnated in future financial crisis emergency legislation, as we will soon see.

2. *Presidents Johnson and Nixon*

As just discussed, after Roosevelt's 1933 suspension of the Gold Standard, domestically, dollars could only henceforth be converted to gold for international transactions.[165] This quasi-gold standard existed until World War II. After the war, delegates from forty-four countries convened at Bretton Woods, New Hampshire to discuss what could be done to maintain currency stability in an economically integrated—ideally more harmonious—world.[166]

The delegates to the Bretton Woods conference drew upon lessons of the prewar gold standard but sought to modernize it in light of aspiring international economic integration and cooperation.[167] In their currency agreement, the delegates agreed to an exchange rate regime that would use gold *and U.S. dollars* as its anchor.[168] According to the plan, the values of all other currencies would be fixed relative to the U.S. dollar, and the dollar's value would be expressed in gold at the prevailing price of $35 per ounce.[169] Other countries would continue to keep gold reserves, but would generally settle their accounts with dollars.[170]

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164 This was done with the passage of the National Emergencies Act, passed into law on September 14, 1976. *See* National Emergencies Act, Pub. L. No. 94-412, § 101(a), 90 Stat. 1255 (1976) ("All powers and authorities possessed by the President . . . as a result of the existence of any declaration of national emergency in effect on the date of enactment of this Act are terminated two years from the date of such enactment."). The International Emergency Economic Powers Act, passed into law on December 28, 1977, restricted the Trading with the Enemy Act to wartime. *See* International Emergency Economic Powers Act, Pub. L. No. 95-223, § 101(a), 91 Stat. 1625, 1625 (1977). It repealed the emergency clause of section 12 of the Gold Reserve Act and arranged for that authority to expire according to the National Emergencies Act. *See id.* § 101(b).

165 ELWELL, *supra* note 56, at 9–10.

166 Sandra Kollen Ghizoni, *Creation of the Bretton Woods System*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/bretton-woods-created [https://perma.cc/2GFU-24CR].

167 *See id.*

168 *Nixon and the End of the Bretton Woods System, 1971–1973*, U.S. DEP'T. OF STATE: OFF. OF THE HISTORIAN, https://history.state.gov/milestones/1969-1976/nixon-shock [https://perma.cc/R76F-7S5W].

169 *Id.*

170 ELWELL, *supra* note 56, at 11.

A new international monetary institution—the International Monetary Fund ("IMF")—was also created to facilitate this currency arrangement.[171] Under the old international monetary regime, countries with currencies that were overvalued experienced gold outflows and subsequent deflation until the currency's value appreciated in line with market forces.[172] The IMF would be used to assist nations experiencing short-term payment imbalances.[173]

However, the basic design of this new *international* monetary system eventually posed *domestic* monetary and fiscal problems in the United States. Because the system was set up to mirror the old gold standard, with member countries pegged to the dollar and the dollar pegged to gold, the United States would need to engage in contractionary monetary policy whenever gold flowed out of the country.[174] This is because while the dollar is backed by (but not convertible with) gold, the Federal Reserve Banks have to maintain a minimum ratio of gold reserves to currency and deposits.[175] As such, when gold flows out of the country, the money supply must necessarily shrink to maintain that gold-to-dollar ratio.[176]

The Fed would need to raise interest rates to help restore this international balance.[177] The mechanism is as follows: higher rates and a contracting money supply cause price levels to fall; with a weaker dollar, exports increase, U.S. goods now seem cheaper to foreigners, and the U.S. experiences a balance of payments surplus.[178] This prompts gold to flow back into the country.[179] Internationally, as such, this monetary system was set up to be self-correcting in line with the nature of a true gold standard.[180]

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171 *See* Ghizoni, *supra* note 166.

172 ELWELL, *supra* note 56, at 11–12.

173 *IMF Lending*, INT'L MONETARY FUND (Dec. 2021), https://www.imf.org/en/About/Factsheets/IMF-Lending.

174 Robert L. Hetzel, *Launch of the Bretton Woods System*, FED. RSRV. HIST. (Nov. 22, 2013), https://www.federalreservehistory.org/essays/bretton-woods-launched [https://perma.cc/54DV-HVXD].

175 *See* Federal Reserve Act., Pub. L. No. 63-43, § 16, 38 Stat. 251, 265–68 (1913) (codified as amended in scattered sections of 21 U.S.C.).

176 Crabbe, *supra* note 121, at 427 ("The required minimum ratio limited the Federal Reserve's authority to augment the money supply, which could continue to expand only so long as gold flowed into reserves.").

177 Hetzel, *supra* note 174.

178 *Id.*

179 *See id.*

180 *See id.*; *see generally* Michael D. Bordo, *The Bretton Woods International Monetary System: A Historical Overview*, *in* A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS

But it was incompatible with the fiscal goals of the 1960s Presidents. By 1964, the Johnson Administration was committed to a policy of full employment—thought to be around four percent—a politically and fiscally oriented goal that had its roots in Roosevelt-era promises that the government could and should guarantee full employment.[181] This presidential goal made it politically very difficult for the Fed to raise rates when needed, as the IMF system required during that period.[182]

The President overrode the international monetary mechanism in favor of domestic concerns by imposing capital controls. Executive Order 11,387, signed January 1, 1968, limited lending abroad and foreign direct investment.[183] Specifically, the Order empowered the Secretary of Commerce to "require, as he determines to be necessary or appropriate to strengthen the balance of payments position of the United States, that any person . . . [with] as much as a ten percent interest in the voting securities, capital or earnings of . . . [a] foreign business" repatriate related earnings or bank deposits to the United States.[184]

To ground his order in a statute,[185] President Johnson relied on the powers afforded to the President in section 5(b) of the Trading with the Enemy Act ("TWEA")—the very same powers Roosevelt used, inherently, to suspend the Gold Standard in 1933.[186]

FOR INTERNATIONAL MONETARY REFORM 3 (Michael D. Bordo & Barry Eichengreen eds., 1993).

181 *See* Lyndon B. Johnson, U.S. President, Annual Message to the Congress: The Economic Report of the President (Jan. 28, 1965), *in* AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/documents/annual-message-the-congress-the-economic-report-the-president-11 [https://perma.cc/W4MN-B3VR]; *see also* Salib & Skinner, *supra* note 18, at 964–65. For a discussion on the fiscal nature of a full employment goal, see Skinner, *supra* note 19.

182 *See* Salib & Skinner, *supra* note 18, at 963–65 (discussing President Johnson's pressuring of Fed Chair Martin not to raise rates).

183 *See* Exec. Order No. 11,387, 3 C.F.R. 437 (1969).

184 *Id.*

185 It will be recalled that just a decade earlier, the Supreme Court had ruled in *Youngstown* that executive orders must be grounded in a grant of authority from a statute or an express Article II power. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."). The President's legal advisors would no doubt have been cognizant of this.

186 Trading With the Enemy Act, Pub. L. No. 65-91, § 5(b), 40 Stat. 411, 415 (1917) (codified as amended at 50 U.S.C. §§ 4301–41). As discussed, in section 2 of the Emergency Banking Act, Congress extended this provision of the TWEA so that Roosevelt could use its powers outside of war in any national emergency so declared by the President. Emergency Banking Act, Pub. L. No. 73-1, § 2, 48 Stat. 1, 1–2 (1933).

Invocation of the TWEA, however, required an emergency.[187] So President Johnson justified this resort to the TWEA with President Truman's December 1950 Proclamation No. 2914, which had proclaimed a national emergency given "events in Korea and elsewhere."[188] Of course, this was entirely pretextual: the United States had not been engaged in an armed conflict with Korea since 1953 (the year now being 1968), and President Johnson's desire to flout the Bretton Woods monetary arrangement in favor of domestic employment goals was totally unrelated to that conflict.[189]

One year later, Richard Nixon was in office. It had become increasingly apparent that there were structural challenges presented by the United States' role in upholding the Bretton Woods Exchange Rate System.[190] As the world demanded dollars as reserves, the United States' deficits grew and the Treasury's stock of gold decreased, creating the risk that the United States would at some point be unable to redeem dollars for gold as expected under Bretton Woods.[191] This, along with other events, eventually sparked massive speculation against the U.S. dollar in May 1971.[192]

In a televised speech on August 15, 1971, Nixon unilaterally "closed" the "gold window,"[193] pronouncing that the United States would no longer convert foreign-held dollars to gold in line with the Bretton Woods system.[194] At the same time, Nixon announced several

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187 Trading With the Enemy Act § 5(b); Emergency Banking Act § 2.

188 Proclamation No. 2914, 15 Fed. Reg. 9029 (Dec. 19, 1950).

189 *See* James L. Butkiewicz & Scott Ohlmacher, *Ending Bretton Woods: Evidence from the Nixon Tapes*, 74 Econ. Hist. Rev. 922, 925 (2021) (discussing international factors that put domestic pressure on the Bretton Woods arrangement).

190 *Id.* at 924–27.

191 *See id.* at 923–24. This state of affairs is also referred to as a "Triffin dilemma." As Michael Bordo and Robert McCauley explain the theory as originally set out by Robert Triffin:

> If the United States eliminated its "overall balance of payments deficits"—its accumulation of short-term liabilities to the rest of the world—it would deprive the world economy of international liquidity needed for the expansion of global trade. If the United States did continue to provide international liquidity, then eventually US policy would be unable to lower interest rates without a run on the gold stock. Either way, deflation and depression threatened.

Michael D. Bordo & Robert N. McCauley, *Triffin: Dilemma or Myth?* 3 (Nat'l Bureau of Econ. Rsch., Working Paper No. 24,195, 2018).

192 *See* Butkiewicz & Ohlmacher, *supra* note 189, at 928–30.

193 *See* Ghizoni, *supra* note 16.

194 Edwin L. Dale Jr., *Severs Link Between Dollar and Gold*, N.Y. Times (Aug. 16, 1971), https://www.nytimes.com/1971/08/16/archives/severs-link-between-dollar-and-gold-a-world-effect-unilateral-us.html [https://perma.cc/3K63-9N66]; Richard Nixon, U.S. President, Address to the Nation Outlining a New Economic Policy: The Challenge of Peace (Aug. 15, 1971), *in* Am. Presidency Project, https://www.presidency.ucsb.edu/documents/address-the-nation-outlin-

other domestic economic policies, including, for the first time in United States peacetime history, wage and price controls.[195] Specifically, "[a]fter a 90-day freeze, increases would have to be approved by a 'Pay Board' and a 'Price Commission,' with an eye toward eventually lifting controls."[196] He described these reforms to the public as targeting a mix of monetary and fiscal problems: "unemployment, inflation, and international speculation."[197] He referred to these policies as his "New Economic Plan"—the world would refer to it as the "Nixon Shock."[198] Monetary and fiscal policy blended and blurred in the presidency once again.

Closing the gold window had far-reaching monetary implications. Internationally, the changes largely benefited the United States.[199] Without the United States' participation in the convertibility regime, it was inevitable that what was once a fixed-rate exchange regime would become a floating-rate regime.[200] And without gold to parallel the dollar, the dollar's status as *the* reserve currency of the world would be cemented.[201] Domestically, this impact was to launch the United States into a system of fiat, paper money for the first time since the Civil War. Dollars were no longer backed by gold; the money supply was no longer constrained by gold reserves—henceforth the dollar would be backed only by the full and good faith of the U.S. government.[202]

Without a doubt, this was a significant and unprecedented exercise of presidential power over the monetary system.[203] And, like

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ing-new-economic-policy-the-challenge-peace#axzz1V6aVsxcZ [https://perma.cc/2T4U-Z88N]; Ghizoni, *supra* note 16.

195 *See The New Economic Policy*, N.Y. TIMES (Aug. 17, 1971), https://www.nytimes.com/1971/08/17/archives/the-new-economic-policy.html [https://perma.cc/8MZ4-2AZB].

196 Gene Healy, *Remembering Nixon's Wage and Price Controls*, WASH. EXAM'R (Aug. 15, 2011, 12:00 AM), https://www.washingtonexaminer.com/remembering-nixons-wage-and-price-controls [https://perma.cc/9STZ-38VE].

197 Nixon, *supra* note 194 ("Prosperity without war requires action on three fronts: We must create more and better jobs; we must stop the rise in the cost of living; we must protect the dollar from the attacks of international money speculators."). *See* 15 U.S.C. § 1022e(c), which gives the President power to combat inflation with certain policy measures. For examples, the President can take action to "alleviat[e] shortages of goods, services, labor and capital . . . to aid in stabilizing prices." *Id.* Broadly, this statute also gives the President the power to take "other administrative actions . . . as the President deems desirable, to promote reasonable price stability." *Id.*

198 Nixon, *supra* note 194; Butkiewicz & Ohlmacher, *supra* note 189, at 924.

199 *See* Butkiewicz & Ohlmacher, *supra* note 189, at 936–37.

200 *See id.* at 937.

201 *See generally id.*

202 *See* Nixon, *supra* note 194.

203 Partly, Nixon intended the policies to be shocking in order to show great strength to the

other presidents exercising great monetary power, Nixon had latched on to an emergency.[204] In his televised speech, Nixon referred to the speculation against the dollar as a "monetary crisis" and "an all-out war on the American dollar."[205] But Nixon did not officially close the gold window via an executive order or proclamation as Roosevelt had done during the Depression. Rather, the apparent source of Nixon's power to end the United States' participation in Bretton Woods convertibility must have been inferred from the overall discretion that Congress had given the President when it formalized the United States' role in the Bretton Woods system in 1945.[206]

After the IMF was established in 1944, each of the member states agreed that they would only deal with the Fund through their nation's respective "Treasury, central bank, stabilization fund or other similar fiscal agency."[207] Perhaps for that reason, when Congress passed the Bretton Woods Agreements ("BWA") Act—setting out the United States' commitments to the Fund and the currency regime more broadly—it placed the President at the helm of the arrangement.[208] Section 2 of the BWA Act gave the President the ability to accept any "Articles of Agreement" of the Fund; these would serve as the institution's governing rules.[209] But the BWA Act stipulated to them ex ante: the Articles of Agreement could be agreed to, and revised, by the members of the new IMF without review or ratification by Congress.[210]

American public. Butkiewicz & Ohlmacher, *supra* note 189, at 935 (noting that Treasury Secretary Connally had persuaded Nixon at Camp David that "[i]t will be an act of great awareness, great statesmanship, and great courage, and must be presented to the people this way" (quoting H.R. HALDEMAN, THE HALDEMAN DIARIES: INSIDE THE NIXON WHITE HOUSE 341 (1994))).

204 *See* Nixon, *supra* note 194.

205 *Id.*; *cf.* Butkiewicz & Ohlmacher, *supra* note 189, at 942–43 (affirming, on their review of the relevant Nixon tapes, that although speculation may have forced the decision on August 15, the policy had already been designed at Camp David beforehand). *But see* Christoffer J.P. Zoeller & Nina Bandelj, *Crisis as Opportunity: Nixon's Announcement to Close the Gold Window*, 5 SOCIUS 1, 6 (2019) (arguing that the language of crisis was pretextual, and that "these disruptions provided a public justification for a course of action already decided upon before May 1971, rather than being action-forcing events"). For a comprehensive treatment of that Camp David meeting, see JEFFREY E. GARTEN, THREE DAYS AT CAMP DAVID: HOW A SECRET MEETING IN 1971 TRANSFORMED THE GLOBAL ECONOMY 166–245 (2021).

206 *See* Zoeller & Bandelj, *supra* note 205, at 10–11.

207 Articles of Agreement of the International Monetary Fund art. V, § 1, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39.

208 Bretton Woods Agreements Act, Pub. L. No. 79-171, 59 Stat. 512 (1945) (codified as amended at 22 U.S.C. §§ 286 to 286k, 31 U.S.C. § 5302(d), 18 U.S.C. § 955).

209 *Id.* § 2.

210 *Id.* For the original 1944 articles of agreement, see Articles of Agreement of the International Monetary Fund art. V § 1, July 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39.

In turn, section 4 of the BWA Act created a domestic governance arrangement to make decisions on the United States' behalf concerning the Articles of Agreement.[211] It established a "National Advisory Council on International Monetary and Financial Problems" which placed the Treasury Secretary in charge.[212] The Council would "recommend to the President general policy directives" to guide the United States representatives to the Fund,[213] and any decisions to be made under the Fund's Articles of Agreement would be made by the Council "under the general direction of the President."[214] So, even though Nixon appears to have disregarded the Articles of Agreement themselves, which required consent from the other members before changing the convertibility regime,[215] Congress, it would seem, had already given him the power to do so at his will.

Possibly, Congress believed that delegating these Bretton Woods powers to the President was justified by the foreign affairs aura of the system.[216] But that assessment was arguably mistaken. The President eventually used this power to revise the international monetary order in a way that would implicate monetary policy and money supply—not foreign affairs—most profoundly. Here too, the President used this monetary power to accomplish fiscal goals. The historical evidence shows that Nixon wanted to devalue the dollar to effectuate expansionary monetary policy to ultimately boost employment, which he perceived necessary to win the next election.[217]

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211 Bretton Woods Agreement Act § 4.

212 *Id.* § 4(a).

213 *Id.* § 4(b)(1).

214 *Id.* § 4(b)(4).

215 *See* IMF, Articles of Agreement art. 3, § 2, 60 Stat. 1401; *see also* Butkiewicz & Ohlmacher, *supra* note 189, at 936 (noting that Nixon did not request IMF approval before the announcement).

216 It bears emphasis that the President does have considerable unilateral authority to use economic sanctions (fashioned through executive order) to address emergencies of foreign affairs. The Trading with the Enemy Act initially instantiated this power and later, the International Emergency Economic Powers Act ("IEEPA") supplied the basis for the Executive Branch's modern sanctions regime. *See* International Emergency Economic Powers Act, 50 U.S.C. § 1701 et seq. However, this Article distinguishes the president's legitimate constitutional authority to gate access to the U.S. economy for national security purposes—"to affect a situation entirely external to the United States, and falling within the category of foreign affairs"—from the substantive influence over monetary policy, the money supply, and fiscal spending that is discussed herein—matters which "relate[] solely to internal affairs". United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315 (1936). *See* Christina Parajon Skinner, *Payments and Foreign Policy*, 60 HARV. J. ON LEGIS. (forthcoming 2023) (discussing the president's authority to use the banking system to effectuate sanctions and to prevent global money laundering).

217 *See* Zoeller & Bandelj, *supra* note 205, at 6.

As in other instances of Presidential exercise of monetary power, it undermined the Fed. Tellingly, Nixon wanted to conceal his planned course of action from the Fed. After the plans for closing the gold window had been laid out at Camp David in early August 1971, Nixon was most adamant to keep the then-Fed Chair, Arthur Burns, largely in the dark.[218] Speaking to Treasury Secretary John Connally, Nixon said: "Now, let's keep Arthur [Burns] out of this game, at this point, because Arthur does not, is not going to play the game our way and then we'll program him just as we did at Camp David."[219]

The wage and price controls were a slightly different matter. Nixon did issue Executive Order No. 11,615 to formalize that program, which had some basis in legislation.[220] Exactly one year before Nixon "shocked" the world, Congress had passed the Economic Stabilization Act of 1970.[221] Section 202 of that law was titled—quite unabashedly—"Presidential authority."[222] It authorized the President "to issue such orders and regulations as he may deem appropriate to stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970."[223] Further, it gave the President plenary power to administer the program within the Executive Branch: "The President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he may deem appropriate."[224]

Such a wide-ranging delegation to straitjacket the economy was an impressive delegation of Congress's fiscal power—it turned completely on its head the Founding-era commitment to keep the levers of the economy largely out of presidential hands.[225] The statute authorizing these actions eventually expired on April 30, 1974.[226] But not before significant damage to the economy had been done. The program ushered in a decade of stagflation—high inflation, slow growth—which adversely impacted living standards for millions of Americans.[227]

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218 *See* Butkiewicz & Ohlmacher, *supra* note 189, at 932–40.

219 *Id.* at 935 (quoting Audio tape: Conversation 014-151 of the White House Tapes (Nov. 17, 1971)) (on file with Nixon Library), https://www.nixonlibrary.gov/white-house-tapes/014 [https://perma.cc/A9UX-RDHB].

220 Exec. Order No. 11,615, 36 Fed. Reg. 15,727 (Aug. 17, 1971).

221 Economic Stabilization Act of 1970, Pub. L. No. 91-379, 84 Stat. 799.

222 *Id.* § 202.

223 *Id.*

224 *Id.* § 203.

225 *See* U.S.H.R.: HIST., ART & ARCHIVES, *supra* note 69.

226 Economic Stabilization Act Amendments of 1973, Pub. L. No. 93-28, § 8, 87 Stat. 27, 29.

227 *See* William N. Walker, Opinion, *Nixon Taught Us How Not to Fight Inflation*, WALL

However objectively wrongheaded the policy was, vestiges of the delegation remain in precedent and popular imagination even if not in statute. Today, in 2022, there are parallels to the economic conditions that existed in 1971—high inflation and large trade deficits.[228] China has developed a digital currency which may again pose challenges for our currency.[229] We may yet see the ghost of Nixon's shock emerge: wage and price controls gained some popular appeal in 2021, and COVID-19 supplied a national emergency for a president to grab onto.[230]

As for the BWA Act, it continues to formally empower the President in all areas involving currency and America's ongoing IMF obligations.[231] As the next Section will discuss, these BWA Act powers, combined with ongoing authorization of the Exchange Stabilization Fund ("ESF"), have effectively conferred upon the President his own "power of the purse" which could also be inflationary.

B. *Exchange Stabilization Fund*

The Exchange Stabilization Fund is the closest thing the Treasury—and hence the President—has to a discretionary fund.[232] It was established in section 10 of the Gold Reserve Act of 1934.[233] When Roosevelt devalued the dollar, the U.S. Treasury made a profit because, at the time, the Fed was compelled to transfer its holdings of gold to the Treasury in exchange for gold certificates—but only at the

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St. J. (Aug. 13, 2021, 5:11 PM), https://www.wsj.com/articles/nixon-fight-inflation-price-controls-stagflation-gas-shortages-biden-democrats-reconciliation-bill-federal-reserve-11628885071 [https://perma.cc/3NWT-GULC].

228 Jeffery E. Garten & Ted O'Callahan, *How the 'Nixon Shock' Remade the World Economy*, Yale Insights (July 13, 2021), https://insights.som.yale.edu/insights/how-the-nixon-shock-remade-the-world-economy [https://perma.cc/7RFJ-4F9A].

229 *Id.*

230 Ben Casselman & Jeanna Smialek, *Price Controls Set Off Heated Debate as History Gets a Second Look*, N.Y. Times (Jan. 13, 2022), https://www.nytimes.com/2022/01/13/business/economy/inflation-price-controls.html [https://perma.cc/SZ7Y-8297]; *Declared National Emergencies Under the National Emergencies Act*, Brennan Ctr. for Just. (Sept. 9, 2022), https://www.brennancenter.org/our-work/research-reports/declared-national-emergencies-under-national-emergencies-act [https://perma.cc/372A-N984].

231 *See generally* Bretton Woods Agreements Act, Pub. L. No. 79-171, 59 Stat. 512 (1945) (codified as amended at 22 U.S.C. §§ 286 to 286k, 31 U.S.C. § 5302(d), 18 U.S.C. § 955).

232 As Professor Josh Chafetz has observed, "It is true that some presidents, starting with George Washington in his response to the Whiskey Rebellion in 1794, have spent money without congressional appropriations in response to emergencies" but they "have not claimed to be acting legally." Chafetz, *supra* note 67, at 59. Professor Chafetz was speaking about overt commandeering or the select use of the power of impoundment, which is not covered here.

233 Gold Reserve Act of 1934, Pub. L. No. 73-87, § 10, 48 Stat. 337, 341–42.

old price of $20.67 per ounce.[234] The difference between that price and the new (Roosevelt-set) market price of $35 per ounce was used to initially fund the ESF.[235] Once the ESF's initial capital was in place, it became exempt from congressional appropriation.[236]

The first purpose of the ESF was to fund the United States' initial contribution to the IMF ($1.8 billion), per the Bretton Woods Agreements Act.[237] The BWA Act also created "permanent authority for the ESF."[238] Originally, the ESF was statutorily authorized to deal in gold or foreign exchange to stabilize the exchange value of the dollar.[239] And during the Bretton Woods era, that was more or less how it was used.[240] But the Gold Reserve Act gave the President total discretion over how ESF funds would henceforth be used. Specifically, section 10(b) put the ESF "under the exclusive control of the Secretary of the Treasury, with the approval of the President, whose decisions shall be final and *not be subject to review* by any other officer of the United States."[241]

After the collapse of the fixed-rate regime in 1971, Congress slightly revised the purpose of the ESF but retained the general theme of total discretion for the President. If anything, the 1970s era amendments delegated even broader monetary power to the President.[242] In the 1976 amendments (effective 1978) Congress removed the language regarding "stabilizing the exchange value of the US dollar" and inserted the more general provision that the ESF could be used, at the President's discretion, for anything "[c]onsistent with the obligations of the Government in the International Monetary Fund on orderly exchange arrangements and a stable system of exchange rates."[243]

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234 Selgin, *supra* note 134.

235 *Id.*

236 *See* Anna J. Schwartz, *From Obscurity to Notoriety: A Biography of the Exchange Stabilization Fund*, 29 J. MONEY, CREDIT & BANKING 135, 136 (1997).

237 MARC LABONTE, BAIRD WEBEL & MARTIN A. WEISS, CONG. RSCH. SERV., IF11474, TREASURY'S EXCHANGE STABILIZATION FUND AND COVID-19 (2020), https://crsreports.congress.gov/product/pdf/IF/IF11474 [https://perma.cc/9EB2-SAV9].

238 *Id.*

239 *See* Gold Reserve Act of 1934, Pub. L. No. 73-87, § 10, 48 Stat. 337, 341–42 ("The fund shall be available for expenditure, under the direction of the Secretary of the Treasury and in his discretion, for any purpose [connected to stabilizing the exchange value of the dollar, and for other things that the Secretary of the Treasury decided to do] with the approval of the President.").

240 *See* Schwartz, *supra* note 236, at 135–37.

241 Gold Reserve Act § 10(b) (emphasis added).

242 *See generally* Pub. L. No. 95-612, 92 Stat. 3091 (1978) (codified as amended at 31 U.S.C. § 5302).

243 *Id.*

In effect, that statutory language conferred nearly carte blanche to use the ESF for any monetary purpose whatsoever. Article IV of the IMF Articles of Agreement states that the United States should "collaborate with the [IMF] and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates."[244] Members are to fulfill that obligation "by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions."[245] This is a broadly worded mandate, to be sure. And again, the President has full discretion to agree to whatever amendments, and expansions, to these Articles if they so choose.[246]

It is not surprising that the Fed was quite concerned when the ESF entered the scene in 1934, referring to it as a tool for the Treasury Secretary (and hence the President) "to assume complete control of general credit conditions and to negative any credit policies which the Federal Reserve System might adopt."[247] In that vein, although the Treasury's spending through the ESF may not have first-order effects that are inflationary, it has on some occasions impinged on the Fed's autonomy and, more broadly, engaged in politicized public spending. Three examples are instructive.

1. *Stabilization Loans*

Since 1936, the ESF has extended myriad "stabilization loans."[248] In practice, these are loans to favored countries—political decisions about where globally to allocate liquidity, which are made by the Secretary of the Treasury.[249]

In at least one case the Treasury used the ESF to directly subvert Congress. During the "tequila crisis" of 1994, the value of the Mexican peso had fallen steeply and billions of dollars in foreign investment were fleeing the country.[250] Concerned that panic would spread, Presi-

244 Articles of Agreement of the International Monetary Fund art. IV, § 1, Jul. 22, 1944, 60 Stat. 1401, 2 U.N.T.S. 39.

245 *Id.*

246 *See* Bretton Woods Agreements Act, Pub. L. No. 79-171, § 4(b)(4), 59 Stat. 512, 513 (1945) (codified as amended at 22 U.S.C. §§ 286 to 286k, 31 U.S.C. § 5302(d), 18 U.S.C. § 955).

247 Memorandum from Edward Leon Smead to Eugene Black, Governor, Fed. Rsrv. Bd. (Jan. 17, 1934), https://fraser.stlouisfed.org/archival-collection/records-federal-reserve-system-1344/memo-governor-black-539755/fulltext [https://perma.cc/34WW-9EMH].

248 Schwartz, *supra* note 236, at 136–38, 146–48.

249 *Id.* at 137.

250 Tim Sablik, *The Fed's "Tequila Crisis,"* ECON FOCUS, First Quarter 2017, at 3, https://www.richmondfed.org/-/media/RichmondFedOrg/publications/research/econ_focus/2017/q1/pdf/federal_reserve.pdf [https://perma.cc/37QY-GFLG].

dent Clinton asked Congress to offer Mexico an aid package. Congress refused, so Clinton used the ESF to provide $20 billion in loans and credits to Mexico.[251] The President's move flouted the appropriation process, but it also commandeered monetary policy. The ESF did not have enough to fully fund the $20 billion but it did have substantial foreign currency holdings. The Treasury looked to the Fed, pressuring it to "warehouse" the currency, that is, to swap U.S. dollars for the ESF's currency holdings—in other words, to monetize the Treasury's foreign currency holdings.[252]

It is not surprising that the Fed's leaders were disturbed. Cleveland Fed President Jerry Jordan noted in a March 1994 meeting that the use of swap lines in Mexico created a "very troubling pattern," St. Louis Fed President Thomas Melzer believed it was "setting a very bad precedent" to fund the Treasury's fiscal operation in Mexico, and Fed Board Governor Lawrence Lindsey stated that the "political risk [to the Fed was] enormous" for helping Treasury subvert the will of Congress.[253]

In the end, the operation did accomplish its stabilization goals. But this controversy has not gone away as the Fed's practice of using currency swap arrangements to support foreign economies has only grown with the 2008 and 2020 financial crises.[254] Certainly, the President has the power to continue to use the ESF to allocate dollars abroad according to his discretion.[255]

2. *Special Drawing Rights*

Although direct loans may be out of fashion, the allocation of special drawing rights ("SDRs") is an equally if not a more effective way for the ESF to allocate dollars to favored nations. SDRs are reserve assets issued by the IMF.[256] They are allocated based on each

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251 *Use of the Exchange Stabilization Fund to Provide Loans and Credits to Mexico*, 19 Op. O.L.C. 83, 83 (1995), https://www.justice.gov/file/21406/download [https://perma.cc/KUB6-BUT8]; Sablik, *supra* note 250, at 5, 20.

252 Sablik, *supra* note 250, at 5.

253 *Id.*

254 *See* Christina Parajon Skinner, *Central Bank Activism*, 71 Duke L.J. 247, 273–76 (2021). This, however, refers to the use of swap lines by the Federal Reserve which are not necessarily guaranteed by the ESF.

255 1977 amendments require that a loan or credit to a foreign government can only be made for six months unless the President provides Congress with a written statement that unique or emergency circumstances require the loan of credit for more than six months. 31 U.S.C. § 5302(b). As one can see from the foregoing, conjuring an emergency is easy enough to do.

256 *Special Drawing Rights (SDRs)*, Int'l Monetary Fund, https://www.imf.org/en/Topics/special-drawing-right.

member's quota in the IMF.[257] So, for instance, if the IMF issues $100,000,000 in SDRs, each member will get a portion in proportion to their quota. Under the Special Drawing Rights Act of 1968, when the IMF allocates SDRs to the United States, or if the United States otherwise acquires SDRs, they become resources of the ESF—a key source of discretionary funds.[258]

But, because the statute has been so loosely structured, this system can be used to end-run congressional appropriation. Consider the most recent SDR allocation in August 2021 of $650 billion.[259] Congress requires approval for any SDR allocation where the United States gets over $120 billion;[260] understandably, since the SDR steps in for an appropriation and then augments the ESF. According to news reports, Secretary Yellen at one point planned to break the new allocation into two components to avoid congressional approval.[261]

But perhaps most directly relevant to the concern of fiscal dominance is the role that central banks play in SDRs. Central banks—including the Fed—can technically convert SDRs into currency which could then be used to refinance government debt.[262] The Treasury can also manipulate the size of the ESF by buying and selling SDRs. For instance, the Treasury can purchase the SDRs from other countries using dollars in the ESF and other countries can trade in their SDRs with Treasury for dollars.[263] For this reason, they have been referred to cheekily as "IMF booty"[264] or "paper gold."[265] The mechanics of the SDR regime, when viewed in light of fiscal dominance, create a mech-

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257 *Id.*

258 Special Drawing Rights Act, Pub. L. No. 90-349, 82 Stat. 188 (1968); *Legislative Basis*, U.S. DEP'T TREASURY, https://home.treasury.gov/policy-issues/international/exchange-stabilization-fund/legislative-basis [https://perma.cc/S7Y8-AWQF].

259 Editorial, *Special Dollars for Dictators*, WALL ST. J. (Mar. 24, 2021, 6:23 PM), https://www.wsj.com/articles/special-dollars-for-dictators-11616624610 [https://perma.cc/9HGQ-QM9G].

260 *Id.*

261 *Id.*

262 Tobias Pforr, Fabian Pape & Steffen Murau, *Special Drawing Rights and Elasticity in the International Monetary System*, INST. FOR NEW ECON. THINKING (Mar. 15, 2022), https://www.ineteconomics.org/perspectives/blog/special-drawing-rights-and-elasticity-in-the-international-monetary-system [https://perma.cc/WMM6-PML7].

263 *See* Press Release, U.S. Dep't of the Treasury, FACT SHEET: How an Allocation of International Monetary Fund Special Drawing Rights Will Support Low-Income Countries, the Global Economy, and the United States (Apr. 1, 2021), https://home.treasury.gov/news/press-releases/jy0095 [https://perma.cc/Y8DH-WU5B].

264 Editorial, *supra* note 259.

265 Butkiewicz & Ohlmacher, *supra* note 189, at 925; *see also* Peter M. Garber, *The Collapse of the Bretton Woods Fixed Exchange Rate System*, *in* A RETROSPECTIVE ON THE BRETTON WOODS SYSTEM: LESSONS FOR INTERNATIONAL MONETARY REFORM, *supra* note 180, at 462.

anism by which the Treasury can leverage the United States' contributions to the IMF to increase its discretionary spending—in essence, convertible SDRs could supply another way of extracting debt monetization services from the Fed.

3. *Financial Sector Backstops*

The ESF is also, since 2008, used to augment monetary policy and amplify appropriations. There are a few variations on this theme.

In at least one instance, the ESF was used like a lender of last resort, but without congressional approval. In 2008, the Treasury used the ESF to guarantee the money market fund sector.[266]To shore up the sector, the Treasury stepped in to guarantee the deposits in MMFs. Effectively, the Treasury used the ESF as a functional equivalent to the kind of insurance supplied to banks by the FDIC as established in the Federal Deposit Insurance Act.[267] Yet Congress did not approve the use of the ESF to rescue money market funds. As with the stabilization package to Mexico in the 1990s, no money was lost—in the end, none of the guarantees were invoked.[268] Congress would later, in the Emergency Economic Stabilization Act of 2008, require the Treasury Secretary to reimburse the ESF for any funds used in the money market guarantee program and prohibited the Treasury from using the ESF for similar programs in the future.[269] Notably, Congress temporarily removed the restrictions during the COVID-19 crisis in 2020 in the CARES Act.[270]

A second example harkens from 2020, and the $454 billion Congress appropriated to the ESF to support financial markets.[271] This

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266 *See* Press Release, U.S. Dep't of the Treasury, Treasury Announces Temporary Guarantee Program for Money Market Funds (Sept. 29, 2008), https://home.treasury.gov/news/press-releases/hp1161 [https://perma.cc/E3TR-5QUH]. Money market funds ("MMFs") had, prior to 2008, generally pegged the value of their shares to the dollar; as a result, shareholders in MMFs had understood them to be interchangeable with ordinary checking accounts at depository institutions. But they were not banks and lacked the backstop of federal insurance guarantees. Accordingly, when the value of the assets of some MMFs dropped precipitously (specifically, those holding the commercial paper of Lehman Brothers), the MMFs "[broke] the buck" and could not honor the 1:1 share for dollar exchange. This state of events precipitated panic and a general run on MMFs. *See* Whitney Cromie, Myron Kwast & Ashley Mihalik, *Use of Systemic Risk Exceptions for Individual Institutions During the Financial Crisis*, *in* CRISIS AND RESPONSE: AN FDIC HISTORY, 2008–2013, 74 n.23 (2017); *see generally* LABONTE ET AL., *supra* note 237.

267 *See generally* Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, 64 Stat. 873 (codified as amended at 12 U.S.C. §§ 1811 to 1835a).

268 *See* Sablik, *supra* note 250, at 5–6.

269 Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, 122 Stat. 3765.

270 CARES Act, Pub. L. No. 116-136, § 4015, 134 Stat. 281, 481 (2020).

271 *Id.* § 4003.

was a huge injection into the President's discretionary fund. For context, before the COVID-19 crisis, the ESF had somewhere around $50 billion in funds, so the CARES Act expanded it ninefold.[272] The money had very few strings attached.[273] Consistent with the general design of the ESF, Congress allowed the Treasury near total discretion to allocate the funding across passenger air travel carriers, cargo air carriers, and other businesses critical to national security, deciding which companies and in what amounts would get that ESF support.[274]

The Treasury also used the ESF to guarantee losses (provide credit protection) in the Fed's liquidity facilities to backstop a range of market actors—commercial paper markets, money market funds, primary dealers, and corporate bonds.[275] The ESF was thus used to support monetary policy—and pointedly to expand it. As Professor Lev Menand has pointed out, "the Treasury does not have . . . the power of the purse," but because "past Treasury Secretaries had already made a habit of drawing on it in emergencies . . . it was not clear who was in a position to challenge [Secretary Mnuchin's] decision" in March 2020.[276] Whether the Treasury formally dominated the Fed in these arrangements cannot be truly known to outside public observers. But the monetary-fiscal arrangements made possible by the ESF arguably suggest that the fund could one day be used as a beachhead for the Treasury's dominance over monetary policy in episodes of economic turmoil.[277]

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272 *See* LABONTE ET AL., *supra* note 237.

273 *See id.*

274 *See id.*

275 *See Secondary Market Corporate Credit Facility*, FED. RSRV. BD. (Oct. 13, 2021), https://www.federalreserve.gov/monetarypolicy/smccf.htm [https://perma.cc/M942-SAAD].

276 LEV MENAND, THE FED UNBOUND: CENTRAL BANKING IN A TIME OF CRISIS 42–44 (2022).

277 Indeed, the battle that ensued between Secretary Mnuchin and Fed Chair Powell over where the balance of the Treasury funds would be returned only corroborates the fact that the Treasury ESF is a potential tool for Fed control. Though Powell would have liked to have the remaining funds on hand for a rainy day, Mnuchin demanded they be returned to the Treasury immediately when the programs expired. *See Letter from Chair Powell to Secretary Mnuchin Regarding Emergency Lending Facilities*, FED. RSRV. BD. (Nov. 20, 2020), https://www.federalreserve.gov/foia/Letter-from-Chair-Powell-to-Secretary-Mnuchin-20201120.htm [https://perma.cc/E8G6-YRRZ]. Mnuchin wanted to ensure that the funds went into the Treasury's general account—which requires a specific act of Congress before funds can be used—rather than the ESF, a wholly discretionary fund that could be deployed by future presidents. *See id.*

C. Financial Stability Oversight Council

Finally, some discussion is warranted regarding the delegations Congress made when it created new financial regulatory *agencies* in the Dodd-Frank Act of 2010 ("Dodd-Frank").[278] The first of these agencies that merits examination is the Financial Stability Oversight Council ("FSOC"). After the financial crisis of 2008, Congress passed Dodd-Frank to address systemic risk—that is, risk that permeates throughout the financial system and creates the potential for future instability.[279] Title I was the lodestar of that statute. It empowered the Fed to regulate and supervise large banks more stringently and created a new inter-agency Council of Regulators to focus on these bird's-eye view stability risks in banks and financial markets.[280]

This new council is housed within the Treasury Department and spearheaded by the Treasury Secretary.[281] The FSOC has the power, among others, to designate certain activities as financial stability risks in the United States, and thus make recommendations to the relevant primary regulator as to how best to tackle that risky activity.[282] From its inception, the FSOC has been criticized as political, shifting priorities and intensity in line with the outlook of the administration.[283]

Most recently, President Biden has, acting through Secretary Yellen, steered the FSOC to push the independent financial regulatory bodies toward the legislative end of regulating climate change.[284] In 2021, President Biden issued Executive Order 14,030, requiring a whole-of-government approach to fighting climate change.[285] The key provision in that Order was section 3, which addressed "Climate-Related Financial Risk by Financial Regulators."[286] It directed the Treasury Secretary as Chair of FSOC to: (1) assess the financial stability risks of climate change; (2) facilitate climate-related data sharing among members of the FSOC and executive departments and agencies; and (3) issue a report to the President outlining the efforts "by

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

279 *See id.*; *see generally* MARC LABONTE, CONG. RSCH. SERV., R47026, FINANCIAL REGULATION: SYSTEMIC RISK (2022).

280 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act §§ 111–12.

281 For discussion of the FSOC's Systemically Important Financial Institutions ("SIFI") designation power, see generally Christina Parajon Skinner, *Regulating Nonbanks: A Plan for SIFI Lite*, 105 GEO. L.J. 1379 (2017).

282 *See* Dodd-Frank Wall Street Reform and Consumer Protection Act § 120.

283 *See* Skinner, *supra* note 281, at 1408.

284 *See* Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 25, 2021).

285 *See id.*

286 *See id.* at 27,968.

FSOC member agencies to integrate consideration of climate-related financial risk in their policies and programs."[287] Because the Fed is a member of the FSOC, this meant that the President could lean on the FSOC to direct the Fed's analysis and maybe supervisory and regulatory policy.

In turn, the FSOC recommended that the Fed adopt a range of supervisory practices concerning banks' exposure to climate change.[288] The subtext of this recommendation is that Fed supervision should effectively deter banks from lending to brown companies and develop underwriting practices to favor green borrowers instead. This accordingly could be seen as a political maneuver on the Fed given that the Fed does not otherwise have statutory authority—let alone responsibility—to proactively mitigate climate change.[289] If this recommendation of the FSOC influences Fed supervision in ways that redirect bank capital, the result will be that the FSOC has functioned as an avenue for the President to influence the allocation of credit in the economy, toward politically favored sectors and away from politically disfavored ones.[290] The FSOC may yet prove to be a power available to the President for directing the central bank's supervisory problems and, as such, a channel for fiscal dominance.

Congress also, in the Dodd-Frank Act, created the Consumer Financial Protection Bureau ("CFPB"). The CFPB is responsible for implementing and enforcing consumer protection laws in the interest of fairness, transparency, and competitiveness.[291] It has sweeping rulemaking authority to implement, and then enforce, a broad statutory prohibition against "any unfair, deceptive, or abusive act or practice" by consumer-finance institutions.[292] The structure of the agency has been a frequent subject of judicial review,[293] including the extent to which the CFPB has contributed to the Monetary Executive.

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287 *Id.*

288 *See* Christina Parajon Skinner, *Central Banks and Climate Change*, 74 VAND. L. REV. 1301, 1311 (2021).

289 *See id.* at 1327, 1364.

290 *See id.* at 1359.

291 Consumer Financial Protection Act, 12 U.S.C. §§ 5481–5603.

292 *Id.* § 5536(a)(1)(B). The CFPB director has authority to "prescribe rules and issue orders and guidance, as may be necessary or appropriate to enable the Bureau to administer and carry out the purposes and objectives of the Federal consumer financial laws, and to prevent evasions thereof." *Id.* § 5512(b)(1). This includes rules "identifying as unlawful unfair, deceptive, or abusive acts or practices" "committed by certain participants in the consumer-finance industry." *Id.* § 5531(b).

293 *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2194 (2020).

In particular, in October 2022, the Fifth Circuit Court of Appeals held that the funding structure of the CFPB violated the separation of powers principles underlying the Appropriations Clause.[294] Problematically, in the court's view, this "sword" inherent in the CFPB's powers had been improperly paired with a "purse"—more specifically, the CFPB was given its very *own* purse.[295] That is, the CFPB is not obligated to seek an appropriation from Congress, like other administrative agencies; but rather, it draws funding directly from the Federal Reserve, which itself is not subject to congressional appropriation.[296] According to this "self-actualizing, perpetual funding mechanism . . . the Bureau simply requisitions from the Federal Reserve an amount 'determined by the Director to be reasonably necessary to carry out' the Bureau's functions."[297]

The Fifth Circuit held that funding structure "ran afoul of the separation of powers embodied in the Appropriations Clause."[298] While the issue in the case pertained to a congressional delegation to an *agency*, like the President's relationship with the Secretary of the Treasury, the court noted that the CFPB director's "presidential subservience exacerbates the constitutional problem[] arising from the [Bureau's] budgetary independence."[299] For this court, such combination of purse and sword in the CFPB was a threat to political liberty.[300]

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This Part has demonstrated that contemporary presidents possess a significant array of powers to intervene in the domestic and international monetary systems unilaterally, with executive orders or the Treasury Department's tools.[301] While many today accept the Monetary Executive as an established feature of the United States govern-

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294 *See* Cmty. Fin. Servs. Ass'n of Am. v. Consumer Fin. Prot. Bureau, No. 21-50826, slip op. at 2, 20–23 (5th Cir. Oct. 19, 2022), https://www.ca5.uscourts.gov/opinions/pub/21/21-50826-CV0.pdf [https://perma.cc/SV8Y-MSKK].

295 *See id.* at 28–33.

296 *See Seila L.*, 140 S. Ct. at 2193–94. The Fed draws funding from bank fees and assessments as well as money earned on the assets on its balance sheet. Excepting the Fed from the appropriations relates to the distinct importance of the Federal Reserve's independence from short-term political pressure as the nation's monetary authority. The logic does not apply at all to the CFPB.

297 *Cmty. Fin. Servs. Ass'n*, slip op. at 29 (quoting 12 U.S.C. § 5497(a)).

298 *Id.* at 32.

299 *Id.* (alterations in original) (quoting Consumer Fin. Prot. Bureau v. All Am. Check Cashing, 33 F.4th 218, 234 (5th Cir. 2022) (Jones, J., concurring)).

300 *See id.*

301 *See, e.g.*, Exec. Order No. 14,030, 86 Fed. Reg. 27,967 (May 25, 2021).

ment, this office was unrecognized by the Framers and Ratifiers of the Constitution.

III. Monetary Checks and Balances

When viewed in isolation, any single delegation of monetary or fiscal power may seem trifling to the overall health of American democracy. But when one takes a step back to consider the cumulative impact of this past (almost) century of delegations, a different picture emerges. Just as the *Youngstown* Court once warned about presidential power generally, the public must keep watch for "[s]ubtle shifts tak[ing] place in the centers of real power that do not show on the face of the Constitution."[302] This Article has, until this point, urged attention to this subtle monetary transformation.

A. *The Problems of Profligacy and Error*

When boiled down to policy impacts, the power behind a Monetary Executive implicates fiscal profligacy and Fed error—both of which can ultimately undermine the value of the dollar. Let us consider first the implications for fiscal discipline. The Framers were concerned that the government be responsible with debt, evidenced by the text which required the government to finance itself with debt and not with paper money.[303] The government would have to prove to public and sovereign lenders—i.e., the purchasers of the sovereign debt—that the full faith and credit of the United States was meaningful because the government would be run sufficiently prudently to honor its debt-based obligations.[304] Although this constraint was eventually relaxed when Congress created paper money,[305] the principle of monetary discipline remained so long as the United States backed its dollars with gold. Nixon's unilateral decision to leave the gold standard and convert the dollar to a fiat currency unmoored monetary discipline from the text of the Constitution.[306]

Now there is no limit to the amount of dollars the Fed can print (figuratively) and very little limit on how much the Treasury can borrow. In regard to printing money, because there is no requirement to back dollars with some ratio of gold, the Fed has the discretion to

302 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 653 (1952) (Jackson, J., concurring).

303 *See supra* Part I; *see also* McConnell, *supra* note 7, at 103–04.

304 *See supra* Part I; *see also* McConnell, *supra* note 7, at 103–04.

305 *See supra* Section I.A.

306 *See supra* Section II.A.2.

issue reserves (i.e., create new money)—by buying government debt—in pursuit of its broadly worded mandate to pursue price stability and maximum employment.[307] Where the U.S. debt is concerned, because the dollar is the reserve currency of the world instead of gold, the United States enjoys high demand for its dollars and its debt.[308] This encourages the Treasury to borrow and spend, knowing creditors the world over are hungry for U.S. debt. But this status quo, a derivative of President Nixon's choices, is not an immutable guarantee. It thus follows that presidents who end-run Congress or flex the play in statutory joints, in order to spend more, can eventually degrade the quality of our debt.

Also, as this Article has argued, presidential exercises of fiscal-monetary power tend to lead to unforced error. For example, FDR's use of the Reconstruction Finance Corporation to accomplish devaluation spooked investors. Even Maynard Keynes—who was the inspiration for FDR's economic policies—pointed to them as folly.[309] In an open letter to the *New York Times*, Keynes wrote that "the recent gyrations of the dollar have looked to me more like a gold standard on the booze than the ideal managed currency of my dreams."[310] He continued, "the time has come when uncertainty should be ended. This game of blind man's buff [sic] with exchange speculators serves no useful purpose and is extremely undignified. It upsets confidence, hinders business decisions, [and] occupies the public attention in a measure far exceeding its real importance."[311]

For its part, the Federal Reserve Board leadership believed FDR had the economic causation reversed—FDR believed that a change in the price level would spur economic activity, but the Fed knew from the recessions of 1924 and 1927 that just the opposite was true—changes in economic activity impact the price level.[312] Regarding wage and price controls, even Nixon knew they would not work. In February 1971, Nixon revealed to Connally his "concern about the

307 Federal Reserve Act of 1913 § 2A, 12 U.S.C. § 225a.

308 For a brief discussion of exorbitant privilege, see Ben S. Bernanke, *The Dollar's International Role: An "Exorbitant Privilege"?*, Brookings (Jan. 7, 2016), https://www.brookings.edu/blog/ben-bernanke/2016/01/07/the-dollars-international-role-an-exorbitant-privilege-2/ [https://perma.cc/5CQH-QS54].

309 *See* John Maynard Keynes, *From Keynes to Roosevelt: Our Recovery Plan Assayed*, N.Y. Times, Dec. 31, 1933.

310 *Id.*

311 *Id.*

312 *See* Wicker, *supra* note 128, at 866 ("[The Fed] thought [Roosevelt's] monetary logic was naive because it had the causation reversed: a change in the level of economic activity induced a change in prices and not vice versa.").

freeze"—namely, that "[t]he difficulty with wage-price controls and a wage board as you well know is that the God damned things will not work. They didn't work even at the end of World War II. They will never work in peacetime."[313] But Connally convinced him that the program would have such popular appeal that the 1972 election would be a certain win:

> To the average person in this country this wage and price freeze—to him means you mean business. You're gonna stop this inflation. You're gonna try to get control of this economy. . . . If you take all of these actions . . . you're not going to have anybody . . . left out to be critical of you.[314]

Without a doubt, Nixon used this broad fiscal-monetary power Congress had delegated for politically expedient theatrics.[315]

Ultimately, the crux of the problem lies with the now porous separation between the Legislative and Executive powers concerning monetary matters. In delegating power and not retracting it, Congress seems to have forgotten over time that "[t]he purpose of the Constitution," as Justice Jackson wrote in his 1952 concurrence, "was not only to grant power, but to keep it from getting out of hand."[316] This objective is precisely the sentiment that Madison articulated in *Federalist No. 47*, when he warned against the "accumulation of all powers . . . in the same hands."[317]

The Framers feared that delegating monetary and fiscal powers to the President would be the Achilles' heel of our society—our path to Rome.[318] To avoid that fate, the question going forward is what can and should be done.

B. The Importance of Central Bank Independence

The foregoing has, if anything, underscored the importance of the central bank's independence—freedom from "fiscal dominance." U.S. Presidents have certainly always found it politically expedient to manage or massage the Fed—a hot economy is always favorable for the

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313 Burton A. Abrams & James L. Butkiewicz, *The Political Economy of Wage and Price Controls: Evidence from the Nixon Tapes*, 170 Pub. Choice 63, 65 (2017). .

314 *Id.* at 73.

315 *Id.* at 63 ("Nixon understood the impact of his wage and price controls, but chose to trade off longer term economic costs to the economy for his own short-term political gain.").

316 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 640 (1952) (Jackson, J., concurring).

317 THE FEDERALIST NO. 47, *supra* note 14, at 301 (James Madison).

318 *Id.*

next election.[319] The impulses that attend the short-term political cycle are well-known to be inconsistent with optimal monetary policymaking. But today, some seriously entertain the notion that Fed independence is misguided—and many believe that large fiscal spending programs will have no impact on inflation.[320]

Although this concept might seem anathema to veteran central bankers, the idea is gaining traction, and the trend correlates to presidential politics. As renowned economist Kenneth Rogoff remarked in 2019:

> With the global rise of populism and autocracy, central-bank independence is under threat, even in advanced economies. Since the 2008 financial crisis, the public has come to expect central banks to shoulder responsibilities far beyond their power and remit. . . . Not too long ago, central-bank independence was celebrated as one of the most effective policy innovations of the past four decades, owing to the dramatic fall in inflation worldwide. Recently, however, an increasing number of politicians believe that it is high time to subordinate central banks to the prerogatives of elected officials.[321]

Since this time, populist groups on the left and right have continued to question, if not outright assault, Fed independence.[322]

Consider just two examples of how the prior and current administrations have considered using the powers discussed herein to pressure or influence the Fed's policy. In 2019, President Trump complained that a strong U.S. dollar was restraining U.S. growth.[323] A weaker dol-

319 *See* Salib & Skinner, *supra* note 18, at 964–68 (discussing the presidencies in which the President exerted influence on the Fed Chair to keep interest rates low for reasons of political expedience).

320 *See, e.g.*, Adam Tooze, *The Death of the Central Bank Myth*, FOREIGN POL'Y (May 13, 2020, 2:57 PM), https://foreignpolicy.com/2020/05/13/european-central-bank-myth-monetary-policy-german-court-ruling/ [https://perma.cc/B59R-Z7BF]. Adherents of "Modern Monetary Theory," which now permeate public discourse, are grounded in the notion that a government can "print money" to fund "exorbitant deficit spending with no repercussions." Krause et al., *supra* note 26.

321 Kenneth Rogoff, *How Central-Bank Independence Dies*, PROJECT SYNDICATE (May 31, 2019), https://www.project-syndicate.org/onpoint/how-central-bank-independence-dies-by-kenneth-rogoff-2019-05 [https://perma.cc/8E9Y-PGR3].

322 *See* Carola Binder, *Presidential Antagonism and Central Bank Credibility*, 33 ECON. & POL. 244, 258 (2021).

323 Damian Paletta, *Trump Suggests He Could Take Steps to Weaken U.S. Dollar, Fueling Confusion*, WASH. POST (July 26, 2019, 5:20 PM), https://www.washingtonpost.com/business/economy/trump-shot-down-navarros-recommendation-to-weaken-the-dollar-as-white-house-searches-for-ways-to-juice-the-economy/2019/07/26/5e2e85f6-afc5-11e9-a0c9-6d2d7818f3da_story.html [https://perma.cc/Z8W6-MF4H].

lar would have in theory boosted U.S. exports and brought associated political advantage.[324] The Administration insinuated that the Treasury might use its ESF to try and depreciate the dollar—and that it might press the Fed to help.[325]

Formally, the Fed is the Treasury's fiscal agent, per section 15 of the Federal Reserve Act.[326] In practice, this should mean little more than bland administration of the Treasury's currency operations. But in politics, the Treasury has before asked the Fed to augment its currency interventions using its own balance sheet.[327] And in fact there is little stopping the Treasury from pressuring the Fed to go further and to warehouse foreign currency interventions so as to augment the ESF's impact on the dollar's value.[328] In the past, the nature of the arrangement between the Treasury and the Fed where currency interventions are concerned has always been rather murky.[329]

A second example is presently unfolding and regards President Biden's desire to have the Fed tackle climate change. Because the Fed does not have clear legal authority to use its policy tools to that end,[330] the President may well attempt to influence the Fed's willingness to stretch its mandate by appointing Fed Governors favorable to that cause. What the future holds if this trend toward Fed control continues—through agency (i.e., the Financial Stability Oversight Council) and personnel (Fed Board appointments)— remains unknown. The advent of unconventional monetary policy—i.e., quantitative easing—to fight financial crises makes the Fed's power even more enticing for a president to capture.[331]

Though not designed as such, quantitative easing ("QE") is inherently a quasi-fiscal action.[332] QE involves the central bank buying trillions of dollars of bonds—this means it extends credit—to combat market turmoil when a major shock erupts.[333] To be sure, the Fed does not intend to allocate credit per se with its QE program—it limits its purchases to risk-free products like Treasuries and the GSE's mort-

324 *See generally* MARC LABONTE, CONG. RSCH. SERV., RL30354, MONETARY POLICY AND THE FEDERAL RESERVE: CURRENT POLICY AND CONDITIONS 11 (2020), https://fas.org/sgp/crs/misc/RL30354.pdf [https://perma.cc/5FGK-PAAP].

325 *See* Paletta, *supra* note 323.

326 Federal Reserve Act of 1913 § 15, 12 U.S.C. § 391.

327 Salib & Skinner, *supra* note 18, at 953, 957 (discussing these incidents).

328 *See id.* at 975.

329 *See id.* at 975–76.

330 *See* Skinner, *supra* note 288, at 1310.

331 *See id.* at 1328.

332 *See* GEORGE SELGIN, THE MENACE OF FISCAL QE 7–11 (2020).

333 *See id.* at 2–4.

gage-backed securities; but invariably, it does so by injecting credit to the mortgage markets. Around the world other QE programs, like the Bank of England's, have included private corporate bonds in their QE programs thereby allocating credit to some corporate sectors and not others even more overtly.[334] Unavoidably, QE is a monetary-fiscal operation—it comes down only to questions of degree.[335]

In the President's hands, QE would be a dangerous weapon of capital allocation as the foregoing has discussed. Any future president could declare an economic emergency and use QE to start dispensing credit to politically preferred sectors.[336] The allocative inefficiency and uncertainty—not to mention inflationary impact—would be considerable.[337]

But one need not rely on hypotheticals to be persuaded of the danger of a president accumulating monetary power by controlling the central bank. History is replete with such experiments that all ended in disaster. Latin America has several chilling examples of economic catastrophes that resulted when presidents had too much monetary power and free rein over the central bank.[338] The Kitchener and Fernandez presidencies in Argentina (2003–15); Salvador Allende's experiment with socialism (1970–73); Peru's first Alan Garcia presidency; and Venezuela's Hugo Chávez (and now Maduro) all attempted economic policies that commanded monetary policy via the central banks to accommodate massive government spending projects and initiatives—usually to cater to populist demands.[339] According to

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334 *See id.* at 13–14.

335 *See id.* at 3–11.

336 *See* Dorn, *Fiscal Dominance*, *supra* note 25.

337 *See id.* An obscure provision of the Federal Reserve Act—which is discussed virtually nowhere in the academic literature or primary source policy documents—would seem to enable this kind of presidential control. Section 10(6) of the Federal Reserve Act provides that the Federal Reserve is "subject to the supervision and control of the Secretary [of the Treasury]" in matters where their jurisdiction overlaps. Federal Reserve Act of 1913 § 10(6), 12 U.S.C. § 246. This provision could supply a dangerous power of direction upon an—even spurious—argument that in QE, the fiscal and monetary prerogatives of the Treasury and Fed do in fact overlap. *See* Salib & Skinner, *supra* note 18, at 953–57 (discussing § 10(6) as a latent power of direction).

338 *See* Sebastian Edwards, *Modern Monetary Theory: Cautionary Tales from Latin America* 15 (Hoover Inst., Econ. Working Paper No. 19106, 2019).

339 *See id.* at 8. But the economic folly is not limited to populism; fascism can give rise to the danger too. The economic program of Hitler's Hjalmar Schacht—from 1933 to 1939—employed similar techniques of autocratic control of the economy and manipulation of monetary policy. Economically, that too proved unsustainable. *See* Christopher Kopper, *Banking in National Socialist Germany, 1933–39*, 5 FIN. HIST. REV. 49, 50–51 (1998); Parker Abt, *The Nazi Fiscal Cliff: Unsustainable Financial Practices Before World War II*, 16 GETTYSBURG HIST. J. 20, 53–54 (2017).

one economic historian that has studied these events, all of these experiments "ended up badly, with runaway inflation, huge currency devaluations, and precipitous real wage declines."[340] That assessment is shared widely in the academic circles where economists are "concern[ed] that prosperity has eluded Latin America" and have "a strong suspicion that macroeconomic policies are in part to blame."[341]

At bottom, the shift in the balance of power from Congress to the President—which has roots in formal law—creates preconditions for the practice of fiscal dominance: the suspension of central bank independence in the name of presidentially determined economic goals.

C. *Congress and the Fed*

This Article has urged attention to the gradual evolution of monetary and fiscal powers to the President—powers long held by Congress, pursuant to Article I of the Constitution. This Article examined how this shift in power from the Legislative to the Executive Branch is likely to adversely impact the quality of our modern monetary policymaking (made by the Fed) and fiscal discipline in general. This Section concludes by considering some means of shielding the Fed against pressure from the President and of the President's assertions of fiscal dominance.

At first blush, there seem to be obvious checks on the President readily at Congress's disposal. For example, Congress can rescind statutory powers granted by prior congresses if it perceives them to be used by presidents excessively or in ways the current Congress does not like.[342] But in practice, Congress is likely to be too politically constrained at any given moment to clip the wings of presidential power; the public is now so accustomed to the notion that the President is the necessary (and benevolent) actor in an economic emergency. Even when Congress *has* rescinded a given power, the precedent of practice often remains etched on the national memory and becomes a template for future legislative delegations.[343]

Alternatively, Congress has inserted automatic sunset clauses in legislation that Congress worries the President might use too broadly or in unintended ways.[344] Such provisions essentially serve as expira-

340 Edwards, *supra* note 338, at 3.

341 François R. Velde, *Foreword* to A Monetary and Fiscal History of Latin America, 1960–2017, at xi (Timothy J. Kehoe & Juan Pablo Nicolini eds., 2021).

342 *See generally* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

343 *See supra* Section II.A.

344 *See* Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 Iowa L. Rev. 1931, 1936–37 (2020) (discussing the "temporal problems of congressional delegation" in-

tion dates on certain executive powers and thus force periodic legislative scrutiny of the manner of their use.[345] But it is also well-known that sunset provisions are routinely disregarded—without consequence—in an emergency.[346] Just consider the overall experience with the NEA's automatic expiration dates and the 1977 Amendments to the ESF that halt overseas lending after six months. Consistently, the President's object in relation to these limits was not to submit himself to the intended legislative scrutiny, but rather, to work around it.

It seems unlikely that the federal courts can check the President's assertions of fiscal dominance. As the administrative state has grown swiftly since the New Deal era of the 1930s, so too has the body of law curtailing the administrative state. The Administrative Procedure Act ("APA") set parameters by which affected citizens can challenge a host of agency actions or decisions.[347] And courts in recent years have narrowed the broad agency discretion so long afforded under *Chevron v. Natural Resources Defense Council*.[348] For example, the Supreme Court and several Courts of Appeal have more regularly referred to the "major questions doctrine," which maintains that the courts should not in fact defer to agency interpretations with vast economic or political significance.[349] And in a recent oral argument, Justice Gorsuch floated the idea of a "pecuniary interest" test to limit *Chevron* at

volving "broad congressional delegations of authority at one time period [that] become a source of authority for agencies to take later action that could no longer receive legislative support or that was not adequately contemplated, let alone considered, at the time of enactment").

345 *See* Roberta Romano, *Regulating in the Dark* 14 (Yale L. & Econ. Rsch. Paper No. 442, 2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1974148 [https://perma.cc/V857-UTEL].

346 *See* Antonios Kouroutakis & Sofia Ranchordás, *Snoozing Democracy: Sunset Clauses, De-Juridification, and Emergencies*, 25 MINN. J. INT'L L. 29, 72–73 (2016) (discussing failure of sunset reviews to "impede agencies from continuing ineffective and unnecessary programs").

347 Administrative Procedure Act, Pub. L. No. 79-404, § 6(a), 60 Stat. 237, 240 (1946). *See generally* CASS R. SUNSTEIN & ADRIAN VERMEULE, LAW & LEVIATHAN (2020) (suggesting how the administrative state can be constitutionally and ultimately morally redeemable).

348 467 U.S. 837, 842–44 (1984) (creating a doctrine of judicial deference to agency interpretations of statutory agency mandates).

349 *See* West Virginia v. EPA, 142 S. Ct. 2587, 2595 (2022); *see also* King v. Burwell, 576 U.S. 473, 485–86 (2015) (noting that if Congress wants to assign questions to agencies of deep economic and political significance, it will do so expressly); Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014) (same); Paul v. United States, 140 S. Ct. 342, 342 (2019) (reaffirming "major policy question" doctrine in denial of certiorari).

"step zero";[350] that is, to apply a presumption against deference where the government's actions favors its own financial interests.[351]

Surely the monetary and fiscal questions discussed above, which impact the shape, value, and deployment of the dollar, are squarely "major questions" and we should be able to see relief from the federal courts. Yet, these doctrines apply only to agency—not presidential—action. As such, executive orders of the kind discussed in Part II may remain fairly insulated from judicial review.

Treasury actions taken via the ESF also seem relatively shielded from review. In the first instance, it is not clear that the Treasury's actions are considered agency actions within the APA.[352] Even if they were, standing may be difficult to establish. Under the so-called political question doctrine, courts often afford broad deference to the President's decisions concerning foreign affairs or national security.[353] A court could well consider the ESF's activities as existing within such off-limits arenas.[354] In any case, it would be difficult for any given plaintiff to demonstrate a "concrete" grievance in connection with an ESF program.[355]

As for the FSOC pressing presidential prerogative on the Fed, there are standing problems there as well. In order to be reviewable, actions must be "final."[356] Accordingly, using the FSOC power of recommendation to exert moral suasion and public shaming of the Fed—i.e., to act on climate change or any other Executive Branch priority—is probably insufficiently related to any APA jurisdictional trigger: a discernible "rule, order, license, sanction, relief, or . . . failure to act."[357] As such, unlike the typical nondelegation doctrine that we see

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350 Transcript of Oral Argument at 29, Becerra v. Empire Health Found., No. 20-1312 (U.S. June 24, 2022).

351 Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187, 191 (2006) (defining "Step Zero" as "the initial inquiry into whether the *Chevron* framework applies at all").

352 *See* Ann Murphy, *A Sea Change in Court Analysis of Treasury Regulations: How the Treasury Department Won the Battle but Lost the War*, A.B.A. (Feb. 25, 2016), https://www.americanbar.org/groups/taxation/publications/abataxtimes_home/16feb/16feb-ac-murphy-a-sea-change-in-court-analysis-of-treasury-regulations/ [https://perma.cc/RJ3Y-7VE9].

353 *See* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 315–27 (1936) (upholding an extremely broad delegation in the foreign affairs context).

354 *See generally* Curtis A. Bradley, Chevron *Deference and Foreign Affairs*, 86 VA. L. REV. 649, 661 (2000); Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 47–56 (1993).

355 *See, e.g.*, Starr Int'l Co. v. United States, 856 F.3d 953, 964 (Fed. Cir. 2017); U.S. Army Corps of Eng'rs v. Hawkes Co., 578 U.S. 590 (2016); Reuss v. Balles, 584 F.2d 461, 469 (D.C. Cir. 1978).

356 5 U.S.C. § 704.

357 *Id.* § 551(13).

taking shape in courts to limit the breadth of some agency actions, it would seem that the *direct delegation* of monetary and fiscal power to the President seems quite far from the courts' purview.

Overall, it appears that these presidential pathways, once dug, are nearly impossible to retrench. What else can Congress do?

1. Presidential Checks

Sunlight has been said to be the best disinfectant to governmental overreach. On that theory, Congress should design a new procedural mechanism for scrutinizing presidential action that is taken in response to an economic emergency. In other areas of emergency action, like national security, the public has become skeptical of overreach, and in response, Congress has more rigorously exercised oversight.[358] The presidential treatment of economic emergency, however, is still not treated as such a threat to liberty. But this would have been too sanguine for the Framers, who understood that emergencies "afford a ready pretext for usurpation."[359] Congress may therefore do best in this area to reflect upon the possible design of a new process that would enable better scrutiny and oversight of the President's exercise of fiscal-monetary power in emergency.

Congress still has the power to censure and investigate presidential action generally, and there are methods that might be adapted from other contexts. Consider the process of appointing a special counsel. Since the 1920's Teapot Dome Scandal, the President—at Congress's instruction or request—has from time to time appointed a "special counsel" to investigate offenses that might be criminal in nature.[360] In 1978, Congress used the Ethics in Government Act to formalize this process within the Office of the Independent Counsel—an office that sat within the Attorney General's office but was directly accountable to Congress.[361]

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358 *See, e.g.*, Andrew Desiderio, *Why Congress Is Finally Starting to Claw Back Its War Powers From the President*, POLITICO (July 7, 2021, 12:00 PM), https://www.politico.com/news/2021/07/07/congress-aumf-biden-498399 [https://perma.cc/38WP-PJRP].

359 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 650 (1952).

360 *See* J. Leonard Bates, *The Teapot Dome Scandal and the Election of 1924*, 60 AM. HIST. REV. 303, 311 (1955).

361 Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824. The Ethics in Government Act lapsed in 1999, at which time Department of Justice regulations created the Special Counsel Investigation Office. *See* JARED P. COLE, CONG. RSCH. SERV., R44857, SPECIAL COUNSEL INVESTIGATIONS: HISTORY, AUTHORITY, APPOINTMENT AND REMOVAL 8 (2019).

The presidential actions discussed here are not within the wheelhouse of the special counsel.[362] The point is simply that with some modifications, a similar office could be created to assess the presidential exercise of fiscal or monetary power—especially when the President justifies action by emergency and invokes emergency powers. Regardless of whether such office would be housed in the Attorney General's office, it would ideally be directly accountable to Congress alone and thus receive its funding from an appropriation rather than the budget of the DOJ. Although this proposal would not prevent future delegations of monetary power, it could curb the exercise of powers already enacted in law. And possibly, the existence of the office would reduce Congress's incentives to grant sweeping economic power going forward.

2. *The Fed and Fiscal Dominance*

In 1970, Milton Friedman famously wrote that "inflation is always and everywhere a monetary phenomenon," setting the intellectual stage for the Federal Reserve to take primary responsibility—both in policy and in the public eye—for managing inflation.[363] Although the Fed has statutory responsibility for maintaining stable prices, as the line between what is "monetary" and what is "fiscal" has increasingly blurred, so too have the roles of Congress, the President, and the Fed in contributing to inflation.[364] So regardless of whether the Fed has actually crossed that Rubicon, the specter of fiscal dominance might be back.[365] As this Article has argued, once the practice of presidential monetary control begins, it is very difficult to check. It is therefore critically important to arrest presidential propensity to dominate the Fed while it is still possible.

Concretely, there are at least two operational changes to Fed policy that might stifle future encroachments. The first change concerns the reinstatement of a monetary rule. There is a long literature discussing the merits and demerits of monetary policy rules versus discretion.[366]

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362 *Id.* at 11–14.

363 FRIEDMAN, *supra* note 26, at 24.

364 *See supra* note 19 and accompanying text.

365 *See supra* note 25 and accompanying text.

366 *See generally* Charles I. Plosser, *Commitment, Rules, and Discretion*, 36 CATO J. 251 (2016); Alexander William Salter, *Is There a Self-Enforcing Monetary Constitution?*, 25 CONST. POL. ECON. 280 (2014); Alexander William Salter, An Introduction to Monetary Policy Rules (Dec. 2014) (unpublished manuscript) (on file with the Mercatus Center).

Generally, those who favor discretion point to the wisdom in *not* tying the Fed's hands in times of crisis.[367] As recent experience confirms, when financial crisis hits the Fed has a battery of ammunition to fire—liquidity facilities,[368] QE,[369] and reducing interest rates.[370] Much of this would not have been possible under an old-world regime like the Gold Standard.[371]

But discretion has some drawbacks, especially political ones. Discretion creates space for Executive Branch pressure, influence, or force.[372] Indeed, others have pointedly argued that "without a credible monetary rule, 'the President's objectives and plans will continue to be the dominant input in the conduct of monetary policy.'"[373] A version of this problem has been labeled the "time inconsistency problem": if central bankers cannot credibly commit to doing the difficult thing over the longer-term—e.g., not expand the money supply in response to presidential pressure—their near-term promises to that effect will not be believed and inflation expectations will get out of hand.[374] In short, there is an independence corollary.

Influential economists have proposed several monetary rules that the Fed might use in lieu of the Gold Standard—namely, targeting money supply growth (Milton Friedman), interest rates (John Taylor), inflation (current Fed practice), or nominal GDP (Scott Sumner).[375] This short concluding overview cannot do full justice to the subject of the costs and benefits of each type of rule. But among these rules, it bears mentioning in closing that nominal GDP (i.e., nominal income) targeting is likely to be the most helpful for the specific matter discussed here—that is, checking presidential exercise of pecuniary power.[376]

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367 *See* Plosser, *supra* note 366, at 252.

368 *See generally* LABONTE, *supra* note 324.

369 *See* SELGIN, *supra* note 332, at 3–11.

370 *See* CONTI-BROWN, *supra* note 32, at 51.

371 *See generally* ELWELL, *supra* note 56.

372 *See generally* Skinner, *supra* note 19.

373 Dorn, *supra* note 27, at 579 (quoting Robert E. Weintraub, *Congressional Supervision of Monetary Policy*, 4 J. MONETARY ECON. 341, 360 (1978)).

374 *See* Plosser, *supra* note 366, at 252.

375 *See generally* DAVID BECKWORTH, FACTS, FEARS, AND FUNCTIONALITY OF NGDP LEVEL TARGETING: A GUIDE TO A POPULAR FRAMEWORK FOR MONETARY POLICY (2019), https://www.mercatus.org/system/files/beckworth-ngdp-targeting-mercatus-special-study-v2.pdf [https://perma.cc/Q8FS-SG5P]; Scott B. Sumner, *Nominal GDP Targeting: A Simple Rule to Improve Fed Performance*, 34 CATO J. 315 (2014).

376 *See* Joshua R. Hendrickson, *How Should the Central Bank Determine Its Target for Nominal Income Growth?*, MERCATUS CTR. (June 13, 2019), https://www.mercatus.org/publica-

NGDP targeting requires the central bank to choose a target growth rate for nominal income (measured as nominal GDP). When nominal income falls below the target, the Fed would increase the money supply (i.e., by reducing interest rates) and vice versa.[377] There are two relevant advantages to this rule. For one, it displaces a "dual mandate" where the Fed targets price stability and employment. The goal of maximum employment has become so ambiguous and so fiscal in nature that it has invited extensive political pressure.[378] Additionally, NGDP targeting can improve fiscal discipline. Increased government spending directly increases nominal incomes, which would then prompt the Fed to contract the money supply—higher government spending would in turn lead to higher interest rates, making substantial spending much less popular.

The second possible bulwark against political pressure is the elimination of the Fed's ability to pay interest on excess reserves. Since 2008 the Fed has operated what is referred to commonly as a "floor system," or an "ample-reserves framework," and it does so by paying interest on the excess reserves that banks hold in their accounts at the Federal Reserve banks.[379] This is referred to as "IOER."[380] In effect, the Board of Governors regulates overnight rates by setting and administering this interest rate which, in turn, makes banks unwilling to part with reserves for any lower rate.[381] As it pertains to fiscal dominance, the concern with IOER is that it divorces the size of the Fed's balance sheet from its stance on monetary policy—which is to say that regardless of how large the Fed's balance sheet grows from buying assets, it can still use the IOR power to influence the amount that banks are lending and at what price, thereby expanding or contracting

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tions/monetary-policy/how-should-central-bank-determine-its-target-nominal-income-growth [https://perma.cc/39EC-SPH9].

377 *See generally* BECKWORTH, *supra* note 375.

378 *See* Skinner, *supra* note 254, at 283–85; *see generally* BECKWORTH, *supra* note 375; Sumner, *supra* note 375.

379 *See* Jane Ihrig, Zeynep Senyuz & Gretchen C. Weinbach, *Implementing Monetary Policy in an "Ample-Reserves" Regime: The Basics (Note 1 of 3)*, FED. RSRV. BD. (July 1, 2020), https://www.federalreserve.gov/econres/notes/feds-notes/implementing-monetary-policy-in-an-ample-reserves-regime-the-basics-note-1-of-3-20200701.htm [https://perma.cc/N2LR-JBGT]; *see also* Ben S. Bernanke & Donald Kohn, *The Fed's Interest Payments to Banks*, BROOKINGS (Feb. 16, 2016), https://www.brookings.edu/blog/ben-bernanke/2016/02/16/the-feds-interest-payments-to-banks/ [https://perma.cc/87VH-P3EX]. Formally, Congress gave the Fed power to pay interest on reserves in the 2006 Financial Services Regulatory Relief Act. Operationally, the Fed's choice of rate (benchmarked to its primary credit rate) is what creates the so-called floor system. *See* SELGIN, *supra* note 332, at 79-81.

380 *See* Ihrig et al., *supra* note 379.

381 *Id.*

the flow of credit and, in turn, the economy.[382] But a completely unconstrained balance sheet as such creates space for political pressure—to engage in politically motivated bond purchases or debt monetization—that would not, in theory, interfere with the Fed's target interest rate. Congress authorized the Fed to engage in IOR policy in 2008 in the heat of the global financial crisis, and it could, now that inflation and fiscal dominance loom ever larger, consider rescinding or curtailing this authority.[383]

CONCLUSION

Today, the President has accumulated an impressive cache of monetary-fiscal power sufficient to dominate the Federal Reserve. Regardless of whether the 2022 episode of inflation is the byproduct of fiscal dominance, events as they have unfolded fired a warning shot across the bow. Since the 1930s, Congress has steadily delegated a host of monetary-fiscal powers to the President, which establishes a legal basis for influencing the Fed's decisions about monetary policy in reaction to a president's fiscal measures and goals. This drift from the constitutional baseline poses threats to the central bank's independence but also presses broader social concerns surrounding fiscal discipline and the prospects for the dollar and the continued ability of representative democracy to safeguard liberal economic values in private property and contract.

382 *See* DAVID BECKWORTH, THE GREAT DIVORCE: THE FEDERAL RESERVE'S MOVE TO A FLOOR SYSTEM AND THE IMPLICATIONS FOR BANK PORTFOLIOS (2018), https://www.mercatus.org/system/files/beckworth-great-divorce-mercatus-research-v1.pdf [https://perma.cc/GDA2-GFJS].

383 Financial Services Regulatory Relief Act of 2006, Pub. L. No. 109-351 § 201, 120 Stat. 1966, 1968–69 (authorizing IOR); Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, § 128, 122 Stat. 3765, 3796 (accelerating the effective date to October 1, 2008).