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Democratic Sovereignty and the Prerogative to Make Money: The Case of the Federal Reserve

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ABSTRACT

The surge of executive power unleashed by the Supreme Court has reached the Federal Reserve, provoking a crisis that the justices seem suddenly anxious to avoid. But the drama is long overdue. The central bank has a constitutional stature that poses a direct challenge to unitary executive theory, the principle animating the Court's recent case law. Congress established the Federal Reserve System to carry out a critical legislative prerogative—making the sovereign money supply. Congress used an institutional form—national banking—innovated precisely to secure sovereign money-making from executive (originally monarchical) interference. Congress in turn assigned a vital responsibility—the capacity to make money out of debt in the people's name—to the Fed. The constitutional conclusion follows: Congress's prerogative over money-making clearly secures the Fed's independence from presidential interference. That conclusion is lost in current scholarship that treats the Fed as fundamentally like other independent agencies. The Court has assumed, similarly, that the unitary executive presides over a relatively homogeneous

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regulatory field. The case of the Fed exposes the separation of powers as a more complicated project. Legislatures built democratic sovereignty by struggling for prerogatives that, like money-making, protected their lawmaking authority. The prerogatives claimed by Congress inform the work of each agency and official, including within the executive branch. The Court dismantles democratic sovereignty when it denies the reach of those prerogatives.

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INTRODUCTION

Modern central banking began in England as a device to lever power from a king's grasp into a legislature's hands.[1] For centuries, monarchs controlled the process that created new money by converting metal into coin through the royal mints.[2] But more than 300 years ago, the British Parliament established a national bank to create a new flow of money. That flow of money—bank notes—would eventually dwarf the stream of coin coming from the mint.[3] And that was exactly the point. Parliament in that moment claimed control over money from a monarch: bank-made money would enter the economy by a route Parliament dictated rather than the king, who had controlled coin from the royal mint for centuries.[4]

Parliament's gambit worked. The Bank of England became a key player in the constitutional democracy built by the British.[5] But Parliament was not alone. Again and again, legislative actors have taken control of money-making in order to pry authority away from executive or

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[1] The Bank of England began was the first sustained national bank of issue—that is, a bank that would lend to the government through newly created bank credit (bank notes). It would develop authorities associated with modern central banks over the next two centuries. *See* CHARLES GOODHART, THE EVOLUTION OF CENTRAL BANKS 14 (1988).

[2] *See The Case of the Mixed Money,* 2 Cobbett's Complete Collection of State Trials 114 (Privy Council Court 1605) (confirming monarch's power to determine character and content of coin).

[3] *See generally* Nuno Palma, *Reconstruction of the Money Supply Over the Long Run: the Case of England, 1270–1870*, 71 ECON. HIST. REV. 373 (2017).

[4] Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, XLIX J. ECON. HIST. 816, 821 (1989); CHRISTINE DESAN, MAKING MONEY: COIN, CURRENCY, AND THE COMING OF CAPITALISM 301-320 (2014); *see generally infra* notes 43-50. War finance drove Parliament's initiative and gave that body the leverage it needed to establish the Bank. Having deposed James II, William III as new ruler desperately needed to funds for military expenses. "William III and his government faced two alternatives: scale back the war against Louis XIV as the Tories wished or adopt the full radical implications of the Whig understanding of political economy. . . . By 1694 William was prepared to throw in his lot with the Whigs." STEVEN PINCUS, 1688: THE FIRST MODERN REVOLUTION 388 (Yale Univ. Press, 2009).

[5] *See, e.g.*, WALTER BAGEHOT, LOMBARD STREET: A DESCRIPTION OF THE MONEY MARKET (John Wiley and Sons, Inc. 1873, 1999) (describing the Bank's essential public role); Patrick K. O'Brien & Nuno Palma, *Not an Ordinary Bank but a Great Engine of State: The Bank of England and the British Economy, 1694-1844*, 76 ECON. HIST. REV. 305 (2023) (documenting role of Bank).

other competing agents. Legislatures in America used the strategy under the British Empire, at the framing of the Constitution, during the Civil War, at the founding of the Federal Reserve, in the New Deal. Each time, they claimed authority over money-making to make real their capacity to act for those who elected them.[6]

Cue the current moment. The Trump administration aims for control of all those officials administering the law. That includes officials in agencies designed by Congress to act with independence from the policy preferences of any given president. Trump's argument to subvert that design is simple. According to Article II of the U.S. Constitution, "the executive power shall be vested in the President." That statement bestows "unitary" authority to implement the law. So far as Congress relies on the president to "fill in the details" when applying more general standards, that official needs discretion and latitude.[7] That belongs to the president, who is the only actor accountable to all voters. The president must have control of the officials who are acting for him, so he must be able to replace them as he wishes.

The Supreme Court has accepted Trump's argument on one terrain after another.[8] It now appears poised to overturn a 90-year old precedent that protects Congress's ability to insulate independent agency leadership from removal for purely partisan reasons.[9] The prospect threatens methods of expert decision-making, the continuity of institutional knowledge and practice, and the tradition of civil service—enough to alarm anyone concerned about American rule of law.[10] But the Court's logic goes further. It would reach the Board of Governors of the Federal Reserve, threatening the central bank's independence in an era so dedicated to the proposition that it has its own acronym. CBI has become a global norm, the axiomatic barrier to loose monetary policy and the parade of horribles that could follow.[11] Even justices dedicated to unitary executive theory are uneasy at the outcome. They float uncertain exceptions for the Fed from that approach like trial balloons.[12]

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[6] *See infra* notes 38-87.
[7] Humphrey's Executor v. United States, 295 U.S. 602 (1935) (cleaned up).
[8] *See, e.g.*, Trump v. Wilcox, 145 S. Ct 1415 (2025); Seila L. LLC v. CFPB, 140 S. Ct. 2183 (2020); Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 U.S. 477 (2010).
[9] A 1935 case, Humphrey's Executor v. United States, 295 U.S. 602 (1935), upheld the constitutionality of commissions designed to ensure political balance with members from both Democratic and Republic parties appointed for terms that crossed presidential administrations. That holding is at stake in the 2025 case Trump v. Slaughter. 606 U. S. ____ (2025).
[10] *See, e.g.,* Noah Feldman, SCOTUS Might Let the President Fire Almost Anyone, Bloomberg News (Dec. 9, 2025), https://news.bloomberglaw.com/us-law-week/scotus-might-let-the-president-fire-almost-anyone-noah-feldman.
[11] *See, e.g.*, Former Treasury Secretaries, Federal Reserve Board Chairs and Governors, Council of Economic Advisors Chairs, and Economists Brief as *Amici Curiae* opposing the application for a stay in Trump v. Cook (2025). In an unprecedented gesture, a set of the world's most influential central bankers issued a joint policy statement on January 13, 2026, defending Jerome Powell, Chair of the U.S. Federal Reserve's Board of Governors. The statement responded to perceived overreach by federal prosecutors who appeared to be escalating presidential pressure on Powell by opening a criminal investigation into cost overruns at the Federal Reserve. Eshe Nelson, *Global Central Bankers Express Support for Fed Chair After Criminal Investigation*, N.Y. TIMES (January 13, 2026), https://www.nytimes.com/2026/01/13/business/trump-powell-central-bank-support.html.
[12] *See, e.g.*, *Wilcox*, 145 S. Ct. 1415; *Seila Law*, 140 S. Ct. at 2186, 2245 n.8.

The history of central banking clearly collides with unitary executive theory. Legislatures seized power over money-making in significant part to fence out the executive. But the Supreme Court's current logic—barring the invention of an uncertain exception—would invite the executive right back in. We return to monarchy with unitary executive theory claiming a democratic pedigree. Something is badly off-track.

The case of the Fed exposes where we went wrong. Unitary executive theory mistakes the separation of powers because it mistakes the powers each branch wields. Several problems are conspicuous. Executive discretion to implement law can easily veer into executive disregard for a law's substance.[13] Unitary executive theory also disables Congress from lawmaking designed to take effect upon certain contingencies, as determined by actors assigned to make such findings.[14]

But another problem lies buried: the executive can encroach on areas of legislative prerogative. Those prerogatives support lawmaking but are distinct from it. They are both familiar—many are centuries old—and yet novel to the current debate—we have forgotten certain principles inherent to the democratic operation of government. More troubling yet, we have forgotten that those prerogatives are practices, not empty hand-waving. They are projections of legislative authority that are institutionalized in our constitutional order as anti-executive devices, barriers against presidential overreach. Those designs embed democratic sovereignty in a real world of checks and balances.

Money-making epitomizes a legislative prerogative, its purpose, and the practice that effectuates it. Consider the problem in the foundational form that early legislators confronted. Medieval legislators could claim authority over lawmaking including even taxation. But if a country ran on metal coin and the monarch controlled the mint, that ruler could subvert the legislature's authority. He, or occasionally she, need only debase the coin to spend on their own initiative. France's Philip IV and Philip VI, and England's Tudors, Henry VIII and Elizabeth I, all diminished the power of their own legislatures by diluting coin and spending the proceeds.[15] By contrast, when Parliament took control of the way money entered into society—when it started

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[13] PETER M. SHANE, MADISON'S NIGHTMARE: HOW EXECUTIVE POWER THREATENS AMERICAN DEMOCRACY (2009); STEPHEN SKOWRONEK, et al., PHANTOMS OF A BELEAGUERED REPUBLIC: THE DEEP STATE AND THE UNITARY EXECUTIVE 24-38 (2021); *see generally* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUMBIA L. REV. 2 (1994).

[14] Courts traditionally dubbed the role of those administrative actors assigned to make such findings "quasi-legislative." The term facilitated lawmaking in a world with an unfolding future and cooperative agents, conditions early and widely recognized as real. *See, e.g.*, Brig Aurora v. United States, 11 U.S. 382 (1813) (upholding law conditioning effect on evidence certified by presidential proclamation); *see generally* Brief for Legal Historians Noah A. Rosenblum and Nathaniel Donahue as *Amici Curiae* Legal Supporting Respondent, *Slaughter*. 606 U. S. ___ (2025) (tracing history).

[15] DESAN, *supra* note 1 at 162-170; *see generally* NICOLAS ORESME, THE DE MONETA OF NICHOLAS ORESME AND ENGLISH MINT DOCUMENTS (Charles Johnson trans., 1956); J.S. Roskell, *Perspectives in English Parliamentary History*, 46 BULLETIN OF THE JOHN RYLANDS LIBRARY (1963-64). The strategy had political costs, to be sure, but the stakes invited monarchs to take that course again and again.

making money—it cut off that avenue of executive abuse. Money-making ultimately secured power over the purse to the modern legislature.[16]

The Federal Reserve descends from that tradition. Its banked design is a function of legislative prerogative, not a gateway for executive authority. Article I of the Constitution consolidates that prerogative in the "aggregate powers" that concern money, revenue, and finance.[17] That authority clearly enables Congress to establish protections from removal for officials on the Fed's Board of Governors[18] and for presidents of the regional Federal Reserve Banks.[19] It informs as well as the legality of the appointment procedures Congress has established for those officers.[20]

The prerogative to make money is perhaps the most closely held legislative prerogative. That sets the Federal Reserve apart. But although the Fed is distinctive, even extreme, its authority is indicative of a larger phenomenon. Legislative sovereignty is a complex capacity. It includes lawmaking but does not reduce to it. Rather, lawmaking is ringed round by one legislative prerogative after another. Legislators acquired those powers over centuries, building capacity as they struggled to *make real* their role as lawmakers.

The next pages spell out how legislatures "make money," an act we rarely think about but one that protects lawmaking while remaining distinct from it. First, the history exposes how legislators made real their lawmaking capacity when they made complete their power over money-making. Second, the essay shows how that history has roots in monetary theory that is also democratic theory. Legislative authority to incur debt on behalf of a community allows it to create money out of that debt. The act is actually self-executing; it needs no discretionary administrative action to complete it. The history and theory of money-making set up a third section on the jurisprudence of money-making. The Supreme Court has repeatedly blessed Congress's authority, powerfully ordaining its prerogative. Fourth and against that baseline, I analyze the crisis created as the Court's unitary executive theory reaches the Federal Reserve. Developed in disregard of the history, theory, and jurisprudence on legislative money-making, the unitary executive approach provokes an impasse that undermines the Court's own authority while locating the Fed—itself an institution with democratic lineage—as an anti-democratic entity.

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[16] *See infra* text accompanying notes 37 to 50. Centuries later, Paul Tucker, former deputy governor of the Bank of England would capture the danger that motivated Parliament to take control of money creation. "If the executive branch controlled the money creation power, it would at the very least be able to defer its need to go the legislature for extra 'supply,' and at worst could inflate away the real burden of its debts to reduce the amount of taxation requiring parliamentary or congressional sanction." PAUL TUCKER, UNELECTED POWER: THE QUEST FOR LEGITIMACY IN CENTRAL BANKING AND THE REGULATORY STATE 288 (Princeton Univ. Press, 2018

[17] Knox v. Lee, 79 U.S. 457, 535 (1871); Norman v. Baltimore and Ohio R.R., 294 U.S. 240, 303 (1935).

[18] 12 U.S.C. § 242.

[19] 12 U.S.C. § 248(f).

[20] 12 U.S.C. § 241 (Governors appointed by the President and confirmed by the Senate for fourteen- year terms); § 242 (Chair of Board appointed by President and confirmed by the Senate for four-year term); § 305 (specifying appointment procedure for regional bank presidents by Class B and C bank directors).

The article ends with a postscript that opens out the argument about legislative prerogatives. The Trump administration claims unprecedented authority to access and deploy information held across the federal government. That assertion conflicts with another legislative prerogative—the prerogative of the legislature to gather information that is sound according to modern norms of knowledge. The drama reveals in sharp detail that democratic sovereignty is immediately at stake across a range of issues.

The checks and balances that support the democratic diffusion of power are not paper inventions but hard-won devices. Legislators have struggled to claim an army of prerogatives, all too easily assumed by subsequent generations. The example of the congressional money-making invites us to rethink the way the unitary executive theory flattens democratic sovereignty, splitting off one legislative prerogative after another. The postscript invites us to consider other prerogatives.

Legislators have the authority to speak freely about their political leaders, be they monarchs or elected officials. That capacity protects the legislators' ability to identify abuse and debate reforms.[21]

Legislators have the authority to receive petitions. That capacity protects their ability to understand the circumstances of their constituents.[22]

Legislators have the authority to investigate relevant issues and require information, enforceable by contempt and subpoena if necessary. That capacity protects their ability to collect evidence about conditions in society.[23]

Legislators have the authority to resolve claims against the government. That capacity protects their ability to grant relief from the public treasury to those injured by public officials.[24]

Legislators have the authority to audit spending by the executive branch, evaluate administrative programs, and assess its policy initiatives. That capacity protects legislators' ability to hold executive actors accountable.[25]

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[21] U.S. CONST. art. I, § 6, cl. 1; Gravel v. United States, 408 U.S. 606 (1971). For British precedent, see The English Bill of Rights of 1689, art. 9; *Parliamentary Privilege First Report*, Joint Committee on Parliamentary Privilege (April 9, 1999), https://publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4303.htm (last accessed Jan. 12, 2025).

[22] U.S. CONST. amend. I*; see also* House Rules on Petitions and Memorials. For the way petitioning functioned to enlarge legislative authority in the colonial era, see, e.g., Barbara A. Black, *The Constitution of Empire: The Case for the Colonists*, 124 U. PA. L. REV. 1158 (1976); JACK P. GREENE, THE QUEST FOR POWER; THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES, 1689-1776 (1963).

[23] *See generally* Eastland v. United States Servicemen's Fund, 421 U.S. 491 (1972); McGrain v. Daugherty, 273 U.S. 135 (1927); *see also* Jurney v. MacCracken, 294 U.S. 125 (1935) (upholding Senate's authority to use contempt, including detention, to protect subpoenaed documents).

[24] *See generally* Floyd D Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Towards a Judicial Model of Payment*, 45 LA. L. REV. 625 (1985); Christine Desan, *The Constitutional Commitment to Legislative Adjudication in the Early American Tradition*, 111 HARV. L. REV. 1381 (1998).

[25] *See generally* Bowsher v. Synar, 478 US. 714 (1986) (confirming authority of Comptroller General and General Accountability Office to perform such functions, not including the executive authority to order

Legislators have the authority to establish procedures for their decision-making. That capacity protects their ability to deliberate in ways they determine.[26]

Legislators have the authority to count the electoral vote. That capacity protects their ability to police the processes to elect the president.[27]

Legislators have the capacity to oversee executive branch officials. The Senate can evaluate and consent to a president's choices for higher office. Legislators in both houses, acting together, can impeach and remove an official from office. Those capacities protect the legislature's ability to check incompetent or corrupt appointees.[28]

Legislators have the authority to declare war. That capacity protects the legislature's ability to determine the elemental issue of a nation's moral and political place in the global order.[29]

If members of a legislative body could not debate freely, receive information from the people, investigate areas for action, relieve those harmed by the government, control their own procedures, oversee and audit executive spending, police the presidential vote, hold accountable public officials, and determine existential questions of national conduct and survival, their lawmaking role would be rendered impotent in one way after another. Governance would be ineffectively debated, ill-founded, impervious to those injured, shaped by laws undemocratically enacted, subverted by executive noncompliance, and administered by officials unacceptable to the polity. Governance as the process of determining a nation's course in the global order would be neutered. To be sure, itemizing an array of legislative prerogatives triggers concern at areas of erosion and evasion. That is completely consonant with the point that they are essential.

When we search for them, institutional arrangements outside a simplistic lawmaking v. law-executing binary protect many of those prerogatives. The battle to produce and preserve information offers a current example. For a far older one, consider the power Congress inherited from colonial legislatures to resolve claims for money from the public treasury. No one calls that activity "lawmaking." It is, instead, legislative adjudication.[30] That prerogative preserves Congress's ability to safeguard public moneys: it disallows any other actor from unlimited access to the resources upon which the government's capacity depends.

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changes in budget implementation); *see also* HENRY ROSEVEARE, THE TREASURY, 1660-1870: THE FOUNDATIONS OF CONTROL 46-74 (1973) (detailing the House of Commons's long struggle to secure accountability in the Crown's expenditures).

[26] U.S. CONST. art. I, § 5, cl. 2.; *see also* U.S. CONST. art. 1, § 5, cls. 1, 3, 6; U.S. CONST. art. 1, § 8, cl. 18 (provisions additionally supporting this authority).

[27] U.S. CONST., Amendment 12; Act of Feb. 3, 1887, ch. 90, 24 Stat. 373 (Electoral Count Act); Pub. L. No. 117-328, div. P, 136 Stat. 4459 (Dec. 29, 2022) (Reform Act of 2022).

[28] U.S. CONST., Art. II, sec. 2, cl. 2 (advice and consent); U.S. CONST. Art. 1, sec. 2, cl. 5, and sec. 3, cl. 6 (impeachment proceedings).

[29] U.S. CONST. Art. I, sec. 8, cl. 11. For the erosion of Congress's authority to declare war and its impact, see, e.g., Oona Hathaway, *How the Erosion of U.S. War Powers Constraints Has Undermined International Law Constraints on the Use of Force*, 14 HARV. NAT'L SEC. J. (2023); Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terror*, 118 HARV. L. REV. 2047 (2005).

[30] *See generally* Shimomura, *supra* note 24; Desan, *supra* note 24.

As the example of legislative adjudication shows, Congress can also institutionalize help from other actors without ceding its prerogative. Until 1855, Congress insisted on doing the work of claims resolution without assistance. Overwhelmed by the work of a rapidly growing population, Congress then established the U.S. Court of Claims.[31] The Supreme Court upheld Congress's authority to establish a tribunal to carry out its prerogative. The U.S. Court of Claims is an Article III court, thus immune from executive interference.[32]

The history, theory, and jurisprudence recaptured here have been missing in the debate over the Federal Reserve. The absence is due partly to the nature of prerogatives. Some of them are expressly identified in the constitutional text. That invites them to be considered discretely and given self-contained doctrinal genealogies.[33] Other prerogatives—including legislative control over money-making—are implicit; they are operating premises that were and are assumed.[34] Those premises pervasively inform constitutional design but are only obvious once we excavate its structure. Second, the debate over the Fed has traced the lineage of that institution backwards to search for precedents, rather than starting with the capacity—money creation—that is the congressional prerogative at stake. Once that animating capacity (to create money) is left aside, the Fed appears much more like any other administrative agency. The same arguments for or against the logic of the unitary executive apply and they exhaust the repertoire.[35] Finally, the strategy of lumping the Fed in with other administrative agencies has something of an *in*

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[31] Act of February 24, 1855, 10 Stat. 612 (1855).

[32] Glidden v. Zdanok, 370 U.S. 530 (1962). While the Court of Claims (today the Court of Federal Claims and the Federal Circuit) was an Article III court, Congress maintained certain limits on its activity. The legislature's ability, ultimately, to deny an appropriation to pay money damage did not undermine the Court of Claim's Article III stature. *Glidden*, 370 U.S. at 569-572; *cf. id.*, at 552-554 (reviewing conditions placed on early Court of Claims).

[33] *See, e.g.*, the history of legislative adjudication or doctrine on the authority of Congress to declare war. *See supra* notes 29-32.

[34] Like this essay, Brian Galle and Aziz Huq put Congress's authority to incur debt in particular ways at the center of their argument. *See* Brian Galle & Aziz Z. Huq, *The Constitutional Money Problem*, 92 U. CHI. L. REV. 333, 353-54 (2025). In that sense, they recognize an essential prerogative. Unlike their work, this paper embeds delegation to banks as an anti-executive strategy with a long historical tradition and connects debt made through national bank credit to the core of money-making. *See infra* notes 43-164.

[35] *See, e.g.*, Lev Menand, *The Federal Reserve Board and the FOMC Are Government Regulators Not Banks: A Reply to Baude, Bamzai, and Nielson* (Jun. 3, 2025) https://ssrn.com/abstract=5279300 (last accessed Feb. 4, 2026); Lev Menand, *The Supreme Court's Fed Carveout: An Initial Assessment* (May 27, 2025) https://ssrn.com/abstract=5266613 (last accesssed Feb. 4, 2026); Daniel Tarullo, *The Federal Reserve and the Constitution*, 97 S. CA. L. REV. 1, 95 (2024); Benjamin Dinovelli, *The Federal Reserve Exception* (Aug. 26, 2025) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5277476 (last accessed Feb. 4, 2026). As Aditya Bamzai and Aaron L. Nielson argue, legislative efforts to design national and central banks appropriately inform consideration of the Federal Reserve Systems's constitutional stature. *See generally* Aditiya Bamzai & Aaron L. Nielsen, *Article II and the Federal Reserve*, 109 CORNELL L. REV. 843 (2024). The approach taken here departs from theirs by focusing on money-making as the essential feature as opposed to private ownership and in identifying the role of money-making as a protective prerogative to democratic sovereignty.

terrorem aim. If the unitary executive theory, taken seriously, reaches the Federal Reserve, perhaps the Court will reconsider the logic of that theory.[36]

The legislative struggle against overweening authority has been messy, nonlinear, and grounded. That reality vanishes exactly as the unitary executive increases in abstraction and uniformity. With it goes the capacity to preserve and calibrate carefully the checks and balances that comprise the separation of powers. It is time to step back, reassess, and reassert the powers and prerogatives that allow legislative representatives to work in the name of the people. The most essential of those authorities is the prerogative to make money.

I. The History: Money and Legislative Sovereignty

The power to make money is the power to rule. Before the spending power, before the power of the purse, before the management of an economy, modern legislatures claim the authority to make sovereign money. Whoever has that power can direct spending with their new flow of funds, can replenish a purse otherwise too easily emptied, and can supply money to a growing economy. As the medium that represents value, money is the very resource that states gather in taxes, the elemental support for a polity's survival. For that reason, monetary sovereigns like the United States claim the authority to create a flow of sovereign money.[37] Those core moneys are the heart of domestic exchange. They furnish the reserves that retail banks will multiply and the cash that counts as legal tender.[38]

For centuries, observers have argued that the people must control the authority to make money. Nicholas Oresme put the case sharply in 1345. Kings may control the mints, he admitted. They may determine how much silver or gold to put in each coin. But they should only dilute that content—and thus increase the money supply—in emergencies that called for quick action to defend the kingdom.[39]

English legislators forced the issue at just the same time. Over the course of the fourteenth century, they hammered out limited parliamentary authority over taxation. While the Crown controlled initiative over the levy, the monarch now had to consult the Commons and justify royal demands.[40] Key to the rising ambition of Parliament was a corollary: the Crown could not debase the money supply. As legislators recognized, if the king could expand the money supply by diminishing the content in each coin—as in Oresme's France—he could supply his needs for money without relying on Parliament.[41] The struggle for the separation of powers in early medieval England depended, literally, on the legislators' success in restraining the Crown's

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[36] Justice Kagan's opinions in Seila Law LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183 (2020), and *Wilcox* can be so read. *See also, e.g.*, Tarullo, *supra* note 35 at 4; Feldman, *supra* note 10.

[37] *See, e.g.*, Robert Mundell, *Money and the Sovereignty of the State*, *in* Monetary Theory and Policy Experience (Axel Leijonhufvud ed. 2001).

[38] Frederic S. Mishkin, The Economics of Money, Banking, and Financial Markets 413 (9th ed. 2010).

[39] *See generally* Oresme, *supra* note 15.

[40] *See* G. L. Harriss, King, Parliament, and Public Finance in Medieval England to 1369 356-375 (Clarendon Press, 1975).

[41] Desan, *supra* note 1 at 152-153, 160-171.

power to create money.

Across centuries of change, Parliament's claim over taxation remained "at the heart of the separation of powers."[42] Likewise the structural connection between that claim and money creation: only so far as Parliament could secure latter was the former safe. By the seventeenth century, a rising tide of liberal theory—the Levelers, Thomas Hobbes, John Locke among others – pitched a constitutional order with individual interests at its heart. The logic made possible a parliamentary experiment—for that was all it was—in money-making.[43] Parliament granted a charter to a group of investors as the Bank of England. The legislature then invited them to make a long-term loan at a charge to the government—but only so far as Parliament provided.[44] It then allowed them to make that loan predominately in bank notes. Parliament took the paper money, spent it, and taxed it back in.[45] People could redeem bank notes for gold and silver coin, to be sure. But because people could also use them to pay the government in lieu of a coin, the bank notes stood on their own.

Note that Parliament had changed the very structure for making money. It had appointed an outside agent—the investors—to issue bank notes that could be used immediately as money.[46] But Parliament had also dictated the circumstances in which the outside agent could act. It could issue bank notes against a particular asset—the government's debt.[47] That is the loan that Parliament committed to repay by taxing back in the Bank of England's notes.[48] The arrangement ensured demand for the notes. It also cut the monarch out of the process. Put simply, the structure of the bank fenced out the Crown's interference. Observing the critical nature of that feature of central banking, a deputy governor of the Bank of England would later

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[42] TUCKER, *supra* note 16 at 288.

[43] The sketch made here overstates, in the simplicity of it outline, the clarity of the trend towards parliamentary control of money creation. The process proceeded improvisationally, in fits and starts. It was controverted and interpreted discrepantly. For more depth, *see, e.g*., J. H. (JOHN HAROLD) CLAPHAM, SIR, THE BANK OF ENGLAND: A HISTORY (1970); ALBERT EDGAR FEAVEARYEAR, THE POUND STERLING: A HISTORY OF ENGLISH MONEY (E. Victor Morgan ed., 2d ed. 1963); DESAN, *supra* note 4.

[44] The Bank's lending was limited to the amount of its capital except as authorized by Parliament. *See* Bank of England Act, 5 & 6 W & M ch. 20 § 26 (1694); DESAN, *supra* note 4 at 316.

[45] The government had an obvious incentive to take the bank notes, because it could always return the bank notes to the Bank of England in payment for the loan. *See generally* DESAN, *supra* note 4.

[46] According to one of its proponents, national banks were widely rumored to be associated with "Republicks" so that "the very establishing of a bank, in England . . . will of course alter the government, for that is to entrust the fund of the nation in the hands of the subjects." William Paterson, A BRIEF ACCOUNT OF THE INTENDED BANK OF ENGLAND 8 (capitalization removed); *see also id.* at 2 (noting consensus that banks were associated with commonwealths). Paterson noted, as if anticipating executive claims to dominance, that others argued that a king, by influencing the wealthy investors running the bank, could become "absolute." *Id.* at 7. Paterson, at pains to increase the Bank's political chances, refuted both views as extreme. *Id.* For Tory arguments that the Bank signified that England would become a republic, see PINCUS, *supra* note 4, at 394-395.

[47] *See supra* note 44.

[48] For the evolution of tax receivability of Bank of England notes, only formalized in 1833, *see* DESAN, *supra* note 4, at 317. The British entrenched the viability of the system by building a robust tax state, itself another a function of parliamentary authority. *See id.*, at 316-317; *see* JOHN BREWER, THE SINEWS OF POWER: WAR MONEY AND THE ENGLISH STATE, 1688-1783 30-45, 88-130 (1988).

observe that the separation of powers "would be undermined if the executive government could use a power to print money as a substitute for legalized taxation."[49] Conversely, Parliament had inserted itself into the money-making process, a strategy it would expand over the decades to come.[50]

American settlers innovated another legislative-centric logic at almost the same moment. From the 1690s on, colonial representatives displaced imperial authority by claiming that the provincial legislatures could create currencies. According to royal governors, only silver and gold coin counted as money, a constraint that left provinces agonizingly short on cash and dependent on an outside money supply. In response, provincial assemblies invented a domestic money when they began spending provincial paper promises as cash.[51] (They acted directly, as imperial authorities prohibited banks in the colonies.[52]) The legislatures ensured demand for their promises by taking them back for taxes and other public fees.[53] The innovation literally relocated spending power to the assemblies, marginalizing the royal governors who were left to work with whatever coin they could gather.[54]

British attempts to re-take monetary power from provincial assemblies provoked fierce defenses of American legislative authority during the 1760s. The cause unified poor settlers who demanded money for everyday use and elites in legislatures who had risen to power on the ground of their ability to create a money supply for their economies.[55] According to recent accounts, the colonists' commitment to their legislatures' capacity to create money dramatically escalated the fervor for revolution.[56]

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[49] TUCKER, *supra* note 16.

[50] Investors in the Bank of England were private. As contemporaries emphasized, that character set them apart from Crown officials who had lost legitimacy in the Stop of the Exchequer. *See, e.g.*, J. K. Horsefield, *The 'Stop of the Exchequer' Revisited*, 35 ECON. HIST. REV. 511 (1982). Private investors brought independent judgment to the issue when to expand the money supply. Third-party agents could, however, be public actors tasked with making loans when economic circumstances permitted, their independence directed by statute. Walter Bagehot would famously argue in 1857 that the Bank of England acted for the public and should recognize its public-regarding responsibilities. *See generally* BAGEHOT, *supra* note 5. The Bank of England was nationalized in 1946. Bank of England Act, 9, 10 Geo. 6, ch. 27 (1946).

[51] *See, e.g.*, KATIE MOORE, PROMISE TO PAY: THE POLITICS AND POWER OF MONEY IN EARLY AMERICA 17-35 (2024); E. James Ferguson, *Currency Finance: An Interpretation of Colonial Monetary Practices*, 10 WM. & MARY Q. 153, 168, 171-175 (1953).

[52] *See* Farley Grubb, *A Transaction-Cost Model of Chronic Specie Scarcity and the Evolution of Monetary Structures in Constrained Colonial Economies*, 19 CLIOMETRICA 661, 670 (2025).

[53] *Ibid.*

[54] MOORE, *supra* note 51 at 13-15, 30-32, 43; ANDREW DAVID EDWARDS, MONEY AND THE MAKING OF THE AMERICAN REVOLUTION 6-10, 21-46 (2025); Christine Desan, *Money as a Practice of Value: Creating a Respiratory System for Capital*, 82 WM. & MARY Q. 355, 383-85 (2025).

[55] *See, e.g.*, JACK P. GREENE, THE QUEST FOR POWER: THE LOWER HOUSES OF ASSEMBLY IN THE SOUTHERN ROYAL COLONIES 1689-1776 (1972) (detailing rise of the asssemblies); HENRY RUSSELL SPENCER, CONSTITUTIONAL CONFLICT IN PROVINCIAL MASSACHUSETTS (1905) (tracking rise of assembly in Massachusetts).

[56] EDWARDS, *supra* note 54 at 97-199.

The Framers fully understood that the authority to issue money was essential to sovereignty. They located all authority over money creation along with taxation in their own hands, displacing the state legislatures' claims to make money.[57] Congress has controlled that authority from the Founding forward. Nothing about its action was as simple as the outline below. As in the British case, many initiatives were improvised, controverted, and experimental.[58] But the trajectory over time was consistent, indeed unmistakable.

Coin was the start of the story but the least of the matter. Article I clearly claimed "the power to coin money" for the legislature, Art. I, Sec. 8. The Constitution also expressly prohibited the power to coin to the states, Art. I, Sec. 10.[59] So far so good—but the future belonged to circulating credit as cash; the growing importance of the Bank of England made that abundantly clear.

Congress immediately created a series of credit instruments that operated as money. Those credit instruments drew on a juggernaut of legislative authority, as described by the Supreme Court. "The breadth and comprehensiveness of the words" giving power to Congress "are nowhere more strikingly exhibited than in regard to . . . revenue, finance, and currency," wrote the Court in *Julliard v. Greenman*, 110 U.S. 421, 439 (1884). That case upheld Congress's authority to issue legal tender notes "as the legislature of a sovereign nation, being expressly empowered by the constitution."[60] A later court captured that authority in terms hard to imagine more sweeping:

The broad and comprehensive national authority over the subjects of revenue, finance and currency is derived from the aggregate of the powers granted to the Congress, embracing the powers to lay and collect taxes, to borrow money, regulate commerce with foreign nations and among the several States, to coin money, regulate the value thereof, and of foreign coin, and fix the standards of weights and measures, and the added express power 'to make all laws which shall be necessary and proper for carrying into execution the other enumerated powers.'[61]

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[57] *See* U.S. CONST., art. I, § 10, cl. 2; Farley Grubb, *The US Constitution and Monetary Powers: An Analysis of the 1787 Constitutional Convention and the Constitutional Transformation of the US Monetary System*, 13 FIN. HIST. REV. 43 (2006).

[58] See the debate over the constitutionality of the Bank of the United States, between Alexander Hamilton, Thomas Jefferson, and James Madison. "Introductory Note: Second Report on the Further Provision Necessary for Establishing Public Credit (Report on a National Bank), [13 December 1790]," *Founders Online,* National Archives, https://founders.archives.gov/documents/Hamilton/01-07-02-0229-0001; "Opinion on the Constitutionality of the Bill for Establishing a National Bank, 15 February 1791," *Founders Online,* National Archives, https://founders.archives.gov/documents/Jefferson/01-19-02-0051; "The Bank Bill, [8 February] 1791," *Founders Online,* National Archives, https://founders.archives.gov/documents/Madison/01-13-02-0284; Jerry Markham, *The Legacy of the First and Second Banks of the U.S.* (Dec. 10, 2026), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5902102 (last accessed Feb. 4, 2026).

[59] The Decision of 1789 did not reduce Congress's power over coin because Art. I, Sec. 8 retained to Congress the authority in full "[t]o coin money, regulate the value thereof, and of foreign coin." U.S. CONST., art. 1, § 8.

[60] *Julliard*, 110 U.S. at 449.

[61] *Baltimore and Ohio R.R.*, 294 U.S. at 303.

Congress would exercise that capacity through a series of institutions. In 1791, it established a national bank and authorized it to issue paper dollars that were promises-to-pay backed by the public debt and other assets. It would recharter a national bank in 1816. When it chose to structure money-making by a bank, Congress distanced the process from executive interference, as had Parliament. And indeed, the president had no or very limited influence over either bank.[62] Across the next decades, Congress also issued paper dollars directly, spending those promises-to-pay into circulation backed by the public faith of the United States.[63]

Both forms of money were small, circulating promises of value made by the United States to those holding them. According to the promise, people could use them as money when paying the government.[64] Both forms of money circulated as cash.[65] And both forms of money dispensed congressional authority to make money for critical ends. As Alexander Hamilton argued, the three strongest reasons to charter the Bank of the United States were to augment the circulating and thus "active" capital of the country, to facilitate loans to the government, and to ease the collection of taxes. Nation-building at its most basic required money creation.[66]

As for direct-issue dollars, they were arguably even more essential. Congress created "Treasury notes" by pledging the public credit. The legislature vehemently debated and adjusted the terms of that pledge—and thus the nature of value in each note—over the course of five acts during the War of 1812.[67] By war's end, the government had spent more $30 million dollars in that form.[68] Congress would issue Treasury notes frequently over the following decades.[69]

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[62] An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, §§ 7, 8, 12, 1 Stat. 191, 194-96 (1791) (allocating no role to the president to appoint directors); An Act to Incorporate the Subscribers to the Bank of the United States, ch. 44, § 8, 3 Stat. 266, 269-70 (1816) (authorizing the president to appoint, with the advice and consent of the Senate, and to remove 5, or 1/5, out of 25 directors). In response to objections by Madison during legislative debates that the President might be able to borrow excessively from the first Bank, Hamilton emphasized the borrowing limits on federal, state, and foreign governments. See Lev Menand, *The Unitary Executive and the Federal Reserve*, 94 FORDHAM LAW REV.__ (2026).

[63] RICHARD H. TIMBERLAKE, MONETARY POLICY IN THE UNITED STATES: AN INTELLECTUAL AND INSTITUTIONAL HISTORY 14-18, 71-74 (1993).

[64] The notes (and deposit liabilities) of the Banks of the United States 1 and 2 were taken for value by the United States. An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, § 10, 1 Stat. 191, 196 (1791); An Act to Incorporate the Subscribers to the Bank of the United States, ch. 44, § 14 Stat. 266, 274 (1816). The direct-issue notes of the United States were as well. TIMBERLAKE, *supra* note 50 at 14; Legal Tender Act, ch. 33, 12 Stat. 345, 345 (1862).

[65] *See* An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, § 10, 1 Stat. 191, 196 (1791) (statutory acceptance by public of BUS notes promoted general use as cash); TIMBERLAKE, *supra* note 63 at 14 (Treasury notes); *id.* at 29 (BUS 2 notes).

[66] "Final Version of the Second Report on the Further Provision Necessary for Establishing Public Credit" (Report on a National Bank), Dec. 13, 1790," *Founders Online*, National Archives, https://founders.archives.gov/documents/Hamilton/01-07-02-0229-0003 (last accessed Feb. 4, 2026).

[67] JOHN JAY KNOX, UNITED STATES NOTES: A HISTORY OF THE VARIOUS ISSUES OF PAPER MONEY BY THE GOVERNMENT OF THE UNITED STATES 21-39 (3rd rev. ed. 1894).

[68] TIMBERLAKE, *supra* note 50 at 15.

[69] Amounts ranged from $3 to $20 million. *Id.* at 85. Both coin and Treasury notes functioned as reserves for state-chartered banks. *Id.* at 21. Those banks expanded the money supply in private credit liabilities

Treasury notes and coin furnished the reserves used by state-chartered banks. Those state-chartered banks spread through the first half of the 19th century, given local and regional need for currencies.[70] State-chartered banks offered private bank notes—credit that operated as money. All of that credit was anchored on the federal dollar, which furnished the unit of account. While the federal dollar remained the anchor of the system, federal and state capacity to police state-based bank lending varied widely. The Banks of the United States operated to constrain over-issue of private bank credit by cashing that credit and other methods, while states moved to a series of regulatory regimes known, counter-intuitively, as free banking legislation.[71] (The strategy was to set universally applicable conditions which, if met, allowed any group of investors to incorporate. Thus, banking was "free" in the sense that it no longer required specifically granted charters.[72])

In effect, Congress during these decades allowed state-chartered banks to amplify the reach of the federal dollar. The strategy made sense given the limited capacity of the national government during the antebellum period. But the strategy also carried risks for Congress. So far as it relied on state governments to support circulating credit in state-chartered bank notes, it fueled state power. Wholly owned state banks could be read (although the Supreme Court did not) to issue bills of credit, violating Article I, Sec. 10's prohibition on those instruments.[73] Note, however, that Congress was sharing its power with state *legislatures*. The strategy may have raised *federalism* eyebrows; it did not raise separation of powers problems. President Jackson would, in fact, attack the policing work of the Bank of the United States through conventional lawmaking means—the veto—not by trying to assume control of the Bank.[74]

Jackson was not finished—his administration moved to increase Treasury power over the money supply in a series of ways. Some, like pressing for congressional investigations of the Second Bank and its director, Nicholas Biddle, observed existing norms of legislative authority. Other, like the drive to control the placement of government deposits as the Bank wound down, pushed those parameters.[75] So far as holding public money strengthened a state-chartered bank and stabilized its balance sheet, it allowed that bank to extend its own issues. [76] Conversely, Jackson would later remove surplus federal revenue from banks altogether, a policy that may have

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that promised the U.S. dollar, which functioned throughout as the monetary base or only legal tender in the United States.

[70] Richard Sylla, *U.S. Securities Markets and the Banking System, 1790-1840*, REV., FED. RSRV. BANK OF ST. LOUIS 83, 86 & Table 1 (1998); *see generally* Richard Sylla, et al., *Banks and State Public Finance in the New Republic*, 47 J. ECON. HIST. 391 (1987) (tracing broad turn towards state-chartered banks).

[71] TIMBERLAKE, *supra* note 63 at 10-11, 28-42; *see* BRAY HAMMOND, BANKS AND POLITICS IN AMERICA FROM THE REVOLUTION TO THE CIVIL WAR, 144-196, 227-250, 549-603 (1957) (mapping different state bank legal regimes); *see generally* STEPHEN MIHM, A NATION OF COUNTERFEITERS: CAPITALISTS, CON MEN, AND THE MAKING OF THE UNITED STATES (2007) (exploring variable value of state bank notes).

[72] HOWARD BODENHORN, STATE BANKING IN EARLY AMERICA: A NEW ECONOMIC HISTORY 183-218 (2003).

[73] *See generally* Briscoe v. Bank of Kentucky, 36 U.S. 257 (1837); *but see* Craig v. Missouri, 29 U.S. 410 (1830) (striking down direct state issues as 'bills of credit').

[74] HAMMOND, *supra* note at 71 at 369-410. In fact, Biddle would easily rebuff an early "feint" by Jackson to use partisan influence over selection of directors. *Id.*, at 369-370; Dinovelli, *supra* note 35 at 23-24.

[75] TIMBERLAKE, *supra* note 63 at 43-46, 51.

[76] TIMBERLAKE, *supra* note 63 at 51.

contributed to the Crisis of 1837.[77] Jackson's initiatives underscore how dynamic was—and is—the struggle between Congress and the executive to control money-making.[78] Congress would, however, retain authority to define the boundaries of presidential power, just as it retained the authority to displace state-chartered bank credit from the money supply.[79] It would use that authority at the Civil War.

That threat to national authority ended congressional reliance on state-chartered bank credit. Congress expanded its direct-issue dollars near the War's start when it created and spent some $450 million "U.S. notes" into circulation. U.S notes—greenbacks—were an essential constituent of the Union's finance.[80] Next, Congress passed the National Currency Act in 1863 to establish nationally chartered banks as money creators, expanding and refining the system a year later.[81] Congress maintained control of their money issue, indeed control that would prove too tight. Those banks could issue notes only so far as the notes were collateralized by government bonds; the notes' value could not exceed 90% of the face or market value of the bonds, whichever was lower.[82]

The Federal Reserve System stands directly in this line of congressional initiatives that create money. The decades after the Civil War set the stage. Congress taxed in greenbacks, which had become indispensable to economic activity, over a long and deflationary period. As for credit and currencies provided by the national banks, they proved insufficient given the cap on issues, among other reasons.[83] The system was plagued by cash scarcity, instability, and inelasticity.[84]

Congress constructed the Federal Reserve System in response. The System is today a complex institution, including a Board of Governors and the Federal Open Markets Committee (FOMC) that works with twelve Federal Reserve Banks to maintain stable conditions for economic

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[77] TIMBERLAKE, *supra* note 63 at 53-59. Jackson's executive order that public land sales be made with specie as opposed to bank liabilities would, likewise, contract bank reserves and thus have a deflationary effect. *Ibid*. at 51-53.

[78] As Christina Parajon Skinner emphasizes, Congress has at times granted the President significant discretion to shape the money supply, a development she dates to the New Deal. *See* Christina Parajon Skinner, *The Monetary Executive*, 91 GEO. WASH. L. REV. 164, 184-207 (considering series of delegations including the Emergency Banking Act, the Thomas Amendment to the Agricultural Adjustment Act, and provisions of the Trading with the Enemy Act).

[79] *See generally* Veazie v. Fenno, 75 U.S. 533 (1869).

[80] Desan, *The Monetary Structure of Economic Activity*, LAW AND CONTEMPORARY PROBLEMS 78, 85-86 (2024); *see generally* Ariel Ron & Sofia Valeonti, *The Money War: An Interpretation of Democracy, Depreciation, and Taxes in the U.S. Civil War* (Aug. 21, 2021) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3906049 (last accessed Feb. 4, 2026).

[81] Jason Dunn & David C. Wheelock, *National Banking Acts of 1863 and 1864*, FED. RESERVE HIST. (July 2022) https://www.federalreservehistory.org/essays/national-banking-acts.

[82] TIMBERLAKE, *supra* note 63 at 87, 433 n.7; *see also* RICHARD FRANKLIN BENSEL, YANKEE LEVIATHAN: THE ORIGINS OF CENTRAL STATE AUTHORITY 268-274 (1990) (reviewing regional cash shortages).

[83] BENSEL, *supra* note 82 at 287-290; TIMBERLAKE, *supra* note 63 at 86-88, 93-97.

[84] BENSEL, *supra* note 82 at 287-290; *see generally* Perry Mehrling, *Retrospectives: Economists and the Fed: Beginnings*, 16 J. ECON. PERSPS. 207 (2002).

growth.[85] Practically speaking, "the Fed" operates as a set of regional reserve banks coordinated in key aspects by the Board of Governors and FOMC.[86] In that critical aspect, its money creative power shares the distinctive modern design that Parliament first innovated. It is a banking architecture, split institutionally between operations and management to ensure public control.[87]

The font of the Fed's power is clear. Congress assigned the Fed the prerogative it had long controlled—the basic task of money creation. The Board of Governors, the FOMC, and the Reserve Banks carry out that task jointly.[88] The Fed's "dual mandate," 12 U.S.C. §225a, is well-known: the Fed should maximize employment and price stability.[89] But the dual mandate *starts with money creation*. That is the active force, the instrumentality, the secret weapon that the Fed wields.

Thus, §225a mandates that the Board of Governors working with the FOMC:

shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.[90]

In turn, the Federal Reserve Act specifies the ways that the regional Reserve Banks can increase the volume of the monetary base—i.e., create money—by issuing Federal Reserve liabilities that act as money ("reserves"). These reserves are injected into the banking system when the Reserve Banks engage in lending or asset purchases under the terms defined by the Federal Reserve Act.[91]

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[85] Board of Governors of the Federal Reserve System, PURPOSES AND FUNCTIONS 1-5 (2019); Michael D. Bordo and Edward S. Prescott, *Federal Reserve Structure, Economic Ideas, and Monetary and Financial Policy*, Working Paper 26098, NBER WORKING PAPERS SERIES 5-11 (2019).

[86] *See* Bordo and Prescott, *supra* note 85.

[87] The Bank of England, nationalized in 1946, *see infra* note 50, has a similar governance structure. As Lev Menand and others have noted, the Board of Governors is a separate body from the Federal Reserve Banks. *See generally* Menand, *supra* note 35. That is true as a formal matter but understates the governing purpose of Board in the role of the Banks.

[88] *See generally* Bordo and Prescott, *supra* note 85 at 5-58 (evaluating flow of ideas between Board, regional banks, and FOMC); Menand, *supra* note 35.

[89] The mandate is actually triple, but moderate long-term interest rates are generally considered part of price stability. Board of Governors, *supra* note 85 at 23-26.

[90] 12 U.S.C. § 225a (emphasis added). Congress authorized the Fed to issue dollars in the original FRA, see §§ 10B, 13, 13A, 14, 16, within the constraints of a gold reserve requirement (35% against member bank deposits and 40% against outstanding Federal Reserve notes). Fed policy also complied with the Real Bills doctrine, which authorized advances on short-term commercial paper. For expansion of the monetary base during the early period, see TIMBERLAKE, *supra* note 63 at 263-269. The modern language was added in 1977.

[91] When they make "advances" the Reserve Banks are advancing sovereign money in the form of Federal Reserve liabilities to the borrower. These loans must be secured by adequate collateral. *See* Federal Reserve Act of 1913, §§ 10B, 13(3), codified at 12 U.S.C. §§ 347b, 343(3). Open market operations involving the purchase and sale of government bonds developed as the principal mode of money creation during the following decades. *See* Federal Reserve Act of 1913, § 14, codified at 12 U.S.C. §§ 353-359, and § 16, codified at 12 U.S.C. §§ 411, 412. For the current technology of money creation through

Making monetary policy, acting as lender of last resort, and coordinating the payments system—all follow directly from the Fed's money creative power. While often discussed in isolation, treating them as free-standing activities unwittingly divorces consequences from the capacity that enables them. Likewise, treating components of the Federal Reserve System as autonomous entities mistakes the character of that System. The Board, the FOMC, and the Reserve Banks together comprise a banked architecture that produces the high-powered money supply. [92]

The banked architecture of the Fed matters. While Congress need not create money using a bank (witness the Greenback, Treasury notes, and other direct issues), its choice to use a bank or, in the case of the Fed, a banking institution, is deliberate. Drawing on the Bank of England, national banks operate in a way that ties their enabling authority—Parliament in the UK, Congress in the US—together to a third-party agent.[93] The enabling authority specifies which long-term assets, typically government debt, a bank can acquire as collateral for a loan or as a purchase. The third-party agent acquires that safe asset, issuing in return a bank credit—a note or a deposit liability—that can be used at face value immediately. The converting operation is called maturity transformation: a longer-term asset is held by the bank, which issues short-term demand liabilities in its place. Voilà, a currency enters circulation. The third-party agent guides the process of injecting the new flow of credit money while the legislative authority sets the terms of operation. The very process of money creation is structured to confine one-off political interventions.[94]

As Paul Tucker, former deputy governor of the Bank of England puts it, an independent monetary authority is a *means* underpinning the separation of powers: "[M]onetary policy could otherwise be used as an instrument of general taxation by the elected executive." [95] By designating an agent that will create money according to a set of statutory directives, Congress preserves its legislative prerogative while managing the immense complications of modern

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repurchase agreements, *see* MORGAN RICKS, THE MONEY PROBLEM: REITHINKING FINANCIAL REGULATION 50, 93-101 (2016); PERRY MEHRLING, THE NEW LOMBARD STREET: HOW THE FED BECAME THE DEALER OF LAST RESORT 23-29 (2011).

[92] *See generally* Bordo and Prescott, *supra* note 85; Menand, *supra* note 35.

[93] *See generally supra* TAN notes 46-50, note 91.

[94] The structural protection most obviously applies to the executive. Congress is itself handicapped because it has no way, but through lawmaking, to intervene. Intervene through lawmaking it always could, but that is not the kind of one-off political pressure that produces easy money and its attendant dangers. Compare the interesting argument by Brian Galle and Aziz Huq that we should infer a constitutional principle of independence for the Fed from Article I, § 8's borrowing power. As they reason, a central bank with significant independence creates credible commitment that the government will repay public debt. Huq & Galle, *supra* note 34 at 353-54 (forthcoming, 2025). The argument here, by contrast, does not assume that CBI insulates the Federal Reserve from congressional interference. Within the terms of its ability, Congress retains the ability to pressure the Fed.

[95] TUCKER, *supra* note 16 at 289, 290. For Tucker, an independent monetary authority is not, thus, "a consequence of the time-inconsistency welfare problem inherent in monetary policy as such," but a 'derivative' of separation of powers for a fiat monetary system. *Id.* at 289. Given its critical role even during the commodity money and gold standard regimes, I would instead locate it as a safeguard, if not generator of the separation of powers.

money.

The banked system has a related advantage. Maturity transformation can expand the money supply for private as well as public use. The early Bank of England again furnished the model when its directors, who were lending the British government bank money out its front door, began lending private borrowers bank money out its back door.[96] The operation worked as follows. Private borrowers could offer the Bank a long-term asset like a promise to (re)pay a loan in 12 months. The Bank made an advance to the borrower in its Bank notes or Bank deposit liabilities. Those Bank notes or deposits were, like the ones lent to the government, promises to pay the official sovereign money, so the system worked as a whole. (The money supply did not become excessive because, so far as private loans were repaid, there was withdrawal of money to match the issue of money.[97]) Private borrowing could expand the de facto money supply in response to private demand.

Private demand for a money, one recognized and supported by the government, would come to dwarf the government's demands for money. Our system operates those two tiers to deliver each kind of money. The Federal Reserve works only out of the front door, so to speak. It creates the monetary base, those moneys authorized by the enabling authorities as Federal Reserve Banks acquire long-term assets as collateral for loans or by purchase.[98] But a retail (commercial) banking system has developed to cater to private demand. Holding the sovereign moneys made by the Fed as reserves, it issues deposit liabilities that act as money to private borrowers.[99] Depending on how much private borrowers want to borrow, that private credit money supply grows or diminishes. That correlates with an economy that is heating up or cooling down. Today, private credit money supplies the great majority of the de facto money supply.[100]

The Federal Reserve runs the two-tiered system, modulating the flow of private credit from retail banks, taking care of the government's own needs, and doing both in a way that is stable and trustworthy.[101] As Lev Menand has made clear, that reality exposes the artificiality, the folly, of attempts to parse the Fed's authority into monetary and regulatory categories. Those operations are fused both historically and functionally. [102]

Monetary policy targets the lending behavior of commercial banks while the managerial work of the Fed, whether labeled regulatory and supervisory, defines the very parameters of that

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[96] DESAN, *supra* note 4 at 320.
[97] *See generally* Perry Mehrling, *Payment vs. Funding: The Law of Reflux for Today* (Institute for New Economic Thinking Working Paper No. 113 ed. 2020).
[98] *See* MISHKIN, *supra* note 38.
[99] *See generally* Morgan Ricks, *Money as Infrastructure*, 3 COLUMBIA BUS. L. REV. 757, 773-779 (2018) (reviewing institutional structure of private money creation).
[100] Press Release, Federal Reserve, Money Stock Measures – H.6 Release (Dec. 25, 2025), https://www.federalreserve.gov/releases/h6/current/default.htm#t1tg1f1. M1 includes cash, demand deposits owned by the domestic non-bank public (not other banks, the government, or foreign official entities) and other very liquid instruments or deposits. *Id.*
[101] *See* Ricks, *supra* note 99 at 773-801.
[102] *See generally* Menand, *supra* note 35; Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking,* 88 U. CHI. LAW REV. 1361, 1383-1396 (2021) (exploring origins of national banking law in means of managing money supply).

behavior.[103] Capital requirements determine that banks fund part of their work with equity[104]; liquidity coverage ratios protect against runs by wholesale funders[105]; risk retention rules for mortgage lending discourage bubble lending[106]; reserve requirements limit credit expansion via demand deposit creation (when the requirements are binding)[107]; and supervisory practices establish accounting transparency and compliance.[108] Those managerial tools determine, de facto, the growth and volatility of credit and thus the viability of the monetary system. Producing the monetary base alone would not accomplish that imperative.[109]

Put another way, there is no inherent relationship between the base money supply directly created by the Fed and the broader money supply, created by retail banks. The broader money supply is, instead, a function of regulatory and supervisory tools as well as monetary policy. Stripping away those tools would disable Congress's design for money creation and distort its results.

Essential managerial powers of the Fed thus come within the scope of its banking authority.[110] That institutional form evokes the other prerogative we met above. The Court of Claims, now the Court of Federal Claims, uses a particular structure—an adjudicative tribunal—to resolve claims against the government. That institution also ties the authority of its judges to Congress, which has imposed a ceiling on aggregate judgments.[111] In each case, the design allows

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[103] *See* Ricks, *supra* note 99 at 773-801.
[104] Mark Labonte and Andrew P. Scott, Bank Capital Requirements: A Primer and Policy Issues, CONGRESSIONAL RESEARCH SERVICE (Mar. 9, 2023), available at https://www.congress.gov/crs-product/R47447.
[105] Liquidity Coverage Ratio: Liquidity Risk Measurement Standards, 79 FED. REG. 61440 (Oct. 10, 2014), available at https://www.federalregister.gov/documents/2014/10/10/2014-22520/liquidity-coverage-ratio-liquidity-risk-measurement-standards.
[106] Credit Risk Retention, 79 FED. REG. 77602 (Dec. 24, 2014), available at https://www.govinfo.gov/content/pkg/FR-2014-12-24/pdf/2014-29256.pdf.
[107] Joshua N. Feinman, *Reserve Requirements: History, Current Practice, and Potential Reform*, FED. RES. BULL.569 (June, 1993). Reserve requirements were reduced to zero during the 2020 pandemic and have not been reinstated. Board of Governors of the Federal Reserve System, *Reserve Requirements* (Mar. 26, 2020), available at https://www.federalreserve.gov/monetarypolicy/reservereq.htm.
[108] David Perkins, *Bank Supervision by Federal Regulators: Overview and Policy Issues*, CONGRESSIONAL RESEARCH SERVICE, (Dec. 28, 2020), available at
[109] I am indebted to Marc Jarsulic for this formulation and to Conrad Milhaupt for sharpening my recognition of its consequence.
[110] Gary Gensler & Lev Menand, *Presidential Supremacy over Administrative Agencies*, THE ECONOMIC CONSEQUENCES OF THE SECOND TRUMP ADMINISTRATION: A PRELIMINARY ASSESSMENT 71 (Gensler et al., eds, 2025); *see generally* Lev Menand, *Why Supervise Banks? The Foundations of the American Monetary Settlement*, 74 VAND. L. REV. 951 (2021). Indeed, if we assume an executive mandated to effectuate rather than obstruct congressional directives, agencies like the FDIC and the OCC surely come within the protective mantle that the Constitution accords Congress's money creative authority. The line-drawing between essential and elective reach will be difficult to be sure and is beyond the scope of this article. For an argument to the effect that independence should not shield all supervisory power, see Christina Parajon Skinner, *The Independence of Central Bank Supervision* (Jun. 13, 2025), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5284859 (last accessed Feb. 4, 2026).
[111] *See supra* note 32.

Congress to share its workload while effectuating its prerogative.

II. MONEY-MAKING IN DEMOCRATIC THEORY

As the history suggests, money is intimate to sovereignty. Like a respiratory system for capital, money animates the domestic market. First, polities create money to source value in a commensurable form. In turn, they enable that value to circulate through a network of users, mobilizing resources for public and private uses. Along the way, polities curate the exchanges made in money by enforcing those they approve and leaving without support those they disapprove.[112] Those activities build the legal economy, a project of immense utility. That utility explains why governments create money again and again.

Creating money is easily within their reach. Again, the history suggests the most common approach. Communities that cohere organize themselves reciprocally. They deliver defense, welfare and other services to members and take contributions, voluntary or not, from those members. Money is created in that relational loop. Governments make a money by spending to particular people in promises of value—IOUs—as they mobilize resources. Those IOUs circulate as representatives of value. In turn, governments accept their own IOUs back from the universe of those owing taxes. The promises satisfy that obligation to contribution in lieu of in-kind or other material goods. [113]

As the examples above demonstrated, the American colonists made money most directly. They paid people with pledges of value, allowed those pledges to circulate, and then took them back for taxes.[114] When British legislators innovated banks of issue, they created an indirect alternative. They borrowed from the Bank of England in the form of *its* promises to pay. Parliament then spent the bank notes and accepted them back for taxes.[115]

Modern money is thus a very particular kind of debt, a small sovereign pledge of value that circulates. (We talk here about high-powered money, aka the monetary base, those dollars issued by the Federal Reserve as circulating cash or as liabilities held in reserve by commercial

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[112] For example, courts hold that debts have been paid when a legal tender of money is offered. Borrowers cannot, except with the consent of the creditor, settle debts by offering other kinds of payment—wood for example, or housekeeping. *See* Desan, *supra* note 80 at 104-109. For the articulation of money as a respiratory system, *see* Desan, *supra* note 54.

[113] DESAN, *supra* note 4 at 45-49 (reviewing logic), 311-322 (mapping logic in case of Bank of England).

[114] *See supra* note 51. As Adam Smith pointed out, the strategy would work independent of coin. *See generally* Adam Smith, *Chapter II: On Money Considered as a Particular Branch of the General Stock of the Society, or of the Expense of Maintaining the National Capital*, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1937 [1776]). And in fact, the settlers had little coin. Taxpayers had the option to give either coin or paper back to the province; they virtually all chose to give paper. *See generally* Grubb, *supra* note 52 (documenting likelihood of specie scarcity with economic modeling).

[115] *See supra* note 45. As in the case of direct issue, bank promises to pay can involve coin. Bank of England notes could be redeemed for coin. But once holders learned that they could use the notes for taxes, they did not need to redeem them. The government had, in effect guaranteed the value of the notes by taking them in lieu of coin for government payments. *See* DESAN, *supra* note 4 at 317-319.

banks.[116]) That small pledge of value—that tiny piece of debt—stands in for real things. The United States pays people for real labor and resources with the dollar pledge when it buys services and goods. People use that dollar pledge among themselves. Then people reciprocate by cashing in the dollar pledge when they use it to pay the government for real things, thus the amounts we turn over in taxes, fees, and other payments to build roads and bridges, support schools, fund defense, welfare, and health.

The logic is captured in U.S. law. It identifies dollars as the currency issued by the Federal Reserve (31 U.S.C. § 5103) and the currency issued by the Federal Reserve as "obligations of the United States" (12 U.S.C. § 411). Because each dollar represents such an obligation, the U.S. will receive it back in payment and enforce it as legal tender in exchange.[117] By agreeing on a pledge that is issued for value and taken back at that value, Congress creates a unit of account that measures value and circulates—money.[118]

While many polities can create money, democracies locate that protean authority in the hands of those most closely tied to the people. According to the Constitution, Congress alone is the body that can create debt, including in money form, in the people's name. Art. I, Sec. 8, cl. 1; see also Art. 1, Sec. 9, cl. 7. Only Congress can create debt because debt commands the flow of resources, both out in spending and back to the government in contributions.[119]

The capacity to spend with credit most obviously empowers authorities. Constituents attend to those with the ability to direct resources. We have seen that the American assemblies expanded their power in the 18th century by capturing that kind of control from the royal governors.[120] Government spending reshaped colonial society, drove nineteenth century development, and continues to comprise the single largest issue of funds into the economy today.[121]

Less obviously but just as critically, every pledge of value must be paid off; the legislature bears responsibility for laying that burden on constituents.[122] Tracing the reciprocal logic that makes money, economists explain that "money can be conceptualized as an asset or, more precisely, the claim to an asset, that holds value according to the utility people anticipate it will have in extinguishing a future tax obligation."[123] The future tax obligation matters; it is the material cost

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[116] See *supra* note 38.
[117] 12 U.S.C. §411; 31 U.S.C. §5103.
[118] For theorizing, see the asset pricing, functional finance, and quantity theoretic models reviewed at DESAN, *supra* note 4 at 45-50.
[119] Within Congress, the House of Representatives holds pride of place as the "most immediate representatives of the people," a stature that justifies its responsibility to originate revenue-raising bills. *See* THE FEDERALIST NO. 58, at 359 (Clinton Rossiter ed., 1961); *see also* U.S. CONST. art. I, § 7, cl 1.
[120] *See supra* note 55.
[121] *See* MOORE, *supra* note 51 at 35-49; Richard Eugene Sylla, *Shaping the US Financial System, 1690-1913: The Dominant Role of Public Finance*, *in* THE STATE, THE FINANCIAL SYSTEM AND ECONOMIC MODERNIZATION (Richard Eugene Sylla, et al. eds., 1999); *Federal Net Outlays as Percentage of Gross Domestic Produc*t, https://fred.stlouisfed.org/series/FYONGDA188S (approximately 22% in January 2024).
[122] By contrast, the Treasury may *manage* that debt, determining the terms of public securities. *See* 31 U.S.C. § 321.
[123] DESAN, *supra* note 4 at 45 (describing work by Thomas Sargent, Bruce Smith, and Charles N. Calomiris.) The fiscal value captured by the model includes a time-dependent discount. That discount is

for making the value of money real. There is no escape, even if a legislature fails to impose taxes. In that case, the value of money would tend to fall and prices to rise. Inflation is, of course, another kind of tax. People pay for money de facto as it loses value in their hands.[124] In other words, each unit of money is a real debt. Even as it carries great utility, it also imposes burdens on a community.

In a democracy, only the people's representatives have the authority to direct spending and to obligate their constituents. That lesson was hard-won, accomplished as legislatures assumed control of debt as a whole, including the longer-term obligations that would anchor short-term bank money. Parliament made that move just when we would expect, as it was developing its constitutional democracy during the Glorious Revolution. Before that period, the Crown assumed debt in its own name, weighing its kingdom with obligations according to its will.[125] During the 1690s, Parliament asserted control over national finances, displacing the Crown's ability to incur debt and funding those commitments with longer term revenue streams.[126] National debt, including public bonds backed by specified levies, displaced the personal obligations of the Crown. The Bank of England played a central role in the process, modeling the new order as an institution established by Parliament and receiving statutorily funded payment for debts.[127] The Bank would then begin managing the national debt for the legislature.[128]

The Americans picked up the British premise without question: legislative authority over the public debt was conspicuous and complete in the new United States. Congress alone controlled repayment of the Revolutionary war debt. Debates about how to do that consumed the legislature's first session. James Madison, Patrick Henry, James Jackson, and others weighed the claims of secondary holders against the claims of the soldiers and suppliers who had served the nation and sold their bonds in desperation afterwards.[129] Congress in turn assumed the debts of

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generally washed out by the premium people attribute to a medium that offers them transactional services. *See id*. at 48. For an analogous logic written in terms of contract rather than property, see generally Scott Sumner, *Colonial Currency and the Quantity Theory of Money: A Critique of Smith's Interpretation*, 53 J. ECON. HIST. 139 (1993), analyzed in DESAN, *supra* note 4 at 45-46, 48. A recent attempt to model money consistently with neoclassical premises joins these accounts by positing tax-based demand for money as a necessary precondition. *See* ROSS M. STARR, WHY IS THERE MONEY? WALRASIAN GENERAL EQUILIBRIUM FOUNDATIONS OF MONETARY THEORY 7 (2012).

[124] ROBERT J. BARRO, MACROECONOMICS 296-97, 300 (3rd ed. 1997).

[125] See, for example, the debt assumed by Charles II, and notoriously left unpaid in the 1680 and 90s. *The Bankers' Case*, adjudicated during the 1690s, marked a radical change in the way Parliament would treat Crown debt. *The Case of the Bankers*, *in* COBBETT'S COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE PRESENT TIME (T.B. Howell ed. 1812 [1696, 1700]). On appeal, the House of Lords permitted a suit against the Crown and found the debt binding on the kingdom. Parliament, however, determined how and when the debt would be repaid, prioritizing war expenses and granting creditors only a partial repayment over two decades. DESAN, *supra* note 4 at 281-290; *see generally* Horsefield, *supra* note 50.

[126] P. G. M. DICKSON, THE FINANCIAL REVOLUTION IN ENGLAND: A STUDY IN THE DEVELOPMENT OF PUBLIC CREDIT, 1688-1756 39-65 (1993); BREWER, *supra* note 48, at 30-45, 88-130 (1988).

[127] CLAPHAM, *supra* note 43 at 1-40.

[128] *Id.*; DICKSON, *supra* note 126 at 39-132, 200-260.

[129] *Debt Debates in the First Federal Congress, Statements of U.S. Representatives James Jackson, James Madison, Thomas Scott – Feb. 9, 11, 16, 1790*, *in* DOCUMENTARY HISTORY OF THE FIRST FEDERAL

the states, a strategy calculated to extend its national authority. Alexander Hamilton, acting as Secretary of the Treasury, advocated the idea—but the authority to implement it was pure Congress.[130]

Finally, Congress took care to create a "Sinking Fund," a commission composed of five high public officials, to oversee a reservoir of revenue dedicated to securing the value and pacing the repayment of the public debt. Members of the commission—the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, the Attorney General—determined when to buy government debt, an act that both paid off holders and supported the value of the securities.[131] As Christine Chabot has demonstrated, Congress constrained executive authority over the Commission. The President had no authority to remove several members of the Commission.[132] His appointments power was also limited, as was his input into the Commission's decision-making.[133] The very architects of the Constitution, from Hamilton and James Madison to Thomas Jefferson, Edmund Randolph, John Adams, and John Jay, raised no doubts about Congress's authority. [134] Note that that authority extended in circumstances that concerned debt management alone: the Sinking Fund had no authority to create money and was thus less immediate to the congressional prerogative over money-making.[135] That reach makes even more striking the extent of Congress's authority.

Put simply, public debt has gravity in the project of governing; it both enables public action and obligates a citizenry. In a society dedicated to the prospect of democracy, only a representative body should determine how much debt to assume and how to distribute the burdens it carries for the public welfare. Conversely, when a representative body makes debt, it acts with authority vital to its role.

Debt's centrality to representation illuminates the nature of the legislature's prerogative to make money. When the legislature is acting directly, that occurs when the legislature makes the legal promise to issue and take back a unit for value. At that moment, the legislature incurs a debt for the polity; the legal act has immediate effect. As monetary theory confirms, the pledge creates the unit of account (the dollar) that will operate as the monetary base.[136] When the Federal Reserve acts for Congress, it issues new money only for those assets and in conditions that

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CONGRESS OF THE UNITED STATES OF AMERICA: LEGISLATIVE HISTORIES 277-282, 355-360 (1986); WOODY HOLTON, UNRULY AMERICANS AND THE ORIGINS OF THE CONSTITUTION (1st ed. 2007).

[130] For Hamilton's advocacy to Congress, which adopted the idea after debate, see Alexander Hamilton, *Report of the Secretary of the Treasury, Jan. 14, 1790*, *in* DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 752-756 (Charlene Bangs Bickford & Helen E. Veit eds., 1790).

[131] *See* Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 35, 38-39 (2020).

[132] *Id.* at 40.

[133] The President had the right to approve by "approbation" purchases agreed upon by three or more of the Commission members. *Id.* at 39-40.

[134] *Id.* at 42.

[135] *See id.* at 39. While Chabot analogizes the Sinking fund to the FOMC, only the FOMC conducts monetary policy that results in new money issuing into supply. As above, the more limited authority of the Sinking Fund Commission makes Congress's care to control it even more remarkable.

[136] *See infra* text accompanying notes 116-118.

Congress has statutorily approved are appropriate.[137] When it does so, it also creates money by making a pledge of value with immediate effect—it creates dollars. The Fed's actions add to the monetary base.[138]

Whether it is done by Congress or its banking agent, incurring debt on behalf of the nation is the critical act. That pledge is transformative. It is, literally, self-executing.

What role, then, for the President? Most obviously, when Congress makes money, it acts through legislation. The executive has a role at that moment, assenting or objecting to Congress's determination. That is, the process follows the constitutional standard of bicameralism and presentment. That role has been completed in the case of all moneys made by the United States. The president assented to the legislation that Congress used to directly issue dollars like the greenback. The president also assented to the law establishing the Fed.

Otherwise, Congress has clearly specified when the executive should be involved. The Executive's authorities are explicit and extend as far as that express authority. Most obviously, the president has the authority to appoint members of the Board of Governors with the advice and consent of the Senate.[139] That provision dates to the original Federal Reserve Act, which included the Treasurer and the Comptroller of the Currency as ex officio members of that Board. The Board's powers were, however, quite limited at that time. The regional Federal Reserve Banks had autonomy to act on their own, independent from Board direction.[140]

Congress restructured the Federal Reserve so thoroughly in the 1930s that Peter Conti-Brown has called that event "the second founding,"[141] After extensively considering "the relationship between the Federal Reserve System and the executive," Congress roundly rejected proposals to increase executive authority over the Fed.[142] To the contrary, the legislature took a series of steps that *insulated* the Fed from executive influence. It increased the size of the Board; it lengthened the term of its members to 14 years; it staggered those terms; it staged them to occur across presidential terms; it removed the Secretary of the Treasury and the Comptroller of the Currency as members; it created the FOMC; and it specified that Fed governors could only be removed

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[137] *See infra* text accompanying notes 91.
[138] *See, e.g.*, *supra* note 99 at 758-766, 774-777. I use the term "Federal Reserve" here as a shorthand for the Federal Reserve System, as Lev Menand reminds us to do. *See generally* Menand, *The Federal Reserve Board*, *supra* note 35.
[139] 12 U.S.C. § 242.
[140] Gary Richardson & David W. Wilcox, *How Congress Designed the Federal Reserve to Be Independent of Presidential Control*, 39 J. ECON PERSP. 221, 222, 224 (2025); *see also* Bordo and Prescott, *supra* note 85 at 2-3, 5-17 (describing structure and the coordination failures it created);. The policy of gold convertibility also shaped the latitude of the Board to suggest expansionary actions. *See* TIMBERLAKE, *supra* note 63 at 259, 263-266.
[141] PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 31 (2016). *See also id.* at 28-32 (describing that transformative period).
[142] MENAND, *supra* note 62 at [66-68]. Menand emphasizes that legislators debated the issue of presidential power over removal just as the Court was deciding *Humphrey's Executor*. Their resolution made clear their agreement with the decision and reliance on it. *Ibid.*

"for cause."[143] Further acting to ensure the Fed's "independence from the president," Congress "eliminated regional independence, consolidated the regional Feds into a unified system, and centralized monetary-policy decision-making."[144] By contrast, the legislators took no measures to increase the independence of the Fed from Congress.[145]

Other than the President's power to participate in appointments and the design mandate of the 1930s restructuring, information about executive's authority follows from the balance of the Federal Reserve Act. By standard rules of statutory interpretation, those express terms exclude the inference of further executive power.[146] The FRA's statutory scheme fits within the democratic lineage of money-making by the legislature. It makes transparent the time and ways that the executive can influence the operation of the Federal Reserve.

Three provisions are relevant. The first dates to the original FRA and is now regarded as virtually obsolete.[147] Section 10(6), codified at 12 U.S.C. § 246, clarifies that the Secretary of the Treasury maintains "supervision and control" where the jurisdictions of the Fed and the Treasury overlap.[148] Congress apparently wanted to preserve the Secretary's authority to decide whether to continue the sub-treasury system as the receptacle for government funds. The sub-treasury was later abolished. Legislators also wanted to preserve the Comptroller of the Currency's authority over the issue of national bank notes and the OCC's ability to set standards for those national banks within its supervisory authority. (The Comptroller is within the Treasury.) National bank notes no longer exist and the division of authority over the national banks is settled. As Michael Salib and Christina Skinner conclude, the history of Section 10(6) "does make plain that it was never intended as an instrument for influencing the Fed's monetary policy."[149]

Another provision, Section 15, 12 U.S.C. § 391, grants the Secretary of the Treasury authority to deposit public money into the regional Federal Reserve banks and to use them as the fiscal agent

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[143] Banking Act of 1935, Pub. L. No. 74-305, 49 Stat. 684 (1935); Richardson & Wilcox, *supra* note 140 at 222 (quote). Congress at the same time renamed the Board, denominating it the Board of Governors of the Federal Reserve System. *Id.* at 223-228.
[144] *Id.* at 223.
[145] *Id.* at 222-223.
[146] Congress similarly specified, and thus evidently constrained, the role of the President in the affairs of the Sinking Fund. *See* Chabot, *supra* note 131 at 40.
[147] Michael Salib & Christina Skinner, *Executive Override of Central Banks in the United States and the United Kingdom,* CLS BLUE SKY BLOG (May 14, 2020) https://clsbluesky.law.columbia.edu/2020/05/14/executive-override-of-central-banks-in-the-united-states-and-the-united-kingdom/?utm_source=openai.
[148] The full text provides: Nothing in this chapter contained shall be construed as taking away any powers heretofore vested by law in the Secretary of the Treasury which relate to the supervision, management, and control of the Treasury Department and bureaus under such department, and wherever any power vested by this chapter in the Board of Governors of the Federal Reserve System or the Federal reserve agent appears to conflict with the powers of the Secretary of the Treasury, such powers shall be exercised subject to the supervision and control of the Secretary. Section 10(6), codified at 12 U.S.C. § 246.
[149] *See* Salib & Skinner, *supra* note 147.

for the United States. That provision, as Salib and Skinner point out, has clearly delimited reach.[150]

Finally, Congress conditioned the Federal Reserve's emergency lending powers in the Dodd Frank Act. Section 13(3), 12 U.S.C. §343(3), provides that the Board "by the affirmative vote of not less than five members," can authorize discount loans to a wide range of borrowers who are part of a "program or facility with broad-based eligibility." During that process, the FRA directs the Fed to consult with the Treasury to establish "policies and procedures" to govern that emergency lending and requires the Fed to receive the permission of the Secretary prior to establishing a lending program.[151] Granting the Secretary of the Treasury authority to shape lending that five members of the Board have already proposed, the provision demarcates the reach of the Secretary in particular terms. Those terms are significant but reactive, limiting the Secretary's reach.[152] By commonsense reading, that is the extent to which the executive can intervene in the Federal Reserve's operation.

The statutory scheme returns us to the core prerogative. Congress established the Federal Reserve System to deploy its money creative powers. Congress provided in explicit terms the occasions for executive authority. Expanding the powers of the president would subvert the system. Worse, it would obfuscate the balance between the branches, operating without the transparency that currently marks that balance in the express provisions identified above.

The mandate of separation of powers is older, more powerful, and more essential to a democratic constitution than subsequent concerns. That includes prudentialist arguments about CBI, a product of late nineteenth century experimentation with the Gold Standard that waned over much of the post-Depression period and waxed again only during the 1980s and 1990s.[153] As that convention holds, central bank independence should be preserved so that politicians do not overstimulate the economy or print money to lighten the government's debt load.[154] But if distinct, the separation of powers concerns and prudentialist arguments are not unrelated. Legislatures in democratic nations claim the authority to create the money supply because of the potent nature of that power. The Federal Reserve routinely creates money to make loans or buy assets, a capacity that could be dramatically abused if it bowed to political pressure to flood the economy with money. That flood of money could lead to escalating inflation.[155]

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[150] *Id.*

[151] Section 13(3)(B)(i), 12 U.S.C. §§ 343(3)(B)(i) and (iv).

[152] For comparison, *see* Chabot, *supra* note 131 at 40.

[153] B.J. EICHENGREEN & ANDREAS KAKRIDIS, INTERWAR CENTRAL BANKS: A TOUR D'HORIZON 15-18, 21-27 (B.J. Eichengreen & Andreas Kakridis eds., 2023). As Eichengreen and Kakridis additionally stress, definitions of CBI have also varied greatly and are heterogeneous. *Id.* at, 22-23, n.13.

[154] *See, e.g.*, European Central Bank, International Central Bankers on the Statement by Federal Reserve Chair Powell on 11 January 2026 (issued Jan. 13, 2026), https://www.ecb.europa.eu/press/pr/date/2026/html/ecb.pr260113~ec4630b9fa.en.html;Brief for Former Treasury Secretaries *et al*., *supra* note 11 at 5-16.

[155] German hyperinflation is the textbook example. *See, e.g.*, GERALD D. FELDMAN, THE GREAT DISORDER: POLITICS, ECONOMICS, AND SOCIETY IN THE GERMAN INFLATION, 1914-1924 (1993); Thomas J. Sargent, *The Ends Of Four Big Inflations* in INFLATION: CAUSES AND EFFECTS 73-85 (Robert E. Hall, ed., 1982).

Creating excessive amounts of money is only one danger. Behind the prudentialist concern remains the imperative protected by the separation of powers. The government directs money into circulation as it issues it, an authority that could be used to gut democratic structures, subvert deliberated market rules, and undermine the public welfare. Consider Section 13(3) again. It empowers the Fed to lend "[i]n unusual and exigent circumstances" to "any participant in any program or facility with broad-based eligibility" subject only to constraints imposed by the Board of Governors.[156] Three points leap out. First, the Fed lends by creating money; there is no inherent limit to its capacity to extend financing. Second, the Board of Governors initiates that action, acting with the approval of the Secretary of the Treasury. See §§ 13(3)(B)(i) and (iv). If the Executive controlled the Board, as well as the Treasury, the division of authority would be redundant. More troubling, there would be no check on ability of the President to advance money to virtually any entity he chose. Finally, "unusual and exigent circumstances" are in the eye of the beholder; they arise out of the most everyday circumstances according to the current administration.[157] An abusive executive could act whenever it wanted, dictating the Fed to fund whatever array of industries, individuals, companies, or enterprises it had chosen to favor.[158] Revising the Fed's banked architecture by expanding the executive's role threatens to destabilize the monetary course of the economy.[159]

Democratic theory, text, and the specter of devastating disorder all dictate the barrier to presidential power over the central bank. They return us to the principle that money-making in its very design must flow, in a democracy, from the immediate representatives of the people. Many aspects of that design may be controversial. My own work criticizes foundational aspects of our modern architecture. In my view, commercial banks operating for profit hold an enormously disproportionate role in creating money and diffusing credit in our society.[160] That role dates to the British innovation I flag above: when the British invited investors to form the Bank of England, they institutionalized material self-interest as the compass at the heart of public money creation.[161] That principle fueled a grand increase in liquidity that nourished great productivity. It also petrified into an overwrought enchantment with privatized incentives, the sacrifice of rich discourses on the collective and cooperative infrastructures of human economy, and escalating inequality.[162] A redesign is, I argue, long overdue.

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[156] § 13(3) of the Federal Reserve Act, codified at 12 U.S.C. § 341.
[157] Rogé Karma, *Trump Is Getting Closer to Having an 'Infinite Money Pit'*, THE ATLANTIC (Sept. 22, 2025) https://www.theatlantic.com/economy/archive/2025/09/trump-federal-reserve-control-unchecked-power/684279/.
[158] *Id.*; Lev Menand, *There's Much More at Stake in the Fed's Case than Interest Rates*, N.Y. TIMES (Jan. 20, 2026) https://www.nytimes.com/2026/01/20/opinion/trump-federal-reserve-independence.html.
[159] *See generally* Gensler & Menand, *supra* note 110.
[160] *See generally* Christine Desan, *How To Spend a Trillion Dollars: Our Monetary Hardwiring, Why It Matters, and What We Should Do About It*, (Harvard Public Law Working Paper No. 22-04, 2022).
[161] *See generally* DESAN, *supra* note 4.
[162] *See, e.g.*, Christine Desan, *The Power of Paradigms in Histories of Economic Development*, JUST MONEY (Mar. 12, 2020) https://justmoney.org/c-desan-the-power-of-paradigms-in-histories-of-economic-development/; Christine Desan, *The Key to Value 2.0: The Debate over Commensurability in Neoclassical and Credit Approaches to Money*, *in* CONSTITUTIONS OF VALUE: LAW, GOVERNANCE AND POLITICAL ECOLOGY (Isabel Feichtner & Geoff Gordon eds., 2023).

That redesign must come, however, from democratically elected legislatures. In the U.S., Congress, albeit a flawed representative[163], is the body that determines both the architecture of money-making and oversees its operation. A recent analysis of the Fed's design found one determination after another to limit executive authority over it. By contrast, the authors "found no discussion in the Congressional Record from 1913 until today indicating that members of Congress thought the Fed should operate independent of congressional oversight or intrusion." To the contrary, they write:

> The original architects of the Fed, like Congress today, regularly compelled leaders of the Fed to testify before Congress, to explain their decisions, and to discuss ways to improve the performance of the system. If the Fed did not act as Congress intended, then Congress admonished its leaders and amended the law to correct the problem. Congress, in other words, has always insisted that the Fed was accountable to the legislature.[164]

And Congress has the prerogative to constrain executive involvement in the Fed's money-creative work.

III. THE JURISPRUDENCE OF CONGRESSIONAL AUTHORITY OVER MONEY CREATION

American jurisprudence on money underscores Congress's capacious authority in the area. A case from 1929, *Raichle v. Federal Reserve Bank of New York*, decided by Augustus Hand, Learned Hand, and Thomas Swan, sets a model of judicial analysis in the area.[165] Faced with a claim by a securities dealer that the Fed's open-market operations and lending decisions had hurt his business, the second circuit bench reviewed the history that had led to the establishment of the Federal Reserve System. The "long struggle" to coordinate a national monetary system began with Congress's attempts to create an "independent treasury" for its own funds. The jurists then described Congress's turn during the Civil War to national banks that could create money "because of their ability to issue circulating notes against government bonds," and identified the continuing problems with the system. The bench in turn detailed the elaborate architecture of the Federal Reserve System that Congress had crafted and the orchestrated authority of the Board and regional banks. In the court's view, judicial second-guessing of the delicate process would be "almost grotesque." The judges concluded by looking kindly on the Reserve Bank's argument that the whole affair was a political question and "not justiciable."[166]

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[163] For a small selection of scholarship documenting problems with our electoral structure and process, *see, e.g.*, Matthew C. Ingram, et. al, *United States Senate malapportionment: A geographical investigation*, 113 POL. GEOGRAPHY (2024); ALEX KEYSSAR, WHY DO WE STILL HAVE THE ELECTORAL COLLEGE (2020); GEORGE C. EDWARDS III, WHY THE ELECTORAL COLLEGE IS BAD FOR AMERICA (3rd ed., 2019); Nicholas O. Stephanopoulos & Eric McGhee, *Partisan Gerrymandering and the Efficiency Gap*, 82 U. CHI. L. REV. 831 (2015); SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION (2006).

[164] Richardson & Wilcox, *supra* note 140 at 222-223.

[165] *See generally* Raichle v. Federal Reserve Bank of New York, 34 F.2d 910 (1929).

[166] *Raichle*, 34 F.2d at 916.

The court's opinion read the parties and the larger legal community a lecture on how difficult it was to create and modulate money and credit in a modern society. That lecture was deliberate, a lesson that came before dismissing the case for failure to join the Federal Reserve Bank of New York as a necessary party. The judges justified their discussion by noting that their joinder determination could be reversed. In fact, their determination ended the case—and their lecture would become iconic, a reference point for generations of legal analysis.[167]

Raichle's lesson on deference to the congressional architecture comports with a virtually unbroken stream of cases that broadly articulate Congress's power in the monetary realm. The most direct challenges to Congress's power came after it issued greenbacks, those promises-to-pay that circulated during the Civil War. The Court's holding in every challenge confirmed Congress's authority to issue greenbacks, whether in wartime or in peacetime.[168] That included the dissenters in each case who, while agreeing that Congress had issuing authority, declined only to follow the majority insofar as it expansively interpreted the legislature's authority also to make those bills legal tender in private exchange.[169] (Absent legal tender status in private exchange, creditors could choose whether or not to take greenbacks as payment. With legal tender status, creditors had no such choice. Courts, state and federal, would declare that an offer (or tender) of payment in greenbacks by a debtor operated to satisfy the debt.)

In fact, the legal tender issue had first gone the other way but brought widespread consternation. In 1864, a creditor had refused repayment in greenbacks of a debt contracted before the greenbacks' issue. The Court in *Hepburn v. Griswold* sided with the creditor, holding that Congress could not legislate that greenbacks would legally satisfy a debt.[170] The decision satisfied sound money advocates but was opposed in the business community, by the railroads, and by Republicans, who began preparing legislation to expand the Court. For the Grant administration, the decision threatened the post-War recovery, a "financial balance . . . painfully achieved."[171] Inheriting two vacancies, the administration promptly packed the post-War Court. A year later, that reconstituted body reversed *Hepburn*.[172]

The next *Legal Tender Case* confirmed Congress's power to keep the greenbacks circulating indefinitely during peacetime. The Court went back to basics. It rehearsed the fact that public debt provides modern money's foundation:

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[167] *See, e.g.*, Ruess v. Balles, 584 F.2d 461, 463-64 (D.C. Cir. 1978); Huntington Towers, Ltd. v. Franklin National Bank, 559 F.2d 863, 868-69 (2d Cir.1977); Steffi Ostrowski, *Judging the Fed*, 131 YALE L. J. 726, 735 (2021-2022).

[168] *See generally* Knox v. Lee, 79 U.S. 457 (1871); Julliard v. Greenman, 110 U.S. 421 (1884); see also Veazie Bank v. Fenno, 75 U.S. 533 (1869). As indicated below, one of the *Legal Tender Cases* held that, while Congress had the authority to issue greenbacks, it could not dictate that those bills were legal tender. *See generally* Hepburn v. Griswold, 75 U.S. 603 (1870). The legal tender holding in *Hepburn* was reversed in 1871. *Knox,* 79 U.S. at 553-554.

[169] *Knox*, 79 U.S. at 670-681 (Chase, Clifford, and Field, J., dissenting); *Julliard*,110 U.S. at 451-470 (Field, J., dissenting).

[170] *See Hepburn*, 78 U.S. at 606-626.

[171] IRWIN UNGER, THE GREENBACK ERA: A SOCIAL AND POLITICAL HISTORY OF AMERICAN FINANCE, 1865-1879 177-178 (1964).

[172] *See Knox,* 79 U.S. at 553-554.

The power 'to borrow money on the credit of the United States' is the power to raise money for the public use on a pledge of the public credit, and may be exercised to meet either present or anticipated expenses and liabilities of the government.[173]

Restating earlier holdings, the Court emphasized both the sovereign authority of Congress and its capacity to issue debt in the form of new money. As for the latter, the Court confirmed that it spoke about making sovereign pledges into cash:

Congress has authority to issue these obligations in a form adapted to circulation from hand to hand in the ordinary transactions of commerce and business. In order to promote and facilitate such circulation, to adapt them to use as currency, and to make them more current in the market, it may provide for their redemption in coin or bonds, and may make them receivable in payment of debts to the government.[174]

As for Congress's authority, the Court could not have spoken in more expansive terms:

Congress, as the legislature of a sovereign nation, [is] expressly empowered by the Constitution "to lay and collect taxes, to pay the debts and provide for the common defence and general welfare of the United States," and "to borrow money on the credit of the United States," and "to coin money and regulate the value thereof and of foreign coin;" and [is] clearly authorized, as incidental to the exercise of those great powers, to emit bills of credit, to charter national banks, and to provide a national currency for the whole people, in the form of coin, treasury notes, and national bank bills"[175]

As the Court concluded, making those notes legal tender for private exchange was "consistent with the letter and spirit of the constitution, and therefore within the meaning of that instrument, 'necessary and proper for carrying into execution the powers vested by this constitution."[176]

The holding in *Julliard* and the other *Legal Tender Cases* applies to modern money most directly because today's dollar, like the greenback, is inconvertible into any coin reserve.[177] Lest there be any doubt, the Court has also confirmed in sweeping terms congressional power to issue, value, and revalue coin as well as to establish a national bank to issue notes accepted as liabilities of the nation. The banking issue came to the Court first.

The Court's holding in *McCulloch v. Maryland*, 17 U.S. 159 (1819), is such a canonical affirmation of the breadth Congress's power that its immediate subject is often treated as secondary. But the subject that drew the tour de force by Justice Marshall was, of course, the incorporation of the Bank of the United States, a means that "statemen of the first class," even

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[173] *Julliard*, 110 U.S. at 444; *see also Knox*, 79 U.S. at 642-647; *Veazie Bank*, 75 U.S. at 548-549.
[174] *Julliard,* 110 U.S. at 444 (emphasis added). As the Court continued, "So much is settled beyond doubt, and was asserted or distinctly admitted by the judges who dissented from the decision in the *Legal Tender Cases*, as well as by those who concurred in that decision. [Citing multiple passages from *Veazie; Hepburn; Knox*]" *Julliard,* 110 U.S. at 445.
[175] *Julliard*, 110 U.S. at 449-450.
[176] *Julliard*, 110 U.S. at 450. See also *Knox*, 79 U.S. at 553; *Veazie Bank*, 75 U.S. at 549.
[177] See An Act to Provide Relief in the Existing National Emergency in Banking, 48 Stat. 1, March 1933 (authorizing President Franklin Roosevelt to end domestic convertibility of dollars into gold); Exec. Order No. 6073 (1933).

those previously opposed to it, had determined to be a "convenient, a useful, and essential instrument in the prosecution of [the government's] fiscal operations."[178] Money and its transmission were at the heart of the matter: "Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east, conveyed to the west, or that this order should be reversed."[179] The poetic language should not obscure its pointed purpose. No construction of the constitution could be preferred, "which would render these operations difficult, hazardous and expensive[.]"[180]

Exactly 50 years later, the Court would reiterate Congress's power to establish the money supply through a national banking system. *Veazie v. Fenno*, 75 U.S. 533 (1869), emphasized first the legislature's determination "in the exercise of undisputed constitutional powers, . . . to provide a currency for the whole country" by way of both greenbacks and federally chartered banks, at that time issuing nonconvertible notes:

Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government; and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank, as to the second.[181]

In a fitting echo of *McCulloch*, which had rejected state authority to tax the Bank of the United States, the *Veazie* court went on to approve Congress's authority to impose a tax on notes issued by state-chartered banks. That tax was explicitly intended to destroy those banks, thus clearing the way for the federally chartered banks to dominate.[182]

Coin is perhaps the most intuitively easy, if obsolete, money issued by Congress. For most in the founding generation and many thereafter, it undoubtedly seemed the "real money" given the gold or silver it contained.[183] Congressional authority to make coin and fix its value was clear, (Art. I, sec. 8). But that pair of authorities raised a question that actually put sovereign authority to create money directly at issue. What if Congress chose radically to diminish the commodity content of coin?[184] That action could make coin a mere figment of its former self, a virtual fiat money.

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[178] *McCulloch*, 17 U.S. at 207.
[179] *McCulloch*, 17 US. at 200.
[180] *Id.*
[181] *Veazie Bank*, 75 U.S. at 549.
[182] *Id.* at 548-549.
[183] Grubb, *supra* note 45 at 69-71 (arguing that delegates to constitutional convention believed that specie-based banking would suffice as national money); *Julliard*, 110 U.S. at 462-465 (Field, J., dissenting). Even the majority in *Knox* cautiously avoided equated legal tender notes with money as opposed to a currency that could circulate as money. *See Knox*, 79 U.S. at 553-554.
[184] See *Julliard*, 110 U.S. at 465-466 (Field, J., dissenting) (noting that a debt of "one hundred pounds" could then be paid by "one hundred shillings"); *Perry*, 249 U.S. at 381 (McReynolds, J. dissenting) (similar).

English law on the issue was clear. The *political command* of the sovereign, not its commodity content, constituted coin. A sovereign could diminish the content of coin if he or she judged it best for the good of the kingdom.[185] But for the fact that it applied to "the Prince," English precedent would confirm congressional authority to define and issue money, including to dilute coin into a fiat token. (The princely part of the doctrine drives home the potent nature of the authority to create money. We can see why the British would have to displace monarchical with parliamentary authority a century later when they established the Bank of England during the Glorious Revolution.)

Congress rarely changed the value of coin, so the debasement issue went untested in the U.S. until the 20th century.[186] But the test came and came dramatically during the Great Depression. In the face of economic turmoil, Congress in 1933 virtually demonetized gold for domestic use.[187] By Joint Resolution, it prohibited payment in gold or gold coin as "against public policy," providing that all payments be made in other forms of "legal tender."[188] A series of other acts permitted and then directed the president to devalue the dollar, setting a ceiling on coin's gold content.[189] Congress's Joint Resolution nullified the contractual "gold clauses" that were commonplace in contracts to shield creditors from repayment in an devalued currency.[190]

Tens of thousands of creditors were incensed. They held private contracts that expressly guaranteed payment in gold coin of the original standard (or its equivalent). Tens of thousands more held public bonds containing the same kind of guarantee.[191] Challenges from creditors came immediately to the Supreme Court.

The Court's response was unequivocal. "The power of the Congress to establish a monetary system" was the foundational issue, it wrote in *Norman v. Baltimore & Ohio R.R. Co*.[192] True it may have been that every party understood the gold clauses to guarantee repayment at the old standard. That course had nevertheless become harmful to the public welfare, a condition that Congress could legitimately address by obviating the gold clauses. After denying the need to rehearse the extent of Congress's authority, the Court unleashed language from *McCulloch; Knox v. Lee; Julliard v. Greenman; Veazie Bank;* and more. The barrage only began with "[t]he broad and comprehensive national authority over the subjects of revenue, finance and currency . . .

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[185] *The Case of the Mixed Money,* 2 Cobbett's Complete Collection of State Trials 114 (Privy Council Court 1605), discussed in DESAN, *supra* note 4 at 268-274.
[186] But see the devaluation of gold coin in 1834 by 6.6%, a measure widely accepted as necessary to restore an appropriate bimetallic ratio between silver and gold mint prices. TIMBERLAKE, *supra* note 63 at 46-47.
[187] *See generally Perry*, 249 U.S. 330 (plurality finding no operating market in gold coin).
[188] Joint Resolution of June 5, 1933, 48 Stat. 112. The Resolution also prohibited payment "in an amount in money of the United States measured thereby" and required "all obligations before or after incurred to be discharged upon payment, dollar for dollar, in any coin or currency which at the time of payment is legal tender for public and private debts." *Id.*
[189] *See generally* Gold Reserve Act of 1934, 48 Stat. 337 (1934); Act of May 12, 48 Stat. 51 (1933).
[190] The Joint Resolution of June 5, 1933, 48 Stat. 112, addressed the problem by abrogating those clauses in both public and private contracts.
[191] CHI. BOOTH REV., *Is it Better to Forgive than Receive?* (Feb. 1, 2006) https://www.chicagobooth.edu/review/it-better-forgive-receive.
[192] *Norman*, 294 U.S. at 302.

from the aggregate of the powers granted to the Congress."[193] It continued with an endorsement of the extent of authority confirmed to Congress in the *Legal Tender Cases,* including the power to issue "obligations of the United States" as currency.[194] Congress could impose requirements of uniformity and parity. It could condition the ownership of gold on limitations made necessary by its use as the content for coin. It could interdict contracts expressly made to safeguard gold value, whether they referred to gold as money or as a commodity.[195]

The point was that those contracts interfered "with the monetary policy of the Congress in the light of its broad power to determine that policy."[196] "Whatever power there is over currency is vested in Congress," wrote the Court.[197]

Norman concerned a private contract, one that had to give way to the imperatives of public purpose. The Court had more trouble with *Perry v. United States*, 294 U.S. 330 (1935), a case brought by creditors holding bonds issued by the United States itself. In the end, *Perry* produced one of the most astonishing affirmations of congressional authority in the monetary canon.

The contracts at issue in *Perry* dated to World War I, when the government had unrolled an unprecedented campaign to raise funds. If they could not fight on foreign soil, Americans could lend on the home front. Liberty bonds pitched purchasers as patriots and came in many sizes to suit all budgets. Not least, Liberty bonds guaranteed that purchasers would not be hurt by devaluation in the means of payment. "The principal and interest hereof are payable in United States coin at the present [1918] standard of value," declared the government.[198] That 1918 standard of value was, of course, precisely the standard abolished as payment and then devalued during the Great Depression.

For a plurality of the Court, the government's bait and switch was just too rich. Congress itself had made the original contract; Congress had now changed the contract. That undermined the guarantee in the earlier agreement that a purchaser "would not suffer loss through depreciation in the medium of payment."[199] The United States had breached its contract.[200]

The head-spinning part of the case followed. The case against the United States could only proceed in the U.S. Court of Claims and that Court could only assert jurisdiction over claims with real, not nominal, damages.[201] Gold coin, however, had been demonetized. That fact vitiated any measure of damages that depended on a calculation assuming that gold coin was a legal tender. "The plaintiff can recover no more than the loss he has suffered and of which he

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[193] *Id.* at 303.
[194] *Julliard*, 110 U.S. at 444.
[195] *Id.* at 303-305, 314.
[196] *Id.* at 311.
[197] *Id.* at 303-304.
[198] *Perry*, 294 U.S. at 348 (quoting bond language).
[199] *Id.* at 349.
[200] *Id.* at 350-354.
[201] The limit on jurisdiction followed from the prerogative that Congress holds to settle claims against the United States. *See supra* note 30-32.

may rightfully complain," the plurality reasoned, "He was not entitled to be enriched."[202] It would not work to claim, as the plaintiff had, that the government owed him more in dollars (in paper or coin) than the face value due, as if the government needed to compensate for the lesser gold content of each now-devalued dollar. Rather, "actual loss" could not be determined "without considering the economic situation at the time the Government offered to pay him" – and that was a time at which gold coin had no legal use in the United States, neither for exchange nor for exportation.[203] Put another way, the plaintiff was arguing that he was due the "'equivalent' in currency of the gold coin promised." But the referent for the claim had disappeared: a "free domestic market for gold was non-existent."[204]

In fact, the justices wrote, a damage award to the plaintiffs would threaten domestic exchange. As the Court put it in *Norman*, the devaluation of the dollar had "placed the economy upon a new basis."[205] In *Perry,* the justices elaborated:

the internal economy [had adjusted] to the single measure of value as established by the legislation of the Congress, and the universal availability and use throughout the country of the legal tender currency in meeting all engagements.[206]

Given that reality, paying the plaintiff what he claimed—exempting him from the single payment system represented by the dollar at its new, legal tender value—would constitute unjust enrichment rather than a recoupment of loss.[207] A fifth justice in *Perry*, Justic Stone, concurred on the ground that Congress's "sovereign power to regulate the value of money" was as powerful as Congress's power to borrow and therefore to obligate itself.[208]

Norman and *Perry* drive home the singular nature of congressional authority to create money and determine its supply. That authority is both material and conceptual. At the material level, consider the amount at stake in the cases. The devaluation authorized by Congress amounted to 69% of the value of the contracts at issue. Applied to the roughly $100 billion worth of contracts affected, Congress's decision to devalue the dollar reduced the debt burden on borrowers by

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[202] *Perry*, 294 U.S. at 355.
[203] *Id.* Congress authorized prohibitions on foreign exchange. *See* Acts of March 9, 1933, 48 Stat. 1; January 30, 1934, 48 Stat. 337. The President acted through Executive Orders of April 20, 1933, August 28, 1933, and January 15, 1934; Regulations of the Secretary of the Treasury, January 30 and 31, 1934. As the Court found, Congress could take such action "by virtue of its authority to deal with gold coin as a medium of exchange." Quoting Ling Su Fan v. United States*,* 218 U.S. 302, 310, 311, the Court continued, "Conceding the title of the owner of such coins, yet there is attached to such ownership those limitations which public policy may require by reason of their quality as a legal tender and as a medium of exchange. These limitations are due to the fact that public law gives to such coinage a value which does not attach as a mere consequence of intrinsic value. . . . They bear . . . the impress of sovereign power which fixes value and authorizes their use and exchange." *Perry*, 294 U.S. at 356.
[204] *Perry*, 294 U.S. at 357-359. The plurality reached the question of damages because the case involved the United States as debtor; the justices considered the obviation of gold clauses by the debtor itself to be a breach of contract.
[205] *Norman*, 294 U.S. at 315.
[206] *Perry*, 294 U.S. at 358.
[207] *Id.*
[208] *Id.* at 360-361.

about $69 billion. That amount was huge—approximately the dimension of the nominal GNP in the U.S. at the time—and the drop in indebtedness staved off countless bankruptcies. [209] The stock market rose on news of the Court's decisions and corporate bonds gained value. Investors—the very class that disproportionately contained creditors—believed that the holdings had benefited the economy.[210] Economists have widely concurred, arguing that the dramatic intervention rescued American society from the worst ravages of the Great Depression.[211]

At the conceptual level, consider the reasoning of the Court. As the majority recognized, when Congress creates money or empowers an agent to act for it, it acts directly on the very means of exchange and tangible value. The legislature's power to determine the matrix and medium of value effectively defines that basis for the domestic economy. In a democracy, Congress alone claims that creative and destructive power for the society it represents.

IV. UNITARY EXECUTIVE THEORY AND THE FED

If Congress's authority over money-making could emerge unscathed from the Great Depression and the epic breach of contract it catalyzed, one would think it solid enough to last in the current moment. But doctrinal developments themselves appear to have created a constitutional crisis. Unitary executive theory, unwittingly oblivious to the deep-set traditions that protect democratic sovereignty, effectively plots a collision course for the polity.

Under the Court's current reasoning, the Fed should be stripped of its independence. If that is a constitutional imperative, it invites economic calamity according to economic experts. Alternatively, the Court could invent a bespoke exception for the Fed. But an untheorized exception appears arbitrary, motivated not by constitutional principle but by outright expediency. Unitary executive theory has created the stand-off, one that requires either calamity or expediency to resolve. There is a way out, of course. It is to reconsider the doctrine that brought us to such crisis.

The Fed's vulnerability to presidential control, should the Court adhere to its unitary executive principles, is obvious. Adopting that approach, the Supreme Court has expanded presidential authority over administrative officers in independent agencies by invalidating as unconstitutional their statutory protections from removal. The Court first invalidated statutory protection for independent regulators removable under a for-cause standard by a superior agency's commissioners, themselves removable only a similar standard.[212] The Court next invalidated the statutory protection for a single agency head removable for "inefficiency, neglect of duty, or malfeasance."[213] The Court next invalidated the statutory protection for another single agency

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[209] CHI. BOOTH REV., *supra* note 191.
[210] *Id.*
[211] *See e.g.*, BARRY EICHENGREEN, GLOBALIZING CAPITAL: A HISTORY OF THE INTERNATIONAL MONETARY SYSTEM 48, 86-90 (2d ed. 2008); *see also* Sebastian Edwards, et al., *The US Debt Restructuring of 1933 Consequences and Lessons* (National Bureau of Economic Research Working Paper No. 21694 2015) (summarizing modest downsides of American breach of contract and continued strength of U.S. market in treasuries).
[212] *See generally* Free Enterprise Fund v. Public Company Accounting Oversight Board, 561 US. 477 (2010).
[213] *See generally Seila Law LLC* 140 S. Ct. 2183.

head removable "for cause."[214] The Court more recently indicated in a series of emergency orders that it planned to invalidate the statutory protections for officials on multi-member commissions removable only under various for-cause standards.[215] A majority of justice most lately suggested at oral argument in just such a case, one involving multi-member commissioners, that they were in fact likely to invalidate the statutory protections for those officials.[216]

The trend is unmistakable, as is the logic and, in fact, the trend in the logic. On January 21, 2025, at the *Trump v. Cook* oral argument, Justice Kavanaugh would invoke Justice Scalia's dissent in *Morrison v. Olson*, 529 U.S. 598 (1988), as "always a good place to look for wisdom."[217] Indeed, Scalia's advocacy there of a "unitary Executive" has something of a talismanic stature to adherents.[218] Scalia there cast the executive as structurally weaker than the legislature.[219] That premise, coupled with the Framers' disinclination to opt for a council or otherwise multiple executive, led the Justice to argue that the president's power must be guarded from fragmentation. When Article II vested "the executive power" in "a president of the United States," it did not mean "*some* of the executive power, but *all* of the executive power."[220]

Scalia spoke, to be sure, of "purely executive functions."[221] Indeed, the line-drawing endorsed by *Humphrey's Executor* was more important to him than the majority.[222] In Scalia's view, it prevented the judiciary from unbound discretion in sorting through removal disputes that turned on fact-specific inquiry.[223] But the sweep of Scalia's language went further. It invited a new kind of line-drawing, one that categorically demarcated legislative and executive spheres. The rationale shifted according. As the Court reasoned in *Free Enterprise Fund,* the president

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[214] *See generally* Collins v. Yellen, 594 U.S. __ (2021).
[215] The removal provisions at issue required "neglect of duty or malfeasance in office but no other cause" (NLRA) or "inefficiency, neglect of duty, or malfeasance in office," (MSPB). The emergency orders allowed the president's removal to go into effect, indicating that it is more likely than not that the president will prevail in the cases on the merits. *See generally Wilcox*, 606 U.S. 1415 (2025) (allowing interim removal of NLRB and MSPB officials).
[216] *Slaughter,* Docket No. 25-332; Madeline Halpert*, US Supreme Court Appears Poised To Expand Trump's Power to Fire Federal Officials,* BBC (Dec. 8, 2025) https://www.bbc.com/news/articles/c3e073pglvzo.
[217] Transcript, Oral Argument at 53, Donald J. Trump v. Lisa D. Cook (2026) (No. 25A312).
[218] *See, e.g.*, Chabot, *supra* note 131 at 17-18.
[219] Morrison v. Olson, 529 U.S. 598, 698 (2000) (quoting Federalist no. 51 (Madison)).
[220] *Morrison*, 529 US at 705 (emphasis added). Ironically in light of the subsequent expansion of immunity doctrine, Justice Scalia enlisted a key point in support of unitary executive approach: "[T]he Founders envisioned when they established a single Chief Executive accountable to the people, the blame can be assigned to someone who can be punished." *Id*. at 731.
[221] *Id.* at 708.
[222] Compare the Court in *Morrison*, 529 U.S. at 688-691, with Justice Scalia, *Morrison*, 529 U.S. at 724-727. Contrary to the Court's reading in *Seila Law*, 140 S.Ct. at 2199, the *Morrison* majority did not appear to be denigrating *Humphrey's Executor*, but to be endorsing a less formalistic and more fact-specific inquiry about the functions performed by an official in a removal dispute.
[223] *Morrison*, 529 U.S. at 724-727. In fact, Scalia's claim for "executive functions" was arguably quite modest: It included "everything . . . [that] has always and everywhere—if conducted by government at all—been conducted never by the legislature, never by the courts, and always by the executive. *Morrison*, 529 U.S. at 706.

obviously had to rely on subordinates to carry out his work. It must be then, "as a general matter," that the Constitution gives the President "the authority to remove those who assist him in carrying out his duties."[224]

With a syllogism, the Court displaced the approach epitomized by Justice Jackson that the Constitution diffused rather than consolidated power:

[T]he Constitution . . . also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity. Presidential powers are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress.[225]

The consequences for the legislative prerogative and the Fed follow. As Steven Calabresi and John Yoo argue, the President must have the ability to control monetary policy.[226] That means he can "legally fire holdover governors," despite the statutory protection from removal provided by the Federal Reserve Act. [227]

President Trump has made the prospect real, claiming the authority to remove, de facto or de jure, governors of the Fed at pleasure. He will succeed de jure if the Supreme Court allows him to fire Governor Lisa D. Cook absent evident of relevant misconduct, making a mockery of the "for cause" provision that protects her post.[228] He will succeed de facto if his campaign to pressure Chair Jerome Powell, now by criminal indictment, terminates Powell's tenure.[229] The executive claim to authority could also reach the right to remove presidents of the regional reserve banks. The president would thus control the FOMC and, more broadly, influence policy made by the Board of Governors.[230]

Despite its developing theory, recent precedent, and occasion, the Court has shown no inclination to agree with the President. In recent cases, it has suggested that a unitary executive imperative may not reach the Fed.[231] And at oral argument in *Trump v. Cook*, justices from both sides of the political spectrum probed for ways to thwart Cook's removal, ideally without reaching the

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[224] *Seila Law*, 140 S.Ct. at 2191; *see also id.* at 2203.
[225] *Youngstown*, 343 U.S. at 635 (J. Jackson, concurring).
[226] STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 6 (2008).
[227] Under the Federal Reserve Act, members of the Board of Governors can only be fired "for cause." *See supra* note 18. Regional presidents, for their part, can be removed only by the Board of Governors. See *supra* note 19. Executive claims to authority may also reach appointment of the presidents of the regional Fed banks. *See supra* note 20.
[228] *See* Menand, supra note 158.
[229] Colby Smith, *Powell, an Unlikely Foil Takes on Trump* (Jan. 16, 2026), https://www.nytimes.com/2026/01/16/us/politics/powell-trump-investigation.html.
[230] I set aside other constitutional problems with the Fed, which may well exist. A legislative prerogative from the eighteenth century may need tailoring to avoid conflict with current equal protection guarantees, for example.
[231] *See infra* note 237.

merits.[232] As striking as the disinclination to apply unitary executive doctrine is the lack of constitutional principle motivating that reluctance. If the exchange at oral argument is any indication, the Court fears the economic disruption that economic experts forecast if central bank independence is threatened.[233] That is, the Court bows here simply to circumstance, contrary to its avowed jurisprudence. In fact, the argument for calamity offered by economic experts offers no constitutional content, only a parade of horribles.[234] To make matters worse, CBI is clearly a modern convention, postdating the original constitutional structure, its public meaning, and the window of historical reference sanctified by the current Court.[235]

So what can we make of the exceptions carved out for the Fed? As currently offered, they further undermine constitutional principle. First the exceptions, then the problems they create.

The suggestion that the Fed may stand apart from other independent agencies came initially in backhanded fashion when the majority in *Seila Law* dismissed the argument that "financial regulators" may have special stature. "Even assuming financial institutions like the Second Bank and the Federal Reserve can claim a special historical status," wrote the Court in a footnote, that special historical status would not help the defendant CFPB.[236] The Court subsequently gave that casual reservation substance. As it granted the emergency stay requested by the President to allow his removal of NLRB and MSPB officials to take effect, the Court disavowed setting a precedent for removal of Fed officials. The Fed, it wrote is a "uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States," citing its earlier footnote.[237]

In atmospherics and content, the Court's Fed exception is unprincipled and internally inconsistent. The sequence in the Court's reasoning—treating a backhanded reference as a deliberate reservation, all without briefing—sets up the problem. More importantly, the exception invokes institutions that both resembled and differed from the Fed, itself various in its

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[232] Ann E. Marimow, *Supreme Court Seems Poised to Reject Trump's Attempt to Immediately Fire Fed Governor*, N.Y. TIMES (Jan. 21, 2026) https://www.nytimes.com/2026/01/21/us/politics/supreme-court-trump-fed-cook.html. The justices could send the case back to the lower court for additional fact-finding or deny the government's stay for procedural reasons. Insofar as the administration drained any substance from the "for cause" standard, a win for Cook would collapse the case into one that amounts to removal at the pleasure of the president.

[233] *See generally id.*; Oral Argument, *supra* note 217, at 17-19, 46-55, 63-65, 118-124.

[234] Brief for Former Treasury Secretaries *et al.*, *supra* note 11 a t 5-17, 22-24.

[235] For the modernity of CBI as a convention, see *supra* note 153. For the Court's preferred approach, see, e.g., *Seila Law*, 140 S.Ct at 2190, 2197; *see also Seila Law*, 140 S.Ct. at 2189 (rejecting precedents that are "modern and contested"); Fin. Oversight & Mgmt. Bd. for P.R. v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1659 (2020) ("the practice of the First Congress is strong evidence of the original meaning of the Constitution."); Chabot, *supra* note 102 at 16-23 (discussing originalist undergirding of unitary executive theory and indeterminacy of Article II); *see generally* Steven G. Calabresi & Gary Lawson, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821 (2018) (rejecting administrative agencies without precedent in seventeenth and eighteenth centuries); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L. J. 541 (1994) (emphasizing "original public meaning" of First Congress).

[236] *Seila Law*, 140 S. Ct at 2245, n. 8.

[237] *Wilcox*, 145 S. Ct at 1415; Most recently, the Court confirmed its discomfort taking unitary executive logic to the Fed in oral argument, see *supra* note 233.

institutional components and functions, without identifying what aspects of the comparison matter. Scholars have had a field day mapping divergences and ambiguities.[238] Not least, the exception is itself self-contradictory. It trades on the existence of institutional precedents, a matter the Court suggests is essential[239], while dubbing the Fed as "uniquely structured."[240]

Second, the exception lacks any substantive reasoning, a problem illuminated by Justice Kagan's attempt in *Seila Law* to understand possible precedents for the CFPB. As she explored the institutional patterns, the Justice thematized Congress's dictates: the legislature was prioritizing financial regulators for independence. The observation picked its way towards a structural reality. Those regulators, conspicuously the OCC and the FDIC, perform roles—overseeing bank operations—that are proximate to Congress's money-making prerogative. The Fed, of course, is critical to that prerogative. Forfeiting the effort to identify a substantive rationale for Fed independence, the Court's exceptionalism looks all the more arbitrary.

Or, perhaps, all the more expedient. We are back to the feeling that the Court is quailing in the face of possible calamity. Quailing in the face of calamity may be better than the alternative, but it surely undermines the Court's reductivist unitary logic. If an exception for the Fed, simply because its activities have an immediate impact on the market, why not an exception for agencies with impacts that are less transparent but just as sacred for those affected? What about the elemental task of fairly managing the conflicts that deeply divide the most productive classes of the society, labor and management?[241] What about the bedrock importance of a competent and honest federal workforce to move the very gears of modern society—gathering information, calibrating contributions, and delivering resources across an immense American population?[242]

An anti-democratic answer suggests itself. The Court excises the Fed, appearances suggest, because the Fed saves the banks and serves the wealthy. That last two decades have fueled both popular and partisan distrust.[243] Confined largely to tools that drove up asset prices, the Fed's work to stimulate the economy after the Financial Crisis advantaged those holding financial wealth.[244] The Fed's liquidity supports in the capital market went only to those large enough to

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[238] *See generally* Dinovelli, *supra* note 4; Menand, *The Supreme Court's Fed Carveout*, *supra* note 35.
[239] *Seila Law*, 140 S. Ct. at 220.
[240] *Wilcox*, 145 S. Ct at 1415.
[241] *Id.*
[242] *Id.*
[243] A recent study finds that 63% of respondents considered the Fed to be an "out-group" institution, i.e., not affiliated with their political party. Their reasons turned on their belief that "the Fed favors the incumbent administration, businesses, or the wealthy." Pei Kuang, et al., *Perceived Political Bias of the Federal Reserve*, 11 & n.8 (NBER Working Paper Series, Working Paper No. 33071 2024). In 2020, Chair Jerome Powell pushed Congress to step up its fiscal outlays to individuals in part on the ground that relying on the Fed and monetary policy for remedy fueled public perceptions of a double standard, one that favored banks and finance over working families. *Semiannual Monetary Policy Report to the Congress Before the Committee on Banking, Housing, and Urban Affairs*, 116th Cong. (2020) (statement of Jerome Powell, Federal Reserve Chair).
[244] *See generally* ELIZABETH ADKINS, et al., THE ASSET ECONOMY: PROPERTY OWNERSHIP AND THE NEW LOGIC OF INEQUALITY (2020); Mark Blyth, et al., *Now the Bank of England Needs to Deliver QE for the People*, THE GUARDIAN (May 21, 2015) https://www.theguardian.com/business/economics-blog/2015/may/21/now-the-bank-of-england-needs-to-deliver-qe-for-the-people; Orla McCaffrey &

use that space for borrowing and investment.[245] The Fed rescued systemically important actors, by definition the largest financial players in the economy, while homeowners lost equity and employment dropped.[246] A similar pattern characterized the Fed's emergency response to the economic downturn caused by COVID-19. The Fed would inject some $5.2 trillion into the economy infrastructure.[247] Chastened by criticisms of its post-2008 programs, the Fed channeled money to smaller as well as larger borrowers. The flow still disproportionately reached larger financial players, however, while front-line workers struggled and unemployment spiked.[248]

The anti-democratic answer suggested by the Court's Fed exception is a poignant outcome. It turns on its head the democratic lineage that underlies the Constitution's allocation of money-making to the legislature. Rather than a reading that respects the long history that moved us towards democratic sovereignty, the Court's exception grasps for a way out of the debacle it constructed.

The incongruity exposes as well the character of the compass that brought us here. Unitary executive theory disregards the realities that undergird the project of governance. That project turns on traditions of struggle that underlay and informed the constitutional moment. Those traditions continued after that moment in the effort to construct a modern world that effectuated democratic ends.

As to that continuing effort, the anti-democratic answer returns us to Congress as well as the Court. Congress's legislative prerogative clearly secures the Fed's independence from short-term political manipulation by the president for partisan advantage. By the same token, it lays at Congress's door the responsibility to build a central bank system that serves the people who hold up the domestic economy. A diminishing number of those people believe that commitment describes the Fed. The constitutional crisis here extends beyond unitary executive theory.[249]

Shane Shifflet, *During Covid-19, Most Americans Got Ahead—Especially the Rich*, WALL STREET J. (June 27. 2021) https://www.wsj.com/economy/consumers/during-covid-19-most-americans-got-richerespecially-the-rich-11624791602?gaa_at=eafs&gaa_n=AWEtsqdZJAQkuY2H6cmOzpIEWPxMIQv5q-nelCNZ0k2dmr-NgatFR0KogDr8QrRzUi4%3D&gaa_ts=69838582&gaa_sig=6gI1of4DvWFBzVL7iwPaHEKwFy39py_4W3oLv7_uUjfu47i2evQn850NMHKQk8UOqkDSeM7Tru8OTVK2K805_g%3D%3D; Paul Krugman, *Wonking Out: Are Billionaires Making Out Like Bandits*, N.Y. TIMES (February 4. 2022) https://www.nytimes.com/2022/02/04/opinion/income-wealth-inequality-pandemic.html.

[245] *See generally* GARY GORTON, SLAPPED BY THE INVISIBLE HAND: THE PANIC OF 2007 (2010).

[246] MARK BLYTH, AUSTERITY: THE HISTORY OF A DANGEROUS IDEA 13-15 (2013); Blyth, et al., *supra* note 244; GERALD EPSTEIN, BUSTING THE BANKERS CLUB: FINANCE FOR THE REST OF US (2024).

[247] Christine Desan, *How To Spend a Trillion Dollars: Our Monetary Hardwiring, Why It Matters, and What We Should Do About It*, 2, n.2 (Apr. 4, 2022) (Harvard Public Law Working Paper no. 22-04) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4056241 (last accessed Feb. 5, 2026).

[248] Patricia Cohen, *Roughly One In Five Workers Are Collecting Unemployment Benefits*, N.Y. TIMES (July 23. 2020); Christine Desan & Nadav Orian Peer, *The Constitution and the Fed after COVID-19,* JUST MONEY (Jun. 10, 2020) https://justmoney.org/the-constitution-and-the-fed-after-the-covid-19-crisis-2/; Desan, *supra* note 132; Aaron Klein, *Trump Almost Has a Point About the Federal Reserve*, THE ATLANTIC (2026).

[249] Serious central banking reform could draw from many sources, including, *e.g.*, LEAH DOWNEY, OUR MONEY: MONETARY POLICY AS IF DEMOCRACY MATTERED (2024); ERIC MONNET, THE DEMOCRATIC

POSTSCRIPT: FROM MONEY TO INFORMATION

The argument in this paper highlights money-making as a congressional prerogative, one that is essential to democratic governance. But the logic of congressional prerogatives extends beyond money into other spheres of democratic governance. Indeed, the debate over congressional prerogative versus executive authority has become a defining feature of constitutional rupture during the second Trump Administration.

A salient example comes from the last year of constitutional conflict over information—the government's authority to collect and use data about individuals, households, and businesses on any number of scores, including employment, income, health, identity, immigration status, criminal record, and political activity. On January 20, 2025, President Trump established the Department of Government Efficiency which quickly sought "access to dozens of the most powerful and sensitive federal databases."[250] The President in turn signed Executive Order 14,243 to grant "full and prompt access to all unclassified agency records, data, software systems, and information technology systems" to presidential designees.[251] The Order's stated goal was to eliminate "information silos," reducing waste and fraud.[252]

Order 14,243 was sweeping—so sweeping as to trigger lawsuits claiming violation of the Administrative Procedure Act, the Freedom of Information Act, the Privacy Act of 1974, the E-Government Act, and the Federal Advisory Committee Act.[253] But as Bridget Fahey and Raul Fernandez point out, there are questions of structural power, not just statutory violation, at stake.[254] A range of official actors, including the President, Congress, the judiciary, and the administrative agencies must obtain and utilize information to perform their jobs. Executive Order 14,243 redraws access and expectations about information in ways that affects each of those actors. So far as the order contemplates reorganizing or consolidating "information silos," it also implicates how data and expertise are organized and produced.[255]

CHALLENGE OF CENTRAL BANKS AND CREDIT POLICY (2022); STEFAN EICH, THE CURRENCY OF POLITICS: THE POLITICAL THEORY OF MONEY FROM ARISTOTLE TO KEYNES (2022); Desan, *supra* note 160; John Crawford, Lev Menand, and Morgan Ricks, *FedAccounts: Digital Dollars*, 89 GEO. WASH. L. REV. 113 (2021); Saule Omarova, *The People's Ledger: How To Democratize Money and Finance*, 74 VAND. L. REV. 1231 (2021); RICKS, *supra* note 91.

[250] Bridget A. Fahey & Raul Castro Fernandez, *The Structural Law of Data,* 93 U. CHI. L. REV. 67, 70 (2026); *see* Exec. Order No. 14,158, 90 Fed Reg. 8, 441 (Jan. 20, 2025) (establishing the Department of Government Efficiency (DOGE)).

[251] Exec. Order No. 14,243, § 3, 90 Fed. Reg., 13, 681 (Mar. 20. 2025) (instructing agencies to provide Presidential designees with "full and prompt access to all unclassified agency records, data , software systems, and information technology systems . . . for purposes of pursuing Administration priorities related to the identification and elimination of waste, fraud, and abuse."); Fahey & Fernandez, *supra* note 250 at 113.

[252] *Id.*

[253] Fahey & Fernandez, *supra* note 250 at 113.

[254] *Id.* at 71-72.

[255] Exec. Order No. 14,243, *supra* note 251.

The Federal Reserve, for example, depends on information about key interest rates that is gathered by the obscure but essential Office for Financial Research (OFR), which sits within the U.S. Treasury. According to financial experts, market participants transmit that data to OFR because it has carefully negotiated agreements with them, uses advanced data processing and validation techniques to produce sound results, and is not an industry regulator.[256] As Nathan Tankus emphasizes, a credible and timely flow of information about a matter so integral to the function of the capital markets is critical to maintain their operation in good times and to guide policy-makers in times of financial volatility or crisis.[257]

Executive action to collapse the OFR or transfer its role, in line with the priorities of Order 14,243 and, it must be added, congressional allies of the President, could undermine essential action by the Fed.[258] If financial observers are correct, the reorganization would disrupt the relationships that ensure the government's ability to gather sensitive data. More troubling still, the analytic capacities, technical expertise, and protocols represented by the OFR's staff and operations could be lost. Order 14,243, asserts presidential power to evaluate those risks as against Congress's decision to delegate designated tasks to particular agencies.

The example exposes an operating premise we take for granted. When Congress establishes an agency to undertake specialized work—scientific, economic, engineering, statistical, medical, or otherwise—it assumes that the information produced will accord with the methodologies and protocols that comprise knowledge in those fields. Those practices are never static and never divorced from interpretive contest. But so far as they supply the standards for the treatment of facts, data, and analysis, they are basic to the production of information. In fact, we might compare expert protocols to devices like banking: they allocate power by enlisting third-party participation. Disciplinary norms and practices author standards for the production of knowledge, fragmenting the control of political actors. By contrast, Executive Order 14,243, read expansively, effectively asserts presidential authority to supervise expert practice, displacing the assumption by Congress that its delegation to specialized actors carried with it their professional protocols.

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[256] As Stacey Schreft, former Deputy Director for Research and Analysis at OFR, put it, the OFR uses "automated, fully audited pipelines for high-frequency data ingest, transformation, and validation from 80+ industry reporters. These connections are governed by tailored Memorandums of Understanding and interagency agreements, supported by the OFR's statutory authorities**.** Transferring or modifying the authority, necessary agreements, and final rules for the OFR's data collections would likely seriously delay or disrupt the collections," quoted in Nathan Tankus, "The 'One, Big Beautiful Bill Act,' Eliminates the Office of Financial Research – Threatening the Stability of the Treasury Market," NOTES ON THE CRISIS (June 10, 2025), https://www.crisesnotes.com/the-one-big-beautiful-bill-act-eliminates-the-office-of-financial-research/ (last visited February 12, 2026); *see also id.* (noting that market participants share data because of long-standing relationships with an office that does not regulate them).

[257] *Id.*; *see also* Robin Wigglesworth and Kate Duguid, "Could Trump's 'Big Beautiful Bill' Kill the OFR and Accidentally Sabotage the SOFR?" FINANCIAL TIMES (June 3, 2025), https://www.ft.com/content/7962a211-a663-4ec0-99ed-1bde012bb0d8 (last visited February 12, 2026).

[258] The Big Beautiful Bill Act significantly reduced funding for the OFR. Compare text at Wigglesworth and Duguid, *supra* note 257 with The Big Beautiful Bill Act, Pub. L. No. 118-123, § 50005, 139 Stat. 456 (2025).

Claims over information—and the burgeoning world of data that anchors that information—thus distribute power between the President, Congress, and other public actors.[259] It determines as well how much the American people know about and can control the way that information is collected and used.

The insight takes Fahey and Fernandez back to the Congress's prerogative to investigate issues and gather information.[260] As they argue, that prerogative is capacious. Congress can act outside conventional lawmaking procedures to obtain the information it needs to legislate. Each house can act independently, as can a committee within that house. Those legislative actors wield the subpoena power, enforceable by contempt; contempt of Congress is a federal criminal offense.[261] The legislative authority to obtain information is long-established and, as the Supreme Court has emphasized "'broad' and 'indispensable.'"[262] The current conflict takes us to a yet more basic level, connecting Congress's authority to gather information to information's very production. Congress must have the authority to assume that when it delegates tasks to specialized actors, they produce knowledge according to professional disciplinary standards. That alone would ensure that when Congress is making law, it acts with full information.

The constitutional conflict is far from finished, however. In the face of Congress's power, President Trump appears to claim that he has an "inherent power to view and use" and, it appears, reorganize and deploy, any information held by administrative agencies.[263] Fahey and Fernandez are skeptical about presidential reach beyond congressional delegation unless it occurs within an area of "exclusive executive" authority, like the military decision-making.[264] But they also argue that the battle over control of information remains in flux at the constitutional level. In that case, they advocate that Congress move statutorily to "assert it constitutional prerogatives to structure and regulate data more robustly."[265]

Their reading does more than expose an issue of great import in the modern information age.[266] It also captures the character of constitutional authority as a matter of pitched struggle over prerogatives. The results, as the case of authority over money-making demonstrates, determine the extent of democratic sovereignty.

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[259] Fahey & Fernandez, *supra* note 250 at 109-124.
[260] *See supra* note 23.
[261] Fahey & Fernandez, *supra* note 250 at 114-115.
[262] *Id.* (citing Trump v. Mazars USA, LLP, 140 S.Ct. 2019, 2031 (2020), quoting *McGrain*, 273 U. S. at 161).
[263] *Id.* at 112. Fahey and Fernandez consider as well how information collection by the judiciary and administrative agencies have escaped congressional control. *Id.* at 116-124. *See also* Zachary D. Clopton & Aziz Z. Huq, *The Necessary and Proper Stewardship of Judicial Data*, 76 STAN. L. REV. 893 (2024) (advocating closer regulation of data).
[264] Fahey & Fernandez, *supra* note 250 at 114.
[265] *Id.* at 136.
[266] Consider, for example, the controversy over the professional qualifications of those appointed to direct the Bureau of Labor Statistics. *See, e.g.,* Jasper Ward, Jarrett Renshaw, and Bo Erickson, "White House Withdraws Antoni's Nomination to Lead Bureau of Labor Statistics," REUTERS (Sept. 30, 2025); Christopher S. Rugaber, "Trump Fires Bureau of Labor Statistics Commissioner After Dismal Employment Report," PBS NEWS (Aug. 1, 2025).

CONCLUSION

History, democratic theory, and jurisprudence together confirm Congress's prerogative to determine the President's role over money-making. More broadly, they suggest how Americans developed their democratic constitutional tradition. The separation of powers became real as a practice of power checked rather than an abstraction of armchair proportions. We can follow the money to that larger lesson.

American legislatures before the Constitution first dreamed of self-determination when they pried money creative power into their own hands. Their commitment fueled the Revolution, an emancipation paid for with money home-made in continental and state legislatures. The Framers consolidated federal representative rule in the Constitution when they confined the money-making prerogative to Congress, taking it from state assemblies. That legislature in turn experimented with national banks, a storied design in early modern liberal polities, one calculated to marginalize monarchs and presidents alike. The experiment in banking unfolded in idiosyncratic fashion across the next American century, arriving finally at the Fed. *Raichle* would remind a world on the edge that the central bank's engineering was dynamic and deliberate, a project adverse to judicial second-guessing.

When the crash came, it exposed the legislature's ultimate responsibility to create and defend the dollar at the national level as a uniform means of exchange and payment, the very air of the economy. The authority draws on legislative power to define sovereign debt, to incur it, spend it, and support it with the levy. The same practice creates the medium we use to represent value and mobilize resources in its measure. As the Gold Clause cases document, money-making power stands up the domestic market.

The New Deal Congress had authorized the President to take drastic actions. But at that moment, a high tide of presidential power, Congress emphatically reduced executive authority over the Federal Reserve. That action asserted the imperative of the legislative authorship of our monetary design. Out of the same exigency, the Court consolidated a monetary jurisprudence that, over two and a half centuries, has undergirded congressional authority as part of a democratic project, a profound, fraught, and enormously important venture.

The character of that venture exposes the forgotten texture of democratic rule. Those who conceived and debated the Constitution operated within a rich tradition of struggle against unchecked authority. That tradition was messy but persistent, pervasive and prolonged. It was written in guerilla tactics rather than simple and elegant categories. Congressional authority was founded on prerogatives that earlier legislators had won. The prerogative to control money creation illustrates how deep those prerogatives went. The current conflict over information drives home the stakes and their immediacy.

The take-away follows. If we want to understand our constitutional tradition and the potential for democratic sovereignty that it represents, we should excavate not ignore those prerogatives. They are the practices that made and make legislative authority real. Some are evident, clearly marked in the text. Others, including legislative authority over money-making, are implicit.

They are operating premises that we notice most sharply when they are broken.

In 1873, the godfather of central banking chastised a British society in denial. The Bank of England had become, de facto, the epicenter of the economy. As Walter Bagehot wrote:

I am by no means an alarmist. I believe that our system, though curious and peculiar, may be worked safely; but if we wish so to work it, we must study it. We must not think we have an easy task when we have a difficult task, or that we are living in a natural state when we are really living in an artificial one.[267]

Bagehot was speaking of central banking; he could also have been speaking of democracy. Legislative authority is anchored in a wide base of prerogatives, the authority to create money prime among them. Unitary executive theory mistakes that reality. It creates devastating prospects, should its logic be applied to undermine Congress's authority over money creation. The same logic already threatens the precious project of democratic sovereignty more broadly.

[267] BAGEHOT, supra note 5 at 20.