

# LAW AND CUSTOM ON THE FEDERAL OPEN MARKET COMMITTEE

*David Zaring*<sup>\*</sup>

Draft Paper for Columbia Symposium on  
Administrative Law and Financial Regulation

## INTRODUCTION

The Federal Open Market Committee (FOMC), which controls the supply of money in the United States, is probably the country's most important agency.<sup>1</sup> The chair of the committee is often dubbed the second most powerful person in Washington, ranking only after the president.<sup>2</sup> Financial scholars and analysts obsess over the institution, leading to a rich tradition of FOMC Kremlinology, veneration, and second-guessing in business schools and economics departments.<sup>3</sup>

---

<sup>\*</sup> Assistant Professor, The Wharton School. Thanks to .... Thanks also to Jenny Lin and Jane Trueper for research assistance.

<sup>1</sup> Gerald Dunne has suggested that the FOMC be renamed the National Monetary Policy Commission, "so as to reflect what the Committee really is." Gerald T. Dunne, *A Central Bank for the Third Millennium*, 113 *BANKING L.J.* 327 (1996). The "probably" exists only to hedge on the possibility that a committee of officials of the Federal Reserve System would be considered an agency, though under 5 USC 551(a), they likely would meet the test (the White House, for what it is worth, does not constitute an agency under the APA).

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

<sup>3</sup> This obsession has led to numerous publications in popular media as well as academic sources. See e.g. Paul Krugman, *Give Jobs A Chance*, *N.Y. TIMES*, Sep. 15, 2013, <http://www.nytimes.com/2013/09/16/opinion/krugman-give-jobs-a-change.html> (focusing many of his articles on the actions of the Fed and debating their merits); Lawrence Summers, *Economic Stagnation Is Not Our Fate – Unless We Let it Be*, *WASH. POST*, Dec. 18, 2013, [http://www.washingtonpost.com/opinions/lawrence-summers-stagflation-is-not-our-fate--unless-we-let-it-be/2013/12/15/55a1b84e-65c1-11e3-a0b9-249bbb34602c\\_story.html](http://www.washingtonpost.com/opinions/lawrence-summers-stagflation-is-not-our-fate--unless-we-let-it-be/2013/12/15/55a1b84e-65c1-11e3-a0b9-249bbb34602c_story.html) (outlining the role of monetary policy in avoiding a permanent depression); Janet Yellen, *The View from Inside the Fed*, in *THE TAYLOR RULE AND THE*

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

The FOMC enjoys a legal mandate that shields its discretion to a remarkable degree. The principal claim here is that this shield, when combined with the imperatives of bureaucratic organization in an institution whose *raison d'être* is stability, have resolved themselves into an agency governed by internally developed tradition, in lieu of externally imposed constraints. The makeup of the committee, the materials that it consults before rendering monetary policy decisions, the way it votes on those decisions, and the way the decision are expressed are products of a *mélange* of evolving tradition and statutory permissiveness.

One might, of course, argue that some combination of law and tradition explains what happens in most agencies. But the degree of reliance on tradition sets the FOMC apart. No one worries about the customs governing evidence presentation and voting order on multi-member boards like the SEC or NLRB, but they are subjects of scrutiny at the FOMC. By the same token, APA law, rather than traditions such as that of the so-called “beige book,” governs what goes into the record before, say, the EPA or Commerce Department make their factual findings.<sup>5</sup> And Supreme Court decisions like *Motor Vehicle Mfrs. Ass'n v. State Farm Ins. Co.*, mean that the decisions rendered by most agencies are substantially lengthier, and strive for substantially less ambiguity, than are and do those of the FOMC.<sup>6</sup>

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

---

TRANSFORMATION OF MONETARY POLICY (Evan F. Koenig et al. eds., 2012) (describing the influence of the famous Taylor Rule on American monetary policy).

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

<sup>5</sup> [https://www.minneapolisfed.org/publications\\_papers/pub\\_display.cfm?id=3568](https://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3568)

<sup>6</sup> 463 U.S. 29 (1983).

oversight.

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

- The FOMC enjoys the sorts of broad delegations that other New Deal agencies benefit from, only more so; the eight annual orders issued by the committee at the conclusion of each of its eight annual meetings do not fit within the traditional paradigms of administrative rulemaking or adjudication, leading courts to eschew any effort to review those decisions as committed to the agency's discretion.<sup>7</sup>
- Given its free hand, the FOMC might be expected to be an empire builder. But really, it has only expanded its remit with regard to the sort of transactions it takes on, which have moved beyond the purchase and sale of federal government debt to include positions in a broader range of financial assets, as the financial crisis exemplified.
- The modest problems that the FOMC has endured at the hands of the branches that monitor independent agencies like it – the courts and Congress – have reflected its extraordinary independence and relative opacity. The courts have turned away a series of plaintiffs, including two senators, concerned about the breadth of the delegation of power over the economy to the committee, and the mechanism of appointment of its members. Congress has occasionally fretted about the black box within which the committee makes its economy changing decisions, but in 1990 removed legislation passed in the 1970s designed to require more reporting from the committee, suggesting that it, too, is cowed by the idea of subjecting the agency to much legislative oversight.
- The committee makes decisions, if the scrutiny of the transcripts of its deliberations during the era in which Alan Greenspan was the FOMC chair is any indication, in a procedurally consistent but increasingly lengthy and elaborate way. Simple correlations between the transcript of these meetings (length, size, mood, number of times the

---

<sup>7</sup> Though probably, if they must belong somewhere in the APA, they belong to informal adjudications, which amount to any order issued by an agency, 5 USC 551(6) (“order” means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rulemaking but including licensing”); the FOMC’s monetary policy rules amount to guidance to its open market trading desks as to what sort of federal funds rate they should target.

chair spoke) and the ultimate decision made by the FOMC, or on a number of leading economic indicators, found one intriguing relationship between attendance and the direction of the federal funds rate. There may be some promising research directions available for this sort of analysis.

This paper is not meant to wholly indict the lack of coverage of the rules and culture surrounding open market operations. Administrative lawyers often assume that the subjects they study closely – rulemaking and adjudication by agencies – are quite different from other government services, including block spending, the management of state owned enterprises, and, yes, the oversight of interest rates. They do not necessarily claim to cover the entire waterfront of government action. Moreover, from a disciplinary perspective, while lawyers are very much engaged in financial supervision – that is, the way that the Fed regulates banks – they have little to do with either the decisionmaking by the FOMC, or even the implementation of its open market orders, which is done by the traders who staff the New York Fed’s open market operations desk.

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

In part I of this paper, the legal constraints of the FOMC are considered in full, in the classical administrative law vein. As we will see, those constraints have not really been constraining at all; FOMC members enjoy independence from Congress, the executive, and the judiciary. Nonetheless, the limitations on the freedom of committee members to do as they wish are also reviewed. In part II, the way that the constraints that do exist have affected the agency’s decisionmaking process is considered. A brief conclusion follows.

## I. THE LEGAL CONSTRAINTS ON THE FOMC

This section of the paper offers a traditional analysis of the law governing the FOMC – a very traditional one, given that the subjects will be authorizing statutes, court decisions, and the small amount of legal scholarship directed towards the committee.<sup>8</sup> The FOMC enjoys a

---

<sup>8</sup> For some context, Henry Hu has described the Federal Reserve, and the FOMC, as a biased, if well-meaning, stabilizers of investor expectations, in a way that incentivizes them

powerfully broad open market operations remit – one too broad for courts to feel comfortable to police even for arbitrariness. Its authorizing statutes and structure give it a strong degree of structural insulation, one shared by the Fed that houses it.

Broad delegation to a committee that meets secretly in order to promulgate orders with profound effects on the economy has resulted in some predictable litigation, albeit with some less than predictable plaintiffs. There have been lawsuits over the legality of the delegation to the FOMC by Congress, the legitimacy of its appointments process, under which some members of the committee are appointed by private parties, and some tussles over the committee's economical approach to transparency.

The committee has straightforwardly survived these conflicts, but, in the interests of comprehensiveness, and to illustrate the perceptible costs of such agency insulation, I recount them in this section. In the next section of the paper, I consider the process that the committee uses to make its decisions, making use of transcripts of committee meetings during the Greenspan era to do so.

I begin with a rough primer on exactly how the committee adjusts the money supply that might serve those unfamiliar with the institution. The FOMC sets monetary policy by adjusting the federal funds rate, which is the rate at which banks may exchange reserves at the Fed on an overnight basis. In a sense, the rate expresses the price for the Fed's willingness for banks to engage in the trade of extremely safe, if uncollateralized or unsecured, assets with one another.<sup>9</sup> It is usually expressed as an annualized rate, and is manipulated by the Fed towards targets identified at the culmination of every FOMC meeting. The FOMC increases the monetary supply by purchasing government securities (e.g. Treasury bills), injecting cash into

---

– somewhat ironically – to take more risks. Henry Hu, *Faith and Magic: Investor Beliefs and Government Neutrality*, 78 Tex. L. Rev. 777 (2000). On this understanding, the Fed's role in ensuring economic stability is regularly undermined by its contribution to moral hazard in finance. Under Allan Meltzer's political economic model of the Fed, any interpretation of the policymaker's decisions would be incomplete without accounting for the relevant political pressures, and even some influence from the academy. ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE, VOLUME 1: 1913-1951 (2003); ALLAN H. MELTZER, A HISTORY OF THE FEDERAL RESERVE, VOLUME 2: 1951-1986 (2009); Allan H. Meltzer, *Politics and the Fed* (Apr. 8, 2010) (unpublished manuscript) (on file with Carnegie Mellon University); available at <https://student-3k.tepper.cmu.edu/GSIADOC/WP/2010-E30.pdf>. As such, policy success is predicated on a delicate balance of political pressures and a correct understanding of economics, which, in his view, means one receptive to monetarism and the economic theories of Milton Friedman.

<sup>9</sup> Collateralization isn't necessary in these cases because the money being exchanged is already on hand at the Fed, and is not capable of being removed by the bank overnight.

the system in exchange for debt, and decreases it by selling those securities, thereby removing the amount of cash equivalent to the sale price of the securities. Higher rates reflect a variety of kinds of risk, of course, but most importantly compensates the purchaser for the risk of currency inflation. Because the federal funds rate is a very safe rate of interest, many other interest rates are based on it, or in practice track it.

#### A. *The FOMC's Powers and Independence*

The Supreme Court has said that “[o]pen market operations-the purchase and sale of Government securities in the domestic securities market-are the most important monetary policy instrument of the Federal Reserve System.”<sup>10</sup> The FOMC’s power to target a particular Federal Funds Rate was given to the Fed by the Federal Reserve Act of 1913.<sup>11</sup> That statute ensured that the Fed has the power to “establish . . . rates of discount to be charged by the Federal reserve bank for each class of paper” that it was authorized to sell.<sup>12</sup>

The FOMC was the part of the Fed created in the Great Depression to coordinate the setting of these discount rates. The FOMC was given the power to engage in “open market operations,” as well as to direct the terms of those operations in all of the federal reserve banks.<sup>13</sup> “Open market operations” is a term that Congress has not defined with precision, though it has identified a laundry list of permissible transactions that fall within the term’s rubric.<sup>14</sup>

The committee has accordingly interpreted its mandate interpreted broadly.<sup>15</sup> The Fed has said that the power to make any “purchase and sale of securities in the open market by a central bank” is what Congress meant to allocate to the committee; and because the term “securities” covers a myriad of financial instruments, the FOMC has exercised its authority to buy and sell American sovereign debt,<sup>16</sup> foreign currencies,<sup>17</sup> and, during

<sup>10</sup> Fed. Open Mkt. Comm. of Fed. Reserve Sys. v. Merrill, 443 U.S. 340, 343, 99 S. Ct. 2800, 2803, 61 L. Ed. 2d 587 (1979)

<sup>11</sup> 12 U.S.C. § 221-522.

<sup>12</sup> 12 U.S.C. § 357.

<sup>13</sup> 12 U.S.C. § 221-522.

<sup>14</sup> 12 U.S.C. §§ 348a, 353 *et seq.*

<sup>15</sup> *Id.*

<sup>16</sup> Credit Liquidity Programs and the Balance Sheet, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, [http://www.federalreserve.gov/monetarypolicy/bst\\_openmarketops.htm](http://www.federalreserve.gov/monetarypolicy/bst_openmarketops.htm) (last updated Jan. 7, 2014).

<sup>17</sup> Colleen Baker, *The Federal Reserve's Use of International Swap Lines*, 55 ARIZ. L. REV. 603, 628 (2013) (“The FOMC [] has traditionally had authority for swap line operations. The Federal Reserve Board has traditionally had authority over the opening and

the financial crisis, to, along with the Fed itself, even take positions in troubled real estate assets.<sup>18</sup>

Congress has directed the FOMC to use its open market powers to facilitate three goals; it “shall maintain long run growth of the monetary and credit aggregates commensurate with the economy's long run potential to increase production, so as to promote effectively the goals of maximum employment, stable prices, and moderate long-term interest rates.”<sup>19</sup> Moreover, with regard to the timing and scale of transactions, it has directed that “open-market operations shall be governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country.”<sup>20</sup>

Those goals certainly amount to guidance, but requiring the FOMC to do anything in particular to pursue them has never been in the cards. The Fed – the FOMC’s home – is probably the most independent of the government’s agencies, and part of its independence lies in its legal design. It has been structured in a way that minimizes executive influence in a manner typical of independent agencies. The Fed, and the FOMC, also enjoys strong freedom from legislative oversight enforced through a tightening or loosening on its purse strings. And the courts almost never get in the agency’s way. Out of this striking independence, a culture of noninterference has grown.

The Fed, like the other so-called “independent” government agencies, exists outside of the executive branch.<sup>21</sup> Unlike the heads of cabinet departments, the members of the Fed’s Board of Governors, who are also the members of the FOMC, cannot be removed from their posts by the President except for cause.<sup>22</sup> Like other heads of independent agencies, Board members are nominated by the President and confirmed by the Senate.<sup>23</sup>

---

the maintenance of accounts with foreign banks based upon the language of section 14(e).”).

<sup>18</sup> E.g., the TALF and the public private partnership during the financial crisis. For a discussion, see <http://www.andrewskurth.com/blogs-TheLine.Checking-in-on-TALF-and-PPIP>.

<sup>19</sup> 12 U.S.C. § 225a.

<sup>20</sup> 12 U.S.C. § 263(c).

<sup>21</sup> PAULINE SMALE, CONG. RESEARCH SERV., RS20826, STRUCTURE AND FUNCTIONS OF THE FEDERAL RESERVE SYSTEM (2010).

<sup>22</sup> 12 U.S.C. § 242. See also *The Federal Open Market Committee*, THE STRUCTURE OF THE FEDERAL RESERVE SYSTEM, <http://www.federalreserve.gov/pubs/frseries/frseri2.htm> (last updated Jan. 14, 2011) (specifying membership composition details).

<sup>23</sup> *The Board of Governors of the Federal Reserve System*, THE STRUCTURE OF THE FEDERAL RESERVE SYSTEM (last updated July 8, 2003),

However, the President enjoys much less control over the Fed and FOMC once they are staffed. The FOMC does not submit a regulatory agenda, or its decisions on monetary policy, for review by the White House's Office of Management and Budget, as executive branch agencies do with their agendas and important regulatory rules.<sup>24</sup>

The control enjoyed by the legislature, often thought to be a feature of independent agencies, is even weaker. Unlike those agencies, the Fed does not depend upon Congress for a budget; it is self-funding, based on the fees it charges banks for supervision, and the profits it makes through its open market operations.<sup>25</sup> The agencies do not ignore Congress; the Fed and FOMC do make senior officials available for testimony before both House and Senate committees.<sup>26</sup> But that testimony is rarely as fireworks-filled as it is for other agency heads; Fed officials do not live in fear of the grilling their counterparts in other agencies receive, as no budget sanction exists in the background, out of which a culture of noninterference has grown.<sup>27</sup>

The result is that the relationship between Congress and the FOMC and Fed is much more attenuated than it is for Congress and the SEC, which does depend on an annual appropriation, and accordingly spends a great deal of time on the cultivation of congressional committees. President Obama's first SEC chair, Mary Schapiro, testified over 48 times before

---

<http://www.federalreserve.gov/pubs/frseries/frseri.htm>.

<sup>24</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sep. 30, 1993). *But see* Ben Bernanke, Letter to Cass R. Sunstein (Nov. 8, 2011), *available at* <http://www.federalreserve.gov/foia/files/regulatory-burden-reduction-111115.pdf> (noting that the Federal Reserve will keep the OMB informed of its efforts). The FOMC, by contrast, simply announces its federal funds rate decisions to the world shortly after it concludes one of its eight annual meetings. *See e.g.* Press Release, Board of Governors of the Federal Reserve System (Jan. 25, 2012), *available at* <http://www.federalreserve.gov/newsevents/press/monetary/20120125c.htm> (announcing FOMC's "principles regarding its longer-run goals and monetary policy strategy.").

<sup>25</sup> BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, THE FEDERAL RESERVE SYSTEM: PURPOSES & FUNCTIONS 11 (9<sup>th</sup> ed. 2005), *available at* [http://www.federalreserve.gov/pf/pdf/pf\\_complete.pdf](http://www.federalreserve.gov/pf/pdf/pf_complete.pdf).

<sup>26</sup> *See e.g.* Ben S. Bernanke, Chairman, Fed. Reserve, Testimony Before the U.S. House of Representatives Committee on Financial Services (July 17, 2013) *available at* <http://www.federalreserve.gov/newsevents/testimony/bernanke20130717a.htm> (presenting the Fed's semiannual Monetary Policy Report to the Congress). Identical remarks were presented to the Senate Committee on Banking, Housing, and Urban Affairs the following day. *Id.*

<sup>27</sup> For example, a recent testimony by Commissioner Fink of IRS' Small Business and Self-Employment Division was quite lively. Gregory Korte, *Blasted by Congress, IRS Apologizes For Lavish Events*, USA TODAY, June 6, 2013, <http://www.usatoday.com/story/news/politics/2013/06/06/irs-conferences-oversight-hearing/2395337/>.



Congress during her 5 years in charge of the agency,<sup>28</sup> and by all accounts left “exhausted.”<sup>29</sup> During that period Ben Bernanke, the Fed and FOMC chair, testified a similar 49 times, but on thirteen occasions, the testimony was simply repeated before different committees; one never hears of Fed chairmen finding their interaction with legislators to be exhausting.<sup>30</sup>

Moreover, the FOMC along with the agency that houses it, have an excellent record in the courts, meaning that the gentle oversight played by the two politically accountable branches is not paired with something more rigorous from the judiciary. Augustus Hand concluded that he couldn't guess at what might be wrong with a legally constituted bank making loans to other banks and setting interest rates for those loans in *Raichle v. Federal Reserve Bank*.<sup>31</sup> Hand concluded that

It would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review. Indeed, the correction of discount rates by judicial decree seems almost grotesque, when we remember that conditions in the money market often change from hour to hour, and the disease would ordinarily be over long before a judicial diagnosis could be made.”<sup>32</sup>

No court, to my knowledge, has disagreed with Hand's view of the institutional competences at play. Indeed, the Fed's record in court is strong enough to suggest that a combination of *Chevron* deference, unwilling potential plaintiffs, and, most importantly, the lack of a standard

---

<sup>28</sup> Schapiro's hearing activity waxed and waned during that period; she testified 8 (2009); 10 (2010); 18 (2011); 8 (2012); 4 (2013) times, at least according to the agency's publicly available records. See *Testimony*, U.S. SECURITIES AND EXCHANGE COMMISSION, <http://www.sec.gov/News/Page/List/Page/1356125649559>

<sup>29</sup> Ben Protess & Susanne Craig, *Rebuilding Wall St.'s Watchdog*, DEALBOOK, Nov. 26, 2012, [http://dealbook.nytimes.com/2012/11/26/schapiro-head-of-s-e-c-to-announce-departure/?\\_php=true&\\_type=blogs&\\_r=0](http://dealbook.nytimes.com/2012/11/26/schapiro-head-of-s-e-c-to-announce-departure/?_php=true&_type=blogs&_r=0); See also Joshua Gallu & Robert Schmidt, *Schapiro SEC Reign Nears End with Rescue Mission Not Done*, BLOOMBERG BUSINESSWEEK, Oct. 19, 2012, <http://www.businessweek.com/news/2012-10-19/schapiro-sec-reign-nears-end-with-rescue-mission-not-done#p1> (“She has told friends that the late nights and almost constant policy battles have left her exhausted and eager to depart after the November election.”).

<sup>30</sup> These occasions were counted from the Federal Reserve database. 2009 *Testimony of Federal Reserve Officials*, BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, <http://www.federalreserve.gov/newsevents/testimony/2009testimony.htm> (last updated Dec. 3, 2009).

<sup>31</sup> 34 F.2d 910 (2d Cir. 1929). See also *Huntington Towers, Ltd. v. Franklin National Bank*, 559 F.2d 863, 868 (2d Cir. 1978) (in a case involving the supervisory powers of the Fed, “it is not for the courts to say whether or not the actions taken were justified in the public interest, particularly where it vitally concerned the operation and stability of the nation's banking system”).

<sup>32</sup> *Id.* at 915.

for reviewability identified by Judge Hand in *Raichle*, has made the agency extremely difficult to judicially supervise.<sup>33</sup>

The record is even stronger for the FOMC; while the Fed's supervisory rules do get reversed occasionally,<sup>34</sup> the FOMC's decisions have generally been exempted from judicial review entirely.<sup>35</sup> None of the five cases reported in the Federal Reporter or Supplement that named the FOMC as a defendant were direct challenges to FOMC open market orders and all were dismissed for lack of standing or merit. Two suits, brought by legislators, challenged the appointment procedures of the committee as violating the Constitution.<sup>36</sup> An earlier suit, filed in 1976, alleged FOMC violations of the Freedom of Information Act for failing to make certain records promptly available.<sup>37</sup> Another suit was brought against both the Fed and the FOMC, challenging the constitutionality of the American monetary system.<sup>38</sup> Although I will analyze this litigation in more detail later in this paper, as a first order of approximation, it, with the exception of the FOIA suit (which failed at the Supreme Court) went nowhere. The judiciary is simply disengaged from the project of oversight of the committee.

### *B. Implications Of Independence*

This striking degree of independence is often thought to be a "best practice" of central bank design.<sup>39</sup> Central banks too subject to the political

---

<sup>33</sup> Cf. David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187 (2010) (discussing the high degree of judicial deference granted to Treasury actions).

<sup>34</sup> See e.g. *Sec. Indus. Ass'n v. Bd. of Governors of the Fed. Reserve Sys.*, 103 S.Ct. 2979 (reversing Fed's decision to permit a bank to sell commercial paper); *In Re Bankers Trust Co.*, 61 F.3d 465 (6<sup>th</sup> Cir. 1995) (holding the Fed exceeded its authority in enacting rule precluding discovery of bank examination information). Compare *Ass'n of Bank Travel Bureaus, Inc. v. Bd. of Governors of the Fed. Reserve Sys.*, 568 F.2d 549 (7<sup>th</sup> Cir. 1978) (denying petition to review the Fed's rule-making decision).

<sup>35</sup> None of the five cases that named the FOMC as a defendant were direct challenges to FOMC decisions and all were dismissed for lack of standing or merit. Two suits, brought by senators, challenged the appointment procedures of the committee as violating the Constitution. An earlier suit, filed in 1976, alleged FOMC violations of the Freedom of Information Act for failing to make certain records promptly available. Another suit was brought against both the Fed and the FOMC, challenging the constitutionality of the American monetary system.

<sup>36</sup> *Melcher v. Fed. Open Market Comm.*, 644 F.Supp. 510 (D.D.C. 1986); *Riegle v. Fed. Open Market Comm.*, 656 F.2d 873 (D.C. Cir. 1981).

<sup>37</sup> *Fed. Open Markets Comm. v. Merrill*, 99 S.Ct. 2800 (1979).

<sup>38</sup> *Howe v. United States*, 632 F.Supp. 700 (D. Mass. 1986).

<sup>39</sup> See Geoffrey P. Miller, *An Interest-Group Theory of Central Bank Independence*, 17 J. LEGAL STUD. 433 (1998) (discussing the interest group effects on a non-independent central bank); Alberto Alesina & Lawrence H. Summers, *Central Bank Independence and Macroeconomic Performance: Some Comparative Evidence*, 25 J. Money Credit &

process, it has been argued, often surrender to short term thinking about the need for currency stability, and are more likely to adjust monetary policy to suit the needs of the party in power – often to the detriment of long term stability to the money supply and economy more generally.<sup>40</sup>

This tendency is why the World Bank has recommended to all of its client countries that they insulate their central banks from political oversight.<sup>41</sup> The European Central Bank has been created with something approaching super-independence. During the European sovereign debt crisis, it has, often over political opposition, devised its own novel and active approach to defending the Euro; it can afford to essentially disregard the views of European political leaders over its appropriate role.<sup>42</sup>

### C. Nondelegation Agonistes

Nonetheless, the dramatic insulation of a particular agency from oversight from any of the three branches of government – or, indeed, the very existence of a central bank with responsibility for currency stability and economic growth – is not something obviously contemplated by the Constitution. The lack of provision for a central bank in the document led early opponents of the Bank of the United States – not a central bank, but a federally chartered institution designed, among other things, to provide a role in organizing government financing – to conclude that it was unconstitutional. The creation of the First Bank of the United States was

---

Banking 151, 154 (1993) (insulated central banks are less likely to set inflationary monetary policy); Laurence H. Meyer, Governor of the Fed. Reserve Board, Remarks at the University of Wisconsin, LaCrosse (Oct. 24, 2000), *available at* <http://www.federalreserve.gov/boarddocs/speeches/2000/20001024.htm> (speech by member of the FOMC on the value of independent central banks); cf. David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294 (2006) (discussing the best practices of agency rulemaking).

<sup>40</sup> Timothy A. Canova, *Black Swans and Black Elephants in Plain Sight: An Empirical Review of Central Bank Independence*, 14 CHAP. L. REV. 237 (“It was widely accepted that politicians could not be trusted with monetary policy because their short-term time horizons and fixations on their next elections.”)

<sup>41</sup> The World Bank strongly advocates for national political, fiscal, and administrative decentralization. *Decentralization & Subnational Regional Economics*, THE WORLD BANK GROUP (2001), <http://www1.worldbank.org/publicsector/decentralization/what.htm> (last visited Nov. 12, 2013).

<sup>42</sup> “Neither the ECB or the national central banks, nor any member of their decision-making bodies, are allowed to seek or take instruction from EU institutions or bodies, from any government of an EU member State or from any other body.” *Independence*, EUROPEAN CENTRAL BANK, <https://www.ecb.europa.eu/ecb/orga/independence/html/index.en.html> (last visited Nov. 12, 2013).

vehemently opposed by Thomas Jefferson for this reason.<sup>43</sup>

*M'Culloch v. Maryland* settled that argument in favor of central banking. The second iteration of the Bank of the United States was deemed to be a permissible exercise of the power to regulate interstate commerce because the Necessary and Proper clause of the Constitution permitted Congress to go beyond the enumerated powers of the Constitution and create new institutions, if doing so would contribute to its constitutional remit.<sup>44</sup> But the decision never mollified critics of the bank like President Andrew Jackson, who said “if the bank be established for that purpose, with a charter unalterable without its consent, Congress have parted with their power for a term of years, during which the Constitution is a dead letter. It is neither necessary nor proper to transfer its legislative power to such a bank.”<sup>45</sup>

If today we can be assured that the existence of a central bank is proper, claims about the breadth of its remit and insulation from the political branches have continued to be raised. Many of those worried about the Fed and the FOMC have focused on the possibility that the latter committee marks an unconstitutional delegation of legislative policy-making authority to a set of private actors. In fact, a suit was brought in 1964 – *Bryan v. Federal Open Market Committee*—challenging the powers of the committee to be an “unwarranted delegation of power by Congress.”<sup>46</sup> The suit was dismissed for lack of standing, as plaintiff could not differentiate his injury from the existence of the institution from that of any other American citizen.<sup>47</sup>

Under the nondelegation doctrine – the doctrine that appeared to exercise President Jackson, along with his disagreement with the Supreme Court over the meaning of the Necessary and Proper Clause – Congress is not allowed to entirely abdicate its responsibility for legislating in favor of some other institution. It must provide that institution with an “intelligible

---

<sup>43</sup> *Growing Opposition*, U.S. HISTORY (2013), <http://www.ushistory.org/us/18c.asp> (last visited Nov. 13, 2013).

<sup>44</sup> 17 U.S. 316, 350 (1819).

<sup>45</sup> Andrew Jackson, *Veto Message* (July 10, 1832), reprinted in 2 MESSAGES AND PAPERS OF THE PRESIDENTS 576-89 (James D. Richardson ed., 1897). See also H.W. BRANDS, *THE MONEY MEN* 57-96 (2006) (describing the obstacles that faced the national bank).

<sup>46</sup> *Bryan v. Fed. Open Mkt. Comm.*, 235 F. Supp. 877, 882 (D. Mont. 1964) (“if plaintiff could champion and litigate such a case, every other owner of government obligations affected by the operations of the Open Market Committee could do the same”).

<sup>47</sup> See also *Howe v. United States*, 632 F. Supp. 700 (D. Mass. 1986) *aff'd*, 802 F.2d 440 (1st Cir. 1986) (dismissing suit against constitutionality of FOMC for lack of standing).

principle” to guide its use of the legislative power granted it by the legislature.<sup>48</sup> The intelligible principle test has been famously easy to meet – indeed, the Supreme Court has only found two delegations of legislative authority to be unconstitutional – and both were in 1935, two short terms before the “switch in time that saved nine” that marked a marked shift in judicial receptivity to the administrative innovations of the New Deal state.<sup>49</sup>

However, that test has a corollary – of uncertain doctrinal provenance – that posits that legislative delegations to private parties are particularly disfavored – much more than would be delegation to the executive branch or to an independent agency.<sup>50</sup> In 2013, the D.C. Circuit proclaimed—in *Association of American Railroads v. United States Department of Transportation*—that “federal lawmakers cannot delegate regulatory authority to a private entity.”<sup>51</sup> The Fed’s regional banks are owned, at least in theory, by their members, who are private sector financial intermediaries. It is this variant of the nondelegation doctrine that most intriguingly threatens the FOMC, with its membership composed partially of regional bank presidents picked by their semi-private boards.

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

---

<sup>48</sup> *Mistretta v. United States*, 109 S.Ct. 647 (1989) (Congress can seek assistance from other branches as long as it “lay[s] down by legislative an intelligible principle to which the person or body authorized . . . is directed to conform”). See also Patrick M. Garry, *Accommodating the Administrative State: The Interrelationship Between The Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921 (2006) (discussing the consequences of “the nearly unbounded nondelegation doctrine”); Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 317 (2000) (describing “how certain canons of construction operate as nondelegation principles”).

<sup>49</sup> See e.g. *A.L.A. Schechter Poultry Corp. v. United States*, 55 S.Ct. 837, 848 (1935) (holding “that the code-making authority thus conferred is an unconstitutional delegation of legislative power.”); *Panama Refining Co. v. Ryan*, 55 S.Ct. 241, 252 (1935) (finding that the challenged statute “goes beyond” the “limits of delegation which there is no constitutional authority to transcend.”).

<sup>50</sup> See Asmara Tekle Johnson, *Privatizing Eminent Domain: The Delegation of A Very Public Power to Private, Non-Profit and Charitable Corporations*, 56 AM. U. L. REV. 455, 462 (2007) (“Courts find delegations of public power to private actors more problematic than delegations to public authorities or agencies for several reasons.”).

<sup>51</sup> For the federal government to “delegate regulatory authority to a private entity . . . would be ‘legislative delegation in its most obnoxious form.’” *Ass’n of Am. R.R. v. United States Dep’t of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) (quoting *Carter v. Carter Coal Co.*). Cf. *Potter v. State*, 509 P.2d 933, 935 (Okla. Crim. App. 1973) (“the general rule has become fixed that the legislature may not delegate legislative functions to private persons”).

subjects ranging from accounting standards set by the privately staffed Financial Accounting Standards Board to safety standards propounded by professional associations of engineers.<sup>52</sup> Still, there are some doctrinal bases for this variant of the antidelegation canon. In *Carter v. Carter Coal Co.*, the Supreme Court described delegations to the private sector as “legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”<sup>53</sup>

And in *United States v. Schechter Poultry, Inc.*, one of the two cases in which the Supreme Court – unanimously, no less – found a legislative delegation to be unconstitutional, it did so in the context of the National Industrial Recovery Act, which delegated authority partly to the President to promulgate regulatory codes over any and every commercial sector of the economy, but also permitted private groups to present draft codes to the President for his imprimatur.<sup>54</sup> The *Schechter* Court sarcastically wondered if it could be “seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries?”<sup>55</sup>

The purported private anti-delegation canon has been the most persistent source of worry about the super-independence of the FOMC in both the legal literature and in the doctrine.<sup>56</sup> As perspicacious a

---

<sup>52</sup> Moreover private delegations have been around for some time; in 1893, Congress delegated the power to establish a mandatory height for drawbars on railroad cars to the American Railway Association, upon the pain of the payment of a civil penalty. Act of Mar. 2, 1893, ch. 196, 27 Stat. 531. The Supreme Court affirmed the delegation. *See* St. Louis, Iron Mountain & S. Ry. v. Taylor, 210 U.S. 281, 285-87 (1908); *see also* Harold J. Krent, *Federal Power, Non-Federal Actors: The Ramifications of Free Enterprise Fund*, 79 FORDHAM L. REV. 2425, 2454 n.31 (2011) (discussing the history of the delegation). *But see* Mistretta v. United States, 109 S.Ct. 647, 680 (1989) (Scalia, J., dissenting). *See also* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 546 (2000) (reconceiving the public/private distinction in governance and administrative law). Compare Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 65 (1990) [hereinafter Krent, *Fragmenting the Unitary Executive*] (arguing that such private delegation is “simply inconsistent with the separation of powers doctrine as currently articulated by the Supreme Court.”).

<sup>53</sup> 298 U.S. 238, 311 (1936).

<sup>54</sup> 295 U.S. 495, 529-42 (1935).

<sup>55</sup> *Id.* at 537 (answering in the negative, stating that “[s]uch a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress”).

<sup>56</sup> Mark F. Bernstein, *The Federal Open Market Committee and the Sharing of*

constitutional thinker as John Hart Ely argued that the Fed and its monetary policy committee were “the poster child of an unconstitutional private delegation.”<sup>57</sup> Timothy Canova has posited that, because of the role played by the presidents of regional Fed banks, the FOMC “is dominated by private actors” in a way that likely makes it illegal.<sup>58</sup>

Other scholars have explored the policy, as opposed to doctrinal, reasons we should worry about private delegations. Jonathan Bernstein believed that the FOMC’s role for semi-private parties “raises questions about . . . conflict of interest and accountability and about agency capture.”<sup>59</sup> For his part, Harold Krent has worried that “the private individuals on the FOMC are not immediately accountable to any public official for the exercise of statutory authority” and has noted that the Committee has “complete control over the purchase and sale of government securities on the open market, and thus [has] decisive influence over interest rates.”<sup>60</sup>

Because of what I would characterize the “settled expectations” check on the logic of constitutional law, the FOMC is probably too old and too important to be vulnerable to life-threatening constitutional challenge like a serious nondelegation doctrine challenge.<sup>61</sup> It has been accepted in almost all corners of the Washington establishment; the FOMC has been playing a surpassingly important monetary policy role since passage of Banking Act

---

*Government Power with Private Citizens*, 75 VA. L. REV. 111 (1989) (“The problems raised by a delegation to private individuals . . . suggest the need for closer scrutiny of the status of the FOMC’s privately appointed members.”); Eric Dodson Greenberg, *Falsification as Functionalism: Creating A New Model of Separation of Powers*, 4 SETON HALL CONST. L.J. 467, 577 (“Neither congressional limitations nor presidential supervision contain the power of the FOMC within the canal of its delegation.”)

<sup>57</sup> Canova, *supra* note 40, at 301 n.361 (crediting “the late John Hart Ely, for this description of the Federal Reserve).

<sup>58</sup> *Id.* at 301.

<sup>59</sup> Bernstein, *supra* note 56, at 127; *see also* Chad M. Pollard, *The Neutral Road: Toward Complete Independence of the Federal Reserve System*, 98 CORNELL L. REV. 743, 746 (2013) (“[T]he Fed’s components have significant private interests at their core and [ ] each of those interests exercises varying degrees of influence over actual Fed policy creation.”)

<sup>60</sup> Krent, *Fragmenting the Unitary Executive*, *supra* note 52, at 85.

<sup>61</sup> This “doctrine” is entirely my invention, and might be considered a precautionary principle for Supreme Court justices, and helps to explain why the Court might find, for example, that prayer to open legislative sessions is not inconsistent with the First Amendment prohibition against the establishment of religion, *Serpentfoot v. Rome City Comm’n*, 426 Fed.Appx. 884 (11th Cir. 2011), or why an agency with broad powers to regulate the accounting industry should not be disbanded despite being staffed in a manner inconsistent with the Appointments Clause. *Free Enter. Fund v. PCOAB*, 130 S. Ct. 3138 (2009).

of 1933. It is difficult to raise constitutional questions now about something that has been part of the furniture of government for so long.<sup>62</sup> Moreover, other longstanding traditions that the Supreme Court has called into constitutional question—the sentencing guidelines, for example, or the legislative veto—had much shorter tenures, and were not the subject of active opposition by duly appointed officers of the United States, such as Article III judges, in the case of the former,<sup>63</sup> and the Department of Justice in the case of the latter.<sup>64</sup>

Nonetheless, these sorts of challenges are the sorts of thought experiments that are inevitable when a heavily insulated, broadly authorized government agency's work is at stake. Because the FOMC has a private component, moreover, the nondelegation threat is as contemporary as the recent *Association of American Railroads* decision.<sup>65</sup>

It is worth underscoring again that the purpose of a review of these nondelegation doctrine rumblings is not so much to question the legality of the agency, or make the case for its destruction at the hands of the judiciary, but rather to explore the facets of its legal and institutional structure, and, because that structure makes it unique, see how the law might, even if a bit uncomfortably, come to terms with an institution that is already an important fact on the ground.

#### *D. The Strange Case Of FOMC Appointments*

If anything, the strongest legal limitations on the FOMC lay not in the calibration of its mandate (which is generously broad), or its location in the federal government (where it is an independent part of a particularly independent agency), but in the constraints on the committee's membership. The committee is comprised of the seven members of the Board of Governors of the Fed, along with five representatives from the thirteen federal reserve banks, one of which is, by law, the head of the Federal Reserve Bank of New York.<sup>66</sup>

This voting structure has enabled regional dissent on open market

---

<sup>62</sup> See Bernstein, *supra* note 56, at 118-23 (outlining the history of the FOMC).

<sup>63</sup> See *Appendi v. New Jersey*, 530 U.S. 466 (2000) (holding that the Sixth Amendment right to a jury trial proscribes judges from imposing criminal sentences above statutorily fixed maximums if the sentence is based on factors other than those determined by a jury beyond a reasonable doubt).

<sup>64</sup> See *I.N.S. v. Chadha*, 462 U.S. 919 (1983) (holding that a section of the Immigration and Nationality Act permitting an Executive Branch decision to allow a deportable alien to remain in the U.S. to be overruled by resolution of one House of Congress was unconstitutional because such action was legislative in nature).

<sup>65</sup> 721 F.3d 666 (2013).

<sup>66</sup> 12 U.S.C. § 263 (2012).



policymaking matters and incorporates some relative outsiders into committee decisionmaking. It also, at least, in theory, makes for an FOMC with a voting membership larger than that of most agencies, and even of the Supreme Court, which ought to be more difficult for a chair to dominate.

But in some ways, the history of the strange appointments to the FOMC has, in the end, served as an example of the bolstering of the insulation of the members of the committee. For example, in the Banking Act of 1933 that created the FOMC, membership was doled out to the Secretary of the Treasury and the Comptroller of the Currency. That was changed in the Banking Act of 1935, which removed the members of the executive branch from the committee, and added the regional bank presidents.<sup>67</sup> The '35 Act also increased the tenure of members of the Board of Governors to a very long, by federal agency standards, fourteen years. In the Banking Act of 1942, the voting and membership structure of the committee as it exists today was established, and that structure privileges the Board members over those of the regional banks.<sup>68</sup>

In other ways, the membership is chosen in a way perfectly consistent with the ordinary practice for federal administrative agencies. The Board of Governors component of the FOMC cannot have more than four members of the same party, and is meant to be drawn from “a fair representation of the financial, agricultural, industrial, and commercial interests.”<sup>69</sup> Presidents do not always honor every aspect of this cross-sectional suggestion, but there is a tradition of nominating one community (which is traditionally the word used to refer to “small” in the industry) banker to the Board of Governors.<sup>70</sup> Non-voting reserve bank presidents also attend the committee’s meetings, and can debate, but not vote.

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

---

<sup>67</sup> For a discussion, see Bernard Shull, *Financial Crisis Resolution and Federal Reserve Governance: Economic Thought and Political Realities* (Levy Econs. Inst. of Bard College Working Paper No. 784, 2014), available at [http://www.levyinstitute.org/pubs/wp\\_784.pdf](http://www.levyinstitute.org/pubs/wp_784.pdf); see also <http://www.federalreserve.gov/boarddocs/speeches/2000/20001024.htm>.

<sup>68</sup> See David Fetting, *The Federal Reserve's Beige Book: A better Mirror than Crystal Ball*, THE REGION, March 1999, available at [https://www.minneapolisfed.org/publications\\_papers/pub\\_display.cfm?id=3568](https://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=3568).

<sup>69</sup> 12 U.S.C. § 241 (2012).

<sup>70</sup> Peter Conti-Brown & Simon Johnson, *Governing the Federal Reserve System after the Dodd-Frank Act 8* (Peterson Inst. for Int'l Econ. Working Paper No. 2013-25, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2376915](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2376915).

federal agencies. Moreover, the regional banks' representation is not a meaningless inclusion of subordinates into a committee that will always be dominated by the members of the Board of Governors.

Moreover, although the FOMC generally speaks with one voice, its rotating regional presidents are the likely sources, if any, of dissent, and they do not necessarily come cut from the same cloth as do appointees to the Board of Governors. Some rise through the ranks of the reserve banks bureaucracy, while others enjoy long careers in either finance or other business before taking up the post of president. In some ways, the regional presidents add some diversity of viewpoints to the FOMC; in other ways, they are often thought to provide lower-quality advice to the chair.

But, given their outsider status, and yet decidedly insider committee role, they, too, have prompted some rumblings about the legality of their role. As with the delegation problems, the manner of the dispute over the constitution of the committee has not gone anywhere yet, and is unlikely to do so in the future—though, as with delegation, a recent decision, in this case the Supreme Court's *Free Enterprise Fund* decision,<sup>71</sup> offers a glimmer of hope to the would be FOMC plaintiff.<sup>72</sup>

The committee has been challenged for constituting a violation of the Appointments Clause; the idea is that the members of the committee are exercising substantial enough powers to constitute officers of the United States, other either a principal or inferior variety, and yet are not treated as such.

Under Article II of the Constitution, "The President . . . shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States."<sup>73</sup> Courts have often bemoaned that it has never been made clear by the Supreme Court or anyone else, what, exactly, makes a government official a principal officer of the United States needing Senate confirmation, but the majority in *Morrison v. Olson* announced a totality of the circumstances test that involved, as Justice Scalia's dissent characterized it, "[t]aking all things into account."<sup>74</sup>

That test is not exactly precise, but the case against the FOMC appointees is straightforward enough. Even if the regional bank presidents did not constitute principal officers—and everyone else on the FOMC does,

---

<sup>71</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010).

<sup>72</sup> That plaintiff would, of course, have all the standing problems that any plaintiff might have in establishing particularized injury from an agency that explicitly attempts to act on a nationwide basis.

<sup>73</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>74</sup> 487 U.S. 654 (1988) (Scalia, J. dissenting)

in fact, go through the process of presidential nomination and Senate confirmation – the argument that they constitute at the very least inferior officers is strong. The FOMC is a component of the Fed, it is true, and therefore is not at the top of the agency organizational chart. But committee members, in voting on what to do with the federal funds rate, are directing the Fed's open market traders to engage in transactions with economy-wide consequences, after being directed by Congress to take nationwide consequences on prices, employment, and productivity into account. The FOMC thus directs important government action, is reversible by no one, and mostly consists of Senate-appointed Officers of the United States. Should five of its twelve members really be considered anything different?

And if they are not principal officers, shouldn't they at the very least be thought to have inferior officer powers? Inferior officers include district court clerks and special prosecutors; the argument that members of the committee tasked with combatting unemployment and inflation on a country-wide basis enjoy similar degrees of authority is straightforward.<sup>75</sup> The appointment of inferior officers need not be subject to Senate confirmation, but the power to do so must be vested in the President, the Heads of Departments, or the Courts of Law.<sup>76</sup> The regional Fed presidents, appointed by their semi-private boards of bankers, probably do not meet that test.<sup>77</sup>

If these look like real problems, the courts have uniformly rejected challenges based on them, either on political question grounds, or on unexplained grounds that seem to work the same way. For example, in *Melcher v. FOMC*, Senator John Melcher (D-MT) challenged the appointment of the five regional bank representatives on the FOMC under

---

<sup>75</sup> As the Heritage Foundation has observed:

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

<http://www.heritage.org/constitution/#!/articles/2/essays/92/inferior-officers>.

<sup>76</sup> U.S. CONST. art. II, § 2, cl. 2.

<sup>77</sup> The court in *Morrison* advanced a four-part test in scrutinizing the constitutionality of appointments that did not occur by the President followed by confirmation by the Senate: (1) whether the officer is removable by a higher Executive Branch official; (2) whether the officer's duties are limited in scope; (3) whether the officer's office is limited in jurisdiction; and (4) whether the officer's office is limited in tenure. *Morrison*, 487 U.S. at 671-72. It seems plausible, if not likely, that the Fed presidents would fail the first of these tests; they may not pass muster under the other factors either.

this exact reasoning. The court, without a substantial amount of explanation, concluded that “while the composition of the [FOMC] may be unusual, it is not unconstitutional.”<sup>78</sup>

In *Riegle v. FOMC*, Senator Donald Riegle (D-MI) claimed that the election process was invalid because it deprived him, as a senator, of his “constitutional right to advise and consent regarding the appointment.” The D.C. Circuit exercised its “equitable discretion to dismiss the case on the ground that judicial action would improperly interfere with the legislative process.”<sup>79</sup>

Recently, these appointments concerns have been given a boost by the logic of *Free Enterprise Fund v. PCAOB*, where the Court suggested that delegations by Congress to agencies that were isolated from the President’s removal powers were constitutionally problematic. The Court, asking whether “[T]he President [may] be restricted in his ability to remove a principal officer, who is in turn restricted in his ability to remove an inferior officer, even though that inferior officer determines the policy and enforces the laws of the United States[ ],” answered in the negative, holding that that “such multilevel protection from removal is contrary to Article II’s vesting of the executive power in the President.”<sup>80</sup> Taken seriously, this also poses a problem for institutions like the FOMC, on which some members appointed by a combination of private parties and for cause appointees of the President sit. Krent has argued that:

The logic of *Free Enterprise Fund* strongly suggests that Congress may not, consistent with Article II, delegate significant authority to private and state entities. Although the decision does not elaborate on what constitutes “significant authority,” it imperils a wide range of structures permitting private and state entities to participate in shaping federal law, including the Federal Open Market Committee.<sup>81</sup>

A serious Appointments Clause challenge to the FOMC would, if plausible, be just as likely to fall prey to the settled expectations check on judicial buccaneering as would a serious nondelegation doctrine challenge.

The private participants on the agency committee, after all, comprise a minority of its membership, and the idea that a private citizen could also play a role in public life—by holding public office while retaining a job in the private sector—is hardly unknown to our constitutional traditions, beginning with the farmer-soldiers of the Revolutionary War, who deemed

---

<sup>78</sup> 644 F. Supp. 510, 524 (D.D.C. 1986) *aff’d*, 836 F.2d 561 (D.C. Cir. 1987).

<sup>79</sup> 656 F.2d 873, 877 (1981).

<sup>80</sup> *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010).

<sup>81</sup> Harold J. Krent, *supra* note 52, at 2454.

George Washington to be the American Cincinnatus, and continuing with the congressmen who continue to practice medicine, the politicians and justices who write books and teach classes, and so on.<sup>82</sup> The part-time government official is something of a long-cherished American ideal; one that has, to be sure, struggled with the professionalization of the bureaucracy, but that retains its own deep-seated hold on the public.<sup>83</sup>

Moreover, worriers such as Krent recognize that two features of private participation on the FOMC are mitigated by a structural alignment of interests. The regional bank members of the committee know that they are accountable to *someone*—the boards of the regional Fed banks, and, moreover, member banks of the Fed desire a stable and strong economy just as much as do the Board of Governors in Washington. Indeed, this alignment of basic interest between banks and their supervisors is a unique feature of banking regulation.<sup>84</sup>

Second, or at least so Krent has argued, market discipline may goad private members to do the public-spirited thing because acting for purely private gain would be easily revealed, and therefore unlikely to be successful.<sup>85</sup> Thus, even though the FOMC is “unaccountable in the usual sense for [its] acts,” the committee is “circumscribed by some external constraint.”<sup>86</sup>

#### E. Secrecy And The FOMC

Because of the FOMC’s deliberations in private on matters of great import to the public, the third area of consternation about the agency has involved its transparency, and this too, has engaged the agency, if only to a modest degree, with the legal system.

The FOMC has been exempted from many of the open government requirements that apply to other administrative agencies, such as the

---

<sup>82</sup> David Zaring, *Against Being Against the Revolving Door*, 2013 U. ILL. L. REV. 507, 546-47 (2013).

<sup>83</sup> See generally Brendan Barnicle, *Congressional Term Limits: Unconstitutional by Initiative*, 67 WASH. L. REV. 415, 430 (1992) (arguing that term limits fostered the rise of part-time politicians); Calvin Massey, *Federalism and the Rehnquist Court*, 53 HASTINGS L.J. 431, 451 (2002) (observing that state legislators, who are “often part-time politicians with some connection to real life,” is one way in which federalism furthers accountability through participation in the political process).

<sup>84</sup> See David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U.L. REV. 59, 107 (2013) (noting that “regulators are charged with ensuring safety and soundness of the system, and the managers and owners of banks have every interest in ensuring that their own institutions do not go bankrupt”); see also Krent, *Fragmenting the Unitary Executive*, *supra* note 52, at 102.

<sup>85</sup> Krent, *Fragmenting the Unitary Executive*, *supra* note 52, at 103.

<sup>86</sup> *Id.* at 102.

Government in the Sunshine Act,<sup>87</sup> and although it is subject to the Freedom of Information Act, it regularly invokes the deliberative process exemption to deny journalists and others a right to listen into its meetings.<sup>88</sup>

The Supreme Court upheld this approach in *Federal Open Market Committee of the Federal Reserve System v. Merrill*.<sup>89</sup> The Court concluded that the agency's directives, which were first directed to its trading desk before being disseminated more broadly, were exempt from FOIA as inter-agency memoranda. "We think that if the . . . Directives contain sensitive information not otherwise available, and if immediate release of these Directives would significantly harm the Government's monetary functions or commercial interests, then a slight delay in the publication of the Directives . . . would be permitted."<sup>90</sup>

If the courts have exempted the FOMC from the tender mercies of FOIA, the committee's relationship with the legislature has at times been more contentious. Congress has repeatedly threatened to require more disclosure from the committee; in practice these sorts of threats are often the first resort of those dissatisfied with the policymaking of the committee.

As we have seen, this has led to two senator-plaintiffs. Indeed, given that the FOMC is a defendant so rarely, the fact that the handful of plaintiffs who have filed suit against the institution include two legislators suggests that the committee has a particular way of bothering Congress.

And no wonder, given the independence of the committee from congressional control. Usually, this has not met with much controversy—testimony by FOMC members before Congress, as I have indicated, is a common phenomenon, but not a vituperative one. But on occasion, the distance of the agency from committee control has led to an eruption of anger.

When, during the 1970s, inflation exposed the Fed to criticism from a number of sectors, Congress, in addition, to occasionally engaging in single-legislator lawsuits, imposed more reporting requirements on the FOMC. The committee was obliged to inform Congress of its targets, and its predictions for the economy, via a series of formal reports.

But, as has been the case with the agency's relationships with the courts,

---

<sup>87</sup> 12 C.F.R. § 281.1 (describing the basis for the FOMC's exemption from the statute).

<sup>88</sup> BD. OF GOVS. OF THE FED. RESERVE SYS., INTERPRETIVE LETTER RULING: RULES REGARDING AVAILABILITY OF INFORMATION FROM FEDERAL OPEN MARKET COMMITTEE, 1994 WL 762911, at \*1 ("Such deliberative, predecisional materials are exempt from disclosure as 'inter-agency or intra-agency memorandums or letters that would not be available by law to a party other than an agency in litigation with the agency.'"). (citing 5 U.S.C. § 552(b)(5)).

<sup>89</sup> 443 U.S. 340, 343 (1979).

<sup>90</sup> *Id.* at 363.

in the end, the FOMC has apparently convinced Congress that what it does is nothing that mere legislators could possibly hope to supervise. The Fed protested this threat to its independence, and successfully managed to get the requirements removed in 2000.

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

## II. FOMC DECISION-MAKING

This paper has argued that consistently observed custom comprises an important part of the governance offered by the FOMC. A test of this thesis would be to see whether there are customs that affect the committee's work product, and, as we shall see, there is some evidence that establishing customs mattered to at least one Fed chair, and that during his tenure, movement in the federal funds rate was correlated in a statistically significant way with the ways its meetings were conducted.

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

Otherwise, except for emergency telephonic meetings, FOMC members do not meet, and while Fed staffers prepare reports to the committee on the state of the economy in every meeting in the interim, no enforcement arm of the committee pursues cases against primary dealers who fail to target the interest rate sought by the agency, and so on. Instead, a trading desk in New York tries to meet the FOMC's targets, and its actions are almost the sum total of the aftereffects – at least those involving bureaucratic action – of an FOMC meeting.<sup>91</sup>

The events at the meetings thus seem worth of analysis. But until recently, such an analysis was difficult to do. For much of the committee's existence, what happened in FOMC meetings was kept secret. But, because of the occasionally anxious input by Congress on the lack of transparency of the committee, the final contribution of this paper is to provide a preliminary analysis of the conduct of those meetings, at least for the years

---

<sup>91</sup> Of course, much of the effect of the announcement at the conclusion of the FOMC meeting is not realized by the trading activities of the New York Fed, but by the reaction of the private sector to the FOMC's announced target.

during the Greenspan administration of the Fed, both in a qualitative and quantitative way.

The qualitative component of the analysis lies in the availability of I-was-there sources on how the Greenspan Fed conducted its business, including an autobiography by Alan Greenspan, and a first-draft-of-history style account of his era by Bob Woodward.

The quantitative component lies in the relatively recent availability of transcripts of Fed meetings, which few realized the Fed kept. Congress only found out that the agency was making meeting transcripts in the mid-1990s, and when it did, it evinced an exceeding interest in publicizing them. The FOMC protested, but ultimately agreed to release the transcripts, provided that a 5 year delay on their publication would be observed. A caution: the final part of this paper is meant more to encourage further research than to make definitive claims about what motivates, or are the markers, on, particular sorts of Fed decisionmaking.

#### *A. Qualitative*

During the Greenspan era, FOMC meetings acquired a predictable sense of order that roughly started with a report, then a discussion, and then a conclusion by each member on the economy, followed by a report, then a discussion, and then a recommendation by each member on what the Board should do with the federal funds rate.

The meeting would begin with a staff report on the country's economic conditions, followed by a discussion by the committee of the report. After that, the members of the committee, in seriatim, would present their own assessments of the economy; regional bank presidents reported on their region, while board members evaluated the national economy as a whole.

The staff would then present a report on policy options followed by a debate over which policy each member of the committee preferred. Greenspan would speak first in the policy debates and generally offered a proposal at that time. After the debate, Greenspan would propose a final policy, including a target funds rate. That policy would be subject to a formal vote and almost overwhelmingly during the Greenspan era, those votes were unanimous. Only seven percent of all votes cast during his template were dissents.<sup>92</sup>

At the conclusion of the meeting, once the target rate and policy preferences had been voted upon, the committee would issue operating instructions—known as a “directive”—to the open market trading desk at

---

<sup>92</sup> Henry W. Chappell, Jr., Rob Roy McGregor & Todd A. Vermilyea, *The Role of The Bias in Crafting Consensus: FOMC Decision Making in the Greenspan Era*, 40 INT'L J. OF CENT. BANKING 39, 42 (2007), available at <http://www.ijcb.org/journal/ijcb07q2a2.pdf>.



the Federal Reserve Bank in New York. During most of Greenspan's tenure, these instructions included a statement about the committee's expectations for future changes in the federal fund rates. The statement on future policy came to be known as the "bias" of the policy directive; that bias would be "symmetric" if it indicated that a tightening or an easing of monetary policy would be equally likely. It would be "tilted" if it suggested that monetary policy was likely to change in the future in one direction or another.<sup>93</sup>

Of course, the meeting itself was not the only opportunity for FOMC members to interact. Greenspan discussed upcoming meetings with the other members of the board—a practice he called "bilateral schmoozing."<sup>94</sup> In these one-on-one interactions, Greenspan could be quite persuasive. In the larger culture, Greenspan had a reputation as solemnity, fueled in part by his famously Delphic pronouncements before Congress of the state of the economy. But those who knew him praised the chairman for his sense of humor.<sup>95</sup>

Greenspan's persuasive skills and apparently winning personality contributed in part to his ability to achieve consensus. Former fed Vice Chairman Manuel Johnson said that "Alan rules the room. Until he makes a big mistake he'll continue to get everything he wants."<sup>96</sup> Recently, Peter Conti-Brown and Simon Johnson have described the FOMC as one dominated by its chair, an observation few would contest for, certainly, the Greenspan years.<sup>97</sup>

In these pre- and post-meeting sessions, Greenspan evinced particular interest in unanimity on FOMC directives. He preferred that "the Fed speak with a single voice, even if no one was totally comfortable with the final decision," even if the question was difficult and the economy was in dire shape.<sup>98</sup> In another case, Greenspan urged his fellow FOMC members to coalesce around a particular policy recommendation, arguing that "it would

---

<sup>93</sup> DANIEL L. THORNTON & DAVID C. WHELOCK, FED. RESERVE BANK OF ST. LOUIS, A HISTORY OF ASYMMETRIC POLICY DIRECTIVE (2000), *available at* <http://research.stlouisfed.org/publications/review/00/09/0009dt.pdf>.

<sup>94</sup> BOB WOODWARD, MAESTRO: ALAN GREENSPAN AND THE AMERICAN ECONOMY 32 (2012).

<sup>95</sup> JEROME TUCCILLE, ALAN SHRUGGED: ALAN GREENSPAN, THE WORLD'S MOST POWERFUL Banker xv, 53, 66 (2002).

<sup>96</sup> *Id.* at 237.

<sup>97</sup> See generally Makram El-Shagi and Alexander Jung, *Does the Greenspan Era Provide Evidence on Leadership in the FOMC?* 6-7 (European Central Bank Working Paper Series No. 1579, 2013) (noting the abundance of academic literature discussing the dominance of the chairman in the FOMC and likewise concluding that, "[c]learly, the Fed's decision-making process is characterised by captainship").

<sup>98</sup> WOODWARD, *supra* note 94, at 49.

be very tragic if a group of this extraordinary capability . . . were perceived to be in disarray," making it "crucially important that we stand tall as a group and try to find the means by which we can merge our differences."<sup>99</sup>

Greenspan was a traditionalist, and over time, the FOMC followed the traditions of inputs, analyses, and decisionmaking consistently. Never one to worry too greatly over the transparency of the institution, Greenspan, as he turned the reports on the economy from the country's regional banks into the more organized *beige book*, would in turn eventually publicize the report before the committee would meet. His organization of the FOMC schedule persists to this day.

### B. Quantitative

#### 1. Introduction

The transcripts for the meetings between, and inclusive of, December 16, 1987, and January 31, 2006, were collected from the Federal Reserve Board's FOMC history database.<sup>100</sup> There was little missing data; some early meetings, held via telephonic conference call, as opposed to in person, were not transcribed. Of the 223 individual meeting days (FOMC meetings are two days long, in most cases, but sometimes are concluded in one), nine meeting days – all in 1987 – did not feature such transcripts. The list of individuals who served on the FOMC at least once was obtained from two sources; the Board of Governors membership list and the first FOMC minutes of each year, which listed the five Fed presidents who had executed their oaths of office joining the committee. The list of attendees at each meeting, which included not just FOMC members, but nonvoting regional bank presidents and Fed staffers, appeared at the beginning of each transcript of the meeting.

Data from macroeconomic variables between August 18, 1987 and January 31, 2006 were collected from the FRED database maintained by the St. Louis Fed. FRED data series were available in varying time interval formats. The format that provided dates that most closely matched the FOMC meeting date were selected for inclusion because that format most accurately reflected the macroeconomic environments on the date of the meeting.<sup>101</sup> Macroeconomic data was collected on the Case-Shiller home

---

<sup>99</sup> *Id.* at 107.

<sup>100</sup> *Federal Open Market Committee – Transcripts and Other Historical Materials*, BD. OF GOVERNORS OF THE FED. RESERVE SYS. (2013), [http://www.federalreserve.gov/monetarypolicy/fomc\\_historical.htm](http://www.federalreserve.gov/monetarypolicy/fomc_historical.htm) (last visited Nov. 13, 2013).

<sup>101</sup> FRED data series were available in varying time interval formats. The format that provided dates that most closely matched the FOMC meeting date were selected for inclusion because that format most accurately reflected the macroeconomic environments

price index, the federal funds rate, the country average home mortgage rate, real GDP in billions of chained 2005 dollars, the S&P 500 Index and the unemployment rate.

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

Because the contributions and the attendance of any member of the committee could be tracked, this paper assembled data doing so, even though it added to the scope of the project. Many of the members, if they were relatively long-serving regional bank presidents, rotated on and off the FOMC with some regularity, or if they were members of the Board of Governors, served for small portions of the approximately 20 years during which Greenspan chaired the Fed, or, if they were staffers appeared at occasional, but not regular, meetings.

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

## 2. Results

Descriptively alone, the transcripts reveal some interesting facts about evolution of open market committee decision-making. Meetings lengthened as the Greenspan era wore on. In the beginning, the transcripts would average around 50 pages in length. This lasted until the mid-1990s, but from 2001 to 2006 the average was much closer to 100 pages in length.

Marginally more people began attending the meetings as well. The number of attendees was always quite large, including as it did the voting

members of the committee, the non-voting presidents of the other regional central banks, and the large quantity of staffers at the Fed reporting to the committee. During the early years, the average number of attendees of the Greenspan era was less than 50, but after the halfway point in his regime the average nosed above that mark.

Moreover, for what it is worth, meetings got more amusing as the chairman aged, perhaps indicating a lightening of the mood in those meetings, although the FOMC certainly went through turbulent times during both the beginning and the end of Greenspan's tenure. FOMC transcribers recorded laughter on a per-transcript-page basis increasing from an average of less than 20 percent between 1988 and 1992 to over 20 percent in between 2001 and 2006.<sup>102</sup> The more attendees who attended a meeting, the more laughter was recorded as well.

Finally, a regression analysis including relevant macroeconomic variables and the various meeting-specific variables was conducted to see if any characteristics of the meetings were reflected some statistically significant relationship with the broader economic decisions that the FOMC was trying to make.

The most intriguing relationship – although a multivariate regression hardly establishes causation (there are no instruments or discontinuities exploited in the analysis) and the relationship was modest – was the statistically significant relationship between the number of attendees at the meeting and the change in the federal funds rate, holding time and other factors constant.

The federal funds rate is the rate that the FOMC specifically targets, and is, at least in theory, the rate over which the committee has the most control. As Figure 1 demonstrates, the rate varied over the era of the Greenspan Fed depending on the state of the economy, inflation, growth and the like. Conventional FOMC policy would be to reduce the the federal funds rate to encourage borrowing during recessions, and to increase it when the economy grew, threatening inflation.<sup>103</sup>

---

<sup>102</sup> Some of these changes, of course, are artifacts of better, or at least different transcription paradigms. Some meetings between 1988 and 1992 were not recorded. Transcription mores may change over time as well; with laughter being part of a responsible transcriber's remit in the 21<sup>st</sup> century, while being superfluous to the art in the early 1980s.

<sup>103</sup> As the San Francisco Fed has explained, "To keep inflation in check, the Fed can use its monetary policy tools to raise the federal funds rate. Monetary policy in this case is said to be 'tight' or 'contractionary.' To fight recessions, the Fed can use its monetary policy tools to lower the federal funds rate. Monetary policy is then said to be 'easy,' 'expansionary,' or 'accommodative.'" <http://www.frbsf.org/education/teacher-resources/what-is-the-fed/monetary-policy>.

FIGURE 1 HERE<sup>104</sup>

As Figure 2 demonstrates, attendance at the meetings exhibited a broadly upward trend; the two trends do not seem at first glance to be particularly synchronized, but, conditioned on time, a small, but statistically significant relationship at the 5 percent level did exist. Figure 3 shows the histogram of the number of attendees over all the meetings in the sample; the mean number of attendees was 48.7 with a standard deviation of 9.3

FIGURE 2 HERE<sup>105</sup>

As it turned out, each additional attendee at an FOMC meeting is associated with a 0.02 increase in the federal funds rate. One way to state the relationship would be to say that for every increase of two basis points in the rate, an additional attendee at the meeting would be expected (“basis points” is the term used in the financial sector for hundredths of a percent; the FOMC tends to target increases and decreases in the federal funds rate in increments of 25 basis points, and very rarely increases or decreases the rate by more than 50 basis points, that is, half of a percent).<sup>106</sup>

To be more precise, the mean of the federal funds rate is 5.02%, with a standard deviation of 2.2 (which means that 68% of the time during the course of the study, the federal funds rate would be between 2.82% and 7.22%). The mean number of attendees is 48.7, with a standard deviation of 9.3. Since each attendee is associated with a 0.02 increase in the federal funds rate, a one standard deviation increase in the number of attendees – that is, 58 people attended an FOMC meeting, rather than 49 – is associated with a  $9 \times 0.02 = 0.18$  increase in the federal funds rate, which is about 8% of the standard deviation in that variable ( $0.18/2.2 = 0.08$ ). In other words, 8% of the ordinary variance in the rate can be associated with substantially increased attendance at the meeting.

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

---

<sup>104</sup> See appendix.

<sup>105</sup> See appendix.

<sup>106</sup> [http://www.federalreserve.gov/monetarypolicy/openmarket\\_archive.htm](http://www.federalreserve.gov/monetarypolicy/openmarket_archive.htm) (tracking the history of changes in the federal funds rate targeted by the FOMC at the conclusion of its meetings).

are nonetheless interesting.

FIGURE 3 HERE<sup>107</sup>

It would be premature to make much of the relationship, given that the effect is modest, and the number of variable included in the regression are few. But positive correlations, and statistically significant relationships, are not to be pooh-poohed, and there is some reason to think that the link between rate increases and meeting attendance is not spurious. Furthermore, the effect size – despite being small – does emerge as statistically significant in the multivariate regression.

Perhaps, during the Greenspan era, the FOMC was marginally more likely to bring additional staffers to its meetings when it was thinking about increasing the interest rate, which had risky consequences for both growth and unemployment. Possibly, more observers, and indeed more committee members, made efforts to attend meetings where a rate raise was at risk. It is difficult to speculate as to precisely why the effect is seen but it is nonetheless worth noting.

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

#### CONCLUSION

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

This regularization on some metric other than law, given law's unavailability governing central bankers, may in part be due to the committee's organic interest in regularity. The FOMC protects currency stability, and, as it turns out, stability is an important value for financial markets. The need for traditions and rules may simply part and parcel of the job of central banking, meaning that if those rules will not be externally imposed, they may be internally adopted.

Over time, consistencies have emerged over the course of the Fed's

---

<sup>107</sup> See appendix.

existence that are quite predictable and that may even – although future research is required before any strong statements could be made – be amenable to some understanding of the relationship between that process and the efforts that the committee makes on the economy as a whole.

## APPENDIX

Figure 1

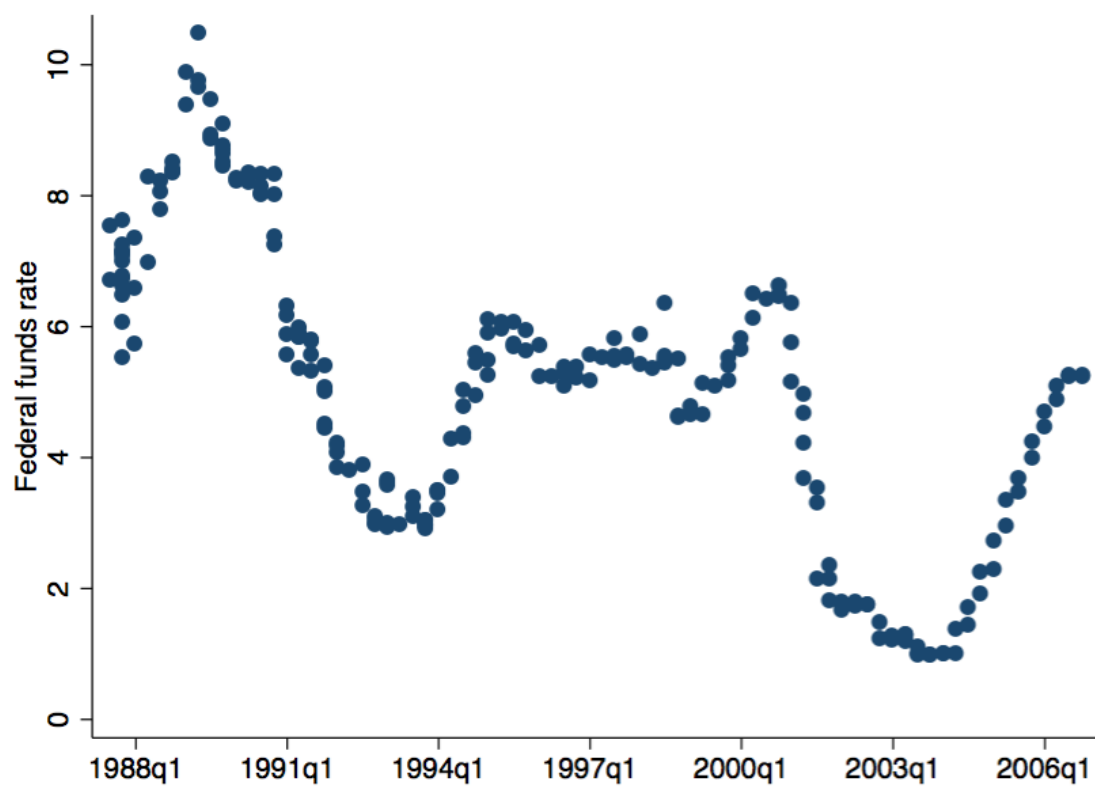




Figure 2

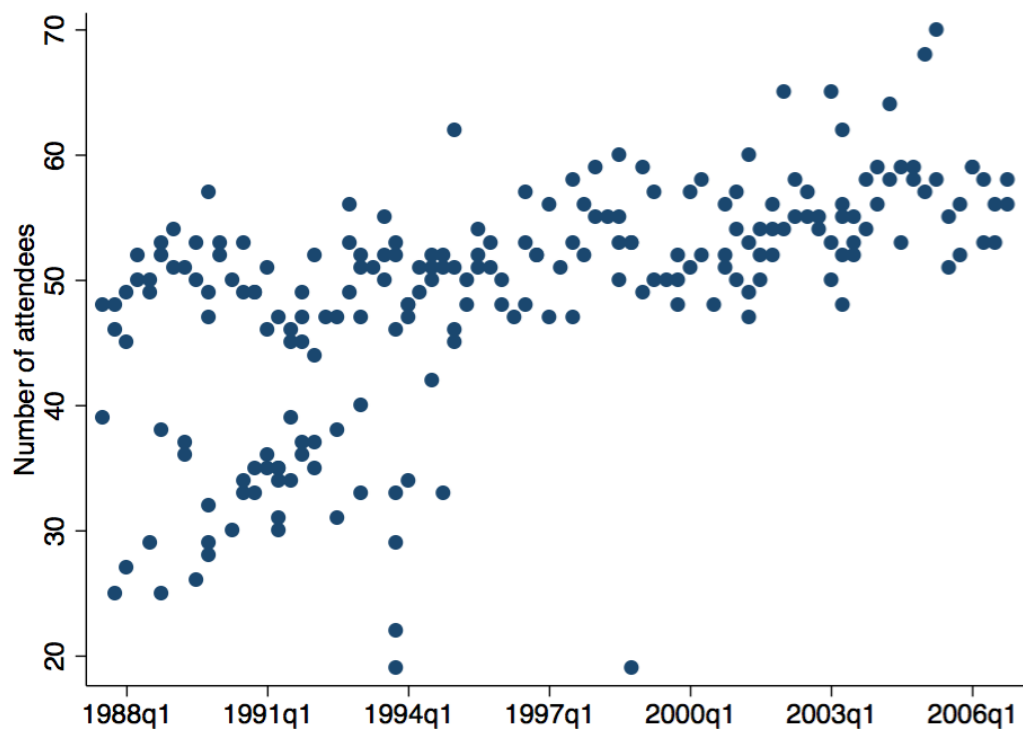


Figure 3

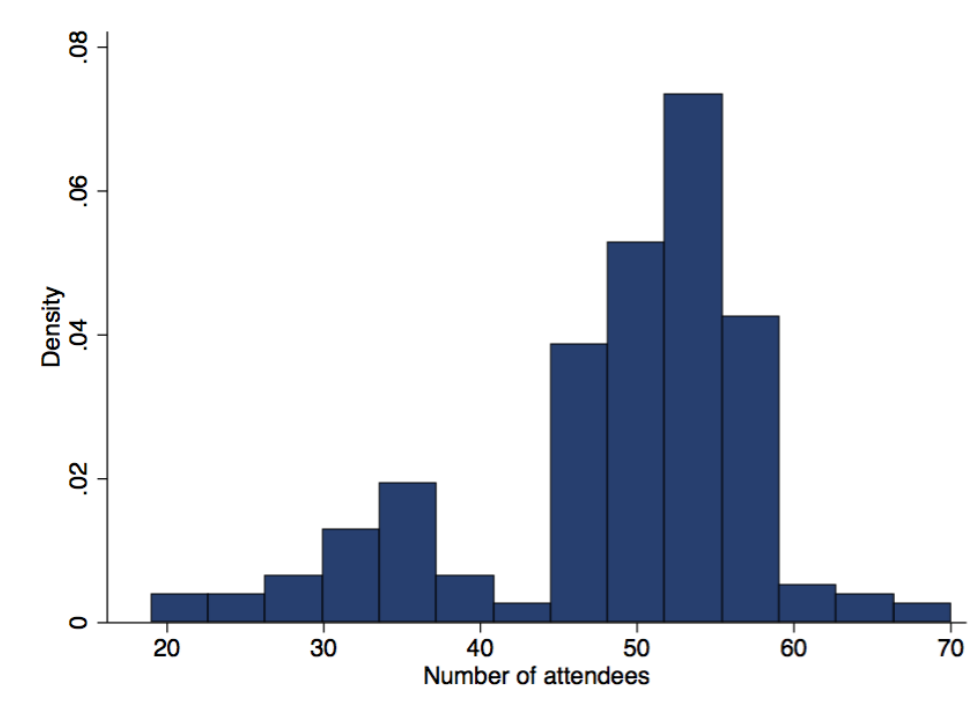


Table 1

|                                 | Dependent variable: federal funds rate |                     |                     |                     |                      |
|---------------------------------|--|---------------------|---------------------|---------------------|----------------------|
|                                 | (1)                                    | (2)                 | (3)                 | (4)                 | (5)                  |
| Lagged federal funds rate       | 0.938***<br>(40.22)                    | 0.889***<br>(28.74) | 0.881***<br>(27.74) | 0.880***<br>(27.05) | 0.881***<br>(27.11)  |
| Year                            |  | -0.0290*<br>(-2.40) | -0.0418*<br>(-2.45) | -0.0452*<br>(-2.50) | -0.0529**<br>(-2.89) |
| Laughter                        |  |                     | 0.00692<br>(1.06)   | 0.00564<br>(0.65)   | 0.00820<br>(0.95)    |
| Transcript length               |  |                     |                     | 0.000606<br>(0.29)  | -0.00250<br>(-1.01)  |
| Number of attendees             |  |                     |                     |                     | 0.0200*<br>(2.22)    |
| Constant                        | 0.315*<br>(2.46)                       | 58.40*<br>(2.41)    | 83.87*<br>(2.46)    | 90.80*<br>(2.51)    | 105.2**<br>(2.88)    |
| N                               | 222                                    | 222                 | 222                 | 213                 | 212                  |
| adj. R-sq                       | 0.880                                  | 0.882               | 0.882               | 0.879               | 0.881                |
| t statistics in parentheses     |  |                     |                     |                     |                      |
| * p<0.05 ** p<0.01 *** p<0.001" |  |                     |                     |                     |                      |

Table 2

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