

**THE FEDERAL RESERVE BOARD AND THE FOMC ARE
GOVERNMENT REGULATORS NOT BANKS:
A REPLY TO BAUDE, BAMZAI, AND NIELSON**

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Presidentialists are in a pickle. They want to transform the federal government into a command-and-control bureaucracy with a single person, the President of the United States, at the top. But they want to segregate at least one aspect of federal governance—monetary policy—from presidential direction and thus to preserve what is known as "central bank independence" or CBI. Several proponents of presidential supremacy have proposed a way to do this, to "carve out" the Federal Reserve Board and the FOMC, two of the central institutions involved in U.S. monetary policy. This Essay examines their arguments and concludes that they don't make sense. If the Court is going to find a way to embrace presidential supremacy without invalidating CBI—a central feature of the American economic order that rightly enjoys quasi-constitutional status—it ought to look elsewhere.

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INTRODUCTION

Presidential supremacists are in a pickle. They want to transform the federal government into a command-and-control bureaucracy with a single person, the President of the United States, at the top. But they want to segregate at least one aspect of federal governance—monetary policy—from presidential direction and thus to preserve what is known as “central bank independence” or CBI. CBI is an institutional arrangement in which a semi-autonomous central bank regulates the rate of growth of the money supply and is considered by economists and investors to be an essential building block of an advanced economy.

Were presidentialists pursuing their agenda through the political process, they could easily achieve this desired result. Congress could simply leave CBI intact in whatever legislation it adopted empowering the President to superintend administrative agencies. But presidentialists abandoned normal politics long ago and for almost forty-five years have been trying to achieve presidential dominance in federal court. The President, they insist, can direct any administrative agency, and ignore any contrary law, because of the President’s inherent constitutional authority to superintend any official exercising “executive power.” And there’s the rub. Monetary policy is the domain of administrative agencies and these agencies carry out statutory schemes laid down by Congress (they exercise “executive power”).

Last month, six Supreme Court justices revealed they are searching for a way out. In a short order granting an emergency application to stay two district court judgments, these justices held that the U.S. government is likely to show that two agencies, the National Labor Relations Board (NLRB) and the Merit Systems Protection Board (MSPB), “exercise considerable executive power” and that therefore it is constitutional for the President to ignore legislation limiting the President’s power to remove the agencies’ leaders. But, at the same time, they further noted that their ruling does not “necessarily implicate the constitutionality of the for-cause removal protections for members of the Federal Reserve’s Board of Governors or other members of the Federal Open Market Committee”—the two government agencies charged with setting monetary policy.¹

¹ Trump v. Wilcox, No. 24A966, 605 U.S. __ (2025), Slip Op. at 1-2.

Their reasoning was threadbare;² to many, mere *ipse dixit*.³ And since the Court has not yet reached the merits in the relevant cases, the ruling was also, in some sense, provisional. Presidentialists have about a year to figure out a way to convince the Court to stick with “unitary executive theory,” as their preferred approach to the Constitution is called, which presumably also requires finding a way for the Court to comfortably preserve CBI in the process.

In this quest, one law review article looms large: “Article II and the Federal Reserve.”⁴ This Article was written by two presidentialists, Aditya Bamzai and Aaron Nielson. In an op-ed immediately following the Court’s ruling, Will Baude cited it to support his contention that the Court’s Fed carveout “has a plausible basis.” According to Baude:

In the decades after the nation’s founding, practice and precedent firmly established the constitutionality of the Bank of the United States, which operated as a corporation with some independence from the president. This suggests that monetary policy is not necessarily executive power. While the Federal Reserve today does many things beyond its core mission of monetary policy, the court would have several options for preserving at least some independent functions for the Federal Reserve.⁵

But, upon inspection, Bamzai and Nielson’s article offers no support for Baude’s contention or the Court’s proposed carveout. Rather than delineating “options” for the Court to preserve “some independent functions for the Federal Reserve” (Baude’s words), Bamzai and Nielson call for an *act of Congress* to “limit the Fed to monetary functions of the sort exercised by the First and Second Banks [of the United States] and remove the agency’s regulatory functions—perhaps placing those functions in another

² *Id.* at 2 (“The Federal Reserve is a uniquely structured, quasi-private entity that follows in the distinct historical tradition of the First and Second Banks of the United States.”).

³ See, e.g., Steve Vladek, “Living by the *Ipse Dixit*,” May 26, 2025; Lev Menand, “The Supreme Court’s Fed Carveout: An Initial Assessment,” May 23, 2025.

⁴ Aditya Bamzai & Aaron L. Nielson, *Article II and the Federal Reserve*, 109 CORNELL L. REV. 843 (2024). There are at least three other major attempts to grapple with this dilemma, each of which I aim to consider in a future piece. See, e.g., Daniel Tarullo, *The Federal Reserve and the Constitution*, 97 SO. CAL. L. REV. 1 (2024); Andrew T. Levin & Christina Parajon Skinner, *Central Bank Undersight: Assessing the Fed’s Accountability to Congress*, 77 VANDERBILT L. REV. 1769 (2024); Brian Galle & Aziz Huq, *The Constitutional Money Problem*, 92 U. CHI. L. REV. 333 (2025).

⁵ William Baude, *The Supreme Court Ruled in Favor of Trump, and That Is OK*, N.Y. TIMES (May 23, 2025).

entity subject to the President’s plenary control.”⁶ (The list of “regulatory functions” they think Congress must eliminate is long and includes “[t]he power to promulgate regulations,” full stop.⁷)

Whatever one thinks about Unitary Executive Theory or CBI, it is hard to escape the conclusion that Baude, Bamzai, and Nielson are confused about the history. All three authors wave the Bank of the United States (BUS) like a magic wand, without actually connecting it in a legally relevant sense to the question at hand. All three authors also play fast and loose with terms they don’t define, such as “monetary policy.” The logic—never clearly spelled out by Baude, Bamzai or Nielson—seems to be that because the Bank of the United States used some of the tools of “monetary policy,” and the President lacked the power to remove its directors, “the Fed” might constitutionally conduct “monetary policy” while being comparably insulated from the White House. (Bamzai and Nielson also make a similar elision using the term “central bank”).⁸

But the Bank of the United States did not conduct “monetary policy” in anything like the sense in which the Federal Reserve Board and FOMC conduct monetary policy, nor was the BUS anything like the Federal Reserve Board or FOMC, the government agencies at issue in the Supreme Court’s carveout. Once you decompose the term “monetary policy” into a set of specific powers and functions, and the “Federal Reserve” into its constituent components,⁹ it is not clear what the historical precedent offers to someone committed to unitary theory.

Especially perplexing is Bamzai and Nielson’s suggestion that Congress save central bank independence by segregating the Fed’s “regulatory” functions from its banking functions—because Congress *has already done this*. What Bamzai and Nielson call the “monetary functions of the sort exercised by the First and Second Banks” Congress placed in twelve formally private Federal Reserve Banks (over which the President has no authority) and the “regulatory functions,” which Bamzai and Nielson suggest should be subject to the President’s plenary control, Congress

⁶ Bamzai & Nielson, *supra* note 4, at 908.

⁷ *Id.* at 905. It also includes the power to “issue fines,” *id.* at 905; “inspect banks,” *id.* at 906; examine “banks for compliance with statutory and regulatory law,” *id.* at 907; “preventing counterfeiting and the like,” *id.*; and “consumer protection,” *id.*

⁸ *Id.* at 874 (the Federal Reserve is “not . . . the nation’s first central bank”); *id.* at 875 (“in critical respects, the First Bank’s operations were like modern central banks”).

⁹ *Cf.* PETER CONTI-BROWN, THE POWER AND INDEPENDENCE OF THE FEDERAL RESERVE 13 (2016) (“the Federal Reserve is a ‘they’ not an ‘it’”).

placed in two government agencies. The whole problem the Court now faces is how to protect *these purely regulatory bodies*—the Board and the FOMC—from “the President’s plenary control.” Many passages in Bamzai and Nielson’s article, including the one quoted above, are actually arguments for doing pretty much the exact opposite of what the Court has done in its latest ruling.¹⁰

It is therefore worth constructing a different argument—one that Bamzai and Nielson never quite make, but that they sometimes seem to *think* they are making¹¹ (and which Baude and the Court plainly imagine *could be made*)—namely that there is some measure of regulatory power that might be permissibly vested in an independent government agency like the Board or the FOMC because it, in some (unspecified) sense, is functionally equivalent to the powers or activities of the Bank of the United States.¹² Based on what Bamzai and Nielson *do* say, I think the argument would have to be, specifically, that an independent Board and FOMC, composed in part of presidentially appointed officers, might properly regulate *the Federal Reserve Banks*, as long as they regulate nothing and no one else.¹³

But there are still significant problems with this version of the argument. One is that it would still be an exception to Unitary Executive Theory with no support from Founding period legal understandings.

¹⁰ An example is this conclusion: “the Fed’s activities that are analogous to the activities of [the First and Second Banks] likely pass constitutional muster, *if performed by private institutions*. But Congress cannot give the Fed authority that exceeds those boundaries and amounts to an exercise of “executive power” requiring the President’s supervision [emphasis added].” A further example is the claim that the Second Bank “could not possibly be constitutional if the second Bank was exercising sovereign and executive power,” which includes, on the authors’ formulation, “[e]xamining banks for compliance with statutory and regulatory law,” *id.* at 907, and “the power to promulgate regulations and issue fines,” *id.* at 905—activities not conducted by the Second Bank but very much conducted by the Board.

¹¹ *See, e.g., id.* at 904-0; *infra* Part IV.

¹² And therefore, presumably, that it is not “executive power” in the Article II sense. Baude says this part explicitly. Baude, *supra* note 5.

¹³ On this version of Bamzai and Nielson’s argument, Board and FOMC rules and orders are permissible because the Fed is just a single entity for constitutional purposes, in effect converting the final agency actions of the Board and FOMC into mere internal agency directives. We would therefore ignore the fact that the Board and FOMC are not actually part of the FRBs and treat them as the functional board of directors of those banks. In other words, the argument would be that the Fed is constitutionally permissible if it is equivalent to what the Bank of the United States would have been if its entire board of directors was presidentially appointed by and with the advice and consent of the Senate and subject to removal by the President only for cause.

Bamzai and Nielson’s Fed would also be a shell of its current self when it comes to monetary control. And its independence would be illusory—because the executive agencies that regulate banks could counteract its monetary policy stance.

The remainder of this Essay is an effort at demystification. It reviews the historical precedents and the design of the Federal Reserve System. It then draws on this descriptive account to assess the normative claims made by Baude, Bamzai, and Nielson. It concludes that if the Court is going to find a way to embrace presidential supremacy without invalidating CBI in the United States, it ought to look elsewhere.

I. The Bank of the United States

Let’s start at the beginning: with the Act to Incorporate the Bank of the United States, adopted by Congress in 1791, at the urging of Alexander Hamilton, the country’s first Treasury Secretary.¹⁴ The Bank was designed to solve a monetary problem. There weren’t enough gold and silver coins in the country to support economic growth. The new republic needed more money, and it needed a supply of money that could expand over time. It needed elasticity.¹⁵

Hamilton, drawing on the English experience, proposed a government-chartered, investor-owned bank. A bank, he explained, would be able to issue notes and maintain deposit account balances that functioned much like gold and silver coins. It is worth quoting his famous report to Congress at length:

It is a well-established fact, that Banks in good credit can circulate a far greater sum than the actual quantum of their capital in Gold & Silver. . . . This faculty is produced in various ways. First. A great proportion of the notes, which are issued and pass current as Cash, are indefinitely suspended in circulation, from the confidence which each holder has, that he can at any moment turn them into gold and silver. Secondly, Every loan, which a Bank makes is, in its first shape, a credit given to the borrower on its books, the amount of which it stands ready to pay, either in its own notes, or in gold or

¹⁴ An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, §§ 7(10), 8, 12, 1 Stat. 191, 194–96 (1791).

¹⁵ BRAY HAMMOND, *BANKS AND POLITICS IN AMERICA: FROM THE REVOLUTION TO THE CIVIL WAR* (1957) [hereinafter, HAMMOND, *BANKS AND POLITICS*].

silver, at his option. But, in a great number of cases, no actual payment is made in either. The Borrower frequently, by a check or order, transfers his credit to some other person, to whom he has a payment to make; who, in his turn, is as often content with a similar credit, because he is satisfied, that he can, whenever he pleases, either convert it into cash, or pass it to some other hand, as an equivalent for it. And in this manner the credit keeps circulating, performing in every stage the office of money, till it is extinguished by a discount with some person, who has a payment to make to the Bank, to an equal or greater amount. Thus large sums are lent and paid, frequently through a variety of hands, without the intervention of a single piece of coin.¹⁶

Banks, in other words, expand the money supply. They *create money*.¹⁷ Today, nearly all of the money used to conduct transactions is created by banks.¹⁸ 99.9% of commerce takes place as Hamilton describes: with an account holder “transfer[ing] his credit to some other person, to whom he has a payment to make; who, in his turn, is . . . content with a similar credit” such that “the credit [i.e., the bank deposit balance] keeps circulating, performing in every stage the office of money.”¹⁹

Hamilton thought it essential that any bank—i.e., a corporation that loans money of its own creation to people, thereby expanding the money supply—be under private control. He warned that if the government got into the business of expanding the money supply—for example, by owning one or more banks—it would undermine confidence in the currency. Government officials would, in certain circumstances, lend money for political reasons, overissuing new notes and deposits, and causing inflation.²⁰ By creating a bank run by investors, Congress would avoid this

¹⁶ ALEXANDER HAMILTON, REPORT ON A NATIONAL BANK (1790), *in* 1 THE WORKS OF ALEXANDER HAMILTON 59, 82 (New York, Williams & Whiting 1810).

¹⁷ N. GREGORY MANKIW, PRINCIPLES OF MACROECONOMICS 347 (5th ed. 2009).

¹⁸ In 2021, non-cash payments totaled \$1,564 trillion. *See* Federal Reserve Payments Study (FRPS), BD. OF GOVERNORS OF THE FED. RESRV. SYS., <https://www.federalreserve.gov/paymentsystems/frps-dfips-cy-2021.htm> (last updated Mar. 6, 2025).

¹⁹ HAMILTON, *supra* note 16.

²⁰ *Id.* (“It would indeed be little less than a miracle, should the credit of the Bank be at the disposal of the Government, if in a long series of time, there was not experienced a calamitous abuse of it. . . . [W]hat Government ever uniformly consulted its true interest, in opposition to the temptations of momentary exigencies? What nation was ever blessed with a constant succession of upright and wise Administrators?”).

problem and solve another, namely, how to ensure the right level of elasticity in the money supply.²¹ An investor-owned bank, Hamilton argued, would lend more money when loan applications were meritorious, i.e., there was a need for more money, and less money when the number of prudent borrowers declined.²²

The federal government ultimately embraced Hamilton's proposal. It incorporated the Bank of the United States. Private investors bought eighty percent of the shares in the Bank; the United States subscribed to the remaining twenty percent. The shareholders, collectively, selected the Bank's governing body, its board of directors, which numbered twenty-five people. The directors in turn selected the President of the Bank.²³

The Bank was a for-profit enterprise; it paid dividends to its shareholders periodically. It had no governmental power of any kind. It could not write rules of conduct for other businesses or persons. It could not issue orders or levy fines. It was not part of the government. The President had no authority to appoint its directors or officers and no authority to remove them.

The Bank *was* a public instrument of enormous importance. It served as banker to the United States Treasury. (The Treasury maintained an account there and accepted its notes in payment of taxes.) The Bank also created notes and deposits that were widely used around the country, alleviating the economy's monetary shortage and fueling economic growth.

But the BUS was not a "central bank" in the contemporary sense of the term. It was, at the federal level, a *monopoly* (like the Dutch East India Company or the Charles River Bridge Company).²⁴ Hamilton thought that a single bank would be best because it would be far more stable, making its notes and deposits a much better form of money (close to government-issued

²¹ Morgan Ricks and I call this a "corporate governance solution to an economic governance problem." Lev Menand & Morgan Ricks, *Federal Corporate Law and the Business of Banking*, 88 U. CHI. L. REV. 1361 (2021).

²² HAMILTON, *supra* note 16 ("Among other material differences between a paper currency, issued by the mere authority of Government, and one issued by a Bank, payable in coin, is this—That in the first case, there is no standard to which an appeal can be made, as to the quantity which will only satisfy, or which will surcharge the circulation; in the last, that standard results from the demand.").

²³ An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, §§ 7(10), 8, 12, 1 Stat. 191, 194–96 (1791).

²⁴ *See id.* § 12, 1 Stat. 191, 196 ("That no other bank shall be established by any future law of the United States, during the continuance of the corporation hereby created; for which the faith of the United States is hereby pledged"); *cf.* Charles River Bridge v. Warren Bridge, 36 U.S. 420 (1837).

gold and silver coins). Importantly, a single bank would not have to compete with other banks. In a system with multiple banks, Hamilton feared, some banks might get carried away and make too many loans.²⁵

But Hamilton didn't account for the state governments deciding to charter their own banks, which they did with increasing frequency after Hamilton's political adversaries (the Jeffersonian Democrats) took power. Many of the Jeffersonian Democrats had resolutely opposed creating the Bank of the United States. But since it had a twenty-year charter, and they couldn't get rid of it, they decided instead to create new banks at the state level to serve their own purposes (primarily lending to farmers instead of merchants).²⁶

As the number of banks multiplied, the BUS emerged as the apex institution in what was becoming a *banking system*. The BUS was in direct business relations with many of the other banks, accepting and redeeming their notes and facilitating payments to and from their depositors. But these were business relations and nothing more. The BUS was not under any obligation to transact with the state-chartered banks, nor did it have any formal regulatory power over their affairs. It was "central" in so far as it was the biggest bank, the most important bank, and the bank used by the government for its own banking needs.

The Bank's centrality gave it the ability to influence the lending practices of state-chartered banks, and therefore "monetary conditions" (the rate of expansion of the amount of bank notes and bank deposits outstanding), but it did not "regulate" the other banks or conduct "monetary policy" in the contemporary sense.²⁷

In section III.A of their article, Bamzai and Nielson quote a history of the First Bank that describes what the First Bank did: "By managing its lending policies and the flow of funds through its accounts, the bank could—and did—alter the supply of money and credit in the economy and hence

²⁵ See, e.g., Letter from Alexander Hamilton to William Seton (January 18, 1791), in HENRY W. DOMETT, A HISTORY OF THE BANK OF NEW YORK: 1784-1884, at 43 (New York, G.P. Putnam's Sons 1884) ("[T]hree great banks in one city must raise such a mass of artificial credit as must endanger every one of them, and do harm in every view.").

²⁶ See HAMMOND, BANKS AND POLITICS, *supra* note 15, at *ADD PINCITE*.

²⁷ As Dan Tarullo nicely puts it, "the 'monetary policy' function of the Banks of the United States . . . was not authorized in either Bank's Act of incorporation. It was the heft and reach of the Banks that enabled them to permit or restrain credit growth by state banks. While Congress had enabled this rudimentary credit regulation practice through providing for a large capitalization and by allowing branching, it had neither asked nor authorized the Banks to fulfill that function." *Federal Reserve*, *supra* note 4, at 80.

the level of interest rates charged to borrowers.”²⁸ In other words, when the BUS adjusted its lending standards and the interest rates it charged, this had a significant effect on the money supply both because the BUS was itself creating new money and lending it out and also because its business practices had a profound effect on the rest of the banking system. Again, quoting from the history, “[w]hen [the BUS] wanted to slow the growth of money and credit, it would present [to the state banks] the notes [issued by those banks, that the BUS had received from its own customers,] for collection in gold or silver [in other words, it would “redeem” the notes], thereby reducing state banks’ reserves and putting the brakes on state banks’ ability to circulate new banknotes.”²⁹

Bamzai and Nielson also quote this same source for the proposition that the above activities constituted “a rudimentary monetary policy.”³⁰ And this is true in a sense—but not in the sense that matters. The BUS, like today’s national banks, had business practices including lending standards that had major effects on monetary conditions. But they were *business practices* not government policies.³¹ The BUS was trying to make a profit, not manage the rate of monetary expansion to achieve long term price stability and maximum employment.³² To call it monetary policy is a bit like saying that the Union Pacific Railroad—an investor-owned federal

²⁸ Bamzai & Nielson, *supra* note 4, at 875 (quoting FED. RSRV. BANK OF PHILA., THE FIRST BANK OF THE UNITED STATES: A CHAPTER IN THE HISTORY OF CENTRAL BANKING 8-9 (2021)).

²⁹ Bamzai and Nielson add that the BUS could also “speed up monetary growth by doing the opposite,” but it is not exactly clear what they mean by “the opposite.” *Id.* at 876. The BUS could plainly refrain from redeeming state notes—in other words, refrain from slamming on the brakes. But refraining from slamming the brakes is not exactly the same as affirmatively easing by lending to the state banks (swapping its own notes for the notes of the state banks), which the First Bank did not really do.

³⁰ *Id.* at 875.

³¹ Although Bamzai and Nielson acknowledge that the BUS differed from modern central banks “in important ways,” *supra* note 4, at 875, their source explicitly disclaims any de jure role: “Unlike modern *central banks*, the Bank of the United States did not officially set monetary policy.” FED. RSRV. BANK OF PHILA., THE FIRST BANK OF THE UNITED STATES: A CHAPTER IN THE HISTORY OF CENTRAL BANKING 8 (2021).

³² Bamzai and Nielson recognize this point, *see, e.g., id.* at 878 (“At the same time, the Court acknowledged that the Bank of the United States ‘was a private [corporation], doing business for its own profit.’”), but without appreciating the implications for the issue at hand. It also bears mentioning that Congress did not design the First Bank to “regulate” the state banks in the way above-described, in part because it was not clear any such banks would even exist.

corporation chartered by Congress in 1862—conducted transportation policy.³³

It is also worth bearing in mind that the early federal government did, in fact, have a monetary policy. And that policy was implemented by Congress and the Treasury Department. As we've seen, it was to establish an investor-owned bank and give that bank the government's own business.³⁴ It would also be true to say that this policy was “rudimentary,” primarily in the sense that it relied on market forces to manage the money supply rather than attempting to control interest rates or lending standards through governmental means.

The First Bank's charter expired in 1811, and Congress did not renew it. In 1816, Congress shifted course and chartered a new federal bank, the second Bank of the United States. Congress did a couple of things differently the second time that bear mention. The most significant is that it changed the mechanism for selecting directors. The U.S. would still acquire just twenty percent of the corporation's shares and the board would still have twenty-five members. But rather than conduct an ordinary shareholder election, the President of the United States, by and with the advice and consent of the Senate, would select five of the corporation's directors, with the other shareholders electing the remaining twenty.³⁵ The President would also have the power to remove the five directors that the President and Senate had selected (but only those five).³⁶ (As previously, the twenty-five directors would select the President of the Bank and the U.S. government would have no power to remove that person from office.)³⁷

The presidentially-appointed directors of the Second Bank were not, formally at least, government officials. Although they were selected by the U.S. government, they served in the same capacity as the directors of the bank who were selected by the other shareholders. As Bamzai and Nielson note, this fact was relevant in subsequent litigation involving the Second

³³ Pacific Railroad Act of 1862, ch. 120, 12 Stat. 489.

³⁴ As Bamzai and Nielson also note, “Congress authorized the Secretary of the Treasury ‘to inspect the bank's books, require statements of the bank's condition as frequently as once each week, and remove the government's deposits at any time for any reason.’” This aspect of the government's “monetary policy” was carried out by the Treasury Secretary who, of course, could be removed by the President.

³⁵ An Act to Incorporate the Subscribers to the Bank of the United States, ch. 44, sec. 8, 3 Stat. 266, 269–70 (1816).

³⁶ *Id.* 3 Stat. at 270.

³⁷ *Id.*

Bank, as courts repeatedly construed the Second Bank as outside of the government notwithstanding the government's involvement in the bank's business affairs. At points, Bamzai and Nielson also suggest that this case law on the Second Bank might provide some support for considering "the Fed" as private today. But, as we will see, at best these precedents could support treating the *Federal Reserve Banks* as private. And if we actually apply the reasoning in these cases to the FRBs, the opposite conclusion beckons: that even the FRBs, the formally "private" part of today's Federal Reserve System, are probably part of the government for constitutional purposes under existing law.

II. National *Banks* and the National Bank Act

The Second Bank's charter expired in 1836, with Congress unable to override President Andrew Jackson's veto of a bill that would have extended its life. But the country did not give up on Hamilton's vision of using investor-owned banks to expand the money supply. By this point, the states had chartered thousands of banks, and those banks continued to operate, providing the country with notes and deposits.

During the Civil War, the federal government lost confidence in the state-chartered banking system. It wanted to assert some measure of federal control over the money supply and create a uniform national currency for use across the country.³⁸ But legislators were reluctant to create a third Bank of the United States. Instead, they decided to create a system of national *banks*, plural, which they hoped would entirely displace the existing mass of state-chartered banks. As one drafter put it:

[The Act's new "national banks" will secure] all the benefits of the old United States Bank without many of those objectionable features which aroused opposition. . . . [Rather than having one big federal bank, it] will be as if the Bank of the United States had been divided into many parts, and each part endowed with the life, motion, and similitude of the whole.³⁹

In 1863, Lincoln signed the National Currency Act into law, creating a new federal agency, the Office of the Comptroller of the Currency to administer the new system. In 1864, Congress modified the 1863 law, passing the

³⁸ BRAY HAMMOND, *SOVEREIGNTY AND AN EMPTY PURSE: BANKS AND POLITICS IN THE CIVIL WAR* (1970).

³⁹ CONG. GLOBE, 37th Cong., 2d Sess. 616 (1862).

National Bank Act (NBA), which remains the foundation of the country's monetary system today.⁴⁰

It is under the National Bank Act that the majority of money is presently created. Under that Act, the Comptroller allocates federal charters to form national banks—like today's JPMorgan Chase and Bank of America. Those charters resemble the ones granted to the First and Second Banks in that they offer limited liability, investor-ownership, and the right to issue notes and deposits. And just like the First and Second Banks, today's national banks are fiscal agents of the federal government.⁴¹ In so far as they differ, it is by being far more prescriptive and restrictive, i.e., far more *governmental*. In other words, the NBA's national banks are *more* like public policy instruments than the First and Second Banks. The law limits their corporate powers to a greater degree, restricts where they can locate, and imposes extensive requirements on their lending and deposit creation. It also regulates and supervises them on an ongoing basis. Since 1933, Congress has even authorized government officials to remove, for cause, the officers and directors of national banks (and, since 1989, any of their employees or parties affiliated with them).⁴² Still, as with the heads of the BUS, the heads of NBA national banks—people like Jamie Dimon, the CEO of JPMorgan Chase—are not considered government officials.

III. The Federal Reserve Act

Congress passed the Federal Reserve Act in 1913 because the national banking system was malfunctioning, primarily in two respects. First, a handful of banks in New York had risen to apex status and organized a “clearinghouse” through which they exercised a power over the rest of the banking system even more potent in some respects than that exercised by the Second Bank. Congress objected to the concentration of private power (the same objection Jackson had levied against the Second Bank). Second, the system was intermittently breaking down, with sharp

⁴⁰ Menand & Ricks, *supra* note 21.

⁴¹ See 12 U.S.C. § 90 (“All national banking associations . . . shall be depositories of public money . . . and they may also be employed as financial agents of the Government; and they shall perform all such reasonable duties, as depositories of public money and financial agents of the Government, as may be required of them.”). Thus, the Treasury Secretary could just as well deposit the federal government's funds with JPMorgan as with the FRBs.

⁴² See 12 U.S.C. § 1818(e); Da Lin & Lev Menand, *The Banker Removal Power*, 108 VA. L. REV. 1 (2022).

contractions in the money supply (in other words, rapid drops in the volume of bank deposits). These contractions, associated with “runs” or “panics,” were causing disastrous economic damage in the form of severe recessions. Congress wanted to avert these contractions by making the money supply more elastic.⁴³

Congress, again, decided not to create a third Bank of the United States. Legislators wanted to regulate better the existing banking system—to reduce the power of the clearinghouses and ensure a more elastic money supply. In December 1913, two days before Christmas, it passed the Federal Reserve Act. The new law established a series of new institutions. First, it created twelve new Federal Reserve Banks—banking corporations with federal charters from the Comptroller of the Currency, just like national banks. Second, it created the Federal Reserve Board (later renamed the Board of Governors of the Federal Reserve System), a new federal government agency to regulate the Federal Reserve Banks and much of the rest of the banking system.⁴⁴

The Federal Reserve Banks

The Federal Reserve Banks differ from the national banks in several important respects. First, their ownership. FRBs are cooperatives owned by “member banks,” which include all of the country’s national banks (they are statutorily required to buy shares in the FRBs) and state banks which apply and are approved. But there is a catch: member bank ownership is only nominal. Member banks are entitled to a fixed dividend (set by statute) but receive no further distributions; instead, residual earnings (profits) are paid to the U.S. Treasury.⁴⁵ Moreover, in the event an FRB is liquidated “any value remaining (after debts are paid) and certain required payments are made) becomes the property of the United States.”⁴⁶ The member banks are therefore *functional* creditors and not true shareholders.⁴⁷

⁴³ See Federal Reserve Act, ch. 6, § 1, 38 Stat. 251 (1913) (naming the full title of the FRA as “An Act . . . to furnish an elastic currency”); Lev Menand, *The Logic and Limits of the Federal Reserve Act*, 40 YALE J. ON REGUL. 197, 225–27 (2023).

⁴⁴ Federal Reserve Act, ch. 6, § 10, 38 Stat. 251, 260 (1913).

⁴⁵ 12 U.S.C. §§ 289, 290 (2018).

⁴⁶ U.S. v. Wells Fargo & Co., 943 F.3d 588, 605 (2d Cir. 2019) (quotations removed).

⁴⁷ *Id.* at 604-05.

Second, their governance. The FRBs are only partly controlled by their nominal owners, the member banks. Unlike national banks, or the First Bank, the board of directors of the FRBs is elected according to a statutory procedure in which member banks choose only six of nine directors. Three of these must be chosen from their own number to represent their interests. Three must be chosen from outside of banking to represent the general public. The remaining three are appointed by a government agency, the Federal Reserve Board, with one of these three also serving as the chairman of the board of directors.⁴⁸

Another difference regards the powers of the board of directors. They are not the same as the powers of an ordinary corporate board. FRB boards can appoint the President and First Vice President of the FRB, but those appointments require approval by a government agency, the Federal Reserve Board. Under current law, only the three government-appointed directors and the three directors chosen by the member banks to represent the general public can vote on the appointment of the President and First Vice President. And while the board of directors can remove these officials at any time, so can a government agency, the Federal Reserve Board.⁴⁹

Third, their corporate powers. The FRBs have much narrower powers than the First and Second Banks or even national banks. They are bankers' banks. Initially authorized to maintain deposit accounts only for their members and for the United States, they are now permitted to bank nonmember banks, a handful of other financial institutions, and foreign governmental banks and organizations—but not the general public. Households and businesses cannot open accounts at FRBs. Neither can the vast majority of financial institutions. Similarly, FRBs were initially authorized to lend only to member banks. And even after this was liberalized during the Great Depression, lending outside the banking system was de minimis prior to 2008.⁵⁰

⁴⁸ 12 U.S.C. § 302 (2018).

⁴⁹ See *Wells Fargo*, 943 F.3d at 605 n.20. Given the Federal Reserve Board's extensive further powers over Reserve Bank operations, it might be more accurate to describe the Reserve Banks as *faux-private*. See 12 U.S.C. § 248(f) (2018).

⁵⁰ In the 1930s, Congress expanded FRB lending powers to permit certain limited lending to individuals, partnerships, and corporations in unusual and exigent circumstances. 13(3) and 13(13). In 1980, Congress opened up access to FRB lending to all depository institutions, see Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, §§201–21, 94 Stat. 132, 142–45, and in 1991 Congress relaxed restrictions on the sorts of collateral required for individuals, partnerships, and corporations to borrow from the FRBs in unusual and exigent circumstances. Federal

The FRBs also have the power to buy and sell financial assets but only a very narrow set and, with a few exceptions, only on the open market. Primarily, they can buy and sell foreign currencies, bankers' acceptances, certain bills of exchange, certain state and municipal bonds, and federal government securities.⁵¹ National banks, by contrast, can invest in most bonds,⁵² similar to the BUS.⁵³

Famously, the FRBs have the power to issue notes—the paper money that we still use.⁵⁴ But paper money is no longer an economically significant payment instrument.⁵⁵ The money supply expands and contracts in the form of bank deposits lent into circulation by national banks (and state banks—which survived Congress's efforts in the 1860s to snuff them out).

The Federal Reserve Board

The Federal Reserve Board differs from the FRBs, national banks, and the BUS in pretty much *all* relevant respects. The Board is not a bank. It is not even a corporation. It does not lend money, pay interest, or maintain bank accounts. It has no investors, and private actors play no role in its activities. It is a federal government agency. It regulates.⁵⁶

Its initial powers were primarily with respect to the FRBs and were substantial. For example, the Board “shall be authorized and empowered . . . to exercise general supervision over said Federal reserve banks” including to “examine at its discretion the accounts, books and affairs of each Federal reserve bank” and “require such statements and reports as it

Deposit Insurance Corporation Improvement Act, sec. 473, § 13(3), 105 Stat. 2236, 2386 (1991).

⁵¹ Federal Reserve Act, ch. 6, § 14, 38 Stat. 251, 264 (1913).

⁵² 12 U.S.C. § 24(seventh) (2018).

⁵³ An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, § 7(10), 1 Stat. 191, 194 (1791).

⁵⁴ Up until the 1930s, national banks also issued paper money (that looked almost identical).

⁵⁵ Incidentally, Bamzai and Nielson's principal definition of “[t]he Federal Reserve” is as “the federal agency that controls the paper money supply.” Bamzai & Nielson, *supra* note 4, at 846. Although true, it is the deposit money supply that contemporary “monetary policy” is concerned with.

⁵⁶ As Nathan Tankus put it, the Federal Reserve Board is “just another administrative agency.” Just Another Administrative Agency: Preserving Central Bank Discretion Without Illusions, NOTES ON THE CRISES (Apr. 22, 2025), <https://www.crisisnotes.com/just-another-administrative-agency-preserving-central-bank-discretion-without-illusions/>.

may deem necessary.” If it finds violations, it has the power to “suspend . . . the operations of any Federal Reserve bank, to take possession thereof, administer the same during the period of suspension, and, when deemed advisable, to liquidate or reorganize such bank.”⁵⁷ It might also suspend or remove any officer or director of any Federal reserve bank.⁵⁸ As importantly, the Board had the power to set the rates and conditions for FRB lending,⁵⁹ and control their note issue.⁶⁰

Congress also granted the Board regulatory authority beyond the FRBs, although initially these powers were modest. Most notably, the Board was authorized “to examine at its discretion the accounts, books and affairs of” member banks⁶¹ (meaning all national banks, which were required to be members, and those state-chartered banks joining one of the FRBs) and to alter their reserve requirements.⁶² Reserve requirements restricted the ability of banks to expand the money supply: it required that they hold a certain percentage of government-issued coins, FRB notes, or FRB account balances against their own deposit account balances. Congress also empowered the Board to levy taxes on member banks in cases where reserve requirements were suspended and banks fell below the previously-required levels.⁶³

Over time, Congress added considerably to the Board’s regulatory authority. Today, its powers are vast. They include supervising and regulating (prudentially and for compliance with a long list of federal statutes) any company that owns or controls a bank (i.e., “bank holding companies”), including all of their nonbank subsidiaries. The Board also has the authority to regulate in certain ways all state-chartered banks (including those that are not members of the system). And the Board supervises and regulates systemically important financial market utilities

⁵⁷ Federal Reserve Act § 11(h).

⁵⁸ *Id.* at § 11(f).

⁵⁹ *Id.* at §§ 13, 14(d).

⁶⁰ *Id.* §§ 11(d), 16.

⁶¹ *Id.* § 11(a).

⁶² *Id.* § 11(c).

⁶³ Other powers included granting permits to national banks to act as trustees, executors, administrators, or registrars of stocks and bonds under such rules and regulations as it might prescribe, *id.* § 11(k); granting applications for member banks to act as the agent of nonmember banks in applying for loans from an FRB, *id.* § 19; crafting regulations permitting member banks to withdraw required reserves to meet existing liabilities, *id.*; and imposing penalties of its design on member banks withdrawing required reserves to meet existing liabilities, *id.*

including the Clearing House Payments Company and CLS Bank International, and has certain authorities over the Chicago Mercantile Exchange, the Depository Trust Company, the Fixed Income Clearing Corporation, and the National Securities Clearing Corporation.⁶⁴

The Federal Open Market Committee

In 1935, Congress created an additional institution to govern the Federal Reserve Banks: the Federal Open Market Committee or FOMC. It populated the FOMC with the seven governors of the Board (the existing regulator of the Reserve Banks) and added five “Reserve Bank representatives,” which it required be either the presidents or first vice presidents of the Reserve Banks. It then gave this body the power to direct the manner in which the Reserve Banks exercise a portion of their banking powers—their powers to buy and sell certain financial assets. The provision is short, so we can quote it in full:

No Federal Reserve bank shall engage or decline to engage in open-market operations under section 14 of this Act except in accordance with the direction of and regulations adopted by the Committee. The Committee shall consider, adopt, and transmit to the several Federal Reserve banks, regulations relating to the open-market transactions of such banks.⁶⁵

Congress gave the new body an explicit mandate (the only other provision it adopted regarding the Committee). It wrote:

The time, character, and volume of all purchases and sales of paper described in section 14 of this Act as eligible for 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.⁶⁶

IV. Bamzai and Nielson’s Claims

⁶⁴ Designated Financial Market Utilities, BD. OF GOVERNORS OF THE FED. RESRV. SYS., https://www.federalreserve.gov/paymentsystems/designated_fmu_about.htm (last updated Jan. 29, 2015).

⁶⁵ Banking Act of 1935, ch. 614, sec. 205, § 12A, 49 Stat. 684, 705–06.

⁶⁶ *Id.*

Bamzai and Nielson say a lot of things that are true but that don't have the implications that they think they do.⁶⁷ For example, they write that “the precedents of the First and Second Banks . . . suggest that the government can create a measure of independence for certain banking and currency creation functions by chartering private entities to perform such activities.” Undoubtedly correct. And today the government has created thousands of banks on precisely this model to lend the vast majority of the U.S. money supply into circulation. No one, as far as I am aware, is raising any issue about whether Jamie Dimon, the CEO of JPMorgan Chase, the country's largest federally-chartered, investor-owned bank, constitutionally serves at the pleasure of the President (although the Federal Reserve Board does have the power to remove him for cause).

Bamzai and Nielson continue: “Alexander Hamilton's 1790 proposal for the First Bank explained that such banks are private in character—even when chartered by the federal government for a specific purpose to benefit

⁶⁷ They also make a number of errors, some of which are relevant to the legal analysis. For example:

1. They say that “the FOMC can also use ‘discount window lending,’ which can help ‘damp upward pressures on the federal funds rate’ and the like.” Bamzai & Nielson, *supra* note 4, at 860. But the FOMC cannot “use” discount window lending because it is a committee without banking powers. Only the Federal Reserve Banks have the power to engage in discount window lending, and they enjoy significant autonomy in that endeavor. Nor does the FOMC have the power to regulate discount window lending. That power is with the Board alone. FRA § 14(d).
2. They write that “Congress has tasked the Reserve Banks with supervising and examining state member banks, thrift holding companies, and non-bank financial institutions that have been designated as systemically important under authority delegated to them by the Board.” Bamzai & Nielson, *supra* note 4, at 862 But Congress has not done this. Congress has tasked the Board with supervising and examining financial institutions and has authorized in general terms the Board to delegate “any of its functions” to a number of actors including the FRBs. Although the Board has delegated many supervisory tasks to the FRBs, importantly, Congress included exceptions to the Board's delegation authority including that it cannot delegate to the FRBs “the establishment of policies for the supervision and regulation of depository institution holding companies and other financial firms supervised by the Board of Governors.” 12 U.S.C. § 428(k).
3. They claim that “Congress allowed the President to remove some of the officers of the First and Second Banks.” Bamzai & Nielson, *supra* note 4, at 902 n.384. But Congress did not allow the President to remove *any* of the officers of the *First* Bank (only the Second).
4. They state: “And like the Fed, the First and Second Banks had private shareholders in addition to government shareholders.” Bamzai & Nielson, *supra* note 4, at 902. But the only part of “the Fed” with shareholders are the Federal Reserve Banks, and the FRBs do not have any government shareholders. *All* FRB shares are owned by member banks.

the public, and even when the United States holds shares in those banks.”⁶⁸ Again, true. But, so what? Such banks exist today: They are national banks like JPMorgan Chase. The United States does not generally hold shares in federally-chartered banks, including the FRBs, which are formally private in character. The question at issue is not whether the lack of presidential authority to remove the directors of the FRBs is a constitutional defect (although, for some, surely it could be). The question is whether the Board or the FOMC, neither of which can be characterized as a “bank [that is] private in character,” are constitutionally constituted.

Bamzai and Nielson add that “the Fed’s activities that are analogous to the activities of [the First and Second Banks] likely pass constitutional muster, *if performed by private institutions*.”⁶⁹ This also seems right. The analogous Fed activities would have to be the banking activities of the FRBs. If they are private, then they are kosher just like JPMorgan Chase.

Bamzai and Nielson then caution, perplexingly: “But Congress cannot give the Fed authority that exceeds those boundaries and amounts to an exercise of executive power requiring the President’s supervision.”⁷⁰ What does this mean? It would seem that *all* of the authority the Board and FOMC possess “exceeds” these “boundaries.” They aren’t banks. They’re government regulators!

By and large, Bamzai and Nielson’s article supports the conclusion that the Board of Governors and the FOMC are inconsistent with the Supreme Court’s emerging theory of Article II. For example, if Bamzai and Nielson are committed—as they often seem to be—to the view that bodies that exercise governmental power to regulate non-governmental persons must be subject to presidential control then there is simply no saving the Board or the FOMC.⁷¹ After all, pretty much the only thing that these entities do is regulate non-governmental persons.

There are moments, however, when it seems that Bamzai and Nielson are making a different argument. In my reconstruction: that there should be an exception under Article II for regulating the Federal Reserve Banks—formally non-governmental persons but functionally highly

⁶⁸ Bamzai & Nielson, *supra* note 4, at 894.

⁶⁹ *Id.* (emphasis added).

⁷⁰ *Id.*

⁷¹ Bamzai and Nielson sometimes proceed as if one might remove the Board’s “regulatory functions,” and leave it with “functions of the sort exercised by the First and Second Banks.” But, were that to occur, the Board would be left with no functions at all.

governmental. If Congress pares back the Board’s regulatory authority over banks and sundry other financial institutions, then, on their logic, maybe there is some sort of path based on historical tradition to permitting such a pared down Board and FOMC to operate independent of the President.

This version of their argument is most clearly advanced in section IV.C.4 of their article. For example—conflating the FRBs, the FOMC, and the Board into “the Fed”—they write:

The Fed’s core mission is monetary policy, which it largely performs through open market operations. Although much more sophisticated today, these types of operations are analogous to the activities of the First and Second Banks, which were private. Buying and selling securities and deciding the rate at which it will lend money to other banks thus arguably do not require sovereign power or, at least, to the extent they do, are supported by history, tradition, and Hamilton’s view of the constitutional structure.⁷²

Translation (I think): It is okay for government officials to direct FRB buying and selling of securities and FRB lending because the First and Second Banks were able to buy and sell securities and lend.

There are a number of problems with this argument (putting aside the fact that Congress would have to dramatically rewrite the Federal Reserve Act and numerous other statutes before it could work). First, it is simply no longer true that the Fed “largely performs” its “core mission” of “monetary policy” through open market operations (OMOs). The Fed stopped adjusting short-term interest rates using OMOs in 2008, over fifteen years ago. Instead, it switched to a “floor system” in which it pushes overnight interest rates up by requiring the FRBs pay interest on balances that banks hold in their deposit accounts at the FRBs (these are called reserve balances and the interest is called interest on reserves or IOR).⁷³

Nor is it entirely true that the Fed “largely” conducted monetary policy through OMOs *before 2008*. While the Fed *did* push around overnight interest rates by buying and selling Treasury securities, the relatively small amount of buying and selling had this effect *only because the Fed also imposed reserve requirements on banks*. It was the *combination* of OMOs

⁷² Bamzai & Nielson, *supra* note 4, at 906.

⁷³ See Morgan Ricks, *Money as Infrastructure*, 2018 COLUM BUS. L. REV. 757, 773, 787 (2018).

with reserve requirements that produced monetary control.⁷⁴ The Fed adjusted the supply of reserves by buying or selling Treasuries—buying Treasuries would create new reserves out of thin air and selling Treasuries would destroy reserves—but it could have achieved the same effect *by changing reserve requirements*. In other words, the Board could have conducted its overnight interest rate policy by promulgating a new binding regulation on investor-owned banks. It is not, as Bamzai and Nielson state, that open market operations are “much more sophisticated today.” It is that the First and Second Banks did not conduct open market *operations*. They bought and sold securities for profit. The Fed, prior to 2008, bought and sold securities as a form of coercive *regulation*.

Second, Bamzai and Nielson do not seem to grasp that there is a big logical gap between “the Founders thought that the First Bank could constitutionally buy and sell securities despite being independent of the President” and “the Founders would have thought that the First Bank could constitutionally buy and sell securities despite being independent of the President—if the First Bank had, in fact, been owned 100% by the federal government.” True, as Bamzai and Nielson say, the example of the First and Second Banks shows us that “buying and selling securities and deciding the rate at which [a bank] will lend money to other banks . . . do[es] not require sovereign power.”⁷⁵ We know this, of course, because JPMorgan Chase is doing these things every day and no one is worrying that it is impermissibly exercising sovereign power—even though it has a federal bank charter just like the one granted to the BUS.

But it does not follow from this fact that a federally chartered bank that was government-owned and controlled would not have been thought to exercise “sovereign power” and to be engaged in “executive” activity by Hamilton and the legislators who chartered the First Bank. Indeed, the treatise relied on by Bamzai and Nielson supports the opposite conclusion.⁷⁶ Had Congress decided to create a *government bank* rather than an *investor-owned bank*, the bank would have been “public” not “private” for purposes of constitutional law. In other words: Yes, the First Bank was “independent” of the President. But it was a *for profit, investor-owned bank*. It was not a

⁷⁴ Id.; see also Jeremy C. Stein, *Monetary Policy as Financial Stability Regulation*, 127 Q.J. ECON. 57, 59 (2012).

⁷⁵ Bamzai & Nielson, *supra* note 4, at 906.

⁷⁶ JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW 118 (1827) (“A bank, created by the government, for its own uses, and where the stock is exclusively owned by the government, is a public corporation.”).

government entity carrying out government policy operating apart from the President. The permissibility of the former tells us next to nothing about the permissibility of the latter.⁷⁷

Bamzai and Nielson have another move for trying to save part of the Fed that would side step this problem—but it doesn't work. The move is to say that, actually, today's Fed is not akin to a government bank; it is a private bank. The acrobatics required for this move are almost too much for even Bamzai and Nielson.

They start with the FOMC:

From a structural perspective, the most salient characteristic of the FOMC is that a majority of its members (the seven Board members) appear to be federal government officials, whereas a minority (five) are representatives of the arguably private reserve Banks. If simple majority rule by voting members would convert the FOMC into a governmental body subject to the Appointments Clause and *Seila Law* and *Collins*, then the organization's structure poses constitutional complications. If, however, significant private representation by the Reserve Bank members is sufficient to treat the FOMC as a whole as a private entity—as Angell and Ames and Chancellor Kent suggested—then its structure might pass constitutional muster. The private participation of the Reserve Banks, in other words, might render the FOMC sufficiently similar to the structure of the First and Second Banks.⁷⁸

Consider some of the flaws with this argument:

First, the Fed's Governors are principal officers of the United States, full stop. As far as I am aware, this has never been in question anywhere, much less in dispute.

Second, the FOMC is considered a governmental body. It is not a bank; it is not a corporation; it is formally part of the government. It has

⁷⁷ It bears noting that as a matter of constitutional law, I think the latter would have been allowed. But that is because Unitary Executive Theory is inconsistent with the predominant Founding era understandings of the text and purpose of the Constitution.

⁷⁸ Bamzai & Nielson, *supra* note 4, at 903.

governmental powers to regulate formally private banks (the FRBs).⁷⁹ And it is subject to a statutory mandate, the same as the Board.⁸⁰

Third, Angell and Ames and Chancellor Kent do not suggest that “significant private representation by the Reserve Bank members [would be enough] to treat the FOMC as a whole as a private entity.” Not even close. These nineteenth century writers examined government-chartered, investor-owned business corporations and considered whether the government’s share ownership in these corporations would be enough to convert formally private entities into public entities for legal purposes. What they say is that where the government is just another (minority) owner, its ownership does not convert the corporation into a sovereign entity.⁸¹

This analysis is inapposite. The government owns no shares in the FOMC. No one owns shares in the FOMC. It is not a body corporate. It cannot conduct banking operations.⁸² It is a regulatory body. Ames and Kent have nothing whatsoever to say about when a regulatory body, because it has some private members on it, becomes private.⁸³ And if we did want to extend the principle, courts would almost certainly conclude that the FOMC is public.⁸⁴

⁷⁹ Bamzai and Nielson write: “The court observed that the original version of the FOMC, under the 1933 statute, ‘was privately dominated, consisting solely of representatives of the twelve reserve Banks,’ but that some members of congress favored ‘greater governmental control over disposition of reserve Bank funds,’ leading to the 1935 act’s addition of the Board member.” *Id.* at 904. But this point is inapposite. The FOMC was a statutory replacement for an informal body that the reserve bank governors had created. That the former was private has nothing to do with the fact that the latter was public.

⁸⁰ See 12 U.S.C. § 225a (“The Board of Governors of the Federal Reserve System and the Federal Open Market Committee 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.”).

⁸¹ See, e.g., JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW (1827) (“But a bank, whose stock is owned by private persons, is a private corporation, though its objects and operations partake of a public nature. The same thing may be said of insurance, canal, bridge and turnpike companies. The uses may, in a certain sense, be called public, but the corporations are private, equally as if the franchises were vested in a single person.”); JOSEPH K. ANGELL & SAMUEL AMES, TREATISE ON THE LAW OF PRIVATE CORPORATIONS AGGREGATE (2d ed. 1843).

⁸² At times, Bamzai and Nielson seem to miss this point. See *supra* note XX.

⁸³ What we have here is a private nondelegation problem, which Bamzai and Nielson acknowledge in passing, and which others have argued in court.

⁸⁴ Not only is a majority of the FOMC comprised of public officials but the “private” members are only formally private. The Justice Department OLC considers them public,

Bamzai and Nielson then leap to the Board, where things get very hairy:

The potential remaining question is whether the Board's interconnected relationship with the Reserve Banks and the FOMC, along with the Board's functions, permit the characterization of the Board as something of a hybrid entity that is sufficiently related to the private nature of other components of the Fed.⁸⁵

What Bamzai and Nielson describe as the “potential remaining question” is, of course, *the core question*—really the only question that matters. Is the statutory limit on the President's power to remove the seven Governors, the only principal officers in the Federal Reserve System, constitutionally permissible under a Unitary Theory of Executive Power? Let's decompose Bamzai and Nielson's analysis. Their claim seems to be that the answer would be yes (provided, as they later elaborate, all the other regulatory functions are statutorily removed) because: (1) the Board is “interconnected” with the FRBs and the FOMC; (2) and its functions are special; (3) so therefore it is a “hybrid entity that is sufficiently related to . . . private . . . components”; (4) to count as outside the government for constitutional purposes (or as Baude puts it, not to count as “executive power”).

There are several flaws in this argument. First, “interconnected” is an imprecise way of describing the relevant relationships. The Board is “interconnected” with the FRBs in the way that the Securities and Exchange Commission (SEC) is interconnected with the New York Stock Exchange: the Board is the primary regulator of the FRBs. It is also odd to say that the Board is “interconnected” with the FOMC; it holds a controlling share of the votes on the committee.

Second, what exactly about the Board's functions matter? That it regulates investor-owned enterprises? Many independent boards and commissions regulate investor-owned enterprises.⁸⁶

inferior officers of the United States, because they are selected jointly by the Board and removable by the Board. Mem. Op., Appointment and Removal of Federal Reserve Bank Members of the Federal Open Market Committee, Oct. 23, 2019, at 2.

⁸⁵ Bamzai & Nielson, *supra* note 4, at 904–05.

⁸⁶ Consider, for example, the FDIC, which has a very similar set of regulatory authorities to the Federal Reserve Board. The FDIC examines and supervises banks, promulgates capital and liquidity requirements, and levies penalties. Its powers are actually more confined to the banking system than the Board's. The FDIC is also actually a corporation (albeit a government-owned one). The FDIC also seems pretty “interconnected” (more interconnected) with private federal instruments (the national banks) than the Board.

Third, why do the first three propositions of the argument, which amount to noting that the Board regulates private organizations (the FRBs and others), make it a “hybrid” entity? The Board is a government agency led entirely by principal officers. Why does closely regulating private enterprises convert a public agency into a “hybrid” or “quasi-private” entity (to use the Court’s term)?

Seen in this light, Bamzai and Nielson’s treatment of the Board appears to be at least the outlines of an argument for excluding from “executive power” all regulation of private enterprise. It is because I do not believe this is their contention that I proposed at the start integrating into their argument something about the Bank of the United States. The additional step, I think, would be between (3) and (4) and would be the claim that the overall complex resembles the private BUS, which was accepted by policy makers in the 1790s.⁸⁷

Now this sequence still doesn’t make sense for the reasons discussed earlier—namely, that a government bank and an investor-owned bank are different animals, and Bamzai and Nielson have yet to identify any reasons why that wouldn’t be the case. But even if this sequence did make sense, there are three pretty big problems with the Court going this route.

The first, as mentioned, and as Bamzai and Nielson acknowledge: it would require significant legislative modifications to the Federal Reserve Act (and I mean, *significant*). That legislation has not been drafted, much less passed. Under Bamzai and Nielson’s reasoning (indeed, they really say as much) the Court would have no basis for exempting the Board from a unitarist interpretation of Article II.⁸⁸

Second, this new Fed, were it created, would be a shell of its current self when it comes to monetary control—easily the weakest major central bank in the world. Bamzai and Nielson seem to think that the Fed is able to do what it does today in “monetary policy” simply using the banking

After all, the FDIC sits in direct privity with them: it insures their deposit balances for a fee. Is the FDIC a hybrid entity? Does it count as outside the government for constitutional purposes?

⁸⁷ See, e.g., Bamzai & Nielson, *supra* note 4, at 907–08 (“[T]o the extent that there is evidence that the First or Second Banks engaged in certain activities, *Seila Law*’s method of analysis may permit a form of independence for an entity like the Fed that engages in those activities today.”).

⁸⁸ See, e.g. *id.* at 908 (“[B]ecause at least some of the Fed’s activities go beyond those of the First and Second Banks, there is a significant argument under *Seila Law* and *Collins* that the President can remove the Fed Chair, Fed Vice Chairs, Board of Governors, and perhaps others who are involved in the Fed’s quintessential regulatory functions.”).

powers possessed by the BUS: the power to issue notes, create deposits, buy and sell assets, and lend on collateral.⁸⁹ But these are merely the operational aspects of twenty-first century monetary policy (and resemble more closely the activities of JPMorgan Chase and the other investor-owned national banks). Without the power to regulate bank balance sheets, especially to control their leverage, the Fed could be forced to raise interest rates much higher to rein in excessive expansion. And without the power to relax regulatory constraints, policy makers could find themselves pushing on a string more often.

Third, this new Fed's independence would be illusory—because in our system of investor-owned banks, bank regulation *is* monetary policy. Leverage ratios, capital requirements, and reserve requirements are all, in effect, regulations related to the availability of money and credit in the economy. Whatever executive agency gets to regulate the rest of the banking system could easily conduct its own expansionary or contractionary monetary policy that might swamp whatever the Fed is doing through the FRBs.

V. Conclusion

Monetary policy is not necessarily executive power, Baude tells us. And if by monetary policy, he means monetary activities, then he is right. It was established in the early Republic that the federal government might constitutionally charter investor-owned banks to expand and contract the money supply with note and deposit instruments of their own creation.

People didn't like how much power this put in the hands of just a few wealthy citizens. They thought it jeopardized the health and vitality of the Republic.⁹⁰ They objected on similar grounds to other infrastructure projects that involved giving private citizens special privileges to achieve public goals.⁹¹ Famously, they got the Massachusetts legislature to build

⁸⁹ See, e.g., *id.* (characterizing “the Fed’s role in influencing monetary policy” as a function that arguably does not require “executive power” because it is analogous to the activities of the First and Second Banks).

⁹⁰ See MORGAN RICKS, GANESH SITARAMAN, SHELLEY WELTON & LEV MENAND, NETWORKS, PLATFORMS, AND UTILITIES: LAW AND POLICY 826–833 (2022) (discussing Jefferson’s opposition to the BUS, Senator Thomas Hart Benton’s argument against rechartering the BUS, and President Andrew Jackson’s veto of the rechartering of the BUS).

⁹¹ See Joseph Sommer, *The Birth of the American Business Corporation: Of Banks, Corporate Governance, and Social Responsibility*, 49 BUFF. L. REV. 1011 (2001),

another bridge over the Charles River,⁹² and they defeated the recharter of the Second Bank.⁹³

But the idea that *only the government* could issue a paper currency was rejected.⁹⁴ As Baude put it, “practice and precedent firmly established the constitutionality of the Bank of the United States, which operated as a corporation with some independence from the president.” It is for that reason (among others) that we have a money supply today largely made up of the liabilities of investor-owned corporations, of which national banks, like the first two, remain the most important players. And these banks enjoy significant autonomy from the President.

But the Federal Reserve Board and the FOMC are not banks, nor are they corporations, nor are they lending new money to households and businesses like the national banks (antebellum and postbellum). The Federal Reserve Board and the FOMC are government agencies designed to regulate banks. At the end of the day, Baude, Bamzai, and Nielson do not supply support for the idea that the founding generation would have treated a government regulator of the Bank of the United States any differently than any other principal officer.

The Federal Reserve’s autonomy from presidential direction and control rightly enjoys quasi-constitutional status in the United States today. It has been in place for as long as anyone has been alive. An interpretation of the Constitution that would invalidate this foundational component of the American monetary system should probably be self-refuting. Therefore, if the Court wants to “preserv[e] at least some independent functions for the Federal Reserve,” its best option is to stand by bedrock precedent on which Congress and the public has relied for almost a century.

⁹² See RICKS ET AL., *supra* note 90, at 55.

⁹³ See HAMMOND, BANKS AND POLITICS, *supra* note 15.

⁹⁴ See, e.g., Letter, To George Washington From Thomas Jefferson, 15 February 1791, FOUNDERS ONLINE, NAT’L. ARCHIVES, <https://founders.archives.gov/documents/Washington/05-07-02-0207> (last accessed May 28, 2025) (“The incorporation of a bank, & the powers assumed by this bill, have not, in my opinion, been delegated to the U.S. by the Constitution.”).