RECENT EVENT

ADMINISTRATIVE LAW — FEDERAL RESERVE — U.S. MONETARY POLICY SHOWS THE MAJOR ISSUES WITH THE MAJOR QUESTIONS DOCTRINE. — Federal Reserve Interest Rate Hike on March 22, 2023.

Imagine that a single act by a federal agency — without notice-and-comment rulemaking — caused billions in losses,[1] millions of layoffs,[2] and a financial crisis[3] by interpreting ambiguous language in a statute to act in a novel way. Last Term, in *West Virginia v. EPA*,[4] the Court condemned this type of agency action.[5] Expounding on the major questions doctrine, it held that agency actions of "economic and political significance" require clear congressional authorization.[6] In March 2023, the Federal Reserve (Fed) raised the target federal funds rate to 4.75–5.00% with two tools: the interest on reserve balances (IORB) and the overnight reverse repo facility (RRP).[7] Congress explicitly authorized the IORB, but not the RRP.[8] By citing the Federal Reserve Act[9] for the RRP, the Fed has plausibly raised a major questions issue.[10] That issue introduces a major problem: the doctrine asks courts to either faithfully apply the doctrine with catastrophic outcomes or dilute it into an amorphous standard that casts too much agency action into doubt.

In 1913, the Federal Reserve Act created the Fed as the central bank of the United States; its goal was to avoid financial panics after decades of instability.[11] The Federal Reserve Reform Act of 1977[12] formalized the Fed's mandate as targeting "maximum employment, stable prices,

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[1] *See Earnings Remittances Due to the U.S. Treasury*, FRED (Mar. 2, 2023), https://fred.stlouisfed.org/series/RESPPLLOPNWW [https://perma.cc/7UYS-WD49].

[2] *See* Alicia Wallace, *The Fed's Fight Against Inflation Could Cost the US 1.2 Million Jobs*, CNN (Sept. 23, 2022, 4:01 PM), https://www.cnn.com/2022/09/23/economy/powell-fed-labor-market/index.html [https://perma.cc/2UPM-MJVS].

[3] *See* Abha Bhattarai, *How the Fed's Inflation Fight Fueled Banking Turmoil, in 7 Charts*, WASH. POST (Mar. 19, 2023, 6:00 AM), https://www.washingtonpost.com/business/2023/03/19/inflation-interest-rates-bonds-svb [https://perma.cc/L7GC-NQWQ].

[4] 142 S. Ct. 2587 (2022).

[5] *See id.* at 2615–16.

[6] *Id.* at 2608 (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[7] *See* Press Release, Bd. of Governors of the Fed. Rsrv. Sys., Implementation Note Issued (Mar. 22, 2023), https://www.federalreserve.gov/newsevents/pressreleases/monetary20230322a1.htm [https://perma.cc/8NRS-KSWR]. The Fed initially used the interest on excess reserves and interest on required reserves; in 2021, it combined them into the IORB. *See* Regulation D: Reserve Requirements of Depository Institutions, 86 Fed. Reg. 29,937, 29,938 (June 4, 2021).

[8] *See* 12 U.S.C. § 461(b)(12).

[9] Pub. L. No. 63-43, ch. 6, 38 Stat. 251 (1913) (codified as amended in scattered sections of 12 U.S.C.).

[10] It has been difficult for plaintiffs to establish standing to bring challenges to the Fed's decisions. *See, e.g.*, Horne v. Fed. Rsrv. Bank of Minneapolis, 344 F.2d 725, 728–29 (8th Cir. 1965); *see also* Steffi Ostrowski, Note, *Judging the Fed*, 131 YALE L.J. 726, 734–40 (2021).

[11] *See* BEN S. BERNANKE, 21ST CENTURY MONETARY POLICY, at xiii (2022).

[12] Pub. L. No. 95-188, 91 Stat. 1387 (1977) (codified as amended in scattered sections of 12 U.S.C.).

and moderate long-term interest rates."[13] Today, the Fed targets these goals by adjusting the IORB and the RRP to hit a 2% inflation rate.[14] When the Fed sets these two rates above 0%, it pays firms to keep cash risk-free at the Fed. This raises the opportunity cost of lending to riskier private parties. Why offer a mortgage at 4.75% interest with repayment risk when the Fed pays 4.75% risk-free? Firms with access to the Fed will lend only if they can earn more than these Fed-set rates. As a result, the Fed affects rates for mortgages, credit cards, and other debts.

Higher rates slow economic growth.[15] When it is costlier for households or firms to borrow, they borrow less. When would-be borrowers borrow less, they spend less, leading to less business. When businesses earn less, they need fewer workers. When workers lose their jobs, they spend less. Higher rates and less business activity lower asset prices, reducing asset owners' desires to spend since they now feel poorer. A light sneeze by the Fed can quickly get everyone sick.

The Fed raises rates to fight high, stubborn inflation.[16] A slower economy may be preferable when the costs of living grow dramatically. Since May 2021, prices have grown over 5% annually; the Fed hopes to tame this inflation by reducing aggregate demand through rate hikes.[17] However, this sickness from higher rates, if too severe, can cause lasting damage. In the 1980s, the Fed raised rates to 20%, killing inflation but driving unemployment to 10.8%.[18] Consequently, many, from politicians to academics, heavily debate when to change rates and if so, by how much; it is neither self-evident nor mechanical.[19]

The Fed's monetary policy tools have evolved over time. Before 2008, the Fed used its powers under section 14(b) of the Federal Reserve Act to "buy and sell in the open market . . . any obligation which is a direct obligation of, or fully guaranteed . . . by, any agency of the United States."[20] In a process called open-market operations, it exchanged U.S. Treasuries from banks for reserves, which are nonphysical cash held at Federal Reserve banks (like cash a person would keep at a bank).[21] Banks could lend based only on their reserves, which were limited.[22]

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[13] 12 U.S.C. § 225a. The Fed has wide latitude to decide how to achieve these statutory goals, but they sometimes conflict — higher rates can lower employment. *See* sources cited *infra* notes 16–19.

[14] *See* BERNANKE, *supra* note 11, at 247–49.

[15] SKANDA AMARNATH & ALEX WILLIAMS, EMPLOY AM., WHAT ARE YOU EXPECTING? HOW THE FED SLOWS DOWN INFLATION THROUGH THE LABOR MARKET 10 (2022).

[16] *See* Jeanna Smialek, *Inflation Cooled Just Slightly, With Worrying Details*, N.Y. TIMES (Feb. 14, 2023), https://www.nytimes.com/2023/02/14/business/economy/january-cpi-inflation-report.html [https://perma.cc/ZL2Y-JUZX].

[17] *See id.*

[18] *See* BERNANKE, *supra* note 11, at 35, 37.

[19] *See, e.g.*, *id.* at 55, 225.

[20] 12 U.S.C. § 355(2).

[21] *See* BERNANKE, *supra* note 11, at xxiii.

[22] *See* 12 U.S.C. § 461(b)(2). This restraint was removed in 2020. *See* Regulation D: Reserve Requirements of Depository Institutions, 85 Fed. Reg. 16,525, 16,525 (Mar. 24, 2020).

By influencing the level of reserves, the Fed controlled the price of lending.[23] After the 2008 crisis, the Fed radically changed its toolkit. Banks had more reserves than they needed,[24] so the Fed could no longer set rates just by buying and selling Treasuries with banks for reserves.

The Fed decided to administer rates directly.[25] First, it paid interest on bank reserves at the IORB rate.[26] Congress authorized the Fed to pay the IORB only to "depository institution[s],"[27] likely assuming banks were the main credit providers in the economy.[28] Banks are indeed the largest financial intermediaries ($18 trillion in deposits[29]). However, money market funds (MMFs) and other financial intermediaries (collectively, "shadow banks") have grown in the last few decades. Today, MMFs hold $5 trillion in assets.[30] When the Fed paid only banks, these creditors still lent below the IORB: earning *some* return was better than *nothing*. This practice caused the IORB to exceed the federal funds rate.[31] Without a change, the Fed could not control monetary policy.

In response, the Fed invoked section 14(b) to create the RRP.[32] This facility lets MMFs "buy" a Treasury from the Fed and then "sell" it back at a premium equal to the IORB. Functionally, this operates like the IORB. When MMFs "buy" a Treasury, they give the Fed their cash. When they "sell" it back, they get back that cash plus "interest" equal to the IORB rate. The Fed has acknowledged the RRP is a workaround for the statutory IORB restriction.[33] But unlike the IORB, the RRP is viewed by the Fed as an open-market operation.[34] The Fed can do open-market operations with any counterparty that it deems

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[23] *See* BERNANKE, *supra* note 11, at xxiii. When the Fed "bought" Treasuries from banks, it raised the reserves that banks held, allowing banks to collect more deposits, which could be lent out. More lending put competitive pressure on banks to lower rates, lowering overall rates. *See id.*

[24] *Monetary Base; Reserve Balances*, FRED (Feb. 28, 2023), https://fred.stlouisfed.org/series/BOGMBBM [https://perma.cc/SQ8V-C3PE]. Bank reserve balances grew from $17 billion in August 2008 to $1.1 trillion in December 2009. *Id.*

[25] *See* BERNANKE, *supra* note 11, at 248–50; *see also* BD. OF GOVERNORS OF THE FED. RSRV. SYS., POLICY NORMALIZATION PRINCIPLES AND PLANS 1 (2014).

[26] *See* BERNANKE, *supra* note 11, at 249.

[27] Emergency Economic Stabilization Act of 2008, 12 U.S.C. § 461(b)(12).

[28] *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., MEETING OF THE FEDERAL OPEN MARKET COMMITTEE ON APRIL 29–30, 2014, at 39 (2014), https://www.federalreserve.gov/monetarypolicy/files/FOMC20140430meeting.pdf [https://perma.cc/Q86X-BWJX].

[29] *Deposits, All Commercial Banks*, FRED (Mar. 3, 2023), https://fred.stlouisfed.org/series/DPSACBM027NBOG [https://perma.cc/GK7N-NJM4].

[30] *Money Market Funds; Total Financial Assets, Level*, FRED (Dec. 9, 2022), https://fred.stlouisfed.org/series/MMMFFAQ027S [https://perma.cc/JTN8-WN8L].

[31] *See* BERNANKE, *supra* note 11, at 249.

[32] *See Statement Regarding Overnight Reverse Repurchase Agreements*, FED. RSRV. BANK N.Y. (Dec. 16, 2015), https://www.newyorkfed.org/markets/opolicy/operating_policy_151216.html [https://perma.cc/AJ7J-HDM2].

[33] *See* BERNANKE, *supra* note 11, at 249.

[34] *Authorization for Domestic Open Market Operations*, FED. OPEN MKT. COMM. (Jan. 25, 2022), https://www.federalreserve.gov/monetarypolicy/files/fomc_domesticauthorization.pdf [https://perma.cc/96YZ-SSPE].

appropriate, such as an MMF.[35] As a result, the Fed launched the RRP without requiring Congress to pass a new law to authorize it.[36]

Since 2015, the Fed has treated the RRP facility as a key policy tool,[37] despite initially claiming it was "supplementary" and would be "phase[d] out."[38] This move was not small. On March 22, 2023, when the Fed raised rates to 4.75–5.00%, it directed the open market desk to sell Treasuries through the RRP to meet this target.[39] The open market desk sold over $2 trillion of Treasuries (representing 40% of MMFs' assets).[40] The Fed also paid the IORB to banks on $3.1–3.3 trillion of reserves.[41]

Raising rates through the RRP plausibly constitutes a major questions problem under *West Virginia*, but courts would likely not strike it down. This is a major problem: it shows the doctrine relies too heavily on judges' discretion to uphold critical agency policy.[42] The Fed's action is economically and politically significant, contrary to section 14(b)'s historical use, and inconsistent with the statutory scheme. To avoid the negative effects of striking down this action, courts would likely apply the major questions doctrine in a manipulable, unpredictable way.

Historically, courts would defer to an agency's reasonable interpretation of an ambiguous statute.[43] But in *West Virginia*, the Supreme Court formally introduced the major questions doctrine, triggered if the history, breadth, and "economic and political significance" of an agency action suggest that Congress did not likely mean to grant such power.[44] If this bar is met, the act is unauthorized absent a clear delegation.[45]

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[35] *See* 12 U.S.C. § 355(2).

[36] *See Statement Regarding Overnight Reverse Repurchase Agreements*, *supra* note 32.

[37] *See* Jane Ihrig et al., *The Federal Reserve's New Approach to Raising Interest Rates*, BD. GOVERNORS FED. RSRV. SYS. (Feb. 12, 2016), https://www.federalreserve.gov/econresdata/notes/feds-notes/2016/the-federal-reserves-new-approach-to-raising-interest-rates-20160212.html [https://perma.cc/P9A6-J8V8].

[38] BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 25, at 1.

[39] Press Release, Bd. of Governors of the Fed. Rsrv. Sys., *supra* note 7.

[40] *Reverse Repo Operations*, FED. RSRV. BANK N.Y. (Jan. 21, 2023), https://www.newyorkfed.org/markets/desk-operations/reverse-repo [https://perma.cc/BA5Q-P7Y9]; *see Money Market Funds; Total Financial Assets, Level*, *supra* note 30.

[41] *Money Stock Measures*, BD. GOVERNORS FED. RSRV. SYS. (Feb. 28, 2023), https://www.federalreserve.gov/releases/h6/current/default.htm [https://perma.cc/5GQ9-7ATE].

[42] The Federal Open Market Committee (FOMC), the body that sets rates, is an agency. *See* Comm. for Monetary Reform v. Bd. of Governors of the Fed. Rsrv. Sys., 766 F.2d 538, 544 (D.C. Cir. 1985) (finding that the FOMC and the Federal Reserve exercised "agency authority").

[43] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844, 865–66 (1984). While the Supreme Court has not reviewed interest rates, courts have given the Fed deference, even pre-*Chevron*. In 1929, the Second Circuit found "persuasive" the notion that rates were "political, and not justiciable." Raichle v. Fed. Rsrv. Bank of N.Y., 34 F.2d 910, 916 (2d Cir. 1929); *see also id.* at 915 ("It would be an unthinkable burden . . . [if the Fed's] discount rates were to be subject to judicial review."). Courts also often defer to the Fed when it acts as a banking supervisor. *See, e.g.*, Bd. of Governors of the Fed. Rsrv. Sys. v. Agnew, 329 U.S. 441, 443, 447 (1947).

[44] West Virginia v. EPA, 142 S. Ct. 2587, 2608 (2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000)).

[45] *Id.* at 2609 (citing Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

In *West Virginia*, the Court invoked the major questions doctrine to reject the EPA's interpretation of the Clean Air Act,[46] despite the "plausible textual basis" for that interpretation.[47] The Act requires the EPA to limit power plant emissions via the "best system of emission reduction" (BSER).[48] Before 2015, the EPA used the BSER to require single plants to reduce emissions.[49] In 2015, the EPA proposed using the BSER to require certain plants to shift to renewable power or lower production.[50] Citing the major questions doctrine, the Court doubted a new "power" would be "in the vague language of an 'ancillary provision[]'" of a statute.[51] It rejected the interpretation as a "fundamental revision of the statute."[52] Justice Gorsuch, in his concurrence, identified several other traits to find major-ness: whether the power "resolve[s] a matter of great 'political significance,'"[53] regulates large parts of the economy, requires "billions . . . in spending," or encroaches on state law.[54]

The creation of the RRP shares many similarities with the EPA's BSER interpretation. The Federal Reserve Reform Act requires the Fed to target maximum employment and stable prices.[55] Before 2013, the Fed used open-market operations to control banks' reserves. In 2013, however, the Fed used the RRP to pay nonbanks to lend above the federal funds rate. This newfound use of the RRP, like that of the BSER, may constitute an unauthorized expansion into a new economic sphere in violation of the major questions doctrine.

First, the Fed used section 14(b) of the Federal Reserve Act, which authorizes open-market operations, in a manner contrary to prior use. In the 1920s, the Fed learned that buying Treasuries from banks could control rates in the economy by adjusting banks' reserves.[56] Congress codified this use.[57] In contrast, by letting nonbanks like MMFs store cash at Federal Reserve banks and profit, the Fed has made a new "safe asset that's conceptually like [a] Treasury" for nonbanks, which seems much broader than just buying or selling securities in the open market.[58] The extent of this change is represented by the "wider and more diverse

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[46] 42 U.S.C. §§ 7401–7671q.

[47] *See* West Virginia v. EPA, 142 S. Ct. at 2609.

[48] *See id.* at 2607 (quoting 42 U.S.C. § 7411(a)(1)).

[49] *Id.* at 2610.

[50] *Id.* at 2603.

[51] *Id.* at 2610 (quoting Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 468 (2001)).

[52] *Id.* at 2612 (quoting MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994)).

[53] *Id.* at 2620 (Gorsuch, J., concurring) (quoting Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (per curiam)).

[54] *Id.* at 2621 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014); King v. Burwell, 135 S. Ct. 2480, 2489 (2015)).

[55] 12 U.S.C. § 225a.

[56] *See* W. Randolph Burgess, *Reflections on the Early Development of Open Market Policy*, 46 FED. RSRV. BANK N.Y. MONTHLY REV. 219, 220 (1964).

[57] *Id.* at 222.

[58] BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 28, at 122.

range of market [actors]" participating in open-market operations.[59] In the past, the Fed dealt with only a few banks, but with the RRP, the Fed serves over one hundred entities.[60] Although section 14(b) is broadly worded and MMFs did not exist when Congress passed the initial Act, Congress passed the IORB for only banks and not MMFs.[61]

Second, the RRP expands the breadth of the Fed's powers in ways that might be more appropriate for Congress to address. While the Fed depicts the RRP as a way to set monetary policy, it also transforms the Fed's role relative to the shadow-banking sector. Some Fed members even suggested the RRP would "reshape the structure of the financial industry in possibly very fundamental ways."[62] Notably, MMFs were a source of stress in 2008 and 2020.[63] Instead of letting Congress reform MMFs, the Fed supports them; in doing so, it may be increasing financial instability by creating an alternative to banks during crises.[64] As MMFs' access to the RRP has grown, the RRP's importance has grown. Now, the Fed relies on MMFs as a "primary transmission mechanism."[65]

Third, the RRP is politically salient and costly. The Fed pays nonbank actors the RRP rate to not lend below the federal funds rate. Since September 2022, as the Fed has raised rates, it has lost over $100 billion.[66] Losses will grow as long as rates remain higher.

If raising rates through the RRP plausibly implicates the major questions doctrine, the Fed must identify "clear congressional authorization" for such action.[67] Upon first glance, section 14(b) seems to pass the bar. Unlike the BSER, section 14(b) is a hallmark of the Fed's powers, not an "ancillary" provision that had been used "only a handful of times."[68] Moreover, section 14(b) is broad. It does not restrict to or from whom the Fed can sell or buy Treasuries. Congress intentionally wrote the Act to give the Fed flexibility to respond to evolving, complex market

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[59] Simon M. Potter, Exec. Vice President of the Mkts. Grp., Fed. Rsrv. Bank of N.Y., Remarks at the Roundtable on Treasury Markets and Debt Management: The Federal Reserve's Counterparty Framework: Past, Present, and Future (Nov. 19, 2015), https://www.newyorkfed.org/newsevents/speeches/2015/pot151119 [https://perma.cc/GGV3-4FG7].

[60] *Reverse Repo Operations*, *supra* note 40.

[61] *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 28, at 39; 12 U.S.C. § 461(b)(12).

[62] BD. OF GOVERNORS OF THE FED. RSRV. SYS., MEETING OF THE FEDERAL OPEN MARKET COMMITTEE ON JUNE 17–18, 2014, at 130 (2014), https://www.federalreserve.gov/monetarypolicy/files/FOMC20140618meeting.pdf [https://perma.cc/9E98-SULC].

[63] *See* BERNANKE, *supra* note 11, at 119, 257.

[64] *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 28, at 70.

[65] *Id.* at 104 ("[The Fed is] beginning to rely on [MMFs] as the primary transmission mechanism of monetary policy.").

[66] *See Earnings Remittances Due to the U.S. Treasury*, FRED (Mar. 2, 2023), https://fred.stlouisfed.org/series/RESPPLLOPNWW [https://perma.cc/8NVN-JUB7].

[67] West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022) (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).

[68] *Id.* at 2602.

conditions.[69] This difference might justify giving the Fed more leeway to interpret the Act to achieve maximum employment and stable prices.

Yet the RRP seems to be in tension with other parts of the statutory scheme of the Fed.[70] It acts as the IORB for nonbanks. But Congress explicitly let only "depository institution[s]" earn the IORB.[71] Federal Reserve Bank of Philadelphia President Charles Plosser argued that the RRP "essentially sidestep[ped] th[is] legal restriction."[72] Section 13 of the Act lets only banks hold deposits with the Fed.[73] While repurchases are technically not deposits, they are functionally the same and acknowledged by members of the Fed as such,[74] contrary to the statute's spirit.[75]

The Fed's usage of the RRP to control rates is thus vulnerable to challenge under the major questions doctrine. If a court held the RRP to be impermissible, it would be catastrophic[76] and threaten a broader range of Fed actions, such as quantitative easing, that rely on similarly worded authorizations.[77] It is not enough for an act to be a "sensible 'solution to the crisis of the day'" to be upheld.[78] Lack of confidence in the Fed's ability to control monetary policy would cause financial instability.[79] The Fed cannot wait for courts to permit each act one by one.[80]

Presuming the judiciary reaches the merits of the RRP under the major questions doctrine[81] and would think twice before sparking massive economic damage, courts have two options. First, they may distinguish *agencies* by giving greater deference based on yet-unenumerated factors. Though the Fed's structure conflicts with recent Roberts Court decisions reining in agency power,[82] Congress has always wanted the Fed to be independent; for example, Congress removed the Comptroller

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[69] *See* BERNANKE, *supra* note 11, at 404–09.

[70] *Cf.* West Virginia v. EPA, 142 S. Ct. at 2607 (arguing words must be based on "context" and the "statutory scheme" (quoting Davis v. Mich. Dep't of Treasury, 489 U.S. 803, 809 (1989))).

[71] *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 62, at 93.

[72] *Id.* This sentiment was echoed by Narayana Kocherlakota, President of the Federal Reserve Bank of Minneapolis. *Id.* at 130 ("Should the Congress not have a say in whether we can essentially pay interest on reserves to other financial entities?").

[73] *See* Lev Menand, *The Logic and Limits of the Federal Reserve Act*, 40 YALE J. ON REG. 197, 262 (2023) ("[T]he ON-RRP is out of step with the design of the Federal Reserve Act.").

[74] *See* BERNANKE, *supra* note 11, at 249 ("[The RRP created] short-term deposits . . . .").

[75] Section 11 requires open-market operations to occur "at a market price," but the Fed sets the RRP rate. *See* Lev Menand, *The Federal Reserve and the 2020 Economic and Financial Crisis*, 26 STAN. J.L. BUS. & FIN. 295, 348 n.211 (2021).

[76] *See* BD. OF GOVERNORS OF THE FED. RSRV. SYS., *supra* note 62, at 98.

[77] *See* 12 U.S.C. §§ 341–361.

[78] West Virginia v. EPA, 142 S. Ct. 2587, 2616 (quoting New York v. United States, 505 U.S. 144, 187 (1992)).

[79] *See* BERNANKE, *supra* note 11, at 29.

[80] *See* Mila Sohoni, *The Supreme Court, 2021 Term — Comment: The Major Questions Quartet*, 136 HARV. L. REV. 262, 314 (2022).

[81] Courts have historically used jurisdictional doctrines like standing or political questions to stay out of certain disputes. *See* Alexander M. Bickel, *The Supreme Court, 1960 Term — Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 41–42 (1961).

[82] *See, e.g.*, Seila L. LLC v. Consumer Fin. Prot. Bureau, 140 S. Ct. 2183, 2191–92 (2020); *see also* BERNANKE, *supra* note 11, at xvii–xix.

and Treasury Secretary from the Board of Governors.[83] Congress has not questioned the Fed's mandate or structure for several decades, despite having multiple opportunities to do so, including after the 2008 crisis. Accordingly, courts may just treat the Fed differently than other agencies.

But even if courts treat the Fed differently, it would prompt us to ask: Why just the Fed? Other statutes suggest Congress wanted other agencies to be politically insulated.[84] The Fed must be sensitive to long-term goals that do not always get a sufficient spotlight in a myopic political cycle, but the same could be said for containing a novel pandemic[85] or reducing emissions.[86] While one *can* draw distinctions, it is not self-evident *how* one should do so. And *West Virginia* offers courts little guidance, forcing them to draw arbitrary distinctions.

Second, courts may distinguish *agency actions* based on yet-unenumerated factors. Congress could have given the Fed "instrument independence," the ability to decide which tools are needed for the complex goals of stable prices and maximum employment. In other words, Congress may have asked the Fed to "fill up the details."[87] It is unclear how a court would know that, though. Is it enough that the authority is found in a key provision, not an "ancillary" one? How does one tell? The ambiguity in the Federal Reserve Act, facially, looks no worse than those of other acts. If this ambiguity is not unique, why do courts not defer to OSHA when it regulates public health and to the EPA when it regulates the environment by citing ambiguous language in their own statutes? How judges draw these lines implicates millions of dollars and lives.

The threat of immediate economic devastation from neutering the Fed illustrates the serious flaws of *West Virginia*'s major questions doctrine. If courts can invalidate even the Fed's RRP based on vague, inarticulable standards, they will cast too much agency action into doubt. Neither approach outlined above is satisfactory for Congress or agencies. While they wait for courts to make case-by-case distinctions, which may conflict with each other, they will not know which previously upheld agency authorizations are still permissible.[88] Meanwhile, those who are impacted by and rely on these agency acts will be left adrift in a sea of jurisprudential doubt. Given the vast economic and political stakes, such an ambiguous, case-by-case approach is not a practical one.

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[83] *See, e.g.*, BERNANKE, *supra* note 11, at xviii, xxi; Fed. Rsrv. Bank of Bos. v. Comm'r of Corps. & Tax'n, 499 F.2d 60, 63 (1st Cir. 1974) ("It would seem that Congress intended . . . [the Fed] to act . . . outside the executive chain of command."); *cf.* Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 30 (1994) (observing that the Second Bank of the United States was "the first truly independent agency in the republic's history").

[84] *See, e.g.*, Blake Emerson, *Liberty and Democracy Through the Administrative State*, 73 HASTINGS L.J. 371, 413–14 (2022) (arguing Congress has intentionally insulated agencies).

[85] *See* Nat'l Fed'n of Indep. Bus. v. Dep't of Lab., 142 S. Ct. 661, 666 (2022) (per curiam).

[86] *See* West Virginia v. EPA, 142 S. Ct. 2587, 2616 (2022).

[87] *Id.* at 2617 (Gorsuch, J., concurring) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 42–43 (1825)).

[88] *See* Sohoni, *supra* note 80, at 314.