

# U.S. AGENCY INDEPENDENCE AND THE GLOBAL DEMOCRACY DEFICIT

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*Critics have accused transnational regulatory networks (TRNs) such as the Basel Committee on Banking Supervision of being undemocratic, but they rarely step back and ask if democracy is the right criterion for evaluating regulatory networks. Such critics often point to the seemingly robust checks of domestic administrative law and argue that similar mechanisms should constrain TRNs. However, the Federal Reserve Board of Governors, a significant banking regulator in the United States, is not democratic. Using the Federal Reserve Board as a case study, this Note challenges critics' claims that there is such a wide gulf between domestic and global procedures.*

INTRODUCTION .....	1803
I. THE BASEL COMMITTEE ON BANKING SUPERVISION (BCBS) AND ITS DEMOCRACY DEFICIT.....	1809
A. <i>Functions and History</i> .....	1809
B. <i>The BCBS's Democracy Deficit</i> .....	1813
1. <i>Defining the Democracy Deficit</i> .....	1814
a. Effectiveness and Status as De Facto Regulator .....	1814
b. Procedural Inadequacies .....	1815
2. <i>Prior Critiques of the Democracy Deficit</i> .....	1817
II. The Federal Reserve Board.....	1820
A. <i>The FRB's Importance in U.S. Banking Regulation</i> .	1821
B. <i>The FRB's Juridical Independence</i> .....	1824
C. <i>The FRB's Political Clout</i> .....	1827
III. THE STRUCTURE OF THE FRB UNDERMINES CLAIMS OF THE BCBS'S DEMOCRACY DEFICIT .....	1830
A. <i>Why the BCBS-FRB Comparison Is Sound</i> .....	1830
B. <i>What the Comparison Shows About the Criticisms of        the BCBS</i> .....	1832

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C. *Flaws in the Approach* ..... 1834

    1. *Independent Agencies as Creatures of Congress  
        (or Other Branches)* ..... 1834

    2. *Bureaucracies Can Serve Second-Order  
        Democratic Objectives* ..... 1836

CONCLUSION ..... 1838

INTRODUCTION

Global cooperation in financial regulation has steadily increased over the years to meet the challenges of a globalized marketplace for financial services.<sup>1</sup> One of the most prominent examples of regulatory cooperation, the Basel Committee on Banking Supervision (BCBS), has played an instrumental role in bank regulation. Countries around the world have implemented BCBS recommendations on capital requirements for banks.<sup>2</sup> Domestic bank regulators use BCBS’s criteria to gauge the safety and soundness of banks and ensure a healthy banking sector.<sup>3</sup> BCBS has made a series of regulatory regimes over the years, known as Basel I, Basel II, and Basel III. While states may not implement the Basel rules with perfect uniformity, the importance of these regulatory standards is beyond doubt. Banks’ compliance (or lack thereof) with these standards regularly makes financial news.<sup>4</sup>

What exactly is the BCBS, and why is it so important? It is composed of prominent bank regulators from around the globe who meet in order to set standards for financial regulation, including capital and bank liquidity guidelines.<sup>5</sup> In that sense, it is similar to a policy think tank. However, because the BCBS’s model rules serve as a gold

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<sup>1</sup> See Stephen Fidler et al., *EU Backs U.S. Delay on Basel Rules*, WALL ST. J., Jan. 26–27, 2013, at B2 (describing the cooperation between EU banking regulators and the Federal Reserve Board (FRB) on implementing new standards).

<sup>2</sup> See *Basel Committee on Banking Supervision*, BLOOMBERG.COM, <http://topics.bloomberg.com/basel-committee-on-banking-supervision/> (last visited Sept. 10, 2013) (compiling the BCBS’s role in recent news stories); see also ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 42–43 (2004) (describing the BCBS’s ascension to prominence).

<sup>3</sup> See SLAUGHTER, *supra* note 2, at 42–43 (describing the promulgation of capital adequacy standards, a measure of stability, adopted by the BCBS member countries).

<sup>4</sup> See, e.g., Simon Nixon, *HSBC’s Unfamiliar Capital Problem*, WALL ST. J. (Mar. 4, 2013, 10:47 AM), <http://online.wsj.com/article/SB10001424127887324539404578340114279183212.html> (noting how HSBC had Tier 1 capital in excess of Basel III requirements and discussing the bank’s strategy for investing it); Laura Stevens & Margot Patrick, *In Europe, Banks Primp Their Models*, WALL ST. J., Feb. 21, 2013, at C1 (noting how large banks were adjusting their calculations of risk-weighted assets in order to lighten regulatory capital requirements).

<sup>5</sup> See BASEL COMM. ON BANKING SUPERVISION, HISTORY OF THE BASEL COMMITTEE AND ITS MEMBERSHIP 1, 4 (2009), available at <http://www.bis.org/bcbs/history.pdf> [hereinafter BCBS, HISTORY] (describing the objectives of the BCBS); Pierre-Hughes Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT’L L. 113, 132 (2009) (describing the history and function of the BCBS).

standard for bank capital regulation, scholars have suggested that it is like a global regulatory agency, promulgating de facto, if not de jure, regulations.<sup>6</sup> The comparison seems apt considering that members of the BCBS are regulators who actually work in the financial regulatory agencies of the BCBS's member countries.<sup>7</sup> The BCBS's regulatory standards apply to many parts of the globe because many countries, especially those with large financial sectors, have implemented the BCBS norms into domestic law.<sup>8</sup>

There are some oddities in describing the BCBS as an agency, however.<sup>9</sup> It lacks the legal features of a domestic agency—it has no organic statute and is not governed by any treaty.<sup>10</sup> Prior to adoption of the BCBS standards by a country, its documents, recommendations, and standards have no legal status.<sup>11</sup> Because of this lack of legal status, scholars have termed it a “transnational regulatory network” (TRN) that has a “twilight existence.”<sup>12</sup>

Global governance and Global Administrative Law (GAL) scholars portray the BCBS as far more than a global think tank. They argue that the lack of formal legal status is not of primary normative importance.<sup>13</sup> The real regulatory work gets done in Basel, where U.S. bank regulators meet with their foreign-country counterparts; domestic regulators then adopt the BCBS standards into domestic

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<sup>6</sup> See Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *LAW & CONTEMP. PROBS.* 15, 18–19 (2005) [hereinafter KKS] (suggesting a global administrative space where bodies like the BCBS operate).

<sup>7</sup> See BCBS, HISTORY, *supra* note 5, at 1 (describing the BCBS's origins as a consortium of central bankers and regulators); Verdier, *supra* note 5, at 132 (same).

<sup>8</sup> See Michael S. Barr & Geoffrey P. Miller, *Global Administrative Law: The View from Basel*, 17 *EUR. J. INT'L L.* 15, 17 (2006) (describing the BCBS regime as one of the most successful of any international regulatory network, having influence in over 100 countries).

<sup>9</sup> See KKS, *supra* note 6, at 28 (noting that analogies between the procedures of global administrative actors and domestic agencies “must be viewed with great caution”).

<sup>10</sup> See Verdier, *supra* note 5, at 117–18 (outlining the informality of BCBS and its separation from a legal order); David Zaring, *International Law by Other Means: The Twilight Existence of International Financial Regulatory Institutions*, 33 *TEX. INT'L L.J.* 281, 302 (1998) (noting the informal status of the BCBS).

<sup>11</sup> See Zaring, *supra* note 10, at 303–04 (describing the “extra-legal status” of the BCBS).

<sup>12</sup> See Anne-Marie Slaughter, *The Accountability of Government Networks*, 8 *IND. J. GLOBAL LEGAL STUD.* 347, 347–48 (2001) [hereinafter Slaughter, *Accountability*] (defining transnational regulatory networks); Zaring, *supra* note 10, at 301–04 (noting how the lack of legal rules governing the BCBS gives it a “twilight existence” in comparison with international organizations governed by public international law).

<sup>13</sup> See, e.g., Gráinne de Búrca, *Developing Democracy Beyond the State*, 46 *COLUM. J. TRANSNAT'L L.* 221, 235 (2008) (noting that the informality of the BCBS standards is made “authoritative” by its incorporation into other international regimes, such as that of the International Monetary Fund (IMF) and the World Bank (WB)).

regulation without sufficient scrutiny.<sup>14</sup> Scholars call this a *fait accompli*: It effectively circumvents the administrative process which would ordinarily require the rigors of notice-and-comment rulemaking.<sup>15</sup>

The combination of the BCBS's importance and twilight existence has generated significant scholarly discussion and criticism over the years. Scholars have called the BCBS undemocratic or characterized it as suffering from a "democracy deficit."<sup>16</sup> According to some, the BCBS is a group of technocrats, subject neither to the rigors of administrative law processes nor to scrutiny by elected leaders.<sup>17</sup>

Much ink has been spilled on whether the BCBS is beyond the reach of administrative law and whether the BCBS is as important as some scholars say. I note three broad strands in the scholarship: (1) The BCBS is important, and the democracy deficit is a serious problem that demands procedural reform.<sup>18</sup> (2) The BCBS is important, but it is restrained by its own procedures and by the domestic regulators who implement the BCBS standards.<sup>19</sup> (3) The BCBS is not such a strong regulator, and states can and do deviate from its norms.<sup>20</sup>

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<sup>14</sup> My colleague and classmate, Max Feldman, has undertaken a detailed examination of this critique in his study of the domestic implementation of the BCBS norms. Maximillian L. Feldman, Note, *The Domestic Implementation of International Regulations*, 88 N.Y.U. L. REV. 401 (2013).

<sup>15</sup> See Régis Bismuth, *The Independence of Domestic Financial Regulators: An Underestimated Structural Issue in International Financial Governance*, 2 GOETTINGEN J. INT'L L. 93, 101–02, 105–07 (2010) (explaining how domestic agencies may shirk responsibilities in implementing international standards).

<sup>16</sup> See, e.g., Barr & Miller, *supra* note 8, at 18–21 (describing the alleged democracy deficit of global institutions and summarizing the viewpoints of some of the BCBS's critics in that light).

<sup>17</sup> Barr and Miller evoke this possibility with a vivid image: "Imagine a club of central bankers meeting secretly in one of Switzerland's wealthiest cities, known for its discretion, its iconic graphic design school, and boring bars." *Id.* at 17.

<sup>18</sup> See de Búrca, *supra* note 13, at 253–54 (advocating for a "democratic-striving approach" to TRNs that would maximize participation in the regulatory process); see also Anne-Marie Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, 39 GOV'T & OPPOSITION 159, 174–86 (2004) [hereinafter Slaughter, *Disaggregated Sovereignty*] (arguing that networks still must meet normative criteria in order to be legitimate).

<sup>19</sup> See Barr & Miller, *supra* note 8, at 24–31 (arguing that the BCBS has become more accountable over time with the adoption of processes such as notice-and-comment procedures at both the transnational and domestic levels); see also Feldman, *supra* note 14, at 420–26 (examining the ways in which U.S. domestic regulators discussed and altered the BCBS's norms).

<sup>20</sup> See Verdier, *supra* note 5, at 162–63 (arguing that TRNs are not deracinated from domestic political interests). To be clear, Verdier does believe that there may be distributive problems created by the use of TRNs. *Id.*

This Note diverges from existing literature and argues that democracy is not an appropriate normative ideal in banking regulatory agencies—and indeed, that its invocation often muddles discussions of the role of TRNs. Democracy alone does not explain what kind of procedures an agency should use or how it should be structured. Undemocratic features are purposefully built into the structure of domestic agencies.<sup>21</sup> Critics who claim that the BCBS suffers a democracy deficit are using a misguided criterion. The undemocratic features in domestic agencies undermine the claims of critics who have called the BCBS an “agenc[y] on the loose”<sup>22</sup> that regulates like domestic agencies without the rigors of domestic administrative law.<sup>23</sup>

This Note takes a step back and looks at the structure of a U.S. domestic banking regulator, which suggests that an insulated, technocratic bank regulator is a central part of our administrative structure. That is not to say that the scholarly critiques mentioned above are wholly incorrect<sup>24</sup> or that democracy as a political value should be discarded. Rather, this perspective reveals one of the deep normative tensions in administrative law between democracy and technocracy:<sup>25</sup> the need for specialized non-political actors outside of Congress and the presidency to tackle complex regulatory issues, and the need for a

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<sup>21</sup> My critique here is highly indebted to the work of Edward Rubin. *E.g.*, Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 713–14 (2001) [hereinafter Rubin, *Democracy*] (arguing that the discourse surrounding democracy and the administrative state “do not reflect our genuine political commitments” due to the tendency to invoke “premodern” elements of government). While I do not endorse all of Rubin’s conclusions, I aim to show that his observations are particularly keen in the case of financial regulation. Additionally, Andrew Moravcsik has taken a skeptical view to democracy deficit claims generally. *See* Andrew Moravcsik, *In Defence of the ‘Democratic Deficit’: Reassessing Legitimacy in the European Union*, 40 J. COMMON MARKET STUD. 603, 605 (2002) [hereinafter Moravcsik, *Defence*] (arguing that democracy deficit scholars should analyze institutions under “reasonable criteria” rather than under “ideal and isolated terms”); Andrew Moravcsik, *Is There a ‘Democratic Deficit’ in World Politics? A Framework for Analysis*, 39 GOV’T & OPPOSITION 336, 337 (2004) [hereinafter Moravcsik, *Framework*] (asserting that “international institutions should not be compared to ideal democratic systems”).

<sup>22</sup> *E.g.*, Slaughter, *Accountability*, *supra* note 12, at 359.

<sup>23</sup> *But see* SLAUGHTER, *supra* note 2, at 220 (noting that central banks, like courts, may be politically insulated for good reasons).

<sup>24</sup> Some scholars do take account of the domestic regulatory picture in greater depth, considering more than just democratic factors. *See, e.g.*, Bismuth, *supra* note 15, 101–08 (discussing the implementation of Basel standards at the national level). I agree wholeheartedly with Bismuth that the domestic structural features of administration go underappreciated in TRN scholarship. I disagree, however, with his normative conclusions: He, similar to de Búrca and Zaring, worries that this leads to a “[c]ircumvention” of national democratic processes, *id.* at 101, which is exactly the type of viewpoint I resist here.

<sup>25</sup> *See generally* K. Sabeel Rahman, Note, *Envisioning the Regulatory State: Technocracy, Democracy, and Institutional Experimentation in the 2010 Financial Reform and Oil Spill Statutes*, 48 HARV. J. ON LEGIS. 555 (2011) (discussing the balance and tensions between democracy and technocracy).

countervailing force to subject those specialized actors to democratic checks and balances.<sup>26</sup>

In short, I argue from the critics' own assumptions about the importance of democratic procedures in the regulatory process.<sup>27</sup> If the BCBS merits scrutiny because it acts like a bank regulator for the whole globe, then we should look to domestic examples of bank regulators in comparison.<sup>28</sup> To support my claim that democracy is not an illuminating normative criterion to apply to bank regulators, I look at the most important banking regulator in the United States: the Federal Reserve Board of Governors (FRB). The FRB is not democratic because it is a powerful, politically resilient independent agency.<sup>29</sup> Despite periods of congressional or presidential discomfort with the FRB's independence, it has remained extraordinarily resilient.<sup>30</sup> The FRB's influence in bank regulation has increased over the years. The Dodd-Frank Wall Street Reform and Consumer Financial Protection Act (Dodd-Frank)<sup>31</sup> cemented the FRB's importance in the United States's bank regulatory scheme, and it now regulates some of the largest, most significant institutions in the U.S. financial sector.<sup>32</sup>

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<sup>26</sup> See Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1676–78 (1975) (noting the tension between political forces that expand agency discretion and those that constrain it).

<sup>27</sup> See *infra* Part III.A (arguing for the soundness of the comparison); see also, e.g., de Búrca, *supra* note 13, at 253–54 (advocating for greater participation rights in transnational governance institutions); Slaughter, *Accountability*, *supra* note 12, at 366 (calling for administrative lawyers to apply procedural expertise to the accountability of transnational regulatory institutions).

<sup>28</sup> A fuller comparison would be a comparative study between all U.S. bank regulators and a greater sample of bank regulators in other countries. Such a comparison is, sadly, beyond the scope of this Note.

<sup>29</sup> This is not to say that the FRB is completely immune from political pressures (one wonders if a public institution could ever be *completely* insulated from all political pressures). See Steven A. Ramirez, *Depoliticizing Financial Regulation*, 41 WM. & MARY L. REV. 503, 545, 550–51 (2001) (finding that the FRB is not immune from political pressure but that independence must be measured on a relative basis). But as far as real-world examples of technocratic institutions go, the FRB is a great example. As I note below, the FRB receives significant deference from political actors, at least in its role as a central bank. See *infra* notes 157–59 and accompanying text.

<sup>30</sup> See BERNARD SHULL, *THE FOURTH BRANCH*, at xi–xii (2005) (noting the paradox of how a much-criticized agency, the FRB, not only managed to survive, but increase in influence).

<sup>31</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) [hereinafter *Dodd-Frank*].

<sup>32</sup> See H. Rodgin Cohen, *Preventing the Fire Next Time: Too Big to Fail*, 90 TEX. L. REV. 1717, 1722 (2012) (noting how submission of large financial institutions to greater regulatory authority like the FRB was a key component of alleviating the “too big to fail” phenomenon). As Cohen notes, the FRB is not the *sole* regulator of large financial institutions. See *id.* at 1725–26 (describing the roles of the Federal Deposit Insurance Corporation (FDIC) and Financial Stability Oversight Council (FSOC)). It is the one that

This Note focuses on the FRB, as opposed to other financial regulators in the United States, because of its importance in capital and liquidity regulation.<sup>33</sup> It is one of the participatory institutions in the BCBS process.<sup>34</sup> It is also one of the agencies that implements the Basel norms into domestic law.<sup>35</sup> I will address the soundness of the comparison more fully in Part III.

This Note will proceed in three parts. Part I is a discussion of the BCBS. First, Part I discusses what it means for a TRN, particularly the BCBS, to suffer from a democracy deficit. While there are many theories of what constitutes “democracy,” there are common threads to all of these critiques of the BCBS. For my purposes here, democracy refers to the ability to subject bureaucratic institutions to elected representatives or affected interests through procedural devices.<sup>36</sup> Second, Part I includes a description of how the BCBS works and a brief overview of its regulatory goals. Part II makes the claim that the FRB is undemocratic. It will discuss (1) the importance of the FRB in bank regulation, (2) the legal features of its independence, and (3) a sampling of instances where it has withstood political pressures. Finally, Part III argues that the FRB’s independence undermines critics’ claims that the BCBS is undemocratic, because the FRB, a domestic regulator, uses a highly technocratic structure. This will involve (1) a discussion of why the comparison between the FRB and the BCBS makes sense, (2) what that comparison means for the critics, and (3) the weaknesses of my theoretical approach.

As a final aside, the assertion that the BCBS or the FRB is undemocratic should not in any way be construed as an indictment of the domestic regulatory institutions themselves, the work they do, or

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proposes capital standards, however. See *Dodd-Frank*, *supra* note 31, § 113(a)(1) (describing the process that puts nonbank financial companies under the supervisory authority of the FRB); Elizabeth F. Brown, *The New Laws and Regulations for Financial Conglomerates: Will They Better Manage the Risks than the Previous Ones?*, 60 AM. U. L. REV. 1339, 1347–51 (2011) (describing the types of institutions regulated by the FRB pre- and post-Crisis).

<sup>33</sup> See *infra* Part II.A (describing the FRB’s role in U.S. banking regulation, including the increased share of regulatory authority after Dodd-Frank).

<sup>34</sup> That is, members of the FRB go to Basel, Switzerland to deliberate and to compose the Basel norms. See BCBS, HISTORY, *supra* note 5, at 8 (listing the U.S. representative institutions).

<sup>35</sup> Other bank regulators do this as well. I focus on the FRB because Dodd-Frank has put many of the largest financial institutions under the FRB’s regulation. See *infra* notes 125–34 and accompanying text (describing the FRB’s role in U.S. bank regulation).

<sup>36</sup> See *infra* notes 71–74 and accompanying text (discussing the critics of the BCBS’s conception of democracy and some definitional nuances); see also *infra* Part III.C.2 (considering whether independent agencies can serve “second order” democratic objectives like agency-capture avoidance, and questioning whether it is useful to refer to “democracy” in seeking those objectives).

the professionals that work in them. The history of banking in the United States has a truly unique, fascinating, and sometimes frightening tradition of pathological conspiracy theories.<sup>37</sup> This Note is not a contribution to that tradition.

## I

### THE BASEL COMMITTEE ON BANKING SUPERVISION (BCBS) AND ITS DEMOCRACY DEFICIT

#### A. *Functions and History*

While this Note focuses on bank regulation procedure, I offer a brief explanation of capital and liquidity requirements—part of the substance of bank regulation.<sup>38</sup> Capital requirements determine to what extent a bank is financed by equity, and to what extent a bank is financed by debt.<sup>39</sup> While the BCBS imposes capital requirements on banks to guard against a variety of risks, the paradigmatic risk that capital requirements guard against is insolvency risk—the risk that a bank’s liabilities will exceed its assets. Liquidity requirements, also imposed by the latest Basel regime,<sup>40</sup> require banks to keep certain minimum amounts of cash on hand, which help prevent crises such as bank runs.<sup>41</sup>

The BCBS seeks to “strengthen the regulation, supervision and practices of banks worldwide with the purpose of enhancing financial stability.”<sup>42</sup> The organization itself notes the lack of legal force behind any of its “conclusions.”<sup>43</sup> It lacks most, if not all, of the salient

<sup>37</sup> See, e.g., DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815–1848*, at 373–95 (2007) (describing President Jackson’s famous standoff with the Second Bank of the United States, especially noting his use of “resounding and demagogic language”).

<sup>38</sup> The merits of capital and liquidity requirements, and the particulars of capital requirements, are beyond the scope of this Note. For one hostile view of the BCBS, see Hal S. Scott, *Reducing Systemic Risk Through the Reform of Capital Regulation*, 13 J. INT’L ECON. L. 763, 773 (2010) (arguing that any regulatory regime will be unlikely to determine the appropriate amount of capital for a given bank).

<sup>39</sup> See RICHARD SCOTT CARNELL, JONATHAN R. MACEY & GEOFFREY P. MILLER, *THE LAW OF BANKING AND FINANCIAL INSTITUTIONS* 52–56 (4th ed. 2009) (outlining the various definitions of bank capital and its regulatory importance).

<sup>40</sup> See generally BASEL COMM. ON BANKING SUPERVISION, *BASEL III: INTERNATIONAL FRAMEWORK FOR LIQUIDITY RISK MEASUREMENT, STANDARDS AND MONITORING* (2010), available at <http://www.bis.org/publ/bcbs188.pdf> (detailing the liquidity portion of the Basel III reforms).

<sup>41</sup> See *id.* at 1–2 (describing the purposes of the BCBS liquidity standards); CARNELL, MACEY & MILLER, *supra* note 39, at 46–47 (describing the relationship between fractional reserves and bank runs).

<sup>42</sup> *About the Basel Committee*, BANK FOR INT’L SETTLEMENTS, <http://www.bis.org/bcbs/about.htm> (last updated June 10, 2013).

<sup>43</sup> BCBS, *HISTORY*, *supra* note 5, at 1.

features of a treaty-based international organization: It has no permanent secretariat, no underlying treaty, and no offices of its own.<sup>44</sup> While the BCBS began as an organization for G-10 members and Luxembourg,<sup>45</sup> its membership had increased to 27 countries as of June 2009;<sup>46</sup> its membership remains the same today.<sup>47</sup>

The BCBS has enjoyed importance since its inception. As a general goal, the BCBS seeks harmonization of supervision across borders in order that “no foreign banking establishment should escape supervision[ ] and that supervision should be adequate.”<sup>48</sup> The BCBS promulgated its first standard—the Capital Accord (Basel I)—in 1988,<sup>49</sup> which determined capital requirements for “internationally active banks.”<sup>50</sup> Its purpose was to address concerns of regulatory arbitrage stemming from a decrease in minimum capital levels throughout banks around the globe.<sup>51</sup> Basel I was intended to apply solely to G-10 countries and Luxembourg;<sup>52</sup> however, as “one of the most successful international regulatory initiatives ever attempted,” Basel I was adopted in some form by more than one hundred other countries.<sup>53</sup> The approach fixed the capital holding requirements, provided a method of determining what kind of capital would meet the threshold, then provided a method of calculating “[r]isk-weighted

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<sup>44</sup> See David Zaring, *Informal Procedure, Hard and Soft, in International Administration*, 5 CHI. J. INT'L L. 547, 569–72 (2005) (noting, among other features, the lack of treaty norms governing the BCBS).

<sup>45</sup> *Id.* at 555 (describing the initial composition and origin of the BCBS). For a list of G-10 member countries, see *Factsheet: A Guide to Committees, Groups, and Clubs*, INT'L MONETARY FUND 4–5 (last updated Apr. 2013), <http://www.imf.org/external/np/exr/facts/pdf/groups.pdf> (providing a brief history and membership list of the G-10).

<sup>46</sup> Mario Giovanoli, *The Reform of the International Financial Architecture After the Global Crisis*, 42 N.Y.U. J. INT'L L. & POL. 81, 116 (2009).

<sup>47</sup> BCBS, HISTORY, *supra* note 5, at 1 (listing the 27 current member countries of the BCBS).

<sup>48</sup> *Id.* at 1–2.

<sup>49</sup> *Id.* at 2.

<sup>50</sup> *International Convergence of Capital Measurement and Capital Standards*, BASLE COMM. ON BANKING SUPERVISION 2 (July 1988), <http://www.bis.org/publ/bcbs04a.pdf>.

<sup>51</sup> Peter King & Heath Tarbert, *Basel III: An Overview*, BANKING & FIN. SERVICES POL'Y REP., May 2011, at 1. For the basics of bank capital standards, see CARNELL, MACEY & MILLER, *supra* note 39, at 251–56.

<sup>52</sup> Barr & Miller, *supra* note 8, at 16–17.

<sup>53</sup> *Id.* at 17. In its implementation progress reports, the BCBS's analyses of implementation focus solely upon member countries, however. See, e.g., BASLE COMM. ON BANKING SUPERVISION, PROGRESS REPORT ON IMPLEMENTATION OF THE BASEL REGULATORY FRAMEWORK 2–3, 6–7 (2013), available at <http://www.bis.org/publ/bcbs247.pdf> [hereinafter BCBS, PROGRESS REPORT] (detailing member implementation of Basel III capital regulations as of March 2013 and describing rubrics used to measure the implementation).

assets.”<sup>54</sup> The risk-weighting system was ultimately problematic because it facilitated regulatory arbitrage.<sup>55</sup>

The BCBS sought to improve upon the substance of Basel I standards in the adoption of Basel II in 2004.<sup>56</sup> The substantive problems of Basel I underscored one of the main issues in the Basel scheme: balancing the objectives of a single global regulatory regime with the on-the-ground differences in countries with widely different financial markets.<sup>57</sup> In contrast to the opacity of the procedures leading to Basel I, the BCBS used more open procedures to craft the Basel II standards. One example is the use of notice-and-comment style rulemaking, which consisted of issuing a consultative paper open to written comments.<sup>58</sup> The Committee made significant changes to the Basel II framework in response to the input it received, especially regarding the flexibility that individual states would have in determining capital adequacy requirements.<sup>59</sup> Most recently, Basel III, which was developed in the wake of the 2007–2009 Financial Crisis (the Financial Crisis), did not depart substantially from the Basel II procedures but has continued to use the consultative framework.<sup>60</sup>

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<sup>54</sup> See King & Tarbert, *supra* note 51, at 2 (describing the tripartite methodology of Basel I).

<sup>55</sup> *Id.* (noting how the identical risk weights assigned to, for example, Greek and United States debt encouraged holding riskier debt as capital).

<sup>56</sup> In particular, the BCBS focused on two perceived issues from Basel I: (1) regulatory arbitrage—that the discretion left to states under Basel I would undermine the goals of the system as a whole—and (2) a lack of sensitivity to differences in the banking industries of different countries. See Barr & Miller, *supra* note 8, at 24 (describing the perceived weaknesses of Basel I); Verdier, *supra* note 5, at 139–40 (same); see also BCBS, HISTORY, *supra* note 5, at 2–3 (describing the changes in Basel I and the development of Basel II).

<sup>57</sup> For example, the United States has a notoriously fragmented banking sector compared to other countries. See Kenneth W. Dam, *The Subprime Crisis and Financial Regulation: International and Comparative Perspectives*, 10 CHI. J. INT’L L. 581, 587–90 (2010) (contrasting the centralization and simplicity of financial institutions in Germany with the decentralization and complexity of the U.S. banking sector); see also Narissa Lyngen, Recent Developments, *Basel III: Dynamics of State Implementation*, 53 HARV. INT’L L.J. 519, 522–24 (2012) (summarizing the scholarship that characterizes Basel I as a compromise result between domestic pressures of various wealthy countries).

<sup>58</sup> See Barr & Miller, *supra* note 8, at 24–28 (describing the notice-and-comment process adopted following criticism of the rulemaking process used to produce Basel I).

<sup>59</sup> See *id.* at 25 (describing the BCBS’s response to comments from various countries—for example, Germany and Japan—that the framework would have a disparate impact on certain countries).

<sup>60</sup> The BCBS maintains its publications and drafts from the last three years on its website. Many of these documents are open to comments via email or post. They can be found on the BCBS website. *Basel Committee—Last 3 Years*, BANK FOR INT’L SETTLEMENTS, <http://www.bis.org/list/bcbs/index.htm> (last visited Sept. 10, 2013).

Basel III has revised the Basel II prudential capital guidelines and added a new set of liquidity standards for banks.<sup>61</sup>

In addition to devising standards, the BCBS monitors the implementation of its standards in member countries. One of the subcommittees of the organization is devoted to implementation and emphasizes timely adoption, regulatory consistency, and consistency of outcomes.<sup>62</sup> The BCBS publishes reports that describe stages of the implementation process, such as whether draft regulations have been published or regulations have been approved.<sup>63</sup>

Moreover, the BCBS's standards have gained significance in international regimes. Since the Financial Crisis the BCBS has participated in a new international regulatory consortium, the Financial Stability Board (FSB), to promote best practices in the global financial system.<sup>64</sup> While the FSB is organized to aid in monitoring financial standards, it is unclear whether this increased monitoring will lead to greater enforcement of standards such as those of the BCBS.<sup>65</sup>

This increasing substantive importance of the BCBS's regulations has led to scrutiny of its procedures. The BCBS's decisionmaking is not democratic. TRN scholars appear first and foremost concerned about the lack of formal procedural safeguards in decisionmaking, not the substance of the Basel standards. The BCBS has adopted informal procedures.<sup>66</sup> It uses a rulemaking process,<sup>67</sup> and anyone can, in theory, participate in that process.<sup>68</sup> But ultimately, they are only informal procedures, and the BCBS is under no legal compulsion to

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<sup>61</sup> See *Basel Committee on Banking Supervision Reforms—Basel III*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbs/basel3/b3summarytable.pdf> (last visited Sept. 10, 2013) (giving a high-level overview of the Basel III changes).

<sup>62</sup> *Basel III Implementation Assessment Programme*, BANK FOR INT'L SETTLEMENTS, <http://www.bis.org/bcbs/implementation.htm> (last visited Sept. 10, 2013).

<sup>63</sup> See, e.g., BCBS, PROGRESS REPORT, *supra* note 53 (assigning numerical values to the implementation status of the Basel regimes in member countries).

<sup>64</sup> See Giovanoli, *supra* note 46, at 98–101, 111–12 (outlining the membership of the FSB and its responsibilities).

<sup>65</sup> See *id.* at 110 (noting that enforcement abilities of the FSB are thus far nonexistent).

<sup>66</sup> Barr and Miller, however, believe that the changes between Basel I procedures (which were largely secretive and/or nonexistent) and Basel II, with its notice-and-comment procedures, represent a bona fide instance of GAL. See Barr & Miller, *supra* note 8, at 17.

<sup>67</sup> See *supra* notes 58–60 and accompanying text (describing the BCBS's use of a notice-and-comment process).

<sup>68</sup> The BCBS publishes “consultative documents”: proposals containing some aspect of banking regulation. See e.g., BASEL COMM. ON BANKING SUPERVISION, CONSULTATIVE DOCUMENT: DEFINITION OF CAPITAL DISCLOSURE REQUIREMENTS (2011), available at <http://www.bis.org/publ/bcbs212.pdf>. It then posts notices on its website explaining where comments can be directed and listing a deadline. It then posts a link to the comments received. E.g., *Basel Committee Issues Consultative Document on Recognising the Cost of Credit Protection Purchased*, BANK FOR INT'L SETTLEMENTS (Mar. 22, 2013), <http://www.bis.org/bcbs/consultative/20130322>.

comply with them. By contrast, critics note, there are a whole host of formal procedures for bureaucracies at the domestic level.<sup>69</sup> Ultimately, the concern is that despite the availability of procedural safeguards at the domestic level, the BCBS may have insufficient procedural ties to domestic constituencies.<sup>70</sup>

### B. *The BCBS's Democracy Deficit*

This section performs two interrelated functions. First, it defines “democracy deficit,” and second, it describes how this concept of democracy deficit applies to the BCBS. The claims are interrelated because it does not make sense to speak of a democracy deficit without mentioning either the institution or type of institution that suffers from it. The key components of the democracy deficit claim are that: (1) The BCBS is an effective regulator, and (2) the BCBS lacks adequate procedures. The first subpart highlights some common features to the democratic criticisms of the BCBS and TRNs generally, and the second subpart summarizes the major democratic viewpoints on the BCBS. Scholars believe that the BCBS suffers from procedural inadequacies to varying degrees.

There is no singular definition of the “democracy deficit,”<sup>71</sup> but

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bis.org/press/p130322.htm (noting both the period and media available to submit comments).

<sup>69</sup> See de Búrca, *supra* note 13, at 232 (“Such [domestic] agencies are institutionally subordinate to other branches of democratic government.”); Robert O. Keohane & Joseph S. Nye, Jr., *Between Centralization and Fragmentation: The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy* 14 (John F. Kennedy Sch. of Gov’t, Harv. Univ., Working Paper No. 01-004, 2001) (contrasting the “disarticulated and elitist” procedures of international governance with the clear procedures of domestic democracy). Slaughter has cautioned optimism about the legitimacy of TRNs over and above bodies such as the World Trade Organization because of their flexible, informal nature. See Slaughter, *Accountability*, *supra* note 12, at 347 & n.3 (arguing for the merits of TRNs while noting their potential problems).

<sup>70</sup> See Caroline Bradley, *Consultation and Legitimacy in Transnational Standard-Setting*, 20 MINN. J. INT’L L. 480, 503–10 (2011) (criticizing the BCBS and the other financial TRNs for failure to provide the means, such as transparency and documents in multiple languages, for the global public to engage meaningfully in the construction of banking norms).

<sup>71</sup> Some scholars have asserted that democracy is an “essentially contested concept[.]” This means that it is fundamentally nonamenable to a single, canonical formulation. See, e.g., Adeno Addis, *Deliberative Democracy in Severely Fractured Societies*, 16 IND. J. GLOBAL LEGAL STUD. 59, 62 n.10 (2009) (explaining the notion of “essentially contested concepts” and its roots in philosophical literature). Other examples of essentially contested concepts include high-level normative concepts such as the “Rule of Law.” See generally Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, 21 LAW & PHIL. 137 (2002) (examining the invocation of the “Rule of Law” during the 2000 U.S. presidential election).

there are common threads to all formulations.<sup>72</sup> They tend to rely on a notion of democracy or democratic accountability that is patterned on domestic government, and particularly domestic administrative law.<sup>73</sup> These scholars focus on procedure and administrative structure.<sup>74</sup> However, this emphasis is misplaced, as will be shown by comparison to the FRB, the major bank regulator in the United States, which is light on procedure and heavy on technocratic insulation from the other branches of government.

### 1. *Defining the Democracy Deficit*

In this subpart, I examine the two major claims of democracy deficit that critics level against the BCBS. First, they argue that the BCBS functions as a de facto regulator. Second, they assert that because the important decisions are made in Basel, there should be greater procedural checks and balances on the BCBS decisionmaking, thereby curing the democracy deficit.

#### a. Effectiveness and Status as De Facto Regulator

The BCBS's success has made it the target of criticism.<sup>75</sup> In this

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<sup>72</sup> As a point of clarification, Slaughter does not often refer to a “democracy deficit,” but prefers to say that TRNs suffer problems of “accountability.” See, e.g., Slaughter, *Disaggregated Sovereignty*, *supra* note 18, at 159 (putting the normative issue in terms of accountability). But see Slaughter, *Accountability*, *supra* note 12, at 360 (“Accountability . . . can stand for democracy, legitimacy, control, responsiveness, and many other attributes of an ideal government or governance structure.”); Anne-Marie Slaughter, *Building Global Democracy*, 1 CH. J. INT’L. L. 223, 224–25 (2000) (discussing the topic of the democracy deficit in global governance); Slaughter, *Disaggregated Sovereignty*, *supra* note 18, at 165 (referring to “democracy deficit” in the context of technocracy). While ultimately there may be differences between the critiques, I believe they are sufficiently similar to be considered together here under the umbrella of “democracy.” Moreover, Slaughter is both a critic and a proponent of the role of TRNs in global regulatory cooperation. See, e.g., *id.* at 190 (summarizing both the importance and possible reforms of TRNs).

<sup>73</sup> But see de Búrca, *supra* note 13, at 226–27 (advocating that transnational conceptualizations of democracy must move “beyond the state” rather than concluding “that the language of democracy simply does not translate to the transnational domain”). A starting point for defining democracy by reference to domestic government may itself be problematic, however. See *infra* note 207 and accompanying text (describing Professor Rubin’s criticisms of the use and potential overuse of the term “democracy” in the domestic administrative and legislative settings).

<sup>74</sup> See Bismuth, *supra* note 15, at 106–07 (alleging that the BCBS desires to insulate itself from democratic processes); Moravcsik, *Defence*, *supra* note 21, at 605 (noting the “procedural qualms” of democratic objectors to the EU).

<sup>75</sup> To give a clarifying example, if I met in a restaurant to discuss best practices in banking capital and liquidity requirements with my friends and colleagues from law school, no one would care that we lacked procedural checks during our deliberations. My friends and I lack the influence and effectiveness that the BCBS boasts.

view, the BCBS has become too good at making policy:<sup>76</sup> Once the BCBS publishes its regulatory standard, all member countries implement that standard with a high degree of uniformity.<sup>77</sup> Downstream stakeholders no longer have sufficient voice in the process.<sup>78</sup> To remedy this problem, Slaughter invokes the notion of “subsidiarity” and suggests that governance decisions should be made at the lowest level—that is, the most local level—practicable.<sup>79</sup>

### b. Procedural Inadequacies

The BCBS lacks the simplest features of a democratic institution<sup>80</sup>: Its membership is not elected,<sup>81</sup> and its goals are not codified in statute by a legislature.<sup>82</sup> It also lacks the more sophisticated features

<sup>76</sup> See SLAUGHTER, *supra* note 2, at 42–43 (asserting that the BCBS’s standards had a “sharp impact on the availability of credit in the world’s most important economies”).

<sup>77</sup> See BCBS, *PROGRESS REPORT*, *supra* note 53, at 4–6 (showing the status of implementation for each member country for the Basel II, 2.5, and III regimes).

<sup>78</sup> See Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 200–01 (1999) (arguing that voters have insufficient input in international treaty ratification in certain scenarios); Daryl J. Levinson, *Rights and Votes*, 121 YALE L.J. 1286, 1313–15, 1355–57 (2012) (analogizing votes to Albert Hirschmann’s notion of “voice” and noting the lack of democratic voice options in the global governance context); see also KKS, *supra* note 6, at 26 (“[I]nternational lawyers can no longer credibly argue that there are no real democracy or legitimacy deficits in global administrative governance because global regulatory bodies answer to states, and the governments of those states answer to their voters and courts.”). In some sense, this element of the problem mirrors the lack of procedures generally. See *infra* notes 84–97 and accompanying text (detailing the arguments about the lack of procedures). My separation of the claims is an artifice for the sake of clarity.

<sup>79</sup> See Slaughter, *Disaggregated Sovereignty*, *supra* note 18, at 185 (“[D]ecisions are to be taken as closely as possible to the citizen.”). This notion is familiar to the student of federalism. See generally Barry Friedman, *Valuing Federalism*, 82 MINN. L. REV. 317, 317 (1997) (questioning why the United States values centralized decisionmaking versus subnational decisionmaking). It is no coincidence that the term “democracy deficit” is used often in connection with the European Union, another public institution that has grappled with the fundamental problem of how to allocate decisionmaking authority. See, e.g., *id.* at 392–93 & n.316 (discussing the “democracy deficit” resulting from the shift of power from member states to the EU); Moravcsik, *Framework*, *supra* note 21, at 348–49 (noting and responding to democracy critics of the European Union).

<sup>80</sup> See Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1411 (2007) (“When stripped down to their essentials, all definitions of democracy rest ultimately on the primacy of electoral choice and the presumptive claim of the majority to rule.”).

<sup>81</sup> See Zaring, *supra* note 44, at 555 (describing the origin of the BCBS as an agreement amongst central bankers of the G-10 members and Luxembourg to meet a financial crisis). Strictly speaking, some of the member institutions of the BCBS are financial regulators, not central banks. See *Basel Committee Membership*, BANK FOR INT’L SETTLEMENTS, <http://www.bis.org/bcbs/membership.htm> (last visited Sept. 10, 2013) (listing the United States Office of the Comptroller of the Currency, which is not a central bank, as a represented institution on the BCBS).

<sup>82</sup> See Zaring, *supra* note 10, at 288 (noting the lack of binding character of the BCBS’s decisionmaking and the BCBS’s own insistence that its decisions are nonbinding).

that democracy scholars have in mind. The members of the BCBS are not subject to immediate oversight by democratically elected representatives.<sup>83</sup> Its procedures were never written by an elected legislature, and neither its procedures nor substance are reviewed by a court.<sup>84</sup> Instead, the BCBS is a select group comprised of technocrats from a select group of countries that set the global benchmarks on how banks all across the globe operate. Compared to the rigors of domestic politics, TRNs are not subject to the same level of political or procedural scrutiny.<sup>85</sup>

Additionally, there are few opportunities for interested parties to participate on the global stage.<sup>86</sup> This is a refinement of the point that the BCBS lacks adequate procedures. Under the critics' view, a more democratic process requires some role for affected parties earlier in the decisionmaking chain, when the regulators are still operating in the global space. When the BCBS deliberates and develops the norms at Basel, where the regulators cooperate with their foreign country counterparts,<sup>87</sup> it operates in the "global administrative space."<sup>88</sup> When a standard is finalized, the regulators go home and implement the global decision into domestic law.<sup>89</sup> Having made the BCBS norms into domestic law, the regulators apply those norms against individual entities through the tools of domestic administration—for example, more specific rules and orders.<sup>90</sup> The procedural

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<sup>83</sup> See Barr & Miller, *supra* note 8, at 18–19 (noting that the BCBS members are highly politically insulated).

<sup>84</sup> This is a distinct issue from judicial review of capital standards when actually implemented domestically in the United States via notice-and-comment rulemaking. See *infra* notes 136–39 (addressing judicial review of banking regulation under the Administrative Procedure Act (APA)).

<sup>85</sup> See Slaughter, *Disaggregated Sovereignty*, *supra* note 18, at 165 (noting that TRNs allow bureaucrats to meet "free from the usual mandated intrusions of public representatives and private interest groups").

<sup>86</sup> See Feldman, *supra* note 14, at 413, 418–20 (noting the influence of affected parties through political pressure and notice-and-comment procedures in domestic implementation). This is an oversimplification, however, because the BCBS has adopted the consultative process to allow notice-and-comment procedures at the global stage. See *supra* notes 58–61 and accompanying text (describing the procedural developments in Basel II and III).

<sup>87</sup> See Feldman, *supra* note 14, at 413–14. For example, FRB Chairman Volcker worked directly with his UK counterpart, Governor of the Bank of England Leigh-Pemberton, to break the inaction at Basel I. *Id.*

<sup>88</sup> See KKS, *supra* note 6, at 18, 21 (describing the global regulatory space and the role of TRNs within it).

<sup>89</sup> See Feldman, *supra* note 14, at 406–08 (describing the process of domestic implementation as applied to international regulations and the political process concerns that arise when domestic regulators implement the BCBS norms).

<sup>90</sup> The FRB provides an aggregated site for the implementation of capital adequacy norms, including specific rules it is proposing with other agencies and its assessment of the implementation of Basel III. See *Basel Regulatory Capital Framework*, BD. OF GOVERNORS

inadequacies lie in the fact that these regulated financial institutions, alongside other interested parties, are only legally entitled to participate in the process once the domestic regulators act.

Getting the right balance between domestic interests and international cooperation is a difficult task. On the one hand, the point of cooperation is to achieve benefits from different countries acting together—benefits that they could not receive without some concerted mechanism.<sup>91</sup> On the other, a country, group, or individual may have legitimate objections to decisions being made upstream at the international level.<sup>92</sup> The downstream objector, if given veto power over the decisionmaking at the global level, could erode the gains from cooperation.<sup>93</sup> That is the crux of the critics' concerns: not that the regulations made by the BCBS and similar entities are necessarily bad, but that too much work is done at the global level.<sup>94</sup> The critics of the BCBS that accuse the BCBS of being undemocratic do not do so because they believe that cooperation on financial regulation is a bad idea,<sup>95</sup> they do so because they think the undemocratic process is flawed.

## 2. *Prior Critiques of the Democracy Deficit*

While TRN scholars share common concerns, there are major debates within the literature. The critics of the BCBS have themselves

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OF THE FED. RESERVE SYS., <http://www.federalreserve.gov/bankinforeg/basel/USImplementation.htm> (last visited Sept. 10, 2013).

<sup>91</sup> See, e.g., Curtis A. Bradley & Judith G. Kelley, *The Concept of International Delegation*, 71 LAW & CONTEMP. PROBS. 1, 25–27 (2008) (outlining some of the incentives driving states' desire to perform decisionmaking at a global level). For a more game-theoretical, political process-oriented discussion of the dynamics between decisions made at the international “Level I” versus domestic “Level II,” see Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT'L ORG. 427, 433–41 (1988). See also SLAUGHTER, *supra* note 2, at 41–42 (describing Putnam's concept of a “two-level game” and applying it to networks such as the BCBS and the International Organization of Securities Commissions); KKS, *supra* note 6, at 16 (noting the inability of purely domestic administrative bodies to cope with global regulatory difficulties).

<sup>92</sup> See SLAUGHTER, *supra* note 2, at 219 (pondering whether bodies such as the BCBS allow participating technocrats to “escape politics” by cooperating together transnationally).

<sup>93</sup> See Putnam, *supra* note 91, at 434 (noting the complex political dynamic created by trying to achieve both international and domestic cooperation for a political goal); Slaughter, *Disaggregated Sovereignty*, *supra* note 18, at 162, 164 (noting the importance of regulatory cooperation to address global issues, while also outlining critics' objections to the exercise of power by diffuse networks).

<sup>94</sup> See KKS, *supra* note 6, at 26 (“[T]he global administrative bodies making those decisions in some cases enjoy too much de facto independence and discretion to be regarded as mere agents of states.”).

<sup>95</sup> This is not at all to suggest that there are no on-the-merits objections to the BCBS's regulatory scheme. See, e.g., Lyngen, *supra* note 57, at 528–30 (describing concerns that Basel III will suffer from the same defects found in Basel II).

faced criticism. There are three broad reactions, all of which differ from my critique insofar as they assume the significance of democracy to at least some degree. It is important to outline these criticisms of the BCBS here in order to understand some of the limitations of the democracy deficit claim.

One critique alleges that the democracy deficit is still a major problem for bodies like the BCBS. Either the BCBS or the domestic agencies that implement its standards merit institutional reform due to the democracy deficit.<sup>96</sup> This could take the form of offering greater procedural protections, such as those identified by GAL scholars, or use of domestic administrative law techniques.<sup>97</sup> The BCBS did give greater participation to parties by adopting a notice-and-comment procedure, which is available to anyone on the Internet.<sup>98</sup> But according to this view, the BCBS's adoption of such procedures, or its consultative process, are ultimately insufficient.<sup>99</sup>

A second critique is that the BCBS's adoption of GAL procedures such as the consultative process has alleviated the democracy deficit. Under this view, the BCBS may have operated questionably during the design of Basel I, where its deliberations were largely opaque, but the BCBS has made significant procedural progress since then.<sup>100</sup> Slaughter, for example, is optimistic about the use

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<sup>96</sup> See, e.g., de Búrca, *supra* note 13, at 249 (arguing that features such as due process, equality, and participation of the public are necessary to alleviate the democracy deficit of TRNs).

<sup>97</sup> Characteristic GAL procedures include participation, review, transparency, and reasoned decisionmaking. KKS, *supra* note 6, at 40–42. Barr and Miller, while generally impressed with the GAL procedural advances made by the BCBS, still believe that more could be done, especially in the realm of transparency. Barr & Miller, *supra* note 8, at 45–46. One scholar calling for the use of domestic administrative law reforms against the tide of globalization (which includes global activity beyond the BCBS) is Alfred Aman, Jr. See ALFRED AMAN, JR., *THE DEMOCRACY DEFICIT: TAMING GLOBALIZATION THROUGH LAW REFORM* 129–32 (2004).

<sup>98</sup> See *supra* notes 58–61 and accompanying text (describing the procedural reforms that the BCBS has implemented).

<sup>99</sup> Barr and Miller give a qualified statement of such a view. See Barr & Miller, *supra* note 8, at 44–45 (finding credibility in the BCBS's bona fides, but questioning whether its GAL procedures are sufficient in light of its linkage to other regimes such as the WB and IMF which have actual policymaking power over member countries); see also Bismuth, *supra* note 15, at 108–10 (proposing “the establishment of an international financial standard-setting organization” that is “treaty-based” in order to “avoid suspicious situations such as the absence of legal personality for the [BCBS] for more than thirty years”).

<sup>100</sup> See, e.g., Barr & Miller, *supra* note 8, at 24, 26 (noting that by the time of Basel II, the BCBS decisionmaking procedures had “begun to open up” and that “[t]he notice and comment rule-making included significant participation and improvements in transparency that permitted a wider range of actors to comment on the rule-making”).

of TRNs because of their ability to adopt informal and flexible procedures.<sup>101</sup>

A third reaction questions the assumption that the BCBS does all of the real regulatory decisionmaking.<sup>102</sup> As noted above,<sup>103</sup> one of the important elements of the democratic critique of the BCBS is the claim that, while the important regulatory decisions made in Basel have no legal force, it is difficult for countries to avoid complying with its norms.<sup>104</sup> This claim, however, may be empirically false. The United States, for example, has rejected the Basel III framework's reliance on Credit Ratings Agencies in computation of capital requirements.<sup>105</sup> In addition, the FRB plans to implement stronger liquidity requirements than those set out in the BCBS.<sup>106</sup> Feldman's extensive research into the domestic implementation of the Basel II standards shows that the U.S. banking agencies scrutinize the Basel standards during the domestic notice-and-comment process.<sup>107</sup> Moreover, the prohibition on Basel's use of credit rating agencies shows congressional involvement as well, undermining the vision of "regulators on the loose." This suggests that the banking regulators in the United States are not asleep at the wheel when implementing the BCBS standards. The same is true beyond the United States, where domestic implementation is not an entirely smooth process: Some member countries have yet to implement even the Basel II standards.<sup>108</sup>

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<sup>101</sup> See, e.g., Slaughter, *Disaggregated Sovereignty*, *supra* note 18, at 162–63 (noting the potential for success of TRNs in global governance if certain procedural thresholds are met).

<sup>102</sup> See Feldman, *supra* note 14, at 426–27 (questioning whether banking regulators adopt the norms as a "fait accompli" based on an analysis of agency rulemaking).

<sup>103</sup> See *supra* notes 75–79 and accompanying text (noting the claims of critics that the BCBS does the real decisionmaking upstream).

<sup>104</sup> For the assertion that the BCBS has "coercive" power, see Chris Brummer, *How International Financial Law Works (and How It Doesn't)*, 99 *Geo. L.J.* 257, 262–63 (2011) (considering how reputational constraints force domestic governments to accept international financial "soft law," including that of the BCBS).

<sup>105</sup> See Dodd-Frank, *supra* note 31, § 939 (removing statutory references to credit ratings); see also Felix Simon, *Dodd-Frank vs Basel III*, *REUTERS.COM* (Jan. 20, 2011), <http://blogs.reuters.com/felix-salmon/2011/01/20/dodd-frank-vs-basel-iii/> (noting how Basel III's reliance on credit ratings agencies in calculating risk weights poses a risk of conflict between "two highly complex bureaucracies"). The jury is still out on the overall noncompliance costs for other countries. See Brummer, *supra* note 104, at 289–90, 298–300 (arguing that there may be sanctions and reputational costs for noncompliance with international norms, but offering an agnostic view about their effectiveness).

<sup>106</sup> See Cohen, *supra* note 32, at 1734 (discussing how the FRB plans to implement more comprehensive liquidity requirement calculations than Basel III requires).

<sup>107</sup> See generally Feldman, *supra* note 14 (examining the domestic capital adequacy regulation in great detail).

<sup>108</sup> The BCBS reports provide some numerical indication of member countries that have yet to implement Basel II. However, the reports elide some of the nitty gritty in the report: that member countries have implemented some norms but not others. Thus, while the

A corollary to the third reaction is that the BCBS's influence is overstated.<sup>109</sup> In support of a reduced view of the BCBS's importance, Verdier highlights the importance of domestic interests in the ultimate shape of the BCBS standards.<sup>110</sup> In addition, the BCBS does not address every detail in capital regulation, leaving space within the BCBS standards to tailor them to the domestic laws of each country.<sup>111</sup>

I take a different critical posture. I step back and ask: Is democracy a good normative criterion? Does it effectively describe the ideal agency or TRN? All of the above-mentioned critiques take the importance of democratic accountability for granted. Democracy is an intuitive value in our political system, yet domestic administrative law shows that undemocratic administrative structures are an important component of government.<sup>112</sup>

The next Part pertains to the United States's domestic equivalent to the BCBS: the Federal Reserve Board of Governors.<sup>113</sup> The FRB's procedures, and particularly its structure, make it an influential and highly resilient actor within the U.S. government.<sup>114</sup> It would be difficult to conceive of a domestic agency *less* democratically responsive to entrust with major banking regulation, including capital and liquidity regulation.

## II THE FEDERAL RESERVE BOARD

The Federal Reserve Board is an independent agency that is extraordinarily well insulated from outside political pressures. It enjoys some of the strongest indicia of agency independence and receives practically no judicial scrutiny for its implementation of the

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influence of Basel II is profound, there are also deviations within many countries' implementation of it. See BCBS, PROGRESS REPORT, *supra* note 53.

<sup>109</sup> See Verdier, *supra* note 5, at 115 (arguing that TRNs face "fundamental limitations" that scholars often ignore).

<sup>110</sup> See *id.* at 143 (noting how the BCBS was unable to counteract domestic pressures for more lenient capital standards).

<sup>111</sup> See *id.* at 142 (noting the flexibility of the Basel II rules).

<sup>112</sup> See Stewart, *supra* note 26, at 1671–88 (outlining major challenges to the U.S. administrative state); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 574–77 (1984) (discussing the difficulty in delineating the relationship between agencies and the executive, legislature, and judiciary).

<sup>113</sup> As mentioned below, the FRB is technically only one of the domestic equivalents due to the peculiarities of banking regulation in the United States. See *infra* notes 118–25 and accompanying text.

<sup>114</sup> See *infra* Parts II.B–C (describing the de jure and de facto independence of the FRB from other political actors, respectively).

BCBS capital standards.<sup>115</sup> The FRB plays a significant and visible role in regulating the United States's most prominent banking institutions. Finally, there is some evidence to suggest that it is able to resist informal political pressures. I argue that these characteristics—its independence and ability to withstand political pressures—make the FRB an undemocratic agency as defined by democracy deficit critics.

This Part offers a brief description of the broad architecture of U.S. bank regulation and the FRB's place in it. Then, it turns to the analysis of the FRB's structure and process.

### A. *The FRB's Importance in U.S. Banking Regulation*

The Federal Reserve Board is one of several banking regulatory agencies in the United States.<sup>116</sup> Below I discuss very briefly what it does, which entities it regulates, and how Dodd-Frank cemented its importance in the domestic regulatory scheme by increasing the number of financial entities it regulates.

The FRB plays many parts in the complicated drama of U.S. financial regulation. This Note looks primarily at the FRB as a bank regulator, a role that is distinct from its status as the central bank of the United States. The roles can be separated, as in other countries.<sup>117</sup> It is not the only federal bank regulator;<sup>118</sup> the United States, in contrast to other states, has an odd patchwork of banking regulators, somewhat misleadingly described as the “dual banking system.”<sup>119</sup> There are over 115 state and federal agencies in the U.S. that regulate financial services in some form.<sup>120</sup> The U.S. system is so complex that

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<sup>115</sup> The FRB may face judicial review for certain types of decisionmaking. *See, e.g.*, *Bd. of Governors v. Dimension Fin. Corp.*, 474 U.S. 361, 364–65 (1986) (holding that the FRB exceeded statutory authority in amending the definition of “banks” via Regulation Y under the Bank Holding Company Act of 1956); *see also infra* notes 137–39 and accompanying text (discussing judicial review of banking regulation).

<sup>116</sup> *See Dam, supra* note 57, at 591–92 (describing the roles of various agencies that regulate banks in the U.S.).

<sup>117</sup> The roles in the U.S. can be separated. Not all countries use their central bank as the main or one of the most important bank regulatory agencies; most of the OECD countries do not. *See Heidi Mandanis Schooner, The Role of Central Banks in Bank Supervision in the United States and the United Kingdom*, 28 *BROOK. J. INT'L L.* 411, 415–17, 417 fig.1 (2003) (defining “primary bank supervisor” and providing a table with the primary bank supervisors in all OECD countries).

<sup>118</sup> *See Dam, supra* note 57, at 591–92 (outlining the roles of the federal banking regulators including the now defunct Office of Thrift Spending (OTS)).

<sup>119</sup> *See, e.g., id.* at 588–89; *see also* Kenneth E. Scott, *The Patchwork Quilt: State and Federal Roles in Bank Regulation*, 32 *STAN. L. REV.* 687, 687 (1980) (describing the structure of regulatory agencies in banking as “an intricate web” and providing the patchwork metaphor).

<sup>120</sup> Brown, *supra* note 32, at 1342.

it must have four federal agencies represented at the BCBS.<sup>121</sup> Other countries have at most two.<sup>122</sup>

The FRB's role in overseeing banks can be divided into two functions: regulation and supervision. Regulation consists of making rules *ex ante* that all regulated entities must follow, such as capital requirements and liquidity requirements—the stuff of Basel III.<sup>123</sup> Supervision, by contrast, is the process of monitoring and evaluating regulated entities in order to ensure compliance with the regulations, and to ensure a safe and sound banking system generally.<sup>124</sup> The FRB regulates and supervises, among others: bank holding companies, financial holding companies, foreign banks with U.S. operations, state member banks, foreign branches of member banks, thrift-holding companies and securities-holding companies, and nonbank financial companies subject to the FRB's supervision pursuant to Section 117 of Dodd-Frank.<sup>125</sup>

Dodd-Frank increased the importance of the FRB, putting more institutions under its regulatory and supervisory mandate with the hope of providing more unity to the regulatory scheme.<sup>126</sup> One of the major aims of Dodd-Frank was to put institutions at risk of being “too big to fail” under the regulatory authority of the FRB.<sup>127</sup> Dodd-Frank

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<sup>121</sup> BCBS, HISTORY, *supra* note 5, at 7–8. This history has not been updated to include the fact that the OTS no longer exists. Dodd-Frank, *supra* note 31, § 313 (abolishing the OTS).

<sup>122</sup> BCBS, HISTORY, *supra* note 5, at 7–8.

<sup>123</sup> See Regulatory Capital Rules, 77 Fed. Reg. 52,792 (proposed Aug. 30, 2012) (to be codified at 12 C.F.R. pts. 3, 5, 6, 165, 167, 208, 217, 225, 324, 325, 326) (notice of proposed rulemaking of Basel III by the Office of the Comptroller of the Currency (OCC), the FDIC, and the FRB). As the notice makes clear, other banking agencies make the capital standards for their respective regulatory purviews. See also BD. OF GOVERNORS OF THE FED. RESERVE SYS., THE FEDERAL RESERVE SYSTEM: PURPOSES AND FUNCTIONS 59–60 (9th ed. 2005), available at [http://www.federalreserve.gov/pf/pdf/pf\\_complete.pdf](http://www.federalreserve.gov/pf/pdf/pf_complete.pdf) (describing “bank regulation,” as distinct from “bank supervision”).

<sup>124</sup> BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 123.

<sup>125</sup> See *id.* at 59, 61 tbl. 5.1; Brown, *supra* note 32, at 1389–97 (describing changes in regulation of financial conglomerates post Dodd-Frank). The FRB's role over investment banks in particular changed drastically during the banking crisis when major firms opted to become bank holding companies and thus subject to FRB regulation. See *infra* notes 126–29 and accompanying text.

<sup>126</sup> Some critics, including Congress, believed that the fragmentation of the United States's banking regulatory apparatus was a major factor in the financial crisis. See Randall D. Guynn, *The Global Financial Crisis and Proposed Regulatory Reform*, 2010 BYU L. REV. 421, 461–62 (2010) (noting criticisms of the lack of a single centralized financial regulator in the United States); Manuel A. Utset, *Complex Financial Institutions and Systemic Risk*, 45 GA. L. REV. 779, 838 (2011) (stating that the FSOC was created to enhance regulatory cooperation).

<sup>127</sup> See Symposium, *Panel 2: Banking Reform*, 7 N.Y.U. J.L. & BUS. 479, 489–93 (2011) (statement of Thomas C. Baxter) (describing how Dodd-Frank changes the structure of financial regulation to prevent large institutions from failing and to prevent the

accomplished this by making the FRB the regulator of “systemically important financial conglomerates.”<sup>128</sup> The FRB thus enjoys greater regulatory authority than before, although Dodd-Frank puts procedural limitations on the FRB’s newer regulatory powers.<sup>129</sup>

Dodd-Frank is not a *carte blanche* expansion of the FRB’s authority: the Federal Stability Oversight Council (FSOC) represents a sophisticated administrative system.<sup>130</sup> Many of its new roles are not grants of authority to the FRB alone; it interacts with many other

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government from shouldering the costs of those failures). The restructuring of the administrative apparatus was accompanied by a suite of new substantive requirements in safety and soundness regulation, alongside instituting a resolution mechanism for institutions at risk of being too big to fail. *See* Cohen, *supra* note 32, at 1722 (outlining Dodd-Frank’s approach to eliminate the risk of institutions too big to fail).

<sup>128</sup> *See* Brown, *supra* note 32, at 1389–97 (detailing the adjustments that Dodd-Frank made to which agencies supervise which entities).

<sup>129</sup> For example, the determination of whether a nonbank financial company is sufficiently important, and thus subject to FRB supervision, depends on a two-thirds vote of the newly created FSOC. Dodd-Frank, *supra* note 31, §§ 112(a)(2)(H), 113(a)(1). The firm in question may seek judicial review for this determination. *Id.* § 113(h). Arbitrary and capricious decisionmaking is only one of several grounds of judicial review under the Administrative Procedure Act. *See* 5 U.S.C. § 706(2). The FSOC also has the ability to recommend heightened prudential standards to the primary financial regulatory agencies, using notice-and-comment rulemaking. Dodd-Frank, *supra* note 31, § 120(a)–(b). The primary agency must either implement the recommendation or provide an explanation to the FSOC for why it will not implement the recommendation within ninety days. *Id.* § 120(c)(2). The definition of primary financial regulatory agency is described in Section 2(12). However, once a nonbank financial company is deemed systematically important, then the FRB may prescribe prudential rules for it on its own. *Id.* § 165(a)(1). Section 165(a)(1) gives the FRB the power to create stricter prudential regulations for certain bank holding companies, of which it is the primary regulator, if the bank holding company has total consolidated assets greater than or equal to \$50 billion. *Id.*; *see also* 12 U.S.C. § 1813(q)(3) (defining the FRB as the appropriate agency for regulating bank holding companies). However, it must also consult with the FSOC and individual council members depending on the regulated entity. Dodd-Frank, *supra* note 31, § 165(b)(4). The voting membership of the FSOC consists of the Secretary of the Treasury, the Chairman of the FRB, the Comptroller of the Currency, the Director of the Consumer Financial Protection Bureau (CFPB), the Chairman of the Securities and Exchange Commission, the Chairperson of the FDIC, the Chairperson of the Commodity Futures Trading Commission, the Director of the Federal Housing Finance Agency, the Chairman of the National Credit Union Administration Board, and an “independent member appointed by the President, by and with the advice and consent of the Senate, having insurance expertise.” *Id.* § 111(b)(1). For a summary of the functions of the FSOC, see *Summary of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Enacted into Law on July 21, 2010*, DAVIS POLK 1–20 (July 21, 2010), [http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910\\_Financial\\_Reform\\_Summary.pdf](http://www.davispolk.com/files/Publication/7084f9fe-6580-413b-b870-b7c025ed2ecf/Presentation/PublicationAttachment/1d4495c7-0be0-4e9a-ba77-f786fb90464a/070910_Financial_Reform_Summary.pdf).

<sup>130</sup> *See* Brown, *supra* note 32, at 1389 (“Dodd-Frank . . . reduced the ability of financial conglomerates to engage in regulatory arbitrage and provided mechanisms to ensure that systemically important financial conglomerates are regulated by the Federal Reserve . . . [.] establish[ed] uniform capital standards for financial conglomerates . . . [, and] took . . . steps to minimize the ‘too big to fail’ problem.”); Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CALIF. L. REV. 327, 369–75 (2013) (arguing that the

financial regulators.<sup>131</sup> That said, the FRB, due to the reorganization of major financial firms as bank holding companies, now regulates many of the institutions that were previously subject to voluntary regulation by the SEC.<sup>132</sup>

To simplify a complicated regulatory picture, the FRB is one of the most important—if not the most important—bank regulators. It is also instrumental in implementing the BCBS rules in the United States.

### B. *The FRB's Juridical Independence*

This section looks particularly at the features that give the FRB its undemocratic character: its independence. In addition to the traditional features of an independent agency, I note more recent scholarly traditions in relevant criteria. I also examine how the Administrative Procedure Act (APA) applies to capital adequacy norms. The APA and agency independence are, strictly speaking, different types of procedural variations on agencies. In order to determine whether there is a democracy gap between the BCBS and domestic agencies, I review the APA and agency independence in tandem to get a holistic view of procedural checks on the FRB.

While few federal agencies are completely unmoored from the checks of U.S. administrative law,<sup>133</sup> the APA<sup>134</sup>—the cornerstone of

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FSOC and the creation of the Orderly Liquidation Authority represent greater political control over financial regulation and supervision in the U.S.).

<sup>131</sup> See Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 626–30 (2010) (describing how the FRB must now interact with other agencies after the Dodd-Frank reforms). Other scholars have questioned whether Dodd-Frank's reforms will actually produce institutions that can meaningfully regulate large financial institutions. See, e.g., Steven A. Ramirez, *Dodd-Frank as Maginot Line*, 15 CHAP. L. REV. 109, 119–23 (2011) (arguing that the incentives to bail out financial institutions will still be overwhelming).

<sup>132</sup> See Brown, *supra* note 32, at 1390–91. Additionally, financial institutions that received government assistance cannot easily evade supervision by the FRB due to Section 117, the “Hotel California” provision. This provision ensures that the FRB supervises certain firms as if they were nonbank financial companies, even though they reorganized, as if the determination had been made under Section 113. Dodd-Frank, *supra* note 31, § 117(b); see also Brown, *supra* note 32, at 1391–95 (describing the “Hotel California” provision). The title of the provision is an allusion to the Eagles’ lyric expressing the inescapability of Hotel California, which is much like the inescapability of banking regulatory supervision. See Brown, *supra* note 32, at 1391 (citing EAGLES, *Hotel California*, on HOTEL CALIFORNIA (Elektra Entertainment 1976) (“You can check out any time you like, but you can never leave.”)). The claim that “[w]e are all just prisoners here, of our own device,” EAGLES, *supra*, is beyond the scope of this Note.

<sup>133</sup> The Department of Defense, the Department of State, and the Department of the Treasury all operate largely outside the confines of administrative law. See David Zaring, *Administration by Treasury*, 95 MINN. L. REV. 187, 238 (2010).

<sup>134</sup> 5 U.S.C. §§ 501–596.

administrative law—does not operate on all agencies in the same manner.<sup>135</sup> One of the APA's significant checks on agencies, judicial review, does not apply to all agency decisions.<sup>136</sup> In the case of the FRB, monetary policy is understood as falling outside the scope of the APA and judicial review.<sup>137</sup> However, exactly which of FRB's banking rulemaking can be subject to judicial review is confusing, and the case law on point is fairly limited.<sup>138</sup> Rulemaking on the BCBS capital adequacy standards has never been subject to judicial review.<sup>139</sup> However, the banking agencies, as Feldman explores in detail, do use notice-and-comment procedures to implement the Basel norms.<sup>140</sup>

One traditional distinction in administrative law is between independent and executive agencies.<sup>141</sup> Theoretically, the executive branch exercises strong control over executive agencies.<sup>142</sup> The canonical set of criteria for independent agencies are: (1) use of a multi-member commission with fixed, staggered terms, (2) requirements on appointments, (3) for-cause removal requirements, (4) required

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<sup>135</sup> See Zaring, *supra* note 133, at 193–94 (noting how the Treasury does not make rules under the APA for most of its decisions and providing examples of other government bodies outside of the APA's reach).

<sup>136</sup> The APA itself acknowledges that some decisions are outside the scope of judicial review. See 5 U.S.C. § 701(a) (listing as exceptions to the application of the APA “statutes [that] preclude judicial review” and “agency action [that] is committed to agency discretion by law”).

<sup>137</sup> See, e.g., Ramirez, *supra* note 29, at 528 (“[T]he Fed’s power over monetary policy probably is not reviewable because these decisions are committed to the agency’s discretion . . . [and the] Courts thus far have refused to extend jurisdiction to any purported victim of the Fed’s policy.”).

<sup>138</sup> See Note, *Judicial Review of the Federal Banking Regulatory Agencies*, 1988 ANN. REV. BANKING L. 365, 365–67 (describing review of banking agencies as a “confounding and amorphous area of administrative law”). To my knowledge there has not since been any sort of comprehensive study of the jurisprudence on bank supervision, which I suspect is due to the paucity of caselaw since 1988. Feldman has provided some overview but similarly has not found a court stopping the implementation of the BCBS norms. See Feldman, *supra* note 14, at 430–32 (examining the limited record of judicial review of bank capital adequacy issues).

<sup>139</sup> The case most closely on point is the FDIC’s issuance of a capital directive. This is a type of enforcement proceeding and is therefore not the same as subjecting an agency to hard look review for the rulemaking of the capital standards. *FDIC v. Bank of Coshatta*, 930 F.2d 1122, 1129 (5th Cir. 1991). The dicta of the case do not cabin the holding to matters of enforcement proceedings. *Id.* Feldman critiques this outcome given the importance of global decisionmaking in the process. Feldman, *supra* note 14, at 427–32.

<sup>140</sup> Feldman, *supra* note 14, at 414–15.

<sup>141</sup> See e.g., Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 18 (2010); Bressman & Thompson, *supra* note 131, at 600–01.

<sup>142</sup> This may be purely theoretical, however. See generally Symposium, *Not-So Independent Agencies: Party Polarization and the Limits of Institutional Design*, 88 B.U. L. REV. 459 (2008) (exploring the ways in which independent agencies have been used for political entrenchment).

submissions of certain proposals to Congress, and (5) litigation authority.<sup>143</sup> Professor Barkow believes that there are other relevant criteria for independence as well: (1) sources of agency funding, (2) ex post restrictions on employment, and (3) the particular agency's role in overall regulation of an issue vis-à-vis other agencies.<sup>144</sup> The independent versus executive agency distinction may be overwrought, more the stuff of "lore" than a meaningful distinction between who controls agencies.<sup>145</sup> Yet when these indicia appear together they can provide guidance in showing how an agency is checked, or not checked, by other political actors.

The FRB meets almost all of the criteria of agency independence. The FRB consists of seven members appointed to terms of fourteen years by the President, with advice and consent of the Senate.<sup>146</sup> Board members must be selected from different Federal Reserve districts, thus functioning as a geographical representation requirement, and the President is to "have due regard to a fair representation of the financial, agricultural, industrial, and commercial interests, and geographical divisions of the country."<sup>147</sup> A Board member may not serve in any position in a member bank of the Federal Reserve System for two years after being a Board member unless that person has served the full term of fourteen years.<sup>148</sup> In addition, Board members cannot hold certain offices or stock ownership in banks.<sup>149</sup> The President, with advice and consent of the Senate, also appoints a Chair and Vice Chair of the Board for terms of four years.<sup>150</sup> Board members who have served a full fourteen-year term cannot be nominated again.<sup>151</sup>

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<sup>143</sup> See, e.g., Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1137–54 (2000) (discussing features of the modern independent agency).

<sup>144</sup> Barkow, *supra* note 141, at 42–58. Barkow also discusses the importance of the ability of Congress to shape agencies in order to more closely align policy preferences with those of elected officials or provide political support for an agency to use its discretion in opposition to other parts of government. *Id.* at 59–64.

<sup>145</sup> See Breger & Edles, *supra* note 143, at 1115 (noting the importance of that "lore" alongside the actual history). According to Breger and Edles, the "prototype" of the independent agencies, the Interstate Commerce Commission, arose in its particular form, not on account of a singular, purposeful institutional design, but rather as a response to railroad regulations in the United States and in Britain in the nineteenth century. *Id.* at 1115–30.

<sup>146</sup> 12 U.S.C. § 241 (2006).

<sup>147</sup> *Id.* Another type of requirement on agency appointments is for political balance, "i.e., no more than a bare majority of members of multi-member agencies may come from the same political party." Breger & Edles, *supra* note 143, at 1139.

<sup>148</sup> 12 U.S.C. § 242.

<sup>149</sup> 12 U.S.C. § 244.

<sup>150</sup> 12 U.S.C. § 242.

<sup>151</sup> *Id.*

The Board has its own source of funding independent from Congress through its power to levy funds on Federal Reserve Banks.<sup>152</sup> And Board members are subject only to for-cause removal.<sup>153</sup> These membership requirements and autonomic features give the FRB all of the indicia of agency independence. When it acts as a central banker, it is the independent agency *par excellence*, enjoying independence from political processes and pressures not seen by any other agency.<sup>154</sup>

Apart from formal checks and balances, there is also a long-standing political culture of deference to the FRB over matters of central banking.<sup>155</sup> In such matters, the FRB has successfully challenged the President in monetary policy when such policies proved politically sensitive.<sup>156</sup> The FRB does not enjoy quite the same degree of independence when acting as a banking regulator, as opposed to the central bank.<sup>157</sup> Regardless, the FRB is one agency. The structural features of independence—for example independence of budget—are present both when the FRB acts as central banker and as bank regulator.

### C. *The FRB's Political Clout*

The legal structure of the FRB only tells part of the story;<sup>158</sup> the history of the FRB shows some capacity for the FRB to withstand political pressures. This Note cannot possibly give fair voice to all the historical nuances at play. However, some scholars have noted a paradox: The FRB receives conspicuous political pushback, yet grows in importance.<sup>159</sup> I note this trend, and offer some evidence that

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<sup>152</sup> 12 U.S.C. § 243 (2006). The independent source of funding, however, is only as reliable as that source. Barkow notes how regulatory arbitrage between the OCC and OTS limited the importance of agency funding as a tool against capture because of the ease of the regulated entity in choosing the regulator. Barkow, *supra* note 141, at 44–45.

<sup>153</sup> 12 U.S.C. § 242.

<sup>154</sup> See Ramirez, *supra* note 29, at 528–34 (discussing the strength of the FRB's independence and contrasting it to other financial regulatory bodies). *But see* Bressman & Thompson, *supra* note 131, at 649–50 (asserting the susceptibility of the FRB to the influence of other governmental actors, such as the Treasury).

<sup>155</sup> See Ramirez, *supra* note 29, at 530–32 (commenting on the “tremendous independence” Congress endowed to the FRB).

<sup>156</sup> See *id.* at 546–49 (describing challenges to both the Carter and Reagan Administrations).

<sup>157</sup> See *supra* note 138 and accompanying text (explaining how the FRB is subject to judicial review over some banking regulatory determinations).

<sup>158</sup> See Ramirez, *supra* note 29, at 518 (“Independence turns, therefore, not only upon the agency's structure, but also upon the strength of presidential and congressional commitment to its independence.”).

<sup>159</sup> See, e.g., SHULL, *supra* note 30, at xi–xii (noting this paradox of “how the Federal Reserve [has] transcended its failures and [grown] to its current stature” and hypothesizing that it is due to its “successful adaptation”). Shull's work predates Dodd-Frank's major

Dodd-Frank, the last major financial regulatory overhaul, has continued that trend.

The FRB has in practice grown to immense importance even in the face of caustic criticism from other branches of government.<sup>160</sup> Franklin Delano Roosevelt compared his struggles with the Federal Reserve System to those between President Jackson and the Second Bank of the United States; despite that, his administration saw one of the FRB's many expansions in power.<sup>161</sup>

The FRB has faced criticism for its role in monetary policy and banking regulation in the past. Yet it still plays a crucial, if not larger, role in the United States's financial life.<sup>162</sup> The President has on numerous occasions put pressure on the FRB to facilitate greater inflation.<sup>163</sup> The FRB has resisted such pressures when it deemed necessary, over and above the public ire and objection of the President.<sup>164</sup> On the other hand, Shull argues that the FRB became more permissive of banking mergers in the 1980s and 1990s due to political pressures.<sup>165</sup> The Financial Crisis repeated this pattern. It caused high

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overhaul of financial regulation. However, for reasons already expressed I believe that Dodd-Frank confirms Shull's thesis. See *supra* Part II.A.

<sup>160</sup> I am drawing here on some of the notable conflicts between the Federal Reserve's role as central bank as opposed to bank regulator. As noted above, there may be distinct normative reasons for preferring the FRB to be independent for central banking purposes and less independent for bank regulatory purposes. See Gadinis, *supra* note 130, at 343–53 (outlining criticisms of the financial regulatory agencies, particularly the FRB, during the Financial Crisis). Professor Ramirez suggests that the FRB may be more independent in areas of monetary affairs. Ramirez, *supra* note 29, at 522. However, Ramirez's analysis predates Dodd-Frank, which has seen a massive expansion in the FRB's authority. Moreover, the element that Professor Ramirez points to as one of the most important aspects of independence—funding—holds just as true when the FRB acts as bank regulator as when the FRB acts as central bank.

<sup>161</sup> See SHULL, *supra* note 30, at 110, 120–21 (describing the increase in importance of the FRB within the Federal Reserve System despite Roosevelt's hostility toward the FRB).

<sup>162</sup> See *id.* at 178 (noting the FRB's prominent role despite its rocky history).

<sup>163</sup> See Ramirez, *supra* note 29, at 546–48 (describing the conflict between the FRB, especially Chairman Volcker, and President Carter, but also noting how the FRB's independence was never compromised). The FRB likewise held out against calls for inflation by the Reagan administration, scoring what Ramirez called a “major political victory.” *Id.* at 548–49.

<sup>164</sup> See SHULL, *supra* note 30, at 10–11 (summarizing portions of the historical criticism of the FRB and the Federal Reserve System); Austan Goolsbee, *The Volcker Way: Lessons from the Last Great Hero of Modern Finance*, FOREIGN AFFAIRS Jan.–Feb. 2013, at 166, 168–71 (reviewing WILLIAM L. SILBER, VOLCKER: THE TRIUMPH OF PERSISTENCE (2012)) (noting FRB Chairman Volcker's “toughness”—his ability to make politically difficult decisions—but also noting how the FRB may have historically been too lax on bank supervision).

<sup>165</sup> See SHULL, *supra* note 30, at 176–77 (arguing that the FRB loosened its tight anti-merger policies after receiving pressure from politicians). Congress later fundamentally altered financial regulation with the passage of the Gramm-Leach-Bliley Act (GLBA), which eroded many of the older barriers in banking in the United States. *Id.* at 177–78; see

political pressures and the demise of one bank regulatory agency: the Office of Thrift Supervision.<sup>166</sup> Politicians expressed skepticism and concern over giving the FRB too much power.<sup>167</sup> Yet the FRB emerged with even greater authority, despite little evidence that it would regulate large financial institutions better than its counterparts.<sup>168</sup> Despite disagreement over the merits of Dodd-Frank,<sup>169</sup> there is little question that the act delegated much of the regulatory work to the bank regulatory agencies, especially the FRB.<sup>170</sup> There may be reason to think that the elected branches pass the buck to the agencies during times of crisis, and that they did so during the Financial Crisis. Some commentators have portrayed the FRB and the Department of Treasury as the main forces behind the resolution of the Financial Crisis.<sup>171</sup> On the other hand, Dodd-Frank has limited some of these powers, so the FRB's influence may be overstated.<sup>172</sup>

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also CARNELL, MACEY & MILLER, *supra* note 39, at 27 (noting how the GLBA dismantled the “wall” between investment and commercial banking created by the Glass-Steagall Act).

<sup>166</sup> Brown, *supra* note 32, at 1389–90 (detailing the transfer of OTS's regulatory power to the OCC and the FRB).

<sup>167</sup> See Guynn, *supra* note 126, at 465 (noting the alternative proposals of charging the FRB with regulating systemic risk or dividing the authority between different agencies).

<sup>168</sup> See Brown, *supra* note 32, at 1400 (questioning whether increased supervisory authority of the FRB will produce better regulation).

<sup>169</sup> Compare Cohen, *supra* note 32, at 1723–24 (praising Dodd-Frank's efforts to tackle “too big to fail”), with Brown, *supra* note 32, at 1413–15 (taking skeptical views towards Dodd-Frank's reforms), and Reza Dibadj, *Dodd-Frank: Toward First Principles?*, 15 CHAP. L. REV. 79, 105–06 (2011) (same).

<sup>170</sup> See Dibadj, *supra* note 169, at 105 (describing the delegation to financial regulators as “vast”); see also Brown, *supra* note 32, at 1415 (noting that the success or failure of Dodd-Frank depends upon the ability of the regulators to function well together, especially noting the importance of the FRB).

<sup>171</sup> See, e.g., DAVID WESSEL, IN FED WE TRUST: BEN BERNANKE'S WAR ON THE GREAT PANIC (2009) (chronicling the importance of both the FRB and Treasury as institutions and the personalities of Secretary Paulson and Chairman Bernanke in handling the Financial Crisis); see also Steven M. Davidoff & David Zaring, *Regulation by Deal: The Government's Response to the Financial Crisis*, 61 ADMIN. L. REV. 463, 466 (2009) (noting how the FRB and Treasury acted together independent of formalized checks by the administration, Congress, or the courts); Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1639–41 (2009) (arguing that the three branches let the agencies play a crucial role during the financial crisis, whereas the “[l]egislatures and courts . . . play[ed] an essentially reactive and marginal role”). I note for the sake of clarity that Posner and Vermeule focus on political behavior during a crisis, whereas my Note looks to the structure of banking regulation in all times, crisis or otherwise. *But see* Adrian Vermeule, *Our Schmittian Administrative Law*, 122 HARV. L. REV. 1095, 1139–40 (2009) (evincing skepticism for the “emergency” versus “ordinary” times distinction).

<sup>172</sup> See Cohen, *supra* note 32, at 1726 (noting how Dodd-Frank limited the FRB's emergency lending provisions).

But the FRB is not completely immune to political pressures. There are examples of Congress and the President putting intense political pressure on the FRB or using the nomination process to achieve political ends.<sup>173</sup> My point is *not* that the FRB faces no political pressures,<sup>174</sup> but that it has shown a remarkable amount of resilience. This is unsurprising given its remarkable amount of de jure independence. This independence ultimately undermines criticisms of the BCBS, which the next Part addresses.

### III

#### THE STRUCTURE OF THE FRB UNDERMINES CLAIMS OF THE BCBS'S DEMOCRACY DEFICIT

In this Part, I explain that the FRB's undemocratic character—stemming from its independence—undermines the democracy deficit critique of the BCBS. I first note why the comparison between the BCBS and FRB is relevant: The democracy deficit argument assumes the democratic character of domestic government. However, I also note that both global and domestic governments may be undemocratic, and both deserve criticism for that reason. The last subpart addresses possible flaws in my methodology.

##### A. *Why the BCBS-FRB Comparison Is Sound*

At first blush, comparing a domestic agency to a legally informal, global organization is odd.<sup>175</sup> I offer three reasons why the comparison is useful. The most important is that the critics I am addressing make the comparison between the dearth of global procedures as opposed to the robust, domestic administrative law procedures. Some claim that TRNs should behave more like domestic agencies and should be subject to the type of administrative law constraints

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<sup>173</sup> See WILLIAM L. SILBER, VOLCKER: THE TRIUMPH OF PERSISTENCE 71–72 (2012) (discussing President Nixon's choice of Arthur Burns as Chairman of the FRB); Ramirez, *supra* note 29, at 550 (same).

<sup>174</sup> Cf. Ramirez, *supra* note 29, at 545–46 (noting the same skepticism of the proposition that any institution is completely devoid of political pressures).

<sup>175</sup> See Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63, 108 (2005) (questioning the linkage between GAL and democracy). Stewart by his own admission is considering how U.S. administrative law may apply to global institutions, and he clearly believes that some of the main normative concerns are present in both domestic administration and TRNs. See *id.* at 63–65. As a major point of difference between the two, he emphasizes the importance of the APA in domestic administration. See *id.* at 73–74 (outlining the structure of the APA). But as I have shown above, the APA does not operate full-bore in banking regulation. See *supra* Part II.B.

imposed on domestic agencies.<sup>176</sup> Among other objectives, one of the points of GAL is to highlight the ways that informal, globalized bodies such as the BCBS can use public law techniques. As such, some scholars have advocated that bodies such as the BCBS use the same sort of administrative techniques that agencies use.<sup>177</sup> While the “democracy deficit” criticisms incorporate many slightly different normative views,<sup>178</sup> all focus on whether the BCBS lacks procedures at the global level *when compared to the domestic level*.<sup>179</sup> Some scholars have noted, however, that the domestic banking regulatory scheme is not itself very democratic.<sup>180</sup>

One scholar even recognizes my objection. De Búrca admits that there are U.S. institutions that are not subject to immediate democratic checks and specifically mentions administrative agencies.<sup>181</sup> She emphasizes the set of “procedural and substantive norms” that constrain their decision making.<sup>182</sup> But what the case study of the FRB shows is that there may be far fewer norms constraining particular agencies.

The FRB-BCBS comparison also allows for a deeper understanding of the decision-making chain of domestic implementation. Despite the fact that the Basel Standard lacks legal status, critics claim that the BCBS does the real work at the global level. As mentioned, this critique is subject to serious empirical contestation.<sup>183</sup> But even if the evidence were more equivocal, critics point to a power imbalance between upstream global actors and downstream domestic agencies. They are both part of the institutional process. Thus, as a descriptive matter, it is impossible to understand how the BCBS works without understanding how agencies like the FRB make the BCBS into law.

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<sup>176</sup> See *supra* notes 67–70 and accompanying text (discussing the calls for greater proceduralization of TRNs).

<sup>177</sup> See *supra* note 175 (discussing Stewart’s use of comparison and relevance of proceduralization).

<sup>178</sup> See *supra* Part I.B (describing nuances of the democracy deficit critique).

<sup>179</sup> See *supra* Part I.B.2 (outlining the common features of the critique).

<sup>180</sup> See SLAUGHTER, *supra* note 2, at 220 (noting that central bankers are politically insulated); Barr & Miller, *supra* note 8, at 18–19 (noting how in both the United States and in Europe, the domestic membership that comprises the BCBS is domestically insulated from political pressure); Bismuth, *supra* note 15, at 102–05 (noting that the independence of banking regulators is an “underestimated” issue and further questioning the democratic bona fides of the BCBS even after Basel II).

<sup>181</sup> De Búrca, *supra* note 13, at 230.

<sup>182</sup> *Id.* at 231.

<sup>183</sup> See *supra* Part I.B.2 (addressing some of the prior discussions of the democracy deficit idea).

Finally, the BCBS has—in response to the scholarly critics—actually adopted administrative-type procedures.<sup>184</sup> In response to accusations that it behaved as a secretive, technocratic agency, it adopted the aforementioned APA-like procedures. These procedures greatly resemble the procedures required by public law, chiefly notice-and-comment rulemaking, public participation, and transparency.

There are relevant differences between the BCBS and the FRB. This Note emphasizes the comparison between the BCBS and domestic agencies such as the FRB primarily as a response to the BCBS's critics on their own terms. It is unclear whether bodies such as the BCBS, as a matter of first principles, should be compared to the FRB. To give one important difference, the FRB can trigger the impressive array of enforcement powers of the U.S. federal government if a bank disobeys its rules. The BCBS, by contrast, can do nothing on its own. The BCBS rules, standing alone, are merely guidelines. On a basic level, society may want to impose greater procedural demands on actors who can put individuals in the dungeon; in contrast to the FRB, the BCBS is not such an institution.<sup>185</sup> Nonetheless, they are also procedurally similar: Both make use of notice-and-comment rulemaking and the transparency norms that go along it, yet both are removed from immediate democratic checks.

### *B. What the Comparison Shows About the Criticisms of the BCBS*

The critics of the BCBS rely on an oversimplified vision of democratic, domestic government, which they then contrast with the supposedly undemocratic global institutions, such as the BCBS.<sup>186</sup> In contrast to domestic institutions, the critics argue that the BCBS is operating on the loose, without the appropriate structural and procedural checks that the domestic administrative actors have.<sup>187</sup> It is these procedural and structural checks that give the domestic administrative state its democratic bona fides. That is the “deficit” part of the democracy deficit.

The FRB shows that the U.S. deploys highly technocratic forms of regulation in banking matters. The FRB is structurally and

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<sup>184</sup> See *supra* Part I.A (discussing the history of the BCBS and its procedural development).

<sup>185</sup> See Stewart, *supra* note 26, at 1672–73 (noting the importance of limiting the discretion of institutions with coercive power and discussing the influence of contract theories on government).

<sup>186</sup> See de Búrca, *supra* note 13, at 232–33 (noting that political checks exist over domestic agencies and courts, but not over TRNs); *supra* Part I.B.2 (summarizing the democratic deficit critics' arguments).

<sup>187</sup> I note, however, that de Búrca questions whether the democratic bona fides of domestic agencies are sufficient. De Búrca, *supra* note 13, at 232.

procedurally insulated from elected officialdom. By any account, it is one of the most independent U.S. agencies. Of course, this does not mean that the three branches of government do not have any control over the FRB. But even so, it has weathered political pressures well, and has been charged with regulating the most significant U.S. banks. It has made, especially in the arena of monetary policy, extremely politically unpopular decisions.

Congress's restructuring of financial regulators in Dodd-Frank undermines the supremacy of democracy as a normative criterion in banking regulation. Aside from granting the FRB a greater role over important swaths of the financial sector,<sup>188</sup> the Act also created a new independent agency, the Consumer Financial Protection Bureau (CFPB).<sup>189</sup> In short, Dodd-Frank demonstrates Congress's endorsement of independent agencies.

Perhaps, instead, we should turn our criticism to the structure of the FRB and U.S. administrative law generally.<sup>190</sup> One possible reaction to this Note's case study is that both the BCBS and FRB have run amok. There has been vigorous debate on the role of independent financial regulators: On one hand, some scholars have called for greater "depoliticization" of financial regulators across the board, hoping that more political independence would lead to superior policy.<sup>191</sup> On the other, there are critics of the FRB even when it acts at its most technocratic—when setting monetary policy.<sup>192</sup> Congress

<sup>188</sup> See *supra* Part II.A (explaining the FRB's role in financial regulation).

<sup>189</sup> See Barkow, *supra* note 141, at 72–78 (using the CFPB as a case study in insulating agencies from capture); Rahman, *supra* note 25, at 557–59 (arguing that Dodd-Frank and the CLEAR Act reflect a technocratic vision of administration).

<sup>190</sup> See Bismuth, *supra* note 15, at 98–99 (calling the FRB and other regulators' activities on the international stage "uncontrolled polycentrism"). Some U.S. administrative law scholars have questioned whether rulemaking is undemocratic. See, e.g., Peter L. Strauss, *Legislation that Isn't—Attending to Rulemaking's "Democracy Deficit,"* 98 CALIF. L. REV. 1351, 1354 (2010) (pondering the extent to which administrative rulemaking suffers from a democracy deficit). Additionally, the potentially undemocratic character of domestic administration is a recurring concern of administrative law scholarship. See, e.g., Stewart, *supra* note 26, at 1669–88 (describing the normative tensions between giving agencies discretion and the legitimacy of their actions).

<sup>191</sup> See, e.g., Ramirez, *supra* note 29, at 503–11.

<sup>192</sup> See, e.g., Timothy A. Canova, *Central Bank Independence as Agency Capture: A Review of Empirical Literature*, 30 BANKING & FIN. SERVICES POL'Y REP., NOV. 2011, at 11, 22–23 (advocating reform of the FRB on the grounds that it has been captured by the financial services industry). Central bank independence is, at the time of writing, a politically sensitive issue in both Hungary and Japan, where elected leaders have staked high amounts of political capital on the success of a particular monetary policy. Margit Feher, *Hungary Central Bank Independence in Focus as New Chief Awaited*, WALL ST. J. (Mar. 1, 2013, 6:48 AM), <http://blogs.wsj.com/emerging europe/2013/03/01/hungary-central-bank-independence-in-focus-as-new-chief-awaited> (noting Hungary's battle over its central bank's independence); *Spin and Substance*, ECONOMIST, Mar. 2, 2013, at 39, 40 (noting that

did tinker with the FRB's powers and structure with Dodd-Frank and limited the FRB's statutory authority over emergency lending. But Congress also gave the FRB greater regulatory turf, which may grow depending on the behavior of the FSOC. Additionally, Congress created another highly politically insulated agency in the form of the CFPB.<sup>193</sup>

The democracy deficit critics of the BCBS make the strongest case when they can show plausible democratically controlled alternatives in financial regulation. Thus, the more examples of democratically controlled financial regulatory institutions they can point to, the more it is plausible that the BCBS is problematically undemocratic. The fact that arguably the most influential domestic financial regulator is not democratically controlled weakens this critique considerably.

### C. *Flaws in the Approach*

Even assuming that we are right to compare the BCBS and the FRB, there are weaknesses in the comparative approach. Perhaps an independent agency is not an undemocratic agency. This section describes two possible threads of this claim: (1) that agencies are the agents of some other branch of government, or (2) that agencies serve second-order democratic objectives.

#### 1. *Independent Agencies as Creatures of Congress (or Other Branches)*

One theory holds that independent agencies are agents of Congress.<sup>194</sup> Congress wants the benefit of agency expertise, yet without the political influence of the President.<sup>195</sup> The analysis in Part III.A highlighted how the FRB is a powerful actor with minimal—or,

Prime Minister Shinzo Abe's appointment to the Bank of Japan constitutes a "hostile takeover" of the institution).

<sup>193</sup> See *supra* note 189 and accompanying text (noting Dodd-Frank's creation of a highly insulated agency, the CFPB).

<sup>194</sup> See Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 63–64 (noting the constitutional argument that independent agencies function as part of the legislative branch). *But see* Barkow, *supra* note 141, at 25 ("The creation of the first independent agencies appears not to have been motivated by a desire to decrease executive control or to buttress legislative power, but subsequent agencies have been established with these interests in mind." (internal citation omitted)).

<sup>195</sup> See Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 259 (1988) (noting that insulation from the executive is a putative motive of having independent agencies, yet questioning that explanation). Professor Verkuil also questions whether separation of powers concerns do much work in explaining the operation of independent agencies. See Paul R. Verkuil, *Separation of Powers, the Rule of Law and the Idea of Independence*, 30 WM. & MARY L. REV. 301, 330–36 (1989).

for a federal agency, at least as few as possible—checks from the three branches of the U.S. government. According to this line of reasoning, my claim that there are minimal checks is exaggerated: Congress can and does alter the structure of even well-insulated agencies such as the FRB, and it has just done so with Dodd-Frank. In short, what Congress creates, it can destroy.

The “agent of Congress” theory is dubious in practice, and not a strong objection to my comparative case study. First, I am looking at the independence of the FRB in comparison to the BCBS. I fully agree that there are theoretical steps that Congress could take to fundamentally alter the workings of the FRB, up to and including eliminating it.<sup>196</sup> But that is true of the BCBS as well. Despite its lack of legal status, its member countries could easily dismantle what they have created.<sup>197</sup> While the “exit costs” of leaving the BCBS regime would be difficult to quantify, the United States has deviated from its norms in Dodd-Frank. Thus, while the BCBS may not be a creature of domestic or international law, it only effectively exists so long as member states desire it to exist. Second, there is at least some evidence to suggest that, as a practical matter, there are serious costs to challenging the FRB.<sup>198</sup>

However, Dodd-Frank also shows that agencies must work with other agencies. Perhaps I have emphasized the independence of the FRB while downplaying the structure of other relevant agencies. Professors Bressman and Thompson, however, argue that the creation of the FSOC grants an important role to the Treasury Department and therefore checks the FRB.<sup>199</sup> There are important aspects of the

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<sup>196</sup> However, Professor Miller is skeptical of the argument that the simple fact that Congress has the power to both create and destroy independent agencies means agencies are an “arm of Congress.” Miller, *supra* note 194, at 64. Moreover, this theory may raise constitutional concerns. *Id.* He ultimately concludes that the most plausible explanation is political expediency: Congress chooses the independent form “for compromise and accommodation among competing political interest groups.” *Id.* at 74; see also Matthew D. McCubbins et al., *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431, 435 (1989) (discussing the unlikelihood of congressional control over agencies after creation).

<sup>197</sup> As of the time of the writing of this Note, the European Union expressed concern that the United States was eroding the efficacy of the BCBS regime by delaying implementation of Basel III. See *EU’s Barnier Says U.S. Should Respect Basel III*, REUTERS.COM (Jan. 31, 2013, 4:28 AM), <http://www.reuters.com/article/2013/01/31/us-eu-banks-idUSBR E90U0D520130131> (noting that U.S. regulators delayed introduction of Basel III).

<sup>198</sup> See *supra* Part II.C (noting some instances where the FRB was able to resist political pressure). These costs emerge most clearly when the FRB acts as a central bank, not bank regulator.

<sup>199</sup> See Bressman & Thompson, *supra* note 131, at 632–33 (noting that the President, through the Secretary of the Treasury, is included in the policy decisions affecting market stability).

Dodd-Frank regulatory reforms that require FSOC, and specifically Treasury action,<sup>200</sup> but this objection depends on the Treasury serving as agent for the President.<sup>201</sup> Professor Zaring has argued that the Treasury has a unique place in the U.S. administrative state and is hardly a pliant proxy for presidential will<sup>202</sup>: Not only did the Treasury wield an immense amount of power effectively unchecked by the President and Congress *during* the Financial Crisis, this level of discretion is par for the course, and not unique to a time of crisis.<sup>203</sup> Thus, while the FSOC is a fascinating and complex bureaucratic structure, it is unclear whether it will amount to an increase in presidential authority over the FRB.

## 2. *Bureaucracies Can Serve Second-Order Democratic Objectives*

The second challenge to the idea that independent agencies may not be democratic is that the structure of independent agencies may further a second-order democratic goal. Some scholars suggest that this kind of second-order benefit to the administrative state exists.<sup>204</sup> They note that while the administrative state may not sit easily in the U.S. constitutional structure, it may help to improve the substantive decisionmaking of government by fostering deliberation and sounder policy.<sup>205</sup> Under this viewpoint, the balance between agency discretion

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<sup>200</sup> One such aspect is the determination of a systematically important nonbank financial institution. *See supra* note 129 and accompanying text.

<sup>201</sup> *See* Bressman & Thompson, *supra* note 131, at 633 (“But having a seat at the table can produce a similar result because it would allow the President, via the Secretary of the Treasury, to participate in an ongoing and official way.”).

<sup>202</sup> *See generally* Zaring, *supra* note 133, at 188–90 (commenting on the unique position of the Treasury that is not limited to the Financial Crisis).

<sup>203</sup> *Id.* Put succinctly, Zaring argues that the “Treasury developed its own way of performing its duties long before the modern administrative state took shape.” *Id.* at 192. Wessel supports this view of Treasury autonomy with respect to the Financial Crisis; as his book title suggests, one of its major themes is how great a role the FRB, particularly Chairman Ben Bernanke, alongside the Treasury, played during the financial crisis without the influence of other officials in the Bush administration. *See* WESSEL, *supra* note 171; *see also* Davidoff & Zaring, *supra* note 171, at 466 (noting the ability of Treasury and the FRB to act decisively without other political parties); *but see* Bressman & Thompson, *supra* note 131, at 633–34 (arguing that the ability of Congress and the President to control the FRB was demonstrated even during the Financial Crisis).

<sup>204</sup> *See* Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 509 (1987) (considering whether New Deal administrative reforms, consisting of technocratic insulated agencies, may further Madisonian deliberation). However, Sunstein goes on to note that this normative vision of the New Deal was scaled back and ponders how more recent checks on the administrative state, such as judicial review, leave that vision intact. *Id.* at 509–10. *But see infra* note 206 (discussing whether Madisonian concerns should be framed in terms of “democracy”).

<sup>205</sup> *See generally* Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95–99 (1985) (discussing possible public legitimacy benefits to broad delegations to administrative agencies); David B. Spence & Frank

and political oversight allows agencies to engage in greater deliberation or to further goals that are not immediately politically popular. In a similar vein, Professor Barkow argues that agency independence may prevent agency capture, which circumvents the political process.<sup>206</sup>

These second-order benefits may well exist, but including them would expand the definition of democracy greatly. Perhaps second-order democratic goals (for example, higher quality decisionmaking and capture avoidance) can be served by a certain amount of technocratic structuring in the administrative state. But since the point of this exercise is to compare the relative democratic bona fides of the FRB with the BCBS, I note merely that the more capacious the definition of democracy, the more that definition erodes claims that the BCBS is undemocratic. In other words, maybe the BCBS deliberates fairly well, and maybe it is insulated from capture.

I fully agree with the abovementioned scholars that there may be legitimate normative reasons to make agencies independent. But Professor Rubin argues against using the term “democracy” in cases like this. He alleges that if we define all good normative goals as democracy-oriented goals, normative discourse may suffer.<sup>207</sup> Particularly, it may dilute the sense of democracy, and therefore, our ability to use it clearly.<sup>208</sup> Furthermore, democracy is a loaded term. It evokes a New England–style town hall as a political ideal, when in

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Cross, *A Public Choice Case for the Administrative State*, 89 GEO. L.J. 97, 141 (2000) (same).

<sup>206</sup> See Barkow, *supra* note 141, at 21–24 (arguing that avoidance of capture is important for maintaining agency independence). I take it to be an uncontroversial claim that an instance of agency capture, if true, would represent a serious disruption of the domestic political process, though perhaps it is better understood as a “Madisonian” concern than as a “democracy” concern. See Richard B. Stewart, *Madison’s Nightmare*, 57 U. CHI. L. REV. 335, 342–43 (1990) (discussing how Madisonian concerns led to the progression of U.S. administrative law); see also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 29–31 (1985) (expressing the aims of administrative law in Madisonian terms). Since the democratic deficit critics use such a capacious definition of democracy, I do not believe that the Madisonian versus democracy label is important for purposes of this Note.

<sup>207</sup> See Rubin, *Democracy*, *supra* note 21, at 714 (proposing that we “set the term ‘democracy’ aside and cease using it in scholarly discussions of modern government”); see also Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 387 (1989) [hereinafter Rubin, *Legislation*] (“Real control of the bureaucratic apparatus and real protection of the individual require a theory based on current legislative practices; the inherited constraints on legislation obscure, rather than enforce, our authentic normative concerns.”).

<sup>208</sup> See Rubin, *Democracy*, *supra* note 21, at 770–71 (noting that traditional notions of democracy look at the relationship between voters and the government but do not help one understand the relationship between agencies and elected officials, or agencies and regulated entities).

reality, the normative concern is how to fine tune a vast bureaucratic edifice which may be a world apart from that image.<sup>209</sup>

#### CONCLUSION

The critics of the Basel Committee on Banking Supervision have assumed that democracy is a good normative criterion to judge institutions. I have questioned this assumption by looking to a prominent domestic counterexample: the Federal Reserve Bank. Democracy may be an important normative value, but it is a questionable framework for explaining the organizing principles of U.S. banking regulation. Perhaps the FRB should be more democratic, but critics should also keep in mind the objectives of agency independence. There are values beyond democracy in agency design.

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<sup>209</sup> See Rubin, *Legislation*, *supra* note 207, at 425 (describing how some normative approaches to law may be outmoded because of false evocations of ancient Athens, or premodern towns).