Georgia Law Review

Volume 50 | Number 1 Article 10

2015

From Fedspeak to Forward Guidance: Regulatory Dimensions of Central Bank Communications

Robert B. Ahdieh
Emory University School of Law

THE THEORY AND STRUCTURE OF FINANCIAL REGULATORY AGENCIES

FROM FEDSPEAK TO FORWARD GUIDANCE: REGULATORY DIMENSIONS OF CENTRAL BANK COMMUNICATIONS

*Robert B. Ahdieh**

TABLE OF CONTENTS

* Vice Dean & K.H. Gyr Professor of Private International Law, Emory University School of Law. My thanks to James Kim, David Zaring, and participants in the *Georgia Law Review* symposium on *Financial Regulation: Reflections and Projections*, as well as the Southeastern Association of Law Schools annual meeting, for their invaluable insights and assistance.

> Let's pause here and note what this moment represented. For the first time, the [Federal Open Market] Committee was using communication—mere words—as its primary monetary policy tool. Until then, it was probably common to think of communication about future policy as something that supplemented the setting of the federal funds rate. In this case, communication was an independent and effective tool for influencing the economy. The FOMC had journeyed from "never explain" to a point where sometimes the explanation *is* the policy.

- Janet L. Yellen[1]

In late 2008, as the full impact the Global Financial Crisis would have on the United States economy remained painfully unclear, the Board of Governors of the Federal Reserve System faced a difficult dilemma. The economy was continuing to contract at a dizzying pace.[2] The already dramatic growth in unemployment showed no sign of abating—and looked like it might well be accelerating.[3] Yet the Fed's primary—if not exclusive—tool for intervention was no longer available to it. The Fed had already reduced its target for the federal funds rate to zero, and further opportunity for monetary stimulus seemed out of reach.[4]

Rather than resigning itself to whatever fiscal stimulus might be generated by the particularly chaotic dynamics of the political branches at that moment, however, the Fed turned to the experience of other central banks facing similar circumstances. Moving beyond its traditional reliance on short-term interest rate

---

[1] Janet L. Yellen, Vice Chair, Bd. of Governors of the Fed. Reserve Sys., Remarks at the Society of American Business Editors and Writers 50th Anniversary Conference: Communication in Monetary Policy 8–9 (Apr. 4, 2013), *available at* http://www.federalreserve.gov/news events/speech/yellen20130404a.htm.

[2] *See* Ben S. Bernanke, Chair, Bd. of Governors of the Fed. Reserve Sys., Speech at the Greater Austin Chamber of Commerce: Federal Reserve Policies in the Financial Crisis (Dec. 1, 2008), *available at* http://federalreserve.gov/newsevents/speech/bernanke20081201a.htm (commenting on the economic decline in 2008).

[3] *Id.*

[4] Yellen, *supra* note 1, at 9.

adjustments alone, the Fed embraced two important new tools of monetary policy.

The first—the Federal Reserve Board's purchase of a massive volume of Treasury and mortgage-backed debt—received substantial public attention. "Quantitative easing," by which the Fed took on debt obligations equivalent in size to the German economy, was the subject of significant controversy.[5] Over its three rounds, however, it appears to have done significant work in helping to stall the economy's downward slide, and eventually to turn that tide.[6]

In this brief Article, I explore the Fed's *other* tool of monetary policy, which has received far less attention but may be no less important, both as a tool of monetary policy and as a window into the growing complexity of administrative agency interventions in the modern economy. That the Fed's second new tool of monetary policy received less attention should perhaps come as no surprise, however, given its nature as nothing more than talk.

Alongside its absorption of a mind-boggling amount of debt the Fed found significant utility in changing its approach to communicating its monetary policy plans.[7] More specifically, in more effectively communicating both its decisionmaking framework for setting short-term rate targets and its expectations for what adjustments might result *over the medium term*, the Fed concluded it could move long-term interest rates in ways that it could not otherwise accomplish and that might be essential to the economy's recovery.[8]

From this significant change in the Federal Reserve Board's communication policy and practice, this Article suggests, we may

---

[5] Jeff Kearns, *The Fed Eases Off*, BLOOMBERG QUICKTAKE (Feb. 4, 2013), http://www.bloombergview.com/quicktake/federal-reserve-quantitative-easing-tape.

[6] *See* JOHN C. WILLIAMS, HUTCHINS CTR. ON FISCAL & MONETARY POLICY, MONETARY POLICY AT THE ZERO LOWER BOUND: PUTTING THEORY INTO PRACTICE 10–11 (2014), *available at* http://www.brookings.edu/~/media/research/files/papers/2014/01/16%20monetary%20policy%20zero%20lower%20bound/16%20monetary%20policy%20zero%20lower%20bound%20williams.pdf (discussing research findings regarding the economic effects of asset purchases by Federal Reserve).

[7] Yellen, *supra* note 1.

[8] *See id.* ("[T]he federal funds rate [can] fulfill an important 'automatic stabilizer' function of the economy.").

gain insight into what we should understand to constitute "regulatory action" by administrative agencies. While far from the type of coercive constraint that regulatory agencies commonly impose, the Fed's systematic use of communication as a tool in the pursuit of its statutory mandate might be understood to have something of a regulatory quality to it. Talk may be cheap. But might it also be a kind of regulation?

In what follows, I begin by outlining the traditional theory and practice of central bank (non-)communication, as well as the Federal Reserve Board's halting movement away from that approach, prior to the global financial crisis. Part II reviews the Fed's initial—and insufficient—response to crisis, setting the stage for its embrace of communication as a critical new tool of monetary policy, as described in Part III. Part IV explores the potential lessons that administrative law might learn from the Fed's turn to communication as a policy tool. In succession, it questions three potential critiques of the treatment of Fed communications as a species of regulation—given the true nature, function, and impact of those communications. Based on the foregoing, it posits the self-evidently perplexing possibility that administrative law should embrace some form of regulatory review of Federal Reserve Board (and analogous) agency communications.

I. THE THEORY AND TRADITIONAL PRACTICE OF CENTRAL BANK COMMUNICATION

In the traditional practice of financial regulation, "central bank communication" was something of an oxymoron. External communication—and public engagement generally—were simply not within the job description of a central banker.[9] Particularly in central banks' task of setting monetary policy, communication was considered irrelevant.[10]

---

[9] *See* Alan S. Blinder et al., *What We Know and What We Would Like to Know About Central Bank Communication*, VOX (May 15, 2008), http://www.voxeu.org/article/central-bank-communication ("[C]onventional wisdom in central banking circles held that monetary policymakers should say as little as possible and say it cryptically.").

[10] *Id.*

In fact, mere disregard may be too generous a characterization of central banks' traditional relationship with communication. For many central bankers, external communication was understood to conflict with effective monetary policy.[11] In maximizing the efficacy of central bank policymaking, secrecy was the goal.[12] As succinctly put by Montagu Norman, the influential former governor of the Bank of England, "never explain, never excuse."[13]

At the extreme, the standard practice of many central banks was to include no announcement whatsoever of their policy decisions.[14] Instead, the bank would simply adjust their lending or purchasing activity—including the relevant interest rate—without prior or even contemporaneous notice.[15] Commercial banks would

---

[11] *See id.* (noting controversy over what constitutes an optimal communication strategy for central banks). The perceived difficulties associated with central bank communication included the possibility (or mere perception) that some might be better able to take advantage of relevant disclosures, the risk of market over-reaction, and the potential to limit a central bank's discretion in the future, even in the face of changed circumstances. *See generally* Yellen, *supra* note 1 (discussing justifications for central banks withholding information about monetary policy decisions). Alan Greenspan succinctly captured the latter concern: "[A] public announcement requirement [for reserves or interest rates] could impede timely and appropriate adjustments to policy." *Zero Inflation: Hearing on H.J. Res. 409 Before the H. Subcomm. on Domestic Monetary Policy, H. Comm. on Banking, Fin. & Urban Affairs*, 101st Cong. 50 (1989) (prepared Statement of Alan Greenspan, Chair, Bd. of Governors of the Fed. Reserve Sys.).

[12] Central bankers long believed that a certain "mystique" attached to their activities; that making monetary policy was an arcane and esoteric art that should be left solely to the initiates; and that letting the public into the discussion would only usurp the prerogatives of insiders and degrade the effectiveness of policy.

Ben S. Bernanke, Governor, Fed. Reserve Sys., Remarks at the Meetings of the American Economics Association: Fedspeak (Jan. 3, 2004), *available at* http://www.federalreserve.gov/Boarddocs/Speeches/2004/200401032/default.htm. *See also* Michael Woodford, *Central Bank Communication and Policy Effectiveness* 1 (Nat'l Bureau of Econ. Research, Working Paper No. 11898, 2005) ("The mystique" of central banking was "jealously guarded by central bankers . . . .").

[13] Bernanke, *supra* note 12 (internal citations and quotation marks omitted).

[14] *See* Sakari Suoninen, *Analysis: Forward Guidance More Than Passing Fashion for Central Banks*, REUTERS (July 11, 2013, 10:16 AM), http://www.reuters.com/article/2013/07/11/us-centralbanks-forwardguidance-analysis-idUSBRE96A0DY20130711 (discussing the evolution of central banks' information policies and the costs and benefits of providing increased information).

[15] *See, e.g.*, ALAN S. BLINDER ET AL., INT'L CTR. FOR MONETARY & BANKING STUDIES, HOW DO CENTRAL BANKS TALK? 67 (2001) (noting past Fed practice of entering money market unannounced, except for symbolic discount rate changes).

learn of the policy change only when they sought to initiate transactions with the central bank.[16]

Alan Greenspan, former Chair of the Board of Governors of the Federal Reserve System, turned this commitment to opacity into a high art. During his tenure as Chair, the telecommunications revolution would make a complete avoidance of public engagement increasingly difficult to sustain.[17] Post-Watergate expectations of congressional oversight—and government disclosure—likely had similar effects, hence Greenspan's perfection of what came to be known—with no little fondness—as "Fedspeak."[18]

Greenspan dutifully embraced his obligation to speak to the Federal Reserve Board's perspective on the United States and global economy, and on the equilibrium of inflation and job growth that the Fed was charged to achieve.[19] But in his use of technical terminology and seemingly contradictory characterizations of the state of the economy and the Fed's views of it—all offered within sentences of almost interminable length—Greenspan perfected the art of speaking regularly, while communicating little.[20] In some cases, he effectively left his audience *less* informed than before he spoke.[21]

---

[16] *See id.* (noting that "Fed watchers" would have to discern the central banks financial strategy indirectly).

[17] *See* Yellen, *supra* note 1, at 3 (relating the "modest" response of the FOMC to the growing speed and frequency of most communication).

[18] *See* Bill Mintz, *Greenspan Makes It Perfectly Obscure*, HOUS. CHRON. (June 22, 1995), http://www.nl.newsbank.com/nl-search/we-Archives?p_action=print&p_docid=0E7B485A20 49AF3.

[19] *See* Yellen, *supra* note 1, at 4 (explaining that pursuit of full employment and moderated inflation constitutes the "dual mandate" of the Federal Reserve Board).

[20] *See* Bill Barnhart, *Fedspeak's New Nuances*, CHI. TRIB. (May 18, 2007), *available at* http://articles.chicagotribune.com/2007-05-18/business/0705171115_1_greenspan-and-bernan ke-ben-bernanke-monetary-policy (commenting on Alan Greenspan's "opaque answers to straightforward questions," which Greenspan said resulted from a "syntax collapse"); *Daily Chart: Fedspeak*, ECONOMIST (Nov. 11, 2014, 2:01 PM), http://www.economist.com/node/21632 021/print (charting comments by the FOMC that became "longer and more complex" over time, forming a kind of "doublespeak" (internal quotation marks omitted)).

[21] One is reminded of Justice Jackson's famous lamentation in dissent: "I give up. Now I realize fully what Mark Twain meant when he said, 'The more you explain it, the more I don't understand it.'" Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194, 214 (1947) (Jackson, J., dissenting).

Amongst innumerable examples, Greenspan's 2005 testimony to the House Financial Services Committee is suggestive: "[R]isk takers have been encouraged by a perceived increase in economic stability to reach out to more distant time horizons . . . [but] long periods of relative stability often engender unrealistic expectations of its permanence and, at times, may lead to financial excess and economic stress."[22] To similarly obtuse effect was his statement to the Senate Banking, Housing, and Urban Affairs Committee in 2001: "The members of the Board of Governors and the Reserve Bank presidents foresee an implicit strengthening of activity after the current rebalancing is over, although the central tendency of their individual forecasts for real GDP still shows a substantial slowdown, on balance, for the year as a whole."[23]

Such verbiage cannot be ascribed to any innate incapacity to communicate, or even an inattention to clarity or syntax on Greenspan's part. To the contrary, as Greenspan acknowledged on more than one occasion, his Fedspeak was a product of intelligent design.[24] Responding to a United States senator who claimed to have understood the point Greenspan had just made, he made that fact quite clear: "[I]n that case," he explained, "I must have misspoken."[25]

---

[22] *Federal Reserve's Second Monetary Policy Report for 2005: Hearing on Oversight on the Monetary Policy Report to Congress Pursuant to the Full Employment and Balanced Growth Act of 1978 Before the S. Comm. on Banking, Hous. & Urban Affairs*, 109th Cong. 34 (2005) (prepared Statement of Alan Greenspan, Chair, Bd. of Governors of the Fed. Reserve Sys.).

[23] *Oversight on the Monetary Policy Report to Congress Pursuant to the Full Employment and Balanced Growth Act of 1978: Hearing Before the S. Comm. on Banking, Hous. & Urban Affairs*, 107th Cong. 57 (2001), *available at* http://www.federalreserve.gov/boarddocs/hh/2001/February/Testimony.htm.

[24] In Greenspan's own words:

> It's . . . a language of purposeful obfuscation to avoid certain questions coming up, which you know you can't answer, and saying . . . "I will not answer or basically no comment is, in fact, an answer." So, I proceed with four or five sentences which get increasingly obscure. The Congressman thinks I answered the question and goes onto the next one.

Jennifer Dauble, *Former Fed Chairman Alan Greenspan Speaks Extensively to Maria Bartiroma*, CNBC (Sept. 17, 2007, 10:06 AM) (quoting an Interview by Maria Bartiromo, CNBC, with Alan Greenspan, former Chair of the Bd. of Governors of the Fed. Reserve Sys.), http://www.cnbc.com/id/20819918.

[25] BLINDER ET AL., *supra* note 15, at 66 (internal quotation marks omitted); *see also* Heather Stewart, *After Greenspan, the Deluge?*, THE GUARDIAN (Oct. 29, 2005, 9:28 PM), http://www.th

For all its charms, however, Alan Greenspan's commitment to ineffective communication was not embraced by all of his peers on the Board of Governors of the Federal Reserve. Beginning in the 1990s, other members of the Board began to encourage enhancement of both the quality and quantity of Fed communication.[26] Over time, even Greenspan himself came to support movement in that direction.[27]

In February 1994—even if only in the face of some external pressure—the Fed for the first time issued a formal announcement of a rate change decision.[28] Within a year, it made that practice official policy.[29] Starting in 1999, the Fed supplemented those announcements with an explanatory statement as to its decision—moving away from its prior practice of terse and generic statements offering little (if any) insight as to the basis for the Fed's decision.[30] Notably, the new practice extended even to meetings at which no change was made.[31]

Beginning with its May 1999 meeting, the Fed also changed its practice regarding any "bias" in its policy stance—its relative concern with inflationary pressures versus economic growth (and job growth in particular).[32] Whereas any bias of the Fed, in the

---

eguardian.com/business/2005/oct/30/useconomy.usnews ("Greenspan . . . telling a Senate committee in 1987, 'since becoming a central banker, I have learn[ed] to mumble with great incoherence. If I seem unduly clear to you, you must have misunderstood what I said.' ").

[26] *See* Woodford, *supra* note 12, at 1 (discussing FOMC's increased transparency over the past fifteen years).

[27] *See, e.g.*, BLINDER ET AL., *supra* note 15, at 67 ("Greenspan immediately announced the FOMC's February 1994 decision to raise interest rates.").

[28] *See* Yellen, *supra* note 1, at 5 ("It wasn't until February 1994 that the Committee issued a postmeeting statement disclosing a change in monetary policy.").

[29] *See* BLINDER ET AL., *supra* note 15, at 67 ("[I]n February 1995, the FOMC adopted the policy of immediate announcement of policy changes.").

[30] *See id.* ("Until 1999, the FOMC made only brief, and often cryptic explanations when it changed policy . . . .").

[31] *See id.* at 67–68 (explaining the evolution of the FOMC's decision to offer an "explanatory statement after *each* meeting (or at least most of them), even when the decision was to leave rates alone").

[32] *See id.* at 68 ("In May 1999, [the FOMC] started announcing the bias immediately after each meeting . . . .").

guise of the Federal Open Market Committee (FOMC),[33] at a given meeting had previously only been announced following its subsequent meeting, it now adopted the practice of offering it immediately, thereby providing forward-oriented guidance to the market.[34] In 2000, the FOMC went yet further, for the first time acknowledging the potential extension of its bias beyond the immediately following meeting.[35]

Following the bursting of the information technology bubble and the accounting frauds that brought down Enron, WorldCom, Tyco, and other blue chip firms in 2001, the Fed formalized this practice of offering guidance on the expected path of interest rates in the future.[36] With the federal funds rate already reduced to the then-historically low level of 1%, such guidance was seen as a potential tool to stimulate weak capital markets.[37] After only two years, however, that practice was abandoned.[38]

Following his appointment as Chair of the Board of Governors in 2006, Ben Bernanke accelerated the movement away from the practice of Fedspeak—and beyond the tradition of minimal central bank communication. To begin, he implemented further

---

[33] "The Federal Open Market Committee (FOMC) is the monetary policymaking body of the Federal Reserve System." Bd. of Governors of the Fed. Reserve Sys., Frequently Asked Questions, http://www.federalreserve.gov/faqs/about_12844.htm (last visited Oct. 31, 2015).

[34] BLINDER ET AL., *supra* note 15, at 67–68.

[35] *See id.* at 68 (noting that the Fed reports its bias as applicable to "the foreseeable future" (internal quotation marks omitted)); *see also* Yellen, *supra* note 1, at 8 (stating that the FOMC noted "whether it was leaning toward increasing or decreasing the federal funds rate in the future").

[36] *See* Yellen, *supra* note 1, at 8 ("The trend toward greater transparency [from the FOMC] accelerated during the early 2000s . . . [and] information about intentions and expectations for the future, known as forward guidance, became crucial in 2003, when the Committee was faced with a stubbornly weak recovery from the 2001 recession."); *see also* Jay G. Stirling, *How to Deal with Hornets: The Administrative Procedure Act and the Social Cost of Carbon*, 100 IOWA L. REV. 853, 870 (2015) (noting that the Fed first began to announce its "intentions and expectations" for the federal funds rate in early 2000s).

[37] *See* Yellen, *supra* note 1, at 8 (discussing how the information was meant to "stimulate the economy").

[38] Silvio Contessi & Li Li, *Forward Guidance 101A: A Roadmap of the U.S. Experience*, FED. RES. BANK OF ST. LOUIS ECON. SYNOPSES, Sept. 2013, at 2, https://www.research.stlouis.fed.org/publications/es/13/ES_25_2013-09-10.pdf.

improvements in the processes surrounding Fed communications.[39] Rather than waiting until after the following meeting to release FOMC minutes, as had previously been the practice, the minutes were released soon after the meeting had occurred.[40] While still not immediate, that accelerated release transformed any insight contained in the minutes into market-relevant information.[41]

"[M]ore explicit statements about the likely future path of interest rates" further enhanced the clarity of FOMC post-meeting statements.[42] And those statements came to be the subject of significant market attention.[43]

Bernanke also initiated a practice of holding regular press conferences and otherwise responding to press inquiries, which in the past had occurred infrequently at best.[44] Finally, a variety of efforts to integrate the views of multiple Board members into an overall statement of the Fed's views and expectations were also undertaken.[45]

II. RESPONDING TO THE GLOBAL FINANCIAL CRISIS

Even with the perspective of time, the scope—and impact—of the financial crisis that struck the global economy in 2007 is not easy to capture. Already by 2010, before the full impact of the

---

[39] *See, e.g.*, Yellen, *supra* note 1, at 1 (noting Chairman Bernanke's practices of conducting post-FOMC committee meeting press conferences and providing "detailed minutes of the [FOMC's] meetings").

[40] *See* Woodford, *supra* note 12, at 1 (commenting on the growing transparency of FOMC policy, through the public availability of minutes of its deliberations, prior to the next meeting).

[41] *See id.* ("Since August 2003 . . . post-meeting statements have included even more explicit statements about the likely future path of interest rates . . .[, which] attracts considerable attention, in financial markets and in the financial press.").

[42] *Id.*

[43] *Id.*

[44] *See* Yellen, *supra* note 1, at 4 (commenting on the evolution of Fed communication, including the introduction of post-meeting press conferences); *cf.* Charles I. Plosser, *Fed Policy: Good Intentions, Risky Consequences*, 33 CATO J. 347, 353 (2013) ("The [Fed] chairman . . . holds press conferences following each of the meetings at which the SEPs are compiled.").

[45] *See* David Zaring, *Law and Custom on the Federal Open Market Committee*, 78 LAW & CONTEMP. PROBS. 157, 164 (2015) (discussing Alan Greenspan's encouragement of unanimity in Fed policy directives).

crisis had been felt, characterizations of some dramatic flair were entirely in order:

> The global financial crisis has been characterized by an unexpected collapse of asset values; extreme uncertainty, fear, and pessimism about future asset values; a severe contraction of credit and risk-taking; rising unemployment; and a shrinkage in general economic output. Hundreds of banks have failed or been bailed out, and hundreds more will fail before the crisis is over. Trillions of dollars of asset values have been wiped out. Fortunes have been lost. Some families have lost their homes. Unemployment has soared. Ponzi schemes have been exposed. Economic output has slowed or even shrunk.[46]

By the time all was said and done, however, even the most over-the-top characterizations turned out to be understatements.

As of 2013, growth in the United States gross domestic product was set back by four years—with a full recovery not expected until 2017.[47] The unemployment rate in the United States more than doubled.[48] Residential and non-residential investment declined by $400 billion each,[49] while housing prices fell by nearly a third.[50]

---

[46] Randall D. Guynn, *The Global Financial Crisis and Proposed Regulatory Reform*, 2010 B.Y.U. L. REV. 421, 422–23.

[47] CONG. BUDGET OFFICE, THE BUDGET AND ECONOMIC OUTLOOK: FISCAL YEARS 2013 TO 2023, at 4 (2013), http://www.cbo.gov/publication/43907.

[48] *See Civilian Unemployment Rate*, FED. RESERVE BANK OF ST. LOUIS (updated Sept. 4, 2015, 11:02 AM), https://research.stlouisfed.org/fred2/series/UNRATE (graphing an unemployment rate of 4.4% in March 2007 and 10% in October 2009).

[49] *See National Income and Product Accounts Tables*, BUREAU OF ECON. ANALYSIS, U.S. DEP'T OF COMMERCE, tbl.1.1.5 (last revised Oct. 29, 2015), http://www.bea.gov/iTable/iTable.cfm?ReqID=9&Step=1#reqid=98Step=1&isuri=1 (Select "Table 1.1.5 Gross Domestic Product"; then "modify"; select "Quarterly"; use range "2005-A&Q" to "2013-A&Q"; click "refresh table") (providing a gross residential investment change of $519.6 billion between the First Quarter of 2006 and Second Quarter of 2009 and a gross nonresidential investment change of $398 billion from the First Quarter of 2008 to the Fourth Quarter of 2009).

[50] *S&P/Case-Shiller 20-City Composite Home Price Index*, FED. RESERVE BANK OF ST. LOUIS (updated Aug. 25, 2015, 10:31 AM), https://research.stlouisfed.org/fred2/series/SPCS20RSA.

The stock market, of course, fell by more than 50%.[51] Add in significant growth in the national debt, a dramatic decline in household income, and increased income inequality, and the human and financial toll of the Global Financial Crisis begins to come into focus.

Responding aggressively from the onset of the crisis, the FOMC cut the target for the federal funds rate ten times over a period of fourteen months—including a series of dramatic three-quarter point reductions.[52] By December 2008, thus, its target range had already been reduced to essentially zero.[53]

Contrary to expectations, however, the market did not respond. Notwithstanding the rate reduction's easing of bank access to credit—and the corollary decline in the return that could be earned on cash reserves—bank lending remained exceedingly tight, with certain credit markets locked up entirely.[54] Companies with cash on hand similarly resisted investment, or any move to increase hiring.[55] Unemployment consequently remained stubbornly elevated, and growth was stuck in low gear, even after the recession formally ended and the economy began to grow in June 2009.[56]

For the Federal Reserve Board, this combination of events presented an essentially unprecedented dilemma. In traditional

---

[51] *Graph: S&P 500*, FED. RESERVE BANK OF ST. LOUIS, https://research.stlouisfed.org/fred2/graph/?id=SP500 (use date range: "Oct. 31, 2005" to "Sept. 16, 2015") (last visited Nov. 2, 2015).

[52] *See Open Market Operations: Intended Federal Funds Rate, Change (basis points) and Level*, BD. OF GOVERNORS OF FED. RESERVE SYS. (updated Feb. 6, 2013), http://www.federalreserve.gov/monetarypolicy/openmarket.htm (reporting changes of three-quarters of a point in January, March, and December of 2008).

[53] *Id.*; Yellen, *supra* note 1, at 9.

[54] The commercial paper market dried up over the course of 2007 and 2008. *See generally* Marcin Kacpercyzk & Philipp Schnabl, *When Safe Proved Risky: Commercial Paper During the Financial Crisis of 2007–2009*, 24 J. ECON. PERSPS. 29 (2010) (explaining the effect of economic downturn on commercial paper).

[55] *See* Tom McGinty & Cari Tuna, *Jittery Companies Stash Cash*, WALL ST. J. (updated Nov. 3, 2009, 12:01 AM), http://www.wsj.comarticles/SB125712903877521763 (noting the cash-hoarding tendency of large companies during the recession).

[56] *See* Peter Yeoh, *The Dilemmas of Compensation Policies and Practices*, 31 BUS. L. REV. 56, 56 (2010) (describing the factors that burdened economic recovery in the United States following the financial crisis).

central bank practice, both in the United States and elsewhere, the central bank's primary, if not exclusive, tool of monetary policy is short-term interest rate adjustments.[57] By reducing the rate at which depository institutions trade Federal Reserve-held fund balances among themselves during an economic downturn, the Fed can encourage banks to increase lending and companies to invest and hire—with resulting positive impacts on economic growth and employment.[58]

With the short-term rate at or near the "zero bound," however, that sole tool ceased to be available.[59] Negative interest rates were an option in theory, of course.[60] In the real world of monetary policymaking, however, the Federal Reserve Board's arsenal was empty—with growth below a sustainable level and unemployment well above normal levels.[61] Faced with that dilemma, the Board of Governors determined to chart a new course, embracing a pair of new tools of monetary policy, both directed at impacting (even if only indirectly) long-term interest rates.[62]

The first, which received far more public attention, was the Fed's program of "quantitative easing."[63] In essence, by buying up and holding Treasury and mortgage bonds, quantitative easing allows the Fed to increase liquidity, and thereby drive down interest rates.[64] Equally important, by reducing the supply of debt on the market, quantitative easing also reduces the term and risk

---

[57] *See* Yellen, *supra* note 1, at 9 (calling the lowering of the Fed funds rate the "traditional tool for expansionary monetary policy").

[58] *Id.* at 4 (explaining how the Fed Funds rate is used to influence and encourage economic growth).

[59] *Id.* at 9.

[60] *See* N. Gregory Mankiw, *Maybe the Fed Should Go Negative*, N.Y. TIMES, Apr. 19, 2009, at B47 (detailing a theory of negative interest rates).

[61] *See supra* notes 46–56 and accompanying text.

[62] Beyond the two major policy innovations noted above, the Fed also briefly engaged in what is sometimes known as "Operation Twist"—an attempt to alter interest rates by extending the maturity of relevant debt. Plosser, *supra* note 44, at 348–49.

[63] *See* Steven L. Schwarcz, *Rollover Risk: Ideating a U.S. Debt Default*, 55 B.C. L. REV. 1, 10–11 (2014) (detailing the effect of quantitative easing).

[64] *See* Federico Lupo-Pasini & Ross P. Buckley, *Global Systemic Risk and International Regulatory Coordination: Squaring Sovereignty and Financial Stability*, 30 AM. U. INT'L L. REV. 665, 710 (2015).

premiums associated with it, with similar effects on interest rates.[65]

Although the program of quantitative easing was controversial in the eyes of many, most retrospective accounts have found it an effective means to increase economic growth and to lower long-term interest rates.[66] Over three rounds of quantitative easing, the Federal Reserve Board's purchase of nearly $4 trillion in debt[67] coincided with a shift in the United States GDP from a negative growth rate of around -8% at the start of the first round in late 2008, to a still modest, but substantially improved, positive growth rate of around 2.2%, when the third round was suspended six years later.[68] Needless to say, that shift did not arise solely—or perhaps even primarily—from the Fed's policy of quantitative easing. But the latter would at least appear to have helped.

As grave as the impact of the financial crisis was, however, the Fed did not limit its policy innovations to quantitative easing alone.[69] It also embraced a second, less widely discussed tool to impact long-term rates.[70] Beyond its earlier efforts to increase the clarity of its communications, the Global Financial Crisis drove the Fed to embrace communication as "an independent and effective tool for influencing the economy."[71] In the brave new world of post-crisis monetary policy, thus, "explanation *is* the policy."[72]

---

[65] *See* Brett W. Fawley & Luciana Juvenal, *Quantitative Easing: Lessons We've Learned*, THE REG'L ECONOMIST, July 2012, *available at* https://www.stlouisfed.org/publications/regional-economist/july-2012/quantitative-easing-lessons-weve-learned.

[66] *See* WILLIAMS, *supra* note 6, at 10–11 (examining the economic effects of the Fed's asset purchase programs).

[67] Jeff Kearns, *Fed's $4 Trillion Holdings to Boost Growth Beyond End of QE*, BLOOMBERG (updated Oct. 24, 2014, 9:42 AM), http://www.bloomberg.com/news/articles/2014-10-24/fed-s-trillion-holdings-keep-boosting-growth-beyond-end-of-age.

[68] *United States GDP Growth Rate*, TRADING ECONOMICS, http://www.tradingeconomics.com/united-states/gdp-growth (last visited Nov. 2, 2015) (using a range of Jan. 1, 2008 to Oct. 31, 2015).

[69] *See* Yellen, *supra* note 1, at 10 (explaining "unconventional" methods of monetary policymaking implemented by the Fed).

[70] *Id.*

[71] *Id.* at 9.

[72] *Id.* (emphasis in original).

III. COMMUNICATION AS CENTRAL BANK POLICY

At least in part, long-term interest rates reflect market expectations about where short-term rates will stand over the life of any given debt instrument. Stating it differently, long-term rates can be understood to represent an aggregation of the short-term rates in place over the relevant period of time.[73] Enhanced insight into where short-term rates are likely to go over time might therefore be expected to indirectly impact long-term rates.[74] By offering such insight, central bank communications can function as a tool in shaping long-term interest rates.[75]

The use of communication as a tool to alter interest rates is not without its challenges. These begin with issues of credibility. On the front end, it will not always be easy for a central bank to establish the necessary credibility to support a change in market expectations about future rates—especially where the use of communication in that fashion is a new practice, or market conditions are characterized by significant uncertainty.[76] Sustaining such credibility once it is achieved may also be challenging, especially in the face of a shifting market.[77] The very need to maintain credibility bears its own risks, however, including potential over-resistance to deviating from prior

---

[73] Clemens J.M. Kool & Daniel L. Thornton, *How Effective is Central Bank Forward Guidance?* 2–5 (Fed. Reserve Bank of St. Louis, Working Paper No. 2012-063A, 2012), https://www.research.stlouisfed.org/wp/2012/2012-063.pdf (describing Woodford's account of optimal policy inertia where short-term rates are related to long-term rates); *see also* Woodford, *supra* note 12, at 3 (describing effect of long-term predictions on interest rates).

[74] *Cf.* Michael Ehrmann & Marcel Fratzscher, *The Timing of Central Bank Communication* 7 (European Central Bank, Working Paper No. 565, 2005), *available at* https://www.ecb.europa.eu/pub/pdf/scpwps/ecbwp565.pdf?f50d520f19dc2a99ccac04fecd32d4b6.

[75] It follows that communication may serve as an effective substitute for reduced short-term rates when the latter have reached the zero bound. Jeffrey R. Campbell et al., *Macroeconomic Effects of Federal Reserve Forward Guidance* 1, BROOKINGS PAPERS ON ECON. ACTIVITY, Spring 2012, *available at* http://www.brookings.edu/~/media/projects/bpea/spring-2012/2012a_evans.pdf.

[76] *See* Suoninen, *supra* note 14 (noting some concern that unpredictability could undermine the goals of monetary policymaking by boxing regulators into a box of their own making).

[77] *See id.*

commitments, even in the face of changed circumstances.[78] The desire to maintain credibility thus may trump good policy.[79]

As much care as effective Fedspeak required, meanwhile, the use of communication to shape long-term market expectations demands even more.[80] Even with such care, however, the psychological complexities against which such motivated communication plays out may limit its potential for success.[81] Part of the issue may be the possibility of excess communication. Consider the market's wild gyrations in response to Fed Chair Ben Bernanke's testimony before Congress on May 22, 2013: As Bernanke delivered his prepared testimony, the stock market rose to the highest level it had ever reached.[82] As he continued speaking during the ensuing questions and answers, however, the market quickly changed its mind, reversing direction, and ultimately falling well below its opening level.[83] Even beyond the possibility of excess communication, though, the impact of communication on market participants' expectations is simply difficult to predict. As a consequence, it will not always be an effective tool of monetary policy.

Finally, there is the risk that the market may come to over-rely on Fed communications. One might thus expect some reduction in private information acquisition, in the face of increased Fed communication.[84] Herding behavior may increase, in turn, given the heightened focal quality of Fed communications as a source of information. Over-reaction to Fed policy announcements might follow as a result.[85]

---

[78] *See id.* (noting that regulators may be "boxed in" by their prior attempts at forward guidance).

[79] *See* Kool & Thornton, *supra* note 73, at 5–6 (providing an overview of pro's and con's of forward guidance, including a form of path dependency as a disadvantage).

[80] *See id.* at 24 (noting limited predictability suggested by studies of long-term predictions).

[81] *See* Anatole Kaletsky, *The Many Interpretations of Ben Bernanke*, REUTERS (May 23, 2013, 12:43 PM), http://www.reuters.com/article/2013/05/23/us-kaletsky-bernanke-idUSBRE94M0UQ20130523#RTmJM4Ogq8Q4sDH9.97 (reporting that investors could be prone to "transference" or "conscious projection" when reacting to policymaker communications).

[82] *Id.*

[83] *Id.*

[84] Kool & Thornton, *supra* note 73, at 5.

[85] *Id.*

Notwithstanding these challenges, numerous central banks embraced communication as part of their arsenal of monetary policy tools well ahead of the Federal Reserve Board.[86] Most notable among these was the Reserve Bank of New Zealand. Beginning in 1997, New Zealand's central bank adopted a practice of announcing the expected path of the three-month bank bill rate.[87] With time, that practice evolved into the bank's issuance of "Policy Assessments" every six weeks, offering so-called "forward guidance" as to the bank's projected path for the bank bill rate.[88]

To a greater or lesser degree, other central banks also came to rely on communication as a tool in moving interest rates, even prior to the Global Financial Crisis. The Norges Bank and the Riksbank—the central banks of Norway and Sweden, respectively—followed New Zealand's lead in 2005 and 2007.[89] In the former case, forward guidance as to three key rates came to be offered three times per year, with projections extended out for three years beyond the relevant calendar year.[90] The Riksbank followed suit, but with guidance only as to its daily rate of interest.[91]

Looking to those and other precedents, the Federal Reserve Board embraced a number of significant new communications strategies, in response to the financial crisis. Most generally, in January 2012, the FOMC drafted and published what it described as a "Statement on Longer-Run Goals and Monetary Policy Strategy."[92] Succinct as that one-page distillation was, it

---

[86] *See id.* at 3 (including the Reserve Bank of New Zealand, Norges Bank, Riksbank, and the Czech National Bank among banks which adopted forward guidance).

[87] *Id.*

[88] *See* Douglas R. Holmes, *Communicative Imperatives in Central Banks*, 47 CORNELL INT'L L.J. 15, 28, 59 (2014) (describing New Zealand's use of public communications in monetary policy).

[89] Kool & Thornton, *supra* note 73, at 3.

[90] *Id.* at 10.

[91] *Id.* at 10–11.

[92] FEDERAL OPEN MARKET COMMITTEE, STATEMENT ON LONGER-RUN GOALS AND MONETARY POLICY STRATEGY (2012, amended 2015), *available at* http://www.federalreserve.gov/monetarypolicy/files/FOMC_LongerRunGoals.pdf [hereinafter FED. STATEMENT]; *see also* Yellen, *supra* note 1, at 11–12 (commenting on the Fed's publication of its long-term policy statement).

represented an important strategy shift for the FOMC. As described by then-Board member Janet Yellen, the Statement "laid out, for the first time, the rates of inflation and unemployment that the FOMC considers consistent with the dual mandate."[93] In doing so, she suggested, the Statement could be expected "to remain a valuable roadmap for many years to come, indicating how monetary policy will respond to changes in economic conditions."[94]

On an ongoing basis, meanwhile, the FOMC's post-meeting statements fully embraced the approach of forward guidance. Starting with the statement following its December 2008 meeting, each FOMC statement has included some articulation of the expected path for short-term interest rates, going beyond the immediately following meeting.[95] That articulation, however, is far from a simple exercise.

Generally speaking, forward guidance can be keyed either to some numeric threshold or to some future point in time. In the former case, the bank commits to hold rates steady unless either (1) inflation rises *above* a certain level or (2) the unemployment rate falls *below* a certain level.[96] In keying forward guidance to a future time, by contrast, monetary authorities commit themselves to hold rates constant at least until some point in the future—be it a precise date ("explicit" forward guidance) or some undefined point in the future ("implicit" guidance).[97]

---

[93] Yellen, *supra* note 1, at 12.

[94] *Id.*

[95] Kool & Thornton, *supra* note 73, at 19–20. Beginning with its August 2011 post-meeting statement, the FOMC shifted from an open-ended reference to maintaining rates near zero for "some time" (i.e., "implicit" forward guidance) to referencing specific future dates (i.e., "explicit" guidance). *Id.*

[96] *See* Yellen, *supra* note 1, at 13 (noting the Fed's use of quantitative thresholds for both inflation and unemployment).

[97] *See* Kool & Thornton, *supra* note 73 (describing forward guidance policies that are implicit, using an undefined period, or explicit, setting a defined period during which policies will be sustained).

The FOMC has taken both approaches in its forward guidance.[98] Beginning in December 2012 the FOMC embraced a "state-contingent approach," with defined thresholds for inflation and unemployment.[99] Yet an indication of timing remained in the guidance as well. The time frame was stated alongside a "reaction function," however, which was expected to allow the market to develop its own conclusions as to future Fed action.[100] Well-warranted as such a mixed approach may have been, it also generated some significant degree of uncertainty.[101]

Finally, the frequency, speed, and regularity of Fed press conferences were also increased.[102] Their clarity was likewise enhanced. In these various ways, the Fed embraced communication as a central tool of United States monetary policymaking in the aftermath of the financial crisis.

IV. REGULATORY DIMENSIONS OF CENTRAL BANK COMMUNICATION

As the Federal Reserve Board has come to utilize communication as a tool of monetary policymaking—in parallel with other relevant tools, including changes in short-term interest rates and debt purchases, how might we think about the regulatory implications of such communication? The Fed's communications cannot be dismissed as mere words. To the contrary, they are designed to alter market behavior no less than any other (more direct, more affirmative, or more concrete) tool of monetary policy.

---

[98] Jay G. Stirling, Note, *How to Deal with Hornets: The Administrative Procedure Act and the Social Cost of Carbon*, 100 IOWA L. REV. 853, 869–70 (2015) (explaining history of Fed forward guidance).

[99] Plosser, *supra* note 44, at 349 n.2.

[100] Yellen, *supra* note 1, at 13.

[101] *Cf.* Kool & Thornton, *supra* note 73, at 3–5 (providing an overview of criticisms of central bank communication). Another variable in the construction of central bank forward guidance—including for the Fed—is whether the guidance should address not only the path of interest rates, but also any program of quantitative easing. *See* Yellen, *supra* note 1, at 10 ("It is important to emphasize that the effects of asset purchases also depend on expectations.").

[102] *See* Plosser, *supra* note 44, at 353 (noting the Fed's implementation of post-meeting press conferences).

The Federal Reserve Board, of course, is an administrative agency.[103] It is subject, as such, to the demands of the Administrative Procedure Act (APA)[104] and the strictures of due process more broadly—its independence notwithstanding. To be sure, judicial review of the Fed's regulatory activity has been highly deferential.[105] But it has not been non-existent.[106]

Might we imagine some framework of regulatory discipline—some minimal procedural requirement, some provision for narrow review, or some other regulatory constraint—that ought to be applied to Fed communications? From the vantage of "agency action" as commonly understood, the answer would arguably be no. More specifically, any treatment of Fed communication as "regulatory" in nature might be resisted on three counts.[107]

To begin, one might question whether the FOMC's various communications constitute agency action at all. The Administrative Procedure Act offers a fairly broad definition of

[103] Bd. of Governors of the Fed. Reserve Sys., Frequently Asked Questions, http://www.federalreserve.gov/faqs/about_12799.htm (last updated Feb. 6, 2015).

[104] Pub. L. No. 404, 79 Stat. 237 (1946) (codified as amended in scattered sections of 5 U.S.C.). The APA defines an agency as "each authority of the Government of the United States, whether or not it is within or subject to review by another agency," thus including the Federal Reserve. 5 U.S.C. § 551(1) (2012).

[105] *See* Zaring, *supra* note 45, at 175 ("[T]he Fed's supervisory rules do get reversed occasionally, [but] the FOMC's decisions have generally been exempted from judicial review entirely." (internal citations omitted)).

[106] *See, e.g.*, Bd. of Governors v. Agnew, 329 U.S. 441, 443 (1947) (reviewing a decision of the Board of Governors of the Federal Reserve to remove the director of a national bank under the Banking Act of 1933).

[107] The analysis above focuses on potential objections to the review of Fed *communication*—and, more specifically, communications of the Federal Open Market Committee—as a species of agency action. More generally, one might question whether any monetary policy decision—regardless of whether it is implemented by way of direct action or through "mere" communication—should be subject to judicial review. No less an observer than Augustus Hand found the possibility of such review to be deeply problematic. *See* Raichle v. Fed. Reserve Bank, 34 F.2d 910, 915 (2d Cir. 1929) ("[I]t would be an unthinkable burden upon any banking system if its open market sales and discount rates were to be subject to judicial review."). Given my ultimate interest in the reviewability of administrative agency communications generally, *see infra* notes 168–69 and accompanying text, I leave that question aside. I would question, however, the argument that the primarily "economic" rather than "legal" effects of the Fed's monetary policy decisions justify their insulation from review. The impact of many agency actions may be primarily economic in nature—in ways very much analogous to the impact of the Federal Reserve Board's monetary policymaking.

"agency action." It "includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act."[108] Acts of omission are thus covered no less than acts of commission. It is not limited to formal acts. Finally, it explicitly encompasses conduct that is the functional equivalent of its enumerated categories of agency action. Perhaps as a result, there has been relatively little jurisprudence directed to whether any given agency conduct rises to the level of "agency action." Instead, the fact of such action would almost seem to speak for itself.

But can agency conduct constitute action where the agency is doing nothing more than *speaking*? Even under a forgiving standard, an agency is arguably not acting when its speech is an end unto itself. One might even cast agency action and mere speech as counterpoints, as in the familiar expression: "All talk and no action."[109]

Even if Fed communications do constitute agency action, a second objection might question whether they are final agency action of the sort subject to judicial review and correction.[110] In order for agency action to qualify for review, it must represent "the consummation of the agency's decisionmaking process."[111] In that way, we can be assured that the agency has been given ample opportunity to reach a legally permissible conclusion—including, as appropriate, by revision of any preliminary action or decision.[112]

---

[108] 5 U.S.C. § 551(13) (2012) (defining "agency action").

[109] The law of criminal conspiracy suggests a similar juxtaposition between talk and action, with mere talk protected, and criminal liability ordinarily dependent on fellow conspirators taking at least one "overt act" in furtherance of the conspiracy. *Cf.* Kevin Jon Heller, Note, *Whatever Happened to Proof Beyond a Reasonable Doubt? Of Drug Conspiracies, Overt Acts, and* United States v. Shabani, 49 STAN. L. REV. 111, 111 (1996) (arguing that Supreme Court's decision to eschew the "overt act" requirement from drug conspiracy cases was incorrect).

[110] 5 U.S.C. § 704 (2012) ("[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review.").

[111] Bennett v. Spear, 520 U.S. 154, 156 (1997) (citing Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp., 333 U.S. 103, 113 (1948). Final agency action is also "an action from which legal consequences will flow.' " *Id.* (quoting Port of Bos. Marien Terminal Ass'n v. Rederiaktiebo Llaget Transatlantic, 400 U.S. 62, 71 (1970)).

[112] *See, e.g.*, Belle Co. v. U.S. Army Corps. of Eng'rs, 761 F.3d 383, 387–90 (5th Cir. 2014) (finding final agency action where the agency has expressed its "official position," and where

We can also avoid, in this way, the unnecessary use of scarce judicial resources.[113]

Further, even if FOMC communication can be understood as a form of agency action, it would seem—by its very nature—to be subject to amendment and adjustment. Once offered, Fed statements can be limited, supplemented, amended, or even abandoned. In a sense, that is precisely their point, across each of the FOMC's rate-setting meetings. FOMC communications are never, as such, truly final.

Finally, even if they can fairly be construed as agency action and as final agency action, it is not apparent that Fed communications can be understood as binding in any fashion that would warrant application of the strictures of administrative law.[114] The FOMC's various and sundry post-meeting statements, minutes, policy statements, and other communications clearly seem to lack the "force of law."[115]

Courts have recognized that the requirement that agency action have legal force cannot be applied in too rigid a fashion, lest it function as a loophole for agencies to avoid the demands of administrative review.[116] Agency action has thus been found to have binding effect, based on how it is understood and applied by the relevant agency—rather than its formal characterization. Perhaps more relevant for present purposes, agency action has

---

no more administrative review of the agency's position was available (quoting Fairbanks N. Star Borough v. U.S. Army Corps. of Eng'rs, 543 F.3d 586, 591 (9th Cir. 2008))).

[113] *See* Ciba-Geigy Corp. v. EPA, 801 F.2d 430, 436 (D.C. Cir. 1986) (noting that premature judicial review of agency action "squanders judicial resources since the challenging party still enjoys an opportunity to convince the agency to change its mind").

[114] *See Bennett*, 520 U.S. at 156 (noting that final agency action must result in some legal consequence).

[115] *See* Chrysler Corp. v. Brown, 441 U.S. 281, 295 (1979) ("It has been established in a variety of contexts that properly promulgated, substantive agency regulations have the 'force and effect of law.' "); *see also* Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure Out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 23 (2009) (finding a lack of clarity from the Supreme Court on what constitutes "force of law" in the context of judicial deference to regulatory action).

[116] *See* Abbott Labs. v. Gardner, 387 U.S. 136, 149–54 (1967), *abrogated in part on other grounds by* Califano v. Sanders, 430 U.S. 99 (1977).

sometimes been deemed effectively binding, based on private parties' experience of it.[117]

Even from the latter perspective, though, it is difficult to find anything in the nature of a legal constraint in the FOMC's communications. They are directed to no one in particular. Nor do they prescribe any specific line of action (or even inaction).

Notwithstanding its limitations, perhaps we should not be too quick to abandon the notion that Federal Reserve Board communications have a certain regulatory quality to them. Regardless of whether they constitute regulation properly defined, Fed communications may generate something of the consequence of such regulation.[118] That may be true, in fact, even with reference to each of the three key metrics just reviewed. A consideration of what might be thought of as the *nature*, the *function*, and the *impact* of Fed communications in the face of the financial crisis thus suggests a potentially more nuanced evaluation of such communication as *agency action*, as *final*, and as *binding*.

A. THE NATURE OF THE FED'S CHANGES IN COMMUNICATIONS POLICY

With the potential exception of its 2012 policy statement, the FOMC's post-meeting statements, meeting minutes, press conferences, and other communications do not naturally fall within the scope of our traditional conceptions of agency action. When we step back to consider both the internally- and externally-oriented nature of the changes that the Fed made in its communications strategy during the financial crisis, however, the question is arguably a closer one.

Internally, the FOMC's changes might be said to represent some regularization of its decisionmaking processes—and perhaps

---

117 *See* Charles H. Koch, Jr. & Richard Murphy, *Finality*, 4 ADMIN. L. & PRAC. § 12:20 (3d ed. 2015) (noting that agency and party have different experiences with finality depending on their perspectives); *see also* Appalachian Power Co. v. EPA, 208 F.3d 1015, 1021 (D.C. Cir. 2000) ("If an agency . . . leads private parties or State permitting authorities to believe that it will declare permits invalid unless they comply [with the putatively final document], then the agency's document is for all practical purposes 'binding.' ").

118 *See supra* notes 73–75 and accompanying text.

of its patterns of behavior more generally. This is perhaps most evident in the aforementioned Statement on Longer-Run Goals and Monetary Policy Strategy. Rather than leaving future policymaking entirely up to the FOMC's exercise of discretion at any given meeting, the Statement seeks to define the terms of FOMC decisionmaking in the future.

The Statement might thus be understood to shift decisionmaking from the open-ended exercise of Fed discretion in supporting the economy to something more regularized and defined. Both full employment and moderated inflation are enumerated as relevant goals.[119] A commitment is made to adopt a balanced approach to their pursuit.[120] And the distinct time horizons for achieving an appropriate level of each are acknowledged.[121] Perhaps most notably, for the first time a specific numeric target is set for inflation—and a numeric range suggested for unemployment—bringing yet further regularization to future FOMC deliberations and decisionmaking.[122]

The FOMC's more detailed (and farther-reaching) post-meeting statements are to similar effect. While nominally speaking only to its current views and expectations regarding rate-setting decisions at subsequent meetings,[123] those statements can be analogized to the Statement on Longer-Run Goals and Monetary Policy Strategy in their introduction of greater regularity and consistency in the FOMC's internal planning and decisionmaking.

The external nature of the Fed's changed approach to communications is simply the corollary of the latter. With increased *internal* regularity, the external predictability of Fed

---

[119] *See* Yellen, *supra* note 1, at 12 ("[The] statement laid out, for the first time, the rates of inflation and unemployment that the FOMC considers consistent with the [FOMC's] dual mandate.").

[120] *Id.*

[121] *Id.* (noting the long-term strategy of monetary policymaking and emphasizing gradual nature of the change).

[122] *See* FED. STATEMENT, *supra* note 92 (setting goal for inflation at 2% and unemployment between 5.2% and 5.5%). The FOMC further states its intention to "reaffirm [the] principles" contained in the Fed. Statement—with appropriate adjustments—at its organizational meeting each January. *Id.*

[123] *See* Yellen, *supra* note 1, at 2–4 (commenting on the Fed's practice of providing post-meeting statements, which provide insight into FOMC policy decisions).

action necessarily grows as well. From an external perspective, though, the nature of the Fed's changes in communication strategy also represent something more than improved predictability.

First, the Fed's more robust communication entails an enhanced degree of *notice*-giving about FOMC decisionmaking. At the most obvious level, FOMC communications give notice of its near-term policy intentions.[124] But even beyond the intentions of which they give explicit notice, FOMC communications allow Fed watchers to evaluate the prospects for FOMC action more generally. Drawing on the decisionmaking criteria and benchmarks identified by the FOMC, observers can construct a kind of "reaction function"[125]—with consequently greater notice as to the Fed's likely decisionmaking than prior to the financial crisis.[126]

More concretely, the increased notice-giving inherent in the Fed's post-crisis communications policy can be seen in the altered timing for the release of FOMC minutes and other information. With the more timely release of such information—and, more particularly, its release in advance of (rather than after) the following meeting—such communications truly give notice in a way that they previously did not, and could not.[127]

Beyond increased notice, the changed nature of Fed communication from an external perspective turns on the increased *reason*-giving in the FOMC's communications. By more openly evaluating relevant factors, and how they cut for or against Fed action today and in the future, the FOMC has significantly

[124] The Fed's policy statements, such as its Statement on Longer-Run Goals and Monetary Policy Strategy, are inherently based on factors that are certain only at the moment in time in which they are considered, even though the statement "reflects the [FOMC's] longer-run goals, its midterm outlook, and its assessment of risks . . . that could impede the attainment of [its] goals." FED. STATEMENT, *supra* note 92.

[125] Yellen, *supra* note 1, at 13.

[126] *See id.* at 4–9 (describing evolution of communications from "never explain" to growing transparency).

[127] *See generally* Yellen, *supra* note 1 (giving general background of increased communication and transparency); *see also Meeting Calendars, Statements, and Minutes (2010–2016)*, BOARD OF GOVERNORS OF THE FED. RESERVE SYS., http://www.federalreserve.gov/omnetarypolicy/Formccalendars.htm (last updated Sept. 17, 2015) (listing meetings and release dates prior to those meetings).

enhanced the quality (or at least the visibility) of its reasoned decisionmaking.[128]

The nature of the Fed's post-crisis communications strategy, then, reflects increased regularity in the FOMC's internal deliberations. Further, it is characterized by a greater degree of both explicit and implicit notice to the market, in terms of future Fed action. Finally, it reflects a heightened emphasis on reason-giving in FOMC decisionmaking.

As is obvious to even the most casual student of administrative law, the foregoing represent just the features—both internal and external—that the statutory and jurisprudential regime of administrative law generally demands from administrative agencies, in support of their relevant actions. When agencies engage in rulemaking, thus, we expect them to give adequate notice of their intended action.[129] Further, they must offer a "concise general statement of [the] basis and purpose" of the proposed rule.[130] Finally, their decision must be grounded in "reasoned decisionmaking," and be supported by a "reasoned analysis."[131]

To be clear, my point is not that the Federal Reserve's shift toward behavior more characteristic of traditional agency action necessarily renders it so. Even if I talk like a duck, I may not be a duck. The FOMC's significant strides in the direction of procedural regularity, notice, and reasoned decisionmaking, on the other hand, may offer grounds for identifying a certain regulatory quality in its communications policy. An account of Fed communications as a species of agency action becomes even more plausible, however, when we consider the function and impact of that communication.

---

[128] FED. STATEMENT, *supra* note 92. *See also* Yellen, *supra* note 1, at 3 (stating "my colleagues and I continue to spend many hours laboring over the few hundred words in this statement, which are then extensively analyzed only minutes after their release").

[129] *See* 5 U.S.C. § 553(b)–(c) (2012) (providing notice requirements for rules, which are to be published in the Federal Register).

[130] *Id.* § 553(c).

[131] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42, 52 (1983).

B. THE FUNCTION OF FED COMMUNICATIONS

Beyond the ways in which the *nature* of the Fed's post-crisis communication policy gives its pronouncements something more of the quality of agency action, the *function* of Fed communication holds further implications for their regulatory quality. More precisely, when we appreciate the function of FOMC communications as a tool of monetary policy, the question of whether they might constitute *final* agency action becomes a closer call.

At the most basic level, FOMC communications might be understood as simply an exercise in information-giving. Through its statements, minutes, press conferences, and the like, the Fed provides the market with information that it would not otherwise have. Properly understood, however, the function of Fed communications goes well beyond the dissemination of non-public information.

The operative function of FOMC communications is to change behavior.[132] It does not seek such change, moreover, merely in the commonplace sense of informing future action by market participants. Rather, FOMC communications seek to change the immediate behavior of relevant market participants.[133]

Recall the model of Fed communication outlined above. In articulating its expectations as to future adjustments (or the lack thereof) in short-term rates, the FOMC aims to shift the long-term rates that are an aggregation of the short-term rates expected to be in place over the relevant long-term.[134] By shaping market expectations as to the likely path of short-term rates, thus, the FOMC is able to move expectations as to long-term rates.[135] That, in turn, alters investment and purchase decisions both directly and indirectly.

---

[132] For an example of central bank communication's impact on market behavior, see BLINDER ET AL., *supra* note 15, at 9.

[133] *See, e.g.*, *id.* (noting the positive effects of Chairman Bernanke's correction of his "misreported" statement on the markets).

[134] *See supra* notes 73–75 and accompanying text.

[135] *See* Yellen, *supra* note 1, at 6 ("What *is* important is the public's expectation of how the FOMC will use the funds rate to influence economic conditions over the next few years.").

At heart, this model is an exercise in coordination. In contrast with settings in which the interests of relevant market participants are fundamentally misaligned, the dynamic here is that of a coordination game, in which players' best interests are achieved by the proper alignment of their choices and behaviors.[136] The operative challenge, as a result, is a matter of setting expectations.[137] Given limits on communication—be they structural or simply a result of the number of relevant players—how can the expectations of each player be coordinated around a common (and mutually beneficial) strategy?

Long-term interest rates are determined in some significant part, then, by the expectations of the collected universe of market participants (or at least a market-moving subset of that universe). Those expectations can be shaped, however, by Fed communications.[138] More specifically, by providing a focal point for long-term rates at a particular level, FOMC communications may serve to coordinate market expectations around that result—and thereby achieve it.[139]

What is critical for present purposes is that Fed communications about the future are not, in this account, about the future. To the contrary, they are about market participant behavior today. In fact, one might state the point even more strongly: Beyond concerns of diminished credibility,[140] if the FOMC's communications have effectively served their function, there is no need for it to actually follow through on its expressed intentions. Rather, the work that its communications are meant

---

[136] *See* Robert B. Ahdieh, *Law's Signal: A Cueing Theory of Law in Market Transition*, 77 S. CAL. L. REV. 215, 234–36 (2004) (explaining the dynamics of coordination). *See generally* Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000) (arguing that the expressive use of law may help solve coordination problems).

[137] Ahdieh, *supra* note 136, at 230–32.

[138] *See* Woodford, *supra* note 12, at 4 ("Better information on the part of market participants about central-bank actions and intentions should increase the degree to which central-bank policy decisions can actually affect these expectations, and so increase the effectiveness of monetary stabilization policy.").

[139] *See* Blinder et al., *supra* note 9 ("[M]anaging expectations is a central part of monetary policy . . . ."); Holmes, *supra* note 88, at 24, 28 (describing the use of central banks communication to influence expectations and to influence others to affect change indirectly).

[140] *See supra* notes 76–79 and accompanying text.

to do will already be done—regardless of what it ultimately does or does not do.[141]

This peculiarity of the function of Fed communication brings us back to the question of whether such communication might constitute final agency action. In some significant sense, the FOMC's communications truly are final. Their work is done the moment they are issued. As a formal matter, of course, they are subject to future agency deliberation, re-evaluation, modification, action, or inaction. In reality, however, none of that is true. The interest rate path the FOMC has promised may or may not ultimately be followed. That is inconsequential as to its communications, however, as the work of the latter is done—and final.

C. THE IMPACT OF FED COMMUNICATIONS

As suggested above, there can be little question that Fed communications are not formally binding on market participants. It is true, as David Zaring points out, that they represent directives to the New York Federal Reserve Bank's open market operations desk.[142] Beyond that narrow mandate, however, they prescribe no conduct whatsoever. In a sense, it is difficult even to identify *whom* they might bind—or to what standard of conduct.

On the other hand, there can be little question that Fed communications impact the behavior of private market participants in significant ways.[143] Given the decisive influence of both short-term and long-term interest rates on lending, investment, purchase, and cash-holding decisions, the Fed's communication of target rate decisions should be understood to have a significant impact on private conduct.

Beyond any such direct effect of interest rate decisions, moreover, the dynamic of coordination can also be understood to

---

[141] *Cf.* Woodford, *supra* note 12, at 4 ("Insofar as the significance of current developments for future policy are clear to the private sector, markets can to a large extent 'do the central bank's work for it' . . . .").

[142] *See* Zaring, *supra* note 45, at 160 (noting that open market orders are implemented by "traders who staff New York Fed's open market operations desk").

[143] *Cf. supra* Part IV.B.

have relevance here. To the extent individual market participants' decisions to lend, to invest, to make purchases, and to accumulate cash earnings are intertwined with the parallel decisions of their peers, the effective constraint generated by Fed communications may be significant.

As to many questions, the decisionmaking of any given market participant is independent of that of other market participants. Institutions and individuals may elect an array of distinct choices, even in the face of uniform market conditions. As to many crucial financial decisions, on the other hand, the optimal strategy may be a coordinated one.[144] While some embrace a counter-cyclical approach to investment,[145] the very existence of a *cycle* suggests some norm of alignment. The return on an investment often will be linked, thus, to the volume of investment generally.[146] The same might be said of the choice between investment and savings, with accrued cash likely to hold less appeal as market investment is growing—and vice-versa.[147] The choice among alternative trading systems—or market platforms more generally—also exhibits something of this coordination dynamic.[148]

Where a dynamic of coordination is at work in market participants' decisionmaking, Fed communications that move long-term interest rates can be understood to have a relatively stronger coercive quality to them. Given the focal quality of FOMC statements on the direction of interest rates, the Fed's capacity to move the market is significant. Once it intervenes in that fashion, in turn, the coordination dynamic at work ensures that the lending, investment, and other decisions of any given market participant are pressed (or pulled) in that direction as well. It

---

[144] *See, e.g.*, Robert B. Ahdieh, *The Visible Hand: Coordination Functions of the Regulators State*, 95 MINN. L. REV. 578, 587 (2010) ("[B]anks can be expected to coordinate around either a strategy of lending funds or of withholding them.").

[145] *Cf.* Josef Lakonishok, Andrei Shleifer & Robert W. Vishny, *Contrarian Investment, Extrapolation, and Risk*, 49 J. FIN. 1541 (1994) (exploring utility of contrarian investing).

[146] *See* Ahdieh, *supra* note 144, at 587–88 (explaining the role of coordination in maintaining market stability).

[147] *See id.* ("[D]epending on relevant expectations, hedge funds and private equity investors will coordinate around a policy of investment or noninvestment (or even divestment).").

[148] *See id.* at 588 n.40 (offering other accounts of coordination in financial markets).

would be wrong to say they are *bound* to go in that direction. But the degree of compulsion should not be underestimated.[149]

Perhaps also relevant to the question of the binding effect of Fed communications are the intentions that stand behind them. As described above, FOMC communications are designed to move the market in precisely the ways that private market participants feel themselves pressed.[150] An intent to bind is not sufficient to render Fed communications legally binding, of course. That the Fed's communications are designed for that purpose, on the other hand, helps support a conception of them as having *some* binding effect.

To be clear, my claim is not that Fed communications are binding in any formal or legal sense. But we do well to attend to their potential to impact market participants in ways functionally equivalent to such binding constraint. That may not warrant treatment of the Fed's communications as identical to agency action as conventionally understood. It may, however, favor the extension of *some* regulatory review to such communication.

* * *

What are the implications of the foregoing? As we have seen, the Fed's post-crisis embrace of communication as a tool of monetary policy exhibits both internal and external qualities akin to conventional agency action. Further, those communications are final in ways that resonate with the APA's requirements for judicial review of agency action under 5 U.S.C. § 704. Finally, they create something of a binding effect on market participants, however lacking they are in formal legal force. Even so, it remains unclear where Fed communications might fit within the current strictures of administrative law jurisprudence.

---

[149] *But see* Flue-Cured Tobacco Coop. Stabilization Corp. v. EPA, 313 F.3d 852, 861 (4th Cir. 2002) ("[I]f we were to adopt the position that agency actions producing only pressures on third parties were reviewable under the APA, then almost any agency policy or publication issued by the government would be subject to judicial review.").

[150] *See supra* notes 132–39 and accompanying text.

Most plausibly, Fed communications might be evaluated as a species of so-called "guidance document."[151] Review of such documents is authorized when they rise to the level of "final agency action."[152] The assessment of finality, in turn, revolves around the nature of any such document as (1) the " 'consummation' of the agency's decisionmaking process," rather than a "merely tentative or interlocutory" pronouncement, and (2) conduct "by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.' "[153]

As discussed above, there is a plausible argument to be made that Fed communications meet the requirements of each of these prongs. They are the consummation of the relevant process in that they are the product of internal agency deliberation and decisionmaking, and they have a significant impact on the external market.[154] They exhibit something of a binding effect on market participants, despite their formal lack of legal force.[155] And, such private market experience of an agency decision, as noted above, has been acknowledged as one basis for ruling that a given agency action has the "force of law."[156] Especially given the Supreme Court's encouragement of a "pragmatic" and "flexible" approach to the question of finality[157]—one oriented to the "practical results of an agency's action"—an account of the Fed's

---

[151] The Administrative Procedure Act thus exempts from the requirements of notice-and-comment rulemaking both "interpretative rules" and "general statements of policy"—more commonly referenced under the broader headings of nonlegislative rules or guidance documents. 5 U.S.C. § 553(b)(3)(A) (2012); *see also* David L. Franklin, *Legislative Rules, Nonlegislative Rules, and the Perils of the Short Cut*, 120 YALE L.J. 276, 286 (2010) (stating that nonlegislative rules are exempt from notice and comment).

[152] 5 U.S.C. § 704 (2012).

[153] Bennett v. Spear, 520 U.S. 154, 177–78 (1997) (internal citations omitted).

[154] *See supra* Parts IV.B–C.

[155] *See* Koch & Murphy, *supra* note 117, § 12:20 ("Notwithstanding any formal appeal of this argument, courts have sometimes determined that a nonlegislative rule is final and subject to review based, among other factors, on its practical consequences for regulated parties.").

[156] *See* Gwendolyn McKee, *Judicial Review of Agency Guidance Documents: Rethinking the Finality Doctrine*, 60 ADMIN. L. REV. 371, 383–84 (2008) (commenting on the *Bennett* test, under which an agency's nonlegislative documents could be subject to review because of the expectations of the agency and parties as to the document's binding force); *see also supra* note 117 and accompanying text.

[157] Abbott Labs. v. Gardner, 387 U.S. 136, 149–50 (1967).

communications as a species of guidance document and as final agency action is at least plausible.

With the potential exception of the Statement on Longer-Run Goals and Monetary Policy Strategy, on the other hand, the Fed's communications do not fall squarely within the range of guidance documents and nonlegislative rules that courts have been willing to subject to administrative review.[158] They are not "policy" statements designed for the ages, but speak only to a distinctly delimited period of time. They are not binding on either the agency or market participant. And however great their consequences may be, their impact is not distinctly legal in nature.

My argument, as such, is at once narrower and broader than a claim that Fed communications should be subject to the existing strictures on agency action. It is narrower, in that I do not suggest that Fed communication meet the requirements for judicial review within the current framework of administrative law. My argument is broader, on the other hand, in that I believe the case of Fed communication may require us to rethink the scope of those current constraints. If the Federal Reserve Board is engaged in conduct that is internally and externally akin to other agency action, is engaged in such conduct not only for the purpose of altering private market participant behavior, but with an eye to doing so immediately, and is having just that impact, we should not be too quick to excuse its conduct from at least some degree of oversight.

The proper scope of any such oversight—falling somewhere between complete insulation from review and the full scope of "hard look" review[159]—is beyond the purview of this brief Article. There can be little question that such review would entail serious

---

[158] *See supra* notes 151–53.

[159] *See* Louis J. Virelli III, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 727–28 (2014) (defining "hard look" review as a " 'searching and careful' process by which a court reviews an agency's policymaking process to ensure that it does not exceed the proper bounds of administrative discretion" (quoting Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402, 415–17 (1971), *abrogated in part by* Califano v. Sanders, 430 U.S. 99 (1977))).

difficulties.[160] This begins with the need to determine its appropriate boundaries. Clearly not *all* agency communication warrants review.[161] Only some subset of communications—which emerge from some process of agency deliberation, are designed to exert some immediate effect, and are fairly consequential in that regard—would be proper targets for review.[162] Yet drawing the line as to each of those criteria is far from easy. Add to that other potential variables, including whether it is the perspective of the relevant agency or the recipients of the given communication that is the appropriate focus, and the line-drawing exercise becomes even more challenging.[163]

The independent status of the Federal Reserve Board introduces a further layer of complexity. As a matter of institutional design, is the appropriate forum for any evaluation of Fed communications the courts, the Office of Information and Regulatory Affairs or elsewhere in the Office of Management and Budget or the Executive Office of the President, or somewhere else entirely? Especially given the foregoing discussion, one might also wonder whether any review directed to Fed communications should be conceived as a procedural or substantive evaluation.[164] Is the Fed merely obliged to engage in certain procedures in its use of communication as a policy tool? Or could we imagine (with obvious difficulty) some substantive appraisal of the "reasoned analysis"[165] behind the Fed's policy choice?

In the final analysis, though, such complexities should not distract us from the fundamental features of the Federal Reserve Board's decision to embrace communication as a tool no less forceful and effective in impacting private market behavior than

---

160 *See, e.g.*, *id.* at 737 (noting the Supreme Court's difficulty in developing a unified theory of judicial review of agency action).

161 *Cf.* Zaring, *supra* note 45, at 175 (noting that the bounds of institutional competencies warrant deferential judicial review).

162 *See supra* Part IV.C.

163 *See supra* notes 117, 156 and accompanying text.

164 *See generally* Mark Seidenfeld, *Substituting Substantive for Procedural Review of Guidance Documents*, 90 TEX. L. REV. 331 (2011) (proposing an alternative mode of judicial review of agency nonlegislative rules).

165 *See supra* note 128 and accompanying text.

its traditional, more affirmative interventions.[166] If such explicit agency action is deserving of some review and constraint, the complete insulation of Fed communications from review becomes difficult to defend.[167] And perhaps ultimately, difficult to sustain.

V. CONCLUSION

It is not, I will be the first to confess, easy to process the notion of mere communication as agency action. It is even more difficult to wrap one's mind around the idea that an agency's communications might be subject to judicial review. With an eye to the Federal Reserve Board's post-financial crisis embrace of communication as one of its key tools in shaping United States monetary policy, however, this Article suggests the need at least to consider the possibility.

But the argument for engaging that possibility ultimately goes beyond the case of Fed communications. Important characteristics of the dynamic at work in Fed communications operate in other areas as well. In areas characterized by coordination, by network externalities, or by a strong orientation to standard-setting, governmental communications—and other interventions with no apparent regulatory force—may have an impact no less than that of coercive regulation.[168] From Internet standard-setting to the avoidance of financial panics, and from file format interoperability to the facilitation of optimal innovation, communication may serve an important *regulatory* function, and warrant our attention and evaluation as such.[169]

Exploration of these and analogous settings lies well beyond this brief Article's attempt to suggest the possibility of an expanded conception of agency action. These examples help to emphasize, however, the need to reconsider our traditional notions

---

[166] *See supra* Part III.

[167] I fully appreciate, as acknowledged above, that some would resist review of *any* Fed action in pursuit of its monetary policy mandate. *See supra* note 107.

[168] *See supra* notes 132–37.

[169] The argument for greater judicial review of agency communications may be even greater outside the context of the Federal Reserve Board, given separate arguments for the insulation of monetary policy from judicial review. *See supra* note 107.

of the scope of agency action subject to judicial review and constraint. In the growing number of areas in which the dynamics of coordination are strong, in which network externalities play a significant role, or in which standard-setting is essential, critical agency interventions may take the form of mere communication. For all its potential impact, such communication may warrant our close attention.