

# SIMPLISTIC STRUCTURE AND HISTORY IN *SEILA LAW*

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*In Seila Law LLC v. Consumer Financial Protection Bureau, the Supreme Court split 5–4 on appointing party lines in striking down for-cause removal protections for the Bureau’s single Director as violating the constitutional separation of powers. Chief Justice Roberts’s majority opinion expounded a novel principle: Significant executive power may not be concentrated in any single individual in the executive branch unless that individual is removable at-will by the President. This Note argues that the majority’s usage of structure and history to constitutionalize this principle was deeply flawed. It is unconstrained by any particular interpretive commitments. Further, it is internally inconsistent, logically flawed, historically opportunistic, and unsupported by a pragmatic consideration of the issue. And the Court’s subsequent decision, Collins v. Yellen—extending Seila Law to invalidate removal protection for the Director of the Federal Housing Finance Agency—has only exacerbated Seila Law’s flaws. I conclude with reflection on agency independence post-Seila Law and a call for pragmatic deference to the political branches.*

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## INTRODUCTION

“[The Framers’] solution to governmental power and its perils was simple: divide it.”

—Chief Justice Roberts, for the majority in *Seila Law*, 2020<sup>1</sup>

“The majority offers the civics class version of separation of powers—call it the Schoolhouse Rock definition of the phrase.”

—Justice Kagan, dissenting in *Seila Law*, 2020<sup>2</sup>

“Gonna have a three-ring circus someday,

. . .

*Guess I got the idea right here at school.*

*Felt like a fool when they called my name,*

*Talkin’ about the government and how it’s arranged,*

*Divided in three like a circus.*

*Ring one, Executive,*

*Two is Legislative, that’s Congress.*

*Ring three, Judiciary.*

*See it’s kind of like my circus, circus.”*

—Schoolhouse Rock, *America - Three Ring Government*, 1979<sup>3</sup>

*Seila Law LLC v. Consumer Financial Protection Bureau* (CFPB) marked the first (and only) time that the popular children’s television show Schoolhouse Rock has appeared in the United States Reports. In *Seila Law*, the Court took up the issue of whether the CFPB’s structure, which provided its single Director with for-cause removal protection, violated the Constitution’s separation of powers. The Court split 5–4 on appointing party lines with a majority opinion by

<sup>1</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2202 (2020).

<sup>2</sup> *Id.* at 2226 (Kagan, J., concurring in part and dissenting in part).

<sup>3</sup> *Schoolhouse Rock!: Three Ring Government* (ABC television broadcast Mar. 6, 1979), <https://www.youtube.com/watch?v=tePd98CbbMk>.

Chief Justice Roberts finding that it did. Schoolhouse Rock's Supreme Court debut was far from the only—let alone the most significant—novelty of *Seila Law*. Despite promising the opposite, *Seila Law*, like a travelling circus,<sup>4</sup> brought many novelties to the Court's removal power jurisprudence. The Court for the first time adopted as significant the difference between an agency being headed by a single director rather than a multi-member commission. The majority adopted a novel structural argument against concentration of executive power in any single individual other than the President, unless removable at-will. And the majority struck off a beaten path of deference to the elected branches' choices regarding the structure and functioning of the administrative state. The Court's subsequent decision in *Collins v. Yellen*, extending *Seila Law* to invalidate the single-director structure of the Federal Housing Finance Agency, only exacerbates the profound textual, structural, historical, and pragmatic issues with *Seila Law*'s novel principle.<sup>5</sup>

There are many possibilities regarding what is reasonable to hope for from the Court in constitutional cases. One might hope that the Court hews to a particular interpretive method so as to promote consistency, diminish uncertainty, and cabin discretion across cases.<sup>6</sup> One might hope that the Court simply lets the democratically elected branches do the jobs the Constitution assigns to them unless constitutional text unambiguously forbids their conduct.<sup>7</sup> More simply, one

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<sup>4</sup> See, e.g., Janet M. Davis, *America's Big Circus Spectacular Has a Long and Cherished History*, SMITHSONIAN MAG. (Mar. 22, 2017), <https://www.smithsonianmag.com/history/americas-big-circus-spectacular-has-long-and-cherished-history-180962621> (“[N]ovelty determined a [travelling circus’s] salability.”).

<sup>5</sup> *Collins v. Yellen*, 141 S. Ct. 1761 (2021), *aff’g in part, rev’g in part* *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc).

<sup>6</sup> Compare Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws* (advocating originalism as the best approach to constrain judicial discretion), in *A MATTER OF INTERPRETATION* 3, 3–47 (Amy Gutmann ed., 1997), Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989) (same), and William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976) (critiquing living constitutionalism as fundamentally unconstrained), with David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877, 879 (1996) (“The common law approach restrains judges more effectively, is more justifiable in abstract terms than textualism or originalism, and provides a far better account of our practices.”).

<sup>7</sup> See, e.g., ADRIAN VERMEULE, *JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION* 233 (2006) (arguing from an institutional competency perspective that “[c]ourts should enforce the Constitution only where . . . no reasonable basis for interpretive dispute exists, because the constitutional text is clear and specific”); James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (arguing that courts should not invalidate legislation unless its unconstitutionality is “so clear that it is not open to rational question”). See generally Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CALIF. L. REV. 519

might hope for reasoned decisionmaking: that the Court makes logical decisions and treats sources bearing upon the issue—text, precedent, history, etc.—fairly, consistently, and accurately so as to preserve and bolster the Court’s institutional legitimacy.<sup>8</sup> Similarly, one might hope that the Court reaches a decision that produces good results that will improve society—for example, by making government function more fairly, efficiently, and effectively.<sup>9</sup>

This Note illustrates how *Seila Law* fails on all the above metrics. In contrast to Justice Kagan’s sweeping dissent, this Note focuses narrowly and directly on *Seila Law*’s novel constitutional principle and in so doing exposes an array of additional interpretive, historical, and logical issues that buttress Justice Kagan’s broader reasoning. Part I utilizes precedent to lay out text, structure, and history bearing upon the question of removal protection for executive officers and summarizes *Seila Law*. Part II argues that the majority opinion’s simplistic usage of history and structure is interpretively unsound. The majority opinion is incompatible with any cohesive commitment to original public meaning originalism. It treats text, history, and structure inconsistently, inaccurately, and opportunistically. And it creates many practical issues that illustrate precisely why the judicial branch—less knowledgeable about agency design and operation than the elected branches—should not be making such incursions. Part III turns to the future: It illustrates the harm caused by *Seila Law* and argues that the Court should revitalize a deferential posture in such separation-of-powers cases.

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(2012) (reflecting on Thayerian deference and evaluating its rise and fall in precedent and scholarship).

<sup>8</sup> See, e.g., Charles L. Barzun, *The Forgotten Foundations of Hart and Sacks*, 99 VA. L. REV. 1, 9 (2013) (noting the Legal Process School’s “insistence that despite the indeterminacy of some legal materials, adjudication can be rational insofar as those materials—whether case law, statutes, or the Constitution—are applied in a principled manner”).

<sup>9</sup> See, e.g., RICHARD A. POSNER, *THE FEDERAL JUDICIARY: STRENGTHS AND WEAKNESSES* 80 (2017) (arguing that when judges are not specifically bound by constitutional provisions “their aim should be to try to improve the American society”); STEPHEN BREYER, *MAKING OUR DEMOCRACY WORK* 75 (2010) (“[T]he court must interpret the [Constitution] in ways that help that document work well for Americans, and the public must accept the Court’s decisions as legitimate.”); cf. Adam M. Samaha, *Dead Hand Arguments and Constitutional Interpretation*, 108 COLUM. L. REV. 606, 645–55 (2008) (discussing arguments that the Constitution’s “good content” can justify continuing to treat it as our supreme law despite society’s vast temporal distance from its adoption).

## I

## REMOVAL OF EXECUTIVE OFFICERS

*"I've yet to see any problem, however complicated, which when you looked at it the right way didn't become still more complicated."*

—Poul Anderson, 1957<sup>10</sup>

This Part utilizes Supreme Court precedent to foreground interpretive sources bearing on removal of executive officers. This analysis exposes significant complexities regarding the issue which the *Seila Law* majority elides. Section I.A addresses attempts by Congress to involve itself in individual removal decisions. Section I.B addresses for-cause removal protection. Section I.C turns to litigation over the CFPB. Section I.D examines how *Collins v. Yellen* extended *Seila Law* in finding the structure of the Federal Housing Finance Agency unconstitutional.

A. *Senate Consent or Congressional Direction*

In 1926, the Court considered for the first time the issue of whether Congress could condition removal of an executive officer on Senate consent.<sup>11</sup> Specifically, an 1877 statute regarding postmasters provided that they “shall be appointed *and may be removed* by the President *by and with the advice and consent of the Senate*, and shall hold their offices for four years unless sooner removed or suspended according to law.”<sup>12</sup> Myers was appointed as a postmaster under this provision. When the Postmaster General removed him from office (at the direction of the President) three years into his term, the Senate did not consent to Myers’s removal.<sup>13</sup> The Court understood the case as “present[ing] the question whether under the Constitution the President has the *exclusive* power of removing executive officers” appointed with consent of the Senate.<sup>14</sup> In reaching its decision, the Court relied upon Article II’s text and history.

Because, as the *Myers* Court recognized, there is “no express provision” for removal of executive officers in the Constitution except by impeachment,<sup>15</sup> the Court made text-based structural arguments from provisions of Article II. Invoking the Vesting Clause—which vests “[t]he executive power” in the President<sup>16</sup>—Chief Justice Taft wrote for the majority that officers’ statutory duties “come under the gen-

<sup>10</sup> Poul Anderson, *Call Me Joe*, ASTOUNDING SCI. FICTION, Apr. 1957, at 8, 12.

<sup>11</sup> *Myers v. United States*, 272 U.S. 52 (1926).

<sup>12</sup> Act of July 12, 1876, ch. 179, 19 Stat. 80 (emphasis added).

<sup>13</sup> *Myers*, 272 U.S. at 106–07.

<sup>14</sup> *Id.* at 106 (emphasis added).

<sup>15</sup> *Id.* at 109.

<sup>16</sup> U.S. CONST., art. 2, § 1.

eral administrative control of the President by virtue of the general grant to him of the executive power” and reasoned that the President “may properly supervise and guide their construction of the statutes under which they act in order to secure . . . unitary and uniform execution of the laws.”<sup>17</sup> The Court then addressed when the President must be able to remove officers: “Finding [executive] officers to be *negligent and inefficient*, the President should have the power to remove them.”<sup>18</sup> Relying on the Take Care Clause—which provides that the President “shall take Care that the Laws be faithfully executed”<sup>19</sup>—the Court stated that allowing the Senate to block removal in such circumstances would mean the President could “not discharge his own constitutional duty of seeing that the laws be faithfully executed.”<sup>20</sup>

Turning to history, *Myers* drew upon Founding Era debates over removal that culminated in the Decision of 1789, which seemingly decided the precise question before the Court. The First Congress quickly confronted the indeterminacy of constitutional text regarding removal power in the context of debates over the creation of a Department of Foreign Affairs.<sup>21</sup> A provision in the draft legislation would have granted the President authority to remove the Department’s head.<sup>22</sup> Debate in the House regarding this issue focused on several conflicting theories: “executive-power theory” proponents viewed the Vesting and Take Care Clauses as giving the President power to remove officials; “advice-and-consent theory” proponents thought the necessity of Congress’s consent to appoint made it necessary to remove by implication; “congressional-delegation

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<sup>17</sup> *Myers*, 272 U.S. at 135.

<sup>18</sup> *Id.* (emphasis added). This phrasing was no coincidence: Among other examples, the Federal Trade Commission Act had twelve years earlier specified that Commissioners could “be removed by the President for inefficiency, neglect of duty, or malfeasance in office.” Pub. L. No. 63-203, 38 Stat. 718 (codified as amended at 15 U.S.C. § 41). Justice Brandeis’s *Myers* dissent cited that Act precisely for its removal standard. 272 U.S. at 262 n.30 (Brandeis, J., dissenting).

<sup>19</sup> U.S. CONST., art. 2, § 3.

<sup>20</sup> *Myers*, 272 U.S. at 135; *see also id.* at 164 (emphasizing constitutional issue posed by Senate consent). In a forthcoming article, Cass Sunstein and Adrian Vermeule identify *Free Enterprise Fund* as “plant[ing] a seed” for the idea that the Take Care Clause should shape the removal power, but, as the quote above makes clear, this suggestion elides *Myers*’s implicit invocation of the Take Care Clause. *See* Cass R. Sunstein & Adrian Vermeule, *The Unitary Executive: Past, Present, Future*, SUP. CT. REV. (forthcoming 2021) (manuscript at 16), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3666130](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666130).

<sup>21</sup> *See* Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 476–77 (2012).

<sup>22</sup> *See id.* at 477 & n.295 (noting the text of the provision specified the Secretary was “to be removable by the President” (quoting 1 ANNALS OF CONG. 370–71 (1789) (Joseph Gales ed., 1834))).

theory” proponents believed Congress could vest removal power in the President; and “impeachment theory” proponents thought impeachment was the only way to remove officers.<sup>23</sup>

After a month of debate, the House ultimately passed a version of the legislation without any grant of executive power authorizing the President to remove executive officers—a seeming recognition of the President’s *inherent* authority to do so.<sup>24</sup> As the Court in *Myers* put it, Congress effectively declared that the President can “remove the Secretary of Foreign Affairs without the advice and consent of the Senate.”<sup>25</sup> Thus, *Myers* viewed the Decision as a rejection of the advice-and-consent theory and a limited endorsement of the executive-power theory. That said, *Myers* did not view the Decision as anything more.<sup>26</sup> History supports that narrow position. Even Sai Prakash—a proponent of the unitary executive—argues that the Decision cannot reasonably be understood as precluding Congress from enacting limitations such as removal protections because they were never discussed.<sup>27</sup>

Finally, the *Myers* Court engaged in what present-day scholarship would describe as an evaluation of whether “acquiescence” had occurred. The core of the idea is that “if one of the branches has acted consistently” in a way that might impinge upon the powers of another branch and that other branch “has ‘acquiesced’ in that action,” then that historical practice is indicative of the behavior being constitutionally permissible.<sup>28</sup> In such an analysis, courts engage with what Justice Frankfurter described as “the gloss which life has written” upon “the words of the constitution.”<sup>29</sup> In *Myers*, the Court noted multiple Presidents objected in constitutional terms to attempts by Congress to insert itself into individual removal decisions<sup>30</sup>: In these instances, the

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<sup>23</sup> Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1023 (2006).

<sup>24</sup> See *id.* at 1026 (arguing that Congress “assumed the President enjoyed a preexisting removal power”).

<sup>25</sup> 272 U.S. at 114.

<sup>26</sup> *Id.* (“It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the power of the President under the Constitution to remove the Secretary of Foreign Affairs without the advice and consent of the Senate. That was what the vote was taken for.”).

<sup>27</sup> See Prakash, *supra* note 23, at 1072–73 (“[R]epudiating the congressional-delegation theory is not identical to repudiating a default removal power.”).

<sup>28</sup> Shalev Roisman, *Constitutional Acquiescence*, 84 GEO. WASH. L. REV. 668, 668 (2016).

<sup>29</sup> Alison LaCroix, *Historical Gloss: A Primer*, 126 HARV. L. REV. F. 75, 75 (2013) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610 (1952) (Frankfurter, J., concurring)).

<sup>30</sup> See 272 U.S. at 167–69 (discussing Presidents Johnson’s and Cleveland’s constitutional objections).

executive branch had not acquiesced. However, as Justice Brandeis pointed out in dissent, the picture was quite different for statutes providing that “removal shall be made only for one of several specified clauses”—which many Presidents had signed into law and only one had contested.<sup>31</sup>

### B. *For-Cause Removal Protection*

Nine years following *Myers*, the Court took up the issue of for-cause removal protection in *Humphrey's Executor v. United States*. The case concerned the Federal Trade Commission Act, which provided that any of the FTC's Commissioners “may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.”<sup>32</sup> The *Humphrey's* Court relied on precedent and a functional analysis in holding that this provision limited presidential removal power to the specified causes and that for-cause removal protection for Commission members did not violate the Constitution.

*Myers* played a prominent role in *Humphrey's*. After commending *Myers's* extensive “historical, legislative, and judicial” analysis, the Court rejected the government's argument that *Myers* rendered for-cause removal protections unconstitutional.<sup>33</sup> The Court emphasized how “narrow” *Myers's* holding (i.e., that the President did not need Senate consent) was despite the *Myers* Court's sweeping analysis.<sup>34</sup> And the Court expressly stated that any general “expressions” in *Myers* that could conceivably be “out of harmony” with the holding in *Humphrey's* were “disapproved.”<sup>35</sup>

Further, in introducing a functional analysis, the Court distinguished *Myers*. Unlike *Myers*, which involved an officer performing purely executive functions, the Court found that FTC Commissioners exercised quasi-legislative (investigating and reporting) and quasi-

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<sup>31</sup> *Id.* at 262 (Brandeis, J., dissenting). Justice Brandeis also emphasized that the “practice of Congress to control the exercise of the executive power of removal from inferior officers is evidenced by many statutes which restrict it in many ways besides the removal clause here in question” and that “[e]very President who has held office since 1861, except President Garfield, approved one or more of such statutes.” *Id.*

<sup>32</sup> Pub. L. No. 63-203, 38 Stat. 718 (codified as amended at 15 U.S.C. § 41).

<sup>33</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 626 (1935).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* The Court cited Chief Justice Marshall's opinion in a prior case for the proposition that “general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision.” *Id.* at 627 (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821)).



judicial (acting as a “master in chancery”) functions,<sup>36</sup> and that any executive functions were merely “in the discharge and effectuation of” the nonexecutive powers.<sup>37</sup> Similarly, the Court found the Decision of 1789 had nothing to say with regard to the question of removal protections for independent agency commissioners both because the office in 1789—that is, head of the Department of Foreign Affairs—was purely executive and because the officer was a member of cabinet “responsible to the President, and to him alone, in a very definite sense.”<sup>38</sup>

The next case<sup>39</sup> that the Court took up regarding for-cause removal protections, *Morrison v. Olson*, upheld the removal protection afforded to the independent counsel by the Ethics in Government Act of 1978.<sup>40</sup> The Act specified that the independent counsel could be removed only by the Attorney General and only for “good cause, physical disability, mental incapacity, or any other condition that substantially impairs the performance of such independent counsel’s duties.”<sup>41</sup> Four points are significant to this Note. *First*, Chief Justice Rehnquist’s majority opinion emphasized that *Morrison*, unlike *Myers*, did not “involve an attempt by Congress itself to gain a role in the removal of executive officials.”<sup>42</sup> *Second*, the Court made clear

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<sup>36</sup> See *id.* at 628 (stating that the FTC “is an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid” and that “[s]uch a body cannot in any proper sense be characterized as an arm or an eye of the executive”).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 631. The Court cited *Marbury* as evidence of this distinction between legislative or judicial functions and executive functions. See *id.* (“[*Marbury*] made clear that . . . a justice of the peace for the District of Columbia was not removable at the will of the President; and that there was a distinction between such an officer and officers appointed to aid the President in the performance of his constitutional duties.”).

<sup>39</sup> In *Bowsher v. Synar*, decided in 1986, the Court had decided a similar issue as *Myers* regarding congressional attempts to retain power to remove executive officers for itself. The Court’s holding was essentially just a straightforward application of *Myers*: “In light of [*Myers* and *Humphrey’s*], we conclude that Congress cannot reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment.” *Bowsher v. Synar*, 478 U.S. 714, 726 (1986). As the Court in *Bowsher* noted, its earlier decision in *INS v. Chadha*—striking down a “one-house ‘legislative veto’ provision by which each House of Congress retained the power to reverse a decision Congress had expressly authorized the Attorney General to make”—likewise “support[ed] this conclusion.” *Id.* at 726 (citing *INS v. Chadha*, 462 U.S. 919, 954–55 (1983)); see also *Morrison v. Olson*, 487 U.S. 654, 686 (1988) (describing *Myers* as the “primary antecedent” for its decision in *Bowsher*).

<sup>40</sup> The Ethics in Government Act was originally enacted by Congress in 1978, Pub. L. No. 95-521, 92 Stat. 1824, but the independent counsel provision that the Court reviewed in *Morrison* was amended in 1987 prior to the ruling, Pub. L. No. 100-191, 101 Stat. 1293.

<sup>41</sup> Pub. L. No. 100-191, 101 Stat. 1293, 1305.

<sup>42</sup> *Morrison*, 487 U.S. at 686.

that *Humphrey's* functional analysis would no longer be determinative; rather, the inquiry would be whether Congress had “interfere[d] with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’”—a clear usage of constitutional text.<sup>43</sup> *Third*, the Court found that there was “no real dispute that the functions performed by the independent counsel are ‘executive.’”<sup>44</sup> Ultimately, the Court held that despite the independent counsel being an executive officer, the “good cause” removal standard did not “unduly trammel[] on executive authority” because the counsel was clearly an “inferior officer . . . with limited jurisdiction and tenure and lacking policymaking or significant administrative authority.”<sup>45</sup> As such, the Court “simply d[id] not see how the President’s need to control the exercise of [the] independent counsel’s discretion is so central to the functioning of the Executive Branch as to require as a matter of constitutional law that the counsel be terminable at will by the President.”<sup>46</sup> *Finally*, the Court emphasized that the “good cause” standard did not “completely strip[]” removal power from the President, but rather left “ample authority” to assure faithful execution of the counsel’s duties under the Act.<sup>47</sup>

In 2010, the Court addressed the specific issue of dual-layer for-cause protection in *Free Enterprise Fund v. Public Company Accounting Oversight Board*.<sup>48</sup> The Sarbanes-Oxley Act of 2002 created the Public Company Accounting Oversight Board (PCAOB) and specified that Board members could only be removed “for good cause shown” by the Securities and Exchange Commission (SEC); SEC Commissioners themselves could only be removed by the President for “inefficiency, neglect of duty, or malfeasance in office.”<sup>49</sup> A Board member, therefore, was subject to two layers of removal protection—Board members were insulated from removal by SEC Commissioners, who in turn were insulated from removal by the President.<sup>50</sup>

Significant in relation to *Seila Law* is that beyond text and precedent, the *Free Enterprise* Court also relied upon an anti-novelty presumption in finding that dual-layered removal protection violated the separation of powers.<sup>51</sup> The majority contrasted the PCAOB’s struc-

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<sup>43</sup> *Id.* at 690 (quoting U.S. CONST. art. 2).

<sup>44</sup> *Id.* at 691.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 691–92.

<sup>47</sup> *Id.* at 692.

<sup>48</sup> 561 U.S. 477 (2010).

<sup>49</sup> *Id.* at 486–87.

<sup>50</sup> *See id.* at 495–96 (discussing these two layers of protection).

<sup>51</sup> *Id.* at 492.

ture to all prior removal restrictions it had upheld and found that “[t]he added layer of tenure protection *makes a difference*.”<sup>52</sup> Specifically, the Court found that the extra layer of protection prevented the SEC from being “fully responsible” for the Board and neither could the President hold the SEC accountable for the Board’s conduct “to the same extent that he may hold the [SEC] to account for everything else it does.”<sup>53</sup> Thus, the Court not only discerned a novelty but also explained why that novelty in fact created a constitutionally pertinent difference.

### C. *The Consumer Financial Protection Bureau*

It did not take long after *Free Enterprise Fund* for the CFPB to face a constitutional challenge to its single-director, removal-protected structure. The CFPB was first proposed in 2007 by then-Professor Elizabeth Warren, who argued that there needed to be a new agency focused on regulating consumer financial products.<sup>54</sup> After President Obama’s election, Warren’s proposal gained traction in Washington and it was made “one of the central parts” of Obama’s financial reform agenda.<sup>55</sup> Ever since, the CFPB has been a target for conservatives: “[O]pponents of the [CFPB] waged an all-out war against the agency, dumping millions of dollars into efforts to stop the agency from coming into being.”<sup>56</sup> These efforts of course failed. In the wake of the 2008 financial crisis, Congress “saw a need for an agency to help restore public confidence in markets” and, through the Dodd-Frank Wall Street Reform and Consumer Protection Act,<sup>57</sup> created the CFPB as an independent agency and, to give existing consumer protection laws a “chance to work,” “collect[ed them] under [the CFPB’s] one roof.”<sup>58</sup> But this was far from the end: “The financial industry and Republicans understood that even though they had

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<sup>52</sup> *Id.* at 495 (emphasis added).

<sup>53</sup> *Id.* at 495–96. The Court further stated that the “Commissioners are not responsible for the Board’s actions,” but rather are “only responsible for their own determination of whether the Act’s rigorous good-cause standard is met,” and thus “even if the President disagrees with their determination, he is powerless to intervene—unless that determination is so unreasonable as to constitute ‘inefficiency, neglect of duty, or malfeasance in office.’” *Id.* at 496 (citing *Humphrey’s Ex’r v. United States*, 295 U.S. 602, 620 (1935)).

<sup>54</sup> See Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, no. 5, Summer 2007, <https://democracyjournal.org/magazine/5/unsafe-at-any-rate> (discussing the U.S. Consumer Product Safety Commission as a model for an agency focused on regulating consumer financial products).

<sup>55</sup> Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 353 (2020).

<sup>56</sup> *Id.*

<sup>57</sup> Pub. L. No. 111-203, 124 Stat. 1376 (2010).

<sup>58</sup> *PHH Corp. v. CFPB*, 881 F.3d 75, 77–78 (D.C. Cir. 2018) (en banc).

lost the first legislative battle, the war over financial regulation would continue in Congress, in the agencies, and ultimately, in the courts.”<sup>59</sup> Thus, though the legal challenges to the CFPB’s single-director structure at first might seem to pose “relatively straightforward” separation-of-powers questions, they were in fact the continuation of a “bruising, bare-knuckle, decade-long fight over the agency.”<sup>60</sup> Section I.C.1 addresses the first constitutional challenge to the CFPB’s structure in the D.C. Circuit. Section I.C.2 turns to the Supreme Court’s ruling in *Seila Law*.

## 1. PHH

In *PHH*, a mortgage lender appealed to the D.C. Circuit challenging the CFPB’s single-director structure after a CFPB enforcement action resulted in a \$109 million order against the lender. Writing for the majority of the three-judge panel, then-Judge Kavanaugh invalidated the CFPB’s structure. He emphasized the “critical” role of history and *tradition* in separation-of-powers cases, noted *Free Enterprise Fund* itself had relied upon an anti-novelty presumption,<sup>61</sup> and argued that the CFPB represented a “gross departure from settled historical practice.”<sup>62</sup> In arguing that this distinction was significant, then-Judge Kavanaugh took a functionalist approach and argued that a single-director structure “poses a far greater risk of arbitrary decisionmaking and abuse of power” than a multi-member independent agency.<sup>63</sup> Specifically, he argued that multi-member commissions promote “deliberative decision making,” can “benefit from diverse perspectives,” and will “tend to lead to decisions that are not as extreme, idiosyncratic, or otherwise off the rails.”<sup>64</sup> And he drew upon structural arguments from the Take Care and Vesting Clauses—with no mention of the Necessary and Proper or Opinions Clauses—to frame his understanding of presidential removal power.<sup>65</sup>

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<sup>59</sup> Sitaraman, *supra* note 55, at 364 (noting that the head lobbyist for the Financial Services Roundtable, which vigorously opposed the Dodd-Frank Act, referred to its passage as just being “[h]alftime”).

<sup>60</sup> *Id.* at 353.

<sup>61</sup> See *PHH Corp. v. CFPB*, 839 F.3d 1, 7 (D.C. Cir. 2016) (“[T]he [*Free Enterprise Fund*] Court emphasized . . . the novelty of the Board’s structure: ‘Perhaps the most telling indication of the severe constitutional problem with the PCAOB is the lack of historical precedent for this entity.’”), *vacated*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

<sup>62</sup> *Id.* at 7–8.

<sup>63</sup> *Id.* at 8 (“[T]o check independent agencies, Congress has traditionally required multi-member bodies at the helm of every independent agency. In lieu of Presidential control, the multi-member structure of independent agencies acts as a critical substitute check on the excesses of any individual independent agency head . . .”).

<sup>64</sup> *Id.* at 26–27.

<sup>65</sup> See *id.* at 12.

When reheard *en banc*, seven judges of the D.C. Circuit found the CFPB's structure was constitutional over dissenting opinions from then-Judge Kavanaugh, Judge Henderson, and Judge Randolph.<sup>66</sup> The majority found that history and precedent confirmed the constitutionality of the CFPB's structure<sup>67</sup>—rejecting PHH's anti-novelty,<sup>68</sup> individual liberty,<sup>69</sup> and anti-power concentration arguments.<sup>70</sup> Further, the majority rejected PHH's arguments regarding the CFPB being independently funded rather than dependent on annual appropriations. The court found that the CFPB's budgetary independence had “no constitutionally salient effect on the President's power,” relying in part upon *Free Enterprise Fund's* dismissal of “issues including ‘who controls the agency's budget requests and funding’ as ‘bureaucratic minutiae’—questions of institutional design outside the ambit of the separation-of-powers inquiry.”<sup>71</sup> PHH did not petition for certiorari.

## 2. Seila Law

After the CFPB successfully obtained an order from a federal district court supporting enforcement of a civil investigative demand pertaining to its investigation of whether Seila Law violated a telemarketing law, Seila Law appealed to the Ninth Circuit challenging the CFPB's structure. In a unanimous panel opinion, the Ninth Circuit upheld the constitutionality of the CFPB's structure, viewing *Humphrey's* and *Morrison* “as controlling.”<sup>72</sup> Noting *Morrison* altered the inquiry from *Humphrey's* purely functional analysis, the Ninth Circuit rejected Seila Law's argument that the CFPB “possess[ing] substantially more executive power than the FTC did back in 1935” rendered it unconstitutional.<sup>73</sup> Similarly, the court found the single-vs.-multi-member distinction to be inconsequential both because *Humphrey's* “made no mention of the agency's multi-

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<sup>66</sup> *PHH*, 881 F.3d 75.

<sup>67</sup> *See id.* at 84–92.

<sup>68</sup> *Id.* at 101 (“[T]he CFPB's sole directorship is not historically anomalous. And, in any event, congressional innovation in the CFPB's internal structure would not alone render the agency constitutionally invalid.”).

<sup>69</sup> *Id.* (“PHH's notion that a multi-member structure would safeguard liberty, writ large, because it would check or slow or stop the CFPB from carrying out its duties is a nonsequitur from the perspective of precedent, which focuses on President's authority and the separation of powers.”).

<sup>70</sup> *Id.* (“[N]othing about the focus or scope of the agency's mandate renders it constitutionally questionable; indeed, the Bureau's powers have long been housed in and enforced by agency officials protected from removal without cause.”).

<sup>71</sup> *Id.* at 119 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 499–500 (2010)).

<sup>72</sup> *CFPB v. Seila Law LLC*, 923 F.3d 680, 684 (9th Cir. 2019).

<sup>73</sup> *Id.* at 683.

member leadership structure when analyzing the constitutional validity of the for-cause removal restriction at issue” and because *Morrison* had upheld a for-cause removal restriction for an entity headed by a single individual and thus “seem[ed] to preclude drawing a constitutional distinction” on this basis.<sup>74</sup> Seila Law petitioned for certiorari and the Supreme Court granted it.

In a 5–4 decision—split on appointing party lines with the majority opinion authored by Chief Justice Roberts—the Court held that the CFPB’s structure violated the separation of powers. The majority first rejected justiciability arguments raised by Paul Clement, who was the court-appointed amicus defending the CFPB’s structure.<sup>75</sup> Turning to the merits, the majority found that neither *Humphrey’s* nor *Morrison* settled the dispute.<sup>76</sup> Instead, the majority characterized prior removal precedent as having created a general rule of “unrestricted removal power,” with two narrow exceptions from *Humphrey’s* and *Morrison*—respectively, for “multimember expert agencies that do not wield substantial executive power” and for “inferior officers with limited duties and no policymaking or administrative authority.”<sup>77</sup> Thus, the majority viewed the question as whether to “extend” *Humphrey’s* or *Morrison* to the “new situation” of the CFPB’s single-director structure.<sup>78</sup> Chief Justice Roberts declined to do so, relying upon historical and structural reasoning in Sections III.C.1 and 2 of his opinion to constitutionalize a structural principle against concentration of substantial executive power in individual officers unless removable at-will by the President.<sup>79</sup>

The majority’s reasoning in Sections III.C.1 and 2—which comprises the focus of this Note—worked in three steps. First, the majority presented a historical analysis purporting to demonstrate the CFPB’s structure was novel. Specifically, the Court relied upon an analysis of four examples of single-director agencies to argue that the CFPB’s single-director and removal-protected structure was “almost wholly unprecedented” and that most examples of such a structure

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<sup>74</sup> *Id.* at 684.

<sup>75</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2195–97 (2020). Specifically, Clement argued that the Court was barred from hearing the case due to traceability, ripeness, and adverseness concerns. *Id.*

<sup>76</sup> *Id.* at 2201.

<sup>77</sup> *Id.* at 2198–200.

<sup>78</sup> *Id.* at 2201.

<sup>79</sup> *See id.* at 2201–04; *see also* Jack M. Beermann, *Seila Law: Is There a There There?*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-beermann/> (“*Seila Law* creates a novel constitutional prohibition: Congress may not create an independent agency with significant regulatory power headed by a single director.”)

were “modern” and “contested” by the executive branch.<sup>80</sup> Second, the Court invoked an anti-novelty presumption—asserting that the “lack of historical precedent” to support the CFPB is “perhaps the most telling indication of [a] severe constitutional problem.”<sup>81</sup> Having found that the CFPB’s structure lacked any “foothold in history or tradition,”<sup>82</sup> the majority thus saw strong indication of a constitutional problem.

Finally, to show the *existence* (rather than mere *indication*) of a constitutional problem, the majority relied upon structural reasoning, primarily from Founding Era sources, to constitutionalize a principle against concentration of executive power in individual officers not removable at-will by the President. The majority departed from then-Judge Kavanaugh’s *PHH* opinions by largely declining to rely on his functionalist reasoning<sup>83</sup>—which was reiterated to the Court by the Solicitor General but faced significant criticism from amici<sup>84</sup>—regarding practical differences between single-director and multi-member commission agencies,<sup>85</sup> though such arguments remained implicated in the majority’s assertions that single-director agencies are more likely to slip from presidential control.<sup>86</sup> Rather, the majority posited that the Constitution’s structure reflects a simple strategy: “divide power everywhere except for the Presidency.”<sup>87</sup> The majority contrasted the concentration of unilateral power in the President with the Framers’ “bifurc[ation]” of the legislative power between two

<sup>80</sup> *Seila Law*, 140 S. Ct. at 2201–02.

<sup>81</sup> *Id.* at 2201 (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010)).

<sup>82</sup> *Id.* at 2202.

<sup>83</sup> See *supra* notes 63–64 and accompanying text.

<sup>84</sup> See, e.g., Brief for Rachel E. Barkow, Kirti Datla, Richard L. Revesz, and Robert B. Thompson as Amici Curiae in Support of the Court-Appointed Amicus at 3, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7) (arguing that the government’s “neat categorical distinction between single member agencies and multi-member agencies . . . rests on inaccurate descriptions of how multi-member agencies are structured, and how they function”); Brief of Amici Curiae Fin. Regul. Scholars in Support of Affirmance at 13–17, *Seila Law LLC v. CFPB*, 140 S. Ct. 2183 (2020) (No. 19-7) (arguing that “a multimember commission—one of the two agency structures that Petitioner believes is constitutionally permissible—has no necessary connection with accountability,” deliberation, or good policymaking).

<sup>85</sup> See Richard L. Revesz, *Toward a “Unitary Executive” Vision of Article II?*, REG. REV. (Aug. 5, 2020), <https://www.theregreview.org/2020/08/05/revesz-toward-unitary-executive-vision-article-ii> (“To its credit, the Court did not embrace the bulk of the government’s functional arguments, perhaps sensing that these arguments were flawed.”).

<sup>86</sup> See *id.* (arguing that “vestiges of the government’s incoherent arguments can be found in the majority opinion” in statements such as that the CFPB’s single-Director structure means “some Presidents may not have any opportunity to shape its leadership and thereby influence its activities” (quoting *Seila Law*, 140 S. Ct. at 2204)).

<sup>87</sup> *Seila Law*, 140 S. Ct. at 2203.

chambers of Congress and the pluralistic composition of each.<sup>88</sup> And, relying heavily on Founding Era language from James Madison and Alexander Hamilton, the majority asserted that this constitutional structure reflected the Founders' desire to preserve "the chain of dependence"<sup>89</sup> of executive officers upon the President and to promote an "energetic executive" rather than one prone to the "'habitual feebleness and dilatoriness' that comes with a 'diversity of views and opinions'"<sup>90</sup>—a stark contrast to the broader constitutional strategy of making "'ambition . . . counteract ambition' at every turn."<sup>91</sup> Additionally, in a non sequitur from Section III.C.2's expressly structural argument, the majority chummed the water for constitutional assault on budgetary independence by citing a hodgepodge of inapposite sources to argue for a presidential power to exert influence via the budgetary process.<sup>92</sup>

Justice Kagan's incisive dissent castigated the majority for departing from the Court's approach since the Founding of leaving "most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to"<sup>93</sup> in a manner that neither constitutional text, nor history, nor precedent, nor functionalist analysis could justify. She argued that the majority's reading of the Take Care and Vesting Clauses overburdened them,<sup>94</sup> that it neglected the Necessary and Proper Clause's grant to Congress of the power to create and structure executive departments,<sup>95</sup> and (in a brief footnote) that it rendered the Opinions Clause "inexplicable."<sup>96</sup> Turning to history, Justice Kagan emphasized that an unrestricted removal power was not accepted by the Decision of 1789, Congress had in fact frequently given "officials handling financial affairs . . . some independence from the President,"<sup>97</sup> and the reality that "[i]ndependent agencies are everywhere" demonstrated that the "broad sweep of history ha[d] spoken to the constitutional question before [the Court]."<sup>98</sup> Regarding single-director agencies specifically, Justice Kagan emphasized that historical

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<sup>88</sup> *Id.* at 2203.

<sup>89</sup> *Id.* (quoting 1 ANNALS OF CONG. 499 (1789) (James Madison)).

<sup>90</sup> *Id.* (quoting THE FEDERALIST NO. 70, at 471, 476 (Alexander Hamilton) (J. Cooke ed., 1961)).

<sup>91</sup> *Id.* at 2202 (quoting THE FEDERALIST NO. 51, at 349 (James Madison) (J. Cooke ed., 1961)).

<sup>92</sup> *See id.* at 2204.

<sup>93</sup> *Id.* at 2224 (Kagan, J., concurring in part and dissenting in part).

<sup>94</sup> *See id.* at 2227 (noting that these Clauses "can't carry all that weight").

<sup>95</sup> *See id.*

<sup>96</sup> *Id.* at 2227 n.3.

<sup>97</sup> *Id.* at 2230.

<sup>98</sup> *Id.* at 2233.



examples were not mere “blip[s],” that their having been contested by the executive branch is par for the course for independent agencies, and that “novelty is not the test of constitutionality when it comes to structuring agencies.”<sup>99</sup> Turning to precedent, Justice Kagan argued that the majority’s rule “does not exist” and that its exceptions are “made up for the occasion—gerrymandered so the CFPB falls outside them.”<sup>100</sup> Notably, Justice Kagan argued that the majority’s expansionist reading of *Myers* as recognizing an unrestricted removal power had been expressly rejected by *Humphrey’s* and subsequent precedent.<sup>101</sup> Finally, Justice Kagan argued that the majority’s functional arguments—specifically, that a single-director agency would be more likely to “slip from the Executive’s control”<sup>102</sup>—failed to present any theory for *why* this is the case and that while generalization is a “fool’s errand,” multi-member commissions are, if anything, *more* difficult to control than single-director agencies.<sup>103</sup>

#### D. *The Federal Housing Finance Agency*

Less than two weeks after handing down *Seila Law*, the Court granted certiorari in *Collins v. Yellen*, which presented the question of whether the Federal Housing Finance Agency’s single-director, removal-protected structure violated the separation of powers.<sup>104</sup> Like the CFPB, the FHFA was a child of the financial crisis—created to provide independent oversight of Fannie Mae and Freddie Mac.<sup>105</sup> *Seila Law* itself had hedged on whether the Federal Housing Finance Agency’s structure would be unconstitutional: The majority noted that, unlike the CFPB, the FHFA “regulates primarily Government-sponsored enterprises, not purely private actors” and emphasized that the FHFA does “not involve regulatory or enforcement authority

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<sup>99</sup> *Id.* at 2241.

<sup>100</sup> *Id.* at 2225.

<sup>101</sup> *See id.* at 2233–36.

<sup>102</sup> *Id.* at 2242 (quoting *id.* at 2203).

<sup>103</sup> *See id.* at 2242–43 (“It’s easier to get one person to do what you want than a gaggle.”).

<sup>104</sup> *See Collins v. Mnuchin*, 141 S. Ct. 193 (2020).

<sup>105</sup> *See* Brief of Constitutional Accountability Center as Amicus Curiae in Support of Court-Appointed Amicus Curiae at 2–3, *Collins v. Yellen*, 141 S. Ct. 1761 (2021) (No. 19-422) (emphasizing that Congress and President George W. Bush created the FHFA following the 2008 financial crisis to “correct” its problems, “prevent their reoccurrence,” and “stem the escalating housing crisis” and that granting the FHFA “a degree of independence” was viewed as necessary in light of the “failures of the previous regulatory regime and the disastrous consequences that resulted from those failures”); *cf. Seila Law*, 140 S. Ct. at 2202 (describing the FHFA as “essentially a companion of the CFPB, established in response to the same financial crisis”).

remotely comparable to that exercised by the CFPB.”<sup>106</sup> Nonetheless, in a 6–3 majority opinion by Justice Alito, the *Collins* Court stated *Seila Law* was “all but dispositive” in finding the FHFA’s structure unconstitutional. Notably, in rejecting arguments distinguishing the FHFA as not exercising “significant” executive power, the majority found that the “nature and breadth of an agency’s authority is not dispositive in determining whether Congress may limit the President’s power to remove its head”<sup>107</sup>—thus rendering *Seila*’s “significant” executive power language insignificant.

Justice Kagan, concurring in the judgment, agreed with the majority that *Seila Law* governed the question because the FHFA was not distinguishable.<sup>108</sup> However, Justice Kagan did not join the majority’s discussion of the constitutional issue. She criticized the majority for constitutionalizing its “mistaken musings about how to create a workable government”<sup>109</sup> and, for “careen[ing] right past” *Seila Law*’s significant executive power criterion “[w]ithout even mentioning” it in “broadening” *Seila Law*’s holding to every single-director agency—“no matter how much executive power it wields.”<sup>110</sup> Justice Sotomayor, joined by Justice Breyer, dissented on the constitutional issue. Justice Sotomayor argued that the FHFA’s powers were more akin to those of the FTC as it existed in 1935—which the *Seila Law* majority had used as a “yardstick for measuring the constitutional significance of an agency’s executive power.”<sup>111</sup> Justice Sotomayor further emphasized that the majority opinion was again “flatly inconsistent” with *Seila Law* in suggesting that “whether an agency regulates private individuals or Government actors does not meaningfully affect the separation-of-powers analysis.”<sup>112</sup>

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<sup>106</sup> *Seila Law*, 140 S. Ct. at 2202.

<sup>107</sup> *Collins*, 141 S. Ct. at 1783, 1784.

<sup>108</sup> *Id.* at 1800 (Kagan, J., concurring in part and concurring in the judgment in part) (“As I observed in *Seila Law*, the FHFA ‘plays a crucial role in overseeing the mortgage market, on which millions of Americans annually rely.’ It thus wields ‘significant executive power,’ much as the agency in *Seila Law* did.” (quoting *Seila Law*, 140 S. Ct. at 2241 (Kagan, J., concurring in part and dissenting in part))).

<sup>109</sup> *Id.* (citations and internal quotations omitted).

<sup>110</sup> *Id.* at 1801.

<sup>111</sup> *Id.* at 1805 (Sotomayor, J., concurring in part and dissenting in part).

<sup>112</sup> *Id.* at 1808–09 (noting that the *Seila Law* majority had “distinguish[ed] the CFPB from the independent counsel in *Morrison*” as well as from “both the FHFA and the Office of Special Counsel” on this basis and arguing that “the Court [being] unwilling to stick to the methodology it articulated just last Term in *Seila Law* is a telltale sign that the Court’s separation-of-powers jurisprudence has only continued to lose its way”).

## II SIMPLISTIC STRUCTURE AND HISTORY

*“Seek simplicity and distrust it.”*

—Alfred North Whitehead, 1919<sup>113</sup>

Even if one believes British mathematician and philosopher Alfred North Whitehead’s counsel to “seek simplicity” is valuable advice for judges,<sup>114</sup> there are very good reasons to distrust the artificial simplicity *Seila Law* imposes. This Part elaborates those reasons. Section II.A considers congruence with original public meaning originalism. Section II.B exposes the majority’s usage of history as acontextual, opportunistic, internally inconsistent, inaccurate, and oversimplistic. Section II.C elucidates structural flaws of the majority’s novel constitutional principle. And Section II.D argues that the majority opinion is logically and pragmatically flawed and thus confirms concerns regarding judicial (in)capacity in complex separation-of-powers cases.

### *A. Incompatibility with Original Public Meaning Originalism*

Whatever the *Seila Law* majority opinion’s approach may be, it is certainly not original public meaning originalism.<sup>115</sup> Rather, as elabo-

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<sup>113</sup> ALFRED NORTH WHITEHEAD, *THE CONCEPT OF NATURE: THE TARNER LECTURES DELIVERED IN TRINITY COLLEGE, NOVEMBER 1919*, at 163 (Project Gutenberg 2006) (1919) (“We are apt to fall into the error of thinking that the facts are simple because simplicity is the goal of our quest. The guiding motto in the life of every natural philosopher should be, Seek simplicity and distrust it.”).

<sup>114</sup> Consider a contrary view: “[C]omplexity is a hallmark of moderation, since it often arises from compromises reconciling competing interests and values.” David M. Driesen, *Complexity and Simplicity in Law: A Review Essay*, 45 ENV’T L. 181, 181 (2015) (reviewing CASS R. SUNSTEIN, *SIMPLER: THE FUTURE OF GOVERNMENT* (2013)). Such “competing interests and values,” *id.*, are endemic to the issue of removal power.

<sup>115</sup> Original public meaning originalism, or “new originalism,” views “the meaning the words and phrases of the Constitution would have had, in context, to ordinary readers, speakers, and writers of the English language, reading a document of this type, at the time adopted . . . .” Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution’s Secret Drafting History*, 91 GEO. L.J. 1113, 1118, 139 (2003) (internal citations omitted). It is thus in contrast to earlier forms of originalism promulgated in the 1970s and 1980s, which focused more on original *intent*—that is, what the Framers intended the Constitution to mean. See Keith E. Whittington, *Originalism: A Critical Introduction*, 82 FORDHAM L. REV. 375, 378 (2013) (“The terms of the debate have shifted somewhat over time, from talking about ‘original intent’ to talking about ‘original meaning.’”). In the 1970s and 1980s, early originalists like Justice Rehnquist and Raoul Berger emphasized adherence to the Framers’ intent as a means to constrain judicial activism, in contrast to the perceived excesses of the Warren Court. See Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 716–17 (2011) (summarizing the midcentury history of judicial originalism). However, the Framers’ intent formulation of originalism did not withstand the “rigors of critical scrutiny” and did not “prove itself as a workable, coherent, and intellectually sound theory of constitutional interpretation.” *Id.* at 718. Instead, it was

rated *infra*, the opinion relies on an unpersuasive smorgasbord of: (1) contentious normative arguments only vaguely tied to text; (2) simplistic and internally inconsistent application of a handful of opportunistically selected quotes from the Founding Era; and (3) logically flawed functionalist reasoning.

The majority opinion's incongruence with today's new, text-focused originalism is not a condemnation in itself: There are good reasons to not subscribe to original public meaning originalism.<sup>116</sup> But it does bring up problems for conservative originalists—including members of the majority—who defend *Seila Law*. Indeed, *Seila Law* would seem to constitute exactly the kind of unconstrained judicial activism that conservative originalists suggest was endemic to the Warren Court's rights jurisprudence.<sup>117</sup> And the paucity of support from original public meaning for the majority's principle exacerbates the weaknesses in its arguments from other modalities.

At first glance, the majority's argument would seem to have all the hallmarks of an originalist opinion: quotes from *The Federalist Papers*, quotes from other Founding Era sources, and liberal allusions to the Framers and contentions as to what they intended.<sup>118</sup> However,

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“buried . . . in a sea of devastating critiques.” *Id.* To “shore up[] some of its flaws,” originalism evolved to a new form focused on original meaning rather than original intent. *Id.* See generally *infra* notes 119–21 and accompanying text (discussing the textual focus of original public meaning theories); Randy E. Barnett, *The Gravitational Force of Originalism*, 82 *FORDHAM L. REV.* 411 (2013) (identifying common characteristics of approaches grounded in original public meaning); Whittington, *supra*, at 409 (discussing the “second wave” of originalism); Colby, *supra*, at 714 (“New Originalism . . . left behind more than . . . the theoretical flaws of its predecessor. It has also . . . sacrificed the Old Originalism’s promise of judicial constraint. The very changes that make the New Originalism theoretically defensible also strip it of any pretense of a power to constrain judges to a meaningful degree.”); Eric Berger, *Originalism’s Pretenses*, 16 *U. PA. J. CONST. L.* 329, 344–54 (2013) (arguing that new originalism’s capacity to constrain judicial discretion is both practically and theoretically overstated).

<sup>116</sup> See generally ERIC J. SEGALL, *ORIGINALISM AS FAITH* (2018) (comprehensively critiquing originalism).

<sup>117</sup> See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 7 (1971) (critiquing *Griswold v. Connecticut* as a “typical decision of the Warren Court” in that there was no protection against “intrusion of [judges’] own values”); Memorandum from Theodore Olson, Assistant Att’y Gen., Off. of Legal Couns., to Att’y Gen. William French Smith, *Policy Implications of Legislation Withdrawing Supreme Court Appellate Jurisdiction Over Class of Constitutional Cases 1* (Apr. 12, 1982), [https://www.washingtonpost.com/wp-srv/nation/documents/olson\\_04\\_12\\_1982.pdf](https://www.washingtonpost.com/wp-srv/nation/documents/olson_04_12_1982.pdf) (noting that President Reagan’s Attorney General, William French Smith, had “repeatedly stated” that decisions such as *Roe v. Wade* “find no support in the text or history of the Constitution and represent judicial excesses that need to be curbed in the best interests of the nation”). See generally Justin Driver, *The Constitutional Conservatism of the Warren Court*, 100 *CALIF. L. REV.* 1101, 1102–05 (2012) (cataloguing conservative critiques of the Warren Court).

<sup>118</sup> See, e.g., *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203–04 (2020).

these are not hallmarks of “[t]oday’s originalism, often referred to as the ‘new originalism,’ [which] is all about the text of the Constitution.”<sup>119</sup> For new originalists, commitment to constitutional text specifically—rather than abstract norms or even the Founders’ intent—is essential to judicial legitimacy.<sup>120</sup> As prominent new originalist Lawrence Solum stated before Congress while testifying in support of Justice Gorsuch’s candidacy for the Court: “The truth is that if the constitutional text does not bind the Supreme Court, then the Justices are the equivalent of a superlegislature or a perpetual constitutional convention. A committee of nine unelected judges has the power to reshape our Constitution as they see fit.”<sup>121</sup> But theory is one thing and practice is quite another: As Professor Thomas Colby notes, “curiously, many leading Supreme Court decisions in matters of great importance to conservatives—in opinions authored and joined by originalist judges, and often praised by originalist scholars—are *seemingly not grounded in the constitutional text at all*.”<sup>122</sup> The separation of powers is an area in which this phenomenon is particularly common,<sup>123</sup> and *Seila Law* is a prime example.

Constitutional text plays little part in Chief Justice Roberts’s structural argument. Throughout the entirety of the relevant section of his opinion, the actual text of the Constitution is not quoted a single time. Rather, the opinion merely refers to a handful of provisions for the result they supposedly effectuate. This is a hallmark of abstract structural argument<sup>124</sup> and is clearly not oriented towards discerning

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<sup>119</sup> Thomas B. Colby, *Originalism and Structural Argument*, 113 Nw. U. L. REV. 1297, 1298 (2019).

<sup>120</sup> See *supra* note 115 (distinguishing old originalism from new originalism). As a recent example of a seemingly new originalist approach, in *Chiafalo v. Washington* the Court specifically focused on constitutional text as opposed to the Framers’ intent. 140 S. Ct. 2316, 2326 (2020) (acknowledging that while some of the Framers intended Electoral College members to have discretion, those “Framers did not reduce their thoughts about electors’ discretion to the printed page”).

<sup>121</sup> *Hearings on the Nomination of the Honorable Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States Before the S. Comm. on the Judiciary* at 7, 115th Cong. (2017) (statement of Lawrence B. Solum, Professor, Georgetown University Law Center).

<sup>122</sup> Colby, *supra* note 119, at 1299 (emphasis added).

<sup>123</sup> See *id.* at 1299–300 (noting that separation-of-powers debates are particularly divorced from the constitutional text); John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2014) (“The Rehnquist and Roberts Courts have repeatedly invalidated statutory programs, but not because those programs violated some particular constitutional provision . . . . Rather, its ‘new structuralism’ rests on freestanding principles of federalism and separation of powers.”).

<sup>124</sup> See, e.g., Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 833 (2004) (defining structural argument as “a method of

the original public meaning of the same clauses.<sup>125</sup> As Cass Sunstein and Adrian Vermeule broadly identified: “The Court’s particular conception [of liberty] is not some straightforward exercise in originalism; it is more like political philosophy. It is contestable and premised on a thick, normative view of constitutional liberty.”<sup>126</sup> In sum, arguments as to original understandings of constitutional text play little part in and do not justify the majority’s position.

### B. *Glossing Over History*

Regardless of one’s opinions regarding the propriety of today’s “new,” text-focused originalism, the majority opinion’s abuses of history should raise severe concerns. Sections II.B.1 and 2 of this Note take a significantly narrower focus than Justice Kagan’s broad historical narrative: These Sections expose flaws in the majority’s Founding Era analysis stemming from the very same sources, events, and individuals the majority relies upon. Section II.B.3 turns to the majority’s survey of single-director agencies and its usage of an anti-novelty presumption. Similarly, it exposes that the very sources the majority relies upon rebut their argument.

#### 1. The Federalist Papers

In support of his novel principle against power concentration in any individual exercising executive power unless removable by the President, Chief Justice Roberts deploys snippets of Madison and Hamilton’s writing in *The Federalist Papers* in an opportunistic and inconsistent manner. To begin with Madison, Chief Justice Roberts, quoting *Federalist No. 51*, states that “‘ambition . . . [must] counteract ambition’ at every turn” and characterizes the CFPB’s single-director structure as “contraven[ing] this carefully calibrated system by vesting

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constitutional interpretation in which the reader draws inferences from the relationship among the structures of government”).

<sup>125</sup> See, e.g., Manning, *supra* note 123, at 43 (“The Rehnquist and Roberts Courts . . . [have] invalidated acts of Congress based on [their] high-level, functional assessment . . . [that] separation of powers requires . . . exercis[ing] independent judgment rather than deferring to Congress’s contrary judgment about the appropriateness of a particular governmental arrangement. The best illustration . . . [is the Court’s] presidential removal power [jurisprudence].”).

<sup>126</sup> Sunstein & Vermeule, *supra* note 20 (manuscript at 24); see also David M. Driesen, *Political Removal and the Plebiscitary Presidency: An Essay on Seila Law*, LCC v. Consumer Financial Protection Bureau, 76 N.Y.U. ANN. SURVEY AM. L. (forthcoming 2021) (manuscript at 2), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3666233](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3666233) (“The Court justifies [its] conclusion by articulating a theory of a plebiscitary presidency, in which the voters choose policies by electing a President, which he then implements, not be [sic] securing legislation, but through manipulating officials who must ‘fear’ and ‘obey’ the President.”).

governmental power in the hands of a single individual accountable to no one.”<sup>127</sup> But the addition of “at every turn” divorces Madison’s statement from its intended context: Madison offered this quote in a paragraph addressing *inter-* rather than *intra-* branch competition—let alone intra-agency-leadership competition.<sup>128</sup> Thus, one might describe this aspect of Chief Justice Roberts’s argument exactly as Roberts (inaccurately) described the CFPB’s structure: lacking any “foothold in history.”<sup>129</sup>

Turning to Hamilton, four main issues attend the majority’s use of his writing in *Federalist No. 70*. First, the internally inconsistent “germynder[ing]”<sup>130</sup> of the contextual scope within which the majority opinion views as relevant the statements upon which it relies is a telling indicator of the majority’s opportunistic and unfaithful utilization of history. Despite being willing to divorce *Federalist No. 51*’s language from its intended context of *inter-*branch conflict to apply it to *intra-*branch dynamics—i.e., that of agency leadership structure—the majority fails to extend the reasoning of *Federalist No. 70*—which was in fact expressly oriented towards *intra-*executive dynamics—to the operation of independent agencies. *Federalist No. 70* was offered as a rebuttal to the options of either vesting executive power “in two or more magistrates of equal dignity and authority”—the “Consuls of Rome” being an example—or “ostensibly” vesting it in one man, but subject “to the control and co-operation of others, in the capacity of counsellors to him”—several states’ “executive council[s]” being the pertinent examples.<sup>131</sup> To draw a contrast to the pluralistic composition of the legislative branch, Chief Justice Roberts turned to *Federalist No. 70*’s language, stating that the Framers “chose not to bog the Executive down with the ‘habitual feebleness and dilatoriness’ that comes with a ‘diversity of views and opinions.’”<sup>132</sup> Despite relying on this language to draw a distinction between executive and legislative structure, the majority declines to apply it to the structure of independent agencies themselves—a clear inconsistency with how the majority divorced Madison’s language from its intended *inter-*branch context to apply it to *intra-*agency dynamics.

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<sup>127</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2202–03 (2020) (emphasis added) (citing *FEDERALIST NO. 51* (James Madison)).

<sup>128</sup> See *THE FEDERALIST NO. 51* (James Madison) (“[T]he members of each department should be as little dependent as possible on those of the others . . .”).

<sup>129</sup> *Seila Law*, 140 S. Ct. at 2201 (2020).

<sup>130</sup> *Id.* at 2225 (Kagan, J., concurring in part and dissenting in part).

<sup>131</sup> *THE FEDERALIST NO. 70* (Alexander Hamilton).

<sup>132</sup> *Seila Law*, 140 S. Ct. at 2203 (quoting *THE FEDERALIST NO. 70* (Alexander Hamilton)).

The second and very much related issue is that giving consistent scope to *Federalist No. 70* by applying it to intra-executive dynamics clearly undermines the majority's artificial distinction between single-director and multi-member commission independent agencies. The conflict is painfully obvious: By allowing for-cause protection for *multi-member commissions* but not *single-director* agencies, the Court in fact proliferates the exact issue they purport to fix with regard to the President. Striking down removal protection for single-director agencies incentivizes creation of multi-member bodies "with a diversity of views and opinions" which are thus "habitual[ly] feeble[] and dilator[y]" by the majority's own reasoning.<sup>133</sup> Considering the materials in front of the *Seila Law* Court, this argument would have been no mystery to its conservative justices, not least because then-Judge Kavanaugh's panel opinion invalidating the CFPB's single-director structure relied precisely upon the assertion that multi-member bodies could serve as a "check" on independent agency's actions.<sup>134</sup> And, by contrast to Madison's narrow argument in *Federalist No. 51* regarding inter-branch relations, Hamilton did not confine his reasoning to the President. Rather, he utilized broad language: "*Wherever two or more persons are engaged in any common enterprise or pursuit, there is always danger of difference of opinion. If it be a public trust or office, in which they are clothed with equal dignity and authority, there is peculiar danger of personal emulation and even animosity.*"<sup>135</sup> This broad language clearly encompasses the dynamics of multi-member commissions and scholarship has consistently identified potential feebleness as a characteristic of such commission structures.<sup>136</sup>

Third, it is notable that Hamilton himself opposed a unilateral presidential removal power, despite generally being a firm advocate

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<sup>133</sup> *Id.* (quoting THE FEDERALIST NO. 70 (Alexander Hamilton)).

<sup>134</sup> PHH Corp. v. CFPB, 839 F.3d 1, 8 (D.C. Cir. 2016). *But see* PHH Corp. v. CFPB, 881 F.3d 75, 78 (D.C. Cir. 2018) (en banc) (stating that in creating the CFPB Congress intended to give consumer protection laws "a chance to work"). This issue was hotly contested in briefings before the Court in *Seila Law*. *See, e.g.*, Brief for Petitioner at 26, *Seila Law*, 140 S. Ct. 2183 (No. 19-7) (arguing that "by requiring consensus to act, a multimember structure prevents any one member from engaging in arbitrary decisionmaking" and that multi-member structure fosters discussion based on "a diversity of viewpoints" (citing Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 794 (2013)); Brief of the Chamber of Com. of the United States of America as *Amicus Curiae* in Support of Petitioner at 4, *Seila Law*, 140 S. Ct. 2183 (No. 19-7) ("[M]ulti-member commissions incorporate checks against arbitrary government action that protect individual liberty.")).

<sup>135</sup> THE FEDERALIST NO. 70 (Alexander Hamilton) (emphasis added).

<sup>136</sup> *See, e.g.*, Datla & Revesz, *supra* note 134, at 794 ("The downside that accompanies [multi-member commissions, which produces] increased deliberation is the 'slowness inherent in group action.'" (quoting MARVER H. BERNSTEIN, REGULATING BUSINESS BY INDEPENDENT COMMISSION 70 (1955))).



for “a singular and energetic executive.”<sup>137</sup> As Justice Kagan noted in dissent, Hamilton in fact believed Senate consent would be necessary to remove officers and argued in favor of such.<sup>138</sup> Obviously this view was rejected to some extent by the Decision of 1789. But the very fact that Hamilton approved of Senate consent for removal—a much greater intrusion upon presidential control than simple for-cause removal protection—casts doubt on the majority’s usage of cherry-picked lines from Hamilton’s writing to strike down the CFPB Director’s for-cause removal protection.

Finally, while certain cherry-picked phrases from the Founding Era might support the majority’s argument at first glance, the actual reality of what early Congresses and Presidents did does not. Rather, Hamilton, President Washington, and early Congresses in fact endorsed agency structures and removal procedures wholly incompatible with the unitary executive vision the Roberts majority adopts. The Founding Era saw both the creation of independent agencies with certain members over whom the President possessed no removal power at all and frequent statutory involvement of the judicial branch in individual removal decisions. Christine Kexel Chabor chronicles the former in her recent scholarship on the Sinking Fund Commission: As President Washington’s Secretary of the Treasury, Hamilton was a key figure in the creation of the Commission in a form that precluded the President from removing several of its officers *at all*.<sup>139</sup> Specifically, the Chief Justice and the Vice-President were both to serve as members on the Commission; the President lacks power to unilaterally remove either of them. Additionally, as Jed Shugerman details in his recent scholarship, “the first Congress gave removal power over executive officers—even principal officers—to [sic] judges and juries in the Treasury Act of 1789, and in four other statutes” and later Congresses “extended removal-by-judiciary in at least 15 other statutes before 1820, and even more thereafter.”<sup>140</sup> These statutes cast severe doubt

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<sup>137</sup> Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, 96 NOTRE DAME L. REV. 1, 5 (2020) (citing THE FEDERALIST NO. 70 (Alexander Hamilton)).

<sup>138</sup> See *Seila Law*, 140 S. Ct. at 2229 (Kagan, J., concurring in part and dissenting in part) (“Hamilton presumed that . . . [Senate consent] ‘would be necessary to displace as well as to appoint’ . . . [and] thought that . . . would promote ‘steady administration’: ‘Where a man in any situation had given . . . evidence of his fitness . . . , a . . . president would be restrained’ from substituting ‘a person more agreeable . . . .’” (quoting THE FEDERALIST NO. 77 (Alexander Hamilton)) (second alteration in original)).

<sup>139</sup> See Chabot, *supra* note 137, at 3–4 (“Congress eliminated the President’s power to replace or remove Commissioners when it placed the Chief Justice and Vice President on the Commission.”).

<sup>140</sup> Jed H. Shugerman, *The Imaginary Unitary Executive*, LAWFARE BLOG (July 6, 2020, 8:54 AM), <https://www.lawfareblog.com/imaginary-unitary-executive>. See generally Jed H.

on any originalist reading attributing expansive and exclusive presidential removal power to the Decision of 1789, which I turn to now.

## 2. *The Decision of 1789*

The final Founding Era source the majority turns to in its structural argument is a single snippet of James Madison's lengthy remarks during debates culminating in the so-called Decision of 1789. The majority asserts that an agency being headed by a single official with for-cause removal protection would break the Madisonian "chain of dependence" from executive officers up to the President and ultimately the People.<sup>141</sup> There are numerous issues with this approach.

First, the majority again divorces Madison's statements from their intended context.<sup>142</sup> Responding to those who favored the Hamiltonian position of "vesting [the removal] power in the Senate jointly with the President," Madison stated:

If the President should *possess alone* the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President, and the President on the community.<sup>143</sup>

Earlier in his remarks, Madison similarly emphasized that "if the officer when appointed is not to depend upon the President for his official existence, *but upon a distinct body* . . . I confess I do not see how the President can take care that the laws be faithfully executed."<sup>144</sup> Thus, read in context, Madison's remarks solely evince a concern against *division* of removal power between the Executive and legislature—that is, a rejection of the advice-and-consent theory.<sup>145</sup>

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Shugerman, *The First Congress Rejected Unitary Presidentialism: The Indecision of 1789, Strategic Ambiguity, and Removal by Judiciary* (Fordham L. & Legal Rsch., Working Paper No. 3597496, 2021) (chronicling this history in greater detail).

<sup>141</sup> *Seila Law*, 140 S. Ct. at 2203 (internal quotation marks omitted) (quoting 1 ANNALS OF CONG. 499 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison)).

<sup>142</sup> Compare how Myers reproduced paragraphs of remarks in full, including the very paragraph that the *Seila Law* majority opportunistically cherry-picks from and juxtaposes to an inappropriate context. *Compare* Myers v. United States, 272 U.S. 52, 131–32 (1926) (internal citations omitted) (reproducing longer excerpts of remarks from Madison and other legislators), with 140 S. Ct. at 2203 (quoting snippets of the same paragraph). Rather than letting Madison's words speak for themselves in their intended context, the Roberts majority forces them to sing a unitary executive tune.

<sup>143</sup> 1 ANNALS OF CONG. 499 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison) (emphasis added).

<sup>144</sup> *Id.* at 497 (emphasis added).

<sup>145</sup> Throughout the remarks that the majority cherry-picks from, Madison explicitly states he is addressing the situation of Congress retaining some power of removal for itself or completely eliminating presidential removal power, rather than placing substantive

Simply put, the majority's opportunistic usage of a mere half-sentence of Madison's remarks to attack rational, substantive limits on what causes for removal are permissible is an abuse of history.

*Second*, background assumptions apparent in Madison's remarks counsel caution in juxtaposing his concerns regarding the "chain of dependency" onto new contexts. In fact, Madison's underlying assumptions may caution against deploying his remarks to invalidate a structure approved by the political branches through legislation (except in exceptionally clear-cut cases) *at all*, rather than deferring to the judgments of present-day political branches. Madison expressly grounded much of his discussion in pragmatic cost-benefit considerations rather than constitutional interpretation. After relying upon a structural argument from the Take Care Clause in rejecting the position that the Senate's advice-and-consent power incidentally incorporates some form of removal power,<sup>146</sup> Madison turned to what he described as "the merits of the question as distinguished from a Constitutional question"—particularly, concerns regarding abuse of removal power by the Executive.<sup>147</sup>

Further, Madison's discussion of the presidential removal power embraces the position that abuses thereof would constitute impeachable misdemeanors and this poses logical issues for the majority. Madison argues that the President would not "displace from office a man whose merits require that he should be continued in it" because he would be "impeachable" by the House and Senate "for such an act of mal-administration."<sup>148</sup> Madison stating that such an act of "mal-administration" would still be impeachable is a strong indicator of how serious he perceived improper removal to be: Two years before, Madison had vigorously opposed a proposal to add "mal-administration" to the list of impeachable offenses, arguing that "[s]o vague a term will be equivalent to a tenure during that pleasure of the

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limits upon that power. *See id.* at 496 ("[Congress] may . . . exclude the President altogether from exercising any authority in the removal of officers; they may give it to the Senate alone, or the President and Senate combined; they may vest it in the whole Congress or they may reserve it to be exercised by this House."); *id.* at 500 (criticizing Senate involvement in removal because it would amount to "link[ing] together two branches of the Government which the preservation of liberty requires to be constantly separated").

<sup>146</sup> *See, e.g., id.* at 496 ("[T]he president is required to take care that the laws be faithfully executed. If the duty to see the laws faithfully executed be required . . . of the Executive Magistrate, it would seem that it was . . . intended he should have that species of power which is necessary to accomplish that end.").

<sup>147</sup> *Id.* at 497.

<sup>148</sup> *Id.* at 498; *see also id.* ("I contend that the wanton removal of meritorious officers would subject him to impeachment and removal from his own high trust.").

Senate.”<sup>149</sup> Madison’s response to concerns regarding abuse of presidential removal power suggests he implicitly assumed such powers to be subject to certain limits. If, as Madison argues, removing an officer for inappropriate reasons is so improper that it would constitute an impeachable offense, it arguably follows that Congress possesses the power under the Necessary and Proper Clause to limit removal to certain acceptable grounds so long as they do not impede the power which, as Madison put it, “in its nature is executive . . . [of] superintending and seeing that the laws are faithfully executed.”<sup>150</sup> To Madison, a president unwarrantedly dismissing an officer was “[s]uch an abuse of power” that it “exceed[ed his] conception.”<sup>151</sup> As such, legislating against such “abuses of power” would presumably fall within Congress’s power under the Necessary and Proper Clause, which “gives Congress express authority to enact legislation ‘necessary and proper’ to implement not only its own powers but also ‘all other Powers’ vested in the federal government.”<sup>152</sup> Put simply, if improper dismissal is a wanton abuse of federal power, legislating to prevent such abuses is necessary and proper.

Moreover, the majority entirely ignores the view on the role of the courts that Madison expressed in the very same remarks and which casts doubt on the majority’s approach. In rejecting the argument that the judiciary should be deciding such questions, Madison expressed a departmentalist view,<sup>153</sup> explicitly eschewed the possibility that the *courts* should have a final say in removal power disputes, and argued that “the decision may be made with the most advantage by the Legislature itself.”<sup>154</sup> This was perhaps the dominant view in the Founding Era.<sup>155</sup> Obviously the Court’s subsequent deci-

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<sup>149</sup> *Bowsher v. Synar*, 478 U.S. 714, 730 (1986) (alteration in original) (quoting 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 550 (1911)).

<sup>150</sup> 1 ANNALS OF CONG. 500 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison).

<sup>151</sup> *Id.* at 499.

<sup>152</sup> John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1943 (2011) (quoting U.S. CONST. art. I, § 8, cl. 18).

<sup>153</sup> See Richard H. Fallon, Jr., *Judicial Supremacy, Departmentalism, and the Rule of Law in a Populist Age*, 96 TEX. L. REV. 487, 489 (2018) (noting that Madison held the “widely believed” position that “each branch or department of government should interpret the Constitution for itself, without any branch’s interpretation necessarily binding the others”).

<sup>154</sup> 1 ANNALS OF CONG. 501 (1789) (Joseph Gales ed., 1834) (statement of Rep. James Madison); see also *id.* at 500 (criticizing the view “that any one department draws from the Constitution greater powers than another, in marking out the limits of the powers of the several departments”).

<sup>155</sup> See, e.g., SEGALL, *supra* note 116, at 15 (“Prior to the Constitution’s ratification in 1787, no country had ever authorized judges to veto laws enacted by a sovereign.”); see also *id.* at 19 (“The majority view [among experts] is that people [before *Marbury v.*

sion in *Marbury v. Madison* confounded Madison's expectations and beliefs to some extent.<sup>156</sup> But Madison's views nonetheless remain relevant context: His comments regarding the need to protect the executive branch were made with the understanding that the Judiciary would not be doing so, perhaps with an exception for extremely clear-cut cases.

### 3. *Single-Director Structure and Its Supposed Novelty*

Moving beyond the Founding Era, Chief Justice Roberts's opinion attempts to buttress its structural argument by asserting that the CFPB's structure is "almost wholly unprecedented" and by deploying an anti-novelty presumption.<sup>157</sup> The majority evaluated four historical examples of removal-protected "principal officers who wield power alone rather than as members of a board or commission."<sup>158</sup> For two such examples—the Office of Special Counsel (OSC) and the Social Security Administration (SSA)—the majority emphasizes that they were "contested" by the executive branch.<sup>159</sup> However, the majority elides that opposition to the OSC from the executive branch was not clearly predicated on its single-director structure and rather was based upon the type of power exercised and other constitutional concerns.<sup>160</sup> Further, the majority overstates the

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*Madison*] . . . thought judges should exercise judicial review rarely and only when judges were sure there is a clear inconsistency between a law and the Constitution."); *id.* at 18 (noting that, on this basis, several prominent contemporary originalists "argue that judges should exercise judicial review consistent with how the founders viewed that authority").

<sup>156</sup> 5 U.S. (1 Cranch) 137, 177 (1803) (finding that it is "emphatically the province and duty of the judicial department to say what the law is" and striking down legislative provisions that extended the Court's original jurisdiction beyond what the Court found constitutionally permissible). The breadth of the ruling regarding judicial review in *Marbury* is disputed on historical grounds, particularly as the legislation at issue concerned the jurisdiction of the Court itself and thus *Marbury's* policing of congressional attempts to alter that jurisdiction is to some degree compatible with a departmentalist view. William Michael Treanor argues that both state and federal pre-*Marbury* cases provide evidence "of general deference to a coequal legislature's substantive constitutional decisionmaking but close scrutiny of that body's decisionmaking where it affected the judiciary." William Michael Treanor, *Judicial Review Before Marbury*, 58 STAN. L. REV. 455, 561 (2005); accord SEGALL, *supra* note 116, at 24 (discussing Treanor's study, noting that "early courts were strongly deferential to laws that did not pertain to the courts," and finding that this pattern is consistent with "*Marbury v. Madison* . . . as the law at issue in that case regulated the original jurisdiction of the Supreme Court").

<sup>157</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201 (2020).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 2202.

<sup>160</sup> It seems that the majority just uncritically incorporated into the opinion the arguments of the Solicitor General regarding these historical examples. See Brief for Respondent Supporting Vacatur at 33–34, *Seila Law*, 140 S. Ct. 2183 (No. 9-17) (raising the exact same instances of presidential opposition to the OSC and SSA); cf. *Seila Law*, 140 S. Ct. at 2241 (Kagan, J., concurring in part and dissenting in part) (arguing that the majority

Clinton Administration's concerns regarding the SSA and ignores subsequent Presidents' acceptance of removal protection for single-director agencies. As such, no defensible formulation of an anti-novelty presumption can work in the majority's favor.

The OSC was created in 1950 and has been headed by a single director enjoying removal protection since that time.<sup>161</sup> Chief Justice Roberts's opinion emphasizes that the OSC "drew a contemporaneous constitutional objection from the Office of Legal Counsel [OLC] under President Carter and a subsequent veto on constitutional grounds by President Reagan."<sup>162</sup> However, a closer look at executive branch objections undermines Chief Justice Roberts's argument. The 1978 OLC opinion expressed no concern regarding the single-director leadership of the OSC, nor did it draw a contrast to multi-member agencies at all.<sup>163</sup> Rather, OLC solely argued that the Counsel's functions were largely "executive in character" and thus "Congress may not restrict the President's power to remove him"—a straightforward application of *Myers* in OLC's view, though one that *Morrison* subsequently cast doubt upon.<sup>164</sup> OLC clearly indicated that this functional analysis comprised its concern: "It is only the quasi-judicial or quasi-legislative nature of an official's duties that justify a measure of independence from Presidential control."<sup>165</sup> Reagan's memorandum accompanying his veto likewise saw no concern with the single-director form.<sup>166</sup> In fact, Reagan seemed to see greater concern with provisions "prohibit[ing] review within the Executive Branch" of views the OSC transmitted to Congress and with authorizing the OSC to obtain judicial review of certain decisions by federal administrative bodies, which Reagan argued would violate constitutional standing requirements by "plac[ing] two Executive branch agencies before a Federal Court to resolve a dispute between

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"can't pretend the disputes surrounding [the OSC and SSA] had anything to do with whether their heads are singular or plural").

<sup>161</sup> See Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 COLUM. L. REV. 1448, 1460 (2010) ("It was not until 1950 that Congress replated [the position of a specialized Assistant Solicitor General] with a separate office (first known as the Executive Adjudications Division and then renamed the Office of Legal Counsel in 1953) led by its own presidentially nominated and Senate confirmed Assistant Attorney General.").

<sup>162</sup> *Seila Law*, 140 S. Ct. at 2202.

<sup>163</sup> See Civ. Serv. Comm'n, 2 Op. O.L.C. 120, 121 (1978) (framing the issue of the Civil Service Commission's constitutionality with no reference to whether it had a single or multi-director structure).

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> See President Ronald Reagan, *Memorandum of Disapproval on a Bill Concerning Whistleblower Protections*, RONALD REAGAN PRESIDENTIAL LIB. & MUSEUM (Oct. 26, 1988), <https://www.reaganlibrary.gov/archives/speech/memorandum-disapproval-bill-concerning-whistleblower-protection>.

them.”<sup>167</sup> Finally, President George H.W. Bush, in signing the Whistleblower Protection Act of 1989, in fact expressed that he was “tremendously pleased” that his Attorney General had worked with congressional leadership to “successful[ly] . . . retain[] current law which provides that the Special Counsel may only be removed for inefficiency, neglect of duty or malfeasance.”<sup>168</sup>

Turning to the SSA, a murkier picture emerges. The Social Security Independence and Program Improvement Act of 1994 provided the SSA Administrator with for-cause removal protection. Chief Justice Roberts’s majority opinion states that President Clinton “questioned the constitutionality” of the SSA’s “new single-Director structure upon signing it into law” and that Clinton requested a “corrective amendment” from Congress.<sup>169</sup> The majority’s implicit assertion that the Clinton Administration’s issue was with the agency’s single-Director structure—rather than the more notable change of making one of the largest and most significant federal agencies independent<sup>170</sup>—cites nothing aside from President Clinton’s statement that it was OLC’s opinion that “the provision that the President can remove the single Commissioner only for neglect of duty or malfeasance in office raises a significant constitutional question.”<sup>171</sup>

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<sup>167</sup> *Id.* (arguing that this litigation authorization “conflicts” both “with the constitutional grant of the Executive power to the President” and “with constitutional limitations on the exercise of the judicial power of the United States to actual cases or controversies between parties with concretely adverse interests”).

<sup>168</sup> President George H.W. Bush, *Remarks on Signing the Whistleblower Protection Act of 1989*, GEORGE H.W. BUSH PRESIDENTIAL LIB. & MUSEUM (Apr. 10, 1989), <https://bush41library.tamu.edu/archives/public-papers/290>. President Bush advocated that “[s]everal provisions of the bill must be construed carefully in order to avoid constitutional problems,” but did not include the removal protections among these. See *Statement on Signing the Whistleblower Protection Act of 1989*, GEORGE H.W. BUSH PRESIDENTIAL LIB. & MUSEUM (Apr. 10, 1989), <https://bush41library.tamu.edu/archives/public-papers/291>.

<sup>169</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2202 (2020) (citing *Statement on Signing the Social Security Independence and Program Improvements Act of 1994* (Aug. 15, 1994), in *PUBLIC PAPERS OF THE PRESIDENTS*, WILLIAM J. CLINTON 1471–72 (1995)).

<sup>170</sup> See 2 *PUBLIC PAPERS OF THE PRESIDENTS*, *supra* note 169, at 1471 (emphasizing the significance of establishing the SSA as “an independent agency within the executive branch”). As then-Judge Kavanaugh put it in his *PHH* panel opinion: “The Social Security Administration long existed first as a multi-member independent agency and then as a single-Director executive agency within various executive departments . . . . Only in 1994 did Congress change the Social Security Administration to a single-Director independent agency.” *PHH Corp. v. CFPB*, 839 F.3d 1, 18–19 (D.C. Cir. 2016). To the extent then-Judge Kavanaugh’s phrasing implies that the SSA long existed as an *independent* agency, he is factually incorrect. Rather, the SSA existed for less than four years, between 1935–39, as an independent agency before it “lost its independent agency status when the new sub-cabinet level Federal Security Agency was created.” *Organizational History*, SOCIAL SECURITY ADMIN., <https://www.ssa.gov/history/orghist.html> (last visited June 22, 2021).

<sup>171</sup> 2 *PUBLIC PAPERS OF THE PRESIDENTS*, *supra* note 169, at 1472.

Examining the legislative history of the 1994 Act reveals the Clinton administration had a complicated position regarding a single-director structure. In fact, the Clinton administration at first *expressly advocated* for a single-director structure. House and Senate versions of the legislation differed as to leadership structure. The House version had a three-member commission structure with for-cause removal protection.<sup>172</sup> The Senate version, introduced by Senator Moynihan, had a single commissioner who would serve “a term of 4 years coincident with the term of the President, or until the appointment of a qualified successor.”<sup>173</sup> In May 1994, two days before the House passed its version, the Office of Management and Budget sent a letter to the House noting that the “Administration supports making the . . . [SSA] an independent agency and will work with the Conferees to address several concerns” about the bill, including “[t]he governance of the agency by a three member board whose structure is unwieldy and likely to undermine the legislation’s intent to make [the] SSA more effective.”<sup>174</sup> The following month, the Secretary of Health and Human Services sent another letter to Congress expanding on this point, among others.<sup>175</sup> As the Secretary explained: “The Administration supports a single executive—a Commissioner appointed by, and responsible to, the President to head the new SSA. A single executive is essential to provide SSA with the strong leadership and effective management it needs, and it is consistent with the recommendations made by numerous experts . . . .”<sup>176</sup> In other words, the Clinton Administration supported a single-director structure precisely because of the risk of insipid leadership that a multi-member commission structure poses<sup>177</sup>—and that the Roberts majority equivo-

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<sup>172</sup> See Social Security Administrative Reform Act of 1994, H.R. 4277, 103d Cong. §§ 702(a)(1)(A)–(B)(i) (1994) (providing the SSA “shall be governed by a Social Security Board,” that the “Board shall be composed of three members appointed by the President by and with the advice and consent of the Senate,” that board Members “shall be appointed for terms of six years,” and can “be removed only pursuant to a finding by the President of neglect of duty or malfeasance in office”).

<sup>173</sup> Social Security Administration Independent Act, S. 1560, 103d Cong. § 702(a)(3) (1993).

<sup>174</sup> Off. of Mgmt & Budget, Exec. Off. of the President, Statement of Administration Policy: H.R. 4277 – Social Security Administration Reform Act of 1994 (May 17, 1994), *reprinted in* 2 SOC. SEC. ADMIN., SOCIAL SECURITY INDEPENDENCE AND PROGRAM IMPROVEMENTS ACT OF 1994: REPORTS, BILLS, DEBATES, AND ACT 469 (1994).

<sup>175</sup> See Letter from Donna E. Shalala, Sec’y of Health & Hum. Servs., to Harold E. Ford, Chair, Subcomm. on Hum. Res., Comm. on Ways and Means, U.S. House of Reps. at 1 (June 22, 1994), *reprinted in* 2 SOC. SECURITY ADMIN., *supra* note 174, at 472.

<sup>176</sup> *Id.* at 472.

<sup>177</sup> *Id.* at 479 (“Experts agree that since it is difficult to maintain a clear dividing line between policy and administration, few boards are willing to delegate responsibility for day-to-day management and operations to a chief operating officer or to refrain from



cates on. Notably, in neither of these letters did the Clinton administration raise *any* concern with removal protection—removal protection isn’t even mentioned, except in summarizing the House bill, nor are any constitutional concerns at all. Rather, the Clinton administration expressed concerns about and expressly opposed any insulation of the SSA from centralized regulatory review or from the standard appropriations process.<sup>178</sup>

After the conference committee approved a single-director, removal-protected structure, Assistant Attorney General Walter Dellinger sent a letter to White House Counsel Lloyd Cutler acknowledging that although OLC “observed that the removal restriction presented a serious constitutional question . . . [OLC] did not resolve whether the removal restriction was in fact unconstitutional.”<sup>179</sup> The letter “recommended that the [removal protection] provision be eliminated or revised to avoid ‘plac[ing] the proper administration of our social security system at risk.’”<sup>180</sup>

In this context, the language of Clinton’s signing statement is striking. President Clinton expressed strong support for the legislation, and merely stated that he “must note” the DOJ’s opinion that removal protection “raise[d] a significant constitutional question.”<sup>181</sup> And, rather than suggesting that amendment was necessary to address executive branch concerns, he mentioned that he would be willing to work with Congress towards a “corrective amendment . . . so as to *eliminate the risk of litigation*.”<sup>182</sup> As far as executive branch “contest[ation]”<sup>183</sup> goes, this is quite weak. And subsequent developments cast further doubt on any assertion that the executive branch has consistently opposed removal protection for single-directors: Despite Clinton referencing the “risk of litigation” over this issue and

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micromanaging.”); *id.* (“Chief operating officer might feel constrained to obtain the consensus of Board members before taking significant actions.”).

<sup>178</sup> *See id.* at 473 (“The Administration strongly urges the Conferees to ensure that the budget, legislative and policy decisions of the new SSA are subject to presidential and executive branch leadership, oversight and review.”); *id.* (“We oppose any provisions that may exempt SSA budgetary and appropriations matters—and thus a huge portion of federal expenditures—from presidential oversight.”); *id.* (“[W]e oppose House provisions that may exempt SSA legislative and policy initiatives from the review and coordination currently provided to executive branch agencies.”).

<sup>179</sup> Constitutionality of the Comm’r of Soc. Sec.’s Tenure Protection, 45 Op. O.L.C. \_\_\_, at \*1 (2021), <https://www.justice.gov/olc/file/1410736/download> [hereinafter 2021 OLC SSA Memo] (citing Letter from Walter Dellinger, Ass’t Att’y Gen., Off. L. Couns., to Lloyd N. Cutler, Couns. to President (July 29, 1994) [hereinafter 1994 Dellinger Letter]).

<sup>180</sup> *Id.* at \*4 (second alteration in original) (quoting 1994 Dellinger Letter, *supra* note 179, at 2).

<sup>181</sup> 2 PUBLIC PAPERS OF THE PRESIDENTS, *supra* note 169, at 1471.

<sup>182</sup> *Id.* at 1472 (emphasis added).

<sup>183</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2201–02 (2020).

Dellinger’s 1994 letter describing the SSA’s single-director, removal-protected structure as “extraordinary,”<sup>184</sup> no such litigation was pursued, President Bush raised no constitutional concerns upon signing legislation creating the Federal Housing and Finance Agency in 2008,<sup>185</sup> and President Obama expressed no reservations regarding the CFPB’s structure upon signing the Dodd-Frank Act into law.<sup>186</sup>

Thus, a very different picture emerges than that which the majority sketches. Rather than the CFPB’s single-director structure being novel, it is in fact the view that an independent agency’s *single-director structure creates any constitutional problem* that is relatively novel and that had not been consistently expressed by the executive branch. Setting aside the isolated blip of President Clinton’s statements regarding the SSA, at no point since Founding to creation of the CFPB did the Executive express concerns to Congress regarding an agency’s *single-director structure*, as opposed to the type and amount of power it exercised. In fact, as the Clinton administration’s letters regarding the SSA show, the executive branch saw the benefits of such a structure. And subsequent Presidents—Republican and Democrat alike—signed legislation creating such agencies.

In large part, the majority’s ultimate holding relies on the application of an anti-novelty presumption in conjunction with its gerrymandered historical analysis. This approach is deeply problematic. Generally, as Justice Kagan cuttingly put it in dissent, “Congress regulates in [creating and structuring agencies] under the Necessary and Proper Clause, not (as the majority seems to think) a Rinse and Repeat clause.”<sup>187</sup> As exposed above, the majority’s entire argument that the CFPB is novel depends upon a gerrymandered frame of analysis and, even in that frame, their analysis shows neither that the CFPB is novel nor any consistently expressed concern from the execu-

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<sup>184</sup> 2021 OLC SSA Memo, *supra* note 179, at \*4 (quoting 1994 Dellinger Letter, *supra* note 179, at 1).

<sup>185</sup> By contrast, President Bush offered extended remarks regarding a different piece of legislation he signed the same day. See George W. Bush, Remarks on Signing the United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008, (July 30, 2008) (detailing President Bush’s extensive remarks upon signing the United States Global Leadership Against HIV/AIDS, Tuberculosis, and Malaria Reauthorization Act of 2008), in 2 PUBLIC PAPERS OF THE PRESIDENTS, GEORGE W. BUSH 1066–69 (2009).

<sup>186</sup> See Barack H. Obama, Remarks on Signing the Dodd-Frank Wall Street Reform and Consumer Protection Act (July 21, 2010) (lauding the Dodd-Frank Act as “represent[ing] the strongest consumer financial protections in history” and emphasizing that “these protections will be enforced by a new consumer watchdog with just one job: looking out for people—not big banks, not lenders, not investment houses”), in 2 PUBLIC PAPERS OF THE PRESIDENTS, BARACK H. OBAMA 1088–89 (2013).

<sup>187</sup> *Id.* at 2241.

tive branch specifically regarding single-director structure. Here, I turn to two further issues. First, employing an anti-novelty presumption *at all*—let alone the unbridled version the majority uses—is misguided. Second, even if novelty is a pertinent indicator that a constitutional problem *may* exist, the Court must still show that the difference that makes the structure novel in fact violates the Constitution.

The idea that novelty is even an *indicator* of the potential existence of a constitutional problem—let alone a factor that should be given weight in an ultimate decision—has been thoroughly eviscerated by Leah Litman.<sup>188</sup> As Litman notes, the primary justification offered for the presumption has been that “novelty suggests prior Congresses believed that similar legislation was unconstitutional.”<sup>189</sup> This justification depends upon the Madisonian notion that each branch will exercise the full scope of its powers—an assumption scholars have demonstrated is simply inaccurate regarding Congress.<sup>190</sup> As Litman notes, three specific factors counsel against this presumption and thus against utilizing an anti-novelty presumption at all: It is difficult to enact federal laws,<sup>191</sup> factors extrinsic to the legislative process often cause novelty,<sup>192</sup> and weaker versions of the presumption are still “inadministrable.”<sup>193</sup> These significant concerns cast doubt upon utilizing anti-novelty at all.

But even if novelty should be a pertinent sign that a constitutional problem *might* exist—which pre-*Seila Law* precedent seemingly accepted<sup>194</sup>—courts must still show that whatever aspect is novel in

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<sup>188</sup> See Leah Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1412 (2017) (arguing that “legislative novelty is not evidence and should not be used as evidence that a statute is unconstitutional” and it should “only be used to assure a judge that a ruling invalidating a federal statute (for reasons unrelated to the statute’s novelty) will not have disastrous practical consequences”); see also Gillian E. Metzger, *The Supreme Court, 2016 Term—Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 19 (2017) (noting the “asymmetry” evident in that “novelty can condemn an administrative arrangement, but lack of novelty can’t save it” and criticizing such as essentially constituting a “skepticism toward administrative government”).

<sup>189</sup> Litman, *supra* note 188, at 1427.

<sup>190</sup> *Id.* at 1427–28 (citing Daryl Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915, 940 (2005)); Bradley & Morrison, *supra* note 21, at 438–47 (problematising Madisonian presumptions in relation to Congress); cf. Neal Devins, *Why Congress Does Not Challenge Judicial Supremacy*, 58 WM. & MARY. L. REV. 1495, 1495 (2017) (“[L]awmakers have both strong incentive to acquiesce to judicial power and little incentive to advance a coherent view of congressional power.”).

<sup>191</sup> Litman, *supra* note 188, at 1429–34.

<sup>192</sup> *Id.* at 1434–47.

<sup>193</sup> *Id.* at 1448.

<sup>194</sup> See *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 505 (2010) (“[T]he most telling indication of the severe constitutional problem with the PCAOB is

fact creates a constitutional problem. In *Free Enterprise Fund*, for instance, the Court found an extra layer of for-cause protection impeded the President's ability to ensure the laws are faithfully executed.<sup>195</sup> In his panel opinion in *PHH*, then-Judge Kavanaugh posited that a single-director structure lacked the check that a multi-member commission provided on arbitrary decisionmaking, thus infringing on notions of individual liberty which he viewed as intrinsic to the separation of powers.<sup>196</sup> Given that the Roberts majority in *Seila Law* largely abandons then-Judge Kavanaugh's functionalist distinction and that the structural principle the majority promulgates lacks persuasive force, any reasonably defensible form of an anti-novelty presumption is insufficient to render the CFPB's structure unconstitutional—if it was even novel at all, which it was not.

### C. *Structural Flaws*

Given that the majority opinion cannot reasonably claim justification as a straightforward application of original public meaning nor as accepting a matter settled by practice of the political branches, its structural argument merits intense scrutiny. The majority's structural argument cannot withstand such scrutiny: It is itself structurally unsound. As this Section elucidates, it renders the Necessary and Proper Clause unnecessary and improper, the Opinions Clause unopinionated, the Vesting Clause over-invested in, and the Take Care Clause carelessly taken advantage of.

#### 1. *Depreciating the Necessary and Proper Clause*

Hans Hofmann, a prominent Twentieth Century German American painter, is well-known for his contributions to the Abstract Expressionist movement, for which he was hailed the "Artist of the Century" by *American Heritage* magazine.<sup>197</sup> One of Hofmann's quotes has found particular appreciation from those seeking to embrace minimalism in their life and art: "The ability to simplify

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the lack of historical precedent for this entity.'" (quoting *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

<sup>195</sup> *Id.* at 484 ("The President cannot 'take Care that the Laws be faithfully executed' if he cannot oversee the faithfulness of the officers who execute them. Here the President cannot remove an officer who enjoys more than one level of good-cause protection . . .").

<sup>196</sup> *PHH Corp. v. CFPB*, 839 F.3d 1, 6 (D.C. Cir. 2016) ("[T]o help preserve individual liberty under Article II, the heads of executive agencies are accountable to and checked by the President, and the heads of independent agencies, although not accountable to or checked by the President, are at least accountable to and checked by their fellow commissioners or board members.").

<sup>197</sup> Frank Stella, *The Artist of the Century*, 50 *AM. HERITAGE*, Nov. 1999, <https://www.americanheritage.com/artist-century>.

means to eliminate the unnecessary so that the necessary may speak.”<sup>198</sup> By contrast, in the *Seila Law* majority’s simplistic structural vision of the separation of powers—hailed by some as a prime example of Chief Justice Roberts’s “conservative minimalism”<sup>199</sup>—the Necessary and Proper Clause is conspicuously silent. The majority’s “conservatism” drowns out any murmur from Article I’s text: If one unfamiliar with the issue were to review the *Seila Law* opinions front-to-back, they would not receive any indication that the Necessary and Proper Clause was relevant—or, in fact, existed at all—until they reached Justice Kagan’s dissenting opinion.

This glaring oversight raises severe concerns regarding the Roberts majority’s structural argument because the Necessary and Proper Clause plays a fundamental role in the structuring of government across all branches.<sup>200</sup> “As Chief Justice Marshall wrote for the Court nearly 200 years ago, the Necessary and Proper Clause reflects the Framers’ efforts to create a Constitution that would ‘endure for ages to come.’”<sup>201</sup> Neglecting the Necessary and Proper Clause is a fatal flaw for the majority’s structural argument. As Dean John Manning argues, the Necessary and Proper Clause serves as a crucial counterbalance to the Vesting Clause: “[W]hen the Constitution is indeterminate—as the Vesting Clauses often (but not always) are—interpreters have no basis to displace judgments made by Congress pursuant to the express power delegated to it to compose the government under the Necessary and Proper Clause.”<sup>202</sup> Ironically, the Roberts majority’s “simple solution” to this problem in their argument—i.e., ignoring it entirely—would fail to pass muster under the administrative law reasoned decisionmaking requirements that check the power of the very agency they find to be unconstitutionally struc-

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<sup>198</sup> HANS HOFMANN, *SEARCH FOR THE REAL AND OTHER ESSAYS*, Appendix (Sara T. Weeks & Bartlett H. Hayes, Jr. eds., M.I.T. Press 1967).

<sup>199</sup> See, e.g., Jonathan H. Adler, *Conservative Minimalism and the Consumer Financial Protection Bureau*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-adler> (“Chief Justice Roberts’s adherence to conservative minimalism was on display in his opinion for the Court in *Seila Law* . . .”).

<sup>200</sup> See *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2227 (2020) (Kagan, J., concurring in part and dissenting in part) (“[The Constitution] does not, as you might think from reading the majority opinion, give the President authority to decide what kinds of officers . . . the Executive Branch requires. Instead, [the] Necessary and Proper Clause puts those decisions in the legislature’s hands.”).

<sup>201</sup> *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 377, 515 (2010) (Breyer, J., dissenting) (quoting *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819)); accord John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1947 (2011).

<sup>202</sup> Manning, *supra* note 201, at 2040.

tured and a threat to our liberty.<sup>203</sup> Justice Kagan’s incisive dissent drives the point home: “[T]he Court ‘appropriate[s]’ the power ‘delegated to Congress by the Necessary and Proper Clause’” for itself.<sup>204</sup>

*Collins*’s blatant disregard of *Seila Law*’s “significant executive power” language only exacerbates the Necessary and Proper Clause issue.<sup>205</sup> If interpreted as a relatively high bar, that language in *Seila Law* could have been construed to allow some form of functionalist balancing—the Necessary and Proper Clause balancing against Article II and preserving removal protections for agencies that do not exercise significant executive power. *Collins*’s removal of any consideration as to whether the executive power exercised is significant or not for single-director agencies pushes the Necessary and Proper Clause entirely out of frame. The *Collins* majority is perhaps right that “[c]ourts are not well-suited to weigh the relative importance of the regulatory and enforcement authority of disparate agencies.”<sup>206</sup> But in *Seila Law* and *Collins* the Court put itself in the business of weighing issues they are far inferior judges of than the political branches—namely, the difference between single and multi-member leadership structures. That venturing into an area the political branches are better suited to, then giving constitutional force to a formalistic rule

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<sup>203</sup> Reasoned decisionmaking requires that an agency not “fail[] to consider an important aspect of the problem.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Pointing this out may seem like a cheap shot; maybe it is. But it is far from irrelevant. The *Seila Law* majority expressly focused on lack of accountability checks in invalidating the CFPB’s single-director structure. *See Seila Law*, 140 S. Ct. at 2203–04 (“[T]he Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties. With no colleagues to persuade, and no boss or electorate looking over her shoulder, the Director may dictate . . . policy . . . affecting millions of Americans.”). Then-Judge Kavanaugh’s *PHH* opinions linked this to even clearer concerns regarding arbitrary decisionmaking. *See supra* note 63 and accompanying text. But the electorate of course does actually have ways to look over the shoulder of the CFPB and check irrational actions—arbitrary-and-capricious review being a key example. By contrast, no one “look[s] over” the Court’s “shoulder” when it makes decisions “affect[ing] millions of Americans.” *Seila Law*, 140 S. Ct. at 2204. The Court is far from errorless and much scholarship attends to how to prevent arbitrary decisionmaking by the Court. *See, e.g.,* Barzun, *supra* note 8, at 9 (emphasizing the Legal Process school of thought’s focus on applying interpretive sources “in a principled manner” so as to avoid irrational decisions); *cf.* Michael Abramowicz & Thomas B. Colby, *Notice-and-Comment Judicial Decisionmaking*, 76 U. CHI. L. REV. 965, 965 (2009) (noting that “judicial opinions often contain errors and frequently have far-ranging and unanticipated negative consequences” and arguing that a “notice-and-comment system could mitigate these concerns, and could also help to constrain judges to follow the rule of law and to improve the legitimacy of the judicial process”).

<sup>204</sup> *Seila Law*, 140 S. Ct. at 2244 (quoting Manning, *supra* note 123, at 78).

<sup>205</sup> *See supra* Section I.D (discussing *Collins* in context of *Seila Law*).

<sup>206</sup> *Collins v. Yellen*, 141 S. Ct. 1761, 1768 (2021) *aff’g in part, rev’g in part* *Collins v. Mnuchin*, 938 F.3d 553 (5th Cir. 2019) (en banc).

out of step with the realities of government, then refusing to engage in any balancing to mitigate the irrational effects of that formalistic rule should be thought of as some form of judicial modesty—as the *Collins*'s majority implicitly requests—is nothing short of risible. The Court's protestations of incapacity in *Collins*, far from conveying modesty or deference, merely highlight how far out of the Court's depth *Seila* and *Collins*'s abandonment of the Necessary and Proper Clause has taken it.

## 2. *Opinions Clause Surplusage*

The majority likewise entirely ignores the Opinions Clause, which provides that the President “may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the Duties of their respective Offices.”<sup>207</sup> The majority opinion effectively renders the Opinions Clause surplusage<sup>208</sup>: The Clause is not mentioned at all by the majority and a substantive reading of it conflicts with the majority's result. Though unitary scholars have argued the Clause should be read as a redundancy, persuasive arguments rebut such a reading. Particularly given that Justice Kagan expressly argued that the majority rendered the Clause “inexplicable,”<sup>209</sup> the majority should have at the very least explained why the Clause has no bearing on the question of removal power and should be treated as redundant.

The precise meaning of the Opinions Clause is hotly disputed. Unitary scholars have suggested there is in fact no need to assign it meaning in debates over removal power and that it *should* be treated as a redundancy (or a mere “restated truism”<sup>210</sup>).<sup>211</sup> But the argu-

<sup>207</sup> U.S. CONST. art. II, § 2, cl. 1.

<sup>208</sup> The anti-surplusage canon instructs courts to “avoid interpreting a provision in a way that would render other provisions . . . superfluous or unnecessary.” WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY, ELIZABETH GARRETT & JAMES J. BRUDNEY, *CASES AND MATERIALS ON LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 1197 (5th ed. 2014); see also ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012) (explaining the canon).

<sup>209</sup> *Seila Law*, 140 S. Ct. at 2227 n.3.

<sup>210</sup> Zachary J. Murray, *The Forgotten Unitary Executive Power: The Textualist, Originalist, and Functionalist Opinions Clause*, 39 PACE L. REV. 229, 241 (2018).

<sup>211</sup> See, e.g., Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 584 (1994) (“[T]he Opinions Clause empowers the President to obtain information in writing on government matters precisely so he will be able to issue binding orders to his subordinates.”); Murray, *supra* note 210, at 232 (summarizing views); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1206 (1992) (arguing that the clause “was intended to augment the unified, hierarchical executive created by Article II, . . . not to insulate executive officers from presidential control”); Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 650–51 (1996) (arguing that

ments against such a reading are simply stronger. *First*, it's generally presumed that words of the Constitution bear meaning.<sup>212</sup> *Second*, and relatedly, the Opinions Clause is in fact “the only power set forth in Article II that speaks to the president’s role in the day-to-day administration of the civilian government.”<sup>213</sup> By contrast to the Vesting and Take Care Clause’s broad and ambiguous language, the Opinions Clause speaks directly to how a President may oversee executive branch officials. The majority ignoring it entirely is thus a “most telling indicat[or]”<sup>214</sup> of a poorly reasoned argument. *Third*, the Opinion Clause’s specification of means by which the President may exercise authority over administration of the laws casts doubt on any absolute removal power by implication.<sup>215</sup> *Fourth*, the argument that the Opinions Clause was intended as a “mere truism” to reemphasize inherent unitary executive power—rather than to indicate any implicit limitations on presidential power corresponding to the authority it granted—is quite strange and cuts directly to the removal power. “Assuming a substantive Vesting Clause, why would the framers choose to reiterate the power to require opinions from only principal officers and not the power to fire anybody at will or the power to issue directives?”<sup>216</sup> *Finally*, unitary arguments from the Vesting Clause—which are key to arguments that the Opinions Clause was intended as a truism or redundancy<sup>217</sup>—themselves lack support in original meaning. As Professor Jed Shugerman demonstrates through analysis of use of the word “vesting” at the time of ratification, the “word ‘vest’ did not connote exclusivity, indefeasibility or a special constitu-

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surplusage is merely “one permissible maxim of commonsensical interpretation” rather than a “rigid and technical rule that must be followed even where it defeats common sense” and that the Opinions Clause was intended to “clarify and exemplify” presidential power).

<sup>212</sup> See, e.g., Murray, *supra* note 210, at 237 (noting the “interpretative canon that redundant readings, particularly of constitutional clauses, should be avoided”).

<sup>213</sup> *Id.* at 231.

<sup>214</sup> Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 537 F.3d 667, 699 (D.C. Cir. 2008) (Kavanaugh, J., dissenting)).

<sup>215</sup> Murray, *supra* note 210, at 259 (arguing that the Opinions Clause “implies that the president does not have absolute powers to remove officials”); cf. Martin S. Flaherty, *The Most Dangerous Branch*, 105 YALE L.J. 1725, 1795–98 (1996) (arguing that the history behind the Opinions Clause in no way supports a unitary executive).

<sup>216</sup> Murray, *supra* note 210, at 241; see also Manning, *supra* note 201, at 2036 n.478 (arguing that Prakash and Calabresi’s explanation “cannot account for why constitutionmakers thought it necessary to include such an express grant”).

<sup>217</sup> See, e.g., Amar, *supra* note 211, at 647 (arguing Article II creates a “unitary and accountable President”); Calabresi & Rhodes, *supra* note 211, at 1206–07 (emphasizing the “unified, hierarchical executive” created by the Vesting Clause in arguing that the Opinions Clause “does not impose limits on the President’s power over the executive department”).



tional status for official power.”<sup>218</sup> And though in other clauses of the Constitution, other words to “convey exclusivity and completeness” were used—e.g., “all,” “exclusive,” “sole,” and “alone”—any such words “are missing from the Executive Vesting Clause.”<sup>219</sup> That the Roberts majority fails to engage with the Opinions Clause *at all*—let alone to reasonably explain why its interpretation of the clause and its (in)significance is correct—leaves a gaping hole in the majority’s structural argument.

### 3. *Overburdening the Vesting and Take Care Clauses*

As one might expect from the fact that the Necessary and Proper and Opinions Clauses have no weight in the majority’s structural account, the Vesting and Take Care Clauses are forced to carry a heavier burden than they can reasonably bear. As a matter of plain text, of original understandings, and of precedent the majority unreasonably overburdens these clauses. Neither the plain text of the Vesting Clause nor that of the Take Care Clause suffice to justify the majority’s position. As Manning elaborates, arguments that removal protection for an executive officer violates the Vesting Clause require an “additional step” beyond constitutional text “to establish unconstitutionality.”<sup>220</sup> Unlike giving the Senate removal power, for example, such removal protections do not vest the power of removal in any person or body other than the President.<sup>221</sup> Likewise, the text of the Take Care Clause only reasonably requires that a removal protection not prevent the President from ensuring the laws are faithfully executed.<sup>222</sup> As discussed in Section II.B *supra*, Founding Era practice belies unitary readings of Article II text’s original meaning. And, as Justice Kagan pointed out, the Court in *Morrison* held that “a President can ensure faithful execution of the laws—thereby satisfying his take care obligation—with a [for-cause] removal provision.”<sup>223</sup>

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<sup>218</sup> Jed Handelsman Shugerman, “*Vesting*: Text, Context, and Separation-of-Powers Problems,” 74 STAN. L. REV. (forthcoming 2021) (manuscript at 1).

<sup>219</sup> *Id.*

<sup>220</sup> Manning, *supra* note 201, at 1967.

<sup>221</sup> *Cf. id.* (noting that “if Congress assigned the executive power to an official wholly beyond the President’s control” that would surely raise Vesting Clause issues).

<sup>222</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. at 2228 (Kagan, J., concurring in part and dissenting in part) (“[T]he text of the Take Care Clause requires only enough authority to make sure ‘the laws [are] faithfully executed’—meaning with fidelity to the law itself, not to every presidential policy preference.”).

<sup>223</sup> *Id.* (internal quotation marks omitted).

### D. *Pragmatic Flaws*

Perhaps all the concerns above could be mitigated if the majority's rule was simply a good one in terms of its substantive content and impact. Such concerns regarding workability and impact were evident in Chief Justice Roberts's *Seila Law* decision itself and can also be found in his other public statements. In rejecting the argument that the for-cause standard could be interpreted to avoid a constitutional issue, Chief Justice Roberts emphasized that neither the House nor court-appointed amicus had "advanced any workable standard derived from the statutory language."<sup>224</sup> Similarly, in his confirmation hearings, then-Judge Roberts rejected adherence to any particular theory of interpretation and instead emphasized that judges like himself "take a more practical and pragmatic approach to trying to reach the best decision consistent with the rule of law."<sup>225</sup>

However, *Seila Law*'s approach and result provide neither good content nor workable standards. Rather, they lack clarity and risk significant harm. Section II.D.1 evaluates the logical flaws in the Court's treatment of budgetary independence. Section II.D.2 points out the majority's neglect of the realities of Senate confirmation politics and of the Federal Vacancies Reform Act.

#### 1. *Power over the Purse*

In the otherwise structural section of his opinion, Chief Justice Roberts tossed in that the CFPB's "receipt of funds outside the appropriations process further aggravates the agency's threat to Presidential control" because, relative to the President's typical role proposing a budget, "no similar opportunity exists for the President to influence the CFPB Director."<sup>226</sup> But this approach adopts an inapt level of abstraction to the neglect of how appropriations actually work, is incongruent with the very points the majority draws from *The Federalist Papers*, and is belied by notions of acquiescence.

First, though the *Seila Law* majority frames the issue at the level of the *statutorily* prescribed ability of the President to propose a budget to Congress,<sup>227</sup> the more apt abstraction level is of course the *constitutional* process by which both budgets and the CFPB's organic statute are passed: bicameralism and presentment. Viewed at the constitutionally prescribed level of abstraction—rather than the *Seila Law*

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<sup>224</sup> *Id.* at 2190 (internal quotation marks omitted).

<sup>225</sup> *Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Confirmation Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 182 (2005) (statement of Judge John Roberts).

<sup>226</sup> *Seila Law*, 140 S. Ct. at 2204.

<sup>227</sup> *Id.* (citing Budget and Accounting Act, 1921, ch. 18, § 201, 42 Stat. 20).

majority's opportunistic and unreasonable statutory level—the degree of control is effectively the same: All the President needs to do to return the CFPB to the standard appropriations process is convince a majority in both chambers to revise its organic statute accordingly. This is the same democratic hurdle the President would need to clear to alter the CFPB's appropriations in any given year. Indeed, executive involvement in legislative drafting is ubiquitous. “[A] fair proportion of the legislation that is considered in the legislative process tends to have been drafted or influenced at some point by executive branch employees.”<sup>228</sup> And a significant portion of respondents in Lisa Bressman and Abbe Gluck's influential study of statutory drafting indicated that “first drafts are typically written by . . . the White House and agencies.”<sup>229</sup>

The majority's budgetary independence argument finds no support in constitutional text. The majority cites Article II, Section 3 for the proposition that the President “normally has the opportunity to recommend . . . spending bills that affect the operation of administrative agencies.”<sup>230</sup> But the actual text of this Article—that is, the President may “recommend to [Congress's] consideration such measures as he shall judge necessary and expedient”<sup>231</sup>—speaks no more to recommending a budgetary tweak for an agency in a given year than to recommending the return of any particular agency to the standard appropriations process. Similarly, though the majority cites Article I, Section 7, Clause 2 in support of the same proposition,<sup>232</sup> the actual text of that clause only states that a spending bill “shall, before it become[s] a Law, be presented to the President of the United States.”<sup>233</sup> Further, a more plausible text-bound structural argument cuts the opposite direction: Clause 1 of Section 7 specifies that appropriations bills “shall originate in the House of Representatives.”<sup>234</sup> In

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<sup>228</sup> CHRISTOPHER J. WALKER, ADMIN. CONF. OF THE U.S., FEDERAL AGENCIES IN THE LEGISLATIVE PROCESS: TECHNICAL ASSISTANCE IN STATUTORY DRAFTING 2 (2015), <https://www.acus.gov/sites/default/files/documents/technical-assistance-final-report.pdf> (quoting Clinton T. Brass, *Working in, and Working with, the Executive Branch, in LEGISLATIVE DRAFTER'S DESKBOOK: A PRACTICAL GUIDE* 275 (Tobias A. Dorsey ed., 2006)); *id.* (describing recent empirical work that confirms that “federal agencies are involved regularly and extensively in the legislative process”).

<sup>229</sup> Lisa Schultz Bressman & Abbe R. Gluck, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part II*, 66 STAN. L. REV. 725, 758 (2014). Hamilton played just such a role in the creation of the Sinking Fund Commission. *See supra* notes 137–39 and accompanying text.

<sup>230</sup> *Seila Law*, 140 S. Ct. at 2204.

<sup>231</sup> U.S. CONST. art. II, § 3.

<sup>232</sup> *See id.* art. II, § 2, cl. 2.

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* art. II, § 2, cl. 1.

short, no plausible textual or structural argument speaks with sufficient specificity to insulation of certain agencies from standard appropriations processes. And, as discussed above, the degree of presidential control in light of bicameralism and presentment is effectively the same.

*Second*, encouraging the President to threaten to veto an appropriations bill (and thus risk government shutdown) to seek to compel changes to appropriations for a particular agency seems undesirable. (Regardless, even pre-*Seila Law* the President could have still threatened to veto an appropriations bill to encourage Congress to legislatively return the CFPB to the standard appropriations process). Further, to reemphasize the majority's opportunistic usage of *The Federalist Papers*, it is hard to argue that a President shutting down the government would be an expression of a "vigorous executive," as opposed to a "feeble" one<sup>235</sup>—and thus, per the reasoning from Hamilton that the majority relies upon, a bad one.

*Finally*, notions of acquiescence provide no support for the majority's approach and instead cast significant doubt upon it. In noting that "for the past century, the President has annually submitted a proposed budget to Congress for approval,"<sup>236</sup> the *Seila Law* majority invokes historical practice explicitly and notions of congressional acquiescence implicitly.<sup>237</sup> However, closer examination reveals any such argument is deeply misguided and, due to its errors, would impair pragmatic benefits of acquiescence rather than advancing them.

The first issue with the majority's historical analysis is that the 1921 Budget Act, which they cite, in no way represented an endorsement of the view that budgetary independence was impermissible. Rather, eight years before passing the 1921 Budget Act, Congress created the Federal Reserve System (the Fed).<sup>238</sup> Since its creation, the Fed has been self-financed from earnings and thus insulated from the budgetary process.<sup>239</sup> As such, when Congress passed the Budget and

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<sup>235</sup> See FEDERALIST NO. 70 (Alexander Hamilton) (advocating for "vigorous executive" over a "feeble" one, for energy in the Executive is "essential to the protection of the community against foreign attacks"); *Seila Law*, 140 S. Ct. at 2202–03 (finding that the Framers viewed judicial opinions as inherently feeble and hindrances to the Executive (citing FEDERALIST NO. 70 (Alexander Hamilton))).

<sup>236</sup> *Seila Law*, 140 S. Ct. at 2204 (citing the 1921 Budget Act).

<sup>237</sup> See generally *supra* notes 28–29 and accompanying text.

<sup>238</sup> See Federal Reserve Act of 1913, Pub. L. 63-43.

<sup>239</sup> See CONG. BUDGET OFF., THE BUDGETARY STATUS OF THE FEDERAL RESERVE SYSTEM 5–6 (1985), <https://www.cbo.gov/sites/default/files/99th-congress-1985-1986/reports/02-1985-federalreserverev2.pdf> (noting that the Federal Reserve banks were "to be financed from earnings" and thus appropriations were not necessary).

Accounting Act in 1921, it was presumably fresh in members of Congress's minds that at least one important agency operated independently of the general appropriations process. And nothing in that Act gave the President additional authority to control the Fed. While one could argue that the CFPB's situation is distinct in that it in fact receives funds outside of appropriations processes—unlike the Fed, which is insulated from the appropriations process because it is self-funding—this does not do any meaningful work for the majority's argument. Because the majority focuses on “threat[s] to presidential control,”<sup>240</sup> the source of an agency's budgetary independence seems irrelevant. Further, as the majority notes, the CFPB actually “receives [its] funding directly from the Federal Reserve.”<sup>241</sup> Thus, that Congress did not give the President increased control over the Fed via the 1921 Budget Act is very pertinent.

The second issue with the majority's reliance on the 1921 Budget Act is that the Act in fact represents a high-water mark regarding how involved Congress has allowed the President to be in the budgetary process.<sup>242</sup> It is thus poor evidence of continued acquiescence to presidential control. Following President Nixon's refusal to disburse congressionally appropriated funds and campaign rhetoric seeking greater presidential control over federal spending, Congress retorted with the 1974 Budget Act.<sup>243</sup> The 1974 Act bolstered congressional power in the budgetary process by creating the Congressional Budget Office, creating House and Senate standing budget committees, bolstering staff on these and related committees, and diminishing presidential impoundment authority.<sup>244</sup>

The final issue with the majority's approach is the fact that if any power is actually at issue here, it would presumably be the House's given the primary role that the Constitution grants to it in the budget process. Founding Era sources buttress this conclusion. As Joshua Chafetz notes, Congress's power over the purse “was the Federalists' strongest rejoinder to Anti-Federalist fears of a tyrannical presi-

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<sup>240</sup> *Seila Law*, 140 S. Ct. at 2204.

<sup>241</sup> *Id.* at 2194 (“Each year, the CFPB requests an amount that the [CFPB] Director deems ‘reasonably necessary to carry out’ the agency's duties, and the Federal Reserve grants that request so long as it does not exceed 12% of the total operating expenses of the Federal Reserve.” (citations omitted)).

<sup>242</sup> See JOSH CHAFETZ, *CONGRESS'S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS* 63 (2017) (describing the situation before the 1921 Act as one of “legislative dominance” of the budget process and noting that in the 1970s Congress began to “push back against . . . executive budgetary dominance”).

<sup>243</sup> See *1974 Congressional Budget and Impoundment Control Act*, U.C. BERKELEY, <https://bancroft.berkeley.edu/ROHO/projects/debt/budgetcontrolact.html> (last visited June 6, 2021).

<sup>244</sup> See *id.*

dent.”<sup>245</sup> Traditionally, in separation-of-powers cases the Court has been quite attuned to acquiescence as a factor—particularly congressional acquiescence. This gives a peculiar flavor to the majority’s protestation regarding the CFPB not being subject to the standard budget process—of course led by the House—when the House in fact intervened in support of the constitutionality of the CFPB’s structure and has not acquiesced to presidential involvement in the budgetary process to anywhere near the degree necessary to justify the *Seila Law* majority’s reasoning.

Because of these errors in the majority’s analysis, their approach would in fact impair rather than advance pragmatic benefits of acquiescence. A frequently invoked benefit of acquiescence is that it allows courts to take note of “evidence that the political branches have settled upon an institutional arrangement that they both deem desirable or at least practically workable and acceptable.”<sup>246</sup> However, given that the majority errs in implying that Congress has acquiesced to the broad presidential budgetary power it envisions, the majority’s approach in fact casts aside historical practice and neglects enduring arrangements—such as the Federal Reserve’s longstanding budgetary independence. Lacking historical, textual, or structural support, the majority’s budgetary independence arguments represent little more than an attempt to impose a baseless rule of their own choosing against the longstanding practices of the executive and legislative branches.

## 2. *Confirmation, Interim Directors, and the Federal Vacancies Reform Act*

The majority opinion’s neglect of Senate confirmation dynamics and of differences between single-director agencies vs. multi-member commissions regarding interim appointments raises serious concerns. For single-director agencies, the Federal Vacancies Reform Act (FVRA) most often makes the President free to appoint an interim director when a Senate-confirmed director’s term ends. By contrast, multi-member commissions are expressly excluded from the scope of relevant provisions of the FVRA. This exacerbates the issue pointed

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<sup>245</sup> CHAFETZ, *supra* note 242, at 57. Both Madison and Hamilton emphasized congressional budget powers as a check against presidential control. *See id.*

<sup>246</sup> Bradley & Morrison, *supra* note 21, at 434; *see also id.* at 434–35 (noting that this approach concerns itself with “operational feasibility and acceptability,” is “consistent with functional, as opposed to formal, approaches to the separation of powers,” and relies on an assumption “that the fact that the political branches have worked out a particular arrangement through repeated practice over time suggests that it is normatively desirable”).

out by Justice Kagan in dissent: Multi-member commissions are potentially even more problematic and “the constitutional concern is, if anything, ameliorated when the agency has a single head.”<sup>247</sup>

When the term of the CFPB Director expires, the President is free to appoint an interim Director.<sup>248</sup> However, when a member of a multi-member commission resigns or their term expires, the FVRA is of no use: It expressly excludes multi-headed independent agencies from its scope.<sup>249</sup> As has become abundantly clear in recent years, the Senate is sometimes willing to unilaterally refuse to confirm nominees.<sup>250</sup> Moreover, individual Senators may be able to unilaterally block appointees by placing “holds” on their nomination.<sup>251</sup> Such holds may even come from the same side of the aisle as the appointing President’s party.<sup>252</sup> For a single-director independent agency, this is no obstacle to presidential control: Under the FVRA, the President can simply choose an interim Director—removable at-will—without Senate consent. But, for multi-member bodies, Congress can impede

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<sup>247</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2225 (2020).

<sup>248</sup> See Memorandum from Steven A. Engel, Assistant Att’y Gen., Off. of Legal Couns., to Donald F. McGahn II, Counsel to the President (Nov. 25, 2017), [https://www.justice.gov/sites/default/files/opinions/attachments/2017/11/25/cfpb\\_acting\\_director\\_olc\\_op\\_0.pdf](https://www.justice.gov/sites/default/files/opinions/attachments/2017/11/25/cfpb_acting_director_olc_op_0.pdf) (advising that on resignation of the CFPB Director the President can appoint an acting director under the FVRA and is not limited to selecting the CFPB’s deputy director).

<sup>249</sup> See 5 U.S.C. § 3349(c) (excluding from coverage any member of a multiple-member board, commission, or similar entity); cf. HENRY B. HOGUE & MAEVE P. CAREY, CONG. RSCH. SERV., R44083, APPOINTMENT AND CONFIRMATION OF EXECUTIVE BRANCH LEADERSHIP: AN OVERVIEW 7 (2021) (“The Vacancies Act does not apply to positions on multimember boards or commissions . . .”).

<sup>250</sup> See, e.g., HOGUE & CAREY, *supra* note 249, at 10 (“[W]here the tenure of a nominee’s appointment would outlast that of an incumbent President, those Senators not of the President’s party might elect to prevent confirmation so as to preserve a vacancy that could be filled by an incoming President of their party.”).

<sup>251</sup> See MARK J. OLESZEK, CONG. RSCH. SERV., R43563, “HOLDS” IN THE SENATE (2017) (“More often than not, Senate leaders honor a hold request because not doing so could trigger a range of parliamentary responses from the holding Senator(s) . . . that could expend significant amounts of scarce floor time.”); see also Josh Huder, *Tradition v. Partisanship: Holds in a Post-Nuclear Senate*, GOVT. AFF. INST., <https://gai.georgetown.edu/tradition-v-partisanship-holds-in-a-post-nuclear-senate> (last visited June 6, 2021) (noting holds have “delayed or killed” executive nominations).

<sup>252</sup> See, e.g., Lucien Bruggeman, *Years of Turmoil at Postal Service Governing Board Fueled Political Firestorm, Critics Say*, ABC NEWS (Aug. 20, 2020, 4:05 AM), <https://abcnews.go.com/US/years-turmoil-postal-service-governing-board-fueled-political-story?id=72482926> (noting Sen. Sanders placed holds on Obama appointees to the Postal Service’s Board); Brian Nicoll, *Post Office Loses Another \$5.1 Billion; Bernie Continues to Prevent Help*, HILL (Dec. 20, 2016, 9:30 AM), <https://thehill.com/blogs/congress-blog/economy-budget/311113-post-office-loses-another-51-billion-bernie-continues-to> (noting that “[n]ot a single member remains of the Postal Board of Governors” which is supposed to have nine appointed members, that “the full Senate has not taken up [Obama’s five appointees] because a senator—believed to be Bernie Sanders—has placed a hold on their nominations,” and that “no governor has been approved since 2010”).

presidential control by refusing to appoint new agency heads. Thus, multi-member commissions can in fact be *less* subject to presidential control than single-director agencies. This illustrates yet another instance of the majority failing to apply the Founding Era sources it draws upon consistently and fairly: What's more "feeble[] and dilator[y]"<sup>253</sup> than an agency that's dead-locked—or lacks any commissioners at all—because the Senate won't move forward with nominations?

### III

#### AGENCY INDEPENDENCE POST-*SEILA LAW*

*"A love of simplicity cannot long endure."*

—Eugene Delacroix, 1847<sup>254</sup>

Having established the illogic, novelty, inaccuracy, opportunism, and inconsistency of Chief Justice Roberts's majority opinion, I now turn to the future. Section III.A discusses *Seila Law*'s needlessly destabilizing effect on several existing agencies. Section III.B draws upon constitutional text, institutional competency considerations, and a less simplistic view of the separation of powers to argue that courts should resume a posture of deference to the choices and practices of the elected branches in such cases. There are good reasons why *Seila Law*'s artificial simplicity should not last for long.

#### A. Agency Design Post-*Seila Law*

Analysis of design options Congress and the President might pursue in order to protect the independence of agencies post-*Seila Law* elucidates the illogic of the *Seila Law* decision. *Seila Law* prompted a groundswell of speculation and scholarship on what Congress now can and cannot do.<sup>255</sup> Already, *Seila Law*'s deeply flawed logic and *Collins*'s unprincipled extension of it have stripped the FHFA and the SSA—critical federal agencies—of a significant

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<sup>253</sup> *Seila Law LLC v. CFPB*, 140 S. Ct. 2183, 2203 (2020) (quoting THE FEDERALIST No. 70, at 476 (Alexander Hamilton)).

<sup>254</sup> Journal Entry, Paris (Oct. 9, 1847), in THE JOURNAL OF EUGENE DELACROIX 88, 89 (Lucy Norton trans., Phaidon Press 3d ed. 1995).

<sup>255</sup> See, e.g., Shugerman, *supra* note 140 (questioning whether Congress can protect the independence of inspector generals, establish a new independent counsel statute, or enact reforms to make the Department of Justice more independent from self-protecting presidents and partisan attorney generals); Richard E. Levy & Robert L. Glicksman, *Restoring ALJ Independence*, 105 MINN. L. REV. 39, 105–07 (2020) (considering how to craft removal protections for administrative law judges so that they pass constitutional muster after *Seila Law*).



measure of independence.<sup>256</sup> As destabilizing as it has been, *Seila Law* and *Collins*'s fabricated principle against single-director agencies does not in fact do much to prevent Congress from creating very powerful independent agencies, and it may in fact incentivize congressional action towards sources of independence more deleterious to presidential oversight in practice.

In short, *Seila Law* is not just destabilizing, but also needlessly and harmfully so. The majority's novel anti-single-director principle simply does little—if anything—to actually protect the President's ability to ensure the laws are faithfully executed. In fact, it may encourage alternate agency design choices—seemingly allowed under current precedent—which *actually do* restrict presidential involvement and energy in the executive, unlike the constitutional “distinction without a difference”<sup>257</sup> between single-director and multi-member commissions. Specifically, the majority's novel principle does nothing to prevent Congress from consolidating massive amounts of power in independent agencies headed by multi-member commissions. And for a Congress still desiring to secure a strong degree of independence, it funnels design choices towards options that may impair presidential control to a greater degree.

*First*, and as a very basic matter, the majority's novel principle against power concentration in an individual does nothing to prevent placing even more power in an agency headed by multi-member commission with removal protection. This is a striking illogic of *Seila Law* and *Collins*'s extension of it: The Court sees a greater constitutional issue with a single-director agency than a multi-member one exercising ten times as much power.<sup>258</sup> Moreover, analyzing *individual* power rather than that of the agency as a whole, a member of a multi-member commission consistently acting as the swing vote on the exponentially more powerful agency logically holds greater power than the single-director of an exponentially weaker one.

*Second*, though the majority treats removal power as the *sine qua non* of presidential ability to ensure the laws are faithfully exe-

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<sup>256</sup> Following the Court's decision in *Collins*, the Office of Legal Counsel concluded that the SSA Administrator could be removed at-will. See 2021 OLC SSA Memo, *supra* note 179, at \*1.

<sup>257</sup> Richard L. Revesz, *A Distinction in Agency Design Without a Difference*, REGUL. REV. (Feb. 17, 2020), <https://www.theregreview.org/2020/02/17/revesz-distinction-agency-design-without-difference> (arguing that the distinction between single-member- and multi-member-led agencies is overly simplistic and incorrect).

<sup>258</sup> See *Seila Law*, 140 S. Ct. at 2203–04 (distinguishing single-director and multi-member commission agencies).

cuted,<sup>259</sup> there are in reality a much broader range of factors that contribute to agency independence. And, by blocking off a single-director structure—which Congress chose for the CFPB to ensure it could act with energy in administering the various statutes it oversaw without undue partisan influence<sup>260</sup>—the Court incentivizes Congress to utilize other design choices if it wishes to effectuate the same goal. These other choices impact presidential control to a far greater degree than the single-director vs. multi-member difference.

A plethora of scholarship has identified a wide range of institutional design choices that determine where an agency may fall on the spectrum of independence and have established that removal protection often has very little to do with it.<sup>261</sup> For example, review of regulations by the Office of Management and Budget and the Office of Information and Regulatory Affairs (OIRA) can give the President substantial influence over agencies’ regulatory activity—arguably more so than the “blunt instrument”<sup>262</sup> of removal.<sup>263</sup> As a matter of

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<sup>259</sup> See, e.g., *id.* at 2203 (arguing the CFPB Director is not “meaningfully controlled (through the threat of removal)”).

<sup>260</sup> See *PHH Corp. v. CFPB*, 881 F.3d 75, 97–101 (D.C. Cir. 2018) (en banc).

<sup>261</sup> See, e.g., Datla & Revesz, *supra* note 134, at 769 (“[T]here is no single feature, structural or functional, that every agency thought of as independent shares—not even the for-cause removal provision commonly associated with independence.”); *id.* at 784–811 (identifying removal protection, tenure, multi-member structure, partisan balance requirements, litigation authority, “congressional comments, legislative proposals, and budget authority,” and adjudication authority as “indicia of independence”); Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 *TEX. L. REV.* 15, 17 (2010) (arguing that the “traditional metrics for an independent agency”—removal, exemption from Office of Information and Regulatory Affairs cost-benefit review, and multi-member structure—“are not the only, or necessarily even the most effective, ways in which insulation from interest groups and partisan pressure can be achieved”); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 *VAND. L. REV.* 599, 600 (2010) (arguing that despite the myopic focus of much jurisprudence and scholarship on removal power, a variety of mechanisms “make independent agencies increasingly responsive to presidential preferences” in the area of financial policy); Cass R. Sunstein, *Paradoxes of the Regulatory State*, 57 *U. CHI. L. REV.* 407, 426 (1990) (arguing that “the fact is that independent agencies are not independent at all” and are actually “highly responsive to shifts in political opinion and even to the views of the President”); Caroline W. Tan, *What the Federal Reserve Board Tells Us About Agency Independence*, 95 *N.Y.U. L. REV.* 326, 326 (2020) (arguing “practical realities of governance” have greater influence on independence than administrative law formalities like the removal power).

<sup>262</sup> Datla & Revesz, *supra* note 134, at 839.

<sup>263</sup> See, e.g., Elena Kagan, *Presidential Administration*, 114 *HARV. L. REV.* 2245, 2248 (2001) (arguing that Clinton used regulatory review to dramatically expand “presidential control of administration” and make “regulatory activity of the executive branch agencies more and more an extension of the President’s own policy and political agenda”); *id.* at 2288 (discussing how the Clinton administration, unlike the Reagan and Bush administration, subjected independent agencies to Office of Management and Budget regulatory planning processes).

political expediency, Presidents since Ford have refrained from subjecting independent agencies to OIRA review, despite OLC having found doing so to be within the President's constitutional authority.<sup>264</sup> In 2017, the House passed a bill—ultimately not enacted—aiming to affirmatively require that independent agencies including the CFPB participate in OIRA review.<sup>265</sup> But if Congress now wishes to bolster agencies' independence, it may simply expressly legislate that independent agencies cannot be required to take part in such review.<sup>266</sup>

### B. *Revitalizing Pragmatic Deference*

For over two hundred years post-Founding, courts mostly took a somewhat deferential posture with regard to separation-of-powers issues—and agency design in particular. Precedent developed that expressly gave weight to the practices of the political branches, thus leaving them space to settle constitutional meaning.<sup>267</sup> And the Court has likewise employed constitutional avoidance or relied on the political question doctrine to avoid unduly intruding upon the political branches' process of competition, accommodation, and negotiation.<sup>268</sup>

As Justice Kagan highlighted in dissent,<sup>269</sup> *Seila Law* marked a striking and strikingly unnecessary departure from this course—one which constitutional text, relative institutional competency, and a less “simplistic” notion of the separation of powers all forewarned against. The Court entirely ignored the Necessary and Proper Clause—which represents the Founders' considered judgment that Congress (and the President, given presentment) should have a wide degree of latitude in

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<sup>264</sup> See Datla & Revesz, *supra* note 134, at 837–38.

<sup>265</sup> See Barbara S. Mishkin, *House Passes Bill to Subject CFPB Rules to OIRA Review*, CONSUMER FIN. MONITOR (Mar. 9, 2017), <https://www.consumerfinance.com/2017/03/09/house-passes-bill-to-subject-cfpb-rules-to-oira-review>.

<sup>266</sup> Datla and Revesz endorse an extant presidential power to require independent agencies to participate in OIRA review but nonetheless acknowledge Congress could legislate a different conclusion. Datla & Revesz, *supra* note 134, at 839.

<sup>267</sup> See, e.g., *supra* notes 28–31 and accompanying text.

<sup>268</sup> See, e.g., *Morrison v. Olson*, 487 U.S. 654, 682 (1988) (reiterating the “duty of federal courts to construe a statute in order to save it from constitutional infirmities”); Fritz W. Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 76 *YALE L.J.* 517, 566 (1966) (arguing the political question doctrine expresses “the Court's acknowledgment of the limitations” of the judicial process).

<sup>269</sup> See, e.g., *Seila Law*, 140 S. Ct. at 2224–25 (Kagan, J., concurring in part and dissenting in part) (arguing that “[t]hroughout the Nation's history, this Court has left most decisions about how to structure the Executive Branch to Congress and the President, acting through legislation they both agree to” and that “[i]f precedent were any guide,” then the “intended independence” of the CFPB “would have survived its encounter with this Court”).

shaping the executive branch.<sup>270</sup> Relative institutional competency considerations buttress the wisdom of the Constitution's judgment on this matter: The elected branches, which routinely make such decisions for quite literally every executive branch office, are vastly superior judges of effective institutional design choices than (unelected) judges.<sup>271</sup> And a nuanced (rather than risibly simplistic) notion of the separation of powers—better reflective of the choices made (and those not made) by the Framers and ratifiers of the Constitution and across over two hundred years of institutional cooperation and competition—counsels against the majority's intrusive, formalistic line-drawing.

### CONCLUSION

The power to remove executive officers and limits upon such power have posed a thorny constitutional question since Founding. *Seila Law*'s foray into these treacherous woods ventured off the path many previous decisions had beaten down. *Seila Law*'s logical flaws, abuses of history, and exceptional stretches of constitutional structure all vividly illustrate the dangers of doing so. Instead of returning towards that path, the Court in *Collins* struck off further into the unknown. In future cases involving multi-member rather than single-director leadership structures, rather than continuing to impose artificial simplicity, the Court should return to a posture of deference that is more appropriate in such separation-of-powers cases and better reflective of the judiciary's inferior capacity regarding complex questions of agency design.

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<sup>270</sup> See *id.* at 2227 (“Article I’s Necessary and Proper Clause puts [these] decisions in the legislature’s hands.”).

<sup>271</sup> See *id.* at 2245.