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The Political Economy of the Removal Power

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INTRODUCTION

In the years leading up to the 2008 financial crisis, financial institutions targeted communities of color with expensive and risky subprime mortgage products. Hundreds of thousands of Black and Hispanic families were charged more for mortgages than their white counterparts or steered into expensive subprime loans, even though they qualified for cheaper prime loans.[1] Over time, financial institutions like Countrywide pushed these "toxic" loans on more and more homeowners and expanded subprime lending throughout the country.[2] When the music finally stopped in 2008, millions of families lost their jobs and their homes, and nearly $11 trillion in household wealth was wiped out.[3] Over the next two years, Congress would work to pass financial reform legislation that was designed to address a variety of risks and dangers in the financial markets.

In 2007, then-Professor Elizabeth Warren proposed a federal agency to regulate consumer financial products.[4] For years, Warren had criticized predatory "tricks and traps" in mortgages, credit cards, and other financial products.[5] One-off, piecemeal reforms had failed, and Americans were drowning in debt.[6] Increasingly, one bad medical diagnosis or the loss of a job would mean bankruptcy and a family's total

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[1] Press Release, U.S. Dep't of Just., Justice Department Reaches $335 Million Settlement to Resolve Allegations of Lending Discrimination by Countrywide Financial Corporation (Dec. 21, 2011), https://www.justice.gov/opa/pr/justice-department-reaches-335-million-settlement-resolve-allegations-lending-discrimination [https://perma.cc/6U2N-7HLY]; Press Release, U.S. Dep't of Just., Justice Department Reaches Settlement with Wells Fargo Resulting in More than $175 Million in Relief for Homeowners to Resolve Fair Lending Claims (July 12, 2012), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-wells-fargo-resulting-more-175-million-relief [https://perma.cc/4VEN-7K4E].

[2] FIN. CRISIS INQUIRY COMM'N, THE FINANCIAL CRISIS INQUIRY REPORT 104–05 (2011).

[3] *Id.* at xv.

[4] Elizabeth Warren, *Unsafe at Any Rate*, DEMOCRACY, no. 5, Summer 2007, https://democracyjournal.org/magazine/5/unsafe-at-any-rate [https://perma.cc/27NQ-XFXY].

[5] *See id.*

[6] *See id.*

economic devastation. Warren argued that other consumer products, like toasters, were regulated at the federal level.[7] Financial products were not so different. By 2009, Congress and the President picked up Warren's proposal, and they made it one of the central parts of the coming financial reform package.[8]

That is when the opposition kicked into gear. For the next decade, opponents of the Consumer Financial Protection Bureau (CFPB) waged an all-out war against the agency, dumping millions of dollars into efforts to stop the agency from coming into being.[9] When they failed to prevent its creation, they switched gears to slow its functioning. And when the Trump Administration gained control of the CFPB, it began to dismantle the agency from the inside.[10] As with the Affordable Care Act, this Obama Administration achievement faced a sustained and relentless assault on its very existence.

A reader of *Seila Law LLC v. Consumer Financial Protection Bureau*,[11] however, would have little sense of the bruising, bare-knuckle, decade-long fight over the agency. Instead, the case presents itself as posing a relatively straightforward, albeit novel-on-the-facts, separation of powers question: Is it constitutional for Congress to create an agency headed by a single director who is insulated from presidential removal, except in cases of "inefficiency, neglect of duty, or malfeasance in office"?[12]

A summary is simple: In 2017, the CFPB issued a demand for Seila Law LLC to produce information on its business practices, as part of the agency's investigation of the law firm for violating telemarketing laws.[13] Seila refused, arguing that the CFPB single-director structure with for-cause removal violated the separation of powers.[14] The CFPB filed suit to enforce its demand.[15] Writing for three Justices, with two others concurring in the judgment, Chief Justice Roberts agreed with Seila and found the agency's design unconstitutional, in the process setting up a framework that appears to allow Congress to condition removal from office for members of multimember commissions but not for

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[7] *See id.*

[8] *See* Edmund L. Andrews, *Banks Balk at Agency Meant to Aid Consumers*, N.Y. TIMES (June 30, 2009), https://www.nytimes.com/2009/07/01/business/economy/01regulate.html [https://perma.cc/6FUH-MUDE].

[9] *See infra* section I.A, pp. 358–64.

[10] *See infra* section I.C, pp. 371–73.

[11] 140 S. Ct. 2183 (2020).

[12] *Id.* at 2193 (quoting 12 U.S.C. § 5491(c)(3) (2018)).

[13] *See id.* at 2194 (citing CFPB v. Seila Law, LLC, No. 8:17-cv-01081, 2017 WL 6536586, at *1 (C.D. Cal. Aug. 25, 2017)).

[14] *Id.*

[15] *Id.* By the time the case came to the Supreme Court, the Trump Administration had agreed with Seila on the merits of the constitutional question, so the Court appointed Paul Clement as amicus to argue the case for the CFPB's constitutionality. *See id.* at 2195.

single-director agency heads.[16] At the same time, the Chief Justice wrote for seven Justices that the CFPB's for-cause removal restriction was severable from the rest of the statute and that it alone would be struck[17] — leaving the agency in place but now with a presidential removal threat looming over its director.

Justice Kagan dissented from the constitutional analysis, along with the three other liberal Justices. In an opinion filled with sharp, cutting language, Justice Kagan protested that there was nothing neutral about the majority's reasoning or its unitary executive theory of the separation of powers. She systematically argued that "constitutional text, history, and precedent invalidate[] the majority's thesis."[18] Justice Kagan even accused the majority of "gerrymander[ing]" their "made up" rule to strike down the CFPB's independent structure.[19] For a separation of powers case, this was about as bloody a fight as it gets.

But why?

Seven Justices agreed that the CFPB can continue to regulate financial products, so long as its head is removable at will by the President. Seila, the law firm, is likely still subject to the investigatory demand because the Trump CFPB, now with a removable director, says it has ratified that demand.[20] And *Seila*, the case, means that if Democratic nominee Joe Biden wins the White House in November, he can fire the Republican-appointed head of the CFPB and install a pro-regulatory appointee. Given that this was one of the marquee cases of the 2019 Term and that the decision broke 5–4 along ideological lines, these are hardly epochal consequences.

Supreme Court cases are often seen as "political" because the first-order effects of the decisions have self-evident political, partisan, or ideological consequences. *Bush v. Gore*[21] chose a President. *NFIB v. Sebelius*[22] could have overturned a President's namesake healthcare initiative. This Term's cases on abortion[23] and the President's taxes[24] have obvious "political" valence. On an initial glance, *Seila* is different. The first-order consequences of the decision are not self-evidently political. The decision does not invalidate the Consumer Financial Protection Bureau as a whole or strip it of any substantive powers. It does not favor the Trump Administration, as President Trump already has his handpicked head of the CFPB in place. It does not favor Republican

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16 *See id.* at 2199, 2201.

17 *Id.* at 2211.

18 *Id.* at 2240 (Kagan, J., concurring in part and dissenting in part).

19 *Id.* at 2225.

20 *See* Ratification of Bureau Actions, 85 Fed. Reg. 41,330 (July 10, 2020) (to be codified at 12 C.F.R.).

21 531 U.S. 98 (2000).

22 567 U.S. 519 (2012).

23 *See* June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020).

24 *See* Trump v. Vance, 140 S. Ct. 2412 (2020); *see also* Trump v. Mazars USA, LLP, 140 S. Ct. 2019 (2020).

Presidents over Democratic ones in some more systematic way either: Presidents of either party could fire the head of the CFPB upon taking office and nominate a new one. Indeed, even if *Seila* is a step toward overturning removal conditions altogether — making commissions like the FTC and FCC less independent — it is not clear that the first-order effects of that rule are "political" either. Republican and Democratic Presidents alike might use their unitary executive power of removal to fire ideologically misaligned commissioners and choose ones more to their liking.

My aim in this Comment is to offer something of a Rashomon[25] of *Seila* to try to explain why *Seila* was so hotly contested, why it is a marquee case, and why it might be considered a "political" decision — in spite of the symmetrical first-order effects and limited consequences for the Consumer Financial Protection Bureau.[26] Throughout this Comment, I use the word "political" in different ways, in order to explore how a case can be "political" beyond obvious first-order electoral consequences (as in *Bush v. Gore*) or policy consequences (as with *NFIB v. Sebelius*).

The first story is of how *Seila* itself came to be. It is not entirely clear why *Seila* was brought to the Supreme Court. After the Court's 2010 decision in *Free Enterprise Fund v. Public Co. Accounting Oversight Board*,[27] it was predictable that the Court would likely hold that the remedy for an unconstitutional removal provision was simply to strike it and leave the agency in place. So why bring the case if recovery was unlikely? Part I provides the policy context for *Seila*, outlining the origins of the CFPB and the decade-long fight over its existence. This context shows how the financial industry, political leaders, and others deployed a variety of tactics and arguments to try to kill or weaken the consumer agency. *Seila* must be understood in this context. It did not simply arise, as the Court suggested, from novel legislative design. It was the culmination of a relentless antiregulatory oppositional campaign that began when Congress and the President took up Warren's proposal — and that eventually turned into a constitutional battle.

The second story places *Seila* within the context of the rise of the unitary executive theory. Part II shows how the unitary theory went from virtually nonexistent in the 1970s to a major part of legal and scholarly debate by the 1990s and 2000s. Its rise was not so much a function of popular constitutionalism in the form of a social movement or public opinion as it was elite efforts. The unitary executive theory

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[25] RASHOMON (Minoru Jingo 1950) (depicting the same event through the perspectives of different characters).

[26] This approach aligns with the law and political economy framework, which seeks to center issues of power, equality, and democracy rather than separating the market from politics. *See generally* Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784 (2020).

[27] 561 U.S. 477 (2010). See *infra* section I.D, pp. 374–75, for a discussion.

gained steam through the initiative of conservative presidential administrations (Ronald Reagan and George W. Bush) and a systematic effort to articulate and defend the theory in legal scholarship. Chief Justice Roberts's straightforward, briefly reasoned opinion in *Seila* reflects the success of the conservative legal movement in making the theory plausible. Justice Kagan's piercing dissent lays bare how contested this reasoning is. Taken together, the conservative push for a unitary executive and the battle between Chief Justice Roberts and Justice Kagan should leave readers with the sense that the case is "political" in a different sense.

The third story is one of values and consequences rather than historical context. Given that the first-order consequences of *Seila* and of a presidential removal power are symmetrical for presidents of both political parties, are there "political" reasons why conservatives are so interested in the presidential removal power? And conversely, are there "political" reasons why liberals and progressives have been so opposed to it? The opinion in *Seila* leaves traces of possible normative views of how the separation of powers should be enforced, which in turn point to some potentially larger ideological stakes. In addition, scholars often reference the rise of the removal power as a danger to the administrative state, but it is unclear precisely through what mechanism this operates, given the first-order symmetry of the rule itself. Part III canvasses these normative views and the mechanisms that might produce asymmetric consequences. It is admittedly a speculative enterprise, but to the extent any of these normative views or policy consequences ring true (and they may not, or may not for everyone), they further indicate why *Seila* and the removal power should be considered deeply "political."

I. THE ASSAULT ON THE CONSUMER FINANCIAL PROTECTION BUREAU

In her 2007 article first making the case for a federal agency to regulate consumer financial products, then-Professor Warren described how financial institutions had engaged in a variety of unfair and predatory practices.[28] One-off regulatory solutions had not stopped lender kickbacks, product steering toward vulnerable communities, or tricks, traps, and obfuscation in financial agreements.[29] Families were suffering as a result. Warren thus argued for the creation of a new agency, akin to the Consumer Product Safety Commission (CPSC), that would regulate mortgages and other financial products just like the CPSC regulates toasters and other consumer goods.[30]

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[28] *See* Warren, *supra* note 4.

[29] *Id.*

[30] *Id.*

Warren offered the CPSC as an analogy, but her focus was not on whether there should be a single-director agency or a multimember commission.[31] Rather, at that point, and throughout the fight to create the CFPB, she primarily wanted an agency that focused on products, rather than issuers, in order to prevent regulatory arbitrage; that would have a mission focused solely on consumer financial protection, rather than having multiple missions; and that would be strong and independent so it could evade industry capture.[32] Importantly, she noted that the ultimate effect of sound regulation would be to improve markets.[33] As with food, drugs, and other consumer products, trust in the safety of the product would make consumers more comfortable and markets more competitive.[34]

The proposal immediately met with two reactions. The first was that it would be effective. A new agency with powers akin to other regulatory agencies could significantly improve the consumer financial product market. The other thing Warren was told: "Don't do it."[35] "There is no possible way you can win," people in Washington said, "because this is going to cost some big banks real money."[36] They cautioned her that the biggest banks would "sweep through this town with their lobbyists, and you will end up with nothing."[37] Instead, they advised her to ask for "bunches of little things, and maybe you will get one or two things."[38] The warnings did not have their intended effect. Warren redoubled her efforts and began to mobilize support from as many groups and individuals as she could.[39] The AFL-CIO, the AARP,

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[31] Warren later commented that as the idea gained traction and she talked to experts about agency design, she quickly came to support a single-director structure. Elizabeth Warren, *The Banking Industry's Transparent Attempt to Weaken the CFPB*, HUFFPOST (Oct. 20, 2016, 5:41 PM), https://www.huffpost.com/entry/banking-industrys-attempt-weaken-cfpb_b_8340792 [https://perma.cc/R6M4-ARXB].

[32] Warren, *supra* note 4. For discussions of how the CFPB fulfilled these aims, see generally Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15 (2010); Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321 (2013); Patricia A. McCoy, *Inside Job: The Assault on the Structure of the Consumer Financial Protection Bureau*, 103 MINN. L. REV. 2543 (2019).

[33] *See* Warren, *supra* note 4.

[34] *Id.*

[35] Kara Swisher & Walt Mossberg, *The 30-Year "Sudden Explosion" of Senator Elizabeth Warren (Video)*, VOX: RECODE (June 10, 2015, 4:00 AM), https://www.vox.com/2015/6/10/11563396/the-30-year-sudden-explosion-of-sen-elizabeth-warren-video [https://perma.cc/L5C3-V3L4].

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *See id.*

the NAACP, and others joined her,[40] and together, they started to push for the agency.[41]

A. The Path to Passage

When the Obama Administration offered its outline for financial reform in 2009,[42] financial institutions immediately identified "killing" the Consumer Financial Protection Bureau as their "top priority."[43] According to news reports, they vowed to fight the proposal "with everything they ha[d]."[44] In September 2009, the Chamber of Commerce began a $2 million ad campaign opposing the reforms[45] and even created a "Stop the CFPA" website.[46] By March of 2010, with the CFPB having passed the House of Representatives and negotiations proceeding in the Senate, the Chamber announced it was "intensifying" its campaign against the CFPB.[47] Its multimillion-dollar television, radio, online, and grassroots outreach effort had already generated nearly two hundred thousand letters to Congress.[48] That year, the financial sector ended up spending $481.2 million dollars lobbying,[49] and it made $346.7 million in campaign contributions in that year's midterm elections.[50] All in all, some three thousand lobbyists worked to kill or weaken parts of the Dodd-Frank bill — almost six lobbyists for every member of Congress.[51]

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[40] *See id.*

[41] There are a number of excellent accounts of the passage of the Dodd-Frank Act from participants and journalists. ELIZABETH WARREN, A FIGHTING CHANCE (2014) offers Warren's own account of her efforts to get the CFPB passed into law. ROBERT G. KAISER, ACT OF CONGRESS: HOW AMERICA'S ESSENTIAL INSTITUTION WORKS, AND HOW IT DOESN'T (2013) is a journalistic account that uses the Dodd-Frank Act as a lens through which to see how Congress functions.

[42] U.S. DEP'T OF TREASURY, FINANCIAL REGULATORY REFORM: A NEW FOUNDATION 55 (2009).

[43] Andrews, *supra* note 8.

[44] *Id.*; *see* KAISER, *supra* note 41, at 127, 131, 134–36 (discussing the banking lobby's immediate opposition to the agency).

[45] Brody Mullins, *Chamber Ad Campaign Targets Consumer Agency*, WALL ST. J. (Sept. 8, 2009, 12:01 AM), https://www.wsj.com/articles/SB125236911298191113 [https://perma.cc/JT7P-56D2].

[46] Earlier in the legislative process, the agency was called the Consumer Financial Protection Agency, rather than Bureau. I refer to it throughout as Bureau or CFPB for simplicity.

[47] Press Release, U.S. Chamber of Com., U.S. Chamber Intensifies Campaign for Bipartisan Financial Regulatory Reform (Mar. 25, 2010, 8:00 PM), https://www.uschamber.com/press-release/us-chamber-intensifies-campaign-bipartisan-financial-regulatory-reform [https://perma.cc/7JGR-8XY7].

[48] *Id.*

[49] *Finance/Insurance/Real Estate: Lobbying, 2019*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/lobbying.php?ind=F [https://perma.cc/29NH-X3F6].

[50] *Finance/Insurance/Real Estate: Long-Term Contribution Trends*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/totals.php?ind=F [https://perma.cc/FW92-8UQM] .

[51] Gary Rivlin, *How Wall Street Defanged Dodd-Frank*, THE NATION (Apr. 30, 2013), https://www.thenation.com/article/archive/how-wall-street-defanged-dodd-frank [https://perma.cc/CEQ8-PQJH].

Opponents of the CFPB recognized the unpopularity of advocating against consumer protection. After all, the proposal came in the wake of a historic economic crash that was rooted in practices designed to steer or trick consumers into expensive and risky financial products. As a lobbyist for the Financial Services Roundtable admitted in the summer of 2009, "the optics are bad."[52] Financial industry lobbyists and their allies did not argue that their bottom lines would suffer from regulation. Rather, they offered a variety of substantive arguments against the agency. These arguments can be grouped into three categories.

First were arguments denying the need for structural changes. Some opponents argued that weak consumer financial products had little to do with the crash.[53] Regulation of any kind, let alone structural regulation, was therefore disconnected from the causes of the crisis. Others conceded the need for reforms but suggested instead "beefed-up" powers for existing regulatory agencies.[54] Still others suggested placing a new office within the FDIC[55] or creating a council of existing regulators.[56] These arguments allowed opponents of the CFPB to claim the high ground in supporting regulation, while effectively minimizing change and keeping the existing (and flawed) structures in place.

The second category included technocratic consequentialist arguments. Arguments of this type were not actually a case against a new agency. They were a case against hypothetical regulations that might emerge from a new agency. Opponents of the new agency thus argued that it might harm small businesses[57] and increase the costs of loans and other financial products.[58] At one point in spring of 2010, they even

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[52] *See* Andrews, *supra* note 8.

[53] The Editors, *The Case Against the Dodd Bill*, NAT'L REV. (Apr. 26, 2010, 8:00 AM), https://www.nationalreview.com/2010/04/case-against-dodd-bill-editors [https://perma.cc/E8CY-54FM]; Duncan Currie, *Getting Financial Reform Right*, NAT'L REV. (Mar. 25, 2010, 8:00 AM), https://www.nationalreview.com/2010/03/getting-financial-reform-right-duncan-currie [https://perma.cc/VY58-PK89] ("I don't see consumer protection as being at all part of the problem we are trying to fix." (quoting John Cochrane)).

[54] R. Christian Bruce, *Regulatory Reform: Summers Urges Speed on Bank Reforms, Says Consumer Protection Agency Essential*, 93 BANKING REP. (BNA) No. 10, at 506 (Sept. 22, 2009) ("[T]he Consumer Bankers Association, the Financial Services Roundtable, and 23 other business groups said creating a stand-alone consumer protection agency with broad powers 'is not the correct approach.' Instead . . . existing regulatory agencies could be given beefed-up powers.").

[55] *See* Victoria McGrane, *Consumer Agency Fight Continues*, POLITICO (Mar. 1, 2010, 3:20 PM), https://www.politico.com/story/2010/03/consumer-agency-fight-continues-033706 [https://perma.cc/E4FA-Z9L4].

[56] *See* U.S. Chamber of Com., *supra* note 47.

[57] U.S. Chamber of Com., *The Proposed CFPA Will Disproportionately Harm Small Businesses*, https://www.uschamber.com/sites/default/files/legacy/chambers/files/proposedcfpawilldisproportionatelyharmsmallbusinesses.pdf [https://perma.cc/J98C-85D2].

[58] James Gattuso, *Senator Dodd's Regulation Plan: Fourteen Fatal Flaws*, HERITAGE FOUND. (Apr. 22, 2010), https://www.heritage.org/markets-and-finance/report/senator-dodds-regulation-plan-14-fatal-flaws [https://perma.cc/TK7L-8DDW].

alleged that the CFPB would regulate orthodontists who offer payment plans for parents whose kids need braces.[59] Still others claimed the proposal would create "a fragmented system of regulation," even though it was designed to do the opposite.[60] This mix of tradeoffs, misdirection, and fearmongering was common throughout 2009 and 2010, and it appeared to be designed at a minimum to shrink the scope of the CFPB's authority — and at a maximum to sow the seeds of doubt among fence-sitters about the need for a new agency with a broad mandate.

The third category included structural consequentialist arguments.[61] These usually came in two flavors, both with hefty libertarian impulses. The first was that a new agency would be a "paternalistic," "elitist," "financial nanny" that undermined freedom and individual liberty.[62] The agency, these terrified opponents claimed, would "for the first time" ever in the history of the country prevent people from buying products and services that are not inherently dangerous.[63] This was, of course, manifestly incorrect, as federal regulation has long restricted the sale of many kinds of products that are not inherently dangerous. The point, however, seems to have been to activate libertarian impulses toward individual freedom.

The second flavor were arguments that framed the agency as a tyrannical, authoritarian apparatus that had "unchecked powers and massive authority over the economy."[64] Senator Mike Enzi, for example, said that the agency would become the "single most powerful agency in

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59 Chris Frates, *Banks Will Accept Consumer Agency*, POLITICO (Apr. 17, 2010, 6:26 PM), https://www.politico.com/story/2010/04/banks-will-accept-consumer-agency-035948 [https://perma.cc/LT5S-F3K9]; Chris Frates, *GOP Chips Away at Wall St. Bill*, POLITICO (May 9, 2010, 6:42 PM), https://www.politico.com/story/2010/05/gop-chips-away-at-wall-st-bill-036983 [https://perma.cc/74SG-FXQH].

60 U.S. Chamber of Com., *supra* note 47.

61 On the difference between technocratic and structural thinking and reform generally, see, for example, GANESH SITARAMAN, THE GREAT DEMOCRACY 51–52 (2019); GANESH SITARAMAN, CTR. FOR AM. PROGRESS, UNBUNDLING "TOO BIG TO FAIL" 10–11 (2014), https://cdn.americanprogress.org/wp-content/uploads/2014/07/TooBigToFail-report.pdf [https://perma.cc/X7TX-S5TS].

62 *See, e.g.*, Peter J. Wallison, *The Consumer Financial Protection Agency*, AM. ENTER. INST. (July 14, 2009), https://www.aei.org/articles/the-consumer-financial-protection-agency [https://perma.cc/6Q7R-22V7]; Peter J. Wallison, *Elitist Protection Consumers Don't Need*, AM. ENTER. INST. (July 13, 2009), https://www.aei.org/articles/elitist-protection-consumers-dont-need [https://perma.cc/JKW4-GRDM]; Anthony Dick, *Re: Financial Nanny*, NAT'L REV. (July 8, 2009, 3:54 PM), https://www.nationalreview.com/corner/re-financial-nanny-anthony-dick [https://perma.cc/Y8VG-YB94].

63 Wallison, *Elitist Protection Consumers Don't Need*, *supra* note 62.

64 U.S. Chamber of Com., *supra* note 47. Language of this type is an example of what Professor Gillian Metzger has called "rhetorical anti-administrativism." Gillian E. Metzger, *The Supreme Court, 2016 Term — Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 34–38 (2017).

the Federal Government" and would exercise "unchecked power."[65] Claims of "unchecked power" were also manifestly incorrect. At a minimum, the proposed CFPB would have been subject to the Administrative Procedure Act's requirements of notice-and-comment rulemaking and judicial review.[66] The idea that the agency would somehow be the most powerful agency in the federal government was also far-fetched, to say the least. Competitors might include the Justice Department, which can prosecute and incarcerate; the Federal Reserve, which can crash the economy in setting monetary policy; and the Federal Trade Commission, whose powers include regulating "unfair or deceptive acts or practices in or affecting commerce"[67] — a power much broader than the CFPB's authority to address unfair and abusive practices related to a "consumer financial product or service."[68] The value of these arguments seems not to have been precision in the possible harms but the crafting of a libertarian, road-to-serfdom narrative of the slippery slope of governmental power. This narrative, like the broccoli argument in the adjacent health care debate,[69] would ultimately migrate from public debate into the legal arena and take on a constitutional valence.

Importantly, so far as I can tell, at no time in the legislative debates did a member of Congress argue that the CFPB's design was unconstitutional. Searching the House and Senate debates for references to the constitutionality or unconstitutionality of the CFPB turns up not a single reference.[70] The debate over the agency — even with heated rhetoric that trended toward absurdity — was fundamentally political, economic, and ideological, not constitutional.

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[65] Arthur E. Wilmarth, *The Financial Services Industry's Misguided Quest to Undermine the Consumer Financial Protection Bureau*, 31 REV. BANKING & FIN. L. 881, 888 n.23 (2012).

[66] *See* Ganesh Sitaraman & Ariel Dobkin, *The Choice Between Single Director Agencies and Multimember Commissions*, 71 ADMIN. L. REV. 719, 728, 739–40 (2019) (explaining that baseline procedural checks apply to both single-director agencies and multimember commissions).

[67] 15 U.S.C. § 45 (2018).

[68] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376, 1031, 1036 (codified as amended in scattered sections and titles of U.S.C.).

[69] The individual mandate provision of the Patient Protection and Affordable Care Act (ACA) led critics to ask if there was anything to prevent the government from requiring that people purchase broccoli. For an explanation of the role of broccoli in the debate of the ACA, see Mark D. Rosen & Christopher W. Schmidt, *Why Broccoli? Limiting Principles and Popular Constitutionalism in the Health Care Case*, 61 UCLA L. REV. 66, 69 (2013); and *NFIB v. Sebelius*, 567 U.S. 519, 558, 608 (2012) (both Chief Justice Roberts's majority opinion and Justice Ginsburg's partial dissent address the broccoli hypothetical).

[70] To determine whether there had been a discussion of constitutionality, Vanderbilt research librarian Meredith Capps undertook two searches. First: she looked at all the briefs in the case, in search of any reference to legislative history that would indicate a concern with constitutionality. Second: she searched the compiled legislative history record for the Dodd-Frank Act in ProQuest Legislative Insight for any reference to "unconstitutional," "constitutional," "separation of powers," "humphrey's," "morrison," "myers," and "free enterprise fund." In both cases she found no indication that there were constitutional concerns with the agency. I thank her greatly for her diligent work.

With these arguments in place, the debate was polarized from the start. Representative Barney Frank led the House effort to create the CFPB, and he supported a single-director agency from the beginning.[71] But he initially lacked the votes for that design, so he adopted a commission structure.[72] Every Republican on the Energy and Commerce Committee voted against the agency in committee and every Republican in the House of Representatives voted against the overall bill in the fall of 2009.[73] One conservative commentator said that when it came to the House bill, "[t]he bad can be summed up in four words: Consumer Financial Protection Agency."[74]

The Senate took up the bill in the spring of 2010.[75] "[T]he fighting was intense," said former (and later) law professor Michael Barr, who was then heading up financial reform at the Treasury Department.[76] There were fears that the publicly popular CFPB would not get a vote in the Senate because senators did not want to vote for it and anger the banks or vote against it and anger their constituents. Warren pushed hard for a clean, public vote on the agency,[77] and she announced her intention to fight efforts to water down the agency into a fig leaf reform without serious authority. "My first choice is a strong consumer agency," she said at the time.[78] "My second choice is no agency at all and plenty of blood and teeth left on the floor."[79] And, she noted, "My 99th choice is some mouthful of mush that doesn't get the job done."[80] Aware of the

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71 Letter from Barney Frank, Rep., U.S. House of Representatives, to Kyrsten Sinema, Rep., U.S. House of Representatives (Oct. 16, 2015), available at https://www.politico.com/f/?id=00000150-81e6-ddfb-a3fo-97fe287c0000 [https://perma.cc/LJF2-Y8QL].

72 H.R. 3126, 111th Cong. § 112 (2009); Letter from Barney Frank, *supra* note 71.

73 *See* Office of the Clerk, Roll Call 968 | Bill Number: H.R. 4173, U.S. House of Representatives (Dec. 11, 2009), https://clerk.house.gov/Votes/2009968 [https://perma.cc/R9E6-UMNR]; H.R. REP. NO. 111-367, at 93 (2009), https://www.congress.gov/111/crpt/hrpt367/CRPT-111hrpt367-pt1.pdf [https://perma.cc/XD9T-G4UU]; *see also* Duncan Currie, *Fed-Bashing and Consumer Protection*, NAT'L REV. (Mar. 5, 2010, 9:00 AM), https://www.nationalreview.com/2010/03/fed-bashing-and-consumer-protection-duncan-currie [https://perma.cc/R23U-PEWP].

74 Stephen Spruiell, *House Passes Financial Reform Bill*, NAT'L REV. (Dec. 11, 2009, 9:00 PM), https://www.nationalreview.com/corner/house-passes-financial-reform-bill-stephen-spruiell [https://perma.cc/742W-XVJY].

75 *See* David M. Herszenhorn & Edward Wyatt, *Republicans Allow Debate on Financial Overhaul*, N.Y. TIMES (Apr. 28, 2010), https://nyti.ms/332wBNk [https://perma.cc/6TUY-YMPG].

76 Rivlin, *supra* note 51.

77 WARREN, supra note 41, at 155–59.

78 Shahien Nasiripour, *Fight for the CFPA Is "A Dispute Between Families and Banks," Says Elizabeth Warren*, HUFFPOST (May 25, 2011), https://www.huffpost.com/entry/fight-for-the-cfpa-is-a-d_n_483707 [https://perma.cc/M9B6-U8HT].

79 *Id.*

80 *Id.*

two sides behind the legislative negotiations, *Rolling Stone* framed the fight as "Elizabeth Warren vs. Wall Street."[81]

Republicans in the Senate used all three arguments against the CFPB in combination, and they emphasized new ones as well. Senator Bob Corker, for example, worried that consumer protection would not be coordinated with financial stability and proposed creating a veto for CFPB rules.[82] The American Bankers Association supported this position as a way to weaken the agency, even though it had opposed linking consumer protection and financial stability a mere four years earlier.[83] Back then, decoupling these functions had been proposed to strengthen consumer protection.[84] Warren called out this hypocrisy as proof that the banks' only consistent principle was opposition to regulation.[85]

Navigating these political waters, Senator Chris Dodd, who was leading financial reform efforts in the Senate, adopted a variation on Corker's proposal.[86] The final Dodd bill involved a single-director agency located within the Federal Reserve, and it gave the Financial Stability Oversight Council a limited veto over some of the CFPB's regulations, making the CFPB the only agency with such a check.[87] Some liberals worried the Dodd bill was too weak because of the inclusion of the veto provision.[88] But even with the accommodation to Senator Corker, the CFPB's creation remained "the most contentious issue" in

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[81] Tim Dickinson, *Elizabeth Warren vs. Wall Street*, ROLLING STONE (Apr. 12, 2010, 2:43 PM), https://www.rollingstone.com/politics/politics-news/elizabeth-warren-vs-wall-street-194416 [https://perma.cc/3BWK-QH5N].

[82] Currie, *supra* note 53.

[83] *See* Elizabeth Warren, *Banking on Hypocrisy*, POLITICO (Mar. 30, 2010, 5:05 AM), https://www.politico.com/story/2010/03/banking-on-hypocrisy-035163 [https://perma.cc/M8W8-BB3T].

[84] *Id.*

[85] *Id.*

[86] For a discussion of the Corker-Dodd negotiations and their failure, see KAISER, *supra* note 41, at 250–56.

[87] S. 3217, 111th Cong. §§ 113(a)(1), 1011(a)–(b) (2010); *see also* JEFFREY M. STUPAK, CONG. RSCH. SERV., R45052, FINANCIAL STABILITY OVERSIGHT COUNCIL (FSOC): STRUCTURE AND ACTIVITIES 3 (2018) (explaining that because Section 113(a)(1) requires an affirmative vote from the Secretary to designate a nonbank as posing systemic risk, the FSOC chair has an effective veto); Mike Konczal, *The GOP Doesn't Oppose Richard Cordray. It Opposes His Whole Agency.*, WASH. POST (May 25, 2013, 2:33 PM), https://www.washingtonpost.com/news/wonk/wp/2013/05/25/the-gop-doesnt-oppose-richard-cordray-it-opposes-his-whole-agency [https://perma.cc/XFS7-DLEQ] (noting the veto power is "a feature that does not apply to any other regulator").

[88] *See, e.g.*, Pat Garofalo, *Corker: I Wish Dodd Would Negotiate with Me, so I Could Weaken His Consumer Protection Bureau*, THINKPROGRESS (Apr. 1, 2010, 10:00 PM), https://shorturl.at/oqBET [https://perma.cc/Z9MG-8WRA].

the debate.[89] According to Corker, the agency's inclusion prevented any Republicans from agreeing to financial reform.[90]

With the CFPB in the Dodd bill, Republicans proposed an amendment on the Senate floor — now to reduce the agency's powers and place it within the FDIC.[91] Warren observed that the "lobbyists' closest friends in the Senate would like nothing better than passing an agency that has a good name but no real impact so they have something good to say to the voters — and something even better to say to the lobbyists."[92] Nonetheless, the consumer agency wouldn't die.[93] The last-ditch efforts to kill it failed. With Dodd's bill having the votes to pass in the Senate, Frank immediately agreed to a single-director structure in conference committee, as it had always been his preference.[94] President Obama signed the new Consumer Financial Protection Bureau into law on July 21, 2010.[95]

B. Halftime

"Halftime." That's what the head lobbyist for the Financial Services Roundtable called it when the Dodd-Frank Act passed.[96] The financial industry and Republicans understood that even though they had lost the first legislative battle, the war over financial regulation would continue in Congress, in the agencies, and ultimately, in the courts.

1. Money and Influence. — Financial institutions ramped up their lobbying efforts and campaign spending. In 2012, the financial industry spent $749 million on campaign contributions, shifting from a roughly even split funding both parties in prior cycles to spending almost seventy percent of their contributions on Republicans.[97] That was on top of $490

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[89] James Rowley & Lisa Lerer, *Consumer Agency Still "Elephant" in Room in Debate*, BLOOMBERG (May 3, 2010, 3:42 PM), https://www.bloomberg.com/news/articles/2010-05-03/consumer-protection-still-elephant-in-room-for-financal-overhaul-debate [https://perma.cc/P3AM-8PVN].

[90] *Id.* (describing Senator Corker's view that the CFPB's creation was "the elephant in the room" that prevented any bipartisan agreement on Dodd-Frank).

[91] Wilmarth, *supra* note 65.

[92] Nasiripour, *supra* note 78.

[93] Elizabeth Warren, *Consumer Agency that Won't Die*, POLITICO (June 1, 2010, 4:58 AM), https://www.politico.com/story/2010/06/consumer-agency-that-wont-die-037971 [https://perma.cc/FH9J-ARWS].

[94] Letter from Barney Frank, *supra* note 71.

[95] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, § 1011(a), 124 Stat. 1396, 1964 (2010) (codified as amended in scattered sections of 12 and 15 U.S.C.); *see also* Ross Colvin, *Obama Signs Sweeping Wall Street Overhaul into Law*, REUTERS (July 21, 2010, 9:23 PM), https://www.reuters.com/article/us-financial-regulation-obama/obama-signs-sweeping-wall-street-overhaul-into-law-idUSTRE66K1QR20100722 [https://perma.cc/RCD7-DU7G].

[96] Rivlin, *supra* note 51.

[97] *Finance/Insurance/Real Estate: Long-Term Contribution Trends*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/totals.php?cycle=2020&ind=F [https://perma.cc/9WA9-TXWK].

million in lobbying expenses.[98] To get a sense of the size and scope of the lobbying effort, consider this: in 2012, the top five consumer advocacy groups had twenty lobbyists in Washington. The top five financial industry groups had 406 — just about one per member of Congress.[99] And those numbers undercount the extensive additional resources that financial industry lobbyists had at their disposal in the form of researchers, PR consultants, and regulatory lawyers.[100] By the 2015–2016 cycle, the sector was spending more than $2 billion between contributions and lobbying — amounting to $2.7 million a day.[101]

The consequences of these resource imbalances were real. Consumer groups had 116 meetings with regulatory agencies in the years after Dodd-Frank was passed; the top five commercial banks met with them 901 times.[102] A study that looked into the relationship between money and policy found that members of Congress who voted for rolling back financial reforms got two to four times as much in campaign contributions from Wall Street PACs than did those who held the line and protected reform.[103] At the time, Dennis Kelleher, the head of the financial reform group Better Markets, asked, "How do you compete when one side is this hydra-headed monster that can devote unlimited resources to killing, gutting or otherwise weakening financial reform?"[104]

The fight against the CFPB continued in public as well. In 2015, the heads of six big trade associations — the American Bankers Association, American Land Title Association, Consumer Bankers Association, Credit Union National Association, Independent Community Bankers Association, and National Association of Federal Credit Unions — penned a joint op-ed again calling for restructuring the agency.[105] A $500,000 television ad campaign, funded by a group whose board included lobbyists for the student loan giant Naviant (which was

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98 *Finance/Insurance/Real Estate: Lobbying, 2019*, OPENSECRETS.ORG, https://www.opensecrets.org/industries/lobbying.php?cycle=2020&ind=F [https://perma.cc/T9K5-DRX5].

99 Rivlin, *supra* note 51.

100 *Id.*

101 *AFR Report: Wall Street Lobby and Campaign Cash Tops $2 Billion for 2016 Elections*, AMS. FOR FIN. REFORM (Mar. 8, 2017), https://ourfinancialsecurity.org/2017/03/afr-report-wall-street-lobby-campaign-cash-tops-2-billion-2016-elections [https://perma.cc/5R5P-7TEY].

102 Rivlin, *supra* note 51.

103 *See* Daniel Stevens, *Representatives Voting for Dodd-Frank Rollback Receive Millions from Top Wall Street Banks*, MAPLIGHT (Dec. 12, 2014), https://maplight.org/story/representatives-voting-for-dodd-frank-rollback-receive-millions-from-top-wall-street-banks [https://perma.cc/7R77-ZX5C].

104 Rivlin, *supra* note 51.

105 Frank Keating, Michelle L. Korsmo, Richard Hunt, Jim Nussle, Camden R. Fine & B. Dan Berger, *CFPB Should Be Bipartisan Commission*, THE HILL (Sept. 30, 2015, 7:00 AM), https://thehill.com/blogs/congress-blog/the-administration/255322-cfpb-should-be-bipartisan-commission [https://perma.cc/6EP7-WJED].

sued by the CFPB), framed the agency as something from the authoritarian Soviet Union.[106] In the ad, bureaucratic drones deny loan applications in a massive room, with giant red banners featuring the faces of by-then Senator Warren and then-Director Richard Cordray hanging in the background.[107] In the eyes of opponents, the Director was a "politically biased regulatory dictator" (that was an industry op-ed in the *Wall Street Journal*).[108] The agency's textbook rulemaking powers amounted to "mak[ing] up laws as it goes along" and were "counter to the American system of limited government" (that was a commentator at the Heritage Foundation).[109] The Republican Party platform in 2016 even declared that the CFPB was a "rogue agency" with "dictatorial powers."[110] Importantly, framing the fight as restructuring to prevent a "dictatorial" agency enabled opponents to avoid attacking the agency itself or its actions, both of which remained popular.[111]

2. Confirmation Wars. — Republican senators also took the extraordinary action of preventing the agency from having a confirmed leader. Forty-four Republicans declared on May 5, 2011, that they would block the confirmation of *any* person as director of the CFPB until structural changes were enacted into law.[112] "No Accountability, No Confirmation" was the headline adopted by Senator Richard Shelby's office.[113] Senator Shelby himself claimed, incorrectly, that the agency has "*unfettered* authority to regulate businesses that extend consumer credit."[114] By July, the Chamber of Commerce had produced a twenty-seven-page statement systematically arguing that the CFPB's director would have "unprecedented unchecked power of extraordinary breadth" and calling for

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106 Gary Rivlin & Susan Antilla, *No Protection for Protectors*, THE INTERCEPT (Nov. 18, 2017, 9:03 AM), https://theintercept.com/2017/11/18/wall-street-wants-to-kill-the-agency-protecting-americans-from-financial-scams [https://perma.cc/6STE-KV3U].

107 *$500K Ad Campaign Against CFPB Launches*, SUBPRIME (Nov. 10, 2015, 11:03 AM), https://www.autoremarketing.com/subprime/500k-ad-campaign-against-cfpb-launches [https://perma.cc/MV9V-L2GS].

108 Dennis Shaul, Opinion, *What Went Wrong with the CFPB*, WALL STREET J. (Nov. 19, 2017, 1:25 PM), https://www.wsj.com/articles/what-went-wrong-with-the-cfpb-1511072512 [https://perma.cc/3EF7-9ZFY].

109 Norbert J. Michel, *The Consumer Financial Protection Bureau Undermines Economic Freedom*, HERITAGE FOUND. (Jan. 8, 2018), https://www.heritage.org/markets-and-finance/commentary/the-consumer-financial-protection-bureau-undermines-economic-freedom [https://perma.cc/E7RC-626Q].

110 REPUBLICAN NAT'L CONVENTION, REPUBLICAN PLATFORM 2016, at 3 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf [https://perma.cc/KD89-3F78].

111 *See* McCoy, *supra* note 32, at 2568.

112 News Release, Sen. Richard Shelby, 44 U.S. Sens. to Obama: No Accountability, No Confirmation (May 5, 2011), https://www.shelby.senate.gov/public/index.cfm/2011/5/44-u-s-sens-to-obama-no-accountability-no-confirmation [https://perma.cc/4L2N-C6HL].

113 *Id.*

114 *Id.* (emphasis added).

structural reforms.[115] The Chamber stopped short of calling the agency's structure unconstitutional, but it sang a constitutional tune, referring to "checks and balances" eight times.[116]

In the face of intransigent Republican opposition, President Obama chose not to nominate then-Professor Warren to run the CFPB in July 2011, and instead picked former Ohio Attorney General Richard Cordray with the hope he might pass muster with Republicans in the Senate.[117] A few months later, in December 2011, Republicans used the threat of a filibuster to block Cordray's nomination, citing once again their demands for structural reforms to the agency.[118]

The confirmation battle over Cordray wasn't important simply as a matter of political hardball. It was also a tactic to prevent the regulation of financial institutions. A legal opinion from the Treasury and Federal Reserve Inspectors General had concluded that without a confirmed head, the CFPB could not exercise its powers to conduct rulemakings under its new legal authorities; take action to prohibit unfair, deceptive, and abusive practices; or supervise nondepository financial institutions.[119] In other words, the CFPB would not get its full powers without having a Senate-confirmed leader.[120]

Playing political hardball himself, President Obama ultimately gave recess appointments to Cordray and three others in January 2012,[121] leading to lawsuits and ultimately the Supreme Court's decision in *NLRB v. Noel Canning*[122] (which, like *Seila*, does not go into the fe-

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115 *See* Statement, U.S. Chamber of Com., Enhanced Consumer Financial Protection After the Financial Crisis 4 (July 19, 2011), https://www.banking.senate.gov/imo/media/doc/Pincus Testimony71911.pdf [https://perma.cc/XE5A-GQJ3].

116 *See id.* at 3, 5–7, 13, 27.

117 *See* Jessica Yellin, *Obama Will Nominate Cordray to Head New Consumer Protection Bureau*, CNN (July 18, 2011, 1:49 PM), https://www.cnn.com/2011/POLITICS/07/18/consumer.bureau/index.html [https://perma.cc/T658-WHU9].

118 *See* Kevin Wack, *Senate Republicans Block Cordray Nomination*, AM. BANKER (Dec. 8, 2011, 11:24 AM), https://www.americanbanker.com/news/senate-republicans-block-cordray-nomination [https://perma.cc/J9HK-HV9T].

119 Wilmarth, *supra* note 65, at 897; Letter from Eric M. Thorson & Elizabeth A. Coleman to Rep. Spencer Bachus & Rep. Judy Biggert, forwarding "Joint Response by the Inspectors General of the Department of the Treasury and Board of Governors of the Federal Reserve System: Request for Information Regarding the Bureau of Consumer Financial Protection," at 6–7 (Jan. 10, 2011).

120 Professor Art Wilmarth has pointed out that restraining the CFPB in this way had the effect of benefitting non-banks vis-à-vis banks — and he has also shown that some bankers were willing to accept an unlevel playing field in order to prevent the CFPB from gaining its full powers. Wilmarth, *supra* note 65, at 897–99.

121 Helene Cooper & Jennifer Steinhauer, *Bucking Senate, Obama Appoints Consumer Chief*, N.Y. TIMES (Jan. 4, 2012), https://www.nytimes.com/2012/01/05/us/politics/richard-cordray-named-consumer-chief-in-recess-appointment.html [https://perma.cc/69GH-LREF].

122 573 U.S. 513 (2014).

rocious political battles being waged between the branches and the economic stakes behind them).[123] Only after Senate Democrats threatened to change the filibuster rules in July 2013 was Cordray finally confirmed.[124]

3. New Legislation and Weaponized Oversight. — After Republicans captured the House of Representatives in 2010, they began a multi-year effort to weaken and roll back the agency's authority, introducing new legislation and weaponizing their oversight powers.[125] Almost immediately upon taking the House, Republicans introduced multiple pieces of legislation designed to make the CFPB a multimember commission, to strengthen the veto over the CFPB's rulemakings, and to subject the agency to congressional appropriations rather than getting its funding from the Fed's budget.[126] On the first anniversary of Dodd-Frank, the House passed major reforms to the CFPB.[127]

Over the coming years, new legislative proposals to weaken the agency got bolder and more creative. One bill would have eliminated most of the CFPB's supervisory and enforcement powers, ended its independent funding source, made the agency's public consumer complaint database secret, halted its authority to regulate small loans like payday lending, reduced the pay of agency employees, and, of course, made the director removable at will.[128] Another would have prevented the agency from collecting loan data on small and minority businesses, and replaced the notice-and-comment rulemaking process with a more cumbersome one that has been shown to lengthen the rulemaking process by more than five times.[129] At one point, Republicans also proposed

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123 *See id.* at 520–22. For a discussion of how playing hardball can regulate separation of powers disputes, see David E. Pozen, *Self-Help and the Separation of Power*s, 124 YALE L.J. 2, 39–48 (2014).

124 Emily Stephenson, *Senate Confirms Cordray as Consumer Bureau Chief*, REUTERS (July 16, 2013, 11:45 AM), https://www.reuters.com/article/us-financial-regulation-cordray/senate-confirms-cordray-as-consumer-bureau-chief-idUSBRE96F0UD20130716 [https://perma.cc/Q2HZ-B3Q7].

125 *See generally* David C.W. Parker & Matthew Dull, *The Weaponization of Congressional Oversight*, *in* POLITICS TO THE EXTREME: AMERICAN POLITICAL INSTITUTIONS IN THE TWENTY-FIRST CENTURY 47 (Scott A. Frish & Sean Q. Kelly eds., 2013).

126 H.R. 1121, 112th Cong. (2011) (proposing to replace the Director of the CFPB with a five-member Commission); H.R. Res. 358, 112th Cong. (2011) (proposing to strengthen the review authority of the FSOC); H.R. 1640, 112th Cong. (2011) (proposing that the CFPB be subjected to regular appropriations); Wilmarth, *supra* note 65, at 890–91.

127 Consumer Financial Protection Safety and Soundness Improvement Act of 2011, H.R. 1315, 112th Cong. (as passed by House, July 21, 2011) (passed by a vote of 241–173); Wilmarth, *supra* note 65, at 891–92.

128 Financial CHOICE Act of 2017, H.R. 10, 115th Cong. (2017).

129 Community Lending Enhancement and Regulatory Relief (CLEARR) Act of 2017, H.R. 2133, 115th Cong. (2017). The replacement for notice and comment is the Magnuson-Moss process that the FTC must use in consumer rulemaking. *See* Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1982–84 (2015).

using budget reconciliation to end independent funding for the agency.[130] All told, between 2011 and 2017, Republicans introduced 135 bills and resolutions designed to hamper or kill the agency.[131] Importantly, many of these proposals took aim at areas in which the CFPB had been successful, such as its enforcement actions against Wells Fargo and its consumer complaint hotline.[132]

At the same time, House Republicans used their oversight powers in extraordinary ways, weaponizing them to tie up the agency and its leadership in paperwork, legal battles, and invented scandals. They (and the Chamber of Commerce) attacked the CFPB for the cost of renovating its headquarters,[133] a "run-down concrete building" that had not been remodeled since 1976.[134] When they appealed to the Inspector General to investigate plans for this "Taj Mahal,"[135] it found that "construction costs appear reasonable"[136] and appropriate cost controls were in place.[137] The National Capital Planning Commission even

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130 DEMOCRATIC STAFF OF THE H.R. COMM. ON FIN. SERVS., 115TH CONG., THE CONSUMER FINANCIAL PROTECTION BUREAU IN PERSPECTIVE 22–23 (2017), https://financialservices.house.gov/uploadedfiles/cfpb_staff_report.pdf [https://perma.cc/X8LJ-JAES].

131 Rivlin & Antilla, *supra* note 106.

132 DEMOCRATIC STAFF, *supra* note 130, at 21–22.

133 Tim Devaney, *GOP Blasts $215M Cost for Consumer Bureau Office with Waterfall*, THE HILL (July 2, 2014, 5:15 PM), https://thehill.com/regulation/211235-ig-report-cfpbs-renovations-spiral-to-215m-in-rented-building [https://perma.cc/S8SL-RCWL]; Trey Garrison, *Sparks Fly as House GOP Grills Cordray on CFPB*, HOUSINGWIRE (June 18, 2014, 12:01 PM), https://www.housingwire.com/articles/30359-sparks-fly-as-house-gop-fires-for-effect-on-cfpb [https://perma.cc/MKU3-TQDV]; Emily Stephenson, *U.S. Lawmaker Directs Consumer Bureau to Ditch Office Upgrade*, REUTERS (Jan. 12, 2015, 6:37 PM), https://www.reuters.com/article/us-financial-regulation-cfpb/u-s-lawmaker-directs-consumer-bureau-to-ditch-office-upgrade-idUSKBN0KL2F620150112 [https://perma.cc/RB7E-Y8VG]. On the Chamber, see Sean Hackbarth, *Out of Control: CFPB Renovation Costs Balloon Nearly 400%*, U.S. CHAMBER COM. (July 2, 2014, 2:30 PM), https://www.uschamber.com/above-the-fold/out-control-cfpb-renovation-costs-balloon-nearly-400 [https://perma.cc/V5WV-FFT4].

134 Karen Weise, *Republican Attacks on a CFPB Office Renovation Don't Add Up*, BLOOMBERG (July 16, 2014, 12:41 PM), https://www.bloomberg.com/news/articles/2014-07-10/republicans-use-iffy-math-to-attack-cfpb-office-renovation [https://perma.cc/KT5A-DQMM]; CONSUMER FIN. PROT. BUREAU, STRATEGIC PLAN, BUDGET, AND PERFORMANCE PLAN AND REPORT 14 (2014), https://files.consumerfinance.gov/f/strategic-plan-budget-and-performance-plan-and-report.pdf [https://perma.cc/KDA9-A4CJ].

135 Michael Hiltzik, *Consumer Protection: Why Do Republicans Hate the CFPB So Much?*, CHI. TRIB. (July 23, 2015, 2:46 PM), https://www.chicagotribune.com/la-fi-mh-cfpb-republicans-20150723-column.html [https://perma.cc/26BR-9453].

136 OFF. OF INSPECTOR GEN., 2015-FMIC-C-012, CFPB HEADQUARTERS CONSTRUCTION COSTS APPEAR REASONABLE AND CONTROLS ARE DESIGNED APPROPRIATELY 6 (2015), https://oig.federalreserve.gov/reports/cfpb-headquarters-construction-costs-jul2015.pdf [https://perma.cc/T7VL-6YMR].

137 *Id.* at 12. For more information regarding the CFPB's budgetary process for the renovation, see Letter from Off. of Inspector Gen., Response to the January 29, 2014, Congressional Request Regarding the CFPB's Headquarters Renovation Project (June 30, 2014), https://oig.federalreserve.gov/reports/cfpb-congressional-request-headquarters-renovation-project-jun2014.htm [https://perma.cc/ZS9D-PS77].

"commend[ed]" the CFPB and the General Services Administration for the renovations.[138]

At times oversight seemed designed to prevent the agency from accomplishing its statutorily directed obligations. Dodd-Frank required the CFPB to study mandatory arbitration clauses and issue rules consistent with its findings.[139] Five days before the final rule went public, Committee Chairman Jeb Hensarling threatened Cordray with contempt proceedings if he promulgated the rule prior to the agency responding to his requests for thousands of documents.[140] House Republicans had flooded the agency with oversight requests, writing ninety letters of inquiry to the agency between 2014 and 2017 and requiring the agency to produce 170,000 pages of documents (which it did).[141] Chairman Hensarling even adopted the practice of issuing unilateral subpoenas — without committee debate or vote — and proceeded to subpoena the CFPB twenty times, leading to more than forty hours of staff depositions.[142]

When President Trump entered office in 2017, Republicans expanded their arsenal against the agency. They took up an innovative use for the Congressional Review Act[143] (CRA). The CRA is meant to allow Congress to override an agency rulemaking by a majority vote and the President's signature.[144] The Republicans used it to overturn the CFPB's arbitration rule (with Vice President Pence's tiebreaking vote),[145] and then they went further and used it to overturn CFPB guidance on auto lending.[146] By the end of 2017, Republicans were even attacking the agency for *inaction*. After the CFPB issued a historic fine against Wells Fargo for fraudulently opening accounts for unknowing

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138 *Executive Director's Recommendation: CFPB Building Modernization*, NAT'L CAP. PLAN. COMM'N 2 (Feb. 4, 2016), https://www.ncpc.gov/docs/actions/2016February/Consumer_Financial_Protection_Bureau_Headquarters_Moderization_Recommendation_0162_Feb2016.pdf [https://perma.cc/2F5X-R8DB]; Commission Meeting, NAT'L CAP. PLAN. COMM'N 23, 29 (Feb. 4, 2016), transcript available at https://www.ncpc.gov/docs/open_gov_files/transcripts/2016/2016_02_04_NCPC.pdf [https://perma.cc/V9T5-5N67].

139 Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5518(a)–(b).

140 DEMOCRATIC STAFF, *supra* note 130, at 25–26.

141 *Id.* at 21.

142 *Id.*

143 5 U.S.C. §§ 801–808.

144 *Id.* §§ 801–802.

145 *See* Rivlin & Antilla, *supra* note 106.

146 Adam Levitin, *Congressional Review Act Confusion: Indirect Auto Lending Guidance Edition (a/k/a The Fast & The Pointless)*, CREDIT SLIPS (Apr. 17, 2018, 10:40 PM), https://www.creditslips.org/creditslips/2018/04/congressional-review-act-confusion.html [https://perma.cc/6S6H-UEUT].

customers,[147] Republicans criticized Cordray for not being aggressive enough.[148]

C. The Fox in the Henhouse

"It's time to fire King Richard," Senator Ben Sasse commented prior to Donald Trump's inauguration.[149] Almost a year later, in November 2017, Cordray resigned as head of the CFPB and designated his chief of staff Leondra English as the CFPB's interim director.[150] President Trump, a few hours later, appointed OMB director Mick Mulvaney as interim director.[151] The schism at the CFPB immediately went to the courts, with English arguing that Dodd-Frank explicitly gave Cordray the power to choose an interim director and the Trump Administration countering that the terms of the Federal Vacancies Act governed.[152] English ended her challenge half a year later when President Trump nominated Kathy Kraninger to run the Bureau.[153]

In control of the CFPB, Mulvaney and then Kraninger took to dismantling the financial watchdog from the inside. Mulvaney had opposed the agency vehemently as a congressman and even sponsored legislation to eliminate it.[154] Now at the helm of the agency he detested, Mulvaney went systematically through the agency's structures, powers,

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147 Michael Corkery, *Wells Fargo Fined $185 Million for Fraudulently Opening Accounts*, N.Y. TIMES (Sept. 8, 2016), https://nyti.ms/2c09hQK [https://perma.cc/U35J-RDCG].

148 Kate Berry & Ian McKendry, *Cordray Lied, Botched Wells Investigation: GOP Report*, AM. BANKER (Sept. 19, 2017, 5:20 PM), https://www.americanbanker.com/news/cfpbs-richard-cordray-lied-botched-wells-fargo-investigation-gop-report [https://perma.cc/T6KG-FF8L]; Press Release, Jeb Hensarling, *ICYMI: The CFPB Is Unconstitutional so Let's Make It Better* (Dec. 12, 2017), https://republicans-financialservices.house.gov/news/documentsingle.aspx?DocumentID=402789 [https://perma.cc/MFR9-DTM9].

149 Rivlin & Antilla, *supra* note 106.

150 Kevin McCoy, *Richard Cordray Resigns as Director of Consumer Financial Protection Bureau*, USA TODAY (Nov. 24, 2017, 4:48 PM), https://www.usatoday.com/story/money/2017/11/24/richard-cordray-resigns-director-consumer-financial-protection-bureau/893489001 [https://perma.cc/CK2L-RQ8W]; Victoria Guida & Katy O'Donnell, *Battle Over CFPB Leadership Ends as Mulvaney Challenger Resigns*, POLITICO (July 6, 2018, 4:32 PM), https://www.politico.com/story/2018/07/06/consumer-financial-protection-bureau-leadership-battle-674254 [https://perma.cc/86Z2-73EG].

151 Avie Schneider, *Trump Names His Budget Chief as Interim Head of Consumer Protection Agency*, NPR (Nov. 24, 2017, 10:03 PM), https://www.npr.org/sections/thetwo-way/2017/11/24/566406495/trump-names-his-budget-chief-as-interim-head-of-consumer-protection-agency [https://perma.cc/CV44-XFJY].

152 Andrew Rudalevige, *It's the Game of Vacancies at the CFPB. Watch Out for the Bureaucratic Duel of Conflicting Statutes.*, WASH. POST (Nov. 29, 2017, 4:02 PM), https://www.washingtonpost.com/news/monkey-cage/wp/2017/11/29/its-the-game-of-vacancies-at-the-cfpb-watch-out-for-the-bureaucratic-duel-of-conflicting-statutes [https://perma.cc/G9S4-3WZ4].

153 Guida & O'Donnell, *supra* note 150.

154 Nicholas Confessore, *Mick Mulvaney's Master Class in Destroying a Bureaucracy from Within*, N.Y. TIMES MAG. (Apr. 16, 2019), https://www.nytimes.com/2019/04/16/magazine/consumer-financial-protection-bureau-trump.html [https://perma.cc/32GB-SXR3].

and operations to twist them to serve his preferences. In area after area — enforcement, rulemaking, supervisions, funding, personnel, and culture — Mulvaney went to war.

He halted new enforcement actions and started withdrawing ongoing enforcement actions, particularly against payday lenders.[155] In 2018, the CFPB undertook only eleven enforcement actions, a fraction of the fifty-five it announced in 2015.[156] When it came to rulemaking, Mulvaney began by reconsidering payday lending rules[157] and dropping plans for rules on overdraft payments and student loan servicing.[158] Mulvaney's CFPB decided it would no longer exercise its supervisory powers to prevent financial institutions from targeting servicemembers with fraudulent or abusive products.[159] He downgraded the status of the student lending office and the office of fair lending by merging them into other offices.[160] And he told the Federal Reserve that the CFPB did not need any new funding.[161]

The CFPB opponent-turned-leader ordered a hiring freeze upon taking over the agency, and effectively made it permanent as part of a strategy of attrition to reduce the capacity of the agency to regulate and enforce the laws.[162] He tapped political appointees to be "policy associate directors" who would shadow the career civil service bureau chiefs,

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155 *Id.*; *see* Devin Leonard & Elizabeth Dexheimer, *Mick Mulvaney Is Having a Blast Running the Agency He Detests*, BLOOMBERG BUSINESSWEEK (May 25, 2018, 4:00 AM), https://www.bloomberg.com/news/features/2018-05-25/mick-mulvaney-on-the-cfpb-we-re-still-elizabeth-warren-s-child [https://perma.cc/XF4U-J45Y]; Ken Sweet, *Under Trump, a Voice for the American Consumer Goes Silent*, AP NEWS (Apr. 10, 2018), https://apnews.com/c80a20db4a5942e7af9632bocbf75700 [https://perma.cc/6TWX-UGEM]].

156 CHRISTOPHER L. PETERSON, CONSUMER FED'N OF AM., DORMANT: THE CONSUMER FINANCIAL PROTECTION BUREAU'S LAW ENFORCEMENT PROGRAM IN DECLINE 15 (2019), https://consumerfed.org/wp-content/uploads/2019/03/CFPB-Enforcement-in-Decline.pdf [https://perma.cc/37AE-Y64F].

157 Confessore, *supra* note 154.

158 Kate Berry, *From Overdraft to HMDA, Rulemaking Has New Look at Mulvaney's CFPB*, AM. BANKER, https://www.americanbanker.com/list/from-overdraft-to-hmda-rulemaking-has-new-look-at-mick-mulvaneys-cfpb [https://perma.cc/3BM5-DR82].

159 Emily Stewart, *The Trump Administration Is Dismantling Financial Protections for the Military*, VOX (Aug. 14, 2018, 8:30 AM), https://www.vox.com/policy-and-politics/2018/8/14/17684810/military-lending-act-mick-mulvaney-cfpb-loans [https://perma.cc/FUT5-7HRL]; McCoy, *supra* note 32, at 2590–91.

160 McCoy, *supra* note 32, at 2592–93; Glenn Thrush & Stacy Cowley, *Mulvaney Downgrades Student Loan Unit in Consumer Bureau Reshuffle*, N.Y. TIMES (May 9, 2018), https://nyti.ms/2I21Ijk [https://perma.cc/5U36-WFMK].

161 Confessore, *supra* note 154; Michael Grunwald, *Mulvaney Requests No Funding for Consumer Financial Protection Bureau*, POLITICO (Jan. 18, 2018, 9:00 AM), https://www.politico.com/story/2018/01/18/mulvaney-funding-consumer-bureau-cordray-345495 [https://perma.cc/3XYL-B9DK].

162 *See* Ryan Rainey, *CFPB Staffing Drops for 4th Straight Quarter, Longest Since Agency Opened*, MORNING CONSULT (Apr. 6, 2018, 4:14 PM), https://morningconsult.com/2018/04/06/cfpb-staffing-drops-for-4th-straight-quarter-longest-since-agency-opened [https://perma.cc/R4HV-5954].

implicitly to ensure they would comply with the Administration's political preferences.[163] New appointees often came from the ranks of those who had opposed the agency and worked to weaken it.[164] And they summarily dismissed every member of the agency's Consumer Advisory Board, Community Bank Advisory Council, and Credit Union Advisory Council.[165]

Finally, Mulvaney took on a number of symbolic actions to break the consumer-focused, mission-driven culture of the agency. His staff rewrote the CFPB's mission statement to include a focus on "unduly burdensome regulations."[166] They changed the CFPB's logo, sign, and name to the "Bureau of Consumer Financial Protection."[167] This cosmetic and symbolic change would cost the agency between $9 and $19 million and financial firms about $300 million.[168] Mulvaney even changed the namesake of the agency's honors program for graduating law students from noted consumer lawyer and Supreme Court Justice Louis D. Brandeis to Justice Joseph Story. Justice Story, who is best known for his commentaries on the Constitution, has no obvious link to consumer issues.[169]

According to one commentator, Mulvaney left the CFPB in a "vegetative state."[170] Director Kraninger's tenure in office continued the trend. Kraninger refused to get refunds for consumers when a payday lender extracted money from 6,829 consumer bank accounts without their permission — even though the lender offered to pay $1.6 million in restitution.[171] And in the midst of the COVID-19 economic crisis,

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163 Confessore, *supra* note 154.

164 Hannah Levintova, *Want to Get Hired by the CFPB? Say You Know How to Destroy It.*, MOTHER JONES (June 25, 2019), https://www.motherjones.com/politics/2019/06/cfpb-political-appointees-resumes-mick-mulvaney [https://perma.cc/Y8SY-G7DR].

165 Hannah Levintova, *The Consumer Financial Protection Bureau Just Dismissed 61 Consumer Protection Advisors*, MOTHER JONES (June 7, 2018), https://www.motherjones.com/politics/2018/06/cfpb-advisory-boards-fired [https://perma.cc/UDT9-KTBH].

166 *See* Confessore, *supra* note 154.

167 *See* Emily Stewart, *New CFPB Director Reverses Mick Mulvaney's Pettiest Move as Acting Director*, VOX (Dec. 20, 2018, 12:50 PM), https://www.vox.com/policy-and-politics/2018/12/20/18150251/cfpb-logo-mick-mulvaney-kathy-kraninger-bcfp [https://perma.cc/U3PG-W9TV].

168 *Id.*

169 *See* CONSUMER FIN. PROT. BUREAU, *Announcing the Joseph Story Honors Attorney Program* (Dec. 19, 2017), https://www.consumerfinance.gov/about-us/blog/announcing-joseph-story-honors-attorney-program [https://perma.cc/FUT5-7HRL].

170 Bess Levin, *Mick Mulvaney Won't Rest Until He's Exorcised Elizabeth Warren from the C.F.P.B.*, VANITY FAIR (May 25, 2018) https://www.vanityfair.com/news/2018/05/mick-mulvaney-elizabeth-warren-exorcism [https://perma.cc/HE8E-8FJX].

171 Kate Berry & Neil Haggerty, *Dems Unload on CFPB's Kraninger: "You Are Absolutely Worthless*," AM. BANKER (Oct. 16, 2019, 4:23 PM), https://www.americanbanker.com/news/dems-unload-on-cfpbs-kraninger-you-are-absolutely-worthless [https://perma.cc/PCS6-RLAC].

with millions unemployed and tens of thousands of consumer complaints flooding into the CFPB's offices, Kraninger has instead sought to weaken or delay rules relating to mortgage lenders and credit card companies.[172]

D. Challenging the CFPB

In light of the battle over the agency, it might not seem surprising that such a heated political brawl would take on a constitutional valence and that a constitutional challenge would reach the Supreme Court. But it should be at least somewhat puzzling, given what the outcome was likely to be.

The reason is that in 2010, the Supreme Court decided a case called *Free Enterprise Fund v. Public Co. Accounting Oversight Board*. Free Enterprise Fund argued that the accounting agency's for-cause removal restrictions rendered it unconstitutional because it was located within the Securities and Exchange Commission, another independent agency.[173] This nestled system created a double-insulation from presidential removal. Free Enterprise Fund raised a variety of unitary executive theory arguments that would also surface in the CFPB case, but what is notable is that the Court stopped short of invalidating the PCAOB wholesale.[174] Rather, it found that the removal provision was severable from the rest of the statute.[175] The PCAOB continued to operate, but board members would be subject to at-will removal from office.[176]

Four years later, the CFPB issued charges against mortgage lender PHH for violating the Real Estate Settlements Procedures Act of 1974 (RESPA) by soliciting reinsurance kickbacks from mortgage insurers in exchange for steering business to them.[177] PHH responded by challenging the constitutionality of the agency's structure, a case it ultimately lost en banc in the D.C. Circuit in 2018,[178] after Cordray had left the agency and President Trump picked Mulvaney as interim successor.

Given *Free Enterprise Fund*, it is not entirely clear why it made sense for PHH to challenge the constitutionality of the CFPB starting

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[172] *See* Katy O'Donnell, *Consumer Bureau Draws Fire for Pro-business Tilt During Crisis*, POLITICO (May 17, 2020, 3:42 PM), https://www.politico.com/news/2020/05/16/consumer-bureau-pro-business-tilt-coronavirus-crisis-261394 [https://perma.cc/97FU-ZQ8S].

[173] *See id.* at 487.

[174] *See id.* at 487–88.

[175] *Id.* at 508.

[176] *Id.* at 507. Notably, the accounting firm (and member of Free Enterprise Fund) did not get any relief from the case. *See* Patricia L. Bellia, PCAOB *and the Persistence of the Removal Puzzle*, 80 GEO. WASH. L. REV. 1371, 1373–74 (2012) (noting the "hollow victory" for the challengers, *id.* at 1373).

[177] PHH Corp. v. Consumer Fin. Prot. Bureau, 881 F.3d 75, 82 (D.C. Cir. 2018) (en banc).

[178] *Id.* at 84.

in 2014. *Free Enterprise Fund* provided strong evidence that the Roberts Court's remedy for a constitutional violation of this type would be to sever the removal provision and let the agency continue to function. PHH would therefore not have been off the hook had it won its challenge. It is possible PHH thought a victory would enable the next Republican President, perhaps arriving in 2017, to fire Cordray and pick a new director who would grant them relief. But through much of the 2016 election cycle, the conventional wisdom was that Hillary Clinton would become President, not Donald Trump.

Seila's actions are equally puzzling, if not more so. After losing its case in district court, Seila appealed to the Ninth Circuit in 2017[179] and continued its case after Cordray had departed later that year and Mulvaney was interim director. In spite of systematically attempting to dismantle the agency, the now Trump-controlled CFPB continued to press its case against Seila. Perhaps this was to keep Seila's constitutional case alive. But again, it is unclear why that mattered much, given the likely remedy after *Free Enterprise Fund*.

So how do we explain the case? I think there are two likely answers. First, as we have seen, for the entirety of the last decade, the CFPB has been the subject of relentless attacks — to prevent it from coming into being, weaken it, reform it, abolish it, and eviscerate it from the inside. This political and economic battle — a battle between Republicans and Democrats, between financial institutions and ordinary families, between Wall Street and Washington — simply gained a momentum that couldn't be stopped. The interests opposed to the agency had mobilized forces so widely that many others embraced the project to kill it. Even if there were only a small chance of a broader, more radical victory — there was still a chance. The second possibility, which is not in conflict with the first, is that the underlying aims of the case were to advance the constitutional vision of the unitary executive. There too, there was a chance that a Supreme Court with new Justices might go further than the *Free Enterprise* Court.

II. *SEILA* AND THE RISE OF THE UNITARY EXECUTIVE

Under the unitary executive theory, Article II, section 1 of the Constitution, which vests "the executive Power" in the President, combines with the Take Care Clause to "creat[e] a hierarchical, unified executive department under the direct control of the President."[180] Unitary

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[179] Complaint, Consumer Fin. Prot. Bureau v. Seila Law, LLC, No. 17-cv-01081 (C.D. Cal. Aug. 25, 2017), 2017 WL 6536586; Appellant's Emergency Motion for Stay Pending Appeal, Consumer Fin. Prot. Bureau v. Seila Law LLC, 923 F.3d 680 (9th Cir. 2019) (No. 17-56324).

[180] Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1165 (1992).

executive theorists argue that the President holds "all" of the executive power.[181] This includes, on their account, the power to "direct, control, and supervise inferior officers or agencies."[182] Among the consequences is that congressionally specified removal criteria are unconstitutional.[183]

The *Seila* Court adopts much of the unitary executive theory's reasoning. This Part places *Seila* in a second context: the decades-long rise of the unitary executive theory. It first recounts how the theory grew within the Justice Department in the 1980s, then in the academy in the 1990s. By the 2000s, the theory was prominent and, during the George W. Bush Administration, commonly invoked. *Seila* should be seen as part of this broader legal movement, and the success of the movement in providing support for the theory can partly explain the brevity of the Court's opinion. In her skillful dissent, Justice Kagan takes aim at each of the pillars of the majority's approach with devastating effect. Her counterattack leaves the reader feeling that the 5–4 divide is not a mere difference of interpretation, but rather a serious political confrontation.

A. The Conservative Legal Movement and the Rise of the Unitary Executive Theory

Debates over the President's ability to remove executive branch officers have existed throughout American constitutional history and have regularly been some of the most fiercely battled political and legal issues.[184] But the modern debate over the removal power started during the Reagan Administration with the rise of the unitary executive theory.[185] Based on interviews, documents, and data collection, Professor Amanda Hollis-Brusky has shown how individuals and groups associated with the conservative legal movement worked from the 1980s through the 2000s to expand the plausibility and legitimacy of the unitary executive theory.[186] The story of the theory's rise is not the traditional one offered under the rubric of popular constitutionalism, which

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181 *Id.* (emphasis omitted).

182 *Id.*

183 *Id.* at 1165–66. Other consequences include the ability of the President to supervise agencies. *See generally, e.g.*, PETER M. SHANE, MADISON'S NIGHTMARE 168 (2009) (discussing regulatory review).

184 *See generally* J. DAVID ALVIS, JEREMY D. BAILEY & F. FLAGG TAYLOR IV, THE CONTESTED REMOVAL POWER, 1789–2010 (2013). As for the ferocity, consider the controversy over the Second Bank of the United States in the Jackson Administration, *id.* at 74, and the Tenure of Office Act during the Andrew Johnson Administration, *id.* at 106.

185 Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RSRV. L. REV. 1451, 1452–53 (1997) (noting that "[t]his modern debate began with claims of executive authority advanced by President Reagan, whose administration continually questioned the constitutionality of independent agencies and of independent counsels," *id.* at 1452).

186 Amanda Hollis-Brusky, *Helping Ideas Have Consequences: Political and Intellectual Investment in the Unitary Executive Theory, 1981–2000*, 89 DENV. U. L. REV. 197, 200 (2011). For

emphasizes the importance of *popular* opinion.[187] Rather, it was largely a function of shifting opinions among legal elites. As Professor Jack Balkin has noted, arguments can go from "off the wall" to "on the wall" quickly when embraced by establishment politicians, and that in turn requires an intellectual foundation and often social movement support.[188]

In the 1970s, the unitary theory per se hardly existed, with only a few scattered references in the legal literature.[189] After the election of President Reagan and particularly after the selection of Ed Meese as Attorney General, the theory began to grow in prominence. For conservatives in the Administration, as Professor and former Reagan Solicitor General Charles Fried has recounted, the Reagan Revolution had two parts. The first was an economic revolution to prevent politicians from "regulat[ing] the economy" and "redistribut[ing] wealth."[190] The second was a legal revolution: "[C]ourts should be more disciplined, less adventurous and political in interpreting the law, especially the law of the Constitution; [and] the President must be allowed a strong hand in governing the nation and providing leadership . . . ."[191]

Under Attorney General Meese, the Justice Department welcomed and encouraged intellectual discussion about the law, particularly in

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works on the conservative legal movement, see generally MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS (2013); AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCE: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION (2015); STEVEN M. TELES, THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW (2008).

187 By the traditional popular constitutionalism story, I mean a story of social movements or broad public understanding. The literature on popular constitutionalism is voluminous. *See generally* LARRY D. KRAMER, THE PEOPLE THEMSELVES (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Larry D. Kramer, *The Supreme Court, 2000 Term — Foreword: We the Court*, 115 HARV. L. REV. 4 (2001); Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959 (2004). My sense is that even with the very public battle over the CFPB, public mobilization around the variety of separation of powers arguments in the case is a far cry from, for example, similar arguments around the Second Amendment leading to *District of Columbia v. Heller*, 554 U.S. 570 (2008). That case is a good example of conservative popular constitutionalism that involved shifts in opinions among legal elites and a social movement. *See* Reva B. Siegel, *The Supreme Court, 2007 Term — Comment: Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 192–93 (2008).

188 Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040 [https://perma.cc/NV88-VXS7].

189 Hollis-Brusky, *supra* note 186, at 198–99.

190 CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION — A FIRSTHAND ACCOUNT 17–18 (1991); *see also* Hollis-Brusky, *supra* note 186, at 201; DAVID A. STOCKMAN, THE TRIUMPH OF POLITICS: WHY THE REAGAN REVOLUTION FAILED 103 (1986) ("Sweeping deregulation was another pillar of the supply-side platform.").

191 FRIED, *supra* note 190, at 17–18.

ways that advanced the conservative movement's aims to expand presidential power. The Attorney General hosted seminars and workshops, including on the separation of powers and the unitary executive theory, in order to persuade skeptics — including Fried, who himself wasn't initially "committed to th[e] program."[192] The push for greater presidential power largely focused on four areas: Office of Legal Counsel (OLC) opinions, presidential signing statements, regulatory review of agencies, and Supreme Court arguments.

Over the course of the 1980s, the Reagan Administration issued seven OLC opinions that mentioned the unitary theory. Notably, the theory evolved over time. In 1981, it was described "in general and rather amorphous terms as the constitutional basis for the President's role in ensuring 'uniform and unitary' execution of the laws."[193] But, Hollis-Brusky notes, it had "evolved into the 'principle of the unitary executive'" by 1983.[194] Some of these opinions, written by then-head of the Office of Legal Counsel Theodore Olson, tried to rein in different forms of agency independence.[195]

The "signing statement initiative," a second effort, was intended not to expound the unitary executive as doctrine, but to express it in practice. The President would issue signing statements in order to give agencies guidance on the President's view of legislation.[196]

The Reagan Administration also moved to gain more control over regulatory agencies. President Reagan required executive branch agencies to adopt rules based on cost-benefit analysis if permitted by statute, and to submit rules to the Office of Information and Regulatory Affairs for review.[197] Despite an OLC opinion that it could apply the executive order to independent agencies, the administration declined to do so for political reasons.[198] Still, it saw independent commissioners as "the extreme example, a kind of emblem, of one of the biggest obstacles to the

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192 Hollis-Brusky, *supra* note 186, at 207 (alteration in original) (quoting FRIED, *supra* note 190, at 158); *see id.* at 202–03.

193 *Id.* at 205 (quoting Proposed Exec. Order Entitled "Federal Regulation," 5 Op. O.L.C. 59 (1981)).

194 *Id.* (quoting Litigation Authority of the Equal Employment Opportunity Commission in Title VII Suits Against State and Local Government Entities, 7 Op. O.L.C. 57, 57 (1983)).

195 Kevin M. Stack, *The Story of* Morrison v. Olson*: The Independent Counsel and Independent Agencies in Watergate's Wake*, *in* PRESIDENTIAL POWER STORIES 401, 410 (Christopher H. Schroeder & Curtis A. Bradley eds., 2009).

196 Hollis-Brusky, *supra* note 186, at 211–12. For a broader discussion of the legality and consequences of signing statements, see Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006). Bradley and Posner note that President Reagan's Attorney General Ed Meese took an "aggressive" view of the interpretive weight signing statements should play — and that this was likely part of a broader attempt to revive presidential power after Watergate. Bradley & Posner, *supra*, at 316.

197 Exec. Order No. 12,291, 3 C.F.R. 127 (1982) (revoked 1993). For a discussion, see SHANE, *supra* note 183, at 150.

198 Stack, *supra* note 195, at 410.

administration's program,"[199] and members of the Administration wanted a Supreme Court case declaring "that statutory limitations on their removal were unconstitutional."[200] As Attorney General Meese said in a 1985 speech, "federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or 'independent' that."[201]

The marquee event for the removal power during the Reagan Administration was *Morrison v. Olson*,[202] a 1988 case challenging the constitutionality of the independent counsel provisions of the Ethics in Government Act.[203] In his 2–1 opinion in the D.C. Circuit, Judge Silberman referred to the unitary executive theory by name ten times in holding that the provisions were unconstitutional.[204] At the Supreme Court, the government relied on the Take Care Clause to argue that the removal restriction was impermissible.[205] Solicitor General Fried later said that he had been persuaded by Meese's Department of Justice seminars.[206] By an 8–1 margin, with only Justice Scalia dissenting, the Supreme Court rejected the President's power to remove the independent counsel, upholding the statute and in the process actually *broadening* the scope of the existing rule under *Humphrey's Executor*.[207] Justice Scalia's dissent had referenced the theory twice by name,[208] but the case was a devastating defeat for the unitary theory's attempt to establish a presidential removal power. So thorough was the loss that after *Morrison* reversed him, Judge Silberman analogized his opinion to Pickett's Charge at Gettysburg, the "high water mark" of the Confederacy.[209]

But it wasn't. Justice Scalia's dissent gave the unitary executive new life. From 1973 to 1988, Hollis-Brusky reports, the theory was mentioned by name in thirty-eight law review articles.[210] In the four years after *Morrison*, seventy-six articles mentioned it.[211] Throughout the

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199 FRIED, *supra* note 190, at 154–55.

200 *Id.* at 157.

201 Stack, *supra* note 195, at 413 (quoting Edwin Meese, III, *Towards Increased Government Accountability*, 32 FED. BAR NEWS & J. 406, 408 (1985)).

202 487 U.S. 654 (1988).

203 For a history of the case, with relevant context to the rise of the unitary executive, see Stack, *supra* note 195, at 401.

204 *In re* Sealed Case, 838 F.2d 476 (D.C. Cir. 1988), *rev'd*, 487 U.S. 654; Hollis-Brusky, *supra* note 186, at 208. For a discussion of the case, see Stack, *supra* note 195, at 424.

205 *See* Brief for Appellee, *Morrison*, 487 U.S. 654 (No. 87-1279), 1987 WL 880907, at *18–20; Stack, *supra* note 195, at 425.

206 Hollis-Brusky, *supra* note 186, at 207.

207 Humphrey's Ex'r v. United States, 295 U.S. 602 (1935); *see also Morrison*, 487 U.S. at 669.

208 *See Morrison*, 487 U.S. at 727, 732 (Scalia, J., dissenting); Hollis-Brusky, *supra* note 186, at 209.

209 Hollis-Brusky, *supra* note 186, at 208 n.63 (quoting Laurence Silberman, *Panel I: Agency Autonomy and the Unitary Executive*, 68 WASH. U. L.Q. 495, 500 (1990)).

210 *Id.* at 209–10.

211 *See id.* at 210–11.

1990s and into the 2000s, Federalist Society scholars took up the project of articulating the theory in great detail.[212] Articles put forward the textual and structural case for the theory,[213] the historical case for the theory,[214] and even the functional arguments in its favor.[215] This impressive, systematic body of scholarship not only expanded the Overton window of legal argument, it also sparked more and more scholarship discussing the theory itself. From 2001 to 2008, there were 453 articles discussing the unitary executive.[216]

Along with a stronger academic pedigree, the theory found a second life in government.[217] The Reagan Administration had mentioned the unitary executive in twelve executive branch documents; the George W. Bush Administration mentioned it in ninety.[218] During the Bush Administration, the unitary executive found its way into OLC opinions on legal issues related to the war on terror, and it undergirded greater oversight of federal agencies.[219] By the time of *Free Enterprise Fund* in 2010 and *Seila* in 2020, the unitary executive theory had become standard in separation of powers debates — particularly among conservatives.

B. Seila *and the Emergence of a Presidential Removal Power*

Writing for a 5–4 majority on the constitutional question in *Seila*, Chief Justice Roberts adopted much of the unitary executive theory's reasoning.[220] "'[T]he executive Power shall be vested in a President,'

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[212] *Id.* at 219–20.

[213] *See generally* Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541 (1994); Calabresi & Rhodes, *supra* note 180.

[214] *See generally* STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE (2008); Calabresi & Yoo, *supra* note 185; Christopher S. Yoo, Steven G. Calabresi & Anthony J. Colangelo, *The Unitary Executive in the Modern Era, 1945–2004*, 90 IOWA L. REV. 601 (2005); Christopher S. Yoo, Steven G. Calabresi & Laurence D. Nee, *The Unitary Executive During the Third Half-Century, 1889–1945*, 80 NOTRE DAME L. REV. 1 (2004).

[215] *See generally* Steven G. Calabresi, *Some Normative Arguments for the Unitary Executive*, 48 ARK. L. REV. 23 (1995).

[216] Hollis-Brusky, *supra* note 186, at 228.

[217] The two, as Metzger has noted in the related context of the administrative state, can be reinforcing. *See* Metzger, *supra* note 64, at 33 ("[T]here is a mutually reinforcing relationship between judicial and academic attacks on the administrative state.").

[218] Hollis-Brusky, *supra* note 186, at 199.

[219] *See* SHANE, *supra* note 183, at 156–57; Hollis-Brusky, *supra* note 186, at 235.

[220] The majority on the constitutional question consisted of Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh. The majority on the severability issue comprised Chief Justice Roberts and Justices Ginsburg, Breyer, Alito, Sotomayor, Kagan, and Kavanaugh. Chief Justice Roberts first addressed three arguments that the Court should not reach the merits: (1) that the demand issued to Seila was not "traceable" to the constitutional defect and that, in removal cases, the action would not have been taken if the official in question were removable, *Seila*, 140 S. Ct. at 2195; (2) that the constitutionality of the removal power should be assessed in the context of a contested removal; and (3) that there was no "adverseness" because the parties agreed, *id.* at 2196; *see id.* at 2195–97. These arguments were made by the court-appointed amicus because the government supported Seila's argument. *Id.* at 2195.

who must 'take Care that the Laws be faithfully executed,'" Chief Justice Roberts began.[221] He noted that the "entire" executive power belonged to the President,[222] having elsewhere mentioned that "all of it" is the President's.[223] This power "generally includes the ability to remove executive officials, for it is 'only the authority that can remove' such officials that they 'must fear and, in the performance of [their] functions, obey.'"[224]

The Chief Justice briefly noted that this view was confirmed by history and precedent, and in two paragraphs summarized the so-called "Decision of 1789," in which the first Congress debated removals while creating the first federal government departments, and *Myers v. United States*,[225] in which Chief Justice Taft recognized "the President's prerogative to remove executive officials."[226] After referencing his own opinion in *Free Enterprise Fund*, Chief Justice Roberts announced two exceptions to the "President's unrestricted removal power."[227] The first was based on *Humphrey's Executor*. That case was decided nine years after *Myers* and all but overturned it while upholding a law enabling Federal Trade Commissioners to serve for a term of years, with removal for inefficiency, neglect, or malfeasance in office.[228] Roberts characterized *Humphrey's Executor* narrowly, stating that the 1935 Court saw the FTC as not exercising substantial executive power.[229] The second exception, which explained *Morrison*, was for "inferior officers with limited duties and no policymaking" role.[230]

Applying this framework to the CFPB, the Chief Justice argued that the agency fit into neither exception.[231] It exercised legislative, judicial, and executive functions, and, unlike the FTC, was not a multimember commission. The CFPB director was also plainly not an inferior officer. The agency's structure was "wholly unprecedented," an "indication of [a] severe constitutional problem."[232] Chief Justice Roberts argued that four other examples of single-director agencies with removal protections

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[221] *Id.* at 2197 (first quoting U.S. CONST. art. II, § 1, cl. 1; then quoting *id.* art. II, § 3).

[222] *Id.*

[223] *Id.* at 2191.

[224] *Id.* at 2197 (alteration in original) (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)).

[225] 272 U.S. 52 (1926).

[226] *Seila*, 140 S. Ct. at 2197.

[227] *Id.* at 2198.

[228] *Id.* For a discussion, see Jane Manners & Lev Menand, *Presidential Removal: Defining Inefficiency, Neglect of Duty, and Malfeasance in Office*, 121 COLUM. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3520377 [https://perma.cc/75YS-9BDY].

[229] *Seila*, 140 S. Ct. at 2198–99.

[230] *Id.* at 2199–200.

[231] *Id.* at 2200.

[232] *Id.* at 2201 (alteration in original) (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 505 (2010)).

were short in duration or "modern and contested."[233] The agency's design also violated the constitutional structure because the Constitution "avoids concentrating power in the hands of any single individual" except the President.[234] The Chief Justice noted that the Framers' "constitutional strategy [was] straightforward: divide power everywhere except for the Presidency, and render the President directly accountable to the people through regular elections."[235] The CFPB's structure was thus unconstitutional because it "vest[ed] significant governmental power in the hands of a single individual accountable to no one."[236] Turning to the remedy, Chief Justice Roberts found that the removal restriction was severable from the rest of the statute, citing *Free Enterprise Fund*.[237]

Justice Thomas dissented from the severability analysis, arguing that the remedy should simply be to not enforce the CFPB's actions.[238] He also argued that *Humphrey's Executor* was unconstitutional and should be overturned outright, instead of narrowed.[239] Still, he was willing to join the Chief Justice because the opinion "limit[ed] *Humphrey's Executor* to 'multimember expert agencies that *do not wield substantial executive power.*'"[240] Justice Thomas then offered a full-throated articulation of the unitary executive theory that included complete executive power over removals.[241]

Between the two opinions, five Justices have embraced much or all of the logic and reasoning of the unitary executive theory with respect to removals. The President's "executive power" and the Take Care Clause are the foundation for this largely preclusive removal power, and these Justices read history and precedents to support that position. Declared all but dead by Judge Silberman after the 8–1 defeat in *Morrison*, the unitary theory and the removal power rose again — and they now have a 5–4 majority on the Supreme Court.

C. The Case Against Seila

What is perhaps most surprising about *Seila*'s treatment of text and structure is not that the Court came to interpretive judgments in these areas, but that it did so with comparatively little analysis or discussion,

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[233] *Id.* at 2201–02. These are the Civil War–era Comptroller of the Currency, Office of Special Counsel, Social Security Administrator, and head of the Federal Housing Finance Agency. *Id.*

[234] *Id.* at 2202.

[235] *Id.* at 2203.

[236] *Id.* Chief Justice Roberts also noted that some Presidents might never get to nominate a CFPB director, and the CFPB's funding is not appropriated by Congress. *Id.* at 2204.

[237] *Id.* at 2209.

[238] *Id.* at 2219 (Thomas, J., concurring in part and dissenting in part). Justice Gorsuch joined Justice Thomas's partial dissent.

[239] *Id.* at 2212.

[240] *Id.* at 2211 (quoting *id.* at 2199 (majority opinion) (emphasis added)).

[241] *See id.* at 2212–19.

given the rebuttals both in Justice Kagan's spirited dissent and in a growing body of scholarship undermining those judgments. Many of these arguments are well known and covered in Justice Kagan's dissent, but a few are worth reiterating.

First, the claim that "executive power" includes "the ability to remove executive officials."[242] Putting aside the atextual (and aggrandizing) references to "all of" or the "entire" executive power, one of the central debates in removal cases is whether the power to remove a subordinate is "executive" in nature. The text of the Constitution does not define "executive," and Justice Kagan notes that the *Morrison* Court was unwilling to find a preclusive, unrestrictable removal power because of the term's generality.[243] The text itself gives a strong clue that "executive" cannot hold such a meaning. Under the Opinions Clause in Article II, the President is explicitly authorized to ask subordinates for their written opinions.[244] If the executive power were as vast and all-inclusive as unitary theorists suggest, Justice Kagan observes, the Opinions Clause would be redundant at best and inexplicable at worst.[245] The majority provides no response to this argument. Justice Kagan also offers historical arguments to show that "executive power" does not include the power to remove: Parliament restricted the King's removals, and many states at the time of the Framing permitted restrictions on gubernatorial removals.[246] In recent scholarly work, Professor Julian Mortenson has gone further and demonstrated persuasively that in both England and during the Framing and Ratification period, the phrase "executive power" had no substantive content; it meant merely the power to execute laws created by some other body.[247]

The Take Care Clause also provides the Court with little additional support for its position, as Justice Kagan notes and scholars have argued

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[242] *Id.* at 2197 (majority opinion).

[243] *Id.* at 2227–28 (Kagan, J., concurring in part and dissenting in part) ("'[E]xtrapolat[ing]' an unrestricted removal power from such 'general constitutional language' . . . is 'more than the text will bear.'" *Id.* at 2228 (alteration in original) (quoting Morrison v. Olson, 487 U.S. 654, 690 n.29 (1988)).).

[244] U.S. CONST. art. II, § 2, cl. 1.

[245] *Seila*, 140 S. Ct. at 2227 n.3 (Kagan, J., concurring in part and dissenting in part).

[246] *Id.* at 2228; *see also* Peter M. Shane, *The Originalist Myth of the Unitary Executive*, 19 U. PA. J. CONST. L. 323 (2016) (discussing state constitutions); Peter M. Shane, *Prosecutors at the Periphery*, 94 CHI.-KENT L. REV. 241 (2019) (noting that criminal prosecution was understood to be quasi-judicial as much as executive at the time of the Founding).

[247] *See generally* Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169 (2019); Julian Davis Mortenson, *The Executive Power Clause*, 167 U. PA. L. REV. (forthcoming 2020). Mortenson contrasts executive power with the King's "prerogative powers," which were substantive. Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, *supra*, at 1228 & n.253. Note also that Chief Justice Roberts refers to removal as the President's "prerogative." *Seila*, 140 S. Ct. at 2197.

at great length.[248] The Clause is framed as a duty, rather than a power, and it appears in a section of Article II enumerating duties, not powers.[249] To the extent the Take Care Clause is a power, Justice Kagan observes, it is only the power to ensure that "the laws" (however they are fashioned) are "executed."[250] In this sense, a removal according to congressionally specified criteria, such as inefficiency, neglect, or malfeasance in office, *is* the faithful execution of the laws.[251] Nonremoval except for at the end of a term of years (which every appointee removable for inefficiency, neglect, or malfeasance in office had[252]) is also the faithful execution of the laws.[253] "The President," as Justice Brandeis noted in *Myers*, "performs his full constitutional duty, if, with the means and instruments provided by Congress and within the limitations prescribed by it, he uses his best endeavors to secure the faithful execution of the laws enacted."[254]

Perhaps the most striking feature of *Seila*'s textual and structural analysis is that, in his thirty-seven-page majority opinion, Chief Justice Roberts never once mentions the Necessary and Proper Clause. The Clause is of obvious relevance, as it gives Congress the power "[t]o make all Laws . . . necessary and proper" to execute not just its Article I powers, but also "all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[255] The Clause even uses the word "vest," as if to make clear that Congress can pass laws to organize the executive power that is "vested" in Article II.[256] As Dean John Manning has noted, "the Necessary and Proper Clause gives Congress express power to prescribe the means by which both the executive and judicial powers are carried

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[248] *Seila*, 140 S. Ct. at 2228 (Kagan, J., concurring in part and dissenting in part). *See generally* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111 (2019) (arguing that the Take Care Clause imposes a "restrictive duty" rather than generating "expansive power," *id.* at 2192).

[249] U.S. CONST. art. II.

[250] *Seila,* 140 S. Ct. at 2228 (Kagan, J., concurring in part and dissenting in part).

[251] Manners & Menand, *supra* note 228.

[252] Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 790 tbl.2 (2013) (showing that all agency heads or administrators with statutory for-cause removal protection have specified tenures).

[253] Manners & Menand, *supra* note 228. Scholars sometimes associated with the unitary executive theory even recognize that *Congress* thus has a removal power, in the sense that it can pass laws restricting officers to a term of years and eliminate offices altogether. *See* Saikrishna Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1780 (2006).

[254] Myers v. United States, 272 U.S. 52, 292 (1926) (Brandeis, J., dissenting).

[255] U.S. CONST. art. I, § 8, cl. 18. For an extensive treatment, see John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045 (2014).

[256] *Cf. generally* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747 (1999).

into execution."[257] Justice Kagan deftly argues that the Court "appropriate[s]" this power from Congress.[258] Another way to put it is that *Seila* involves the erasure of explicit, textually granted Article I powers.

Seila also presumes that the President's removal power is "confirmed by history and precedent."[259] The Chief Justice says that the so-called "Decision of 1789" settled the question.[260] The best historical evidence, however, does not support this interpretation. Justice Kagan notes that "Taft's historical research [on the Decision] has held up even worse than *Myers'* holding," and observes that one of the leading scholars of executive power, Professor Sai Prakash, says in his study of the Decision that the First Congress "never squarely addressed" the removal question at issue in *Seila*.[261] Professor Jed Shugerman's review goes even further in questioning the Court's reading of the early history.[262] Shugerman argues that "Chief Justice Roberts's interpretation is consistent with Taft's Madison, but not Madison's Madison."[263] Among other pieces of evidence, including an extensive analysis of legislative voting patterns, Shugerman says Chief Justice Roberts ignores that Madison himself recognized the First Congress had not established a default rule in favor of at-pleasure removal.[264]

In a set of passages reminiscent of Professor Karl Llewellyn's famous account of the canons of construction, Justice Kagan and Chief Justice

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[257] John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 2005 (2011); *see also* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 597 (1984) ("The text and structure of the Constitution impose few limits on Congress's ability to structure administrative government.").

[258] *Seila*, 140 S. Ct. at 2244 (Kagan, J., concurring in part and dissenting in part) (alteration in original) (quoting John F. Manning, *The Supreme Court, 2013 Term — Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 78 (2014)).

[259] *Id.* at 2197 (majority opinion); *see also id.* at 2192 (arguing the power to remove was "settled by the First Congress").

[260] *Id.* at 2197 ("The view that 'prevailed, as most consonant to the text of the Constitution' and 'to the requisite responsibility and harmony in the Executive Department,' was that the executive power included a power to oversee executive officers through removal." (quoting Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010))).

[261] *Id.* at 2230 (Kagan, J., concurring in part and dissenting in part) (quoting Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1072 (2006)).

[262] *See* Jed Handelsman Shugerman, *The Indecisions of 1789: Strategic Ambiguity and the Imaginary Unitary Executive (Part I)*, Fordham L. Legal Stud. Rsch. Paper No. 3596566 (May 8, 2020), https://ssrn.com/abstract=3596566 [https://perma.cc/7KQC-VGDJ]; Jed Handelsman Shugerman, *The Decisions of 1789 Were Non-unitary: Removal by Judiciary and the Imaginary Unitary Executive (Part II)* 35, Fordham L. Legal Stud. Rsch. Paper No. 3597496 (May 10, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3597496 [https://perma.cc/2HRC-E2QK] [hereinafter Shugerman, *The Decisions of 1789*].

[263] Shugerman, *The Decisions of 1789*, *supra* note 262, at 35.

[264] *Id.*

Roberts also duel over the *Federalist Papers*.[265] Llewellyn noted that for every canon there is an equal and opposite canon, such that any thrust of the rhetorical epee can be parried by a skilled fencer.[266] Justice Kagan offers up dueling views on the removal power — both from the *Federalist Papers* — as a way to show that there was no settled meaning at ratification.[267] The Chief Justice's response is that Madison and Hamilton changed their minds over time.[268] It may be that the Court means to adopt a "liquidation" theory of interpretation,[269] but even then, the facts on the Decision of 1789 remain, at best, messy, complex, and inconclusive. Whether or not the Court adopts a liquidation theory, its account of the historical record raises classic interpretive problems that Judge Harold Leventhal once described (and that Justice Scalia characterized) as "looking over a crowd and picking your friends."[270] When a legislative record is conflicting, messy, and complicated, and the enacted legislative text is unclear, relying on reasoning and inferences from legislative debates, proposals, actions, or inaction can easily turn into cherry-picking evidence that supports a predetermined policy position.

Justice Kagan forcefully shows that precedent also cuts against the Court's position. Although the Chief Justice characterized *Myers* as a "landmark" case in both *Free Enterprise Fund* and *Seila*,[271] Justice Kagan points out that the Court had all but overturned *Myers* prior to these recent cases, in favor of the approach offered in *Humphrey's Executor* and *Morrison*. *Humphrey's Executor*, Justice Kagan notes, "unceremoniously — and unanimously — confined *Myers* to its facts"

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265 Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401–06 (1950); *see Seila*, 140 S. Ct. at 2229 n.4 (Kagan, J., concurring in part and dissenting in part); *id.* at 2205 n.10 (majority opinion).

266 Llewellyn, *supra* note 265, at 401–06.

267 *See Seila*, 140 S. Ct. at 2229 (Kagan, J., concurring in part and dissenting in part) ("In Federalist No. 77, Hamilton presumed that under the new Constitution '[t]he consent of [the Senate] would be necessary to displace as well as to appoint' officers of the United States."); *id.* (quoting THE FEDERALIST NO. 39, in which Madison says "[t]he tenure of the ministerial offices generally will be a subject of legal regulation, conformably to the reason of the case, and the example of the State Constitutions"). She notes too that "[n]either view, of course, at all supports the majority's story." *Id.*

268 *Id.* at 2205 n.10 (majority opinion).

269 *See generally* Curtis A. Bradley & Neil S. Seigel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255 (2017); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (explaining James Madison's theory of "liquidation" as a method of looking at post-Founding practice to settle constitutional disputes).

270 *See* Conroy v. Aniskoff, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment); Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983) ("It sometimes seems that citing legislative history is still, as my late colleague [Judge] Harold Leventhal once observed, akin to 'looking over a crowd and picking your friends.'").

271 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 492 (2010); *Seila*, 140 S. Ct. at 2192.

and "expressly 'disapproved'" everything in the decision as "out of harmony" with *Humphrey's Executor* (with the sole exception of the narrow factual holding regarding postmasters of the first class).[272]

Justice Kagan also pushed back on the Court's antinovelty claim. The Necessary and Proper Clause is not a "Rinse and Repeat" clause, she said.[273] "Congress had no obligation to make a carbon copy of a design from a bygone era."[274] In scholarly work, Professor Leah Litman has exhaustively shown that antinovelty arguments make little logical or constitutional sense, in part because there is no constitutional or practical reason for Congress to regulate to its fullest capacity in every possible manner at every possible time.[275] But it is also worth noting that *how* the Court frames the historical scope of its inquiry shapes whether an agency's design looks novel. For example, *Seila* talks of the Civil War–era Comptroller, but not the Founding-era Comptroller (as Justice Kagan points out).[276] It discusses the Administrator of Social Security and the head of the Federal Housing Finance Agency,[277] but not the Sinking Fund Commission, a Hamilton-proposed, First Congress–created economic agency whose members included the Chief Justice and the Vice President, neither of whom could be removed from office.[278] The Court also offers no explanation for the Second National Bank, created in 1816 with the assent of then-President James Madison.[279] The President could appoint and remove only one-fifth of the Bank's directors.[280] The Second Bank, of course, was also upheld by Chief Justice Marshall as an exercise of the Necessary and Proper power in *McCulloch v. Maryland*.[281] Framing the scope of historical practice — and limiting it to single-director heads of agencies with for-cause removal protections — is itself a freighted choice. It is unclear why the Court should adopt this level of specificity when evaluating the

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[272] *Seila*, 140 S. Ct. at 2233 (Kagan, J., concurring in part and dissenting in part) (quoting Humphrey's Ex'r v. United States, 295 U.S. 602, 626 (1935)).

[273] *Id.* at 2241.

[274] *Id.* at 2242.

[275] Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1427–28 (2017). For a discussion of innovation-based arguments in the context of recess appointments, see Gillian E. Metzger, *Appointments, Innovation, and the Judicial-Political Divide*, 64 DUKE L.J. 1607 (2015).

[276] *Seila*, 140 S. Ct. at 2241 (Kagan, J., concurring in part and dissenting in part).

[277] *Id.* at 2202 (majority opinion).

[278] *See id.* at 2229, 2230–31 (Kagan, J., concurring in part and dissenting in part); Christine Kexel Chabot, *Is the Federal Reserve Constitutional? An Originalist Argument for Independent Agencies*, NOTRE DAME L. REV. (forthcoming) (manuscript at 5), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3458182 [https://perma.cc/6UVW-3MY8].

[279] *Seila*, 140 S. Ct. at 2231 (Kagan, J., concurring in part and dissenting in part).

[280] *Id.*

[281] 17 U.S. (4 Wheat.) 316 (1819).

congressional design of agencies, unless its goal is to stack the deck against novel agency designs.[282]

All of this should be troubling to most constitutional lawyers. One of the central arguments for relying on text and history in constitutional interpretation is judicial restraint.[283] Following the text or the original history, or even historical practice, is supposed to constrain judges and prevent them from imposing their policy preferences on the country.[284] The more a judge is picking friends from the historical crowd, to modify the old saying, the more likely it is the judge is making policy. Given the strong arguments against the Court's position on text, structure, original history, and historical practice, let alone the un-precedenting of *Humphrey's Executor* and re-precedenting of *Myers*, it is not clear that there is much restraint being exercised in *Seila*.

And it is not as if a restrained approach was unavailable to the conservative majority. In thorough, expansive, and persuasive articles, Dean John Manning has offered a lesson in how a faithful, conservative, restrained interpreter of the Constitution's text should address separation of powers cases.[285] "Where the Constitution is specific," the Court should follow it.[286] Where "no specific clause speaks directly to the question at issue, interpreters must respect the document's indeterminacy,"[287] which in this context defaults to the textually granted general authority of the Necessary and Proper Clause. But the Court does not follow Manning's approach or counter it. Indeed, it is Justice Kagan who cites Manning and makes the case for judicial restraint in light of text and history.[288]

As if to underscore, albeit subtly, that even the Justices understood that *Seila* was a deeply political case, the amicus appointed to argue the CFPB's case was distinguished conservative lawyer Paul Clement.[289] Commentators noted that Justice Kagan likely chose Clement in order

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[282] This selection-effects problem is distinct from the *weight* that longevity is given. As Metzger has noted, members of the Court treat that asymmetrically too. Metzger, *supra* note 64, at 19 ("[N]ovelty can condemn an administrative arrangement, but lack of novelty can't save it.").

[283] On textualism and restraint, see Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION 1, 24–25, 35 (Amy Gutmann ed., 1997) (discussing textualism in the statutory context). On historical practice, see Curtis A. Bradley, *Doing Gloss*, 84 U. CHI. L. REV. 59, 65–66 (2017); Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 428 (2012) ("Precisely because the Constitution's textual references to executive power are so spare and because there are relatively few judicial precedents in the area, historical practice may provide the most objective basis for decision.").

[284] *See* Scalia, *supra* note 283, at 17–18, 23 (discussing textualism in the statutory context).

[285] *See, e.g.*, Manning, *supra* note 257, at 1947; Manning, *supra* note 258.

[286] Manning, *supra* note 257, at 1947.

[287] *Id.* at 1948.

[288] *See Seila*, 140 S. Ct. at 2227–30 (Kagan, J., concurring in part and dissenting in part).

[289] *Seila*, 140 S. Ct. at 2191.

to appeal to the Court's conservatives and depoliticize the case.[290] After oral argument, however, some commentators suggested this tactic might have backfired, because of both Clement's style and his substance.[291]

Ultimately, the Court's weak reasoning, Justice Kagan's efficient work dismantling it, and the availability of a conservative, textualist alternative leave a reader wondering if there is something else at issue in *Seila* than a simple divide on a technical question of constitutional interpretation — and something bigger at stake with the rise of the unitary executive theory and its support for a preclusive presidential removal power.

III. THE POLITICAL ECONOMY OF REMOVALS

One of the more striking things about *Seila* is that its first-order political consequences hardly seem to warrant the conflict over it. It is certainly possible that liberals and conservatives simply disagree on the best reading of the legal materials. But it is worth considering whether the issue in *Seila* might have broader political underpinnings and consequences. This Part starts by noting the first-order symmetry in *Seila* and the broader unitary theory as applied to the removal power. It then speculates on some ways in which *Seila* might have a normative, and ideologically contested, vision of the Constitution undergirding it, and on the particular ways in which its consequences might have politically relevant implications for the administrative state. This third story offers more reasons why *Seila* is worthy of attention and should be considered a deeply "political" case.

A. First-Order Symmetry and the Unitary Executive

The result in *Seila*, as I have noted, does not have obvious first-order political benefits for conservatives or Republicans. The Trump Administration already controls the CFPB, so the case does not benefit the current Administration. If anything, it could *harm* the current Administration. The rule in *Seila* means a new Democratic President could fire the Republican head of the CFPB and nominate a person of their choosing. Indeed, after the case was decided, commentators immediately noted that the decision was a "real gift" to a possible Biden

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[290] Ephrat Livni, *An Unlikely Hero Could Save the Government Agency Designed to Protect Consumers*, QUARTZ (Oct. 31, 2019), https://qz.com/1738560/scotus-taps-a-famously-conservative-attorney-to-defend-the-cfpb [https://perma.cc/96RZ-B5RL].

[291] Josh Blackman, *The CFPB Needed Better Friends*, REASON: THE VOLOKH CONSPIRACY (Mar. 4, 2020, 10:56 AM), https://reason.com/2020/03/04/the-cfpb-needed-better-friends [https://perma.cc/7AM3-YXYA].

Administration, as he could fire Director Kraninger on day one if he is elected.[292]

An even more aggressive unitary executive decision, along the lines Justice Thomas suggests, would not have made *Seila* more favorable to conservatives, in terms of its first-order effects. *Seila* itself seems to contemplate future cases marching in this direction. Chief Justice Roberts described the exceptions to a preclusive presidential removal power as twofold: "[O]ne for multimember expert agencies *that do not wield substantial executive power*, and one for inferior officers with limited duties and no policymaking or administrative authority."[293] Any multimember commission that currently "wields substantial executive power" is thus potentially at risk of constitutional challenge to ensure its members are removable at-will by the President.[294]

Every member of the Court seems to understand this phrase as inviting further litigation. The majority attempted to reframe the FTC's powers in 1935 as limited to "making reports and recommendations to Congress" and "submitting recommended dispositions to an Article III court."[295] This characterization creates a contrast between the 1935 FTC (which was upheld because it did not wield substantial executive power) and the current FTC (which by implication does wield substantial executive power). Justice Kagan fired back that the FTC "could and did run investigations, bring administrative charges, and conduct adjudications," and that it "lacks all plausibility" that the Court in 1935 misunderstood these powers.[296] Her point is to show that the FTC in 1935 did wield substantial executive powers, so as to insulate it (and other agencies) from a future challenge. Meanwhile, Justice Thomas noted that he joined the majority opinion *because* the Court limited *Humphrey's Executor* to agencies that do not wield substantial executive power.[297] He even emphasized that clause in italics, perhaps as a flag to future litigants.[298] It's hard to read these passages as anything less than the first shots in the battle to extend the removal power to multimember commissions.

But here's the thing: if the Court does expand the President's preclusive removal power to cover multimember commissions for which

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[292] Adam Levitin, Seila Law v. CFPB*: Winners and Losers*, CREDIT SLIPS (June 29, 2020, 1:07 PM), https://www.creditslips.org/creditslips/2020/06/seila-law-v-cfpb-winners-and-losers.html [https://perma.cc/GK95-CFJB].

[293] *Seila*, 140 S. Ct. at 2199–200 (emphasis added).

[294] This rationale, of course, builds on *Free Enterprise Fund*. *See* Kevin M. Stack, *Agency Independence After* PCAOB, 32 CARDOZO L. REV. 2391, 2417 (2011) (arguing that "*PCAOB* embraces a principle — when an agency has policymaking and enforcement powers, the need for executive control trumps congressional concern for the agency's independence in its exercise of adjudicative functions — that is not inherently confined to second-layer removal provisions").

[295] *Seila*, 140 S. Ct. at 2200.

[296] *Id.* at 2339 n.10 (Kagan, J., concurring in part and dissenting in part).

[297] *Id.* at 2211 (Thomas, J., concurring in part and dissenting in part).

[298] *See id.*

Congress has specified removal criteria, that enterprise is also likely to have symmetrical first-order political effects. With an expansive removal power, a Democratic President could fire inherited Republican multimember commissioners and nominate new Republican commissioners — but ones who are more aligned with the President's views. Alternatively, a Democratic President could fire Republican commissioners and leave their positions open, so long as quorum requirements are met to keep the agency functioning. In either case, a Democratic President could then direct the expansive powers of the Securities and Exchange Commission, the Federal Trade Commission, and the Federal Communications Commission, among other agencies. A Republican President could, of course, do the same. But that is the point. The first-order consequences do not obviously help Republicans or Democrats, conservatives or progressives. Whether we frame the President as a "decider" or "overseer" with respect to federal agencies does not have obvious first-order implications.[299]

That conservative presidential administrations and their movement allies have thus embraced the unitary theory is perhaps somewhat surprising, and maybe more so given the history of the presidency. In the late nineteenth century, the presidency was not at the center of the American political or constitutional universe. Woodrow Wilson's classic 1885 book was entitled *Congressional Government*, not presidential government,[300] and Lord Bryce felt obligated to include an entire chapter in his *The American Commonwealth* explaining why "great men" are not elected President.[301]

The transformation of the presidency happened with the Progressive Era. Constitutional scholars tend to recall President Theodore Roosevelt's comments that the President was empowered to do virtually anything not prohibited by the Constitution.[302] His approach may have been on the far end of the constitutional spectrum, but Progressive Era intellectuals generally pushed to expand the power of the presidency as part of an attempt to shift policymaking away from the constraints of courts and Congress.[303] They believed that a less constrained President

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[299] *See* Peter L. Strauss, *Foreword: Overseer, or "The Decider"? The President in Administrative Law*, 75 GEO. WASH. L. REV. 696 (2007). Unitary executive champions, Strauss notes, tend to be on the "decider" side, and skeptics tend to think the Constitution either does not specify or sets up an overseer role. *See id.* at 697 n.3.

[300] WOODROW WILSON, CONGRESSIONAL GOVERNMENT (Johns Hopkins Univ. Press 1981) (1885).

[301] *See* JAMES BRYCE, THE AMERICAN COMMONWEALTH 73–80 (London, MacMillan & Co. 1888).

[302] THEODORE ROOSEVELT, THEODORE ROOSEVELT: AN AUTOBIOGRAPHY 510 (1913).

[303] Stephen Skowronek, *The Unsettled State of Presidential History*, *in* RECAPTURING THE OVAL OFFICE: NEW HISTORICAL APPROACHES TO THE AMERICAN PRESIDENCY 15, 17 (Brian Balogh & Bruce Schulman eds., 2015).

would be more attuned to the needs of democracy. Wilson thus claimed the President was the "only national voice" in public affairs, and progressives saw Presidents as at once leading public opinion and being regulated by it.[304] This reimagining of the presidency was coupled with a decades-long refashioning of administrative power from the cronyist, patronage-focused spoils system of the nineteenth century to a more expert-oriented enterprise that was decoupled from party machines and bosses. At the same time, progressives were clear that their aim was not a resurrection of the royal prerogative.[305] "The modern president," Professor Stephen Skowronek writes, "would not direct affairs at will; he would orchestrate the work of the whole according to commonly recognized and externally verifiable standards."[306]

Presidential power and administrative capacity thus went hand in hand, and the two were largely designed to advance the goals of economic regulation. Rooseveltians wanted the federal government to regulate corporations.[307] Brandeisians wanted the federal government to break them up.[308] Still others wanted federal-corporate collaboration to stop "ruinous competition."[309] But in each case, the aim was federal power to regulate economic activity — and this required both administrative capacity and presidential leadership. A generation later, President Franklin Roosevelt pursued each of these courses at various times, using the "bully pulpit" that his distant relative had christened to mobilize support for a range of regulatory policies.[310] More narrowly, it is worth pointing out that it was Democrat Woodrow Wilson who fired Myers, and Democrat Franklin Roosevelt who fired Humphrey. Progressives and their Presidents championed presidential and administrative power largely in order to bring the economically powerful to heel. If history is any guide, we might even wonder if the unitary executive theory might one day find favor with future progressive Presidents. But to even point out that possibility is to recognize first-order political symmetry.

B. Why the Removal Power Is "Political"

Given the prominence of the case and the ferocity of the battles over it, it seems unlikely that there is nothing deeper, nothing political, at stake. So what are the possible "political" reasons why conservatives are so supportive of a preclusive removal power? Or, alternatively, what "political" features make progressives so fiercely opposed to it?

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304 *Id.* at 19.

305 *See id.* at 18–20.

306 *Id.* at 20.

307 GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION 174–75 (2017).

308 *Id.* at 178–81.

309 *Id.* at 174–85.

310 *Id.*

I think there are a number of possible explanations, and they can be divided into two categories. First are normative views of how the separation of powers should function. At times, the opinion in *Seila* reveals normative assumptions about constitutional dynamics and values that plausibly align with ideological divisions. Second are the consequences for the administrative state. Commentators often reference the rise of the removal power as tied to an assault on the administrative state, but it is not entirely clear what mechanism links the two (as compared, for example, to the nondelegation doctrine, which has an obvious first-order relationship to the administrative state). These two categories are not mutually exclusive, but separating them out — and separating out some of the different possibilities within each — helps identify the political stakes.[311]

1. Normative Views of the Separation of Powers. — By normative view of the separation of powers, I do not mean the best reading of the relevant legal materials on any particular provision. I mean that conservatives and liberals might have different views of what the Constitution should require, based on functional preferences or normative intuitions. In any given case, legal doctrines and interpretive methods might be deployed to achieve that constitutional vision. In *Seila* and the removal cases, at least three normative views of the separation of powers are identifiable.

First, and following one of Justice Kagan's comments, is a kind of *Schoolhouse Rock constitutionalism*. In her dissent, Justice Kagan needled the majority for adopting an overly simplistic approach to constitutional structure, akin to the cartoon civics video's explanation of the federal government.[312] Her comments seem only partly in jest. It is possible that some people could have a normative commitment to such an approach. One could think the Constitution should adhere to a simple structure of three branches, totally separated, and that such an approach is net beneficial because it is simpler to administer or easier to explain to the general public. The trouble, of course, is that the *Schoolhouse Rock* Constitution is manifestly not our Constitution. Moving toward a simplified form is plainly a political choice, not a legal one.[313]

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311 It is worth noting that nothing about this analysis turns on whether members of the Court intentionally see themselves as advancing a political cause. They could have views that are "political" even if they do not see them that way. They could adopt interpretations that have "political" effects even if they are not motivated by those effects. They could also act in line with the conventional wisdom within their intellectual ecosystem, independent of how that wisdom came about or what its effects are. Part of my point here is that those possibilities do not make a decision or constitutional rule not "political."

312 *Seila*, 140 S. Ct. at 2226–27 (Kagan, J., concurring in part and dissenting in part).

313 For a discussion opposed to this mode of constitutionalism, see Strauss, *supra* note 257, at 577–79.

A second view that emerges from the removal cases might be called *strongman constitutionalism* or, for the age of Donald Trump, *the fetishization of firing*. One of the striking things about *Myers*, *Free Enterprise Fund*, and *Seila* is their view of management and leadership. Without the removal power, Chief Justice Roberts said, quoting *Myers*, it "would make it impossible for the President . . . to take care that the laws be faithfully executed."[314] The reason is that officials in the executive branch will only "fear" and "obey" the "authority that can remove" them.[315] "[T]he threat of removal" is what enables control.[316] As a result, any other elements that might be considered relevant to the political control of the bureaucracy — funding, personal relationships, oversight, political factors — are simply "bureaucratic minutiae."[317]

This overarching worldview — which depends on "fear" and "threat[s]" to get people to "obey" — seems to involve a strongman leader who controls the bureaucracy from the top down. Other commentators have called the removal power the "gun behind the door" because it enables the president to "bend" subordinates "to his will."[318] This approach is perhaps somewhat fitting for the moment, given that the current occupant of the White House's most famous phrase is "You're Fired."[319]

It is worth pointing out that there is nothing *legal* or *constitutional* about this approach — including the reasoning behind the removal power as a way to effectuate political control of the bureaucracy. Rather, this is a form of what Professors David Pozen and Adam Samaha have called "anti-modalities" in constitutional law.[320] Pozen and Samaha show that functional arguments often seep into constitutional law, under the cover of accepted modalities of constitutional reasoning or by modification into shallow and superficial platitudes so as not to appear as "impermissible" policy arguments.[321]

Indeed, the idea that everything but firing is "bureaucratic minutiae" and that firing is the only effective means of control would be a surprise to the entire field of political science, and much of administrative law too. Members of these fields have spent decades describing various

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314 *Seila*, 140 S. Ct. at 2198 (quoting Myers v. United States, 272 U.S. 52, 164 (1926)).

315 *Id.* at 2197 (quoting Bowsher v. Synar, 478 U.S. 714, 726 (1986)).

316 *Id.* at 2203.

317 Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 500 (2010); *Seila*, 140 S. Ct. at 2207 (quoting *Myers*, 272 U.S. at 164).

318 CLINTON ROSSITER, THE AMERICAN PRESIDENCY 20 (2d ed. 1960).

319 *Cf.* Marc Fisher, *On TV, Trump Loved to Say "You're Fired." In Real Life, He Leaves the Dirty Work to Others.*, WASH. POST (Mar. 15, 2018), https://www.washingtonpost.com/politics/on-tv-trump-loved-to-say-youre-fired-in-real-life-he-leaves-the-dirty-work-to-others/2018/03/14/0e85d25e-27a7-11e8-b79d-f3d931db7f68_story.html [https://perma.cc/2GDA-6XE3].

320 *See* David E. Pozen & Adam M. Samaha, *Anti-modalities*, 119 MICH. L. REV. (forthcoming 2021), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3579500 [https://perma.cc/8QXS-CPQU].

321 *Id.*

forms of political control over the bureaucracy short of firing. Books and articles recount the many ways Congress exercises control over agencies;[322] the ways Presidents exercise power over officials short of threatening to remove them;[323] examples of situations in which a President cannot practically remove subordinates because of their independent power or leverage;[324] and indeed, even the ways in which presidential removal might be unnecessary, ineffectual, or actually backfire and *reduce* political control of the bureaucracy.[325]

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[322] *See generally, e.g.*, DAVID EPSTEIN & SHARYN O'HALLORAN, DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS (1999); JOHN D. HUBER & CHARLES R. SHIPAN, DELIBERATE DISCRETION?: THE INSTITUTIONAL FOUNDATIONS OF BUREAUCRATIC AUTONOMY (2002); DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER (2016); Jason A. MacDonald, *Limitation Riders and Congressional Influence over Bureaucratic Policy Decisions*, 104 AM. POL. SCI. REV. 766 (2010); Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61 (2006); Kenneth Lowande, *Politicization and Responsiveness in Executive Agencies*, 81 J. POL. 33 (2019); Mathew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols Versus Fire Alarms*, 28 AM. J. POL. SCI. 165 (1984). For a more general discussion of issues surrounding agency accountability and independence, see also ROBERT E. CUSHMAN, THE INDEPENDENT REGULATORY COMMISSIONS 666–99 (1941); Jennifer L. Selin, *What Makes an Agency Independent?*, 59 AM. J. POL. SCI. 971 (2015); David E. Lewis & Jennifer L. Selin, *Political Control and the Forms of Agency Independence*, 83 GEO. WASH. L. REV. 1487 (2015); Edward Rubin, *The Myth of Accountability and the Anti-administrative Impulse*, 103 MICH. L. REV. 2073, 2074–75 (2005).

[323] *See generally, e.g.*, RICHARD E. NEUSTADT, PRESIDENTIAL POWER AND THE MODERN PRESIDENTS: THE POLITICS OF LEADERSHIP FROM ROOSEVELT TO REAGAN (1990); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001); Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 YALE L.J. 2182 (2016); Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63 VAND. L. REV. 599, 644–45 (2010) (discussing jawboning and litigation control); Andrew B. Whitford & Jeff Yates, *Policy Signals and Executive Governance: Presidential Rhetoric in the War on Drugs*, 65 J. POL. 995 (2003); Neal Devins, *Political Will and the Unitary Executive: What Makes an Independent Agency Independent?*, 15 CARDOZO L. REV. 273 (1993) (exploring the issue of executive control over litigation); B. Dan Wood & Richard W. Waterman, *The Dynamics of Political Control of the Bureaucracy*, 85 AM. POL. SCI. REV. 801 (1991).

[324] *See, e.g.*, Jonathan L. Entin, *Synecdoche and the Presidency: The Removal Power as Symbol*, 47 CASE W. RES. L. REV. 1595, 1600 (1997).

[325] *See, e.g.*, Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 68–69 (2008); Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 6 (2013) ("Empirical evidence and political science models instead show that the power to remove is sometimes unnecessary and sometimes ineffectual to the goal of political control of the bureaucracy. Worse, presidential removal authority often has perverse and undesirable effects quite apart from democratic accountability goals."); *id.* at 39 ("Removal may not only be unnecessary given the extant instruments of agency control wielded by a supervising official; it may also be ineffectual because it is too costly, too clumsy, and too molar a tool for attaining desired policy results. As a result of these limitations, even a supervising official who has no other instruments of agency control will not necessarily find her ability to elicit desirable policy outcomes increased in any meaningful way by a judicial intervention reallocating removal power."); Robert V. Percival, *Presidential Management of the Administrative State: The Not-So-Unitary Executive*, 51 DUKE L.J. 963, 1003 (2001) (arguing that even with removal, Presidents cannot direct subordinates to take substantive positions on issues about which they are legally entitled to make decisions). Note also that

In other words, there are a range of views on how best to control bureaucracies, including debates over whether presidential control through removal is the optimal way to do so. The vision of Presidents governing the bureaucracy through "fear" and "threat[s]" is one approach to management. But it is not the only one. And it is also hard to believe that the generation that overthrew a king would have endorsed it. For our purposes, however, the point is not that political control of the bureaucracy through fear and threats is the right or wrong approach. It is that it is fundamentally a choice — and a contested one — to govern in that way. The Court, as Justice Kagan says, "has nothing but intuition to back up its essentially functionalist claim that the CFPB would be less capable of exercising power if it had more than one Director."[326] It also has nothing but intuition to back up its essentially functionalist claim that at-will removal is necessary for political control of the bureaucracy.

A brief sidebar: if members of the Court do take this view of managerial dynamics, it likely implies that they see themselves as completely unaccountable. Unlike the President, they are not subject to elections, and any other mechanism of political control over the judiciary would be, in the Chief Justice's words, "bureaucratic minutiae." To the extent the Justices do feel disciplined by other factors, such as public opinion, then their intuition about the essential role the threat of firing plays is inconsistent with their own behavior and experience.

In any case, conservatives might support strongman constitutionalism for functional reasons. They could think it is the most effective (or only effective) way to "take care" that the laws are faithfully executed. Another possibility is that the roots of strongman constitutionalism are psychological. In his book *The Righteous Mind*, Professor Jonathan Haidt argues that conservatives differ from liberals at the level of deep psychological intuitions, particularly with respect to their commitment to hierarchy.[327] Political scientists have similarly suggested that divergences of this type can explain a great number of policy differences.[328] It is possible that either some psychological impetus, or more weakly, simply an intuition in favor of hierarchy, is at the source of conservatives' general preference for the removal power, the unitary executive, and the system of management that undergirds both. Given that there

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Presidents have other tools at their disposal — for example, an official's ambition to get their next job, rather than being fired from the current one. Sitaraman & Dobkin, *supra* note 66, at 750.

[326] *Seila*, 140 S. Ct. at 2244 (Kagan, J., concurring in part and dissenting in part).

[327] *See generally* JONATHAN HAIDT, THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION (2013).

[328] MARK J. HETHERINGTON & JONATHAN D. WEILER, AUTHORITARIANISM AND POLARIZATION IN AMERICAN POLITICS (2009); KAREN STENNER, THE AUTHORITARIAN DYNAMIC (2005).

is nothing "legal" or "constitutional" about psychological biases, if *Seila* is based in part on these intuitions, it should be seen as political.

A third view is of *libertarian constitutionalism*. Conservatives might hold a normative position that the Constitution should put a thumb on the scale against federal power generally and economic regulation specifically.[329] This libertarian vision often seeps into constitutional arguments, with the libertarian anti-modality masquerading as constitutional reasoning. For example, the Supreme Court frequently argues that the separation of powers exists, in part, to safeguard individual liberty.[330] *Seila* continues this trend, claiming that "[t]he Framers recognized that, in the long term, structural protections against abuse of power were critical to preserving liberty."[331] This libertarian separation of powers argument suggests that it is essential to prevent the accumulation of power to preserve freedom from government tyranny, and is offered in defense of a formalist reading of the structural separation of powers principle.[332] But the argument says nothing about the ability of government to protect individuals from *private* tyranny.[333] As one scholar has noted, "it can be just as oppressive to prevent government from operating as to hijack its operation for factional ends."[334]

This concern, at least as much as the libertarian one, motivated the Framers to create the Constitution. Constitutionalism, as scholars have

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329 For a recent discussion of how this anti-government, anti-administrative approach manifests in recent constitutional cases, sub-constitutional cases, and academic literature, see Metzger, *supra* note 64. I include here both libertarian and classical liberal perspectives, as the two are closely related. On the more philosophical side, see RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY (2013); and RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2017). More doctrinal and historical works include Gary Lawson, *The Rise and Rise of the Administrative State,* 107 HARV. L. REV. 1231 (1994) (declaring in its very first sentence "[t]he post–New Deal administrative state is unconstitutional") and PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014), to which Professor Adrian Vermeule has responded, "No," *see* Adrian Vermeule, *No*, 93 TEX. L. REV. 1547, 1547 (2015) (reviewing HAMBURGER, *supra*).

330 *See, e.g.*, Bond v. United States, 546 U.S. 211, 223 (2011) ("[I]ndividuals, too, are protected by the operations of separation of powers and checks and balances."); Wellness Int'l Network v. Sharif, 135 S. Ct. 1932, 1954 (2015) (Roberts, C.J., dissenting) (noting that the separation of powers "promotes both liberty and accountability"); NLRB v. Noel Canning, 537 U.S. 513, 525 (2014) ("We recognize, of course, that the separation of powers can serve to safeguard individual liberty . . . ."); Free Enter. Fund v. Pub. Co. Acct. Oversight Bd., 561 U.S. 477, 497–501 (2010); Clinton v. City of New York, 524 U.S. 417, 450 (1998) (Kennedy, J., concurring) ("Liberty is always at stake when one or more of the branches seek to transgress the separation of powers."). Commentators make the same argument. *See* Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1557–58 (1991); Calabresi & Rhodes, *supra* note 180, at 1155 ("The genius of the American Constitution lies in its use of structural devices to preserve individual liberty.").

331 *Seila*, 140 S. Ct. at 2202 (quoting Bowsher v. Synar, 478 U.S. 714, 730 (1986)).

332 Aziz Z. Huq, *Libertarian Separation of Powers*, 8 N.Y.U. J.L. & LIBERTY 1006, 1033–37 (2014).

333 *See* Sitaraman & Dobkin, *supra* note 66, at 735–37.

334 Adrian Vermeule, Reaction, *Recess Appointments and Precautionary Constitutionalism*, 126 HARV. L. REV. F. 122, 123–24 (2013).

long observed, involves both creating capacity for government and controlling government, both building power and constraining it.[335] As Madison wrote in *The Federalist No. 51*, "[i]n framing a government . . . the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself."[336] Indeed, the entire purpose of the creation of the U.S. Constitution was to make the national government *stronger* than the government under the Articles of Confederation.[337]

The CFPB offers an excellent illustration. The agency was created after widespread private discrimination and fraud collapsed the national and global economies, with devastating consequences for individuals' lives and livelihoods. The actors who perpetrated those frauds then fought tooth and nail to prevent regulation of their behavior. The CFPB, as Justice Kagan pointed out, has recovered more than $11 billion for consumers who were cheated by financial institutions.[338]

What motivates *Seila*, however, seems to be the hypothetical possibility of "kneebuckling penalties against private citizens" rather than the fact that some private citizens took a financial baseball bat to the knees of other private citizens.[339] Indeed, Chief Justice Roberts's description of the circumstances around the creation of the CFPB makes no mention of discrimination, fraud, tricks, traps, deception, or any other illegal, unfair, or problematic practices. Rather, he characterized the 2008 crisis as coming (passively) when "the subprime mortgage market collapsed," and Warren's feeling that products were "unsafe" as simply about the "regulatory jumble."[340]

For our purposes, the point is not whether the danger of government issuing "kneebuckling penalties" is more or less than the danger of private actors engaging in discrimination and fraud. It is that the "safeguards of liberty" principle smuggles into separation of powers debates an

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335 *See* Daryl J. Levinson, *The Supreme Court, 2015 Term — Foreword: Looking for Power in Public Law*, 130 HARV. L. REV. 31, 44–46 (2016).

336 THE FEDERALIST NO. 51, at 319 (James Madison) (Clinton Rossiter ed., 2003).

337 *See generally* MAX M. EDLING, A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE 5 (2003); MICHAEL J. KLARMAN, THE FRAMERS' COUP: THE MAKING OF THE UNITED STATES CONSTITUTION (2016); GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION (2017); Levinson, *supra* note 335, at 47 ("The overarching ambition of the constitutional Framers was to create a centralized government powerful enough to fulfill the fiscal and military requirements of respectable statehood.").

338 *Seila*, 140 S. Ct. at 2239 (Kagan, J., concurring in part and dissenting in part).

339 *Id.* at 2202 n.8 (majority opinion). Judge Pillard made this point nicely in *PHH Corp. v. CFPB*, 881 F.3d 75, 106 (D.C. Cir. 2018) (en banc) ("It remains unexplained why we would assess the challenged removal restriction with reference to the liberty of financial services providers, and not more broadly to the liberty of the individuals and families who are their customers.").

340 *Seila*, 140 S. Ct. at 2192. To be sure, Warren was concerned with a regulatory jumble. But the reason was because it meant that bad practices were not penalized and bad actors in the financial markets were often not held accountable. *See* Warren, *supra* note 4.

assumption that the libertarian concern is stronger than the government-capacity concern. This is the Safeguards of Liberty Fallacy[341]: even if the principle captures something important at a high level of theoretical generality, it tells us nothing about how any given case should come out because it is contravened by the equal and opposite principle of needing to enable a strong government in order to prevent private tyranny. Placing a thumb on the scale for the libertarian approach is a contested political preference.

2. Consequences of Reducing Agency Independence. — Seila might also be seen as political because there are asymmetric political consequences to creating a presidential removal power — even if they are not first-order political consequences. Scholars and commentators frequently say that the political stakes in removal cases include the existence and capacity of the administrative state.[342] At this high level of generality, however, it is not clear how exactly that threat manifests. Progressive Presidents could, of course, use unitary removal powers to *expand* the regulatory state. This makes removal different from the nondelegation doctrine, which has clear first-order consequences for the administrative state.[343] In this section, I consider some of the specific mechanisms by which the removal power could be asymmetrically "political" with respect to the administrative state — in ways that might explain the ideological divide.

We might call the first possibility *asymmetric bureaucracy*. This possibility operates at the level of both agency leadership (commissioners and agency directors) and civil service bureaucrats. Conservatives might think that the civil service is largely liberal ideologically and that agencies with leadership that is insulated from removal might be more likely to operate in the center-left of the political spectrum. With this assumption, a presidential removal power could potentially have an asymmetric effect on the bureaucracy. Firing liberal or moderately conservative agency leaders could make room for more conservative leaders who can then direct the civil service in line with conservative preferences. And even if they encounter a "deep state" that will not implement conservative positions, conservative agency leaders would at least have the power to stop the civil service from taking liberal actions.[344]

Whether or not distrust of "liberal" civil servants is warranted, a blanket fear of a liberal bureaucracy does not appear to be. There is some evidence there are more liberal federal employees than conservative ones, but the differences might not be as great as those who worry

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341 *See* Sitaraman & Dobkin, *supra* note 66, at 735–37.

342 *See, e.g.*, Metzger, *supra* note 64, at 17–20.

343 Lawson, *supra* note 329, at 1237–41.

344 MIKE LOFGREN, THE DEEP STATE: THE FALL OF THE CONSTITUTION AND THE RISE OF A SHADOW GOVERNMENT (2016).

about deep state conspiracies think.[345] In addition, political scientists Mark Richardson, Joshua Clinton, and David Lewis have shown that the bureaucracy is not monolithic in its ideology. Some agencies are perceived to slant conservative, while others are perceived to be liberal.[346] And it is not clear that agencies with removal protections are systematically more liberal than agencies under the eye of the President. The Defense Department comes close to maxing out the Richardson-Clinton-Lewis scale on the conservative side, while the Department of Health and Human Services is the mirror image on the liberal side.[347] Neither has congressionally specified removal criteria for its leadership. The SEC and CFTC, commissions with independence from presidential removal, are perceived to lean conservative; the CFPB and the Consumer Products Safety Commission, liberal.[348] Within agencies, there is also variation, with some offices considered more conservative than others.[349]

The choices between a single-director agency and a multimember commission and between removal protections or their absence are also often conflated.[350] Separating the two does not help much, at least logically, in identifying a systematic skew either. An EPA that oscillates between conservatives and liberals does not seem so different than the Cordray-Mulvaney divide at the CFPB. Indeed, some might contend that a CFPB that oscillates between conservatives and progressives will, on net, be more progressive than an SEC that is relatively conservative regardless of the partisan composition of the Commission.[351] The need for multiple votes, asymmetric partisan polarization (among commissioners), the Democratic coalition's balance between progressives and centrists, and a host of other factors arguably combine to ensure that

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345 Federal employees, for example, gave more money to Hillary Clinton than to Donald Trump in 2016. Jonathan Swan, *Government Workers Shun Trump, Give Big Money to Clinton*, THE HILL (Oct. 26, 2016, 6:01 AM), https://thehill.com/homenews/campaign/302817-government-workers-shun-trump-give-big-money-to-clinton-campaign [https://perma.cc/74XX-8G9U]. But at the same time, at an earlier point in that same election cycle, polling showed forty percent of federal employees identifying as Republican or Republican-leaning, compared to forty-four percent as Democratic or Democratic-leaning. Eric Katz, *There Are More Republicans in Federal Government than You Might Think*, GOV. EXEC. (Aug. 14, 2015), https://www.govexec.com/oversight/2015/08/there-are-more-republicans-federal-government-you-might-think/119138 [https://perma.cc/Q632-TZJ5]. An earlier, 2014 survey of federal executives found that forty-four percent identified as liberal, thirty-five percent as moderate, and twenty-one percent as conservative. *See* David E. Lewis, Opinion, *"Deep State" Claims and Professional Government*, REG. REV. (Dec. 5, 2017), https://www.theregreview.org/2017/12/05/lewis-deep-state-professional-government [https://perma.cc/6ELU-NUBM].

346 Mark D. Richardson, Joshua D. Clinton & David E. Lewis, *Elite Perceptions of Agency Ideology and Workforce Skill*, 80 J. POL. 303, 307 fig. 3, app. at 11–16 (2018); Lewis, *supra* note 345.

347 Lewis, *supra* note 345.

348 Richardson et al., *supra* note 346, at 307.

349 *Id.* at 305.

350 Sitaraman & Dobkin, *supra* note 66, at 722–23.

351 *Id.* at 731.

multimember commissions will not be terribly progressive, even though commissioners are not removable at will.[352]

It is also not clear that a civil servant in an agency whose leadership is removable will exert more independent power over policy than will their counterpart in an agency whose leadership is not removable. It might instead be that civil servants in both cases take direction faithfully from the agency leadership — or that civil servants in both cases disobey guidance from agency leadership.[353] Similarly, accounts of removable political appointees taking aggressive actions that even push civil servants to the point of resignation do not seem so far from Director Mulvaney's aggressive actions as the nonremovable head of the CFPB.[354] And of course, civil service disobedience can take place in both Republican and Democratic administrations.[355] In any case, political scientists have found that civil servants report that their senior ranks are responsive or very responsive to the policy decisions of the President.[356] In a Democratic administration, liberal agencies are more responsive than conservative agencies, and the opposite is likely true as well.[357]

Still, regardless of accuracy or precision, it remains possible that the politics of the removal power are based on some general impression that the administrative state is liberal — and an assumption that presidential removal can rein in a liberal bureaucracy.

A second possibility is *asymmetric presidential administration*. It might be that conservatives think that Democrats and Republicans are asymmetrically polarized not just in their political views,[358] their willingness to fill judicial positions,[359] or their willingness to play political

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352 *See generally id.* Indeed, in other work, I have called for making the FTC into a single-director agency for these reasons. *See* GANESH SITARAMAN, TAKING ANTITRUST AWAY FROM THE COURTS 11, GREAT DEMOCRACY INITIATIVE (Sept. 2018), https://greatdemocracyinitiative.org/wp-content/uploads/2018/09/Taking-Antitrust-Away-from-the-Courts-Report-092018-3.pdf [https://perma.cc/NHX3-GBZ9].

353 *See* Jennifer Nou, *Civil Service Disobedience*, 94 CHI.-KENT L. REV. 349, 357 (2019). For an argument that civil servants, political leadership, and outside groups create a new separation of powers, see Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 COLUM. L. REV. 515 (2015).

354 *Compare supra* pp. 356–57, *with* Heidi Kitrosser, *Accountability in the Deep State*, 65 UCLA L. REV. 1532, 1535–36 (2018) (describing the complaints and resignation of a civil servant at the Department of the Interior).

355 Nou, *supra* note 353, at 351.

356 Lewis, *supra* note 345.

357 *Id.*

358 JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY 11 (2005).

359 *See* David Fontana, *Cooperative Judicial Nominations During the Obama Administration*, 2017 WIS. L. REV. 305, 306.

and constitutional hardball[360] — but also their willingness to have the President wield the powers of the administrative state. Democrats might be systematically unwilling to appoint officials who are progressive and to use the administrative state aggressively for regulatory ends. Republicans might be systematically willing to appoint extreme conservatives and to use the administrative state aggressively for deregulatory ends. In that case, the removal authority would mean a net benefit over time for conservatives.

The history of the Reagan Justice Department's actions suggests an understanding of the possibilities of using legal authorities and arguments aggressively to change the terms of policy and politics.[361] So long as conservatives were ahead of the curve in recognizing and using those tactics, the removal power and the broader unitary theory would have asymmetric effects. Some might argue that progressives also use presidential power aggressively, potentially making this explanation less valuable.[362] But even with President Clinton's use of presidential administration[363] and President Obama's often creative regulatory endeavors,[364] it may be that presidential administration is asymmetrically polarized. The Trump Administration's approach to the CFPB, for example, has been far more radically deregulatory than the CFPB was regulatory in its early years.

More broadly, given the historical relationship between progressives and the presidency, the recent example of President Obama's use of executive authorities, and the challenges of retaining unified government, one might think Democrats might even come to *embrace* the unitary theory as a way to accomplish their policy goals. There are a variety of practical and political reasons why an asymmetry in views of the unitary theory is likely to persist — including Democrats' tendency to a technocratic form of governance, the heterogeneity of the Democratic political coalition, industry capture and the divide between left-neoliberals and progressives, and fears that playing hardball will backfire — but it is also worth noting a set of intellectual commitments within the left that make ideological drift along these lines unlikely.

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360 Joseph Fishkin & David E. Pozen, *Asymmetric Constitutional Hardball*, 118 COLUM. L. REV. 915, 918 (2018); Mark Tushnet, *Constitutional Hardball*, 37 J. MARSHALL L. REV. 523, 524–29 (2004).

361 Hollis-Brusky, *supra* note 186, at 199.

362 Binyamin Appelbaum & Michael D. Shear, *Once Skeptical of Executive Power, Obama Has Come to Embrace It*, N.Y. TIMES (Aug. 13, 2016), https://www.nytimes.com/2016/08/14/us/politics/obama-era-legacy-regulation.html [https://perma.cc/L3L4-L3Y8]; Nick Gass, *Christie: Obama Wants to Act "As if He Is a Dictator,"* POLITICO (Jan. 3, 2016, 12:52 PM), https://www.politico.com/story/2016/01/christie-obama-guns-executive-actions-217297 [https://perma.cc/8P36-9SMZ].

363 Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2248 (2001).

364 David J. Barron & Todd D. Rakoff, *In Defense of Big Waiver*, 113 COLUM. L. REV. 265, 267–68 (2013).

Democrats might potentially be willing to support a unitary theory when it comes to the regulatory state but not the national security state. Civil libertarian fears with respect to war and criminal justice push against building state capacity, even though state capacity is also needed to combat economic power and address economic injustice. General theories of state power thus run up against these policy preferences. Indeed, Democrats tend to be internally divided between liberals, who are more concerned with individual rights, and progressives, who are more concerned with building structures of power.[365] This divide might make progressives more willing to build executive power than liberals, even with the attendant risks, but the fractured coalition may make adopting the theory more difficult.

Interestingly, liberals and progressives could develop a structural constitutional or political theory that might account for these challenges. Constitutional theorists speak frequently of foreign affairs or national security exceptionalism, with those realms warranting greater executive power and judicial deference than domestic affairs.[366] But one could imagine progressives developing a theory of national security exceptionalism that cuts in the opposite direction. Given the particular dangers of state power over life itself and a range of hawkish biases that affect individual and group decisionmaking,[367] controls on state power should arguably be *more* stringent in these sectors, not less, than in the economic realm — or at least equally stringent.[368] A theory along these lines would parallel the divide between economic regulation and personal rights that emerged through the New Deal settlement, but at the level of structure rather than rights.[369]

A third, and closely related, possibility might be thought of as what Steve Bannon called the "*deconstruction of the administrative state*."[370]

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365 On the liberal legacy, see LAURA KALMAN, THE STRANGE CAREER OF LEGAL LIBERALISM 145 (1996).

366 Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1906–11 (2015) (discussing foreign affairs exceptionalism).

367 Ganesh Sitaraman & David Zionts, *Behavioral War Powers*, 90 N.Y.U. L. REV. 516, 521 (2015).

368 As a constitutional theory, this would of course be subject to specific textual provisions. As a matter of policy, divides between foreign and domestic could be justified based on specific functional needs, rather than over- and underinclusive categories like foreign and domestic. *See* Sitaraman & Wuerth, *supra* note 366, at 1935–49; *see also* Ganesh Sitaraman, *Foreign Hard Look Review*, 66 ADMIN. L. REV. 489, 525–32 (2014).

369 Suzanna Sherry, *Property Is the New Privacy: The Coming Constitutional Revolution*, 128 HARV. L. REV. 1452, 1457–58 (2015) (reviewing RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION (2014)).

370 Philip Rucker, *"Deconstruction of the Administrative State" Is the Plan, Bannon Tells Conservatives*, MCCLATCHY DC: IMPACT 2020 (Feb. 23, 2017, 9:50 PM), https://www.mcclatchydc.com/news/politics-government/article134553909.html [https://perma.cc/34KV-DYD9]. Professor David Noll has recently characterized deliberate efforts to undermine agencies as a form of sabotage, rather than

Progessive-era reformers saw the administrative state as "the only institution capable of securing a competitive economy and fair society," and their opponents thus saw it as "an intrinsic threat to personal freedom and private ordering."[371] Conservatives might therefore want to undermine it. There are two linked, asymmetric mechanisms at work. The first is the asymmetry in building and breaking. In his book *Political Order and Political Decay*, Professor Francis Fukuyama argues that institutions can suffer from political decay if they fail to reform and update to changed conditions.[372] He notes that dysfunction and entrenched actors in the United States contribute to this decay.[373] But active efforts to break institutional capacity do as well. As he describes in great detail, building institutional capacity and reforming institutions is difficult work.[374] If it is easier to break an institution than it is to build it, easier to erode capacity than to generate it, then greater presidential control might have asymmetric effects that benefit those who want to break institutional capacity more than those who want to strengthen it. Expansive presidential power is particularly important for this project if proponents cannot get the votes or political support to pass legislation eliminating agencies altogether.

The "deconstruction of the administrative state" might not simply mean a desire to deregulate or reduce the capacity of the regulatory state. It is possible that the aim is to delegitimize the administrative state altogether.[375] Here, the removal power could have asymmetric effects through the mechanism of making the federal government more partisan and more responsive to presidential preferences. While removal is not the only and perhaps not even the most important element of agency independence, it is clear, concrete, and perhaps symbolically important. Members of agencies who hold norms and follow practices of independence might see their own roles differently if the agency head is formally removable at will — precisely because that power is attached to the unitary theory.[376] In addition, if the public increasingly sees "expert" agencies as little more than arms of partisans, subject to the whims of the President and staffed with the President's cronies, then the entire

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mere policy disagreement. *See* David L. Noll, *Administrative Sabotage* (unpublished manuscript) (on file with the Harvard Law School Library).

371 Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1967 (2018).

372 FRANCIS FUKUYAMA, POLITICAL ORDER AND POLITICAL DECAY 462 (2014).

373 *Id.* at 503–04.

374 This is the subject of both volumes of his work on the topic. *See id.*; FRANCIS FUKUYAMA, THE ORIGINS OF POLITICAL ORDER (2011).

375 For a discussion related to the use of antigovernment rhetoric, see Metzger, *supra* note 64, at 50 ("[T]he Court's rhetorical invocations of liberty-threatening bureaucrats . . . undermine[] the administrative state's sociological and moral legitimacy . . . .").

376 *Cf.* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163, 1204 (2013) (discussing the SEC's independence as an unwritten convention).

expertise-based administrative enterprise might increasingly appear illegitimate. This could be based on an opposition to expertise in itself[377] or to governance by semiautonomous experts.[378]

Delegitimizing the expert-based administrative state would have multiple consequences. It would undermine the existing administrative state's operations and also reduce the likelihood of future innovations and the development of administrative capacity to address new problems that emerge.[379] Importantly, reducing the legitimacy of the administrative state could also have a spiraling effect, by which, as Fukuyama has explained, "[d]istrust of executive agencies leads [to] demands for more legal checks on administration, which further reduces the quality and effectiveness of government by reducing bureaucratic autonomy."[380] The consequence would be a vicious cycle that keeps eroding bureaucratic institutions and public confidence in them.

The fourth and final explanation rests on constitutional political economy.[381] The policy fights over the CFPB — and the PCAOB — were fiercely contested because they were fundamentally about the regulation of economically powerful actors. Most commentators in recent years have focused on the First Amendment as the constitutional weapon of choice in facilitating a deregulatory policy agenda.[382] Another tactic is narrowing the scope of the Commerce Clause, an approach that has enjoyed an occasional revival in both the Rehnquist and Roberts Courts.[383] The First Amendment operates as an external limit on congressional power; the new Commerce Clause jurisprudence acts as an internal limit.[384]

Seila and *Free Enterprise Fund* might be seen as another front in the war over constitutional political economy, with the site of the battle

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377 *See generally* TOM NICHOLS, THE DEATH OF EXPERTISE (2017) (describing the rise of skepticism of experts and expertise).

378 *See generally* DANIEL CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY (2020) (providing a history of the opposition to agency independence in the United States).

379 Metzger, *supra* note 64, at 50; *see also* Jeremy K. Kessler, *The Struggle for Administrative Legitimacy*, 129 HARV. L. REV. 718, 771 (2016) (reviewing DANIEL R. ERNST, TOCQUEVILLE'S NIGHTMARE: THE ADMINISTRATIVE STATE EMERGES IN AMERICA, 1900–1940 (2014)).

380 Francis Fukuyama, *The Ties that Used to Bind: The Decay of American Political Institutions*, AM. INTEREST (Dec. 8, 2013), https://www.the-american-interest.com/2013/12/08/the-decay-of-american-political-institutions [https://perma.cc/8GSL-HUVY].

381 Joseph Fishkin & William Forbath, *Reclaiming Constitutional Political Economy: An Introduction to the Symposium on the Constitution and Economic Inequality*, 94 TEX. L. REV. 1287 (2016).

382 *See, e.g.*, Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133; Genevieve Lakier, *The First Amendment's Real* Lochner *Problem*, 87 U. CHI. L. REV. 1243 (2020); Elizabeth Sepper, *Free Exercise Lochnerism*, 115 COLUM. L. REV. 1453 (2015).

383 Erwin Chemerinsky, *The Rehnquist Revolution*, 2 PIERCE L. REV. 1, 1 (2004); David A. Strauss, *Commerce Clause Revisionism and the Affordable Care Act*, 2012 SUP. CT. REV. 1 (2013).

384 *See, e.g.*, 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 794–95 (3d ed. 2000).

being the Necessary and Proper Clause.[385] The cases, and the unitary theory itself, are framed around giving content to unspecified Article II powers. The constant reference to "all" executive power broadens the scope of that unspecified power, while individual cases help articulate its content. But unitary theory conservatives never seem to reference "all" of Congress's Necessary and Proper power. As we have seen, the *Seila* majority does not mention the clause at all. The unitary executive theory's expansion of preclusive Article II powers may therefore be as much about shrinking Congress's textually granted and extremely broad Article I Necessary and Proper power. *Seila* could thus be read in conjunction with the creation of the recognition power in *Zivotofsky II*;[386] with the Court's recent opinions shrinking the Necessary and Proper Clause, like *NFIB v. Sebelius*;[387] and with its broader First Amendment and Commerce Clause jurisprudence constraining Congress's power to regulate.[388]

If *Seila*, the removal power, and the modern rise of the unitary executive theory are indeed part of a broader *battle to reduce the power of Congress*, the political context of the mid-twentieth century was likely an important contributing factor. From 1933 until 1995 — a total of sixty-two years — Democrats held the House of Representatives for fifty-eight years.[389] During those same sixty-two years, Democrats held the Senate for fifty-two.[390] But partisan control over the presidency was far more evenly divided — twenty-eight years for Republicans and thirty-four years for Democrats. The result is that for decades a Democratic Congress passed legislation and created agencies with economic and general welfare missions that differed from conservative preferences. Conservatives might have noticed that increasing presidential powers and reducing congressional power would be to their benefit because they were more likely to take control of the presidency than Congress. When the unitary executive theory and the modern drive for a removal power emerged in the 1980s, Republicans had held power in

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[385] For additional discussions of the general contest over constitutional political economy, see generally, for example, GANESH SITARAMAN, THE CRISIS OF THE MIDDLE-CLASS CONSTITUTION (2017); Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 L. & CONTEMP. PROBS. 195 (2014); Mila Sohoni, *The Trump Administration and the Law of the* Lochner *Era*, 107 GEO. L.J. 1323 (2019); and Ganesh Sitaraman, *America's Post-crash Constitution*, POLITICO (Oct. 5, 2014), https://www.politico.com/magazine/story/2014/10/americas-post-crash-constitution-111596 [https://perma.cc/6R3R-R483].

[386] Zivotofsky *ex rel.* Zivotofsky v. Kerry (*Zivotofsky II*), 576 U.S. 1059 (2015).

[387] 567 U.S. 519, 560 (2012).

[388] *See* sources cited *supra* note 382.

[389] The exceptions were 1947–1949 and 1953–1955. *Party Divisions of the House of Representatives, 1789 to Present*, HIST., ART & ARCHIVES: U.S. HOUSE OF REPRESENTATIVES, https://history.house.gov/Institution/Party-Divisions/Party-Divisions [https://perma.cc/R63C-LRML].

[390] The exceptions were 1947–1949, 1953–1955, and 1981–1987. *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/HL24-BSA5].

Congress for only four years in almost a half-century — and the last time had been more than twenty-five years earlier.

At a structural level, reducing the scope of Article I powers to regulate does have asymmetrical political consequences even beyond which party controls Congress.[391] It systematically restrains Congress's ability to develop creative, innovative solutions to regulate challenging, novel, contested policy issues — from political corruption and cronyism to interest group capture and economic power. Indeed, the CFPB was deliberately designed in order to insulate the agency from capture by financial institutions — directly and indirectly via a captured Congress or captured President.[392] Holding Congress to only the agency designs it adopted centuries ago (and taking a blinkered view of those designs too) will have significant consequences — and those consequences align with ideological divides between conservatives and progressives on political economy.

Each of these four possibilities is speculative, of course, and particularly as to motivations. But they are not mutually exclusive. It is possible that with decades of Democratic control of Congress and power over the legislative agenda, conservatives believed that Congress passed laws that regulated the economically powerful too aggressively and created agencies to implement those laws that were staffed by liberal personnel. Unable to eliminate these agencies altogether through the legislative process, strong Republican Presidents could aggressively exercise the powers of appointment and administrative oversight to break down these agencies. Democratic Presidents would have a harder time building them back up, for both political and institutional reasons. Premeditated or not, the result of these interlocking asymmetries would be to undo the New Deal–era administrative state and its system of political economy.

CONCLUSION

"When should courts be responsible for designing federal administrative agencies?" Professor Aziz Huq has asked.[393] The obvious answer, one might think, is never. But between *Free Enterprise Fund* and *Seila*, the Supreme Court has now inserted itself into fiercely contested political battles twice in a decade, and without terribly persuasive textual, structural, or historical reasoning. The Court might not want to say so,

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391 For discussions of the Rehnquist Court's "constitutional revolution" that emphasize restrictions on congressional power, see Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution*, 87 VA. L. REV. 1045 (2001); and Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 IND. L.J. 363 (2003).

392 *See generally, e.g.*, Barkow, *supra* note 32 (identifying some of the ways in which agencies can be insulated from capture).

393 Huq, *supra* note 325, at 1.

but "personnel is policy," whether in the specific choices of individuals or in structuring their offices.

My aim in this Comment has been to show that *Seila* is a political case in more ways than one. The CFPB emerged and persisted in spite of a relentless assault on its existence. That battle took it to the Supreme Court, where it met an impressive decades-long effort to articulate and legitimize the unitary executive theory and a preclusive removal power. Those legal theories, in turn, might depend on normative views of the Constitution, and they likely have asymmetric political effects — though not the first-order effects that characterize many "political" issues that make it to the Supreme Court. Debates over constitutional structure might seem esoteric, with discussions of obscure historical events and attempts to divine meaning from a text that is at once concise and general. But that does not necessarily make them any less political than cases that normally carry that moniker.