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## The Roberts Court's Theory of Agency Accountability: A Step in the Wrong Direction

Howard Schweber

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# THE ROBERTS COURT’S THEORY OF AGENCY ACCOUNTABILITY: A STEP IN THE WRONG DIRECTION

HOWARD SCHWEBER\*

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## INTRODUCTION

The power to appoint and remove executive officials has been a point of controversy between legislative and executive branches since the period before the English Civil War saw the rise of Parliament to take on the role of a lawmaking authority capable of challenging the crown. In

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\* Professor of Political Science and affiliate faculty member of the Law School and Legal Studies at University of Wisconsin-Madison. I am grateful to Morgan Marietta for helpful comments on an earlier essay that appeared in *SCOTUS 2020: Major Decisions and Developments of the U.S. Supreme Court* (Palgrave MacMillan 2020), and to the editors of Belmont Law Review for their assistance and suggestions.

American constitutional jurisprudence, questions about the appointment and removal powers are among the earliest constitutional issues confronted by Congress, and those issues continue to be hotly debated to the present day. What has changed in the intervening two centuries, of course, is the emergence of the administrative state; debates over appointment and removal often take the form of trying to make doctrines and principles from an earlier era fit into this new historical context. In particular, a line of recent cases in the U.S. Supreme Court culminating in *Seila Law LLC v. CFBP* in 2019 has developed a new orthodoxy that is supposed to guide future consideration of appointment and removal controversies. This article argues that in his majority opinion in *Seila Law* Roberts, in particular, makes three fundamental errors:

1. he fails to recognize the relationship between separation of powers and checks and balances as competing and at times contradictory guiding principles;
2. he fails to take account of the constitutional implications of the modern administrative state; and
3. he uncritically adopts an 18<sup>th</sup> century understanding of political accountability and applies that understanding in a formalistic and ultimately self-defeating way to the conditions of modern politics.

These errors did not arise from nothing, they are rooted in the doctrinal developments of the past decades. Nonetheless, this article argues, Roberts' *Seila* opinion, the test it establishes, and the justifications for that test taken together represent an additional step in a wrongheaded direction.

This article is in four parts. First, I will review some of the historical background concerning appointment and removal powers. Second, I will present the line of recent cases that define the modern doctrine on removal powers leading up to the most recent rulings. Third, I will review *Seila Law* and its redefinition of the standards for permissible design of independent agencies with respect to removal powers. Finally, I will present the points of critique identified above.

## I. THE HISTORY OF REMOVAL POWER CONTROVERSIES

In the months leading up to the English Civil War, there was an exchange of written statements (a "Remonstrance" and an "Answer")

between Parliament and Charles I.<sup>1</sup> Parliament had already issued its Petition of Right of 1628, demanding no taxation without consent of Parliament, no imprisonment without cause, no quartering of soldiers, and no imposition of martial law in peacetime.<sup>2</sup> In 1642, on the eve of civil war, Parliament sent a “Grand Remonstrance” to the King. Comprising “Nineteen Propositions,” the Remonstrance was essentially a demand for ceding control of all actions of government to Parliament.<sup>3</sup> The first three of the propositions referred to control over the appointment and removal of government officials, including members of the King’s own Privy Council. The first proposition called for the dismissal of all members of the King’s Privy Council “excepting such as shall be approved of by both Houses of Parliament,” the second provided that Parliament should have veto power over the selection of future councilors; and the third required parliamentary approval for the appointment of various high officers. The judiciary, too, was to be given a dramatic role in governing the operations of the Crown government. The eleventh Proposition specific the oath of office for council members and made violations of that oath punishable by judicial proceedings, while the twelfth proposition demanded that the King give up the power of removal with respect to judges. In his “Answer” Charles identified the last limitation on his removal power as a particular infringement. The twelfth proposition, he declared, would be “the first round of that Ladder, by which Our Just, Ancient, Regall Power is endeavoured to be fetched down to the ground.”<sup>4</sup>

Parliament’s demands went beyond control over the appointment and removal of the members of the Privy Council. In addition, the role of the council was altered.<sup>5</sup> All measures proposed by the Crown would have to be approved by a majority vote of the Council, making the body a veto point of the King’s authority rather than advisory while Parliament would have sole jurisdictions over questions of lawmaking. “Which Demands,”

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1. *1642: Propositions Made by Parliament and Charles I’s Answer*, ONLINE LIBRARY OF LIBERTY, <https://oll.libertyfund.org/pages/1642-propositions-made-by-parliament-and-charles-i-s-answer> [<https://perma.cc/TGX4-GLPM>] (last visited Jan. 4, 2021); *The English Civil War*, ONLINE LIBRARY OF LIBERTY, <https://oll.libertyfund.org/groups/68> [<https://perma.cc/BC23-PLEU>] (last visited Jan. 4, 2021).

2. *1628: Petition of Right*, ONLINE LIBRARY OF LIBERTY, <https://oll.libertyfund.org/page/1628-petition-of-right> [<https://perma.cc/Z8JK-6FWK>] (last visited Jan. 4, 2021).

3. *1642: Propositions Made by Parliament and Charles I’s Answer*, ONLINE LIBRARY OF LIBERTY, <https://oll.libertyfund.org/pages/1642-propositions-made-by-parliament-and-charles-i-s-answer> [<https://perma.cc/TGX4-GLPM>] (last visited Jan. 4, 2021).

4. *Id.*; see generally Colin Tyler, *Drafting the Nineteen Propositions, January-July 1642*, 31 PARLIAMENTARY HISTORY 263–312 (2012).

5. ONLINE LIBRARY OF LIBERTY, *supra* note 3.

responded Charles, “are of that Nature, that to grant them were in effect at once to depose both Ourselves and Our Posteritie.”<sup>6</sup>

In the dispute between Parliament and Charles, both sides recognized that appointment and removal powers are directly connected to execution of the laws and especially control over prosecutions. In addition, Parliament’s demands would have converted the King’s control over government to a set of constraints on that control exercised by Parliament through the organs of the Executive, senior officials, and the Privy Council.<sup>7</sup> For an analogy, one may imagine that the members of a President’s cabinet were to be appointed with the consent of both houses of Congress and, furthermore, that any executive action would require a majority vote by the Cabinet. Both relations between the Executive and the Legislative branches and, equally important, relations among constituent elements of the Executive are at issue.

Appointment and removal were not key issues in the Glorious Revolution of 1688, but the Bill of Rights of 1689 strengthened Parliament’s authority over the execution as well as the creation of laws, providing that laws could not be suspended nor could taxes be collected without consent of Parliament.<sup>8</sup> The Act creating the Bill of Rights listed offenses by James I, including “prosecutions in the Court of King’s Bench for matters and causes cognizable only in Parliament.” As had been the case with respect to Charles I, Parliament objected to the exercise of excessive executive control over the prosecutorial function.<sup>9</sup>

Turning to the American context, during the debates leading up to the Constitution, various positions were articulated. Article II provides that “[t]he executive Power shall be vested in a President,” but because it would be “impossib[le]” for “one man” to “perform all the great business of the State,” the Constitution assumes that lesser executive officers will “assist the supreme Magistrate in discharging the duties of his trust.”<sup>10</sup> The question is who controls the process of appointing and removing these executive officers? The text of Article II section 2 provides only a partial answer:

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6. *Id.*

7. *Id.*

8. *English Bill of Rights 1689*, YALE L. SCH. AVALON PROJECT, [https://avalon.law.yale.edu/17th\\_century/england.asp](https://avalon.law.yale.edu/17th_century/england.asp) [<https://perma.cc/WY32-RM5C>] (last visited Jan. 4, 2021).

9. *Id.*

10. U.S. CONST. art. II, § 1; *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2188 (2020); GEORGE WASHINGTON, *To Eleonor Francois Elie, Comte de Moustier, May 25*, in *THE WRITINGS OF GEORGE WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES 1745–1799*, vol. 30, at 333, 334 (John C. Fitzpatrick, ed., 1939).

[The President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law: but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”<sup>11</sup>

In addition, “Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments.”<sup>12</sup> There are noticeable lacunae in the clause; it does not define “inferior officers,” and it describes the process of appointment but not removal.

The issue came to a head in 1789, when James Madison introduced legislation creating the positions of Secretary of War, Secretary of the Treasury, and Foreign Secretary. Madison’s description of the Foreign Secretary’s position specified presidential removal power, saying “that there shall be established an executive department, to be denominated the department of foreign affairs; at the head of which there shall be an officer, to be called, the secretary to the department of foreign affairs, who shall be appointed by the president, by and with the advice and consent of the senate; *and to be removable by the president . . .*”<sup>13</sup> In Madison’s view, the power to remove officials was an essential mechanism to protect the Executive branch from being taken over by Congress. Madison argued that requiring a President to accept subordinate executive officials who lacked “loyalty” would “thwart the Executive in the exercise . . . of his great responsibility.”<sup>14</sup> In addition, Madison argued that giving the President control over all executive officers would enhance accountability, as the President could be held accountable by the voters for the actions of his government.<sup>15</sup> “If the president should possess alone the power of removal from office, those who are employed in the execution of the law will be in their proper situation, and the chain of dependence be preserved; the lowest officers, the middle grade, and the highest, will depend, as they ought, on

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11. U.S. CONST. art. II, § 2.

12. *Id.*

13. LINDA GRANT ET AL., DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA vol. 3: MARCH 4, 1789-MARCH 3, 1791, at 726 (1972).

14. Howard Schweber, *Seila Law v. Consumer Finance Protection Bureau on Separation of Powers*, in SCOTUS 2020: MAJOR DECISIONS AND DEVELOPMENTS OF THE U.S. SUPREME COURT (Morgan Marietta ed., 2021).

15. JAMES MADISON, *Speech in Congress on Presidential Removal Power, June 16, 1789*, in WRITINGS OF JAMES MADISON 453, 461 (Jack Rakove ed., 1999).

the president, and the president on the community. The chain of dependence therefore terminates in the supreme body, namely, in the people.”<sup>16</sup> Separately, Madison argued that powers of appointment—and hence of removal—were intrinsically executive functions, so that in the absence of specific constitutional provisions to the contrary such powers should be assumed to belong to the President. “If the Constitution had not qualified the power of the president in appointing to office, by associating the senate with him in that business, would it not be clear that he would have the right by virtue of his executive power to make such an appointment?”<sup>17</sup>

Others disagreed with Madison’s view. Elbridge Gerry warned that giving the President the power to remove officers would undercut the role of the Senate. “[I]f we give the President the power to remove . . . you virtually give him a considerable power over the appointment, independent of the Senate.”<sup>18</sup> Elbridge Gerry warned of the danger of arbitrary dismissals. “Suppose an officer discharges his duty as the law directs, yet the president will remove him; he will be guided by some other criterion; perhaps the officer is not good natured enough . . . because he is so unfortunate as not to be so good a dancer, as he is a worthy officer, he must be removed.”<sup>19</sup> Gerry’s reference to officials’ dancing ability was facetious, but his concern was clear: that a President with the power of arbitrary removal would have *too much* personal control over the conduct of the Executive branch. James Jackson of Georgia argued that keeping congressional control over the appointment and removal of the Secretary of the Treasury, in particular, was critical to preventing the President from usurping Congress’ power of the purse. “If he has the power of removing and controlling the treasury department, he has the purse strings in his hand.”<sup>20</sup> The question of authority to remove financial officials—the Secretary of the Treasury, the Comptroller General, and others—remains one of the most hotly contested questions of removal power to this day.<sup>21</sup>

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16. GRANT ET AL., *supra* note 13, at 925.

17. *Id.* at 868.

18. HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, *AMERICAN CONSTITUTIONALISM: VOLUME I STRUCTURES OF GOVERNMENT* 171 (2nd ed. 2017).

19. GRANT ET AL., *supra* note 13, at 1022–23.

20. *Id.* at 1002.

21. See Aditya Bamzai, *Tenure of Office and the Treasury: The Constitution and Control Over National Financial Policy, 1787 to 1867*, 87 *GEO. WASH. L. REV.* 1299, 1303, 1385–86 (2019) (reviewing debates over status of Treasury officials and concluding that, between 1789 and the trial of Andrew Johnson, financial institutions were treated as no different from other government offices with respect to presidential control but “private corporations” such as the First and Second National Bank were conceived as separate from the Executive due to performing “non-sovereign” functions).

A third position held that dismissal required the consent of the Senate in order to parallel the process of appointment. Theodorick Bland reasoned that since the Constitution gave the power of appointment to the President and the Senate, “it naturally follows, that the power which appoints shall remove also.”<sup>22</sup> Bland made a motion on May 19 to add, “by and with the advice and consent of the senate” which was defeated.<sup>23</sup>

Yet a fourth view held that since the Constitution was silent on the question of removal, Congress had the authority to create offices with whatever rules of dismissal it found appropriate. Roger Sherman reasoned that “[a]s the officer is the mere creature of the legislature, we may form it under such regulations as we please . . . we may say he shall hold his office during good behavior, or that he shall be annually elected; we may say he shall be displaced for neglect of duty, and point out how he should be convicted of it—without calling upon the president or senate.”<sup>24</sup> For Sherman, the silence of the text implied Congress had authority to delegate to the President the power of removal or to refrain from doing so in all cases.<sup>25</sup> Finally, “[s]ome argued that since the constitutional text did not provide a mechanism for removal, executive positions implicitly carried life tenure subject to impeachment.”<sup>26</sup>

“The ‘Decision of 1789,’” as it is known, was inconclusive (making the name inapt); proposed Executive departments were approved, but the general question was left unresolved.<sup>27</sup> In response to Black’s concerns the statute creating the Department of the Treasury contained detailed descriptions of the duties of various officials, while the statutes establishing the Departments of State and War referred to duties assigned by the President.<sup>28</sup> The variation among those statutes was only one indication that no general rule governing future offices had been agreed to.<sup>29</sup>

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22. GRANT ET AL., *supra* note 13, at 737.

23. *Id.* at 738.

24. *Id.* at 917.

25. *Id.*

26. Howard Schweber, *Seila Law v. Consumer Finance Protection Bureau on Separation of Powers*, in SCOTUS 2020: MAJOR DECISIONS AND DEVELOPMENTS OF THE U.S. SUPREME COURT 141, 143 (Morgan Marietta ed., 2021).

27. J. DAVID ALVIS ET AL., *THE CONTESTED REMOVAL POWER, 1789–2010*, at 11 (2013); Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1072 (2006).

28. *Compare* An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65, 67 (1789) (describing in detail specific duties of the Secretary, the Comptroller, Treasurer, Register and Auditor, and providing that “whenever the Secretary shall be removed from office by the President . . . the Assistant shall, during the vacancy, have the charge and custody of the records”), *with* An Act for Establishing an Executive Department, to be Denominated the Department of Foreign Affairs, ch. 4, 1 Stat. 28 (1789) (“that there shall be a principal officer therein, to be called the Secretary for the Department of Foreign Affairs, who shall perform and execute such duties as shall from time to time be enjoined on or



The problem that faced the First Congress was a conceptual one that frequently creates confusion in modern discussions.<sup>30</sup> There is a common tendency even among Supreme Court Justices to talk about separation of powers and checks and balances as though they are equivalent concepts. In fact, they are very nearly opposite. ‘Separation of powers’ is the idea that each branch should be supreme within its ambit, without being subject to interference from the other two.<sup>31</sup> ‘Checks and balances’ are created when powers *overlap*: Congress has the power to make laws but the President has the power of veto but Congress has the power of override; Congress has power over expenditures but the Executive has discretion over the process of spending the money; Congress can create criminal and administrative laws but the Executive has discretion over their enforcement.<sup>32</sup> And in all of this the courts act as referees, preserving the effective system of checks and balances against the danger of excessive concentration of control over policymaking in one of the other branches.<sup>33</sup>

The relationship between separation of powers principles and checks and balances remained unresolved in 1789. In 1803, however, John Marshall’s Supreme Court added some clarity to the general understanding. In *Marbury v. Madison*, Marshall declared that where an appointment constituted a vested property right, officers of the Executive branch had no discretion; their act of carrying out the appointment would be purely “ministerial.”<sup>34</sup> Prior to that point—or outside that process—questions of appointment were political, left to the discretion of the Executive branch and no proper business of the courts. Marshall just carved out an area of discretionary removal power and its limits; where Congress created an office outside the scope of the President’s removal power, the Executive branch became an instrument of congressional authority.<sup>35</sup> More generally,

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intrusted to him by the President of the United States, agreeable to the Constitution,” with no reference to removal), and An Act to Establish an Executive Department, to be Denominated the Department of War, ch. 7, 1 Stat. 49 (1789) (“that there shall be a principal officer therein, to be called the Secretary for the Department of War, who shall perform and execute such duties as shall from time to time be enjoined on, or entrusted to him by the President of the United States, agreeably to the Constitution,” again with no reference to removal.) In structure and content the latter two Acts are identical, while the Act establishing the Department of the Treasury is the outlier.

29. See generally Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1035–37 (2006).

30. *Id.*

31. *Id.*

32. *Id.* at 143–44.

33. *Id.* at 144.

34. *Marbury v. Madison*, 5 U.S. 137, 158 (1803).

35. See Saikrishna Bangalore Prakash, *The Appointment and Removal of William J. Marbury and When an Office Vests*, 89 NOTRE DAME L. REV. 199 (2013).

the implication was that the Executive branch was bound by procedural requirements in cases of removal; it was the completion of those procedures that caused the officeholder's position to "vest." In a parallel case, *Stuart v. Laird*, Marshall upheld the Removal Act of 1802 by which Jefferson and his supporters in Congress tried to remove Federalist judges by abolishing the courts to which they had been appointed.<sup>36</sup> As a result, another principle was announced: Congress has the power to remove officials by abolishing their offices, a power that can presumably be exercised with or without the support of the sitting President if Congress has the votes to override a veto.<sup>37</sup> Both *Marbury* and *Stuart* concerned judicial appointments; would these principles apply equally in the case of Executive officials?

That question arose during the Jackson administration. At odds with Congress over the propriety of a national Bank, Jackson ordered his Secretary of the Treasury to remove all federal deposits. In a moment with foreshadowings of Watergate's "Saturday Night Massacre,"<sup>38</sup> the Secretary of the Treasury, William J. Duane, refused to carry out the order, so Jackson fired him and replaced him with Attorney General Roger Taney who was rewarded for his loyalty with an appointment as Justice of the Supreme Court in 1835.<sup>39</sup> Whigs in Congress argued that Jackson had no authority to give the order to remove deposits in the first place. They pointed out that the Bank charter gave authority over federal deposits to the Secretary of the Treasury, not the President.<sup>40</sup> In response, Jackson articulated the theory of the "unitary executive," which held that since the President controlled the appointment and removal of executive officers, all their actions were his actions and subject to his control.<sup>41</sup> Thus, if Congress delegated authority to the Treasury Secretary, the President could instruct the Treasury Secretary on how to exercise that authority and could replace him at will if he failed to obey. Jackson's chief opponent in Congress,

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36. *Stuart v. Laird*, 5 U.S. 299, 309 (1803).

37. See Saikrishna Bangalore Prakash, *Removal and Tenure in Office*, 92 VA. L. REV. 1779, 1805 (2006).

38. The term "Saturday Night Massacre" refers to events of Saturday, October 23, 1973. On that day, at the height of the Watergate investigation, President Nixon ordered his Attorney General Elliott Richardson to fire special prosecutor Archibald Cox. When Richardson refused to carry out the order Nixon fired him, and turned to the second-ranking official in the Justice Department, William Ruckelshaus. Ruckelshaus also refused to carry out the order and was likewise fired, at which point Nixon turned to the third-ranking official in the Justice Department, Robert Bork. Bork carried out Nixon's orders and fired Cox, an action that was the source of some of the Democratic resistance to his nomination to the Supreme Court in 1987.

39. Schweber, *supra* note 26, at 144.

40. *Id.*

41. *Id.* (citing HOWARD GILLMAN, MARK GRABER, & KEITH WHITTINGTON, *AMERICAN CONSTITUTIONALISM: VOLUME I STRUCTURES OF GOVERNMENT* 230 (2013)).

Henry Clay, argued that, under the 1789 statute creating the Department of the Treasury the Secretary was “constituted the agent of Congress.”<sup>42</sup> As a result, whatever the President’s powers of control and removal in other contexts, the Treasury—with its control over the power of the purse—should be treated as independent. “The treasury department is placed by law on a different footing from all the other departments . . . Except the appointment of the officers, with the co-operation of the Senate, and the power which is exercised of removing them, the president has neither by the Constitution nor the law creating the department, anything to do with it.”<sup>43</sup> In fact, the statute creating the Secretary of the Treasury position explicitly referenced the possibility of presidential removal, but it also spelled out the duties of the Secretary and other officers in great detail, i.e., it articulated a congressional specification of powers and duties.<sup>44</sup>

During the Jacksonian era, Presidents used their powers of appointment and removal to institute the infamous spoils system, rewarding both party and personal loyalty and punishing political enemies.<sup>45</sup> To the extent the courts considered the validity of these practices they generally supported presidential authority. In 1839, the Court ruled that the clerk of a district court could be fired at the discretion of the judge; in *dicta*, Justice Thompson used that minor controversy to review his understanding of the principles of removal authority. “[I]t was very early adopted, as the practical construction of the Constitution, that this power [of the President to remove officers appointed with the concurrence of the Senate] was vested in the President alone.”<sup>46</sup> Thompson also pointed to congressional legislation including provisions in the statutes establishing the first three Departments in 1789.<sup>47</sup> And finally, Thompson explained that the general principle that the official with the power of appointment had the power of removal, as in the case of a Secretary appointing junior officials or a judge appointing a court clerk. These clerks fell under that class of inferior officers, the appointment of which the Constitution authorizes Congress to vest in the head of the department. According to Thompson, “[t]he same rule, as to the power of removal, must be applied to offices where the appointment is vested in the President alone . . . all inferior officers appointed under each by authority of law must hold their office at the

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42. HENRY CLAY, *On the Removal of Deposits*, in THE WORKS OF HENRY CLAY COMPRISING HIS LIFE, CORRESPONDENCE AND SPEECHES 575, 584 (Calvin Colton ed., 1904).

43. GRANT ET AL., *supra* note 13, at 319, 321.

44. An Act to Establish the Treasury Department, ch. 12, 1 Stat. 65 (1789).

45. Steven G. Calabresi & Christopher S. Yoo, *The Unitary Executive During the First Half-Century*, 47 CASE W. RESRV. L. REV. 1451 (1997); LEONARD D. WHITE, *THE JACKSONIANS: A STUDY IN ADMINISTRATIVE HISTORY 1829-1861*, at 109 (1954).

46. *In re Hennen*, 38 U.S. 230, 259 (1839).

47. *Id.*

discretion of the appointing power.” Such is the settled usage and practical construction of the Constitution and laws, under which these offices are held.<sup>48</sup>

Control over finances was also involved in an unusual provision of the 1863 Banking Act that created a new Comptroller of the Currency to deal with the national currency that had been created by the Legal Tender Act the previous year.<sup>49</sup> The Comptroller was removable five years unless sooner removed by the President, which could only occur by and with the advice and consent of the Senate.<sup>50</sup> This unique specification of a consultative role in removal was removed the next year in the Banking Act of 1864, replaced by a provision providing for the removal of the Comptroller by the President “upon reasons to be communicated by him to the Senate.”<sup>51</sup>

Despite the fact that it was operative for only one year, the 1863 Banking Act version of the removal provision was cited as precedent for the Tenure in Office Act of 1867 that prohibited President Johnson from removing any of the Secretaries of State, Treasury, War, Navy, and the Interior, as well as the Postmaster-General and the Attorney General without “the advice and consent of the Senate.”<sup>52</sup> That Act was a creation of radical Republicans in Congress as a mechanism to constrain President Andrew Johnson.<sup>53</sup> The enmity between Congress and the President at this point in time was the closest the United States has ever come to the relationship between Parliament and Charles I leading up to the English Civil War, and the Tenure of Office Act has clear echoes of the Nineteen Propositions contained in the Grand Remonstrance of 1631 that was discussed at the beginning of this article. When Johnson defied the law and removed Secretary of War Edwin Stanton, Congress responded with articles of impeachment; the major issue in the Senate trial was the constitutionality of the Tenure in Office Act.<sup>54</sup> Johnson avoided removal in the Senate by a single vote. The first Republican Senator to vote against impeachment was William Fessenden of Maine, a leading figure among radical Republicans who had been Lincoln’s Secretary of the Treasury and had opposed the

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48. *Id.* at 260.

49. National Bank Act of 1863, ch. 58, 12 Stat. 665 (1863).

50. *Id.*

51. National Bank Act of 1864, ch. 106, 13 Stat. 100 (1864).

52. Tenure of Office Act, ch. 154, 14 Stat. 430 (1867). For a review of the arguments in favor of the Tenure of Office Act, see Bamzai, *supra* note 21, at 1381–82. Edwin Stanton declared that the 1863 law “restored to the letter and true spirit of the Constitution, with the concurrence of all parties.” 3 ANDREW JOHNSON ET AL., TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, BEFORE THE SENATE OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 86 (1868).

53. Bamzai, *supra* note 21, at 1380.

54. *Id.*

1863 terms of removal for the Comptroller.<sup>55</sup> Fessenden insisted that presidential control over removal was established by the precedent of long practice, dismissing the 1863 provision (which he had opposed) as an aberration. Presidential authority over removal, he declared, “has been uniformly recognized in practice; so long and so uniformly as to give it the force of constitutional authority.”<sup>56</sup>

The political environment of removal controversies changed as the federal government dramatically expanded beginning in the late 1870s.<sup>57</sup> One of the driving forces behind the growth of executive agencies was the Progressives’ belief in the efficacy of regulatory executive agencies.<sup>58</sup> The Progressive ideal involved disinterested experts providing sound policy mandates based on non-political considerations.<sup>59</sup> The same “good government” ideals were behind the adoption of the Pendleton Act that created the modern civil service.<sup>60</sup> These two developments fundamentally changed the landscape of debates over removal authority.

The Pendleton Act took an enormous number of federal employees outside of the category of “removal” entirely by creating legal rights to hiring based on merit and job security thereafter.<sup>61</sup> The employees covered by these protections were not “officers” of any kind, and therefore, their appointment and removal did not fall within the Appointments Clause.<sup>62</sup> “When [the Pendleton Act] was enacted under President Arthur, the act initially protected 11 percent of the government’s 131,000 employees, but it allowed the president to extend the merit system to additional employees by adding them to the classified civil service. After Cleveland was defeated for re-election in 1888, he expanded the merit system” to cover 27,000 federal employees, a move that had “a slow but incremental effect in making the federal civil service less political and more professional.”<sup>63</sup> The law also had ethics provisions that prevented officials from soliciting campaign contributions on federal property. That rule was found to be violated in

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55. *Id.* at 1382–83.

56. *Id.* at 1382 (quoting 3 ANDREW JOHNSON, TRIAL OF ANDREW JOHNSON, PRESIDENT OF THE UNITED STATES, ON IMPEACHMENT BY THE HOUSE OF REPRESENTATIVES FOR HIGH CRIMES AND MISDEMEANORS 18 (1868)).

57. STEPHEN SKOWRONEK, BUILDING A NEW AMERICAN STATE: THE EXPANSION OF NATIONAL ADMINISTRATIVE CAPACITIES, 1877–1920, at 39 (1981); Michael Nelson, *A Short, Ironic History of American National Bureaucracy*, 44 J. OF POLS. 747, 768 (1982).

58. THOMAS M. MCCRAW, PROPHETS OF REGULATION 127 (1984).

59. SKOWRONEK, *supra* note 57, at 64.

60. *Id.*

61. *Id.* at 71–72.

62. *Compare* United States v. Germaine, 99 U.S. 508 (1878), *with* United States v. Hartwell 73 U.S. 385, 393 (1867) (Treasury Clerk an “officer” because appointed by the head of a “Department” (acting Treasury Secretary)).

63. STEPHEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 213 (2008).

1906 when “E.S. Thayer, a member of the Texas Republican state committee, wrote to a federal tax official . . . ‘You are now . . . receiving a salary of \$900 per year. I, therefore, ask you to at once . . . remit the sum of \$45, it being 5 percent of your salary. This is very important.’”<sup>64</sup> The Pendleton Act was created to protect civil servants from this kind of shakedown as well as to bring an end to the spoils system.

Another transformative event was the creation of the independent regulatory commissions. These entities did not fit the traditional tripartite model of separation of powers at all, as they exercised rulemaking, adjudicatory, and enforcement authority all at once.<sup>65</sup> Their responsibilities were likewise different from traditional models as they were charged with promoting as well as overseeing the industries they regulated.<sup>66</sup> According to the designs approved by Congress, the heads of these agencies would be “inferior officers”; hence, Congress was free to vest the appointing authority in the President, the courts, or “the heads of departments.” The constitutional limitations on removal remained unclear; the Tenure in Office Act remained in force while the regulatory agencies continued to expand in number and importance.

The first independent regulatory commission was the Interstate Commerce Commission (“ICC”) in 1887.<sup>67</sup> Only the year before, in *United States v. Perkins*,<sup>68</sup> the Supreme Court, while upholding congressional control over the terms of removal for a naval cadet engineer, had stated a limiting principle that the exercise of that authority would be proper only if there was no resulting interference with the President’s performance of his duties. The members of the ICC were subject to removal by the President only for cause (“inefficiency, neglect of duty, or malfeasance”); did the inclusion of such a provision interfere with the President’s performance of the duties of his office? In the 1903 case *Shurtleff v. United States*, an identical “for cause” provision was tested in the case of a customs appraisers removed by President McKinley without notice or any stated

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64. Ruth Marcus, *Many Interpretations of Obscure Law*, WASH. POST: CAMPAIGN FIN. (Oct. 2, 1997), <https://www.washingtonpost.com/wp-srv/politics/special/campfin/stories/cf100297a.htm> [<https://perma.cc/S97C-ZVRB>].

65. Center for Effective Government, *A Brief History of Administrative Government* (Feb. 7, 2021, 3:40 P.M.), <https://www.foreffectivegov.org/node/3461#:~:text=The%20period%20between%201865%20and,bring%20order%20into%20industry%20competition.&text=In%20some%20cases%20industries%20themselves,to%20help%20end%20competitive%20practices.> [<https://perma.cc/979R-HYVF>].

66. *Id.*

67. Paul Stephen Dempsey, *The Rise and Fall of the Interstate Commerce Commission: The Tortuous Path from Regulation to Deregulation of America’s Infrastructure*, 95 MARQ. L. REV. 1151, 1151–52 (2012).

68. *United States v. Perkins*, 116 U.S. 483, 484–85 (1886).

reason.<sup>69</sup> Justice Peckham reasoned that the “for cause” provision was not exclusive; the President retained inherent power of removal unless Congress had excluded that authority with “very clear and explicit language.” The “for cause” provision, said Peckham, did not satisfy that test because it did not explicitly exclude removal for other reasons.<sup>70</sup> Peckham further observed that dismissal for cause would have triggered procedural protections; reasoning backward he concluded that the dismissal must have been for no cause at all under the President’s inherent removal power and was therefore not reviewable by a court.<sup>71</sup>

The rulings in *Perkins* and *Shurtleff* represented significant judicial pushback against Congress’ assertion of control over the removal of executive officials, but they did not represent an outright rejection of congressional authority on constitutional grounds. That step was taken in 1926 in *Myers v. United States*.<sup>72</sup> For a 6–3 majority, Taft issued a ruling that threatened to undermine the entire system of independent regulatory agencies.<sup>73</sup> First, the ruling overruled the Tenure in Office Act, thus restoring presidential removal authority with respect to the (non-inferior) executive officers specified in the law. The specific issue in the case, however, involved an inferior officer and, by extension, the scope of congressional authority over removal of inferior officers generally including agency heads. A statute enacted by Congress provided that “postmasters of the first, second, and third class may be removed by the president with the advice and consent of the Senate, and shall hold their offices for four years unless sooner removed according to law.”<sup>74</sup> Taft ruled that the law was unconstitutional by virtue of its inclusion of an advice and consent requirement.<sup>75</sup> Extending the principle that “the power of removal is incident to the power of appointment,” Taft ruled that, if Congress gave the President the power of appointment of inferior officers, an unrestricted presidential power of removal was necessarily implied.<sup>76</sup> There were three dissenting opinions.<sup>77</sup> Justice McReynolds argued that an absolute power of removal as an incident of Executive authority should require explicit language, which was missing from the Constitution.<sup>78</sup> Justice Holmes adopted the position that Congress had the authority to create positions and

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69. *Shurtleff v. United States*, 189 U.S. 311, 312 (1903).

70. *Id.* at 314–15.

71. *Id.* at 318.

72. *Myers v. United States*, 272 U.S. 52 (1926).

73. *Id.* at 106.

74. Act of July 12, 1876, 19 Stat. 78, 80 (1876).

75. *Myers*, 272 U.S. at 176.

76. *Id.* at 122.

77. *Id.* at 177, 178, 240.

78. *Id.* at 178–239.

therefore had the power to assign powers of removal as well as appointment as they saw fit.<sup>79</sup>

In the third dissenting opinion, Justice Brandeis took a different tack. McReynolds' and Holmes' arguments echoed positions that had been asserted during and since the "Decision of 1789." Justice Brandeis offered a different gloss, one that had also appeared in previous debates.<sup>80</sup> Brandeis appealed to a half century of consistent practice of Senate concurrence in removal of executive officials as precedent establishing constitutionally acceptable practice.<sup>81</sup> Taft asserted that there was no such precedent in the formal provisions of statutes with the exception of the 1863 National Bank Act, which Taft declared had been "adopted without discussion of the inconsistency."<sup>82</sup> Brandeis, by contrast, described the statute as, "[t]he first substantial victory of the civil service reform movement."<sup>83</sup> For Brandeis, the focus on reform was key. He quoted Justice Story in 1833 for the proposition that congressional power over removal was an essential guard against corruption: "it will be a consolation to those who love the Union and honor a devotion to the patriotic discharge of duty that, in regard to 'inferior officers' (which appellation probably includes ninety-nine out of a hundred of the lucrative offices in the government), the remedy for any permanent abuse is still within the power of Congress by the simple expedient of requiring the consent of the Senate to removals in such cases."<sup>84</sup>

Taft's majority opinion drew immediate and vigorous criticism by virtue of its obvious threat to the system of independent agencies that had been created over the preceding four decades. Erwin Corwin described the ruling as a "menacing challenge to an administrative organization which represents years of planning and experimentation in meeting modern conditions."<sup>85</sup> Sure enough, in 1935 in *Humphrey's Executor v. United States*,<sup>86</sup> the Court issued a new ruling, carving out a set of principles that shielded independent agencies from the operation of the constitutional principle it had announced in *Myers*. *Humphries Executor* concerned a "for cause" provision limiting the President's authority to remove members of the Federal Trade Commission ("FTC").<sup>87</sup> The Federal Trade Act of 1914 provided that members of the Commission could be removed by a President only for "inefficiency, neglect of duty, or malfeasance in office."

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79. *Id.* at 177, 240.

80. *Id.* at 240-94.

81. *Id.*

82. *Id.* at 165.

83. *Id.* at 282.

84. *Id.* at 240.

85. Edward S. Corwin, *Tenure of Office and the Removal Power under the Constitution*, 27 COLUM. L. REV. 353, 399 (1927).

86. *Humphrey's Ex'r v. United States*, 295 U.S. 602, 628-30 (1935).

87. *Id.* at 618-19.



Writing for a unanimous Court, Justice Sutherland introduced a new, function-based distinction between purely executive agencies and those that were “quasi-legislative” or “quasi-judicial.”<sup>88</sup> Sutherland found that the FTC was not a purely executive agency because it carried out policymaking and the adjudication of claims—saying, “its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative”<sup>89</sup>—and therefore its members could be shielded from removal without cause. The rule of *Myers* remained in place, but it was declared to be inapplicable to an official “who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.”<sup>90</sup> Finally, Sutherland severed the analytical equation of appointment and removal powers. There was no inherent presidential power of removal for “quasi-judicial” or “quasi-legislative” functions regardless of the manner of appointment.<sup>91</sup> Sutherland’s opinion contained a perfect expression of the Progressive ideal: “The commission is to be nonpartisan, and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law. . . . [I]ts members are called upon to exercise the trained judgment of a body of experts appointed by law and informed by experience.”<sup>92</sup>

## II. MODERN DOCTRINAL DEVELOPMENTS

Later cases applied the principles of *Humphrey’s Executor* to various specific situations, but the tension between the principles expressed in *Myers* and *Humphrey’s Executor* provided the background for the analysis. In *Bowsher v. Synar*,<sup>93</sup> the Court reviewed a provision of the Gramm-Rudman-Hollings Act of 1987<sup>94</sup> stating that the U.S. Comptroller General could only be removed for cause, a situation remarkably similar to those in 1863 and 1864. One important difference was that under the Act the existence of budget deficits as determined by the Comptroller would trigger automatic budget cuts.<sup>95</sup> The Directors of the Office of Management and Budget (“OMB”) and the Congressional Budget Office (“CBO”) were required to report to the Comptroller General regarding their recommendations for how much must be cut. The Comptroller General was then supposed to evaluate these reports, make his own conclusion, and give

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88. *Id.* at 622.

89. *Id.* at 624.

90. *Id.* at 628.

91. *Id.* at 629.

92. *Id.* at 624.

93. *Bowsher v. Synar*, 478 U.S. 714, 717 (1986).

94. Congressional Budget and Impoundment Control Act of 1974, H.R. 7130, 93rd Cong. (1974).

95. *Id.*

a recommendation to the President, who was then required to issue an order effecting the reductions recommended by the Comptroller General unless Congress made the cuts in other ways within a specified amount of time.<sup>96</sup> Chief Justice Warren Burger, writing for a 7–2 majority, held that the limitation on the removal powers of the President was unconstitutional because in the context of the law the actions of the Comptroller General were “the very essence of the ‘execution’ of the law.”<sup>97</sup> Burger reasoned that the Comptroller General was effectively “commanding” the President to carry out budget cuts, and thus specifying the manner in which a law was to be executed.<sup>98</sup> Burger’s analysis thus applied the *Humphrey’s Executor* analysis but found that the Comptroller was a different kind of officer from the head of the FTC.

In *Morrison v. Olson*,<sup>99</sup> the Court was asked to consider the constitutionality of a special prosecutor law. According to the arguments of the appellants, prosecution of crimes is unquestionably a classic executive function, and therefore, the power to remove a special prosecutor should rest entirely with the President.<sup>100</sup> This was an argument that did not rely on the equation of powers of appointment with powers of removal, as the process for the appointment of a special prosecutor involved a referral from the House of Representatives to the Attorney General and then a determination by a “Special Division” (a non-Article III court). Authority over the removal of the Special Prosecutor, in turn, rested with the Attorney General. The law was a post-Watergate measure designed to insure the possibility of a genuine investigation of criminal wrongdoing by members of the Executive Branch.<sup>101</sup>

Chief Justice Rehnquist wrote the majority opinion upholding the law.<sup>102</sup> In Rehnquist’s view, the Special Prosecutor was an “inferior officer” whose terms of office were subject to congressional control. Rehnquist emphasized the fact that the Special Prosecutor had limited duties and that removal authority rested with the Executive branch if not with the President himself, an argument that rejected the implications of the Jacksonian theory of the unitary executive. Rehnquist therefore found that there was no usurpation of Executive functions by Congress.<sup>103</sup> The analysis focused on two specific questions: first, whether the “for cause” restriction on the Attorney General’s removal authority “impermissibly interferes with the President’s exercise of his constitutionally appointed functions,” and second, whether the law “taken as a whole” reduced the President’s

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96. *Bowsher*, 478 U.S. at 732.

97. *Id.* at 733.

98. *Id.*

99. *Morrison v. Olson*, 487 U.S. 654 (1988).

100. *Id.* at 655–56.

101. *Id.* at 673.

102. *Id.* at 655–58.

103. *Id.* at 657.

authority to control criminal prosecutions.<sup>104</sup> Rehnquist found that the restriction on removal authority was only partial. “[B]ecause the independent counsel may be terminated for ‘good cause,’ the Executive, through the Attorney General, retains ample authority to assure that the counsel is competently performing his or her statutory responsibilities in a manner that comports with the provisions of the Act.”<sup>105</sup>

On the second second question in the case, Rehnquist noted that the law did not involve an attempt by Congress to increase its own powers by assuming control over executive functions, nor did the Special Division’s role constitute a judicial intrusion on Executive authority.<sup>106</sup> Rehnquist rejected a formalistic approach defining categories of officials in favor of a functionalist analysis. “The analysis contained in this Court’s removal cases is designed not to define rigid categories . . . but to ensure that Congress does not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the laws be faithfully executed’ under Article II.” Rehnquist found that the imposition of a good cause requirement for dismissal did not have the effect of “unduly” interfering with the performance of executive functions. Importantly, Rehnquist gave deference to Congress’ determination that the limitation on the removal power was “essential” to ensuring the independence of the independent counsel.<sup>107</sup>

Justice Scalia wrote a famous dissenting opinion. Scalia went back to the Massachusetts Constitution of 1780 for an articulation of a pure tripartite separation of powers principle.<sup>108</sup> “In the government of this Commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them . . . to the end it may be a government of laws and not of men.”<sup>109</sup> Scalia argued that, as a matter of practical politics, an Attorney General would feel compelled to seek the appointment of a Special Prosecutor on an application by Congress, and that in any case the law put the burden on the Attorney General to find an absence of good cause to decline to recommend the appointment.<sup>110</sup> “Thus . . . Congress has effectively compelled a criminal investigation of a high-level appointee of the President.”<sup>111</sup> In Scalia’s view, the question was binary and formal: if the function in question was executive in nature, then *all* control over its exercise must remain with the Executive. He argued that Rehnquist’s analysis of what constituted too much intrusion on executive prerogatives missed the point; *any* such intrusion rendered an agency’s

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104. *Id.* at 685.

105. *Id.* at 692.

106. *Id.* at 656–57.

107. *Id.* at 657–58 (citations omitted).

108. *Id.* at 679 (Scalia, J., dissenting).

109. *Id.* at 698 (Scalia, J., dissenting) (quoting MASS. CONST. art. XXX).

110. *Id.* at 701–02 (Scalia, J., dissenting).

111. *Id.* at 703 (Scalia, J., dissenting).

design constitutionally suspect. “It effects a revolution in our constitutional jurisprudence for the Court, once it has determined that (1) purely executive functions are at issue here, and (2) those functions have been given to a person whose actions are not fully within the supervision and control of the President, nonetheless to proceed further to sit in judgment of whether ‘the President’s need to control the exercise of [the independent counsel’s] discretion is *so central* to the functioning of the Executive Branch’ as to require complete control.”<sup>112</sup> Scalia thus articulated the theory of the unitary executive and swept the question of removal powers in the context of law enforcement into the broader ambit of that theory. “[T]he President’s constitutionally assigned duties include *complete* control over investigation and prosecution of violations of the law.”<sup>113</sup>

Scalia’s *Morrison* dissent was the beginning of a movement to challenge the constitutional basis of the entire system of independent agencies under the theory of the unitary executive.<sup>114</sup> In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court heard a challenge to a system in which members of the Board could only be removed for cause, and the determination of “cause” was left to an overseeing Commission.<sup>115</sup> Roberts found that this arrangement created a double layer of insulation from presidential control by both imposing a good cause requirement and depriving the President of authority to determine when good cause for termination existed. “The result is a Board that is not accountable to the President, and a President who is not responsible for the Board.”<sup>116</sup> Roberts’ argument opened (or re-opened) the question of the unitary executive by couching the conclusion in terms of the extent of presidential control over executive functions. At the same time, by distinguishing between a double and a single layer of removal restrictions, the Court avoided confronting the conflict between Rehnquist and Scalia’s positions in *Morrison*, to the evident disappointment of then District Court Judge Brett Kavanaugh who had called *Free Enterprise Fund* “the most important separation of powers case regarding the President’s appointment and removal powers in the last 20 years.”<sup>117</sup>

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112. *Id.* at 708-09 (Scalia, J., dissenting).

113. *Id.* at 710 (Scalia, J., dissenting).

114. Steven D. Schwinn, *Does the For-Cause Removal Provision for the Director of the Consumer Financial Protection Bureau Impermissibly Encroach on the President’s Constitutional Power to Direct and Control the Executive Branch - If So, is It Severable from the Rest of the Dodd-Frank Act (19-7)*, 47 U.S. PREVIEW OF SUP. CT. CAS. 22, 24 (2020).

115. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010).

116. *Id.* at 495.

117. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F. 3d 667, 685 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

Then came the Consumer Finance Protection Bureau. In 2011, in the aftermath of the catastrophic Great Recession of 2008, Congress established the Consumer Finance Protection Bureau (“CFPB”).<sup>118</sup> Like many administrative agencies, the CFPB was designed to be independent, with a head who, rather than serving at the pleasure of the President, served a five-year term and could only be removed for “inefficiency, neglect of duty, or malfeasance in office.” In the first decade of its operation, the CFPB brought numerous actions against financial institutions, recovering more than \$11 billion in damages for the US Treasury.<sup>119</sup>

The first constitutional challenge came in 2018 in *PHH Corp v. CFPB*.<sup>120</sup> The en banc opinion of the District Court of Washington, D.C. ran 250 pages with six separate opinions. The majority opinion was written by Judge Cornelia Pillard.

Pillard began by reviewing basic principles. “The Court has repeatedly held that ‘a “good cause” removal standard’ does not impermissibly burden the President’s Article II powers, where ‘a degree of independence from the Executive . . . is necessary to the proper functioning of the agency or official.’ Armed with the power to terminate such an ‘independent’ official for cause, the President retains ‘ample authority to assure’ that the official ‘is competently performing his or her statutory responsibilities.’”<sup>121</sup>

The reason for this general statement of principles was to set up the radicalism of PHH’s position. “[PHH] would have us cabin the Court’s acceptance of removal restrictions by casting *Humphrey’s Executor* as a narrow exception to a general prohibition on *any* removal restriction—an exception it views as permitting the multi-member FTC but not the sole-headed CFPB. The distinction is constitutionally required, PHH contends, because ‘multi-member commissions contain their own internal checks to avoid arbitrary decisionmaking.’”<sup>122</sup>

While the formal analysis is long, multi-part, and complex, ultimately there were two reasons Pillard was reluctant to accept PHH’s argument.<sup>123</sup> First, the implications threatened the entire system of independent agencies. PHH’s claim that courts could easily distinguish single-headed from multi-member agencies, said Pillard, was somewhere between unconvincing and outright disingenuous. “PHH seeks no mere course correction . . . PHH makes no secret of its wholesale attack on

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118. 12 U.S.C.S. § 5491 (LexisNexis 2010).

119. *See Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2188 (2020).

120. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75 (D.C. Cir. 2018) (en banc).

121. *Id.* at 79 (citations omitted).

122. *Id.* (citations omitted).

123. *Id.* at 79–80.

independent agencies—whether collectively or individually led—that, if accepted, would broadly transform modern government.”<sup>124</sup>

Critically, Pillard rejected PHH’s assertion that there was a clearly identifiable constitutional difference between single-headed and multi-headed agencies. “[T]he constitutional distinction PHH proposes between the CFPB’s leadership structure and that of multi-member independent agencies is untenable. That distinction finds no footing in precedent, historical practice, constitutional principle, or the logic of presidential removal power.”<sup>125</sup> In other words, granting the challenge to CFPB’s structure would open the door to challenges to all independent agencies since there was no identifiable constitutional distinction.

Second, Pillard rejected the argument that the differences in patterns of decision-making between individual and group decision-makers as a matter of internal institutional checks had constitutional significance. This was an argument based on what was essentially a game theoretic model with political variables.<sup>126</sup> “The relevance of ‘internal checks’ as a substitute for at-will removal by the President is no part of the removal-power doctrine.” In his concurring opinion, Judge Tatel put the point more starkly: “The Constitution no more ‘enacts’ social science about the benefits of group decisionmaking than it does ‘Mr. Herbert Spencer’s Social Statics.’”<sup>127</sup>

Other arguments that PHH raised—and that Pillard rejected—were more familiar. In response to the claim that the design of the CFPB was new, Pillard pointed to other examples that he said were essentially similar, and further argued that the novelty of a practice was not determinative of its constitutionality.<sup>128</sup> Novelty “is not necessarily fatal; there is a first time for everything. . . . The independent counsel, the Sentencing Commission, and the FTC were each ‘novel’ when initiated, but all are constitutional. In the precedents PHH invokes, novelty alone was insufficient to establish a constitutional defect.”<sup>129</sup> Perhaps most importantly, Pillard invoked a norm of judicial deference in saying that Congress had exercised its valid authority in deciding that the design of the agency was necessary to achieve its purposes, similar to Rehnquist’s argument concerning the design of the office of the Special Prosecutor in *Morrison*.<sup>130</sup>

Finally, PHH mounts a slippery-slope argument against the CFPB. Sustaining the CFPB’s structure as constitutionally permissible, PHH

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124. *Id.* at 80.

125. *Id.* at 79–80.

126. *Id.*

127. *Id.* at 113 (citing *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)).

128. *Id.* at 102–03.

129. *Id.* (quoting *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 549 (2012)) (internal quotation marks omitted).

130. *Id.* at 92–93.

argues, could threaten the President's control over the Cabinet, an argument that appeared to reach back to before the adoption of the Constitution and its Appointments Clause.<sup>131</sup> None of these arguments was found to be persuasive by the majority.

On the other hand, Judge Brett Kavanaugh, dissenting, picked up on the argument raised by PHH—directly inspired by Justice Scalia's dissenting opinion in *Morrison*—declaring that securing executive control over removal power was essential to “liberty.” “The purpose of the separation and equilibration of powers in general, and of the unitary Executive in particular, was not merely to assure effective government but to preserve individual freedom.”<sup>132</sup>

In the understandings of Progressives, independent agencies were to be enterprises that would work cooperatively with the Executive and Legislative branches as well as with private sector stakeholders. In Kavanaugh's description, those agencies were an alien force operating outside the constitutionally designed branches of government. “The independent agencies collectively constitute, in effect, a headless fourth branch of the U.S. Government . . . Because of their massive power and the absence of Presidential supervision and direction, independent agencies pose a significant threat to individual liberty and to the constitutional system of separation of powers and checks and balances.”<sup>133</sup> Kavanaugh adduced (or imagined) a carefully calibrated congressional strategy to keep the “massive power” of independent agencies in check. “To mitigate the risk to individual liberty, the independent agencies [although not checked by the President] have historically been headed by *multiple* commissioners or board members.” In Kavanaugh's understanding, these multiple agency head act as checks on one another, thus helping to “protect individual liberty.”<sup>134</sup> The principle at work, in Kavanaugh's view, was the same principle of accountability that explained the theory of the unitary executive. “The overarching constitutional concern with independent agencies is that the agencies exercise executive power but are unchecked by the President, the official who is accountable to the people and who is responsible under Article II for the exercise of executive power. In lieu of Presidential control, the multi-member structure of independent agencies operates as a critical substitute check on the excesses of any individual independent agency head.”<sup>135</sup>

Remarkably, Kavanaugh translated this description of *congressional* reasoning into a *constitutional* requirement without

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131. *Id.* at 106.

132. *Id.* at 164 (Kavanaugh, J., dissenting) (quoting *Morrison v. Olson*, 487 U.S. 654, 727 (1988) (Scalia, J., dissenting)) (internal quotation marks omitted).

133. *Id.* at 165 (Kavanaugh, J., dissenting).

134. *Id.* (Kavanaugh, J., dissenting) (quoting *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935)).

135. *Id.* at 166 (Kavanaugh, J., dissenting).

explanation. The posited intellectual heritage seems to go something like this: (1) in the 19<sup>th</sup> century there was a theory of the unitary executive promoted by Jacksonians; (2) in the 20<sup>th</sup> century this theory was rejected with the creation of the administrative state; and (3) we should now test the constitutionality of arrangements in the administrative state by deciding how far they are consistent with a theory of accountability that was the justification for the 19<sup>th</sup> century unitary executive theory. What is missing are any effort to ask how political accountability works in practice in the case of independent agencies; how multi-member control is more likely to prevent excesses than to lead to partisan capture or paralysis; whether Congress considered those questions in coming up with its single-headed model; whether courts owe deference to Congress on questions of what practices do or do not contribute to political accountability; or whether Congress' balancing of goals of accountability and efficacy should guide judicial review.

### III. *SEILA LAW LLC V. CONSUMER FINANCE PROTECTION BUREAU*<sup>136</sup>

The constitutional challenge to the structure of the CFPB reached the Supreme Court in 2020 in *Seila Law*.<sup>137</sup> Roberts' majority opinion and Kagan's dissenting opinion largely reiterated arguments presented in *PHH* by Judge Pillard and Judge Kavanaugh, respectively, but with additional elements.<sup>138</sup> *Seila Law* thus stands as the (disturbing) expression of the current Supreme Court doctrine on questions of removal powers.

#### A. Roberts' Majority Opinion: A Theory of Political Accountability

Chief Justice Roberts' majority opinion in *Seila Law* referenced nearly all the arguments that have been mentioned so far and even a few more. First, Roberts eagerly embraced a version of the unitary executive theory, which he insisted was essential for accountability: "Under our Constitution, the executive Power—all of it—is vested in a President . . . Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else."<sup>139</sup>

Second, Roberts read the historical record as an unbroken affirmation of the unitary executive theory. Where another reader might have perceived a shifting landscape of competing principles, adjustments to new conditions, movement in one direction or another over time, and an undertheorized set of underlying justifications captured in terms like "quasi-legislative" or "impermissible interference," Roberts saw no such

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136. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183 (2020).

137. *Id.*

138. *Id.*

139. *Id.* at 2191 (internal quotations omitted).



ambiguities. In his reading, the historical record is a consistent affirmation of unilateral presidential authority over removal of all executive branch officials subject to two highly specified exceptions. “Our precedents have recognized only two exceptions to the President’s unrestricted removal power. In *Humphrey’s Executor v. United States*, we held that Congress could create expert agencies led by a *group* of principal officers removable by the President only for good cause. . . . And in *United States v. Perkins*, and *Morrison v. Olson*, we held that Congress could provide tenure protections to certain *inferior* officers with narrowly defined duties.”<sup>140</sup> Roberts’ reading of *Humphrey’s Executor* to make the multi-member character of the Federal Trade Commission the key to its immunity from removal at will is remarkable; the majority’s discussion of “quasi-legislative” functions is treated as at best a secondary concern. To make his account work Roberts is engaging in a violent imposition of a narrative completely invisible to its participants.

In this way, Roberts embraces the central distinction between individual and non-individual agency leadership that Judge Pillard had found to be without constitutional significance.<sup>141</sup> In fact, in Roberts’ telling the difference between individual and group leadership is a core constitutional principle that has previously been unrecognized.<sup>142</sup> The President, Roberts notes, occupies a unique position by virtue of his being an individual rather than a congress or a court. “To justify and check *that* authority—unique in our constitutional structure—the Framers made the President the most democratic and politically accountable official in Government. Only the President (along with the Vice President) is elected by the entire Nation.”<sup>143</sup> Roberts uncritically adopts Madison’s “chain” of accountability model. “Through the President’s oversight, the chain of dependence [is] preserved, so that the lowest officers, the middle grade, and the highest all depend, as they ought, on the President, and the President on the community.”<sup>144</sup>

Madison had been discussing the accountability of Executive officers, heads of “Departments” who would in turn be in charge of their junior officials. But of course, Madison’s council had been made subject to the Exceptions Clause providing congressional authority to define the terms of employment and removal of inferior officers, subject to a massive exception in the form of the Pendleton Act, and most importantly, ambiguous in the case of independent agency. Roberts simply ignores these elements in his discussion. Further, Roberts embraces Kavanaugh’s

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140. *Id.* at 2192 (citations omitted).

141. *Id.* at 2197; *PHH Corp. v. Consumer Fin. Prot. Bureau*, 881 F.3d 75, 96 (D.C. Cir. 2018) (en banc).

142. *Seila*, 140 S.Ct. at 2202.

143. *Id.* at 2203 (quoting THE FEDERALIST NO. 70, at 479 (Alexander Hamilton)).

144. *Id.* (internal quotation marks omitted).

ominous description of executive agencies as a “headless fourth branch of the U.S. Government.”<sup>145</sup> Yet he did not, however, extend the Madisonian principle to either of two obviously possible conclusions: that Congress should lack the authority to create inferior officers other than by Presidential appointment, or that where Congress specified Presidential appointment there would be an implied inclusion of a power of removal. Instead, Roberts reached the conclusion that where Congress put conditions on removal—that is, “good cause” provisions or a requirement of congressional approval—then there was an implied requirement that the agency in question be headed by a committee rather than an individual, a distinction that plays no role in any of Madison’s recorded comments nor those of anyone else during the “Decision of 1789,” the Exceptions Clause, the creation of the Civil Service, or any of the prior judicial examinations of removal power in the context of independent agencies.<sup>146</sup> The key constitutional principle governing the case is drawn from a combination of an 18<sup>th</sup> century metaphorical description of political representation and the historical fact of a familiar practice.

Roberts justified his intellectual maneuver by appealing to an implied theory of “liberty” that Scalia had introduced in his *Morrison* dissent and that Kavanaugh enthusiastically embraced in *PHH*.<sup>147</sup> In Roberts’ telling, the great danger was “arbitrary” action by an individual agency head uncontrolled by the threat of presidential removal. “The Director may *unilaterally*, without meaningful supervision, issue final regulations, oversee adjudications, set enforcement priorities, initiate prosecutions, and determine what penalties to impose on private parties.”<sup>148</sup> The same unilateral authority that rendered the President accountable for his actions renders a single agency head unaccountable because he or she is not elected by the national people. In other words, the justification for the *Seila Law* rule depends on an empirical assertion about the nature of politics, that Presidents are more accountable *in practice* than single agency heads. That empirical assumption about the workings of the political system is the basis for invoking a principle of “liberty,” which in turns justifies the creation of a constitutional principle out of Madison’s remarks and prior congressional decisions.

Roberts’ reliance on past congressional practice into a constitutional limitation deserves examination. He appealed to historical practice both in its positive sense (the existence of past practice suggests constitutionality) and in its negative sense (the lack of past practice suggests *unconstitutionality*).<sup>149</sup> “Perhaps the most telling indication of [a]

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145. *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting).

146. *See Seila*, 140 S.Ct. at 2183.

147. *Id.* at 2203; *Morrison v. Olson*, 108 S.Ct. 2597, 2623 (1988) (Scalia, J., dissenting); *PHH Corp.*, 881 F.3d at 165 (Kavanaugh, J., dissenting).

148. *Seila*, 140 S.Ct. at 2203–04 (citations omitted).

149. *Id.* at 2201.

severe constitutional problem with an executive entity ‘is [a] lack of historical precedent’ to support it.” A single headed agency like the CFPB, he said, was “almost wholly unprecedented.”<sup>150</sup> As for the “handful” of exceptions, all of these cases except that of the Comptroller of the Currency in 1863 were “modern and contested,”<sup>151</sup> a finding that apparently deprived them of significance as examples of prior practice. The implication, then, is that past practice defines constitutional limits if contrary practices are recent or “contested.”

One obvious difficulty with Roberts’ analysis is that it has nothing to do with the discussions in *Myers* and *Humphries Executor*, or even *Morrison*. To resolve this problem, Roberts attached a requirement of multiple agency heads to the background principles of Progressive Era reform.<sup>152</sup> “The Court identified several organizational features that helped explain its characterization of the FTC as non-executive. Composed of five members—no more than three from the same political party—the Board was designed to be non-partisan and to act with entire impartiality. The FTC’s duties were neither political nor executive, but instead called for the trained judgment of a body of experts ‘informed by experience.’”<sup>153</sup> Thus, Roberts found that the general rule of presidential removal authority of *Myers* had been made subject only to a very specific exception “for *multimember* bodies with ‘quasi-judicial’ or ‘quasi-legislative’ functions.”<sup>154</sup>

Thus, Roberts’ ultimate argument was that the President retains authority over all removals with two exceptions: where an agency is engaged in non-executive activities *and* has a multi-head structure, or in the case of inferior officers. In Roberts’ view, however, the authority of the CFPB Director took him outside the scope of either category. The CFPB Director would have authority to promulgate rules under nineteen different statutes. The decisions of the agency would be final, rather than advisory statements delivered to an Article III court. And the agency was authorized to seek monetary penalties, “a quintessentially executive power not considered in *Humphrey’s Executor*.”<sup>155</sup> That the agency was also authorized to engage in non-executive activities was relegated to irrelevance.

Ultimately, Roberts’ concerns came back to his empirical assessment of political representation in practice. Here the argument takes a truly remarkable turn: in the name of separation of powers Roberts wants to ensure that the President will have direct control over policymaking. The

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150. *Id.* (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010)).

151. *Id.* at 2202.

152. *Id.* at 2200–02.

153. *Id.* at 2198 (quoting *Humphrey’s Ex’r.*, citations omitted).

154. *Id.* at 2199 (citations omitted, emphasis added).

155. *Id.*

danger, then, is that if regulatory agencies are too independent Presidents may not be able to control their policy agendas.<sup>156</sup> “Because the CFPB is headed by a single Director with a five-year term, some Presidents may not have any opportunity to shape its leadership and thereby influence its activities.”<sup>157</sup> Reversing his earlier course, Roberts now leaned on the fact that the CFPB engages in non-executive actions or rulemaking as well as enforcement, making it an important actor in policymaking. As a result, unlike the [FTC] commission members in *Humphrey’s Executor*, the Constitution required that a CFPB Director be subject to removal by a President “based on disagreements about agency policy.”<sup>158</sup> So the fact that the CFPB engages in quasi-legislative and quasi-judicial activities is a reason *not* to shield its head from removal, and rather than avoiding an agency interference in the Executive’s performance of its enforcement duties the goal is to *ensure* the President’s ability to interfere with Congress’ authority over policymaking. From a strict separation of powers viewpoint, of course, this is an argument that turns the logics of *Humphrey’s Executor* and *Morrison* on their respective heads. Of course, the analysis might look different if one adopted a perspective informed by a constitutional norm of checks and balances rather than the kind of strict and formalistic separation of powers thinking demonstrated in the Jacksonian theory of the unitary executive.

### **B. Justice Kagan’s Dissent: Checks and Balances, Politics, and Judicial Deference**

Justice Kagan wrote an opinion that can best be described as an evisceration of Roberts’ arguments.<sup>159</sup> The majority’s account, she wrote, “is wrong in every respect. The majority’s general rule does not exist. Its exceptions, likewise, are made up for the occasion—gerrymandered so the CFPB falls outside them. And the distinction doing most of the majority’s work—between multimember bodies and single directors— does not respond to the constitutional values at stake.”<sup>160</sup>

The emphasis on constitutional values was a reference to Roberts’ complete abandonment of checks and balances. Kagan accused Roberts of employing a simplistic “Schoolhouse Rock” version of separation of powers.<sup>161</sup> “James Madison stated the creation of distinct branches “did not

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156. *Id.* at 2204.

157. *Id.*

158. *Id.* at 2206.

159. Justice Thomas wrote an opinion calling for *Humphrey’s Executor* to be overruled and for *all* independent and inter-branch agencies to be abolished in order to restore a pure system of separation of powers. *Id.* at 2216 (Thomas, J., concurring).

160. *Id.* at 2225 (Kagan, J., concurring).

161. *Id.* at 2226 (Kagan, J., concurring).

mean that these departments ought to have no partial agency in, or no control over the acts of each other.”<sup>162</sup> To the contrary, Madison explained, the drafters of the Constitution—like those of then-existing state constitutions—opted against keeping the branches of government “absolutely separate and distinct.”<sup>163</sup> And Kagan quoted Justice Story to back up Madison’s analysis. “[W]hen we speak of a separation of the three great departments of government, it is not meant to affirm, that they must be kept wholly and entirely separate. Instead, the branches have—as they must for the whole arrangement to work—common link[s] of connexion [and] dependence.”<sup>164</sup>

Kagan rejected Roberts’ idea that independent agencies represent an exception to a larger rule.<sup>165</sup> Kagan cited a long history of Congress creating agencies whose heads were immune from removal by the President without cause under the authority of the Necessary and Proper Clause of Article I, section 8. “The text of the Constitution, the history of the country, the precedents of this Court, and the need for sound and adaptable . . . bestow discretion on the legislature to structure administrative institutions as the times demand, so long as the President retains the ability to carry out his constitutional duties.”<sup>166</sup> Thus Kagan attempted to assert the continuing validity of the principle announced by Rehnquist in *Morrison* against Scalia’s dissenting opinion in that case. Kagan was making it clear that for all Roberts’ protestations that the majority was declining to take a step beyond existing precedent, in fact he was undermining the doctrinal scheme that had been in place for twenty years in favor of elevating Scalia’s then-minority position to the level of orthodoxy.

As for Roberts’ emphasis on the existence of a single agency head rather than a commission, Kagan referred to this as a form of intellectual “gerrymandering” designed to find a way to take the case out of the reach of the mainstream principle. “The majority picks out that until-now-irrelevant fact to distinguish the CFPB, and constructs around it an until-now-unheard-of exception.”<sup>167</sup> Moreover, as Kagan pointed out, the logic of the majority’s argument—that a single-headed agency would be too independent of the President—contradicted the realities of administrative operations. Kagan proposed that a single agency head was *more* subject to presidential control than an equally non-removable panel of

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162. *Id.* at 2227 (Kagan, J., concurring) (quoting THE FEDERALIST NO. 47, at 325 (James Madison)).

163. *Id.* (Kagan, J., concurring) (quoting THE FEDERALIST NO. 47, at 327 (James Madison)).

164. *Id.* (Kagan, J., concurring) (quoting 2 JUSTICE STORY, COMMENTS. ON THE CONST. OF THE U.S. OF THE UNITED STATES 8 (1833)) (internal quotation marks omitted).

165. *Id.* at 2241 (Kagan, J., concurring).

166. *Id.* at 2226–27 (Kagan, J., concurring).

167. *Id.* at 2241 (Kagan, J., concurring).

commissioners.<sup>168</sup> Furthermore, Kagan argued, a President retains numerous ways of influencing an agency short of the threat of removal, a point that illustrated the reasons courts should stay out of the business of limiting Congress' decisions about agency design.<sup>169</sup> "Compared to Congress and the President, the Judiciary possesses an inferior understanding of the realities of administration and the way political power operates."<sup>170</sup>

#### IV. *SEILA* LAW, A STEP IN THE WRONG DIRECTION

It has to be said that one searches the historical records in vain for any kind of unified support for the principles of solitary accountability in the President that Roberts relies on. In the debates of 1787, the idea of a single President had competed with proposals for an Executive Council. Edmund Randolph declared that "he should not do justice to the Country which sent him if he were silently to suffer the establishment of a Unity in the Executive department," instead proposing a three-member Executive council drawn from different portions of the country.<sup>171</sup> George Mason made a similar proposal, and in part presented an argument specifically about powers of appointment. "[H]e was averse to vest so dangerous a power in the President alone."<sup>172</sup> Mason proposed a Privy Council, of six members, to the President, a position in which he was joined by James Wilson and Benjamin Franklin.<sup>173</sup> Elbridge Gerry referred to the idea of presidential accountability as "chimerical" on the grounds that "the President cannot know all characters, and can therefore always plead ignorance."<sup>174</sup> To be sure, others took a contrary position. Pierce Butler (S. Car.): "If one man should be appointed he would be responsible to the whole, and would be impartial to its interests. If three or more should be taken from as many districts, there would be a constant struggle for local advantages."<sup>175</sup> And of course, Roberts relied on Madison's description of a "chain" of accountability in the debates of 1789 over the structure of the first Executive Departments. And of course, the argument depends on a commitment to a mode of interpretation that privileges the understanding of individual members of the constitutional convention. In other words, there

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168. *Id.* at 2243 (Kagan, J., concurring).

169. *Id.* at 2225–26 (Kagan, J., concurring) (quoting *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 523 (Breyer, J., dissenting)).

170. *Id.* at 2226 (Kagan, J., concurring).

171. Max Farrand, ed., *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, vol. 1, 88 (Yale Univ. Press 1911).

172. *Id.*, vol. 2, at 527.

173. *Id.* at 538–39, 542.

174. *Id.* at 539.

175. HOWARD GILLMAN, MARK A. GRABER & KEITH E. WHITTINGTON, *supra* note 18, at 85–86.

were various and numerous arguments and proposal; the idea that there was an original consensus around the position favoring a unitary executive is unsupportable. As noted earlier, confronted by other historical statements actors, Roberts simply found ways to discounted them in favor of a narrative that posited a single person—Madison—who commanded absolute agreement on his particular theory of representation and its implications for removal powers.

The ahistoricism of Roberts' theory is not its most problematic element. The more important critiques of the analysis in *Seila Law* relate to the body of doctrine and theories that define modern separation of powers doctrine in the removal context. As was stated in the Introduction, there are three points of critique that are the focus of this section:

1. Roberts fails to recognize the relationship between separation of powers and checks and balances as competing and at times contradictory guiding principles;
2. Roberts fails to take account of the constitutional implications of the modern administrative state;
3. Roberts uncritically adopts an 18<sup>th</sup> century understanding of political accountability and applies that understanding in a formalistic and ultimately self-defeating way to the conditions of modern politics.

#### **A. Roberts Fails to Recognize the Relationship Between Separation of Powers and Checks and Balances**

Early in the discussion, while talking about “the Decision of 1789,” the point was raised that there is a critical analytical tension between principles of separation of powers and principles of checks and balances. The key point is that these are fundamentally opposing ideas. Checks and balances are about overlapping, not separate, areas of authority. Where a President has total authority over the appointment, management, and removal of an official, there is separation of powers; where that authority is shared with Congress, there are checks and balances. Put another way, the desire to make the President directly accountable to the voters may mean making him unaccountable to the other branches.

This confusion of categories becomes especially apparent when one considers the extent to which Roberts *avoids* the implications of a pure separation of powers system. If the idea were truly to cabin policymaking power in the Congress and policy-executing power in the Executive, then the goal should be to *reduce* the Executive role in the rulemaking and

adjudicatory processes. Even supporters of the idea of a unitary executive may conclude that there is a simultaneous need to cabin the scope of executive power at the same time that it is made more absolute within its realm. From a pure separation of powers perspective, congressional control over removal is one of the ways to prevent the Executive branch from assuming an undue policymaking role.<sup>176</sup>

Justice Thomas was entirely willing to accept the consequences of a pure system of separation of powers. In his view, in fact, Roberts' logic had already led to that conclusion: "with today's decision, the Court has repudiated almost every aspect of *Humphrey's Executor*"<sup>177</sup> (implying a restoration of the absolute presidential authority rule of *Myers*). In Thomas' view, the result was a rejection of the model of independent agencies *tout court* in order to prevent not only congressional interference in executive functions but also and equally *executive* participation in lawmaking. "The Constitution does not permit the creation of officers exercising 'quasi-legislative' and 'quasi-judicial powers' in 'quasi-legislative' and 'quasi-judicial agencies.' No such powers or agencies exist. Congress lacks the authority to delegate its legislative power . . . Free-floating agencies simply do not comport with [the] constitutional structure."<sup>178</sup>

In fact, however, the Constitution itself stands against any such a pure system with its identification of congressional authority over "inferior" officers. Even the most absolutist equation of removal power with appointment power (a la Peckham in *Myers*) cannot avoid Congress' authority to "vest" appointment of inferior officers in "courts of law" or "heads of departments,"<sup>179</sup> a point Thomas does not address. And the civil service system is based on the idea that most federal employees are not "officers" at all. There are some modern critics who call for the abolition of the civil service system precisely on the grounds that the Pendleton Act was unconstitutional infringement on presidential authority;<sup>180</sup> that would be the logical extension of Thomas' call for the abolition of independent agencies. These are extreme positions born of fetishization of separation of powers and the unitary executive at the expense of all other constitutional values.

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176. See, e.g., Saikrishna Bangalore Prakash, *THE LIVING PRESIDENCY: AN ORIGINALIST ARGUMENT AGAINST ITS EVER-EXPANDING POWERS* (Harv. Univ. Press, 2020) (recommending increasing the advice and consent role of the Senate regarding appointments and removals).

177. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2211 (2020) (Thomas, J., concurring).

178. *Id.* at 2216 (Thomas, J., concurring).

179. U.S. CONST. art. II, § 2.

180. See, e.g., Phillip K. Howard, *Civil Service Reform: Reassert the President's Constitutional Authority*, *THE AMERICAN INTEREST* (Jan. 28, 2017), <https://www.the-american-interest.com/2017/01/28/civil-service-reform-reassert-the-presidents-constitutional-authority/> [<https://perma.cc/Q8R6-5BYQ>].



At a theoretical level, what is missing from Roberts' and Thomas' (and Kavanaugh's) arguments are a recognition of a constitutional value of checks and balances applied to the President. Elections are the point at which the voters hold Presidents accountable (or don't—see discussion below) but the idea of checks and balances is to have divisions among overlapping areas of authority *during* the period in which government is operating. The absence of serious consideration of the need for checks and balances becomes a one-way ratchet that pushes Executive control to ever-higher levels with fewer and fewer limitations. A constitutional theory of separation of powers that undercuts the principle of checks and balances is not “textualism,” “originalism,” or an interpretation of “constitutional structure”; it is an abandonment of the judicial role. As institutional roles and practices change, an unchanging and formalistic understanding of the basic rules of operation invite unintended and destructive consequences.<sup>181</sup>

#### **B. Roberts' Failure to Take Account of the Constitutional Implications of the Modern Administrative State**

The existence of the modern administrative state is not mere an historical accident, nor is it a purely political (in the partisan bargaining sense) arrangement. Rather it is a creation of Congress and the Executive working together to apply constitutional principles to a new set of circumstances that developed over a period of time through experimentation. Roberts' description, like Kavanaugh's, belies this historical development and the constitutional politics involved. As a result, the constitutional principles at work in the design and operation of the administrative state go unrecognized.

One way this failure appears is in the presentation of a falsely dichotomous choice between congressional or presidential control over the appointment and removal powers. The Exceptions Clause, however, provides for a third alternative; appointment of inferior officers by the judiciary. It is difficult to see how a Madisonian “chain of accountability” is preserved by putting federal judges in charge of the appointments process, yet a constitutional interpretation that denies any role for Congress in checking presidential removal authority opens up that alternative channel. Even from a simple textualist perspective, then, the claim that preventing Congress from controlling agencies preserves liberty by ensuring presidential control depends on ignoring relevant constitutional provisions.

More generally, once again Roberts avoids the implications of a constitutional value of checks and balances as one of the basic purposes behind separation of powers. Checks and balances work most effectively

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181. See Timothy Duncheon & Richard L Revesz, *Seila Law as an Ex Post, Static Conception of Separation of Powers*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-duncheon-revesz/> [<https://perma.cc/BMC7-HQ4R>].

when the lawmaking branch and the law-executing branch are required to work cooperatively. Judicial rulings that *prevent* cooperative arrangements invite either conflict or evasion. A good example is the (in)famous decision in *Chadha v. INS* that struck down the practice of legislative vetoes on separation of powers grounds.<sup>182</sup> The result in that instance was evasion. As Louis Fisher describes it, confronted with what Justice White (in his dissent) had described as an “Hobbesian all-or-nothing choice . . . Congress and executive agencies have discovered other more acceptable options: using the legislative veto precisely as before and converting legislative vetoes into informal understandings that give committees effective control over agency decisions.”<sup>183</sup>

Consider the possibility of a President determined to avoid congressional oversight. “In this area, as in others, President Trump has pushed the envelope of accepted past practice in ways that bring the issues into sharp relief, relying on ‘acting’ appointments to avoid advice and consent requirements, asserting a particularly strict version of the unitary executive, and at least appearing to try to convert traditionally independent agencies—particularly those involved in matters of public health and medical science—to instruments of his political will.”<sup>184</sup> Critics assert, with evidence, that President Trump has sought to restore a Van Buren-style requirement of personal loyalty as well as using his power to appoint acting officials as a kind of high-level spoils system.<sup>185</sup> None of these is a possible scenario that enters into the consideration of Chief Justice Roberts’ simple and static model of separation of powers.

The model of independent regulatory agencies was an example of the kind of cooperative arrangements among the branches and private stakeholders that was adopted with the goal of effectuating Progressive ideals of good government; it was also an attempt to apply constitutional principles to a new set of situations created by the modern American political economy. Roberts cannot logically or sensibly argue for a pure distribution of responsibilities while at the same time accepting Executive branch control over rulemaking; this was the basic theory of the non-

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182. *Chadha v. INS*, 462 U.S. 919, 922 (1983).

183. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, 56 LAW & CONTEMP. PROBS. 273, 275 (1993).

184. Howard Schweber, *Seila Law v. Consumer Finance Protection Bureau on Separation of Powers*, in SCOTUS 2020: MAJOR DECISIONS AND DEVELOPMENTS OF THE U.S. SUPREME COURT 141, 149 (Morgan Marietta ed., 2021).

185. See, e.g., Kathryn Dunn Tenpas, *Vacancies, acting officials and the warning role of the U.S. Senate*, BROOKINGS (Sep. 24, 2020), <https://www.brookings.edu/blog/fixgov/2020/09/24/vacancies-acting-officials-and-the-waning-role-of-the-u-s-senate/> [https://perma.cc/75CA-FR9F]; see also Glenn Altschuler, *Trump’s Contempt for Advice and Consent*, THE HILL (Aug. 10, 2020), <https://thehill.com/opinion/white-house/511265-trumps-contempt-for-advice-and-consent> [https://perma.cc/SF72-CRBN].

delegation doctrine that the Court relied on in *Schechter Poultry* to strike down the National Recover Act.<sup>186</sup> In that case, Chief Justice Hughes, writing for a unanimous Court, articulated a principle of balance: *unconstrained* delegation of authority to the Executive branch ran afoul of separation of powers principles precisely because it abandoned the concomitant concept of checks and balances.<sup>187</sup> Chief Justice Roberts gives no apparent consideration to the possibility that a similar excessive aggrandizement of Executive power is at work today, nor does he assert excessive congressional control is at work; he simply treats the current set of arrangements as an ideal point from which any departure is to be resisted. The logical problem with that reasoning is its failure to recognize that the current set of arrangements are themselves the result of cooperation and compromise consistent with constitutional principles. The existence of a modern economy necessitated an expansion of state capacity; the constitutional implications of that development were not the abandonment of either separation of powers or checks and balances, but rather new specific mechanisms to give effect to those principles in an evolving extralegal context. To assert a constitutional requirement for retaining an earlier set of just these kinds of arrangements undercuts its own logic.

To see why, go back to Roberts' assertion that the (alleged) novelty of the institutional arrangement was strong evidence of its unconstitutionality.<sup>188</sup> This is part of a pattern of appeals to "extrajudicial precedents" that characterizes the opinion,<sup>189</sup> but as Justice Kagan points out, this is an argument that proves far too much since *all* independent agencies were novel institutional arrangements when they were created starting in 1887.<sup>190</sup> If the constitutional challenge in *Seila Law* had not been brought for ten more years, would the passage of that time have required a different outcome? "That was then, this is now," is a truism; it is not a constitutional principle without the accompaniment of significant further explanation.

Furthermore, while past practice is frequently invoked in separation of powers discussions, most often it is relied upon to explain why a practice is constitutionally acceptable, not for a premise that past congressional practice can be translated into a constitutional requirement. In particular, the idea of congressional "acquiescence" demonstrated by a lack of asserted objection over time is used to justify assertions of executive authority.<sup>191</sup> But a constitutional principle that says that past acquiescence defines the

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186. See generally *Schechter Poultry v. United States*, 295 U.S. 495 (1935).

187. *Id.*

188. *Id.* at 2189.

189. David A. Strauss, *Non-Judicial Precedent and the Removal Power*, U. CHI. L. REV. ONLINE (Aug. 27, 2020) <https://lawreviewblog.uchicago.edu/2020/08/27/seila-strauss/> [<https://perma.cc/S8AA-SG9A>].

190. *Id.*

191. See, e.g., *Dames v. Regan*, 453 U.S. 654, 686 (1981).

limits of any subsequent actions is not merely novel, it makes the argument from practice an arbitrary exercise. In *Seila Law* there was no objection raised by any representative of the Executive branch, nor had there previously been objections raised to the decades-long practice of experimenting with different forms and models of independent agencies.<sup>192</sup> The argument from past practice cut at least as strongly in favor of a finding of constitutionality as the converse. It is important to remember that the constitutional text says nothing about removal powers; from 1789 onward this has been a matter for debate both in Congress and the courts. That fact, that the entire argument rests on constitutional silence, merely emphasizes the extent to which Roberts' constitutional argument is a pure invention.

### C. Roberts' Theory of Accountability: Applying 18<sup>th</sup> Century to a 21<sup>st</sup> Century State

Roberts insists that he is not abandoning congressional constraints over removal because of the key difference between single-headed and multi-headed agencies.<sup>193</sup> In that way, he may be taken to implicitly recognize some form of checks and balances, but his primary concern throughout is "accountability." *Contra* Thomas, he is willing to accept an abandonment of strict separation of powers principles so long as it is accompanied by a congressionally created practice that serves the constitutional purpose of keeping independent agencies "accountable"<sup>194</sup> (once again converting the fact of prior congressional practice into a constitutional requirement). The problem is that his model of accountability makes no sense either logically or empirically in a modern context, even if one assumes the model made sense when Madison proposed it in 1789.

The argument from accountability constitutes Roberts' foray into practical politics. The Chief Justice worried that a President might not be able to control the policymaking activities of an agency due to an inherited agency head that could not be removed for cause.<sup>195</sup> This is a core point in the argument. As Chief Justice Rehnquist noted in *Morrison*, a "for cause" removal restriction is not a very strict limitation on the exercise of executive control.<sup>196</sup> In particular, as Justice Kagan pointed out (quoting Rehnquist), such a limitation does nothing to impede the President's ability to "take care" that the laws be faithfully executed since failure to execute the laws is precisely the "cause" that the "for cause" provisions gives the

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192. See generally *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2188 (2020).

193. *Id.* at 2203.

194. *Id.* at 2209.

195. *Id.* at 2192.

196. *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

President as grounds for removal.<sup>197</sup> A for-cause standard gives him “ample authority to assure that [an official] is competently performing [his] statutory responsibilities in a manner that comports with the [relevant legislation’s] provisions.”<sup>198</sup>

What is missing, in other words, is not the ability of the President to ensure that laws are enforced but rather the ability of the President to control agency policy by *preventing* the faithful execution of the law. That would be the scenario in a situation in which a newly elected President opposes the mandate of an independent agency. Roberts presents the reverse situation—a President who wants to see an agency’s mandate carried out but is stymied by the resistance of an inherited agency head—but in fact that situation falls squarely within the “for cause” removal provision. In fact, removal on these grounds is more easily carried out with respect to an individual agency head than a committee; evading responsibility to take action is almost the defining characteristics of committees. Indeed, Justice Kagan asserts that to the extent that external control by the President is considered a *desideratum*, a single-headed model provides greater rather than less control.<sup>199</sup>

Roberts ignores these concerns and instead follows Kavanaugh in raising the specter of a threat to individual liberty posed by the potential for arbitrary actions by agency heads are accountable to no one. As already noted, however, this description is simply not accurate given that the President retains the power of removal for cause. “Arbitrary” action would almost certainly constitute cause for dismissal. Such actions would also be subject to court challenges under the Administrative Procedures Act (“APA”) and other procedural protections. The APA is what Eskridge and Ferejohn refer to as a “super statute”<sup>200</sup>; enacted by Congress, it provides a layer of protection of the liberty with which Roberts and Kavanaugh profess to be concerned by constraining the manner in which agencies exercise their functions in specific cases.

The connections between direct accountability to a President, multiple versus single agency heads, and the protection against arbitrary actions thus appear muddled as a matter of logic. Separately, Roberts’ argument that presidential control protects individual liberty<sup>201</sup> flies in the face of historical experience that led to the creation of the independent counsel statute in *Morrison*. The reason is that to say that without the threat of removal there is no accountability is to ignore the realities of government operations and the incentives of officials. Presidents can reward as well as punish; officials are concerned with their future positions as well as their

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197. *Seila*, 140 S. Ct. at 2228 (Kagan, J., dissenting).

198. *Id.*

199. *Id.*

200. William Eskridge & John Ferejohn, *Super Statutes*, 50 DUKE L. J. 1215 (2001).

201. *Seila*, 140 S. Ct. at 2191.

present ones; Congress has the ability to change the rules of operation for an agency at any time (or to abolish them altogether). The existence of a bipartisan system of group leadership may in fact *insulate* an agency from these various mechanisms of accountability. Conversely, historical experience teaches that too much presidential control—reifying the concept of separation of powers without concern for checks and balances—is a grave danger. What is also removed by the “for cause” provision is the ability of a President to use appointments as spoils and to build his own cadre of loyalists in positions of power, the very forms of corruption evident during the Jacksonian Era that prompted the creation of independent agencies in the first place. In all these respects, then, the preservation of for cause protections serves the goals that Roberts identifies while insisting on a multi-headed agency model does not.

All of this is arguably secondary, however, to the main point that the Madisonian model of direct accountability to a President who is directly accountable to the voters is nonsensical in the modern context even if it made sense in 1789. Voters do not choose presidential candidates based on a fine grained knowledge of the actions of agency heads, nor is the election of a President a measure of popular will in an era in which the candidate with fewer votes won the office, as happened in 2000 and again in 2016. An argument of “accountability to State party leadership” might be plausibly proposed, but that hardly comports with Roberts’ invocations of “liberty”. Roberts was presumably aware of these aspects of presidential electoral politics but chose to ignore them in favor of a formalistic recitation of Madison’s formulaic statement.

Kagan argued that the important point is not whether one or another description of presidential elections is more valid, but rather that consideration of these variables involves political calculations of a kind that Supreme Court justices have often showed themselves to be inexpert.<sup>202</sup> The point is an important one. Reading Supreme Court justices make authoritative pronouncements on questions that ignore the findings of decades of work by political scientists is troubling enough. Realizing that those same justices are effectively asserting that their understanding of the political system in actual operation is superior to the understandings of the other two *political* branches is startling. The result, predictably, is a self-defeating argument that begins with a false premise about how elections work and concludes with a solution that diminishes rather than enhances political accountability.

In truth, the problem of accountability is precisely the reverse of the version that Roberts propounds. Short of following the suggestion of Justice Thomas and simply dismantling the system of independent agencies, principles of separation of powers *and* principles of checks and balances require internal constraints to prevent excessive aggrandizement of power

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202. *Id.* at 2225–26 (Kagan, J., dissenting).

in the agencies. But the plausible location of that accountability is not in the person of the President nor in the operations of partisan election campaigns, it is in Congress. The existence of a powerful system of independent agencies requires that there be mechanisms to avoid their capture by the President; as Roberts says, individual authority is liable to be exercised arbitrarily, a point that is especially valid when the only check on the exercise of that authority is a false version of “accountability” in the form of national elections.<sup>203</sup>

Roberts relies on what Theodore Lowi called the “plebiscitary” model of the presidency,<sup>204</sup> one that describes a popularly elected leader unconnected to the rest of government and directly responsible only to the people. Once again, this is a model that entirely overlooks the concept of checks and balances. Indeed, the word “accountability” contains within it the obligation to “give an account”; precisely the responsibility that is entailed by a for cause dismissal provision.<sup>205</sup> The claim that a plebiscitary presidency enhances accountability is especially troubling given the reality of presidential elections; the idea that voters review or even *could* review the exercise of presidential control over specific agency heads and determine their voting preferences on that basis is laughable.<sup>206</sup> Indeed, the exercise of that oversight—the assurance of accountability in the executive—is more effectively exercised by Congress, yet another reason for courts to defer to congressional determination of what mechanisms will enhance accountability of the President as well as of agency heads.

There is a strong case to be made that in the design of independent agencies Congress has abdicated too much of its lawmaking role and delegated too much authority to the Executive. Neal Katyal argues that as a result executive-executive checks are required as much as checks that operate between the branches.<sup>207</sup> Katyal’s point is well taken. But the enhancement of executive-executive checks should be even more problematic to judges committed to separation of powers and a unitary executive than allowing Congress to preserve the accountability of agency heads to the branch that created their authority in the first place.

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203. *Id.* at 2203.

204. THEODORE LOWI, *THE PERSONAL PRESIDENT: POWER INVESTED, PROMISE UNFULFILLED* (Cornell Univ. Press 1985); *see also*, David M. Driesen, *Political Removal and the Plebiscitary Presidency: An Essay on Seila Law, LLC v. Consumer Financial Protection Bureau*, 76 NYU ANNUAL SURVEY OF AMERICAN LAW (2021).

205. LOWI, *supra* note 204.

206. *See, e.g.*, Cynthia R. Farina, *False Comfort and Impossible Promises: Uncertainty, Information Overload, and the Unitary Executive*, 12 PENN. J. OF CONST. L. 357 (2010).

207. Neal Katyal, *Checking the Most Dangerous Branch From Within*, 115 YALE L. J. 2314 (2006).

The great fear today, as it was for the creators of the independent agency system, should be a return to the days when the system of administration was subject to capture by a corrupt administration. The institution of a multi-headed leadership may be one way to prevent that capture; a single agency head with a fixed term subject to removal for cause is another. The model of a single agency head removable by the President at will is surely the least desirable model from any perspective that takes the idea of checks and balances seriously. The formalistic bright line division between single and multi-headed agencies in *Seila Law* is largely orthogonal to the real constitutional concerns at issue in the operations of the administrative state. The precedent established by Roberts' arguments in the case, however, are a damaging step in the wrong direction.