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## A Modest Proposal: Abolishing Agency Independence in *Free Enterprise Fund v. PCAOB*

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**A MODEST PROPOSAL:  
ABOLISHING AGENCY INDEPENDENCE IN  
*FREE ENTERPRISE FUND V. PCAOB***

*Neomi Rao\**

*Free Enterprise Fund v. Public Company Accounting Oversight Board*<sup>1</sup> outlines a modest proposal for abolishing agency independence. The U.S. Supreme Court’s decision creates a framework for challenging the constitutionality of agency independence and the restrictions on removal that shield the heads of independent agencies from presidential oversight. In the course of assessing the constitutionality of the Public Company Accounting Oversight Board (PCAOB or Board), the Court provides the reasoning for undermining most forms of agency independence. Yet the potential scope of the decision has gone largely unnoticed. Most commentators have pronounced the decision insignificant for presidential authority. This Article questions the conventional interpretation and demonstrates that the structure of the Court’s argument, which focuses on the importance of presidential control and accountability through the removal power, logically calls into question the constitutionality of agency independence. Moreover, the Court’s remedy of severing invalid for-cause removal limits provides a workable approach for future cases—eliminating agency independence without eliminating the independent agencies.

*Free Enterprise Fund* raises a question of first impression: may executive branch officers, such as members of the PCAOB, be insulated from the President’s oversight and removal power by two layers of tenure protection? The PCAOB was created by the Sarbanes-Oxley Act of 2002 (the Act)<sup>2</sup> in response to a number of high-profile corporate and accounting scandals. The Act gives the Board wide-ranging authority over accounting firms that audit publicly held companies.<sup>3</sup> Under the Act, Commissioners of the Securities and Exchange Commission (Commission or SEC) appoint members of the Board and Board members can be removed by

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1. 130 S. Ct. 3138 (2010).

2. Pub. L. No. 107-204, 116 Stat. 745.

3. 15 U.S.C. §§ 7211–7215 (2006) (outlining the responsibilities of the Board).

Commissioners only “for good cause shown.”<sup>4</sup> The Commissioners, in turn, can be removed by the President only for inefficiency, neglect of duty, or malfeasance in office—creating the double for-cause removal protection over the Board. The Court holds this double layer contravenes separation of powers because the President “cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”<sup>5</sup>

The Court emphasizes that the Board enjoys an unusual double layer of for-cause removal protection and purports to limit the scope of its decision to this arrangement.<sup>6</sup> Nonetheless, in the course of reaching its conclusion, the Court articulates a series of principles, a sort of proof, for the unconstitutionality of agency independence. Writing for the 5-4 majority, Chief Justice John Roberts calls the question presented a “modest” one that does not challenge for-cause limitations in general.<sup>7</sup> Yet the Chief Justice answers the modest question with ambitious constitutional principles that logically challenge most for-cause removal restrictions. The Court’s reasoning strongly suggests that statutory limits on the President’s removal power, such as those protecting the officers of the independent agencies, are unconstitutional.

The Court articulates three fundamental principles that lead to its conclusion that the Act’s for-cause removal provisions are unconstitutional:

First, the Court establishes that the President must oversee the work of the executive branch. This premise stems from separation of powers, the vesting of the executive power in the President, and the singular responsibility of the President to the people for the faithful execution of the laws.<sup>8</sup>

Second, the Court argues that presidential oversight requires the capacity to remove subordinate officers. The President cannot fully oversee subordinate officers if he cannot remove them from office when they fail to faithfully execute the law. For the President to be held accountable for the work of the executive branch, he must be able to hold his subordinates accountable, by removal if necessary. Other methods of control cannot substitute for the removal power.<sup>9</sup>

Third, a statute cannot diminish or modify the President’s removal power, because removal provides a key constitutional means for the President to resist legislative encroachments and ensure adequate control over the executive branch.<sup>10</sup>

QED: From these general principles, the Court concludes that the Board’s two layers of for-cause removal protection are unconstitutional. As a remedy, however, the Court does not enjoin the operations of the Board.

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4. *Id.* § 7211(e)(6); *see also id.* § 7217(d)(3).

5. *Free Enter. Fund*, 130 S. Ct. at 3147 (quoting U.S. CONST. art. II).

6. *Id.* at 3147.

7. *Id.* at 3157.

8. *Id.* at 3151–57. *See infra* Part II.A.

9. *Free Enter. Fund*, 130 S. Ct. at 3158–59. *See infra* Part II.B.

10. *Free Enter. Fund*, 130 S. Ct. at 3154 n.4. *See infra* Part II.C.

Instead, it severs the for-cause removal protections that insulate the Board from the Commission.<sup>11</sup>

As a result of the Court's decision, the Board can proceed with its statutory functions, but with the possibility of at-will removal by the SEC. The SEC Commissioners, however, can be removed by the President only for cause, as the parties to the case stipulated. The Court decides the case with this understanding and does not reexamine the precedents upholding single layer restrictions on the President's removal power.<sup>12</sup> Therefore, the Court leaves Board members subject to removal by the SEC, an independent agency. The *President's* control over the Board only marginally increases, which leads a number of commentators to call the case "symbolic"—an insignificant win for proponents of the unitary executive theory.<sup>13</sup>

Yet the Court's reasoning proves both too much and too little for the case at hand, which deals with the relatively unusual circumstance of two levels of for-cause protections insulating the Board. The broad principles about presidential control over the executive branch go too far for the Court's ultimate conclusion that the SEC—an independent agency operating without full presidential control—may provide constitutionally adequate oversight for the Board.

The disconnect between the reasoning and the remedy implicitly raises the question: if two levels are unconstitutional, why not one? The Court's only answer to this is that *the Court*, not the Constitution, has previously allowed limitations on the President's removal power: "Since 1789, *the Constitution* has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary. *This Court* has determined, however, that this authority is not without limit."<sup>14</sup> The Court's precedents such as *Humphrey's Executor v. United States*<sup>15</sup> and subsequent cases sustained statutory limits on the President's removal power. Although these precedents are not challenged in this case, the Court makes clear that there may be a gap between the Court's precedents and the Constitution. The Court's *reasoning* fails to explain how two layers of removal protection differ from one.

This tension in the Court's opinion sets the foundation for a wider assault on agency independence. The proof applies logically to the more ordinary first layer of agency independence. First, the President must oversee

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11. *Free Enter. Fund*, 130 S. Ct. at 3161–62.

12. *Id.* at 3147 ("The parties do not ask us to reexamine any of these precedents, and we do not do so.").

13. See, e.g., Rick Pildes, *The Unitary Executive, Administrative Agencies, and the Supreme Court*, BALKINIZATION, (May 18, 2009, 10:36 AM), <http://balkin.blogspot.com/2009/05/unitary-executive-administrative.html>; see *infra* notes 51–53 and accompanying text.

14. *Free Enter. Fund*, 130 S. Ct. at 3146 (emphasis added) (citing *Humphrey's Executor*, 295 U.S. 602, 620 (1935); *Myers v. United States*, 272 U.S. 52 (1926)).

15. 295 U.S. at 628–30 (upholding the constitutionality of statutory limitations on the President's removal power with regard to the Commissioners of the Federal Trade Commission).

executive branch officials. Second, oversight requires the ability to remove such officials. Third, the President's removal power cannot be diminished or modified by statute. QED: The first layer of agency independence is unconstitutional because it insulates the heads of independent agencies from the President's removal power and consequently contravenes the constitutional structure that vests the executive power and accountability for the executive branch in the President. The Court's logic can lead to the conclusion that even one layer of for-cause removal protection is unconstitutional. The proof can be applied beyond the narrow question presented here to the wider battle over agency independence.

Furthermore, the Court's severance remedy increases the possibility that the decision may have a further reach because it separates independence from the independent agencies. The Court severs the Board's for-cause removal protections, which leaves the Board intact, but subject to removal by the SEC. As the Court explains, "[T]he existence of the Board does not violate the separation of powers, but the substantive removal restrictions imposed by [the statute] do."<sup>16</sup> Similarly, severing one layer of agency independence would make the officers of an independent agency subject to at-will removal by the President, but it would not otherwise alter the statutory responsibilities of the agency. Congress might wish to restructure agencies that lose their independence, but the *judicial* remedy would be relatively narrow; it would bring agencies under presidential control, but not abolish them altogether. Both the proof and remedy proposed by the Court resolve the narrow question about the PCAOB, but they gesture toward more. The Court has made a modest proposal for abolishing agency independence.

The Chief Justice's opinion in time may be viewed like *Marbury v. Madison*,<sup>17</sup> reaching a narrow result on the immediate controversy at issue—the Board continues largely as before—while staking out ground for a judicial incursion against agency independence. As in *Marbury*, the Chief Justice could have gone a number of different directions, but the decision reaches a result that minimizes political opposition, while leaving open the possibility for more significant impact in future decisions. To see this case as inconsequential is to miss the forest for the trees.

This Article focuses on the possible implications of *Free Enterprise Fund* for the constitutionality of agency independence.<sup>18</sup> The Article first explains the background of the PCAOB case, the Supreme Court's decision, and responses to the case.<sup>19</sup> Next, it sets out the Court's proof for why the

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16. *Id.* at 3161.

17. 5 U.S. (1 Cranch) 137 (1803).

18. This Article does not take up the broader questions about the appropriate scope of the removal power, which are discussed in greater detail by other scholars. *See generally*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 642–45 (1994); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1, 2 (1994); Geoffrey P. Miller, *Independent Agencies*, 1986 SUP. CT. REV. 41, 42–43; Saikrishna Prakash, *New Light on the Decision of 1789*, 91 CORNELL L. REV. 1021, 1022–23 (2006).

19. *See infra* Part I.

Board is unconstitutional and examines how the Court's focus on formal, structural principles applies beyond the facts of this case.<sup>20</sup> Then, the Article explains how the Court's proof—its emphasis on the importance of presidential control and accountability—calls into question the constitutionality of agency independence more generally.<sup>21</sup> Finally, it presents evidence that the Court may be receptive to reconsidering its earlier precedents and suggests some implications for future challenges to the constitutionality of agency independence.

I. BACKGROUND OF *FREE ENTERPRISE FUND V. PCAOB* AND REACTIONS TO THE DECISION

A. *Summary of the Case*

As part of accounting and financial services reforms in the Sarbanes-Oxley Act, Congress created the PCAOB to standardize and regulate the auditing of public companies. Accounting firms that audit publicly traded companies must register with the Board<sup>22</sup> and must comply with auditing and other standards issued by the Board.<sup>23</sup> The Board must regularly inspect registered accounting firms and has authority to conduct investigations of any action or practice that may violate the Act, the securities laws, the Board's rules, or the SEC's rules.<sup>24</sup> The Board was modeled on private self-regulatory organizations such as the New York Stock Exchange, but “[u]nlike the self-regulatory organizations . . . the Board is a Government-created, Government-appointed entity, with expansive powers to govern an entire industry.”<sup>25</sup>

The Commission appoints the five members of the Board and oversees their issuance of rules and imposition of sanctions.<sup>26</sup> The Commission can remove Board members only “for good cause shown” and in accordance with certain procedures.<sup>27</sup> The standard for removal is “unusually high,” as the Court observed.<sup>28</sup> In order to remove a Board member, the Commission must make a finding on the record, after notice and opportunity for a hearing, that (1) the Board member *willfully* violated the Act, the rules of the Board, or the securities laws, (2) *willfully* abused his authority, or (3) failed to enforce compliance by an accounting firm of relevant statutory provisions or professional standards.<sup>29</sup>

Beckstead and Watts, LLP, a Nevada accounting firm, registered with the Board. After the Board released a report critical of the firm's auditing

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20. *See infra* Part II.

21. *See infra* Part III.

22. 15 U.S.C. § 7212(a) (2006).

23. *Id.* § 7213(a)(1).

24. *Id.* §§ 7214–7215.

25. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3147 (2010).

26. 15 U.S.C. §§ 7211(e)(1), 7217(b)–(c).

27. *Id.* § 7211(e)(6).

28. *Free Enter. Fund*, 130 S. Ct. at 3158.

29. 15 U.S.C. § 7217(d)(3).

procedures, the firm, along with Free Enterprise Fund, a nonprofit organization, sued the Board and challenged its constitutionality. The two organizations (petitioners) argued that the Act was unconstitutional because it violated the Appointments Clause and separation-of-powers principles. The parties stipulated that the SEC Commissioners could be removed from office only under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office."<sup>30</sup> The Court emphasized that it decides the case "with that understanding."<sup>31</sup> Moreover, none of the parties asked the Court to reexamine *Humphrey's Executor* or the constitutionality of the SEC's independence.<sup>32</sup> Accordingly, the central question in the case was whether the for-cause limitation on the removal of Board members by the Commission was constitutional. In particular, petitioners argued that the Act violated separation of powers by insulating the PCAOB from presidential oversight, control, and supervision.<sup>33</sup>

Moreover, petitioners contended that the Act violated the Appointments Clause because Board members are principal officers who must be appointed by the President with the Advice and Consent of the Senate.<sup>34</sup> Even if the Board members were treated as inferior officers, Article II requires their appointment be vested in the "Head" of a "Department," not by the majority of Commissioners.<sup>35</sup> Petitioners argued that independent agencies are not Departments and that the Head of the SEC is its Chairman.<sup>36</sup> As a remedy, they sought a declaratory judgment that the Board is unconstitutional and an injunction enjoining further operations of the Board. The district court rejected these arguments on the merits and held that the Act was constitutional.<sup>37</sup> The U.S. Court of Appeals for the District of Columbia affirmed,<sup>38</sup> with Judge Brett Kavanaugh dissenting.<sup>39</sup>

In a 5-4 decision, the Supreme Court reversed in part the Court of Appeals and held that "the dual for-cause limitations on the removal of Board members contravened the Constitution's separation of powers."<sup>40</sup> Writing for the majority, Chief Justice Roberts focused on the issue of first impression presented by the particular structure of the Board, in which its

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30. *Free Enter. Fund*, 130 S. Ct. at 3148–49. For an interesting discussion of this aspect of the case see Gary Lawson, *Stipulating the Law*, 109 MICH. L. REV. (forthcoming), available at <http://ssrn.com/abstract=1677014> (arguing contrary to standard American practice that parties should be able to stipulate legal conclusions).

31. *Free Enter. Fund*, 130 S. Ct. at 3149.

32. *Id.* at 3147 ("The parties do not ask us to reexamine any of these precedents, and we do not do so.").

33. Brief for Petitioners at \*7–8, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 2247130 at \*7–8.

34. *Id.*

35. *Id.* at \*8.

36. *Id.*

37. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, No. 06-0217, 2007 WL 891675, at \*4, \*6 (D.D.C. Mar. 21, 2007).

38. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 715 (D.C. Cir. 2008).

39. *Id.* at 685 (Kavanaugh, J., dissenting).

40. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3151 (2010).

members are protected by two levels of for-cause removal. In the Court's precedents, "only one level of protected tenure separated the President from an officer exercising executive power. It was the President—or a subordinate he could remove at will—who decided whether the officer's conduct merited removal under the good-cause standard."<sup>41</sup> As the Court explained, Board members may be removed only for good cause and the determination over whether good cause exists is vested with the SEC Commissioners, who may only be removed for cause. "The result is a Board that is not accountable to the President, and a President who is not responsible for the Board."<sup>42</sup> The Court held that the second layer of protection makes a constitutional difference; two layers of for-cause protection contravened the constitutional structure of separation of powers and the vesting of executive power in the President.

As a remedy, the Court held that the for-cause removal protections for the Board could be severed from the Act. The Board could continue with its duties, but would be subject to at-will removal by the Commissioners.<sup>43</sup> The Court explicitly rejected the petitioners' other claims. It held that the Board's appointment was consistent with the Appointments Clause because appointment was vested in the Head of a Department, here the Commissioners of the SEC. The Court rejected the arguments that the Commission is not a Department, or that the Head must be the Chairman of the Commission. Because it determined that the for-cause provisions could be severed, the Court declined to issue the broader declaratory and injunctive relief sought by petitioners that would have enjoined the operation of the Board.

Justice Stephen Breyer dissented, joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Sonia Sotomayor, arguing that the second layer of removal protection "does not significantly interfere with the President's 'executive Power,'" and "violates no separation-of-powers principle."<sup>44</sup> Justice Breyer noted that no text, history, or precedent fully answered the question about the constitutionality of two layers of for-cause removal.<sup>45</sup> Accordingly, the dissent's functional analysis focused on how the Board operated and the type of practical control exercised by the Commission. Justice Breyer explained how the Commission exerted substantial control over Board activities and why the independence of Board members served important institutional purposes. Moreover, the dissent criticized the Court's decision for being "both imprecise and overly broad."<sup>46</sup> Justice Breyer argued that the majority's opinion did not distinguish two layers of for-cause protection from one layer,<sup>47</sup> and that its decision might affect hundreds, even thousands of high-level government officials.<sup>48</sup>

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41. *Id.* at 3153.

42. *Id.*

43. *Id.* at 3161–62.

44. *Id.* at 3164 (Breyer, J., dissenting).

45. *Id.* at 3167.

46. *Id.* at 3184.

47. *Id.* at 3171.

48. *Id.* at 3178–80.

### B. *The Reaction*

*Free Enterprise Fund* drew a lot of attention when the Court granted certiorari and there was much anticipation about the outcome largely for two reasons. First, the Board regulated a key part of the economy and controlled the fate of accounting firms nationwide. As a practical matter, dismantling the Board and its work might have had significant consequences for the financial industry and for Congress' attempts at reform. Second, from a theoretical perspective, the decision was anticipated for what it might say with regard to the President's appointment and removal powers and separation of powers generally—would the Court overrule *Morrison v. Olson*?<sup>49</sup> Would it enjoin the Board because it was constituted in contravention of the Appointments Clause?

As it turned out, the Court's decision ultimately generated few headlines. Commentators almost uniformly found the decision to be of limited significance, both on a practical level with regard to the operation of the Board, and on a theoretical level with regard to the constitutionality of the independent agencies. As to the effect on financial industry regulation, the Board could continue with its statutory duties because the Court's remedy only severed the removal protection of the Board, but otherwise left the Board intact. The decision left Commissioners free to remove Board members at will, but most commentators familiar with the workings of the SEC thought the decision would have little impact on the Board. Rick Pildes, who filed a brief on behalf of seven former SEC Chairmen, argued that the victory was "symbolic." He noted that the decision "has no practical effect at all on the Sarbanes-Oxley Act; the SEC and the Board that administers the Act will go on as before."<sup>50</sup> Professor Pildes also argued "the decision will change nothing in the on-the-ground relationship between the SEC and the Board."<sup>51</sup>

David Zaring suggested that the Court "handed petitioners a pretty empty declaratory victory" and although the remedy was "unconventional," "it ma[de] this decision much less dramatic than it threatened to be."<sup>52</sup> Similarly, John Elwood argued that the opinion "won't have much immediate effect outside of the PCAOB" and that a ruling on other grounds would have been "far more disruptive."<sup>53</sup> Others expressed disappointment that the Court did not go further toward invalidating the independent agencies, arguing that Chief Justice Roberts "slapped a bandaid on a gaping

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49. 487 U.S. 654 (1988).

50. Rick Pildes, *The Free Enterprise Decision: A Symbolic Victory for the "Unitary Executive Branch" Vision of the Presidency, but of Limited Practical Consequence*, BALKINIZATION (June 28, 2010, 11:47 AM), <http://balkin.blogspot.com/2010/06/free-enterprise-decision-symbolic.html>.

51. *Id.*

52. David Zaring, *Goodbye, Old PCAOB, and Hello, New PCAOB*, THE CONGLOMERATE, <http://www.theconglomerate.org/2010/06/goodbye-old-pcaob-and-hello-new-pcaob.html> (June 28, 2010).

53. John Elwood, *Free Enterprise Fund: The Lopez of Separation of Powers Doctrine*, VOLOKH CONSPIRACY (June 28, 2010, 12:31 PM), <http://volokh.com/2010/06/28/free-enterprise-fund-the-lopez-of-separation-of-powers-doctrine>.

canyon in the Constitution. The decision is wholly unpersuasive.”<sup>54</sup> In the initial aftermath of the decision, the widespread conclusion was that the decision would have a marginal impact on the President’s authority, little effect on the Board’s operations, and no consequence for the independent agencies generally.

In the ensuing months, scholars have examined the decision more closely and focused on particular aspects of the Court’s reasoning, but by and large, have concluded that the decision has limited significance for separation of powers and the constitutionality of independent agencies. For instance, Professor Pildes acknowledged that it is the “most expansive vision of presidential power over the structure of administrative agencies in perhaps ninety years” but maintained that the “implications of *Free Enterprise Fund* for the more general struggle between Congress and the president over administration remain obscure because the case presented such an idiosyncratic context.”<sup>55</sup> Peter Strauss has noted that the case was “hardly earthshaking” and that the implication of the decision was to “reaffirm the result in *Humphrey’s Executor*” because it recognizes that “Congress can create elements of the executive branch whose heads are removable only ‘for cause.’”<sup>56</sup> Sustaining the PCAOB on this rationale required the Court to accept the constitutionality of the single for-cause protection of the SEC, and therefore reaffirmed the constitutionality of independent agencies.<sup>57</sup> Similarly, Jack Beermann argued, “the Court did not deliver on the opening paragraph’s promise of a major reform in the law of separation of powers” and that to the extent the decision was viewed as a milestone “it is more likely to be understood as the acceptance of independent agencies by a conservative Court that may have been expected to move things in a different direction.”<sup>58</sup> As the next part explains, this Article challenges these common perceptions.

## II. A PROOF FOR THE UNCONSTITUTIONALITY OF THE PCAOB

Chief Justice Roberts’ opinion for the Court sets out a number of very broad principles about separation of powers and the importance of vesting the executive power in a single President. These principles cast doubt on the constitutionality of agency independence more generally. The opinion

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54. Stephen M. Bainbridge, *The PCAOB Anti-climax*, PROFESSORBAINBRIDGE.COM (June 28, 2010, 9:38 AM) <http://www.professorbainbridge.com/professorbainbridge.com/2010/06/the-pcaob-anticlimax.html>.

55. Richard H. Pildes, *Free Enterprise Fund, Boundary—Enforcing Decisions, and the Unitary Executive Branch Theory of Government Administration*, 6 DUKE J. CONST. L. & PUB. POL’Y (forthcoming), available at <http://ssrn.com/abstract=1678031>.

56. Peter L. Strauss, *On the Difficulties of Generalization—PCAOB in the Footsteps of Myers, Humphrey’s Executor, Morrison, and Freytag* 17, 19 (Colum L. Sch. Pub. L. & Legal Theory Working Paper Grp., Working Paper No. 10–253, 2010), available at <http://ssrn.com/abstract=1693143>.

57. *Id.* at 19.

58. Jack Michael Beermann, *An Inductive Understanding of Separation of Powers or Why the PCAOB Opinion Doesn’t Change Anything Yet* 3–4 (Boston Univ. Sch. of L., Working Paper No. 10–24, 2010), available at <http://ssrn.com/abstract=1656452>.

notes the “modesty” of the question proposed,<sup>59</sup> but then answers that question with principles that form a proof, one that seems suited not so much to the unusual facts of this case, but rather to independent agencies more broadly. Moreover, the Court uses a severance remedy that can easily be applied to independent agencies because it allows an agency to continue with its duties, subject to the possibility of at will removal by the President.

In the course of answering the modest question about the Board, the decision provides the reasoning for undermining *Humphrey’s Executor* and the constitutionality of agency independence. Is the Court inclined to overrule its precedents to invalidate agency independence? There are some reasons to think that it has created an opening for such a challenge, as discussed below.<sup>60</sup> Although there are the usual difficulties with predicting where the Court will go next, the logic of *Free Enterprise Fund* has the potential to disrupt agency independence across the board.

This part explains the Court’s proof in greater detail and demonstrates how the opinion’s reasoning sets the foundation for challenging the constitutionality of agency independence. Admittedly, the Chief Justice’s opinion does not proceed precisely in the form identified in this part; such a clear roadmap of the broader implications might run against claims to judicial modesty. Yet the principles about the structure of the Constitution, the vesting of the executive power in the President, the need for political accountability in the executive branch, and the constitutional imperative of the removal power form a type of proof that highlights the central logic of the opinion, which is that a statute cannot diminish or eliminate the President’s power to oversee and remove executive officers.

#### A. Faithful Execution of the Laws Requires Presidential Oversight

The Court’s major premise is that separation of powers requires the President to oversee and to control executive branch officials in order to ensure faithful execution of the laws.

In *Free Enterprise Fund*, the Court begins with separation of powers: “Our Constitution divided the powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.”<sup>61</sup> Article II vests the executive power in the President who must take care that the laws be faithfully executed.<sup>62</sup> Executive officers help the President with his duties and the Constitution empowers the President to “keep these officers accountable—by removing them from office, if necessary.”<sup>63</sup> The President must oversee executive officers, because “if any power whatsoever is in its

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59. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3157 (2010) (“The point is not to take issue with for-cause limitations in general; we do not do that. The question here is far more modest.”).

60. See *infra* Part IV.A.

61. *Free Enter. Fund*, 130 S. Ct. at 3146 (internal quotation marks omitted).

62. U.S. Const. art II, § 1, § 3; *Free Enter. Fund*, 130 S. Ct. at 3146.

63. *Free Enter. Fund*, 130 S. Ct. at 3146.

nature Executive, it is the power of appointing, overseeing, and controlling those who execute the laws.”<sup>64</sup>

To support this principle, the Chief Justice appeals to the “landmark case” of *Myers v. United States*,<sup>65</sup> which recognized that the President has “general administrative control of those executing the laws.”<sup>66</sup> *Myers* is often considered to be the high-water mark of the unitary executive theory, because the lengthy decision emphasizes the constitutional imperative of the President’s exclusive and unhampered removal power. Invoking *Myers* at the outset indicates the direction of the Court’s opinion. The Court does not frequently cite *Myers*, but follows its general principles throughout.

The Court links control of the executive branch with the ability to oversee the work of its officers. “Without the ability to oversee the Board, or to attribute the Board’s failings to those whom he *can* oversee, the President is no longer the judge of the Board’s conduct.”<sup>67</sup> The President can judge the Board’s conduct only if he can oversee its activities. Here, the Court expresses this idea in the context of the double layer of for-cause removal, but the principle stresses the general importance of presidential oversight of executive officers.

The Court explains that the President’s responsibility for overseeing and controlling executive branch officials stems in part from the constitutional obligation to “take Care that the Laws be faithfully executed.”<sup>68</sup> The President’s inability to oversee the Board means that “[h]e can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member’s breach of faith.”<sup>69</sup> The judgment of what constitutes “faithful execution” of the laws rests with the President under Article II. Accordingly, the President must be able to set the standard for determining whether his subordinates are properly executing their duties.<sup>70</sup> If the President is to be held accountable to the people for faithful execution, he must be able to oversee the work of executive branch officials and such oversight must be left to his discretion.<sup>71</sup>

Moreover, the Court explains that presidential oversight and control of executive branch officials has an important structural purpose—it plays an integral part in the scheme of separation of powers between the President and Congress. The President’s appointment, oversight, and control of those who execute the laws are “key constitutional means” for the executive to

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64. *Id.* at 3151 (1 ANNALS OF CONG. 463 (1789) (statement of James Madison)) (internal quotation marks omitted).

65. 272 U.S. 52 (1926).

66. *Free Enter. Fund*, 130 S. Ct. at 3152 (quoting *Myers v. United States*, 272 U.S. at 164) (internal quotation marks omitted).

67. *Id.* at 3154.

68. U.S. CONST. art. II, § 3; *see also Free Enter. Fund*, 130 S. Ct. at 3147 (“The President cannot ‘take Care that the Laws be faithfully executed’ if he cannot oversee the faithfulness of the officers who execute them.”).

69. *Free Enter. Fund*, 130 S. Ct. at 3154.

70. As the next part of the proof explains, oversight of subordinates requires being able to remove them at will. *See infra* Part II.B.

71. As the third step of the proof explains, this argument leads the Court to the principle that the removal power cannot be limited by statute. *See infra* Part II.C.

resist the encroachments of the other branches.<sup>72</sup> The Court considers the appointment and oversight of executive officials to be one of the structural protections of the Constitution that, in the words of James Madison, allows ambition to counteract ambition by “giving each branch ‘the necessary constitutional means, and personal motives, to resist encroachments of the others.’”<sup>73</sup>

Without presidential oversight, Congress could assume a disproportionate power over the administrative state. As the Court explains, “Congress has plenary control over the salary, duties, and even existence of executive offices. Only presidential oversight can counter its influence.”<sup>74</sup> Vesting responsibility for executive officers with the President empowers him to resist legislative encroachments. In addition, it matches responsibility for faithful execution with control over executive branch officials.<sup>75</sup>

For this responsibility to be efficacious, the responsibility must ultimately belong to the President alone: “It is *his* responsibility to take care that the laws be faithfully executed. The buck stops with the President, in Harry Truman’s famous phrase.”<sup>76</sup> The Chief Justice does not use the contentious term “unitary executive,” but instead cites an opinion by Justice Stephen Breyer for the proposition that the President “‘cannot delegate ultimate responsibility or the active obligation to supervise that goes with it,’ because Article II ‘makes a *single* President responsible for the actions of the Executive Branch.’”<sup>77</sup> The singular, centralized nature of the President’s authority is a key feature of the structure of accountability within the executive branch.

Chief Justice Roberts explains that the unitary nature of presidential control is necessary to self-government:

Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of

72. *Free Enter. Fund*, 130 S. Ct. at 3157 (quoting 1 ANNALS OF CONG. 463 (1789)) (internal quotation marks omitted).

73. *Id.* at 3157 (quoting THE FEDERALIST No. 51 (James Madison)).

74. *Id.* at 3156.

75. Similarly, in *Myers* the Court explained that the constitutional structure could not have given Congress or the Senate

in case of political or other differences, the means of thwarting the Executive in the exercise of his great powers and in the bearing of his great responsibility, by fastening upon him, as subordinate executive officers, men who by their inefficient service . . . [or] by their lack of loyalty to the service, or by their different views of policy, might make his taking care that the laws be faithfully executed most difficult or impossible.

*Myers v. United States*, 272 U.S. 52, 131 (1926). *Myers* noted that the President’s exercise of his great powers requires subordinates who are efficient, loyal, and share the President’s view of policy. *Id.* The President’s responsibilities require that he oversee whether his subordinates meet these and other criteria that he might set out for their service in his Administration. *Id.*

76. *Free Enter. Fund*, 130 S. Ct. at 3152.

77. *Id.* at 3154 (emphasis added) (quoting *Clinton v. Jones*, 520 U.S. 681, 712–13 (1997) (Breyer, J., concurring)).

daily life, heightens the concerns that it may slip from the Executive's control, and thus from that of the people.<sup>78</sup>

It follows from the President's constitutional responsibility that resting important executive powers beyond the control of the President undermines democratic accountability. "The diffusion of power carries with it a diffusion of accountability."<sup>79</sup> Within the executive branch, the President is the only democratically elected official and the political accountability of his subordinates depends on their accountability to the President.<sup>80</sup> The Court acknowledges that Congress has the power to create a vast federal bureaucracy, but the "Constitution requires that a President chosen by the entire Nation oversee the execution of the laws."<sup>81</sup>

The Court establishes this central principle: vested with the executive power, the President must oversee executive officers as part of his obligation for faithful execution of the laws and to ensure political accountability for the work of the executive branch. This principle serves as the major premise of the Court's proof.

*B. Presidential Oversight Requires the Capacity to Remove Subordinate Officers*

The Court begins with the premise that the structure of our constitutional democracy requires that the President oversee the work of his subordinates and ensure they are faithfully executing the laws. The first principle is relatively uncontroversial, as the need for presidential supervision of the executive branch is widely acknowledged.<sup>82</sup> The difficult questions pertain to how the President exercises supervision and to what degree Congress can restrict the President's ability to supervise.

The Court answers some of these questions in its second premise: presidential oversight requires the President have the ability to remove executive branch officials. Effective oversight and control require the ability to remove officials who fail to properly execute the laws. As Chief Justice Roberts explains, debates during the founding era suggested that "the executive power included a power to oversee executive officers *through removal*; because that traditional executive power was not 'expressly taken away, it remained with the President.'"<sup>83</sup> By contrast, Justice Breyer does not argue against the importance of presidential

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78. *Free Enter. Fund*, 130 S. Ct. at 3156.

79. *Id.* at 3155.

80. *Id.* (citing THE FEDERALIST No. 72 (Alexander Hamilton) (J. Cooke ed., 1961)).

81. *Id.* at 3155–56.

82. See, e.g., Strauss, *supra* note 56, at 20 ("[T]he question is not whether [the President] is entitled to command or decide, but what constitutes the constitutionally indispensable elements of his necessary oversight relationship.").

83. *Free Enter. Fund*, 130 S. Ct. at 3151–52 (emphasis added) (quoting letter from James Madison to Thomas Jefferson (June 30, 1789), in 16 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 893 (2004)).

oversight, but instead maintains that such oversight may be provided by means other than the removal power.<sup>84</sup>

At various points in the opinion, the Court suggests that these two principles—presidential oversight and the removal power—are inextricably linked. This is the strongest form of the argument with regard to the unitary executive and the unconstitutionality of the independent agencies, and is the principle at the heart of *Myers*.<sup>85</sup> The Court expounds on how the removal power is one of the key constitutional means of presidential control over the executive branch. The President cannot fulfill his responsibilities through mere persuasion. As Chief Justice Roberts emphasizes, “Congress cannot reduce the Chief Magistrate to a cajoler-in-chief.”<sup>86</sup>

The accountability of the President for the faithful execution of the laws requires that he have the power to secure execution in the manner he sees fit: “That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties. Without such power, the President could not be held fully accountable for discharging his own responsibilities; the buck would stop somewhere else.”<sup>87</sup> This argument proceeds on the structural understanding that oversight requires the means of controlling subordinates and that ultimate control requires the removal power. Without the ability to direct and control backed up by the removal power, executive authority dissipates and this undermines the responsibility of the President for the actions of the executive branch. The natural implication of the constitutional structure is that the President retains the full removal power, a point also discussed in *Myers*.<sup>88</sup>

By contrast, the dissent defends the Act by highlighting the virtues of bureaucratic independence. Statutes give the heads of independent agencies tenure protection precisely to limit the President’s oversight and political control. Justice Breyer expresses the standard interests served by for-cause removal provisions, including that they protect the independence of adjudication and serve the “need for technical expertise.”<sup>89</sup> With regard to the independent agencies, such goals are thought to be in conflict with direct presidential oversight. Independent agencies are created in part to remove certain functions from the President’s “political” influence.

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84. *Id.* at 3170 (Breyer, J., dissenting) (evaluating the extent to which the removal provision “as a practical matter” limits the “President’s exercise of executive authority”).

85. *See generally* *Myers v. United States*, 272 U.S. 52, 122 (1926) (explaining in great historical detail why the removal power necessarily follows from the President’s control of the executive branch).

86. *Free Enter. Fund*, 130 S. Ct. at 3157.

87. *Id.* at 3164.

88. *Myers* drew this connection between faithful execution of the laws and the power to appoint and remove executive officers. As Chief Justice William Howard Taft explained,

The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

*Myers*, 272 U.S. at 122.

89. *Free Enter. Fund*, 130 S. Ct. at 3174 (Breyer, J. dissenting).

Justice Breyer would also uphold independence of the Board and its double insulation from presidential removal on the ground that the statutory oversight provided by the Commission is constitutionally sufficient. He explains that although Board members may be removed only for cause, in reality the statute gives the Commission very broad control over the Board and such *functional* control renders the Board constitutional. The statutory scheme includes various means of control, including that the Commission (1) must approve Board rules, (2) may review and alter Board rules, (3) may review and alter Board sanctions, and (4) may promulgate rules restricting the Board's conduct of inspections and investigations.<sup>90</sup> Moreover, the Commission controls the Board's budget and can assign the Board any duties or functions that it deems appropriate.<sup>91</sup>

Justice Breyer argues that these provisions effectively give the Commission a significant degree of control over the Board even without at-will removal: "And if the President's control over the Commission is sufficient, and the Commission's control over the Board is virtually absolute, then, as a practical matter, the President's control over the Board should prove sufficient as well."<sup>92</sup> From the dissent's perspective, the limitations on the Commissioners' removal power have little significance because of the Commissioners' "authority and virtually comprehensive control over all of the Board's functions."<sup>93</sup> In sum, functional control can substitute for removal and provide a constitutionally sufficient method of oversight.

Chief Justice Roberts responds to the dissent by defending the importance of the removal power on both functional and constitutional grounds. First, he argues that functional means of control cannot replace the removal power. Although the Commission may hold the Board accountable by approving its budget or overseeing its rules and sanctions, these means of control are "not equivalent to the power to remove Board members."<sup>94</sup> As a practical matter, control over the Board's budget or sanctions "is a problematic way to control an inferior officer. The Commission cannot wield a free hand to supervise individual members if it must destroy the Board in order to fix it."<sup>95</sup> The Court stresses that removal is a targeted and specific method of oversight that allows the President to dismiss an executive officer who fails to serve the goals and policies of the President. Chief Justice Roberts argues that removal is a better and more precise means of control. Other methods, such as cutting the Board's budget or enacting rules to govern the Board's procedures, work like a sledgehammer when a scalpel is more effective. The President should not have to hobble a government agency because he cannot dismiss an ineffective or disloyal officer.

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90. *Id.* at 3172.

91. *Id.* at 3173 (citing statutory provisions).

92. *Id.*

93. *Id.* at 3172.

94. *Id.* at 3158 (majority opinion).

95. *Id.* at 3158–59.

The Chief Justice's argument, however, goes beyond a disagreement about whether removal is functionally superior. Rather, removal is the constitutionally required means of oversight, particularly because the Board exercises significant executive power outside of the effective control of the Commission.<sup>96</sup> The Court rejects the idea that pragmatic or functional limitations can be, as Justice Breyer says, "sufficient," because they do not serve the same purpose as removal—a distinct means of oversight related to the executive power and executive duty of faithful execution. Accordingly, the constitutional structure of separation of powers requires presidential oversight of executive officers and such oversight requires the ability to remove these officers at will.

### C. Congress Cannot Limit the President's Removal Power

Faithful execution of the laws requires presidential oversight of executive officials. Moreover, such oversight requires, as a general rule, the ability to remove officials when they fail to perform to the President's standards. These first two fundamental principles lead to the next question about the extent to which Congress has the authority to restrict the President's removal authority. This is precisely the question at issue in the case: "whether Congress may deprive the President of adequate control over the Board, which is the regulator of first resort and the primary law enforcement authority for a vital sector of our economy."<sup>97</sup> The Court holds that Congress cannot deprive the President of such "adequate control."<sup>98</sup>

This question, however, is not entirely straightforward. The Constitution provides for the appointment of principal and inferior officers, but is silent with respect to their removal.<sup>99</sup> Since *Humphrey's Executor*, the Court has held that Congress may limit the President's authority to remove officials within independent agencies.<sup>100</sup> Moreover, the Court has also upheld restrictions on principal officers to remove their inferiors, because the principal officers remain ultimately responsible to the President.<sup>101</sup> The Court puts aside consideration of these cases and notes that their validity is not at issue in this case.<sup>102</sup> The specific question about the constitutionality of two levels of for-cause removal is one of first impression. With regard to

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96. *Id.* at 3159 ("[T]he Act nowhere gives the Commission effective power to start, stop, or alter individual Board investigations, executive activities typically carried out by officials within the Executive Branch.").

97. *Id.* at 3161.

98. *Id.*

99. *See id.* at 3167 (Breyer, J., dissenting) ("[T]he question presented lies at the intersection of two sets of conflicting, broadly framed constitutional principles. And no text, no history, perhaps no precedent provides any clear answer."); *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

100. *See Humphrey's Executor v. United States*, 295 U.S. 602, 631–32 (1935).

101. *See Morrison*, 487 U.S. at 672; *United States v. Perkins*, 116 U.S. 483, 485 (1886).

102. The parties stipulated that SEC members could be removed only for cause, and they did not challenge the validity of *Humphrey's Executor*. *Free Enter. Fund*, 130 S. Ct. at 3148.

this new arrangement, the Court holds that the removal power can be diluted no further. Two levels is too many.

Nonetheless, in reaching this conclusion about the Board, the Chief Justice sets out the general principle that Congress cannot limit the President's removal power, because such power is constitutionally vested in the President. "Congress has plenary control over the salary, duties, and even existence of executive offices. Only Presidential oversight can counter its influence. That is why the Constitution vests certain powers in the President that 'the Legislature has no right to diminish or modify.'"<sup>103</sup> Presidential oversight is an essential counterbalance to Congress and the removal power is essential to make such oversight effective.<sup>104</sup> The vesting of the executive power with the President means that Congress cannot "diminish or modify" the President's powers, including the power to remove executive officers. Although the Court at points pleads restraint, its language goes beyond the narrow question of the Board's unusual two layers of insulation from presidential control, and instead sets forth the constitutional principle that Congress cannot diminish or modify the President's removal power because of the constitutional structure of separation of powers and the vesting of the executive power in the President.

The generality of the Court's principle—that the President must retain the full removal power—is reflected in the statements quoted above, but also in the opinion's fourth footnote, which provides a key step in the Court's reasoning.<sup>105</sup> The Court explains that the double layer of for-cause protection is problematic when the President wants to remove a Board member whom the Commission wants to retain. "With the second layer in place, the Commission can shield its decision from Presidential review by finding that good cause is absent—a finding that, given the Commission's own protected tenure, the President cannot easily overturn."<sup>106</sup> Chief Justice Roberts argues that this is not just a possible scenario. Rather, "it is the central issue in this case: The second layer matters precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so."<sup>107</sup>

The Court concludes that a statute cannot prevent the President from removing a subordinate officer when he finds it necessary, because the President must have sole authority to determine necessity for removal. The removal power is a constitutional one and cannot be hampered by for-cause

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103. *Id.* at 3156 (quoting 1 ANNALS OF CONG. at 463 (1789) (statement of James Madison)).

104. *Id.* at 3157.

105. *Id.* at 3154 n.4. *Cf.* *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 281 (1989) ("When constitutional scholars talk about the 'problem of the footnote,' they are referring to a specific footnote, *the Footnote*, footnote four of *United States v. Carolene Products* . . . Here indeed is a footnote that has become more important than the text; that is often read separated from its text; that can stand alone.").

106. *Free Enter. Fund*, 130 S. Ct. at 3154 n.4.

107. *Id.*

limitations. The Court applies this principle to the double layer at issue in this case, but the Court's *reasoning* is not limited to the double layer.

The Court's remedy—severing the Board's for-cause removal protections—reinforces the constitutional mandate of the removal power. The Court explains that for-cause removal in the Act is only one of a number of provisions that together create the constitutional violation, and Congress remains free to pursue other alterations to the statute. But the Court suggests that any such alteration must allow the President to oversee and to control officials conducting core executive functions. Congress could “limit the Board's responsibilities so that its members would no longer be ‘Officers of the United States,’” or the Board's enforcement powers might be limited so it becomes purely recommendatory.<sup>108</sup> The alternatives suggested by the Court, however, make clear that Congress cannot create independence from presidential oversight, control, and removal for a Board that executes core executive branch functions. This remains true even if Congress does not aggregate power to itself and even if the President wishes to tie his hands with such provisions.

Thus, the Court maintains that the President's power to remove subordinate officers at will is a constitutional one that cannot be diminished or modified by statute.

*D. QED: Tenure Protections for the Board are Unconstitutional*

The Court sets out three broad principles: (1) faithful execution of the laws requires presidential oversight, (2) this oversight includes the power to remove executive branch officials, and (3) the removal power is a constitutional one that cannot be diminished or eliminated by statute. The Court draws from these broad principles the narrow conclusion that the Board's two layers of for-cause tenure are unconstitutional. This “new type of restriction—two levels of protection from removal for those who nonetheless exercise significant executive power” does not follow from the Court's precedents.<sup>109</sup> The Court explains: “We deal with the unusual situation, never before addressed by the Court, of two layers of for-cause tenure. And though it may be criticized as ‘elementary arithmetical logic,’ two layers are not the same as one.”<sup>110</sup> The Court concludes, “Congress cannot limit the President's authority in this way.”<sup>111</sup>

The Court emphasizes the novel, second level of tenure protection as its reason for holding the Board's independence unconstitutional. The Court holds that Board officials exercising executive power must have presidential oversight because such oversight ensures faithful execution and allows the public to hold the President politically responsible for the actions of the executive branch: “By granting the Board executive power without the Executive's oversight, this Act subverts the President's ability to ensure

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108. *Id.* at 3162.

109. *Id.* at 3164.

110. *Id.* at 3157 (citation omitted).

111. *Id.* at 3164.

that the laws are faithfully executed—as well as the public’s ability to pass judgment on his efforts.”<sup>112</sup> Article II vests the executive power in the President and the Court stresses that the President is singularly responsible for the actions of the executive branch. Accordingly, he cannot delegate this ultimate responsibility or the obligation to supervise that goes with it.<sup>113</sup> The Court makes clear that the Constitution requires presidential oversight and that such oversight requires unimpaired removal power by the President. The for-cause protections for the Board are unconstitutional because they disrupt the chain of accountability between the President and executive branch officials beyond the Court’s existing precedents.

After the lofty discussion about the importance of presidential oversight of executive officials, however, the Court provides a more pedestrian remedy to the constitutional problem. Severing the for-cause tenure protection simply allows the *Commission* to remove Board members at will—it does not bring Board members under the direct oversight of the President. The Board remains insulated from presidential control by the for-cause limits protecting the Commissioners. The Commissioners can remove Board members at will, but because of the Commissioners’ protected tenure, the *President’s* control over the Board continues to be attenuated.<sup>114</sup>

The Court’s proof establishes both more and less than what it needs to justify its remedy. It establishes too much with the first three steps of the proof that would naturally lead to the conclusion that the Board requires direct presidential oversight. It establishes too little when it fails to explain why oversight by the SEC, an independent agency, is a constitutionally sufficient means for the President to exercise control of the Board. As the next part demonstrates, however, a proof ill-suited to the Board nonetheless applies logically and perhaps more naturally to the traditional independent agencies.

### III. CHALLENGING THE CONSTITUTIONALITY OF FIRST-LEVEL AGENCY INDEPENDENCE

Despite claims to minimalism by the Court, *Free Enterprise Fund* logically implicates the constitutionality of agency independence. The breadth of the proof and the narrowness of the remedy are not well suited to the unusual and limited question about the constitutionality of the Board’s two levels of tenure protection. The proof and the remedy, however, create a framework for challenging the constitutionality of the independent agencies more generally. By emphasizing the importance of presidential control and accountability through the removal power, the Court calls into question the constitutionality of the ordinary first layer of agency independence. Moreover, severing for-cause removal provisions provides a

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112. *Id.* at 3155.

113. *Id.* at 3154.

114. Justice Breyer identifies this central aspect of the majority’s opinion. *Id.* at 3171 (Breyer, J., dissenting).

workable remedy for eliminating agency independence without eliminating the independent agencies.

Admittedly, *Free Enterprise Fund* does not directly challenge the constitutionality of the SEC or other independent agencies, because these questions were not presented to the Court. The parties stipulated that Commissioners could be removed only under the *Humphrey's Executor* standard of "inefficiency, neglect of duty, or malfeasance in office."<sup>115</sup> Moreover, no party challenged the constitutionality of the SEC's independence or asked the Court to reexamine *Humphrey's Executor*.<sup>116</sup> Accordingly, the Court does not revisit its precedents, nor does it specifically reaffirm them.<sup>117</sup> The Court, however, suggests some receptivity to a future challenge when it emphasizes that the President's removal power follows from the constitutional structure, whereas limitations on the removal power rest only on the Court's precedents.<sup>118</sup> Furthermore, the logic of the Chief Justice's opinion calls into question the constitutionality of one layer of removal protections. As this part demonstrates, the Court's framework could be used to challenge agency independence and possibly revisit *Humphrey's Executor*.

#### A. Applying the Proof to One Level of Agency Independence

The principles and proof that lead the Court to conclude that the Board's two layers of tenure protections are unconstitutional logically apply to most for-cause restrictions on the President's removal power, such as those insulating the independent agencies from presidential oversight. This logical application, of course, runs headlong into the Court's precedents. Whether the Court would in fact reconsider its precedents remains to be seen, but *Free Enterprise Fund* holds out this possibility.<sup>119</sup>

The Court's first premise is that faithful execution of the laws requires presidential oversight. This general principle follows from the separation of powers, the vesting of executive power in the President, and the need for democratic accountability in the executive branch. Although the Court at times focuses on the Board's two layers of for-cause removal, it also casts doubt on whether one layer is constitutional. For example, the Chief Justice repeatedly highlights that the President can hold the Commissioners accountable only in an attenuated way because they can be removed only for inefficiency, neglect of duty, or malfeasance in office: "Neither the President, nor anyone directly responsible to him, nor *even* an officer whose

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115. *Id.* at 3148 (majority opinion) (quoting *Humphrey's Executor v. United States*, 295 U.S. 602, 620 (1935)) (internal quotation marks omitted).

116. *Id.* at 3147.

117. *Cf.* *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the Gun Free School Zone Act of 1990 exceeds Congress's Commerce Clause authority, but reaffirming far-reaching Commerce Clause precedents such as *Wickard v. Filburn*).

118. *Free Enter. Fund*, 130 S. Ct. at 3146 ("Since 1789, the *Constitution* has been understood to empower the President to keep [executive] officers accountable—by removing them from office, if necessary. *This Court* has determined, however, that this authority is not without limit.") (emphasis added) (citing *Myers v. United States*, 272 U.S. 52 (1926)).

119. *See infra* Part IV.A.

conduct he may review only for good cause, has full control over the Board.”<sup>120</sup> The Chief Justice emphasizes the language of fullness—somebody must be “fully accountable” for the Board’s conduct, must have “full control over the Board.”<sup>121</sup>

Moreover, contrary to the reading of other commentators,<sup>122</sup> the Court’s holding does not require reaffirming the constitutionality of the first layer. In fact, throughout the opinion the Court casts doubt on the constitutionality of the limited control that the President has over the Commission. For example, after emphasizing the importance of full or direct control over executive officers, the Court notes that the President lacks “direct control” of the Commission.<sup>123</sup> The Court treats full control as the constitutional standard, but stresses that the President has less than full control of the Commission. Under existing precedents and the parties’ stipulation as to the independence of the Commission, the President can hold the Commission accountable only up to a point.

The Court never states that the President’s control over the Commission is sufficient, only that it remains unchallenged in this case. Instead, the Court simply repeats that without the tenure protections on the Board the President “could then hold the Commission to account for its supervision of the Board, to the same extent that he may hold the Commission to account for everything else it does.”<sup>124</sup> The second level of tenure protection changes even this limited accountability because the President “cannot hold the Commission fully accountable for the Board’s conduct, to the same extent that he may hold the Commission accountable for everything else that it does.”<sup>125</sup>

This formulation is at best ambiguous about the constitutionality of the SEC’s single layer of independence from the President’s control. Far from accepting the constitutionality of the first layer, it notes that accountability of the President over the Commission is incomplete—not full control or supervision, but some ill-defined quantum of accountability for all of the Commission’s actions. The Court does not have to reaffirm the constitutionality of the Commission’s for-cause removal protection to reach its conclusion. It simply holds that having a second layer of for-cause protection fundamentally changes the nature of the President’s removal power and goes beyond the accountability preserved by the Court’s precedents. What this accountability comes to, or whether and in what circumstances it would be constitutional, is simply not addressed by the decision. The logic of the opinion, however, strongly suggests that control over independent agencies such as the SEC is not sufficient, precisely

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120. *Free Enter. Fund*, 130 S. Ct. at 3154 (emphasis added).

121. *Id.*

122. See *supra* notes 56–58 and accompanying text.

123. *Free Enter. Fund*, 130 S. Ct. at 3153 (“[The] decision [regarding the Board’s removal] is vested instead in other tenured officers—the Commissioners—none of whom is subject to the President’s direct control.”).

124. *Id.* at 3154.

125. *Id.*

because separation of powers requires the President to have full oversight and control over executive branch officials.

The lack of adequate control relates to the second premise: presidential oversight requires the removal power. Again, the constitutional importance of the removal power does not turn on the two layers of removal protection for the PCAOB. Rather, the Court states a general principle that can extend to the first level of agency independence: “The Constitution that makes the President accountable to the people for executing the laws also gives him the power to do so. That power includes, as a general matter, the authority to remove those who assist him in carrying out his duties.”<sup>126</sup> If oversight requires control through the ability to remove, this logically applies to the first layer of tenure protection as well.

The implication for the first level is reflected in the Court’s analysis of the lack of “full” accountability over the Board, which does not result only from the second level of tenure protection as the Court sometimes maintains. Rather, the constitutional infirmity arises from the combination of tenure protections—the President can remove Commissioners only for cause, and the Commissioners in turn can remove Board members only for cause. The second level of tenure protections for the Board would not be unconstitutional *but for* the fact of the SEC’s independence. If Commissioners could be removed at will, then the tenure protections for Board members would presumably be constitutional under *Morrison v. Olson*.<sup>127</sup> The SEC’s independence is thus essential to the Court’s conclusion. If the Commissioners’ independence—their insulation from removal except for specified causes—poses no constitutional difficulty, then why can the Board not be independent from the SEC? The narrow and direct answer is that two layers of tenure protection are not the same as one.<sup>128</sup>

The Court’s logic, however, suggests a more substantial constitutional infirmity. The unconstitutionality of the Board’s tenure protection stems from the independence of the SEC. The Court holds that the second layer diminishes presidential control to an unacceptable degree: “this dispersion of responsibility could be multiplied. If Congress can shelter the bureaucracy behind two layers of good-cause tenure, why not a third?”<sup>129</sup> The Court holds that two or more layers of for-cause tenure impermissibly limit the President’s authority. The constitutionality of one layer of for-cause protection looms large despite the Court’s protestations to the contrary. If Congress cannot shelter the bureaucracy behind two layers of good-cause tenure, why can it shelter the bureaucracy behind one? The

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126. *Id.* at 3164.

127. 487 U.S. 654, 692 (1988) (upholding for-cause restrictions on the Attorney General’s ability to remove the independent counsel because “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”).

128. *Free Enter. Fund*, 130 S. Ct. at 3154–55.

129. *Id.* at 3154.

Court's reasoning implies that the first level of independence is at least constitutionally attenuated. Holding that the Board's protections go *too far* in removing control from the President implies that the independence of the Commission is itself on shaky constitutional ground because it undermines full presidential oversight. Whether one layer of agency independence impermissibly diminishes the President's control is a question left for another case, but the Court lays the foundations for an affirmative answer.

This implication is not lost on the dissenters. Justice Breyer denounces the Chief Justice's logical assault on the independent agencies. "[I]f the President's control over the Commission is sufficient, and the Commission's control over the Board is virtually absolute, then, as a practical matter, the President's control over the Board should prove sufficient as well."<sup>130</sup> Justice Breyer's argument draws on two assumptions. First, the President's control over the SEC is sufficient; and second, the SEC's control over the Board is virtually absolute. The majority focuses its argument on the second assumption and stresses that the Commission's control over the Board is not absolute, but instead leaves the Board with substantial independence over important executive functions. The majority explains at length how the Commissioners are "not responsible for the Board's actions"<sup>131</sup> and focuses on the specific deficiencies of the statutory scheme creating the Board.

The logic of the Court's opinion, however, repeatedly throws Justice Breyer's other fundamental premise into question—i.e., that presidential control over the SEC is constitutionally sufficient. The second step of the Court's proof—that presidential oversight requires the unhampered removal power—can apply to the first layer of for-cause removal as well as to the second. The Court indicates that the President's control over the Commission is *not* sufficient because the President cannot oversee Commissioners or remove them at will. For example, Chief Justice Roberts explains, "Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct."<sup>132</sup> The Court finds that the President cannot oversee the Board, in part because the President cannot sufficiently oversee the Commission. The President cannot adequately oversee the Commission precisely because he cannot remove Commissioners at will.<sup>133</sup>

Which brings us to the third step of the proof: Congress cannot diminish or modify the President's removal power. As with the previous steps, the

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130. *Id.* at 3173 (Breyer, J., dissenting).

131. *Id.* at 3154 (majority opinion); *see also id.* at 3158–59 (describing the statutory scheme and explaining the absence of meaningful control by the Commissioners).

132. *Id.* at 3154.

133. Justice Breyer again does not let the Court sidestep the central inquiry. The majority identifies as the central problem the fact that the decision to remove Board members is vested in Commissioners, "none of whom is subject to the President's direct control." *Id.* at 3171 (Breyer, J., dissenting). Breyer explains that "nullifying the Commission's power to remove Board members only for cause will not resolve the problem the Court has identified: The President will *still* be 'powerless to intervene' by removing the Board members if the Commission reasonably decides not to do so." *Id.*

general principle follows from separation of powers and the vesting of the executive power in the President. The Chief Justice's explanation for why Congress cannot place a double restriction on the President's removal power also implies that a single restriction is unconstitutional. As footnote four explains, the central issue in the case is that "[t]he second layer matters precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so."<sup>134</sup> Of course, this is also the central issue with regard to the constitutionality of the first layer of removal protection enjoyed by the heads of the independent agencies. The for-cause removal limits matter "precisely when the President finds it necessary to have a subordinate officer removed, and a statute prevents him from doing so."<sup>135</sup> This issue is the nub of the constitutional question for the first layer of removal protections as much as for the second. The Chief Justice's logic fails, perhaps by design, to distinguish between the constitutionality of one and two layers of for-cause removal protection.

Justice Breyer makes the same observation: "the Court fails to show why *two* layers of 'for cause' protection—Layer One insulating the Commissioners from the President, and Layer Two insulating the Board from the Commissioners—impose any more serious limitation upon the *President's* powers than *one* layer."<sup>136</sup> Layer One insulates the Board from the President's full control in the same manner that it insulates all of the activities of the Commission. The Court's severance remedy gives the *President* only slightly more control over the Board by removing the second layer of protection. The primary control over the Board goes to the Commissioners, who remain subject to removal by the President only for cause. The President's indirect control over the Board is enhanced by the decision in uncertain ways.<sup>137</sup> The President can hold Commissioners responsible only if their failure to remove a Board member results from inefficiency, neglect of duty, or malfeasance in office.

If a Board member disregards presidential policy and the Commissioners decide not to remove the Board member, this would likely not constitute "good cause" for removal.<sup>138</sup> Thus, as the dissent recognizes "a removal restriction's effect upon presidential power depends not on the presence of a 'double-layer' of for-cause removal, as the majority pretends, but rather on the real-world nature of the President's relationship with the Commission."<sup>139</sup> This real-world relationship includes the fact that the

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134. *Id.* at 3154 n.4 (majority opinion).

135. *Id.*

136. *Id.* at 3171 (Breyer, J., dissenting).

137. *Id.* at 3170–71 (explaining how the decision may increase or decrease the President's control depending on the circumstances).

138. This raises the question of what "good cause" might require. The Court states that neither its precedents nor the Government suggested that disagreement with policies or priorities would be good cause for removal. *See id.* at 3157 (majority opinion). For a helpful discussion of reading "good cause" in light of constitutional concerns, see John F. Manning, *The Independent Counsel Statute: Reading "Good Cause" in Light of Article II*, 83 MINN. L. REV. 1285 (1999).

139. *Free Enter. Fund*, 130 S. Ct. at 3171 (Breyer, J., dissenting).

President cannot remove Commissioners except for cause, and therefore cannot adequately oversee their work. The Court draws a line at the second layer, but the decision rests on broad principles that do not distinguish between layer one and layer two—the analysis suggests both are unconstitutional.

Moreover, the Court’s proof implicates the independent agencies by analogy: the President’s relationship to the SEC is as the SEC’s relationship is to the Board. This analogy could lead to the conclusion that the President’s control over the Commission is not sufficient for precisely the same reason that the Commissioners’ control over the Board is not sufficient: “The Commissioners are not responsible for the Board’s actions. They are only responsible for their own determination of whether the Act’s rigorous good-cause standard is met.”<sup>140</sup> Similarly, the President is not responsible for the Commissioners’ actions. He is only responsible for determining whether the good-cause standards are met. By analogy, such limited responsibility does not satisfy the Constitution’s requirements because, as the Court repeatedly emphasizes, the President must be fully responsible for the work of executive officers as part of his duty to take care that the laws be faithfully executed. The logical implication of the Court’s proof is that statutory restrictions of even one layer on the President’s removal power are unconstitutional.

*B. A Workable Remedy: Separating Independence from the Independent Agencies*

The Court’s opinion presents a robust understanding of the constitutional grounds for full presidential control of executive branch officials based on separation of powers and the vesting of executive power in the President. Severance highlights the importance of these principles. The Court’s remedy can be seen as a masterful choice: minimal in this particular decision, leaving the Board and its functions intact, while establishing a plausible remedy for future judicial dismantling of agency independence.

The Court’s severance remedy provides a means of targeting agency independence—not just the second layer, but also the first—without taking the more radical step of abolishing the independent agencies. This mitigates one of the main concerns expressed with overturning *Humphrey’s Executor*, which is that the Court will not and cannot dismantle the independent agencies because they are an entrenched part of the federal government. The Court’s remedy is based on the idea that “the existence of the Board does not violate the separation of powers, but the substantive removal restrictions imposed by [the statute] do.”<sup>141</sup> This simple move, separating the independence from the independent agency, provides a model for future cases. The Court adopts a remedy that can bring

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140. *Id.* at 3154 (majority opinion).

141. *Id.* at 3161.

independent agencies fully under the President's supervision, while allowing those agencies to otherwise continue with their statutory duties.<sup>142</sup>

In light of the historical growth and entrenchment of the independent agencies, the Court's remedy of separating the independence from the independent agency fits the judicial role. The Court has determined that the Constitution requires presidential oversight and accountability through the removal power. The remedy has a minimalist result by which the Court severs the portion of the Act that most offends the constitutionality of the Board—the double for-cause removal protections.<sup>143</sup> The Board, however, may continue with its statutory duties, only now subject to at-will removal by the Commission. As the Court explains, severing the for-cause removal protection for the Board, “affects the conditions under which those officers might some day be removed, and would have no effect, absent a congressional determination to the contrary, on the validity of any officer's continuance in office.”<sup>144</sup>

Severance provides a remedy with much further potential to reach new contexts, precisely because it minimizes disruption to the affected agencies. Yet commentators have identified only the narrowness in this particular case, focusing on how the Court leaves in place the first layer of independence, the removal provisions protecting the SEC. For example, Peter Strauss suggested that the Court affirmatively endorsed the constitutionality of agency independence because “[t]he constitutionality of the PCAOB's authority could not . . . have been sustained without accepting the single level of ‘for cause’ protection the majority attributed to the SEC.”<sup>145</sup> Similarly, Jack Beermann argued, “By embracing ‘single’ for cause restrictions on the discharge of most executive officials including the heads of independent agencies, the Roberts Court has in essence approved the independence of independent agencies.”<sup>146</sup> They argue that logically the Court must have endorsed the constitutionality of the first layer of agency independence. This is one way to understand the Court's opinion.

As discussed above, however, the Court does not have to accept or even uphold the Commission's independence to reach its conclusions. The Court explicitly notes that the parties did not request the Court to reexamine its earlier removal power precedents and that the Court does not do so in this

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142. *Id.* (“Concluding that the removal restrictions are invalid leaves the Board removable by the Commission at will, and leaves the President separated from Board members by only a single level of good-cause tenure. The Commission is then fully responsible for the Board's actions, which are no less subject than the Commission's own functions to Presidential oversight.”).

143. *Id.* (explaining that severance allows the Court to “limit the solution to the problem”). See Miller, *supra* note 18, at 44–45 (arguing that “Congress may not constitutionally restrict the President's power to remove officials who fail to obey . . . presidential instructions” but explaining that this principle could be implemented through interpretation and severance of offending provisions without “wholesale invalidation of federal statutes”).

144. *Free Enter. Fund*, 130 S. Ct. at 3161.

145. Strauss, *supra* note 56, at 19.

146. Beermann, *supra* note 58, at 4.

case.<sup>147</sup> The parties stipulated to the SEC's removal protections and no party asked the Court to reconsider the constitutionality of this independence. The remedy thus proceeds from this stipulation, rather than from a necessary holding about the constitutionality of the first layer.

Admittedly, severance leaves the relationship between the President and Commission intact and petitioners' proposed remedy—an injunction against the continuing operations of the Board—would have been more consequential in this case. Yet severance has more potential for future challenges and it follows from constitutional principles far more ambitious than the arguments raised for invalidating the Board.

The importance of the severance remedy and its potential may be assessed by comparing it with the remedies proposed by petitioners. Petitioners' remedies and reasoning were largely limited to the Board and other similar entities and so would not have created a framework for a broader assault on agency independence. By contrast, the Court's severance remedy logically applies to independence more generally. The Chief Justice's opinion does not follow petitioners' arguments. Instead, it strikes out a different course, emphasizing that the vesting of the executive power in the President and his obligation to take care that the laws be faithfully executed require him to oversee and be able to remove executive branch officials.

Contrary to what has been assumed by most commentators, the Court's *rejection* of petitioners' Appointment Clause arguments and related remedies establishes a firmer foundation for the President's authority over executive branch officials and casts a shadow over agency independence generally. For example, petitioners argued that Board members are principal officers requiring presidential appointment with the Senate's advice and consent under the Appointments Clause. If the Court had held that Board members were principal officers under the Appointments Clause, the holding would likely be limited to the unusual two-level tenure protection of the Board.

Dissenting in the D.C. Circuit, Judge Kavanaugh would have decided the case in part on these grounds. Notably, he emphasized the narrowness of such reasoning, which “would not itself call into question the many other independent agencies that dot Washington, D.C.” because the “heads of those agencies are appointed by and removable for cause *by the President*.”<sup>148</sup> By contrast, “the PCAOB is uniquely structured, and a judicial holding invalidating it would be uniquely limited to the PCAOB.”<sup>149</sup> Judge Kavanaugh correctly observed that judicial invalidation of the PCAOB on these grounds would have little application to other independent agencies.

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147. *Free Enter. Fund*, 130 S. Ct. at 3147.

148. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 537 F.3d 667, 688 (D.C. Cir. 2008) (Kavanaugh, J., dissenting).

149. *Id.*

An Appointments Clause challenge to the PCAOB cannot be easily analogized to the independent agencies, whose heads are already treated as principal officers with presidential selection and senate confirmation. There may have been persuasive constitutional reasons for holding that Board members are principal officers,<sup>150</sup> but a holding on these grounds would not advance the case against ordinary first-level agency independence. Moreover, in previous decisions analyzing whether an executive officer is a principal or inferior officer, the Court has stuck closely to the specific functions of that officer and his relationship to other authorities.<sup>151</sup> In this case, the analysis would have had to focus on the Act, the type of functions undertaken by Board members, and the extent of supervision exercised by the Commission. Thus, a decision on these grounds might invalidate the Board, but would have limited implications for other agencies.

In the alternative, petitioners argued that even if Board members were “inferior officers,” the SEC is not a Department for Appointment Clause purposes because its commissioners are not directly accountable to the President.<sup>152</sup> The petitioners argued that only an entity with direct accountability to the President could be considered a Department with the constitutional authority to appoint inferior officers. If the Court had held that an independent agency such as the SEC was not a Department, this would prevent such agencies from making appointments of inferior officers. This would deprive the heads of independent agencies of a substantial power and might bring the appointment of these inferior officers within the control of the President. It would not, however, provide the President any greater control over the heads of the independent agencies. If the SEC were not a “Department,” presumably Commissioners would remain subject to removal only for good cause, and the President’s influence over the commissioners would remain attenuated. The President might be able to appoint inferior officers within the SEC, but without any additional control over their superiors.<sup>153</sup> Again, a holding on these grounds might have been

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150. See generally Gary Lawson, *The “Principal” Reason Why the PCAOB is Unconstitutional*, 62 VAND. L. REV. EN BANC 73 (2009), <http://www.vanderbiltlawreview.org/articles/2009/11/Lawson-62-Vand-L-Rev-En-Banc-73.pdf>.

151. See, e.g., *Edmond v. United States*, 520 U.S. 651, 664 (1997) (discussing the specific duties of the Coast Guard Court of Criminal Appeals judges and their supervision by and accountability to other executive officers before concluding that the judges are “inferior officers”); *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (citing a number of factors for determining whether an officer is an inferior one but noting that “[t]he line between ‘inferior’ and ‘principal’ officers is one that is far from clear, and the Framers provided little guidance into where it should be drawn”).

152. Brief for Petitioners, *supra* note 33, at \*56.

153. Petitioners also argued that even if the SEC were considered a Department, the full Commission cannot appoint Board members because only the Chairman is the “Head.” *Id.* at \*60. They explained that “‘Heads of Departments’ does not connote a committee of equals” because a “Head” was understood at the time of the founding to be a principal or leader and the “Head” of the SEC is its Chairman. *Id.* Accordingly, the statutory provision that vests appointment of the Board with the Commission is unconstitutional. See *id.* Such a holding would be of limited long-term consequence largely for the same reasons as discussed with regard to petitioners’ other claims.

fatal for the Board, but would have few, if any, implications for agency independence generally.

No doubt a decision on any of these alternative grounds would have generated more headlines in this case because the likely remedy would be to enjoin the Board's operations, leaving uncertainty with the accounting industry until Congress could respond to the Court's decision. A holding based on petitioners' Appointment Clause arguments would have the disadvantage of being perceived as activist in an area of significant political interest—the regulation of the accounting industry after a number of high-profile difficulties and scandals. Moreover, the reasoning would be limited to the Board and other similar entities with two layers of tenure protection. To the extent that the Court wanted to assert a broader principle about presidential control of the administrative state, these approaches would have little impact in future cases.

Instead the Court rejects the Appointments Clause arguments and severs the Act's removal provisions, which leaves the Board in place, but subject to full supervision by the Commission. This may have a modest or perhaps even negligible impact on the Board, but follows from a series of constitutional principles that provide a framework for challenging agency independence more generally in a future case.

It does not require much imagination to see how this remedy could easily apply to other independent agencies, precisely because it does not jeopardize the existence of these agencies, only their independence. The idea of severing the Board's tenure protections precisely targets the aspect of independent agencies thought to be unconstitutional—i.e., their independence. The Court's reasoning in *Free Enterprise Fund* suggests that independence from presidential control undermines the constitutional structure of separation of powers. The Court's proposed remedy aims at the constitutional violation. Severance could provide a remedy that allows the independent agencies to continue with their statutory duties, but subject to at-will removal by the President and therefore under his full control and supervision.

#### IV. IMPLICATIONS FOR FUTURE CASES

This part considers some of the implications of applying the reasoning of *Free Enterprise Fund* to one layer of agency independence. First, I highlight some indications that the Court may pursue its logic and reexamine precedents such as *Humphrey's Executor*. Second, I briefly discuss some issues that may develop in future cases challenging the constitutionality of agency independence.

##### A. *Minimalism or Marbury for the Independent Agencies?*

This Article suggests that *Free Enterprise Fund* establishes a framework for invalidating agency independence. This raises an obvious question about whether the Court will reexamine *Humphrey's Executor* and other removal power precedents in a future case. Many commentators have

suggested just the opposite—that *Free Enterprise Fund* in fact reaffirms the constitutionality of the independent agencies.<sup>154</sup> The Court, however, explicitly states that no party has asked for such a reexamination and the Court does not reexamine those precedents in this case. But is the Court open to this possibility in the future? Without hazarding a prediction of what the Court will do, I want to suggest that the opinion in *Free Enterprise Fund* demonstrates the Court’s openness to the possibility of invalidating even one layer of agency independence. Whether such indications are deliberate, the opinion holds more possibilities than has generally been recognized.

First, the opinion opens by observing: “Since 1789, *the Constitution* has been understood to empower the President to keep these [executive] officers accountable—by removing them from office, if necessary. *This Court* has determined, however, that this authority is not without limit.”<sup>155</sup> The Court proceeds to discuss *Humphrey’s Executor* and other limits on the removal power upheld by the Court’s precedents.<sup>156</sup> This leaves a potential space between the *constitutional* authority of the President’s removal power and the *Court’s* allowance of certain limitations in *Humphrey’s Executor* and subsequent decisions. The Court’s precedents are not equivalent to the Constitution as understood since 1789. At the outset, the Court stresses the constitutional importance of the removal power and suggests receptivity to a future challenge to agency independence and the Court’s limits on the removal power.

Second, as discussed above, the logic of the opinion fits neatly with a challenge to ordinary, one layer agency independence. It does not, however, fit very closely with the facts of the Board. The opinion stresses the importance of presidential oversight and control of executive officials, but then allows the SEC, an independent agency, to have full removal power over the Board. The Court highlights these principles in general terms that apply directly to independent agencies separated from the President’s removal power by one layer of for-cause protection. The fourth footnote of the opinion makes clear that a statute cannot restrict the President from removing a subordinate officer when he finds it necessary. This approach foreshadows a challenge to agency independence generally by adopting an expansive view of presidential authority and by stressing the importance of the removal power to separation of powers.

Third, the Court also notes at the beginning of the opinion that existing precedents are not at issue here. After briefly noting the Court’s key decisions about removal, the Court states, “The parties do not ask us to reexamine any of these precedents, and we do not do so.”<sup>157</sup> The Court notably does not reaffirm these precedents and it never states that presidential control over the SEC is constitutionally sufficient. It is only

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154. See *supra* notes 52–55.

155. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) (emphasis added) (citing *Myers v. United States*, 272 U.S. 52 (1926)).

156. *Id.*

157. *Id.* at 3147.

when the time comes for the remedy that the Court severs the removal restrictions and leaves the Commission with the removal power for the simple reason that “[u]nder the traditional default rule, removal is incident to the power of appointment.”<sup>158</sup> In a future case, perhaps the Court will measure *Humphrey’s Executor* and other precedents against the constitutional requirements set forth in *Free Enterprise Fund*.

Fourth, the Court allows the parties to stipulate to the legal status of the Commission as an independent agency. This stipulation allows the Court to structure its argument in a manner that has broader potential reach. The Court accepts the parties’ stipulation, even though, as Justice Breyer points out, accepting this point of law creates the double layer and the constitutional problem in this case.<sup>159</sup> The stipulation also allows for the analogy to the first layer of agency independence. The Court holds that for the Commission to exercise effective oversight and control over the Board, the Commission must have the ability to remove Board members at will. Similarly, for the President to exercise effective oversight and control over an independent agency, the President must have the ability to remove the heads of such agencies at will. The stipulation allows the Court to focus on the constitutional imperative of presidential oversight and creates an analogy to the first layer.

Finally, choosing severance creates a general remedy for other forms of agency independence. Although hardly briefed, the Court chooses severance without any specific considerations of the text, structure, or purposes of the Sarbanes-Oxley Act. By evaluating the issue in a cursory fashion, the majority creates a sort of presumption in favor of severance for invalid removal provisions. The remedy avoids the doomsday scenario of abolishing the independent agencies altogether or halting their work. Severance simply affects “the conditions under which those officers might some day be removed,” but has “no effect” on the officers’ ability to continue in office.<sup>160</sup> Decoupling agency independence from the independent agencies creates a remedy that does not require restructuring the executive branch, but brings its officers within the control and removal authority of the President.

Other commentators have cited some of these factors as evidence of the Court’s *minimalism* in this case. As discussed above, they have suggested that the expansive constitutional principles in the opinion ring hollow in light of the ultimate disposition; that leaving the SEC with removal power over the Board reaffirms the constitutionality of the independent agencies;

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158. *Id.* at 3161.

159. As Justice Breyer notes,

The Court then, by assumption, reads *into* the statute books a ‘for cause removal’ phrase that does not appear in the relevant statute and which Congress probably did not intend to write. And it does so in order to strike down, not to uphold, another statute. This is not a statutory construction that seeks to avoid a constitutional question, but its opposite.

*Id.* at 3184 (Breyer, J., dissenting).

160. *Id.* at 3161.

and that severance leads to a result that will have no real world change in the Board's operations.

Yet I find these factors point toward a reconsideration of the constitutional imperative of the President's unhampered removal power. The Court stresses the importance of separation of powers, the vesting of the executive power in the President, the responsibility of the President to oversee executive branch officials, and the constitutional imperative of the removal power for ensuring the President's accountability. The majority opinion strains to create a framework that accommodates these principles yet leaves the Board intact. The principles established by the Court could allow for the reexamination of the constitutionality of for-cause removal restrictions. Whether the Court will push forward or draw back when faced with a direct challenge to its precedents remains to be seen.

### B. *The Severability Analysis in Future Cases*

Although the Court's severability approach seems well designed for one layer of for-cause removal insulating the independent agencies, the Court provides little guidance for how this analysis would apply in a future decision. The issue was hardly briefed by the parties. In a short footnote at the end of its brief, the Government simply noted that severing for-cause removal provisions in the Act "would be far more consistent with Congress's intentions than any broader invalidation of the Act."<sup>161</sup> The Government offered severability as a last-ditch solution preferable to outright invalidation of the Board. The Government's argument for severing the for-cause provisions was little more than a suggestion—it did not offer any evidence of congressional intent with respect to severability in the Act's text, structure, or purpose.

The Court adopts the remedy of severability but provides few details about its application. The Court explains that, in general, upon finding a part of a statute unconstitutional it will try to sever problematic portions of a statute while leaving the remainder intact.<sup>162</sup> With regard to the Board, the Court finds severance of the for-cause removal provisions appropriate because the "remaining provisions are not incapable of functioning independently, and nothing in the statute's text or historical context makes it evident that Congress, faced with the limitations imposed by the Constitution, would have preferred no Board at all to a Board whose members are removable at will."<sup>163</sup> The Court notes that this inquiry may sometimes be "elusive," but that congressional intent seems clear in this case.<sup>164</sup>

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161. Brief for the United States at \*52 n.20, *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010) (No. 08-861), 2009 WL 3290435.

162. *Free Enter. Fund*, 130 S. Ct. at 3161.

163. *Id.* at 3161–62 (citation omitted) (internal quotation marks omitted).

164. *Id.* at 3161 (citation omitted). With regard to other separation-of-powers decisions, however, the Court sometimes has refused to sever an unconstitutional provision. For example, in *Bowsher v. Synar*, the Court determined that the Comptroller General, an officer removable by Congress, could not exercise executive powers, but that "striking the removal

In future cases, presumably the Court will have to consider whether a statutory scheme could remain operative without the removal protections and also whether Congress would have intended to preserve the agency even without its independence. But how will such an inquiry be made? In *Free Enterprise Fund*, the Court does not examine the text of the Act, nor does it consider any of the other indicators of congressional intent, such as the structure, purpose, or historical context. Instead, the Court merely asserts that no evidence can be found that makes it “evident” Congress would have preferred invalidation to severing the unconstitutional for-cause provisions. The inquiry is conclusory and does not aver to any specific evidence.

One might surmise from the Court’s lack of discussion that in a subsequent case, it will rarely be “evident” that Congress would prefer to sacrifice an agency rather than sever its independence. Independent agencies are often significant bureaucracies charged with carrying out comprehensive statutory schemes. In light of this, one might expect that the Court will hesitate to find that the independence of an agency would trump Congress’s interest in having the agency at all.<sup>165</sup> This is especially true given the strong presumption in favor of severability and the prevalence in many statutes of severability provisions. In some cases, however, it might be, as Justice Breyer points out, “the only available remedy to certain double for-cause problems is to invalidate entire agencies.”<sup>166</sup> Nevertheless, in the context of the Board, the Court has suggested that dismantling independent agencies is not the remedy of first choice, but rather the Court can sever unconstitutional removal provisions and thereby bring independent agencies under the control of the President.

### C. Some Further Implications

If the foregoing analysis is correct, then the Court in *Free Enterprise Fund* has created a framework for challenging the constitutionality of agency independence. The Court sets out a proof that logically demonstrates how the independent agencies contravene the constitutional structure. Moreover, the Court provides a remedy that would allow the Court to separate agency independence from the independent agencies by severing for-cause removal provisions.

Given the likely resistance to overturning *Humphrey’s Executor*, if the Court faces a challenge to one of the independent agencies, it may consider in greater detail the statutory structure of the challenged agency. In *Free Enterprise Fund*, Chief Justice Roberts accepts the parties’ stipulation that the SEC Commissioners may be removed only for cause, although this is

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provisions would lead to a statute that Congress would probably have refused to adopt.” 478 U.S. 714, 734–35 (1986).

165. See *INS v. Chadha*, 462 U.S. 919, 933–35 (1983) (discussing the severability of the one-house legislative veto held to be unconstitutional and relying on the statutory severability provisions as well as the legislative history to conclude that the presumption in favor of severability was not rebutted).

166. *Free Enter. Fund*, 130 S. Ct. at 3182 (Breyer, J., dissenting).

nowhere specified in the statute.<sup>167</sup> In addition, no party challenged the constitutional validity of *Humphrey's Executor* and the first layer of for-cause removal limits.

If such a challenge, however, were to be raised in a future case, the Court may pay more attention to statutory questions about agency independence in order to minimize disruption to these agencies.<sup>168</sup> As a preliminary matter, *Humphrey's Executor* considered whether the Federal Trade Commission Act's for-cause removal grounds were exclusive.<sup>169</sup> The statute did not provide any words of exclusivity, but the Court explained that the text and structure of the statute led to the conclusion that such terms were exclusive.<sup>170</sup> Similarly, in *Free Enterprise Fund*, the statute that governed the Board did not expressly make its grounds for removal exclusive.<sup>171</sup> The Court found the exclusivity implied because the statute provided for removal for good cause shown and specified findings and procedures for removal. This structure would not make sense "if Board members could also be removed without any finding at all."<sup>172</sup> This reasoning follows from the well-established precedent in *Humphrey's Executor*—for-cause removal provisions are generally read to be exclusive grounds for removal even when the statute does not explicitly provide for exclusivity.

Faced with a direct challenge to an independent agency, the Court may decide to examine the specific statutory language more carefully, particularly because the statutes governing the independent agencies differ. In some instances, the removal limitations are simply assumed, as with the SEC. Other statutes provide that removal may be had "for cause" without stating the specific causes.<sup>173</sup> Some statutes list the specific grounds for removal without any language of exclusivity; other statutes indicate that the statutory causes are the exclusive ones.<sup>174</sup> The statutory variation could be examined in greater detail to see whether it corresponds to real differences between the specific statutory schemes. The Court may decide to treat these different formulations as meaningful variation between the statutes, or may plausibly conclude that they are drafting differences of no consequence

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167. *See id.* at 3182–84 (arguing that the majority simply assumes that SEC Commissioners are removable "for cause" even though the statute is silent on this point and the SEC statute was enacted between *Myers* and *Humphrey's Executor* when such for-cause removal provisions were thought to be unconstitutional).

168. *See* Miller, *supra* note 18, at 86 (arguing that statutes creating the independent agencies may be saved through interpretation).

169. *Humphrey's Executor v. United States*, 295 U.S. 602, 610–11 (1935).

170. *Id.* at 611.

171. *See* Brief for the United States, *supra* note 161, at \*51 n.19.

172. *Free Enter. Fund*, 130 S. Ct. at 3158 n.7.

173. *See, e.g.*, 12 U.S.C. § 242 (2006) (providing that members of the Federal Reserve Board "shall hold office for a term of fourteen years from the expiration of the term of his predecessor, unless sooner removed for cause by the President").

174. *Compare* 15 U.S.C. § 41 (2006) (providing for the Federal Trade Commission that "[a]ny Commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office"), *with* 42 U.S.C. § 7171(b)(1) (2006) (providing for the Federal Energy Regulatory Commission that members "may be removed by the President *only* for inefficiency, neglect of duty, or malfeasance in office") (emphasis added).

given the strong background understanding since *Humphrey's Executor* that limitations on the President's removal power are read to be exclusive.

In a different vein, after *Free Enterprise Fund*, the President may seek to test the limits of good cause removal by exercising greater control over independent agencies and using removal if agency heads do not comply with his directives. Perhaps the government will push to reconcile presidential control with the statutory limits on removal by arguing for a broader conception of what constitutes good cause. Questions about what constitutes good cause remain relatively open because of the paucity of challenges and decisions in this area.<sup>175</sup>

Moreover, if the Court were to invalidate the removal protections for an independent agency, and thereby overrule *Humphrey's Executor*, the new framework would shift the balance between the political branches. Allowing full supervision by the President of the independent agencies diminishes congressional control, at least to the extent that it bolsters presidential control. One might expect that Congress will not sit quietly by the sidelines if the Court shifts power over such agencies to the President and thereby presumably diminishes some of Congress's authority. Trying to draw out the potential congressional responses is beyond the scope of this Article.<sup>176</sup> In any event, a judicial decision upsetting agency independence would lead the political branches to compete for power under this constitutional framework and it is difficult to predict how such competition would play out between the branches.

#### CONCLUSION

*Free Enterprise Fund* answers a modest question about a federal agency that enjoys a double layer of tenure protection. The Court determines that the second layer goes too far—it diffuses the President's oversight and control beyond the Court's precedents. The Court emphasizes formal constitutional principles in the course of reaching this holding: the President must oversee executive branch officers; such oversight requires the removal power; and Congress cannot diminish or modify the removal power. The decision sets forth a logical proof that leads to a limited conclusion in this case, but its implications go beyond the Board and raise questions about the constitutionality of even one layer of agency independence. The opinion stresses throughout that a statute cannot prevent the President from removing an officer he believes is not faithfully executing the laws—a conclusion that logically implies the unconstitutionality of agency independence. Whether, or in what fashion, the Court applies its logic to the independent agencies remains to be seen.

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175. See Miller, *supra* note 18, at 86–87.

176. One can, however, imagine some possibilities. Threatened by the expansion of presidential authority over these agencies, Congress might seek to restructure the duties or obligations of the independent agencies—it could reduce their authority and power, but rolling back the administrative state may prove politically and practically difficult. More plausibly, Congress might try to redirect control over these agencies through appropriations and the exercise of its oversight authority.